THE STATE
versus
STYLE CHAYISVA

HIGH COURT OF ZIMBABWE
CHINHENGO J
HARARE 28 January 2004

Review Judgment

CHINHENGO J: The accused appeared before the Magistrates Court at Chivhu facing one count of housebreaking with intent to steal and theft and another of stock theft. He pleaded guilty to the charge of stock theft. He admitted to having stolen a cow and a heifer and to have slaughtered the cow and sold the heifer. The heifer was recovered. He pleaded not guilty to the charge of housebreaking with intent to steal and theft. He was tried but was convicted nonetheless. He was found to have broken into the complainant's home and stolen a jersey valued at $2 500.

The magistrate treated both offences as one for the purpose of sentence. He imposed a globular sentence of four years imprisonment. The accused had three previous convictions for theft, housebreaking with intent to steal and theft and stock theft.

I asked the magistrate to justify his approach to sentence i.e. treating the offences of housebreaking with intent to steal and theft and stock theft as one for the purpose of sentence. He failed to do so.

What prompted me to ask the magistrate to justify the approach he had taken in respect of sentence was the fact that the two offences were not at all connected. The housebreaking with intent to steal and theft had been committed on 11 December 2002. The accused had stolen the jersey from a house in Chivhu Township, an urban settlement, where he had visited his brother. The cow and heifer were stolen on 18 January 2003 from a complainant who resided at Dzova Village, Chief Mutiti, Chivhu District – a rural area.

John Reid Rowland in *Criminal Procedure in Zimbabwe* states the following at p 25-25(b):

> "Where the accused is convicted of two or more offences, it is preferable that he should be sentenced separately for each offence, especially where the offences are entirely different. In most cases there is no practical advantage in imposing a globular sentence, where all counts are treated as one for sentence. An exception might arise where it is decided, in dealing with a juvenile, to place him in a training institute or impose a sentence of whipping. The imposition of a globular sentence often causes difficulties on appeal or review. Consequently, one globular sentence for two or more offences should only be considered where the offences are the same or of a similar nature and are closely linked in time. A common example would be charges of forgery and uttering."

There is no statutory provision authorizing the imposition of a globular sentence. The Criminal Procedure and Evidence Act [*Chapter 9:07*] provides in s 343 only for cumulative or concurrent sentences. That section provides that:

> "(1) Where a person is convicted at one trial of two or more different offences or where a person under sentence or undergoing punishment for one offence is convicted of another offence, the court may sentence him to several punishments for such offences, or for such last offence, as the case may be, as the court is competent to impose.
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> (2) When sentencing any person to punishments in terms of subsection (1), the court may direct the order in which the sentences shall be served or that such sentences shall run concurrently."

It is clear therefore that the Criminal Procedure and Evidence Act does not make provision for the imposition of globular sentences. The exception may be the one stated by John Reid Rowland above and also referred to in *S v Nkosi* 1965 (2) SA 414 at 415E. This, however, is not to say that globular sentences may not be imposed. There has been judicial approval of this approach and it is now routinely resorted to by our courts. See *R v Chikwara* 1952 (1) SA 368 (SR) which involved a conviction of forgery and uttering and *R v Phillips* 1956 (1) SA 80 (SR) where BEADLE J (as he then was), finding that the cumulative sentences of four days imprisonment on each of seventeen counts was too severe, proposed that treating all offences as one may be an option open to a judicial officer in an appropriate case. At 82G-83C he said:

> "In any event, I do not think the rule that separate sentences should be imposed on different counts should be stretched any further than necessary, or applied too slavishly, because there are instances when it is desirable that all counts should be treated together for the purpose of sentence. See *R v Visser,* 1930 TPD 170; *R v Minnaar,* 1945 (2) PH 227. For example, in the case of the conviction of a juvenile on large number of counts of equal gravity, if the court wishes to impose a sentence of corporal punishment the only possible thing to do is to treat all counts together as one for the purpose of sentence.
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> Again it may be argued that s 351(2) (now s 343) of the Code, which deals with concurrent sentences, seems to indicate that the sentences should be treated count by count. I do not think, however, that this was the intention of the Legislature in framing this particular subsection . The intention appears to be merely to indicate that, in the absence of anything said to the contrary, sentences of imprisonment for different offences should run consecutively, and not concurrently, with each other."

BEADLE J carried through with this reasoning when he became Chief Justice. In *R v Makanza & Ors* 1969 (1) RLR 97 he specifically recommended to magistrates to treat many counts as one for the purpose of sentence in cases in which the several counts arise out of the same transaction. Judicial approval was also given to this approach in *John Zacharia v The State* HH 17.2002 (to be reported in 2002 (1) ZLR).

In deciding to pass a globular sentence therefore, a judicial officer must be guided by the following factors which are not exhaustively stated:

(a) the offences are the same or of a similar nature; and

(b) the offences are closely linked in time; or

(c) the offences arise out of the same transaction.

The offences of which the accused was convicted in the present case do not meet any of the criteria I have outlined. The first was committed in an urban area about one month before the second offence of stock theft was committed. The latter was committed quite some distance from where the former was committed and in a rural area. Although both offences are of a similar nature, the one is a less serious offence of housebreaking with intent to steal and theft and involved the theft of a clothing item whilst the

other is a serious offence of stock theft. The Legislature had, in respect of stock theft, to enact a law to deal specifically with it to emphasise its seriousness – see the remarks of EBRAHIM J in *S v Maphosa* 1985 (1) ZLR 184 (H). The two offences did not arise out of the same criminal transaction. In my view this was not a proper case in which the magistrate should have coupled the two offences for the purposes of sentence. The conviction and overall sentence is appropriate for an accused with previous convictions for similar offences. But for the reasons I have given the sentence must be set aside and substituted with the following:

"Count 1: (Housebreaking with intent to steal and theft)
12 months imprisonment.
Count 2: (Theft of stock)
36 months imprisonment."

Omerjee J, agrees:.....