HB 115-18
HCA 14-15/17
HCA 31/17
CRB BN 356-8/16

COSSAM MWEMBE
and
ALBERT ZVIDZA
and
EDSON ZVIDZA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MATHONSI AND TAKUVA JJ
BULAWAYO 14 MAY 2018 AND 17 MAY 2018

Criminal Appeal

K Ngwenya for 1st the appellant
2nd and 3rd appellants in default
Ms N Ndlovu for the respondent

MATHONSI J: The three appellants, who have appealed separately, were jointly charged with two counts of stocktheft at Binga Magistrate Court. Although they all pleaded not guilty, they were convicted in respect of both counts following a full trial and each sentenced to 25 years imprisonment of which 5 years imprisonment was suspended for 5 years on condition of future good behaviour.

They have appealed against both conviction and sentence. The first appellant's main ground of appeal is that he was wrongly convicted on the basis of the evidence of his two co-accused who testified that they had bought the four herd of cattle belonging to the two complainants from him and he had assisted them to drive the cattle from Binga to Gokwe North, a distance of over 100km.

The second and third appellants' grounds of appeal centre on that their defence of having purchased the beasts from the first appellant who had assured them that they were his should stand. In addition, they assert that there was an improper separation of charges as the one head in count one and the three head in count two were stolen on the same day at the same place. As such this was one criminal act constituting one count.

I should quickly dismiss the last argument as being fundamentally flawed in that the cattle in each count belonged to two different complainants. This is enough to separate the charges. In addition, it is unknown when and where the cattle in each count were stolen between 3 and 6 December 2016. They went missing at the pastures on 3 December 2016 only to be found at a slaughter house on 6 December 2016. The charges were properly separated.

It has been held in *S* v *Maniko and Another* HH 44-91 that it is a proper splitting of charges where an accused person had stolen cattle from two people at the same place but an hour apart. In this case the cattle not only belonged to different people but the time and place of the theft were unknown. Let it be noted though that their appeal was dismissed for want of prosecution and not on the merits as they defaulted despite being given notice of the set down.

The facts in count one are that Muleya Dube of Khumba village under Chief Siabuwa in Binga had left his five head of cattle to graze at a nearby grazing land. During the period extending from 3 to 6 December 2016, one brown ox was stolen from the herd and taken to an abattoir in Gokwe where it was due to be slaughtered when the complainant arrived after receiving a tip-off. As the second and third appellants had sold it to the abattoir owner they were arrested and led the police to the first appellant claiming to have bought it from him.

In count two, during the same period as in count one, Leornard Chiabe of the same village also left his ten head of cattle to graze at a grazing area near his homestead. Three oxen were stolen from the herd and driven to an abattoir in Gokwe where one ox had already been slaughtered, when he arrived following a tip-off.

Let me begin by examining briefly the first appellant's submission relating to the reliance on the evidence of his co-accused. The position of our law is that where two or more persons are jointly charged with an offence and each gives evidence blaming the other for the offence, the evidence of each is admissible against the other, but the court is required to approach it with care given the risk that either or both may try to protect themselves by falsely incriminating the other. See *S* v *Sambo* S -22-90.

The first appellant's counsel appears to mistake the above proposition for the provisions of section 259 of the Criminal Procedure and Evidence Act [Chapter 9:07] . It provides that

where an accused gives a statement to the police in response to questions put to him or her that statement is only evidence against the maker of it and not against any other accused. There is a reason why that is so. It is that the other person does not have the opportunity to cross examine the maker of the statement. However in a situation where the maker of the statement goes in to the witness box and repeats the statement on oath, by so doing he or she becomes liable to cross-examination by an accused jointly charged with him or her. For that reason the evidence on oath becomes admissible against the co-accused. There is therefore no merit in the first appellant's ground of appeal based on the incriminating evidence of his co-accused.

In any event, the state case was not premised on the evidence of the second and third appellants only. There is a lot of evidence that was common caused which tends to point to the guilt of all the appellants. It was common cause that;

(a) Prior to the events of 3 to 6 December 2016 the three appellants already knew each other very well and were bossom buddies. Their friendship started when they met in Gokwe involved in the business of selling cattle.

(b) On the night of 3 December 2016 the second and third appellants who are brothers, and hail from Gokwe, some 180km from Binga, arrived at the first appellant's homestead in Binga and were well received by him. They put up there for the night.

(c) Their sole mission in Binga was to secure cattle for sale at an abattoir back in Gokwe.

(d) The following day they left the first appellant's home and indeed left Binga driving four head of cattle belonging to the two complainants who had not given or sold the cattle to them.

(e) In driving the cattle several kilometers to Gokwe as they did, they flouted every rule book for the movement of cattle. They did not have an agreement of sale with whoever gave them the cattle, and certainly not with the two owners. They did not inform the village head that they were moving cattle from Binga to Gokwe. They did not obtain a movement permit from the department of veterinary services as required by law. They did not obtain a clearance certificate from the local police.

(f) These are people who, by their own admission, had been in the cattle business for a long time.

(g) Upon arrival in Gokwe they immediately sold the cattle at an abattoir for slaughter and in doing so, they used their own stock card to clear the cattle, as if the cattle were registered in their stock card as their own when they were not.

Faced with all that evidence, the court *a quo* had really no choice but to convict the second and third appellants. Unfortunately for the first appellant who hosted these two cattle rustlers in Binga, they pointed at him as being part of the rustling ring who had even assisted in driving the cattle several kilometers before boarding a bus back to Binga. The circumstances clearly point to the involvement of the first appellant. He was also properly convicted.

Regarding sentence, there was an obvious misdirection in that the court *a quo* wallowed under the misapprehension that the number of cattle involved determines the period of imprisonment to be imposed. In terms of the penal provision in section 114 of the Criminal Law Code [Chapter 9:23] , the court was required to impose the minimum mandatory sentence in respect of each count. This court has stated previously that the mandatory minimum sentence imposed by the legislature for such cases is already rigorous and invariably heavy. For that reason there is no need for the sentencing court to make the situation worse by going beyond that which is prescribed for a single count. It matters not that one count involved three herd of cattle. See *S* v *Mweembe and Another* HB 102-18. Where the count involves more than one beast, it is advisable, in recognition of the number, to impose a slightly higher sentence but suspend the period above the minimum mandatory sentence in recognition of that fact.

Ms Ndlovu for the respondent conceded that the court *a quo* misdirected itself by imposing a sentence of 25 years imprisonment. She urged the court to reduce the sentence to 18 years imprisonment. In my view the concession is proper regard being had that no justification was given whatsoever for imposing a sentence far above the mandatory minimum one. See *S* v *Togarepi* HMA 8-17. The appeal against sentence should succeed.

In the result, it is ordered that:

1. The appeal against conviction in respect of the first appellant is hereby dismissed.

2. The first appellant's appeal against sentence is upheld. The sentence of the court *a quo* is set aside and substituted with the following sentence:

   "Count 1: The first appellant is sentenced to 9 years imprisonment.

   Count 2: The first appellant is sentenced to 12 years imprisonment 3 of which is suspended for 5 years on condition he does not, during that period commit an offence involving stocktheft for which he is sentenced to imprisonment without the option of a fine."

3. The second and third appellants' entire appeal is hereby dismissed for want of prosecution.

Takuva J agrees……

Muvhiringi and Associates, 1st appellant's legal practitioners
Hove and Partners, 2nd and 3rd appellants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners