

THE STATE

Versus

TWAYIMENINCUBE

IN THE HIGH COURT OF ZIMBABWE
MUTEMA J
BULAWAYO 23 OCTOBER, 2014

Criminal Review

MUTEMA J: The accused person was arraigned before a provincial magistrate sitting at Plumtree charged with stock theft in contravention of section 114 (2) (a) of the Criminal law (Codification and Reform) Act [Chapter 9:23].

The agreed facts are that in the year 2010 a stray hornless brown steer joined accused person's herd at 25 Haygrange Farm. The accused did not bother to report the stray bovine to the police or the dip attendant. The steer grew into an ox in accused's custody. He still did not report its presence to anyone. When greed overcame him the accused, on 8 April, 2014 took the stray beast to Mainline Cattle Sale and sold it. It is not ventilated for how much it was sold. Two days following the sale accused's neighbours reported the event to the police leading to his arrest. The bovine beast is valued at US\$610,00 and it was recovered.

On arraignment the accused pleaded guilty to the charge and was duly convicted as charged. He was sentenced to 36 months imprisonment of which 6 months imprisonment was suspended for 5 years on the usual condition of future good conduct, the learned provincial trial magistrate having found special circumstances which constrained him to eschew from imposing the mandatory minimum sentence of 9 years imprisonment. This finding of special circumstances is encapsulated in these words:

“... however, I find special circumstances in accused's case in that accused had kept a calf which had joined his cattle for 5 years without anybody claiming ownership of it.”

When the matter landed on my desk on automatic review I addressed this query to the learned trial magistrate:

“What is special about an accused person who keeps a stray steer for 5 years and does not

report it to the police or dip attendant or to any authority and proceeds to sell it well knowing that he was committing stock theft?”

The response was this:

“In finding special circumstances in this case, I was guided by the case of *S v Brian Nyathi* HC-603-98, in which the accused person stole a stray beast which he had kept for 3 years unclaimed. In that case his Lordship Mr Justice Sibanda with the concurrence of his Lordship Mr Justice Cheda gave the guidance on sentencing an accused person convicted on a charge of stock theft involving a stray beast, the circumstances of which I have found to be almost similar to those in the present case. In that case his Lordship had this to say, “This is a clear case in which the circumstances surrounding the presence of the ox in the area must have presented a temptation to the accused which he could not resist.” In that case a sentence of 18 months imprisonment of which 6 months imprisonment was suspended, was quashed and set aside and was substituted with one of 12 months imprisonment of which 4 months imprisonment was suspended on the same conditions.”

The case which the learned trial magistrate says guided him in arriving at the sentence that he imposed, could, however, not be found despite spirited and diligent search. In 1998 there was no case number HC 603/98. In fact High Court judgment numbers for Bulawayo are preceded by the letters HB and those for Harare HH.

In any event, even assuming that such a case does exist it would appear, with respect, that the facts therein, according to the learned trial magistrate were “almost similar” to those of the present matter. Almost means nearly. The learned trial magistrate shunned, designedly or otherwise, from spelling out that difference in the facts between the two set of cases to enable a proper and informed comparison to be made. The tone of his response constrains me to find that his case which he says guided him could well be distinguishable on certain of the facts for he did not say that the facts of the two cases fall on all fours. Even if they did, I would, with respect, not be encumbered from holding that the finding on special circumstances in that case does not sit well with the legal position on special circumstances.

There is nothing special about a stock thief who deliberately refrains from reporting a

stray beast that joins his herd to the authorities for such a long time and subsequently proceeds to sell it. If anything such conduct is aggravatory. Clearly special circumstances are non-existent *in casu*.

In the event, the sentence imposed by the learned trial magistrate is hereby set aside and the matter is remitted to the trial magistrate to recall the accused and sentence him in terms of the mandatory provisions of the law. In so doing, part of the 36 months imprisonment which the accused has already served should be deducted from the mandatory minimum sentence of 9 years imprisonment.

Kamocha J agrees