

1. THE STATE
versus
JOHN NDLOVU

Crim (A) 107/06

2. THE STATE
versus
KENNETH CHITENDA

Crim (A) 112/06

HIGH COURT OF ZIMBABWE
KAMOCHA J
HARARE, 12 July 2006

Transfer for sentence

KAMOCHA J: These two matters are dealt with at the same time because they both raise issues that emanate from the misapplication by the trial courts of the provisions of the Stock Theft Amendment Act 6 of 2004 which came into operation on 27 August 2004.

The amending act inserted a new section to the principal Act, which sets out special sentences for offences in respect of certain stock. The section reads as follows:

“12 Special sentences for offences in respect of certain stock.”

1. Any person who is convicted of the theft or attempted theft of any equine or bovine animal or receiving knowing it to have been stolen or inciting or conspiring with any other person to commit any offence shall, if there are no special circumstances in the particular case as provided in subsection (2), be liable to imprisonment for a period of not less than nine years or more than twenty-five years.”

The amending Act, however, inadvertently omitted to confer upon magistrates special jurisdiction empowering them to impose the mandatory minimum sentence. In *State v Tazvitya Gangarahwe* HH 29-2005, this court directed that upon conviction of any person on a charge of theft of stock the magistrates court had to invoke the provisions of section 54(2) of the Magistrates Court Act [*Chapter 76:10*]

The respective circumstances of these two cases are these:

CASE I

The 22 years old accused was charged with the theft of 4 donkeys which he had allegedly stolen on 25 October 2003 from Rosemary Dube of Mabhuku Village in Zhombe. He tendered a plea of not guilty on arraignment but changed his plea to one of guilty as the trial progressed and was accordingly found guilty as charged. The conviction seems proper to me. The trial court then sentenced the accused to undergo 36 years imprisonment of which

18 years imprisonment was suspended for a period of 5 years on the customary conditions of future good behaviour. In doing so, the trial magistrate purported to act in terms of the new section 12 quoted *supra* of the Stock Theft Act [*Chapter 9:18*] as amended by Act 6 of 2004.

The matter came for automatic review. The reviewing judge set aside the sentence and directed the trial court to act in terms of section 54(2) of the Magistrates Court Act [*chapter 7:10*] which reads as follows:

“54 Stopping and conversion of trials

- 1)
- 2) If upon the conviction of an accused person upon summary trial or trial on remitted by the Attorney-General, before sentence is passed, the magistrate is of the opinion that a sentence in excess of his jurisdiction is justified, he may adjourn the case and remand the person convicted and submit a report to the Attorney-General, together with a copy of the record of the proceedings in the case.”

The trial magistrate complied with the directive of the reviewing judge and referred the matter to the Attorney-General who directed in terms of section 225 (b)(i) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] that the matter be transferred to this court for sentence which the trial court did.

After the record of proceedings had been placed before me in chambers pursuant to the provisions section 227 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] two errors were apparent on the record of proceedings.

Firstly, the accused stole 4 donkeys. A donkey is neither an equine nor bovine animal. The word equine is defined in Collins English Dictionary as “adjective-pertaining to a horse; noun-a horse” and the word bovine is defined as “adjective- pertaining to cattle” [*Chapter 9:18*]

The Stock Theft Act [*Chapter 9:18*] defines stock in section 2 as “(a) any horse, mule, ass, bovine, sheep, goat, pig, poultry, pigeon or chinchilla; or.” It is, therefore, quite clear that it was not proper for the trial magistrate to impose on the accused a sentence which was meant for theft of a horse or bovine when his conviction related to theft of 4 donkeys (asses).

The second error relates to applying the law retrospectively. The theft of the four donkeys was committed on 25 October 2003 which was 10 months before the Stock Theft Amendment Act 6 of 2004 was enacted. The magistrate sentenced the accused for an offence committed before the law was enacted using the provisions of the new law. That, in my view, is not proper as the general rule at common law is that statutes are not to operate retrospectively. See Crais on Statute Law 7th edition by S.G.G. Edgar at page 391. Francis

Benion in *Statutory Interpretation Butterworths 1984* at page 313 states the principle as follows:

“It is a principle of legal policy that, except in relation to procedural matters, changes in the law should not take effect retrospectively. The court, when considering, in relation to the fact of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator, intended to observe this principle.”

This general rule can however, be departed from where it is expressly enacted that an enactment shall be retrospective. Further, *Crais* on statute law *supra* at page 392 states that:-

“If it is a necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation, the courts will give such an operation.”

