

THE STATE
versus
MUCHINAPO MHLANGA
and
SIMON SITHOLE

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 21 June 2006

Criminal Review

KUDYA J: On 28 April 2005, the two accused persons were arraigned before the Magistrates Court sitting on circuit at Middle Save. They were charged with the theft of a bovine from the grazing area in Musapingura Village Chief Musikavanhu, Chipinge, which occurred on 20 April 2005.

They both pleaded guilty and were properly convicted. The beast which was valued at \$2 million was not recovered as they slaughtered it and disposed of the meat.

On 28 April 2005, the trial magistrate canvassed the issue of special circumstances and found none. He proceeded to impose the mandatory minimum sentence of 9 years imprisonment on each accused person.

The record of proceedings was submitted for review on 4 May 2005. On 11 May 2005 OMERJEE J, with the concurrence of GOWORA J, set aside the sentence that had been imposed and returned the record of proceedings to the trial magistrate in line with the sentiments expressed in *State v Gangarabwe* HH 29/2005 as the trial magistrate did not have jurisdiction to impose the mandatory minimum sentence.

On 29 March 2006 the trial magistrate resubmitted the record on review in the following terms:

"Please put this record before the Honourable Judge with the following comments:

This record of proceedings was initially returned for the magistrate to proceed in terms of *S v Gangarabwe* HH 29/05.

Unfortunately upon its return the record was misfiled in the Clerk of Courts office and when it was finally discovered magistrates had already been granted the jurisdiction to pass the minimum mandatory sentence.

The record is now before you for review proceedings.

The delay is sincerely regretted."

In resubmitting the record in the form it was when it was first submitted in May 2005, the trial magistrate misdirected himself in several respects.

Firstly, he failed to appreciate that the sentence that he imposed on 28 April 2005 was set aside. When he resubmitted the record there was no new sentence that had been imposed. He in essence submitted an incomplete record for review, a record which did not have a sentence. Once this court set aside the previous sentence, he no longer had the power to resuscitate the old sentence which had been quashed.

Secondly, he erred in his belief that by 26 March 2006 all magistrates now had the power to impose the mandatory minimum sentence. In the absence of special reasons only senior, provincial and regional magistrates have such power. This is in accordance with the provisions of section 9 of the Stock Theft Act [*Chapter 9:18*] as amended by section 10 of the General Laws Amendment Act No. 6/2005.

The General Laws Amendment Act No. 6/2005 came into effect on 3 February 2006. Section 9 of the Stock Theft Act, now reads as follows:

"Notwithstanding anything in the Magistrates Court Act [*Chapter 7:10*] -

- a) Regional magistrates, provincial magistrates and senior magistrates shall have special jurisdiction to impose any penalty prescribed in section eleven and twelve.
- b) Magistrates other than magistrates referred to in paragraph (a) shall have special jurisdiction to impose any penalty prescribed in sections four and five."

In the present matter, the trial magistrate holds the magisterial rank of magistrate. He is not seized with the special jurisdiction to impose the mandatory minimum sentence.

Thirdly, it was incompetent for the trial magistrate to resubmit the record of proceedings in its original form, without dispatching it first to the Attorney-General in terms of section 54(2) of the Magistrates Court Act. The full procedure of how this is done is set out in *S v Dangarembizi and Ano* 1987(2) ZLR 196 and in *S v Mandizha* HH275/90.

The registrar is directed to bring this review judgment to the attention of the Chief Magistrate as it is prudent that cases of Stock Theft be presided over by senior, provincial or regional magistrates at those stations where these are resident to obviate the delay associated with invoking the provisions of section 54(2) of the Magistrates Court Act.

In the present matter, the trial magistrate is however directed to comply with the order of this court of 11 May 2005 by invoking the provisions of section 54(2) of the Magistrates Court Act.