THE STATE
versus
KUDAKWASHE SHOKO

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 30 March, 2017 and 9 October 2019

Criminal Review

CHITAPI J: This case was dealt with as a plea matter by the magistrate sitting at Kadoma on 4 May, 2017. The record was placed before me on review. I raised a query on the propriety of the conviction. The magistrate has responded to my query. The magistrate has sought to support his decision. As I am of the view that the magistrate is misdirected, I consider it necessary to compose this written judgment for the guidance of the magistrate concerned and others who may find themselves dealing with similar matters.

The accused, a 27 year old male was charged with contravening s 114 (2) (a) of the Criminal Law Codification and Reform Act [*Chapter 9:23*] which creates the offence of "Stock Theft". The charge put to the accused was that, on 29 January, 2017 at Chehamba Village 40, Nyaunde Sanyati, the accused "unlawfully and intentionally took two oxen" belonging to the complainant intending to permanently deprive the complainant of the livestock.

The facts of the case were that on 29 January, 2017 the complainant's children penned complainant's cattle in the cattle kraal. The number of cattle was 18 in all. During the night, the accused opened the cattle pen and stole two oxen separately described as; "a brown ox with horns curving in front" and another one described as "a white ox with horns curving up with a scar on the back".

The accused drove the two stolen oxen to farm 50 Chenjiri, Sanyati arriving there at about 0330 hours. He offered the two beasts for sale to one Rueben Chacha for US$ 750.00. Rueben Chacha insisted on the accused first producing his national identity card and the stock card. The accused failed to produce the requested documents. The intended sale fell through. The accused then drove the two oxen away and abandoned them near Bhunu Farm within the Sanyati area. The accused went away. The complainant fortuitously saw his oxen in the later hours of the same day by a bus stop as he waited for transport to go on a planned journey. He

drove back his oxen home. On arrival, he discovered that the kraal gate was open. The other herd of cattle was roaming within the fence which surrounds the kraal. The accused was subsequently arrested.

On being arraigned before the magistrate on 8 February, 2017, the accused pleaded guilty to the charge. He was asked whether he agreed with the facts as outlined in the State outline. He agreed with the facts and had nothing to add to them nor subtract. The essential elements as required in terms of section 271 (2) (b) of the Criminal Procedure & Evidence Act, [*Chapter 9:07*] were explained to the accused as follows:

"Q. Correct on 29 January, 2017 you took two beasts from the complainant's pen

A. Yes I agree

Q. Had you been allowed to take these beasts

A. No

Q. What did you intended to do with these beasts

A. I intended to sell them

Q. So, it was your intention to permanently deprive complainant of his cattle.

A. Yes

Q. Any right to do so

A. No

Q. Any defence to offer

A. No

Q. Is your plea of guilty an admission of the charge, facts and the essential elements of the offence as explained to you.

A. Yes."

Verdict: Guilty as charged.

The accused had a previous conviction in which on 16 December, 2016, he was convicted of theft as defined in s 113 (1) (a) of the Criminal Law (Codification and Reform) Act. He was sentenced to 6 months imprisonment with half suspended on condition of restitution and the remainder on condition that he performs community service. The accused admitted the previous conviction. Special circumstances were thereafter explained to him which he would need to demonstrate in order to avoid the mandatory minimum penalty of 9 years for a conviction for Stock Theft. The accused understood the explanation. He submitted that he did not have food and this had caused him to commit the offence. The magistrate rightly ruled that the excuse given did not amount to a special circumstance. Following mitigation, the magistrate ruled that he did not have a discretion to impose any lesser sentence in the absence

of special circumstances except to impose the mandatory minimum sentence. He sentenced the accused to 9 years imprisonment.

In my query on review, I asked the magistrate to comment on my concerns which I addressed as follows:

> "1. Section 114 (2) (e) of the Criminal Law Codification & Reform Act refers to 'any bovine ….(not bovines).
> 2. The accused stole 2 bovines each distinct from the other, albeit from one cattle pen.
> 3. Did the conduct of the accused not amount to 2 counts of stock theft? If yes, why was he convicted on 1 count? If no, why should it not be held that 2 counts of stock theft were committed?
> 4. Kindly transcribe/type record and refer back for finalization within 21 days."

