THE STATE
versus
AMOS ZHAKATA

HIGH COURT OF ZIMBABWE
MUREMBA AND MUTEVEDZI JJ
HARARE, 11 MARCH 2022

Criminal review

MUTEVEDZI J:

Background

The accused person in this case was convicted by a provincial magistrate at Guruve of two counts of stock theft as defined in s 114(2) (a) of The Criminal Law (Codification and Reform) Act *[Chapter 9:23]*. Having found that no special circumstances existed the provincial magistrate sentenced the accused to the minimum mandatory 9 years imprisonment on each count. The record of proceedings was placed before me for what is colloquially called automatic review in terms of s57 of the Magistrates Court Act *[Chapter 7:10]*. I dispensed with the norm of seeking the views of the concerned magistrate before reviewing the case. My decision not to consult the magistrate was informed by my awareness of guidelines from a decision of this court in such matters which compelled the magistrate to proceed in the manner she did.

The issue

The issue which I agonized over is whether the charges were unnecessarily split resulting in the accused person facing the double counts which he stands convicted of. He stole 2 bovines from the same complainant on the same night at the same time on 31 March 2021 and sold them. The only difference in the charges in the two counts is the description of the bovines stolen. In count 1 the accused stole a **grey ox** whilst in count 2 he stole a **black cow.** The outlines of the state's case in both counts are equally similar in every detail from paragraph 1 to paragraph 13. Like with the charge, the only variation is found in paragraph 6. It is again in relation to the identity of the beasts. The complainant, Joseph Chauruka is the same in both counts.

Given the interconnectedness of the events in the two counts, I have no hesitation to conclude that this was a typical case of unnecessary splitting of charges resulting in a double conviction of the accused on what was essentially the same transaction.

The law

The conundrum of conflicting judgments of the same court

I am aware of what MATHONSI J (as he then was) described in the case of *Constable Tamanikwa v Board President & Anor* HH 676/15 at p. 4 as the conundrum of diametrically conflicting pronouncements of the law expressed by the same court. I agree that it is disconcerting when the same court, in different judgments, expresses views that are conflicting in relation to the same principle of law. The remarks of MAKARAU JA (as she then was) in the case of *Jacob Bethel Corporation v Emmanuel Chikuya* SC 48/19 at p. 4 are also apposite. She pointed out that

> " an appropriate starting point would be to note that a judgment does not belong to the judge who authors it. It is a judgment of the court to which the judge is appointed. Once it is correctly viewed that judgments are passed by the institution and not the individual members who constitute the court, sentiments tending to denote personal claims to judgments as are to be discerned in the judgment aquo become clearly misplaced."

The lesson which comes out of these erudite pronouncements is that where judges of the same court argue, rankle and contradict each other they may sometimes think that they achieve a victory, but that victory remains pyrrhic. Reasons and facts get wasted in argument and rancour. Inevitably, the companionship and cooperation required of judicial officers who share the same responsibility dictate that they must always find each other. Hereunder, I do not intend to advance any argument but to share my contrary view so that I am not mortified in the end in case that view turns out to be unattractive.

I refer to the above decisions because in the case of *S v Kudakwashe Shoko* HH 676/19 the High Court dealt with a case on all fours with the case at hand. After chronicling the rationale behind the rule against splitting of charges and reviewing some decided cases the court ended with the inescapable conclusion that where an accused person steals more than one bovine in one transaction the counts of stock theft with which he must be charged must be equivalent to the number of cattle he would have stolen. Thereafter magistrates were accordingly guided.

Whilst I agree that the judgment which the High Court made in *S v Kudakwashe Shoko-supra* is also my decision and the decision of every other judge of this court, I am for reasons that I will deal with hereunder, unable to agree with the court's findings.

In the case of *The Commissioner –General ZIMRA v Benchman Investments (Private) Limited* SC 88/21 at p.11 the Supreme Court admonished that where a judge of the same level of jurisdiction with one who has made a pronouncement on the law desires to depart from the previous decision, he or she must show that the earlier decision is wrong or that the law has since evolved. The Supreme Court added that it must be shown that it is unconscionable to abide by the previous decision. It is not enough for the judge to merely declare that he or she does not agree with the conclusion previously made. Neither is it sufficient to say that the decisions that have interpreted a statutory provision proceeded from a flawed premise without demonstrating how, and indeed why, the interpretation is wrong.

I wish to add that even departing from a decision of a judge of the same level jurisdiction without acknowledging its existence is as inappropriate as not giving reasons for departing from it.

