1. STATE CRB MGJ 412-413/21
versus
WORLD KERA
and
GIVEMORE USAI

2. STATE CRB KAR 1446-61/22
versus
LEONARD SHOKO
and
LEARNMORE MUBAZANI

HIGH COURT OF ZIMBABWE
CHITAPI & MUTEVEDZI JJ
HARARE,30 June 2022

Criminal review

MUTEVEDZI J: The two cases are a paradox of ill-conceived good intentions. The two record of proceedings were placed before me on automatic review in terms of s57 of the Magistrates' Court Act [*Chapter 7:10*]. I decided to join the two records of proceedings for purposes of this review because the issues which arise from the mistakes in the two cases are the same. In the case of the *State* v *World Kera and Another*, the two accused persons were arraigned before a provincial magistrate's court at Karoi on 6 January 2022. After a contested trial, they were both convicted of the offence of contravening s 114 (2) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (Herein after the Criminal Law Code) "Stock Theft. No issues arise out of that conviction and it is confirmed as having been in accordance with real and substantial justice. The accused persons were each subsequently sentenced to:

> "Ten years imprisonment of which 9 months imprisonment is suspended for 5 years on condition that within this period accused does not commit any offence involving an element of dishonesty and for which upon conviction he will be sentenced to imprisonment without a fine option. Another three months imprisonment is suspended on condition accused restitutes $29 750 to William Kera through the Clerk of Court Karoi on or before 29/4/22. The remaining 9 months imprisonment is effective."

In the case of the *State* v *Leonard Shoko and Another,* the accused were also convicted of the offence of stock theft after a full trial by the court of a magistrate also sitting at Karoi. Nothing also turns on the conviction and it is accordingly confirmed as being in accordance with real and substantial justice. They were each sentenced as follows:

> "14 years imprisonment of which 3 years imprisonment is suspended for 5years on condition the accused does not commit any offence involving dishonesty of which upon conviction will be sentenced to imprisonment without option of a fine. The remaining 11 years, 1 year imprisonment is suspended on condition that each accused restitutes the complainant Maramba Everson to the sum of $100 US at the interbank rate prevailing on that date on or before 31 April 2022. Effective 10 years."

The above sentences are both inelegantly phrased. The inelegance is however inconsequential. It is only dealt with for purposes of future guidance of magistrates. I would have confirmed the penalties were it not that there are more profound mistakes. As will be illustrated later because of those grave transgressions, the sentences are incompetent and must be vacated.

I propose to first point out the mundane mistakes. Every magistrate must strive to avoid them. In the case of *World Kera and Another* after suspending the first 9 months from the 10 years imposed, the trial magistrate went on to say ***'Another 3 months imprisonment is suspended on condition accused restitutes …"***

The phrase **another 3 months** is inapposite because it conveys the misconception that the 3 months imprisonment is not part of the total 10 years imprisonment but an additional standalone sentence which is being independently suspended on condition of restitution. Yet clearly the intention of the trial magistrate was to suspend a further 3 months imprisonment on condition of restitution from the period which remained after the first 9 months imprisonment was suspended on good behaviour. The law prohibits the imposition of two separate prison terms for one offence. A trial court's sentence may therefore be regarded as falling foul of the law in instances where it suspends a portion of the prison term imposed in a manner so clumsy that it can be interpreted as an autonomous penalty. The suspension of a prison term on various conditions is permitted by s 358 (2) (b) of the Criminal Procedure and Evidence Act (Herein after the CP&E Act) which provides that:

> (2) When a person is convicted by any court of any offence other than an offence specified in the Eighth Schedule, it may—
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> (*a*) …
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> (*b*) pass sentence, but order the operation of the whole or any part of the sentence to be suspended for a period not exceeding five years on such conditions as the court may specify in the order;

The appropriate way of suspending such a single sentence is to ensure that it remains clear to the accused and those charged with the responsibility of enforcing the execution of criminal penalties that the periods suspended are all subtracted from the initial prison term. It is imperative therefore that where a court has initially suspended a part of the sentence but wishes to also suspend a further portion, it must specify and use the words **'of the remaining period of imprisonment, a further … imprisonment is suspended on condition..."** That way the potential confusion brought by the ambiguities pointed out above is avoided.

