

THE STATE

Versus

JATHO NDEBELE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 22 JANUARY 2020

Criminal Review

MAKONESE J: This matter has been forwarded by the scrutinizing Regional Magistrate.

The accused in this matter appeared before a Provincial Magistrate at Plumtree facing charges of stock theft as defined in section 114 of the Criminal Law (Codification & Reform) Act (Chapter 9:23) . The accused stole four donkeys valued at \$2 800. The accused sold the donkeys and nothing was recovered. The accused pleaded guilty and was convicted and sentenced on his own plea of guilty. Accused was sentenced to 12 months imprisonment of which 3 months was suspended for 5 years on the usual conditions of future good conduct. A further 4 months was suspended on condition of restitution. The remaining 5 months was suspended on condition the accused performed 175 hours community service.

Nothing turns on the conviction in this matter. The Regional Magistrate requested the trial magistrate to justify the sentence which he viewed as lenient considering the following facts:

- (a) Stock theft is inherently a serious offence.
- (b) The number of donkeys stolen is high.
- (c) The accused stole from a relative thus breaching his trust.
- (d) A non-custodial sentence was wholly inappropriate.

In her response to the query by the Regional Magistrate the trial magistrate responded as follows:

“The reason why I deemed a custodial sentence inappropriate is because accused person is a first offender. The general sentencing trend is that first offenders should be kept out of prison where possible. That was mentioned in State v Chitenda HH 215-89, Matwana v State SC 20/ ... (sic), MUNYAMWA HB 14/87. He tendered a plea of guilty plus he shows remorse. The complainant mitigated on his behalf. So whilst I do appreciate the aggravating factors. It is a breach which the complainant has forgiven stating that he wants to keep family relations intact. Accused is also willing to retribute the complainant. In addition to which he is of ill health. These were part of the factors considered in conclusion that imprisonment should be spared. The complainant actually said that he did not want accused to be arrested. So it will be terrible for him to be imprisoned. Thus I have noticed that accused is remorseful. He appears to have learnt a lesson. These are my reasons why I arrived at my sentence. I stand guided.”

In his response to these remarks the Regional Magistrate had this to say, *inter alia*:

“... In my view, even if the learned trial magistrate had opted for a non-custodial sentence, which is within her discretion, still the gross sentence should reflect the big number of donkeys which were stolen coupled with the nature of the offence. I think that a gross sentence of 12 months imprisonment underestimates the nature of the offence and the number of donkeys stolen. Whether she opted to suspend a portion on restitution and the remaining portion on community service or any other condition to remain with a non-custodial sentence, the total gross term of imprisonment should reflect what I have said above. See; State v Lovemore Ncube HB 111.2008.”

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. Donkeys provide draught power in communal areas. When a person decides to steal a donkey he robs the complainant of his means of survival. 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. Whilst I concede that the trial magistrate was persuaded by the mitigating factors advanced by the accused, the danger is that a wrong precedent will be set and the offence of theft of donkeys will be trivialised. To ensure that there is uniformity in sentencing in similar offences, involving theft of donkeys, I would hazard to say that where one donkey is stolen and weighty mitigating factors are placed before the court, a sentence of community service may be appropriate. Where two or more donkeys are stolen, my view is that a custodial sentence is called for.

In *State v Lovemore Ncube* HB 11.08, the accused stole three donkeys valued at Z\$150 000 (old currency). Nothing was recovered. The accused pleaded guilty and was sentenced to 15 years imprisonment. This court set aside the sentence and substituted it with an effective sentence of 3 years imprisonment.

In all the circumstances of this case, inspite of the attitude of the complainant, who did not want to see the accused sentenced to a custodial term, the court was enjoined to hand down an appropriate sentence. In my view a sentence of 2 years imprisonment would have met the justice of the case.

I would, accordingly decline to confirm the proceedings as being in accordance with real and substantial justice, and withhold my certificate.

Takuva J..... agrees