

THE STATE
versus
TATENDA TAKAWIRA
and
TITOS MUKANGA

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 28 January 2015

Review judgement

MATHONSI J: The trial magistrate in this matter has seen it fit to provide early comic relief for 2015. In response to a query raised as to why he sentenced the two accused persons each to 20 years imprisonment of which 1 ½ years imprisonment were suspended on conditions upon convicting them of one count of stock theft involving 2 beasts, this is what he had to say:

“The above matter refers and in particular to the review minute by his Lordship Justice MATHONSI where he queried why the accused were sentenced to 20 years when the mandatory minimum sentences (*sic*) of 9 years is on its own already stiff. The trial magistrate opted for the 20 years for the following reasons:

- (a) The accused’s conducts are more reprehensible as they stole cattle on the eve of the rain season. Moreso, they stole oxen which are critical at this stage of the season. They deprived the owner of the beasts which are vital to conduct his farming and usher misery into that household.
- (b) The accused executed their criminal enterprise under cover of night and moreso entered a kraal to execute their crime.
- (c) Accused are rural dweller (s) who should have protected the cattle of their fellow rural dweller.
- (d) Accused were motivated by economic gain as they intended to sell and indeed sold the beasts.

So as a result of these aggravatory factors which are reprehensible, the court found that the minimum mandatory sentence would not meet the justice of the case, that is why it opted for a 20 year jail term.”

Never mind that there was not the slightest of evidence placed before the court in respect of all that the trial magistrate so gratuitously alluded to. The state never led evidence in aggravation of sentence. In fact the prosecutor did not even address the court on sentence. The court was still able to find those facts clearly because the trial magistrate allowed his

mind to wander into the unknown, thereby going astray and completely losing focus on the mandatory sentence to be imposed.

The 2 accused persons, both aged 27 years, were arraigned before a magistrate at Chitungwiza facing one count of stock theft, it being alleged that on 11 September 2014 (certainly not “the eve of the rain (y) season”) at Farm 74 Muda, Beatrice, they unlawfully took two oxen belonging to the complainant, drove them to a nearby bush where they slaughtered them. They hired a vehicle to ferry the carcasses to Tomson Farm in Beatrice but were spotted by an informer offloading them into the second accused’s house. When the Police were notified they searched the house and recovered the carcasses leading to the arrest of the accused persons.

The 2 accused persons pleaded guilty and when the court found no special circumstances as would enable it to impose a sentence other than the mandatory sentence of 9 years provided for in s 114 (2) (e) of the Criminal Law Code [*Cap 9:23*], it sentenced each of them to 20 years imprisonment of which 1 year imprisonment was suspended for 5 years on condition that each accused person does not within that period commit any offence involving dishonesty for which upon conviction he is sentenced to a term of imprisonment without the option of a fine. A further ½ year imprisonment was suspended on condition that each accused person restitutes the complainant a sum of \$800-00 (the value of each beast) by 16 October 2014.

In arriving at that sentence the court gave its reasons as:

“Accused pleaded guilty showing contrition and were candid and open with the state, police, the complainant and the court at large in avoiding a protracted trial. A plea of guilty is essential for the effective and efficient contribution to the administration of justice.

Accused is (*sic*) a first offender to whom there is an emphatic general policy to the effect that wherever possible first offenders should not be sent to prison for fear of being contaminated by hardened and determined criminals. Imprisonment has various deleterious effects ranging from regulation of one’s personal life to personal liberty.

However, this offence is on the increase and there is need for personal and general deterrence. Accused benefitted from their crime when crime must not benefit the offender. So accused’s plea of guilty does not show any contrition as they benefitted from their crime. Accused were motivated by economic gain as they intended to sell the livestock they stole. Zimbabwe is a cattle country, that is why in our national highways there are sign posts of cattle crossing the roads for motorists to be wary of such cattle. This stresses the importance of cattle. A loss to an ox at this eve of the rain season or ploughing season would bring misery to the complainant’s household. They are deprived of their oxen which are their ploughing tractors. Oxen are castrated to devote most of their energies to ploughing. They are a source of draught power. Cattle are a source of meat and cash to the owner.