The comments I made in relation to the sentence in *World Kera* above apply with equal force to the sentence in *Leonard Shoko* because the same clumsiness is exhibited in the second condition of suspension. To cap it, the trial magistrate directed that the restitution must be paid by **31 April 2022.** Needless to say, that date does not exist because the month of April only has 30 days even in a leap year. The restitution was directed to be paid in United States dollars. Ordinarily that would not have escaped censure. I do not intend to debate the propriety or otherwise of that order. It may be dealt with on another day. However, to show that the trial magistrate was grossly misdirected on procedure, she neither canvassed the existence of special circumstances as required by s 114 (3) of the Criminal Law Code nor gave any reasons for the sentence she imposed as is the rule when punishing offenders. That would have been one reason for vacating the sentence imposed were it not that I will shortly turn to deal with other issues which are equally dispositive of the matter. Because of that it becomes unnecessary for me to discuss in detail the effect of failing to canvass special circumstances after convicting an offender of a crime where the legislature has stipulated a minimum mandatory sentence. For the trial magistrate's guidance however, her attention is drawn to the case of *S v Manase* 2015(1) ZLR 160 where the subject of special circumstances and how a magistrate must procedurally deal with the issue is extensively discussed by MUREMBA J. Although the judgment involved a case under the Mines and Minerals Act, the approach remains the same.
Apart from the indiscretions pointed above, of greater significance is that s 114 (2) (a) as read with subparagraph (e) of the Criminal Law Code provides that any person who steals livestock or its produce where the stock theft involved any bovine or equine animal stolen in the circumstances described in para (*a*) or (*b*), and there are no special circumstances in the particular case as provided in subsection (3), the person shall be sentenced to imprisonment for a period of not less than nine years or more than twenty-five years. In other words, the provision calls for the imposition of a minimum mandatory sentence of 9 years imprisonment.

Where that is the case, it is ill-advisable for a trial court to resort to punishment which is greater than the minimum mandatory penalty unless there are exceptional circumstances compelling it to do so. In *S* v *Chitate* HH 568/16 MAFUSIRE J at pg 2 of the cyclostyled decision emphasised this point when he said:

> "Where the essential elements of the crime have been proved and there are no special circumstances, the courts have no choice but to impose the prescribed minimum. Undoubtedly, the court may go above the prescribed minimum. But by all accounts, 9 years is already a very long stretch. The court's discretion to impose a sentence other than the prescribed minimum has to be exercised judiciously, not whimsically. The sentence should not be a thumb-suck."

In other words, a judicial officer must always bear at the back of his/her mind that a mandatory minimum sentence is by any standard already severe. Where one decides to impose anything lengthier than the minimum prescribed there must be exceptional reasons for doing so. In *S* v *Guvhu* HMA 55/18, the High Court was again faced with a similar injudicious exercise of discretion by the trial magistrate. The point was once again reiterated. In the instant case, the trial magistrates in both cases ought to have justified why they chose to sentence the accused to 10 years and 14 imprisonment respectively instead of the 9 years stipulated as the minimum. As already stated, In *Leonard Shoko* the magistrate did not give any reasons for the sentence. It was a thumb-suck. In *World Kera* in its reasons for sentence the court stated that:

> "I took into account that there were no special circumstances to consider deviation from the mandatory sentence. Therefore mandatory sentence coupled with a suspended sentence of good behaviour plus restitution will be appropriate."

Although inadequately explained and poorly expressed, it would appear the court's reason for imposing the 10 years imprisonment was that it wanted the accused to be restrained by the suspended sentence in future. More importantly, it wanted the accused persons not only to pay reparation to the complainant but to also be disgorged of the ill-gotten benefits of crime. I do not intend to over-emphasise the wisdom or lack of it, of going beyond the prescribed minimum mandatory sentence. That aspect was adequately dealt with by this court in the decisions I have referred to above.

What I perceive as having been left hanging in those decisions and which I wish to add to is that once a court has decided to impose a sentence greater than the minimum mandatory penalty, it is incompetent and unlawful for it to suspend any portion of that sentence even in

circumstances where the suspension does not leave the effective penalty below the minimum prescribed. That means in these two cases, once the trial courts decided to impose 10 and 14 years imprisonment respectively, they could not suspend any portions of those terms. It is the reason why this court has on various occasions, implored magistrates to exceed the minimum prescribed sentences only in exceptional circumstances. Those circumstances may include instances where an accused has previous convictions or where he/she stole several beasts in one transaction.