In the response, the magistrate apologized for not complying with the time limit I had given for the record to be transcribed and returned for finalization. He indicated that the Registrar did not timeously forward the record to the court *a quo*. I do accept the explanation. On the substance of the propriety of the conviction, the magistrate responded as follows in the operative part;

> "…. I absolutely agree that section 114 (2) (e) of the Criminal Law Codification and Reform Act [*Chapter 9:23*] refers to "any bovine ….", not "bovines. I am sure that this is a matter of interpretation of that provision. In my view, the phrase "any bovine…." means a bovine of any nature, small, big, young, old, ill, healthy, etc. If a person steals a beast of any nature, and there are no special circumstances, then he/she should get a minimum of 9 years imprisonment.
>
> In the present case, accused stole 2 bovines from the same kraal. It is correct that the beasts are distinct from the other.
>
> In my respectful view, it would have been incompetent to charge accused of two counts of stock theft despite the fact that he stole 2 beasts different from the other. Accused did not commit 2 counts of stock theft. The reasons are two-fold (*sic*);
>
> 1. <u>Single act</u>
>
> Accused stole the beasts in question in a single act of stock theft. Had he stolen the 2 beasts at different times then legally he should have been charged on 2 counts of stock theft.
>
> 2. <u>Single complainant</u>
>
> Complainant in this matter is Tafara Sithole. He is the owner of the beasts in question. Had the beasts belonged to different persons, the accused would have committed 2 counts of stock theft despite the fact that both were stolen from the same pen.
> In my view where an accused steals more than one beast/bovine in one count, that may be a factor affecting the overall sentence to be imposed on him. The court may even go beyond 9 years."

As I understand it, what the magistrate is simply seeking to present in justification of what he did is that it would have amounted to a splitting or duplication of charges had the

accused been charged of and convicted on two counts of stock theft. It is a rule of practice that there should be no splitting of charges. The underlying ratio of the practice has its basis in fairness to the accused person who should not be saddled with a multiplicity of charges and convictions based on the same set of facts which may result in punishment duplication. It is the duty of the court to ensure that there is no duplication of charges and in that way ensure that the accused has received a fair trial.

The rule against splitting of charges has evolved over a long time. It is ultimately a matter of common sense and logic whether in a given case, a court can hold that there has been a splitting of charges. The courts have however developed two tests or guides which they apply in helping them determine whether in any given case there has been a splitting of charges. The first such test is the "single intent test" set out as far as back as 1905 in the case of *R* v *Sabuyi* 1905 TS 170. The second test has been referred to as the "same evidence test" which can be read in detail on reference to the case of *R* v *Gordon* 1909 EDC 214. The two cases will provide good reading for the discerning judicial officer, legal practitioner, prosecutor or other avid reader of law. For those not interested in opening up archives, the tests have also been dealt with by this court and the Supreme Court in several cases like *S* v *Zacharia* 2002 (1) ZLR 48 (H), *R* v *Peterson* 1970 RLR 49, *S* v *Jambani* 1982 (1) ZLR 213; *S* v *Mhandu* 1985 (1) ZLR 228 (s); *S* v *Matimba* 1989 (3) ZLR 173 (s).

In *R* v *Johannes*, a judgment of the Honourable Judge President, CURLEWIS JP; 1925 TAD 782, the following instructive pronouncement is made:-

> "it seems to me that the court can safely lay down that under certain circumstances (my own underlining) both these tests or the one or the other may be applied, viz, the test whether two acts are done with a single intent and constitute one continuous criminal transaction and the test whether the evidence necessary to establish one crime involves proving another crime."

In *casu*, Stock Theft is a statutory offence. The magistrate agreed with me as he was expected to that on the facts, the accused stole two oxen. Could he have stolen only one if one may ask? The answer is yes. Did he have to steal two oxen in order to consummate or achieve his intended purpose? The answer is no. This brings me to the reasoning by the magistrate that only one complainant was involved. With respect, there is no substance in this submission. What it amounts to is that if say of the two bovines stolen which were in one kettle pen, a husband and wife were to come forward and the husband claims ownership of one and the wife ownership of the other, then this would ground two counts. The fallacy of such argument lies in addressing a simple question, "would accused have known the ownership of each of the bovines? The answer is no.