Reverting *to S v Kudakwashe Shoko* the court therein retraced the origins of the rule against splitting of charges and in my view correctly captured its essence. It also held that the test to determine whether there has been a splitting of charges is not a rule of law but one of common sense and logic. Admittedly, although this is so, the courts have developed two tests which are used to determine whether there has been an improper splitting of charges or not. The case of *R v Peterson and Ors* 1970(1) RLR 49 at p.50 extensively explains the rationale. The rule is essentially designed to protect an accused person from an unnecessary duplication of convictions in a trial where the whole criminal conduct imputed on the accused constitutes in substance only one offence which could have been properly embodied in one all-embracing charge where such duplication results in prejudice to the accused.

Application of the rule in statutory offences

I will revert to the above discussion a little later because whilst the judge in *Kudakwashe Shoko* entirely agrees with the application of the tests, he appears to suggest that the tests do not apply or rather can be qualified in case of statutory offences.

It is important to note that since the advent of the Criminal Law (Codification and Reform) Act *[Chapter 9:23]* (the Criminal Law Code) the Zimbabwean criminal law is wholly codified. If the argument is accepted that the rule against splitting of charges is

qualified in statutory offences the unavoidable deduction will be that the rule is of little if any significance in our jurisdiction. Even before codification of hitherto common law offences, decided cases illustrate that the rule against splitting of charges applied to statutory offences with as much force as it applied to common law offences. In *S v Matimba* 1989(3) ZLR 173(S) the Supreme Court dealt with breaches of the Road Traffic Act where an accused had failed to stop, failed to assist injured persons and drove negligently. It concluded that preferring those various transgressions each as a separate crime constituted improper splitting. That decision puts to rest any argument that the rule against splitting of charges is not or is of limited applicability to statutory offences.

The interpretation of s114(1)

For purposes of completeness and to put this discussion into context, I am forced to reproduce in *extenso,* that part of the High Court's judgment in *Kudakwashe Shoko* which deals with this aspect. The court's point of departure from the norm was clearly the interpretation of s114(1) of the Criminal Code. It had this to say at p.5:

> "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."

To begin with it is settled that rules of statutory interpretation require that a court must give the words in a statute their literal grammatical meaning unless doing so leads to an absurdity which the legislature clearly did not intend. *See Mawrire v Mugabe* 2013(1) ZLR 469 (CC). The judge's interpretation of the word *any* in s114 (1) as shown above however appears nebulous. The word *any* was held to denote singularity. The Oxford English Dictionary, 2nd Edition (1989) defines the word any as "used to refer to one or some of a thing or number of things, no matter how much or how many. That in my view, is the literal meaning of the word any. To say it denotes singularity is to only describe one part of it because it also means *some of a thing or number of things no matter how much or how many.* l thus do not believe that parliament intended to punish the theft of each bovine stolen with a minimum 9 years imprisonment. My view is that the use of the word any in s114 (1) was intended to connote the indiscriminate nature of the bovines which the provision intended to cover even more than the number.

In addition to the above, the consequence of isolating the words *any bovine* is that one inevitably reads them out of context. When you combine the word *any* with bovine as the court did, bovine then stands as a noun. The statute however uses it differently because it talks of <u>any bovine animal.</u> (my emphasis). In that context bovine is used to describe the word animal. It is an adjective. Contrary to popular belief, the word bovine does not solely refer to cattle. Rather it refers to those animals in the cattle group. These include among others, animals such as the buffalo and the bison. As such if for instance a farmer domesticates a buffalo or a bison and a rustler stole it, that outlaw can be convicted of stock theft as defined in s114. He will be liable to the minimum mandatory sentences prescribed if the offence was committed in the aggravating circumstances provided. In English grammar, the word *any* is called a determiner or a quantifier which in turn is a word that describes quantity in a noun phrase. A determiner or quantifier specifically addresses the question 'how many?' or "how much?" It is measured on a scale of 0% to 100%. *Any* refers to an

unspecified quantity. As shown above it can refer to one, some or all. It relates to a quantity from 1 to infinity.