Cattle are used to pay lobola and there is no valid marriage at customary law that can be entered without the payment of cattle.

Accused committed this offence under cover of darkness and offences of this nature are difficult to detect and bring criminals to book. Accused therefore premeditated over their offence and struck at nocturnal hours. Accused could not expect the owners of the cattle to employ security guards to guard their kraals when retired to bed. Accused, as rural dwellers they know the importance of cattle and had a duty to protect them. An effective term of imprisonment which is prolonged is called for as there are no special circumstances.”

What a mouthful. Just where did the magistrate get all this from? Certainly not from the record before me. I have said that the magistrate let his mind wander and he lost track. Nothing underscores the importance of giving reasons for sentence more than the above cited passage of the record. It is imperative that reasons for any decision, including sentence, be given to show that the judicial officer has heard the evidence and arguments for each side and has not taken into account extraneous considerations: *S v Mkali & Ors* HB23/93. See also the Magistrates Court (Criminal) Rules, 1966.

In this case, the magistrate did not bother to gather necessary pre-sentencing information relating to the particular accused persons but had certain of his views stored in his mind which he ventilated and then drew the conclusion that the accused persons needed to be incarcerated for a “prolonged” period without regard to the penal provisions of the Act.

It should always be borne in mind by all those entrusted with the responsibility of punishing offenders that sentencing is a process which should be approached rationally and objectively. Magistrates should not let their emotions cloud their judgment on what is an appropriate sentence or allow themselves to be carried away by imagination as this may lead to them exaggerating the seriousness of the offence and the imposition of a disproportionate sentence; *S v Harington* 1988 (2) ZLR 344(S).

I am also concerned about the gratuitous statements made by the magistrate in sentencing the accused persons, statements so detached from the facts at hand that they could have only been imagined. It has always been said that while it is proper to express disapproval of the criminal misconduct in formulating the sentence, the use of extravagant and overblown language should be avoided: *S v Mahati* 1988 (1) ZLR 190 (H).

Pruned down to the bare bones of the matter, the accused persons were convicted of one count of stock theft and the mandatory sentence for that is 9 years imprisonment in the absence of special circumstances. What appears to have played on the mind of the magistrate is the fact that 2 beasts were involved. He probably thought that theft of each beast and not

the count should be visited with its own 9 years imprisonment. Otherwise how else can one explain the sentence of 20 years? Whatever the case, it was a misdirection calling for interference with the sentence.

The penal provision for stock theft shows that the legislature wanted to impose a deterrent sentence in respect of a prevalent crime. The penalty is severe enough without the court having to add to it even though the court has a discretion to impose a sentence of up to 25 years : *S v Zulu* HB174/11; *S v Chitukula & Ors* HH155/12.

In my view nothing would be achieved by suspending a small portion of an otherwise very stiff sentence on conditions. If a court considers suspending part of the sentence on conditions, it must make it possible for the affected person to fulfil the condition: *S v Mukura & Ors* 2003 (2) ZLR 596 at 599 H. If a person is already serving a minimum of 9 years imprisonment, he would have no motivation to retribute and avoid 6 months imprisonment. It's a futile exercise.

In my view, the mandatory 9 year term is deterrent enough and considering that 2 beasts were involved a further term of imprisonment suspended on condition of future good behaviour is sufficient recognition of the number of animals involved.

In the result, it is ordered that:

1. The conviction of the 1st and 2nd accused persons is hereby confirmed.
2. The sentences imposed on the 1st and 2nd accused persons are hereby set aside and in their place is substituted the following:

“Each accused person is sentenced to 12 years imprisonment of which 3 years imprisonment is suspended for 5 years on condition he does not during that period commit an offence involving dishonesty for which upon conviction he is sentenced to imprisonment without the option of a fine.

Effective sentence: 9 years.”

MAWADZE J agrees