

NIGEON SIBANDA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE

NDOU AND KAMOCHA JJ

BULAWAYO 25 JUNE & 5 JULY 2012

G Nyathi for appellant

T. Makoni for respondent

Criminal Appeal

NDOU J: After hearing counsel we dismissed the appeal against sentence and indicated that reasons for doing so will follow. These are the reasons. The salient facts are the following.

The appellant was convicted and sentenced by a Plumtree magistrate for being in possession of stock in circumstances that give rise to a reasonable suspicion that at the time of such possession the stock was stolen as defined in section 114 (2) (c) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. It is beyond dispute that the ox in question strayed into appellant's herd. The appellant kept the ox for about two months without alerting or informing the authorities i.e. the dip tank attendant or the police to the presence of stray ox. At the end of the trial the appellant was convicted and sentenced to undergo twenty-four months imprisonment of which six months were suspended for five years on the usual conditions of future good behaviour. Appellant appeals against sentence only. The respondent has conceded that the sentence imposed is severe. In *Nhumwa v S* SC-40-88, KORSAH JA stated in pages 5 to 6 of the cyclostyled judgment:

“It is not for the court of appeal to interfere with the discretion of the sentencing court merely on the ground that it might have passed a sentence somewhat different from that imposed. If the sentence imposed complies with the relevant principles, even if it is

severe than one that the court would have imposed, sitting as a court of first instance, this court will not interfere with the discretion of the sentencing court. *S v Anderson* 1964 (3) SA 494 (AD); and *S v de Jager & Another* 1965 (2) SA 616 (AD) at 628 and 629 where HOLMES JA said –

“It would not appear to be sufficiently realized that a court of appeal does not have a general discretion to ameliorate the sentences of the trial courts. The matter is governed by principle. It is the trial court which has the discretion, and a court of appeal cannot interfere unless the discretion was not judicially exercised, that is to say unless the sentence is vitiated by irregularity or misdirection or is so severe that no reasonable court could have imposed it. In this latter regard an accepted test is whether the sentence induces a sense of shock, that is to say if there is a striking disparity between the sentence passed and that which the court of appeal would have imposed. It should therefore be recognized that appellate jurisdiction to interfere with punishment is not discretionary but on the contrary, is very limited.”

Thus cases where this court has left undisturbed a sentence imposed by the trial court only confirm that the trial court correctly applied the general principles regarding quantum and not that the appellant court, sitting as a court of first instance, would have imposed exactly the same sentence. It seems to me that the court of appeal aims, not so much at uniformity of sentence, but at uniformity of approach. We can aspire to reach the former only if we attain the latter.”

In casu, the appellant kept the stray ox for around two months. The offence was discovered as a result of a tip-off the police got from a law abiding citizen. When confronted by the police, the appellant lied to them and said he had reported the presence of the stray ox to the dip tank attendant in question (who had already left his employ). It was only when the former dip tank attendant was located that the falsehood was established. In his reasons the learned trial magistrate explained why a fine or the option of community service would not meet the justice of the matter. Such reasoning cannot be faulted notwithstanding the concession made by state counsel. A sentence of twenty four months does not induce in me a sense of shock. The learned trial magistrate assessment of sentence cannot be impeached. The concession made on behalf of the state was made without regard to the general principles regarding sentence for this kind of crime.

It is for this reason that the appeal was dismissed.

Judgment No. HB 152/12

Case No. HCA 109/09

X REF CRB MPH 59/07

Kamocha J I agree

Sansole & Senda appellant's legal practitioners

Criminal Division, Attorney General's Office, respondent's legal practitioners