If any support was required, I am fortified in my interpretation of s114 by the penalties which are provided thereunder. It provides that:

> **114 Stock theft**
> (2) Any person who−
> (a) takes livestock or its produce−
> (i) knowing that another person is entitled to own, possess or control the livestock or its produce or realising that there is a real risk or possibility that another person may be so entitled;
> (ii) intending to deprive the other person permanently of his or her ownership, possession or control, or realising that there is a real risk or possibility that he or she may so deprive the other person of his or her ownership, possession or control; or
> (b) …
> (*c*) …
> (*d*) …
> shall be guilty of stock theft and liable−
> (*e*) if the stock theft involved any bovine or equine animal stolen in the circumstances described in paragraph (*a*) or (*b*), and there are no special circumstances in the particular case as provided in subsection (3), to imprisonment for a period of not less than nine years or more than twenty-five years;

Once the cloud cast by the notion of singularity supposedly depicted by s114 (1) recedes it becomes clear that the legislature envisaged a situation where an accused could be convicted of the theft of many bovine animals in one transaction. That the sentences are on a scale which ranges from 9 to 25 years is an illustration that the lawmakers intended to cover situations where an accused not only had previous convictions but also where he would have stolen one or many beasts in a single transaction.

The aspect relating to whether *in casu* there was an improper splitting of charges is barely debatable. I have already highlighted that there are two tests which are used to determine whether there has been an improper splitting. These were more recently discussed in *S v Zacharia* 2002(1) ZLR 48 (H) as the "single intent" and the "same evidence" tests. Our courts have on countless occasions explained both tests.

The Single Intent Test

Put simply the single intent test entails that where an accused commits several criminal acts each of which standing alone constitutes a crime in instances where the acts are inevitably and intrinsically linked with a single intention, it is unacceptable to charge him

with each of those criminal acts. As said earlier the rationale is to restrict prejudice to the accused where a duplication of convictions would ensue. This means that where the double or multiple convictions pose no detriment to the convicted individual, the multiplicity of convictions becomes inconsequential.

I also note and quite interestingly so, that most precedents where the single intent test has been applied were concerned with cases where the accused's transgression gave rise to the possibility of being charged with several distinct offences. For instance, In the case of *S v Ngwenya* 1971(1) RLR 190 at p. 191 GREENFIELD J held that where an accused commits robbery upon a woman but in the process also assaults a man to get him out of the way before robbing the woman a conviction on both the robbery and assault charges amounted to an improper splitting of charges. Both acts were logically necessary for the accomplishment of his dominant intention to rob his victim. In my view, the single intent test is seldom appropriate or decisive in the determination of whether there has been an improper splitting in cases where the accused commits two or more counts of the same offence. This is so because the intention is the same in both or all the counts such that it becomes difficult to extricate one from the other. What must be determined in those cases is whether the accused formed a separate intention in the commission of each of the counts. Admittedly that adventure is not easy. The most outstanding instance in which the single intent test appears to be applied in cases of more than one count of the same offence is murder or an attempt thereof. In *S v Ndhlovu* 1971(1) RLR 190 the judge opined that he had always understood it to be the practice in cases of multiple murder to charge each count separately unless special circumstances showed a single act accompanied by a single intent to kill several people all present together. His Lordship proceeded to give the analogy of an accused who shoots B and C in quick succession and is charged with two counts of murder as compared to another accused who burns down a hut occupied by D, E and F and kills them all being charged with the murder of those people in a single count. The proposition, which I agree with, is that in the first scenario, there are two distinct acts separated by a split second but each characterised by its own intention whereas in the second there is a single act and a single intention. [1]

The Same Evidence Test

[1] See also *S v Mabwe* 1998 (2) ZLR where an accused rammed a fork lift into a vehicle with two occupants. He was held to have been properly convicted of 2 counts of attempted murder.

My perception is that the same evidence test was designed to mitigate the difficulties posed by scenarios where it is difficult to determine the existence of separate intentions in the commission of several counts of one offence. Stripped to its basics, the test postulates that the same evidence used to prove one criminal act should not be used again as evidence to prove another. In other words, it is impermissible to use the same essential evidence in one offence to secure a conviction of the same accused on another charge. The rationale is no different from that of the single intent test. Given the self-explanatory nature of the test I have little if anything to add to the illustrious comments of the eminent jurists who have in the past dealt with the subject.

