

**THE STATE**

**Versus**

**BIGBOY NDOU**

IN THE HIGH COURT OF ZIMBABWE  
MUTEMA J  
BULAWAYO 20 JANUARY 2014

Criminal Review

**MUTEMA J:** The accused person *in casu* was properly convicted of two counts of stock theft in contravention of section 114 (2) (a) of the Criminal Law (Codification and Reform) Act, [Chapter 9:23] following a contested trial wherein he was legally represented. The allegations in count 1 are that on 19 September, 2013 the accused, in concert with two suspects who are still at large, stole twelve head of cattle belonging to Oteng Matswagole from some pasture in Botswana, brought them into Zimbabwe and superimposed accused's brand on complainant's and kept them in his kraal until the police anti-stocktheft personnel were tipped off and arrested him. Eight head valued at \$3 600,00 were recovered while the balance valued at \$1 800,00 were not recovered.

Regarding the second count, using the same *modus operandi* as in count one, accused stole one bull belonging to Matthew Dube valued at \$450,00 and it was recovered.

The trial magistrate sitting at Gwanda who convicted the accused person found no special circumstances and sentenced him as follows:

"Both counts as one: 20 years imprisonment of which 4 years imprisonment is suspended for 5 years on condition accused is not convicted within that period of any offence involving dishonesty committed within that period and of which upon conviction he is sentenced to imprisonment without the option of a fine. Of the remaining 16 years imprisonment 2 years imprisonment is suspended on condition accused pays compensation of US\$1 800,00 to Oteng Matswagole through the clerk of court Gwanda on or before 2 December, 2013."

Since the accused person was legally represented, pursuant to proviso (ii) (a) of section 57(1) of the Magistrates' Court Act, [Chapter 7:10], the proceedings did not enjoy the right of automatic review unless his legal practitioner, in terms of subsection (2) requested for such review. *In casu* no such request was filed with the clerk of court. How then did the record of these proceedings find its way to the review desk? It came via a minute by the Regional Magistrate Gwanda couched in these words:

"Please place the above record before a review Judge with the following comments. The above matter was dealt with by a Provincial Magistrate at Gwanda. Since the matter was

represented (*sic*) it does not proceed for automatic review. However, my interest was aroused by the sentence that appeared in the local press. On reading the report I felt the magistrate could have fallen into error. In *State v Huni and others* 2009 (2) 432 ZLR (*sic*) J Kudya (*sic*) is on record saying it's not competent to take multiple counts and treat them as one in offences that attract a mandatory minimum sentence nor to suspend sentence on good behaviour. If my observation is correct can the proceedings be rectified in terms of the High Court Act, section 29."

Section 29 of the High Court Act, [Chapter 7:06] confers on the High Court review powers in criminal proceedings. Subsection (4) provides that:

"(4) Subject to rules of court, the powers conferred by sub-sections (1) and (2) may be exercised whenever it comes to the notice of the High Court or a judge of the High Court that any criminal proceedings of any inferior court or tribunal are not in accordance with real and substantial justice, notwithstanding that such proceedings are not the subject of an application to the High Court and have not been submitted to the High Court or the judge for review."

The import of this provision is that it matters not how the criminal proceedings attracted the notice of the High Court or a judge thereof but as long as they are not in accordance with real and substantial justice, such criminal proceedings are subject to review.

Subsection (2) of section 29 provides inter alia as follows:

"(2) If on a review of any criminal proceedings of an inferior court or tribunal, the High Court considers that the proceedings –

- (a) ...
- (b) are not in accordance with real and substantial justice, it may, subject to this section –
  - (i) ...
  - (ii) ...
  - (iii) set aside or correct the proceedings of the inferior court or tribunal or any part thereof or generally give such judgment or impose such sentence or make such order as the inferior court or tribunal ought in terms of any law to have given, imposed or made on any matter which was, before it in the proceedings in question; or " (emphasis supplied)

Now are these criminal proceedings in accordance with real and substantial justice in terms of the sentence that was imposed? A reading of the penal provision in section 114 of the Criminal Law (Codification and Reform) Act [Chapter 9:23] shows beyond any shadow of doubt that they are not. Section 114 (2) (a) as read with paragraph (e) provides that any person who steals livestock or its produce shall be guilty of an offence and liable, if the stock theft involved any bovine beast and there are no special circumstances as provided in subsection (3) (i.e. peculiar to the case), to imprisonment for a period of not less than nine years or more than twenty-five years. Subsection (4) is the catch which the trial magistrate missed. It provides that a court sentencing a person to the minimum sentence of imprisonment of nine years shall not

order that the operation of the whole or any part of the sentence be suspended and if sentenced to imprisonment exceeding the minimum sentence of imprisonment of nine years the court may order the operation of the whole or any part of the sentence exceeding the nine years to be suspended.

The simple literal interpretation to be placed is that in the event that any accused person is either sentenced to the mandatory minimum of nine years or to any sentence in excess of the nine years, the bottom line is that that nine year mandatory minimum sentence must remain intact even where like in the latter scenario the court decides to suspend any portion in excess of the nine years.

Apart from the clear provision of the statute regulating mandatory minimum sentences in multiple counts the cited case of *S v Huni & Ors* 2009 (2) ZLR 432 (H) clearly tackled the issue as well. That case held that respecting multiple counts, treating them as one for sentence is not competent for the mandatory minimum sentence remains applicable on each count, although it is permissible to order the sentence on one count to run concurrently with the sentence on the other count or counts.

In the instant case it was therefore incompetent for the trial magistrate to treat both counts as one for sentence and impose the globular sentence he imposed which he proceeded to truncate by suspending portions on various conditions with the net effect of resultantly leaving the accused with a sentence below the mandatory minimum in respect of each count. He ought to have sentenced the accused to the mandatory minimum nine years per each count and leave the sentence as is or order one to run concurrently with the other or to have sentenced the accused separately on each count to anything between nine years and twenty-five years imprisonment and then suspend the portion in excess of nine years wholly or partially on whatever condition he deemed appropriate.

In the result the sentence imposed by the trial magistrate is hereby set aside and in its place, substituted with the following:

- Count 1: 9 years imprisonment
- Count 2: 9 years imprisonment

The trial magistrate is directed to recall the accused and explain to him the new sentence.

Moyo J ..... I agree