

THE STATE  
versus  
FORSTEN

HIGH COURT OF ZIMBABWE  
BHUNU J  
HARARE, 29<sup>th</sup> October 2004

### **Criminal Review**

BHUNU J: The accused was convicted on his own plea of guilty on a charge of stock theft as defined in the Stock Theft Act [*Chapter 9:18*].

He was then sentenced to the mandatory minimum term of 9 years imprisonment in terms of section 12 of the Act as amended by Section 4 of the Stock Theft Amendment Act 6 of 2004. The Section provides that:-

“12(1) Any person who is convicted of the theft or attempted theft of any equine or bovine animal or receiving knowing it to have been stolen or inciting or conspiring with any other person to commit any of the foregoing offences shall if there are no special circumstances in the particular case as provided in subsection (2) be liable to imprisonment for a period of not less than nine years or more than twenty five years.”

The accused stole a cow valued at \$1 500 000.00. The cow was recovered. There was therefore no actual prejudice to the complainant. The accused having failed to satisfy the trial court that there were special circumstances pertaining to his case he was sentenced to the minimum mandatory sentence of 9 years.

The accused however committed the offence on 16<sup>th</sup> August 2004 eleven days before the Amendment Act 6/04 which introduced the minimum mandatory sentence became law on the 27<sup>th</sup> August 2004 under General Notice 437/04/

It is trite in our law that statutory provisions do not have a retrospective effect unless the legislator has expressly said so.

That being the case the accused was not liable to be sentenced to the

mandatory term of imprisonment which only became law after he had already committed the offence. See *S v Mutandwa and Another* 1977(3) SA 391(R).

The trial magistrate therefore misdirected himself in imposing the minimum mandatory penalty when it was not applicable to him. There is therefore need to quash the sentence and sentence the accused according to the prevailing law at the time he committed the offence.

Since all the relevant facts are before this court, it is convenient and more expeditious for this court to pass the appropriate sentence.

In assessing sentence the court will take into account that the accused is a young first offender of 20 years of age. He is married with one child to look after. He fends for himself and his family through gold panning earning about \$40 000.00 per week which translates to about \$1 600 000.00 per month.

The accused pleaded guilty and was contrite. The stolen beast was recovered and there was no actual prejudice to the complainant. On the other hand the court will not lose sight of the fact that stock theft is a serious and prevalent offence. This has prompted the lawmaker to set a minimum mandatory sentence of 9 years which the accused has escaped by a whisker. The offence was premeditated and the product of careful planning. That the beast was recovered was fortuitous rather than the result of repentance.

An examination of case law reveals that for offences of this nature a sentence of not less than 3 years with a portion suspended for theft of one or two beasts is appropriate. See *S v Manyambwe* SC 21/93. Because of the progressive increase in prevalence of offences of this nature there is need to pass progressively more deterrent sentences.

It is accordingly ordered:-

- 1) that the sentence passed by the trial court be and is hereby quashed and set aside.
- 2) That the accused be and is hereby sentenced to 4 years imprisonment of which 1 year imprisonment is suspended for a

period of 5 years on condition t he accused does not again within that period commit any offence involving dishonesty and for which he is sentenced to imprisonment without the option of a fine.

BHUNU J.....

MAKARAU J, agrees:.....