THE STATE

Versus

TAKESURE MOYO

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 22 & 29 APRIL 2021

Criminal review

DUBE-BANDA J: This matter was placed before me on automatic review. The accused was arraigned before the Magistrate's Court sitting in Bulawayo. He was charged with two counts of stock theft. He pleaded not guilty. At the conclusion of the trial he was found guilty as charged. The conviction is proper and nothing turns on it. The trial court was unable to find any special circumstances, and the accused was sentenced to the minimum mandatory sentence of nine years *per* count. The total cumulative sentence is eighteen years imprisonment. It is cumulative sentence that attracted my attention.

The cumulative sentence appeared to me to be so excessive as to be disturbingly inappropriate. I had to find a permissive device to ameliorate its excessiveness. First, the two counts of stock theft each carry a minimum mandatory sentence of nine years imprisonment, and therefore could not be taken as one for the purposes of sentence. See: The *State v Simbarashe Ncube* HB 10/06. Second, I considered whether the sentences can be ordered to run concurrently.

When an accused is convicted for more than one offence, and a sentence is imposed for each offence, a *cumulative effect* may develop. In other words, the combined punishments may become too severe. My view is that section 343(2) of the Criminal Procedure and Evidence Act [Chapter 9:07], is designed to ameliorate this effect. It says when sentencing any person to punishments, the court may direct the order in which the sentences shall be served or <u>that such sentences shall run concurrently</u> (I make the emphasis). My view is that this empowering provision is designed to prevent a too severe cumulative effect where more than one sentence is imposed. In effect, it allows an accused to receive a 'discount' for bulk offending, particularly

where the various counts are similar in nature, and the imposition of a separate and consecutive sentence for each individual charge would result in a very high aggregate penalty which would be disproportionate to the moral blameworthiness of the accused having regard to his line of conduct as a whole.[1]

A decision to order sentences to run concurrently cannot and should not happen in a vacuum. Ordering sentences to run concurrently is part of the sentencing decision of the trial court, which is determined by the sentencing discretion, based on all circumstances of the case. Punishment is pre-eminently a matter for the discretion of the trial court, and the reviewing court should be careful not to erode such discretion. See: *S* v *Nyathi* 2003 (1) ZLR 587 (H) 588C-G, 589A. In exercising its discretion, the sentencing court should consider all the circumstances, look at the totality of the criminal behaviour and determine how the cumulative effect, if any should be prevented. I am of the view that the reviewing court should alter the sentence only if the discretion had not been judicially or properly exercised. Factoring into the equation that punishment should never be too oppressive, otherwise it will lose effectiveness.

In an appropriate case, an otherwise unjustifiable long imprisonment arising from more than one sentences, could be ameliorated by ordering such sentences to run concurrently. The cumulative effect of sentences must always be borne in mind and concurrently served sentences may prevent an accused from undergoing a severe and unjustified long effective term of imprisonment. See: *S v Whitehead* 1970 (4) SA 424 (A) 438F-440; *S v Young* 1977 (1) SA 602 (A). However, a trial court has a very wide discretion and, provided that discretion is exercised on reasonable grounds, a reviewing judge will not interfere: See: *S* v *Coetzee* 1970 (4) SA 83 (RA). Where multiple counts are closely connected or similar in point of time, nature, seriousness or otherwise, ordering sentences to run concurrently is a useful device of ensuring that the punishment imposed is not unnecessarily duplicated or its cumulative effect not too harsh on the accused.

[1] Terblanche : *The Guide to Sentencing in South Africa* (2013), Chapter 7 at para 2.2.1

On the facts of this case, the cumulative effect of the sentences is so excessive as to be disturbingly inappropriate. The following factors are relevant in assessing whether the trial court should have ordered the two sentences to run concurrently, these are; the accused stole two beasts on different dates from the same complainant; the first count was committed in December 2019, and the second count 25 April 2020; accused was an employee of the complainant; was convicted and sentenced in a single trial; the trial court imposed a specific sentence for each count; the complainant recovered his stolen cattle. The accused was sentenced to the minimum sentence of nine years *per* count, resulting in a total sentence of eighteen years. These factors provide a rational basis for ordering the sentences to run concurrently. See: *S v Mate* 2000 (1) SACR 552 (T).

I take the view that the trial court *erred* by failing to palliate the aggregate sentence in order to come up with a realistic total. It was an injudicious and improper exercise of discretion. The only way to avoid the undoubtedly long time of imprisonment was to order the sentences to run concurrently. This court is therefore at large to intervene.

In the result I order as follows:

1. The conviction is confirmed.
2. The sentence is confirmed save that the 9 years imprisonment count 1 and 9 years imprisonment in count 2 are and hereby ordered to run concurrently.

Lastly, in light of the above, the accused should be called and be properly advised of the orders I made.

Kabasa J: agrees ……