I have indicated that Stock Theft is a statutory offence. As such, the application of the rule on splitting of charges may be qualified by statute. This is the situation here. Whilst l do not take issue with the tests, l hold that the magistrate has failed to appreciate the statutory interventions involved in this case. It is important to consider the provisions of s 114 (1) of the Criminal Law (Codification and Reform) Act. It reads as follows:

(1) In this section –

"livestock" means –

a) Any sheep, goat, pig poultry, ostrich, rabbit or bovine or equine animal; or
b) Any domesticated game
c) The carcass or any portion of a carcass of any slaughtered livestock as defined in paragraph (a) or (b);

……."

The word "any" read with "bovine" used in para (1) (a) connotes singularity. What the legislature intended to achieve was to punish the theft of "any bovine" with a minimum 9 year sentence in the absence of special circumstances. In this case, the accused committed one single act of opening the cattle pen. The offence is not the single act of opening the cattle pen. He then stole two oxen which were in the kraal. It was not necessary to achieve his objective of stealing to drive out two oxen. He could have driven one. It would be ridiculous and offend rules of statutory interpretation, in particular the golden rule of interpretation which requires a court to give words their ordinary grammatical meaning to hold that it did not matter that the accused stole two bovines but that what mattered was the act of opening the cattle pen. Looked at another way, assuming that the cattle were grazing in a paddock and the accused consciously chose to steal five bovines and driven them away, he would have committed five counts of stock theft. Any other interpretation in the light of the use of the words "any bovine" in ss 114 (1) (a) and 114 (3) of the Criminal Law (Codification Reform) Act would be ludicrous, absurd, inane and nonsensical.

If the conduct or mischief sought to penalized by the legislature was the manner that the Stock Theft is committed, then it would not have mattered that the thief removed one or more livestock from the cattle pen. In *casu*, the accused clearly committed two counts of stock theft by choosing and stealing two distinct oxen to the exclusion of 16 others since they were 18 in all.

I must also comment on the magistrates' definition of "any bovine". The magistrate argues that the meaning is limited to the physical characteristics of the bovine. This construction is too narrow and should be expanded to include number. The word "any" s 114 (1) (a) is followed by countable nouns. The nouns are in the form of the listed animals. The legislature in its wisdom did not describe the animals listed in the plural but singularized them. Courts should give effect to this.

In conclusion therefore, the accused should have been charged with two counts of stock theft because this is what the facts when the law is applied to them reveal. The accused should have been convicted on the two counts as aforesaid. Since the finding that there were no special circumstances would have applied to both counts, the accused should have been sentenced to 18 years imprisonment in order not to defeat the clear intention of the legislature see *S* v *Huni and Ors* HH 147/09. To ameliorate the globular sentence, the magistrate could have ordered that the sentence in count 1 runs concurrently with that in count 2; see *State* v *Makonora* HH 42/11. For the avoidance of doubt, count 1 would have related to the brown ox and count 2 to the white ox as already described, the complainant being one. Going forward, the State is *dominus litus*. It preferred a single charge instead of two. It cannot be given the benefit of a second bite of the cherry, by having the proceedings re-opened. I therefore propose to and hereby withhold my certificate as the proceedings do not for the reasons l have extrapolated accord with real and substantial justice. This judgment will therefore serve as a guide or reference point in similar matters. The course adopted is made pursuant to s 29 (2) (b) (iii) of the High Court Act, [*Chapter 7:*06] which allows me to inter alia correct proceedings and/or otherwise make such order as the inferior court should have made without quashing the proceedings, conviction or sentence.

Since I have indicated that this judgment is intended as a guide. I have requested another judge to consider the proceedings and my judgment and Honourable CHIRAWU-MUGOMBA J agrees with the judgment.

CHITAPI J: …….

CHIRAWU-MUGOMBA J: agrees…….