

THE STATE  
versus  
ELPHAS MUTERO

HIGH COURT OF ZIMBABWE  
HUNGWE J  
HARARE, 21 February 2012

### **Criminal Review**

HUNGWE J: The accused was charged in the Magistrates' court with two counts. The first count was contravening s 5 of the Trapping of Animals Control Act [*Cap 20:21*] "make use or possess class one traps" in that on 10 October 2001 and at Merrivale Ranch Mwenezi, the accused unlawfully made, used or possessed class 1 traps, that is to say he set twelve wire snares and caught two female kudus.

In the second count he was charged with stock theft in that on 10 October 2001 at Merrivale Ranch, Mwenezi, he had unlawfully and intentionally stolen one cow the property of one Botha and in his lawful custody.

He pleaded guilty to both counts. On the first count he was sentenced to 14 months imprisonment. On the second count he was sentenced to 36 months imprisonment. Of the total of 50 months imprisonment, 10 months were suspended for 5 years on condition of good behaviour. Of the remaining 40 months imprisonment, 20 months imprisonment were suspended on condition the accused compensates the complainant in the sum of Z\$18 000-00 through the Clerk of Court Mwenezi by 1 January 2002.

The agreed facts which were placed before the court in terms of s 27 (2)(b) of the Criminal Procedure and Evidence Act [*Cap 9:07*] were as follows:

The accused, a resident of Mutiri Village, Chivi district went to Merrivale Ranch in Mwenezi district. He set twelve class 1 wire snares. Two of these snares caught two female kudus. One snare caught one cow. The accused took the meat to a rocky place and dried it. He was arrested whilst in the process of sorting out the meat. It was not in dispute that he found the cow dead in the snare and skinned it.

Nothing turns on the conviction in count I.

I queried with the trial magistrate the propriety of the conviction in Count 2. The learned trial magistrate conceded that the dominant intention in setting snares was to catch

wild game animals. If this was his intention, he could not have intended to deprive the owner permanently of his ownership of the cow that was caught up in one of the snares. His recklessness (if there was such) as to whether or not domestic animals were snared, may well disclose the crime of malicious injury to property. (See *S v Sibanda* 1977 (2) RLR 30 at p 32). The question whether the accused foresaw the possibility of a cow being caught in his snare was never put to him.

It cannot be denied that the accused only formed the intention to appropriate the carcass upon finding the dead cow snared. The fact that the accused admitted theft of stock only serves to demonstrate the obligation and responsibility which a court has towards an unrepresented accused. It could not be expected that an unsophisticated accused could be aware of the distinction between theft of a live cow and theft of a carcass of a cow. No attempt was made to explain this distinction to the accused and as such the court fell into error.

The actions of the accused fell outside the ambit of s 8 of the Stock Theft Act [*Cap 9:18*] the provisions of which only apply to the theft of a living equine or bovine and not to a slaughtered or dead one nor to “stock” as it is widely defined in s 2 of the Act (See *S v Sibanda* at p 33). As such the carcass of stock only falls within this definition if it is proved to have come from stock which has been slaughtered.

In *casu* the agreed facts are that the accused found the cow already dead as a result of being ensnared. It therefore does not fall within the definition of “stock”.

The appropriate finding in count 2 ought to have been one of guilty of theft of carcass of a bovine. In the result the conviction and sentence in count 2 are set aside and a conviction of theft of a carcass of a bovine is substituted. A sentence of nine months is substituted.

The conviction and sentence in count I is confirmed.

MATHONSI J: agrees.