BRODRICK MOYO

**versus**

THE STATE

HIGH COURT OF ZIMBABWE

BERE AND MOYO JJ

BULAWAYO 20 FEBRUARY 2017 AND 23 MARCH 2017

**Criminal Appeal**

*T J Mabhikwa* for the appellant

*K Ndlovu* for the respondent

**MOYO J:** The appellant was convicted of stocktheft as defined in section 114 of the Criminal Law Codification and Reform Act [Chapter 9:23]. He was sentenced to the mandatory minimum sentence of 9 years imprisonment after no special circumstances were found by the trial court. The facts of the matter as contained in the state outline were that the appellant and his co-accused, together with one Victor Mwene and Tichafa Shumba, who are still at large, hatched a plan to steal cattle from Phikelela village Chief Ndube in Filabusi. The accused persons allegedly stole a herd of 10 cattle at Phikelela grazing area, Chief Ndube in Filabusi and drove them to a secluded place and loaded them using an irregular police clearance. The appellant allegedly connived with the second accused person who was on duty at Selonga Police base, Guyu for the clearance of the stolen cattle without physically seeing them as per procedure. The appellant and the two accomplices who are still at large, then took the forged police clearance to Ntepe Animal Health Centre instead of going to Selonga Animal Health centre, which covers the area. The appellant misrepresented facts to the veterinary officer there, one Thandi Mathobela. The police clearance was then used to collect cattle from Filabusi and the offence came to light because of the observant nature of the staff at Mvutcha abattoir where they had been taken to for slaughter, who realized that there were heifers amongst the herd, and yet heifers are not sold for slaughter. Again, the cattle had the brand mark T35, which meant they originated from Filabusi and yet the clearances were issued from Selonga in Gwanda.

The appellant, dissatisfied with both the conviction and sentence, then approached this court. The appellant, in his grounds of appeal attacks the trial court’s assessment of the facts as presented by the state. The appellant avers that there is no evidence that links him to the offence and that therefore his guilt was not proven beyond a reasonable doubt.  *Ad* sentence, the appellant contends that having been convicted on the basis of being guilty of association and not being the perpetrator of the crime, that was a special reason enough to warrant the exclusion of the mandatory minimum sentence.

The trial magistrate in his judgment convicted the appellant and his co-accused on the basis of accomplice liability. The trial magistrate found that from the evidence accused one (the appellant) went with Victor Mwene and Tichafa Shumba to Selonga. They were using Tichafa Shumba’s motor vehicle, with accused one (the appellant) being the driver. After getting to Selonga they proceeded to Makapakapa village with appellant still driving. They returned from Makapakapa to Selonga, when appellant called accused two and introduced Victor Mwene to him. Accused two issued to Victor Mwene a ZRP Livestock clearance certificate (Exhibit1) wherein he cleared 16 herd of cattle, with Victor Mwene of village Head D Pida, Tibeli, Selonga as the owner/seller, and the intended destination being Mvutshwa Abattoirs, Bulawayo. Accused two issued the clearance without seeing the 16 cattle the witness Durban Pida. The appellant and Victor Mwene together with Tichafa Shumba, then proceeded to Ntepe (which is on the way back from Selonga to Gwanda) where a cattle movement permit was issued by the vet officer Thandi Mathobela, in the name of Victor Mwene (Exhibit 11)

Martin Ndlovu is the truck driver who ferried the cattle from Filabusi to Mvutshwa Abattoir, and he collected 10 herd of cattle in the presence of a short and stout man, believed to be Victor Mwene. He was shown the clearances as the papers for the ten cattle.

The learned magistrate correctly found that the cattle clearance form issued by accused two assisted Victor Mwene to obtain a cattle movement permit from the veterinary officer in Selonga. The learned magistrate correctly found that the clearances obtained from Selonga with the assistance of the appellant were the same papers that Martin Ndlovu used to ferry the cattle and hence were the papers presented at Mvutshwa Abattoir in Bulawayo, and consequently were the same exhibits in court. The learned magistrate made a factual finding that when appellant drove Victor Mwene and Tichafa Shumba to Selonga he knew of their intended mission there.

The learned magistrate correctly found that at Makapakapa, it is appellant who called accused two for purposes of accused two issuing the forged police clearance to Victor Mwene.

The learned magistrate also correctly found, that appellant’s confirmation on the issues related to Victor Mwene requiring stock clearances and movement permits, are that ones that influenced both accused two and the veterinary officer to provide what was requested.

The learned magistrate again correctly found factually that the appellant’s conduct, after the cattle had been intercepted in Bulawayo showed that he was involved in the stocktheft for when the police were investigating the matter, he sent two text messages one to Tichafa Shumba, one to accused two. The one to Tichafa Shumba was to the effect that a person was needed who would pose as Willy Tshuma so that that person could be shown to the authorities if they demanded to see the Willy Tshuma. It was also to the effect that the appellant had handed money to someone. The Willy Tshuma to be “created” was the one the police had been told had sold the cattle.

I have not found any fault with the reasoning as given by the trial court, it was seized with the facts, it assessed them in an appropriate manner and accordingly convicted the appellant. The court record clearly shows that the appellant was involved in the procurement of the clearances that were used in the commission of the offence, and that he went further and tried to throw spanners into the works of the police investigators by seeking to create a fictitious person. This conduct can only be of one who is culpable.

The cumulative effect of appellant’s involvement and his conduct after the interception of the cattle rightfully point towards guilt and indeed the state did manage to prove the guilt of the appellant beyond any reasonable doubt.

After all, proof beyond reasonable doubt does not mean proof to an absolute degree of certainty. It means that there should be such proof as leaves no reasonable doubt in the mind of an ordinary man capable of judgment and of appreciating human motivations. The state does not have to close every avenue of escape and fanciful or remote possibilities can be discounted as these do not lead to reasonable doubt. Refer to the case of *Isolano* 1985 (1) ZLR 62 (SC) at 64-65.

Ad Sentence

The court *a quo* did not err in sentencing the appellant to the mandatory minimum sentence as there is no authority to the proposition that where mandatory sentences are concerned, different sentencing principles apply to accomplices.

Even appellant’s counsel has not in his heads of argument offered legal principles and authority for such a disposition because it is not there. All he makes is a bold assertion on that point.

I accordingly dismiss the appeal in its entirety for the reasons stated herein.

Bere J agrees…………………………………………

*T J Mabhikwa and Partners*, appellant’s legal practitioners

*National Prosecuting Authority*, respondent’s legal practitioners