The above approach has been adopted by our courts several times for instance in *Agere v Nyambuya* 1985 (2) ZLR 336 (SC) at 338H-339A GUBBAY JA (as he then was) had this to say:-

“It is a fundamental rule of construction in our law, dating probably from Codex 1:14:7, that there is a strong presumption that retrospective operation is not to be given to an enactment so as to remove or in any way impair existing rights of obligations unless such a construction appears clearly from the language used or arises by necessary implication. For instance, where it is expressly retrospective, or deals with past events, or concerns a matter of procedure, practice or evidence. The supposition is that the legislature intends to deal only with future events and circumstances.”

See also *Bater & Anor v Muchengeti* 1995(1) ZLR 80(S) at 84G-H and *Nkomo & Anor v A-G + Ors* 1993 ZLR 422(S) at 428H-429B.

In casu there is nothing to suggest that the provisions of section 12 inserted by the Stock Theft Amendment Act No. 6 of 2004 were to be applied in retrospect. Neither can it be said that there is a necessary implication from the language used that the legislature intended the said section to operate retrospectively. There was, therefore, no basis for the trial court to have had recourse to section 12 of the Stock Theft Act [*Chapter 9:18*] as amended when sentencing the accused. He should have exercised the jurisdiction conferred on him by the Stock Theft Act prior to the amendment.

CASE 2

In or about January 2004, the accused, with the connivance of his brother, who was employed as a herdsman by the complainant, took one beast belonging to the complainant and kept it as his. The beast, valued at \$1.5 million, was recovered.

On arraignment in the magistrate's court he denied the charge but was convicted after trial. He was sentenced to the mandatory minimum sentence of 9 years imprisonment. In my view the conviction is proper and no issues arise from it.

The sentence, however, suffers the same defect of applying the law in retrospect. The accused was sentenced to the mandatory sentences of nine years for a crime he had committed eight months before the mandatory sentence came into operation. I have held in the first case that there was no legal basis for the trial magistrate to have done so. My reasons for arriving at that conclusion in the first case apply with equal force in this case also.

Just like the first case this matter was also transferred to this court for sentence in terms of section 225(b)(i) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] after the reviewing judge had set aside the sentence of 9 years imprisonment and directed the trial magistrate to invoke the provisions of section 54(2) of the Magistrates Court Act [*Chapter 7:10*].

In the light of the foregoing there was no need for these two cases to be transferred to this court for sentence. After the sentences had been set aside the magistrates should have been directed to pass sentence *de novo* exercising the jurisdiction that was conferred on them by the Stock Theft Act [*Chapter 9:18*] prior to its amendment.

Be that as it may I shall proceed to sentence both accused. In that regard arrangements have been made to have them brought before me for sentence as soon as possible.

GARWE JP: I agree with the above remarks by KAMOCHA J.

The matters forming the subject of this review judgment stress the need for reviewing judges to exercise great caution before interfering with the proceedings of the lower courts. Clearly the mandatory sentence of nine (9) years imprisonment was never intended for an offence other than theft of bovine or horse. A donkey i.e. an ass is neither. It was therefore not proper for this court to set aside the sentence imposed in the first matter and direct the trial magistrate to proceed in terms of section 54(2) of the Magistrates Court. The office of the Attorney General must also share the blame. Had that office properly considered the matter, it would have been apparent that the trial magistrate in fact had jurisdiction to pass sentence and that this was not an appropriate case for transfer to the High Court for sentence.

That the law cannot operate retrospectively in the absence of a clear intention to that effect is trite. Again this is an aspect judicial officers should be alive to. An accused person who committed theft of bovine or horse prior to the promulgation of the mandatory

minimum sentence cannot be sentenced to the mandatory minimum sentence. The trial court must proceed to pass sentence in the light of the laws in existence at the time of the commission of the offence.

The directive in both cases to the trial magistrates to stop the proceedings (and proceed in terms of section 54(2) of the Magistrates Court Act) and the decision by the office of the Attorney General thereafter to transfer the matters to this court for sentence were improperly made. The result is that there has been a delay in the finalisation of both matters. Had the matters been properly handled in the first instance this court, in the exercise of its criminal review jurisdiction, could have set aside the sentences and substituted what it considered to be more appropriate sentences in the circumstances. Alternatively this court could have directed the trial magistrates to pass sentence afresh, taking into account their jurisdiction at the time of the commission of the offences.