

THE STATE
versus
RICHARD CHIBAYA
and
PROSPER SHOKO

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 7 April 2016

Criminal Review

TSANGA J: The two accused were charged with seven counts of stock theft as defined in s 114 (2) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and were convicted separately and differently on the charges. The record indicates that there were initially six accused persons. Four were charged and found not guilty and were acquitted. The first accused Richard Chibaya and the third accused Prosper Shoko were found guilty.

The accused were sentenced pursuant to s 114 (2) (e) which provides that:

(e) if the stock theft involved any bovine or equine animal stolen in the circumstances described in paragraph (a) or (b), and there are no special circumstances in the particular case as provided in subsection (3), to imprisonment for a period of not less than nine years or more than twenty-five years; or....

In casu, the trial magistrate found no special circumstances. The import of s 114 (2) (e) and 114 (4) is that in the absence of special circumstances an accused will be sentenced to an effective mandatory minimum sentence of nine years for each count that he is convicted of.

The first accused, Richard Chibaya was convicted of all seven counts of stock theft. The magistrate sentenced him to a cumulative sentence of 63 years. To put the cumulative sentence into perspective, he was sentenced as follows:

“Count one : eleven years imprisonment of which two years imprisonment is suspended on condition accused restitutes the complainant, Charles Chakara in the sum of \$1 100-00 on or before 29/05/15.

Count two: eleven years imprisonment of which two years imprisonment is suspended on condition accused restitutes the complainant, David Siyambulo in the sum of \$1 000-00 on or before 29/05/15.

Count three: eleven years imprisonment of which two years imprisonment is wholly suspended on condition accused restitutes the complainant, Praise Mucheri in the sum of \$700-00 on or before 29/05/15.

Count four: thirteen years imprisonment of which four years imprisonment is wholly suspended on condition accused restitutes the complainant, Romeo Katemanyoka in the sum of \$1 000-00 on or before 29/05/15.

Count five: nine years imprisonment.

Count six: twelve years imprisonment of which three years imprisonment is suspended on condition accused restitutes the complainant, Michael Baradza in the sum of \$1 200-00 on or before 29/05/15

Count seven: nine years imprisonment”.

Accused three, Prosper Shoko was convicted of three counts of stock theft. For the three counts for which he was convicted, he received a total sentence of 27 years. To put his cumulative sentence in perspective, he was sentenced as follows:

“Count three: eleven years imprisonment of which two years imprisonment is wholly suspended on condition accused restitutes the complainant, Praise Mucheri in the sum of \$700.00 on or before 29/05/15.

Count four: thirteen years imprisonment of which four years imprisonment is wholly suspended on condition accused restitutes the complainant, Romeo Katemanyoka in the sum of \$1 000.00 on or before 29/05/15.

Count five: nine years imprisonment”.

Having sentenced the accused for each count, the cumulative sentence with respect to each of accused was excessive. The sentences could have been made to run concurrently given the similarity in nature and proximity in time in the commission of some of the counts. A cumulative 63 year sentence for accused one for cattle totalling \$8000-00 in value makes no sense and clearly exceeds what would be appropriate in meeting the justice of the case. The same applies to accused three where an effective sentence of 27 years for cattle valued at \$2 900-00 is out-rightly excessive. Upon enquiry, the magistrate conceded that she could have made the sentences run concurrently but was unsure whether she could do so.

That sentences may run concurrently finds clear support in the Criminal Procedure and Evidence Act [*Chapter 9:07*] where s 343 provides as follows:

“(1) Where a person is convicted at one trial of two or more different offences or where a person under sentence or undergoing punishment for one offence is convicted of another offence, the court may sentence him to several punishments for such offences, or for such last offence, as the case may be, as the court is competent to impose.

(2) When sentencing any person to punishments in terms of subsection (1), the court may direct the order in which the sentences shall be served or that such sentences shall run concurrently.”

Support is also found in various case law. For instance in *S v Pearce*¹ Beadle CJ as he then was, put it simply as follows:

“I draw attention to the fact that the sentences on two separate counts each carrying a minimum sentence of imprisonment **can**, and **often** are made to run concurrently with each other...” (My emphasis)

In *S v Muyambo*² it was stated that there are two approaches to sentencing where multiple counts are involved; sentencing as one those similar in nature; or where counts are individually sentenced, ordering the sentences to run concurrently. It is the ‘concurrent’ approach which in my view would be appropriate in this case in terms of rationalising the sentence.

Herein the offences are clearly of similar nature and are closely linked in time to justify the sentences for some of the counts running concurrently. As regards the first accused, counts one and two involving stock theft from different households, occurred on the same day on 11 November 2014, whilst counts three and four also occurred on the same day on 21 November 2014. The offences in count six and seven also occurred on the same day on 6 November. The offence in count 5 occurred on 30 November and the cattle were recovered. In rationalising the sentence imposed on the first accused Richard Chibaya, the sentence is set aside and substituted as follows:

“Count one: eleven years imprisonment of which two years imprisonment is suspended on condition accused restitutes the complainant, Charles Chakara in the sum of \$1 100-00 through the clerk of court Karoi.

Count two: eleven years imprisonment of which two years imprisonment is suspended on condition accused restitutes the complainant, David Siyambulo in the sum of \$1 000-00 through the clerk of court Karoi.

¹ 1974 (2) SA 37(R) at 38A-B

² HH 52-94

Count three: eleven years imprisonment of which two years imprisonment is wholly suspended on condition accused restitutes the complainant, Praise Mucheri in the sum of \$700-00 through the clerk of court Karoi.

Count four: thirteen years imprisonment of which four years imprisonment is wholly suspended on condition accused restitutes the complainant, Romeo Katemanyoka in the sum of \$1 000-00 through the clerk of court Karoi.

Count five: nine years imprisonment.

Count six: twelve years imprisonment of which three years imprisonment is suspended on condition accused restitutes the complainant, Michael Baradza in the sum of \$1 200-00 through the clerk of court Karoi.

Count seven: nine years imprisonment.”

The effective nine years in count 1 shall run concurrently with the effective 9 year sentences in counts 2, 3, 4 and 5.

The effective nine years imprisonment in count 6, shall run concurrently with the effective 9 year sentence in count 7. Total effective term of imprisonment **18** years.

The sentence imposed on Prosper Shoko, the third accused is set aside and substituted by the following:

“Count three: nine years imprisonment
Count four: nine years imprisonment
Count five: nine years imprisonment.
The 9 years imprisonment in count 3, shall run concurrently with the period in count 4 and 5.

Total effective term of imprisonment, **9** years”.

The magistrate shall bring the altered sentences to the attention of the relevant authorities.

Tsanga J.....

Mushore J Agrees:.....