A reading of s 358 (2) of the CP&E Act which I have already reproduced above shows that the power of a court to suspend prison terms is applicable to all offences except those specified in the 8th schedule to the Act. That schedule provides as follows:

> **EIGHTH SCHEDULE (SECTION 358)**
> OFFENCES IN RELATION TO WHICH POSTPONEMENT OR SUSPENSION OF SENTENCE, OR DISCHARGE WITH CAUTION OR REPRIMAND, IS NOT PERMITTED
> 1. Murder, other than the murder by a woman of her newly born child.
> 2. Any conspiracy or incitement to commit murder.
> 3. Any offence in respect of which any enactment imposes a minimum sentence and any conspiracy, incitement or attempt to commit any such offence. (underlining is my emphasis)

As is apparent, paragraph 3 of the 8th schedule lists as an offence in relation to which suspension of sentence is impermissible, any offence in respect of which a statute prescribes a minimum mandatory sentence. Section 114 (2) (e) of the Criminal Law Code imposes a minimum 9 years imprisonment for theft of a bovine animal in instances where there are no special circumstances. In the instant cases, the trial court in the first case canvassed the question of special circumstances. The record of proceedings indicates that it came to the conclusion that there indeed were no special circumstances. It was therefore bound by law to impose the minimum mandatory sentence in terms of subparagraph (e). It proceeded to do so. In the second case, the imposition of 14 years imprisonment must also have been from the assumption that there were no special circumstances. The finding that there were no special circumstances brought the offences within the ambit of schedule 8. It became incompetent to suspend any portion of the prison terms imposed in respect of the offences. Admittedly, both

trial magistrates did not suspend the sentences to below the minimum prescribed. That however does not detract from the fact that they both violated the clear import of para 3 of schedule 8. The ordinary grammatical meaning of the words used in the provision admit of no other interpretation other than that a suspension of any portion of the term of imprisonment which may be imposed is outlawed. It is unambiguous. Any attempt to read it as meaning that the suspension should not leave the sentence below the minimum mandatory would amount to an unacceptable reading in of new words. The rationale for that is clear.

I have already indicated the reasons why the magistrate in the *World Kera* case decided to impose a sentence higher than the minimum mandatory. Those intentions were noble and are in keeping with modern sentencing objectives where the interests of victims of crime must be given equal consideration to those of the offender and society. See REYNOLDS J's remarks in the case of *S* v *Mpofu (2)* 1985(1) ZLR 285 (H) at pg 293 E-D. Unfortunately, as I pointed out in the introductory paragraph of this judgment, those intentions were ill-conceived and misplaced. Where the legislature has prescribed a minimum mandatory sentence such as in this case the sentencing principles enjoining a court to consider ordering the convicted person to make reparation to his victim can only be given effect to using totally different mechanisms.

The numerous cases which come before this court on review in which magistrates apparently struggle to accept the reality that it is illegal to suspend minimum mandatory prison terms convinces me that there is a critical statute which has become lost to both the prosecution and judicial officers in the lower courts. When the offence creating section was incorporated into the Criminal Law Code, the Stock Theft Prevention Act [*Chapter 9:18*] was not repealed. A significant portion of its provisions remain extant. It is those provisions which must be resorted to in instances where courts seek to prevent injustices to victims of stock theft. Given the prevalence of cases of stock theft in our jurisdiction and the frequency with which such cases are dealt with in the Magistrates' Courts the Stock Theft Prevention Act is mandatory reading for every magistrate. It is a very short and precise statute. It comprises of only 5 sections including s 1 which shows its short title and s2 which is the interpretation section. Critically however, in s10 it provides for the imposition of a compensatory fine on the convicted person. For all intents and purposes, that fine is not public revenue but is payable to the victim of stock theft as compensation for his/her loss. The compensatory fine is levied as an additional penalty to imprisonment already imposed on the offender. A trial court is enjoined to ensure that the fine does not exceed the market value of the stolen stock where the

stock was not recovered. Where the stock was recovered the fine must not exceed an amount equal to the difference between the market value of the stock at the time of the theft and the value of such stock at the time it was recovered. Every magistrate is reposed with increased jurisdiction to impose a fine of any amount in this regard.

