

**THE STATE**

**AND**

**MARTIN GWAREGA**

IN THE HIGH COURT OF ZIMBABWE  
CHEDA J  
BULAWAYO 21 FEBRUARY 2013

Judicial Review

**CHEDA J:** This matter was initially reviewed by my brother Ndou J who has since left the bench.

Prior to his departure he had raised a query with regards to the sentencing approach by the magistrate.

The accused was charged with 3 counts of stock theft involving 3 heifers. He pleaded not guilty to all the 3 counts but nonetheless was convicted of the three counts. Having found no special circumstances he was sentenced as follows:

“Count 1 – 9 years imprisonment  
Count 2 – 9 years imprisonment  
Count 3 – 9 years imprisonment  
Sentences in counts 1 and 2 to run concurrently.”

Accused stole three heifers from his employer and sold them to two different people. He was arrested following a tip off.

Ndou J queried as to whether by making counts 1 and 2 run concurrently the court had not reduced the sentences to below 9 years per count.

The learned trial magistrate’s view is that certain counts can run concurrently as they maybe burdensome if left as they are bearing in mind that the two counts are related. The learned magistrate has misdirected himself in this matter. The mandatory sentences can not be interfered with in a manner that effectively reduces or removes the sting of a court in that manner. If the magistrate desired to reduce the net effect of the sentence he should have

treated the two closely related counts as one and added the remaining count so as to give a harsher sentence. Left as it, accused has not been sentenced for counts 1 and 2.

In view of the misdirection the following is the order:-

**Order**

- (1) the conviction is confirmed
- (2) the sentence is set aside
- (3) the matter is referred back to the trial magistrate for the re-assessment of a suitable sentence.

Cheda J.....

Mutema J agrees.....