Application of the tests to present facts

I have already summarised the facts of this case and indicated that they are strikingly similar to the ones in the matter that this court dealt with in *Kudakwashe Shoko*. The holding therein was that when the accused opened the complainant's cattle pen, he formulated separate intentions to steal each of the two oxen. That finding presupposes that at the time the accused opened the cattle pen he had no intention whatsoever and only formulated the intention to steal when he was already in there. It is unlikely that a cattle rustler would proceed to his victim's cattle kraal without knowing what he intended to do. It is not like the thief got into the cattle pen, drove out one beast and later returned to steal another one. The circumstances of the case at hand demonstrate an accused person who knew exactly what he wanted to achieve and executed his plan accordingly. He drove out two beasts at the same time and sold them. The circumstances betray stock theft which appeared pre-planned. If it was, there can be little doubt that the accused knew the number of cattle he targeted well before getting into the kraal. The fact that he then drove out two beasts in this case cannot take away the fact that he had a single intention. I doubt that even if the cattle had belonged to two different complainants that would have had a bearing on the question whether there the acts constituted two counts instead of one. This is so because in the case of *R v Peter* 1965 RLR 155 (G) quoted by GARWE J (as he then was) with approval in *S v Mabwe* 1998(2) ZLR 178 (H) at p. 179 an accused entered a school dormitory and stole various items from six different complainants. He was convicted of six counts of theft. On review it was held that his actions still constituted one count of theft. As such there had been an improper splitting of charges. Because the evidence showed that there had been theft of property from

several persons at the same time and place, one *contrectatio,* only one verdict of guilty must have ensued instead of six.

I have also explained earlier that in the instant case the charges and outlines of the state's case in both counts are congruent. The complainant is the same in both instances. It does not matter that the accused pleaded guilty because that simply means he admitted the facts as stated in the outlines of the state case. If for instance the counts had been tried separately- which proposition is a reality- the same witnesses who would testify in count 1 would be the same witnesses to testify in count 2. Their evidence would essentially be the same except for the description of the beasts. There is therefore no denying that the essential evidence used to prove count 1 was the same evidence used to prove count 2. That clearly is an affront to the rule against splitting of charges. It was improper to charge the accused person with two counts emanating from the same *mens rea.*

My view is supported by the findings of NDOU J in the case of *S v Ephraim Nyoni and Francis Mukwebu* HB 39/2004. In that case the accused persons set up wire traps. They saw two oxen and drove the beasts into the snares. The cattle were caught because of the accused's act. The judge was unapologetic in his finding that the accused set the wire snares to facilitate the theft of two head of cattle. Their sole intention was to catch the two oxen. He added that the accused persons' conduct constituted one transaction motivated by a single purpose of stealing the two oxen. There was no substantial difference between the ingredients of the two charges in counts 1 and 2 and as such there was an improper splitting of charges.

Prejudice to the Accused

As already shown one of the reasons for the operation of the rule is that it is designed to protect the accused from being prejudiced by a multiplicity of convictions emanating from essentially one transaction because the net effect is that penalties will then have to be imposed on each charge. The law has crafted ways of mitigating such prejudice where this happens. One of those ways is to treat the different counts as one in the determination of sentence. Given that, a further question in this instance is whether there has been prejudice to the accused. Unfortunately, I hold that there indeed has been. *In S v Huni and Ors* 2009 (2) ZLR 432 (H) it was held that where an accused person is convicted of more than one count of an offence which has a minimum mandatory sentence to treat the counts as one for sentence serves to defeat the clear intention of parliament that each count must attract the minimum

mandatory sentence. In this case stock theft falls into that category of offences. Once he was convicted of two counts of the offence it was mandatory that the accused received the minimum sentence on each count. Inevitably the penalties of 9 years imprisonment for each of the two counts were meted. As a result the accused is due to serve 18 years imprisonment. To cure this the magistrate had the option to order the two sentences to run concurrently with each other. She did not exercise that option. The result is that the accused's sentence was doubled in a situation where he should have been convicted on one count.

Disposition

For reasons stated above, I am compelled to depart from this court's decision in *S v Kudakwashe Shoko-supra* whose import is that where an accused steals more than one bovine animal in a single transaction he commits and must be charged with several counts of stock theft. The reality is that where he does so with a single intent and the same evidence required to prove one count is essentially the same needed for the proof of the other, only one count must be preferred regardless of the number of bovine animals stolen.

This court in terms of the review powers conferred on it by s29 (2) (b) (iii) of the High Court Act *[Chapter 7:06]* is empowered to:

> " set aside or correct the proceedings of the inferior court or tribunal or any part thereof or generally give such judgment or impose such sentence or make such order as the inferior court or tribunal ought in terms of any law to have given, imposed or made on any matter which was before it in the proceedings in question."

I have already held that the magistrate ought to have mitigated the prejudice occasioned by the unnecessary splitting of the charges by directing that the two sentences imposed on the accused run concurrently with each other. All other options of correcting these proceedings appear unattractive. I am left with no choice but to order as I hereby do that:

1. The sentence of 9 years imprisonment in count 2 shall run concurrently with that in count 1.
2. The trial magistrate must recall the accused to explain to him the import of this judgment and ensure that the warrant of committal is appropriately amended.

MUREMBA J: Agrees……