Clearly therefore s10 provides in one remedy the twin objectives of disgorging the convicted person of the ill-gotten profits on one hand and compensating the victim of stock theft on the other. It is the panacea for the challenges which judicial officers face in situations where the legislature has outlawed the suspension of prison terms on condition of restitution. As shown above, several imperatives must be observed when resort is had to the Act otherwise worse confusion than the mischief sought to be cured will ensue. There are apparent pitfalls which call for circumspection in use of the procedure. For purposes of completeness, I reproduce s10 of the Stock Theft Prevention Act verbatim below:

> **10 Compensatory fine**
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> (1) In any case in which a person is convicted of any contravention of subsection (2) of section 114 of the Criminal Law Code, the court may impose a fine upon the person convicted by way of compensation, in addition to any sentence which it may have imposed upon him, if—
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> (*a*) the person convicted is of or above the age of eighteen years and is unable to satisfy the court that he has not or is unable to obtain the means of satisfying any fine which may be imposed under this section; and (*b*) the court is satisfied that the stock or produce which forms the subject-matter of the charge is the property of some other person; and
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> (*c*) the stock or produce has not been recovered or, if recovered, is worth less than its market value at the time of the theft; and
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> (*d*) the owner of such stock or produce does not apply under the Criminal Procedure and Evidence Act [*Chapter 9:07*] for compensation.
>
> (2) The fine imposed in terms of subsection (1) shall not exceed—
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> (*a*) where the stock or produce has not been recovered, an amount equal to the market value of such stock or produce at the time of the theft;

(*b*) where the stock or produce has been recovered, an amount equal to the difference between the market value thereof at the time of the theft and the value of such stock or produce when it was recovered; less, in either case, the amount of any compensation which may have been paid to the owner by or on behalf of the person convicted.

(3) A fine imposed in terms of this section may be recovered in the manner provided by section 348 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], and any amount so recovered shall be paid to the owner of the stolen stock or produce, subject to the owner giving security *de restituendo* in case the judgment of the court is reversed on appeal or review.

(4) If the court imposes a fine in terms of this section it shall, at the same time, sentence the person convicted to a term of imprisonment not exceeding twelve months in default of payment thereof or recovery thereof in terms of subsection (3).

(5) If some other sentence of imprisonment for the offence has been imposed upon the person convicted, then any sentence of imprisonment imposed in terms of subsection (4) shall be served after the expiration of such other sentence of imprisonment.

The most obvious requirements which appear from the provision include the need for judicial officers to satisfy themselves before ordering an offender to pay a compensatory fine that:

a) the offender is of or above 18 years
b) the convicted person has the means to pay the compensatory fine
c) the stock which was stolen was not recovered or if it was that its market value is now less than what it was before the theft

In addition, the court must ensure that the victim does not proceed to apply for compensation in terms of the Criminal Procedure and Evidence Act. The provision is also elaborate in stipulating that regardless of the value of stock stolen the period which a convicted person may serve in default of failure to pay the compensatory fine shall not exceed 12 months imprisonment.

It is against the above background that I make the finding that the imposition of sentences greater than the minimum 9 years imprisonment following a conviction of stock theft and a finding that there are no special circumstances and then proceeding to suspend portions thereof is not permissible under s 358(2) of the CP&E Act. I cannot confirm the sentences in both cases as being in accordance with real and substantial justices. Accordingly, it is ordered that:

1. The sentence in the case of *S v World Kera and Givemore Usai* be and is hereby set aside
2. The case is remitted to the magistrate to resentence the accused taking into account the directions given in this judgment
3. The sentence in the case of *Leonard Shoko and Learnmore Mubazani* be and is hereby set aside
4. The case is remitted to the magistrate for her to recall the accused, canvass the question of special circumstances and thereafter resentence him.
5. The registrar of this court is directed to ensure that a copy of this judgment is delivered to the Chief Magistrate's office so that the attention of every magistrate is drawn to the stated imperatives.

My brother CHITAPI J agrees with this judgment.

MUTEVEDZI J……..

CHITAPI J …… I agree