

THE STATE

Versus

SIMON CHOSEMWA

HIGH COURT OF ZIMBABWE
WAMAMBO J
MASVINGO 18 NOVEMBER, 2020

Review Judgement

WAMAMBO J: The accused person appeared before a Magistrate sitting at Masvingo charged with 3 counts of contravening section 114 (2) of the Criminal Law Codification and Reform Act [*Chapter 9:23*]. In essence accused stole 3 donkeys from the complainant in count one, one donkey from the complainant in count two and 6 donkeys from the complainant in count three. In total he stole 10 donkeys of which only three donkeys were recovered.

Two of the three counts were committed at Fusira Village, Chief Nyajena while one was committed at Chekai Village, Chief Nyajena.

The learned Trial Magistrate treated the 3 counts as one for purposes of sentence and imposed the following sentence:

12 months imprisonment of which 2 months imprisonment were suspended on conditions of good behaviour. A further 4 months were suspended on condition of restitution. The remaining 6 months were suspended on condition of performing community service.

The Scrutinising Regional Magistrate raised issues with the learned Trial Magistrate on the sentence imposed, being of the view that the sentence was too lenient and that a custodial sentence should have been imposed. The cases of *State v Jotno Ndebele HB 18/20* and *State v Lovemore Ncube HB 11/2008* were brought to the attention of the Trial Magistrate.

In response however the Trial Magistrate was of the following view:

"I sentenced the accused person to a suspended sentence of good behaviour, restitution, and community service as. I was of the view that the complainant's property in count 2 and count 3 had been recovered thus imprisonment would be harsh."

Not satisfied with this response the scrutinising Regional Magistrate referred this matter to a Reviewing Judge for guidance.

It is important to note that from the very on set the sentence passed goes against the grain of precedent.

The two cases cited by the Scrutinising Regional Magistrate are but part of a plethora of cases that should have guided the Trial Magistrate.

In State v Lovemore Ncube HB 111/08 CHEDA J found that for the theft of three donkeys which were all recovered on appropriate sentence was 3 years imprisonment.

In State v Ndebele HB 18/20 MAKONESE J When dealing with a review matter declined to confirm the proceedings as being in accordance with real and substantial justice.

The facts of that matter are that the accused was found guilty of theft of four donkeys in contravention of section 114 of the of the Criminal Law Codification and Reform Act [*Chapter 9:23*].

The four donkeys were recovered. On a plea of guilty accused was sentenced to 12 months imprisonment of which 3 months imprisonment were suspended for 5 years on conditions of future good conduct. A further 4 months were suspended on condition of restitution. The remaining 5 months were suspended on condition of the performance of community service.

At page 2 the Honourable Judge said

"Theft of stock is without doubt always considered a serious offence. The accused person stole 4 donkeys and sold them. He naturally benefited from the commission of the offence. Theft of a large number of donkeys should necessarily attract a custodial sentence. When a person decides to steal a donkey, he robs the complainant of his means of survival. Donkeys provide draught power in communal areas. The seriousness of the offence should be reflected in the imposition of custodial sentences for theft of stock especially when more than two donkeys are involved."

In the instant case a total of 7 donkeys went unrecovered. Accused way laid the donkeys at the grazing lands. In the light of the above cited cases the sentence that would fit the crime, the offender and the expectations of society is a custodial sentence.

In the circumstances I confirm the conviction but I decline to confirm the proceedings as being in accordance with real and substantial justice and withhold my certificate.

WAMAMBO J

ZISENGWE J agrees.....