

THE STATE  
versus  
ZIVISO NCUBE

HIGH COURT OF ZIMBABWE  
MAWADZE J & ZISENGWE J  
MASVINGO, 5 June 2023

### **Criminal Review**

ZISENGWE J: This review matter once again brings to the fore the often vexed question of what amounts special reasons for one to escape the mandatory minimum sentence prescribed for theft of bovine beasts. The brief facts of this matter are the following. The accused was convicted following his plea of guilty to the offence of stock theft in contravention of section 114 (2) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. He candidly admitted having unlawfully slaughtered stray beast whose custody for the time being had been entrusted to him. The owner of that beast remains unknown.

Right at the commencement of the trial, the trial magistrate duly explained to the accused that the offence in question was one for which a mandatory minimum sentence of 9 years was prescribed and that it was only upon a finding of the existence of special reasons that an offender could escape that mandatory minimum sentence. The explanation was sufficiently .....

Following the accused's conviction, the trial court commendably once again gave the same explanation and invited the accused to advance any such special reasons. I will repeat here verbatim the accused's response

*"The bovine came to my kraal own its own and I kept it. It then got sick and I decided to kill it so that it does not die on its own. I am sorry for what I did. I killed the bovine against the law. "*

The State did not address the court nor did it lead evidence in rebuttal of those assertions. However, the trial court ruled that the explanation proffered by the accused was merely mitigatory and did not amount to special reasons. It then sentenced the accused to the mandatory minimum sentence of 9 years' imprisonment.

When the record of proceedings was submitted for review in the ordinary course, I directed a query to the magistrate enquiring in the following terms:

*"In the absence of a rebuttal of the accused's assertions to the effect that he slaughtered the stray beast because it was terminally sick, shouldn't the court have made a finding of the existence of special circumstances. "*

In response the magistrate indicated that when he sentenced the accused, he was initially ambivalent as to whether these facts amounted to special reasons before deciding that they did not. He wrote:

*"It had entered my mind that it could be a special circumstance that the bovine was ill. At the time of sentence my reasoning was torn in two since the accused could have left the bovine to die and still suffer no prejudice as the adage goes what manner of mercy is it for a leopard to remove an antelope from a trap. " It would stand that accused wanted to benefit somehow from the killing of the bovine without any authority which would lead to permanent prejudice to whoever the owner is. However after Honourable Zisengwe J's comments, I am satisfied that a finding that there are special circumstances is one that is not out of the ordinary and is justifiable and safe.*

*"To that end I concede that the court a quo could have come to that finding of special circumstances and still not be found wanting."*

Although there appears to be some initial conflation between the question of conviction and that of special circumstances, ultimately the magistrate correctly conceded that special circumstances were indeed present.

Cases abound on the import of special circumstances within the context 144 (3) of the Criminal law code (as with other statutes with a similar provision). The first error which the trial court fell into was the assumption that because an intention to permanently deprive the owner had been established, then special reasons did not exist. The former relates to conviction and the latter to sentence.

The word special is defined in the Concise Oxford English Dictionary, 11<sup>th</sup> edition as "bigger, greater or otherwise different from what is usual"

It is axiomatic therefore in the context of as section 114 that any reason provided by an accused be "exceptional" or otherwise different from the usual run of the mill mitigating factors routinely encountered in criminal cases.

In the absence of submissions or evidence by the State in rebuttal of accused's assertions that he finished off the beast, the court should have exercised its discretion by finding that special circumstantial did indeed exist justifying the imposition of a lesser sentence than the prescribed minimum. The accused found himself on the horns of a dilemma, whether to finish off the terminally sick stray bovine and at least salvage something from it or let it perish, he chose the former.

As is evident from his response that the trial magistrate agonised over whether or not to find them as special circumstances. He should have:

An error therefore occurred requiring appropriate remedial action. Having thus found that special circumstances exist this court is at liberty to substitute as own sentence for that of the trial court. Accordingly, the sentence imposed by the trial court is hereby set aside and substituted with one of "three years imprisonment. " The accused to be brought before court without undue delay to be informed of the alteration of his sentence on review?

ZISENGWE J

MAWADZE J agrees.....