

THE PEOPLE v 1. EDWARD LUPENGE and DAVID MOOLA (1980) Z.R. 238  
(H.C.)

HIGH COURT  
SAKALA, J,  
6TH JULY, 1979  
HLS/2/79

**Flynote**

Criminal law and procedure - Stock theft - Second offence - Jurisdiction of magistrates where statutory minimum sentence is to be imposed.

Criminal law and Procedure - Jurisdiction - Stock theft - Second offence - Jurisdiction to try.

**Headnote**

The Class III magistrate after convicting two accused for stock theft discovered that one of them had a previous conviction of the same offence. He committed both accused to the High Court for sentence purportedly under s. 217 (1) of the Criminal Procedure Code.

**Held:**

A magistrate is inhibited from trying offences where the statutory minimum sentence exceeds his sentencing powers. A Class III magistrate has no jurisdiction to try stock theft offences where a statutory minimum sentence is to be imposed. *Mabeta Mapowa v The People* (3) followed.

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**Legislation referred to:**

Criminal Procedure Code, Cap. 160, s. 217.

**Cases referred to:**

(1) The People v Daniel Mubita Situmbeko (1977) S.J.Z.

(2) The People v Chilembe (1975) Z.R. 40.

(3) Mapowa v The People (1979) Z.R. 30, 232.

For the accused: In person.

For the People: K.V. C. Kamalanathan, Senior State Advocate.

**Editorial**

**Note:**

The judge expressed the need to amend s. 217 of the Criminal Procedure Code, Cap. 160.

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Judgment

**SAKALA, J.:**

Both accused were connoted by the subordinate court of the third class for the Namwala District on

two counts of stock-theft contrary to ss. 275 and 272 of the Penal Code, Cap. 146. Originally they were jointly charged with another person who was acquitted at the end of the trial. After the conviction but before sentence, it transpired the David Poole had a previous conviction of stock-theft. The learned trial magistrate then observed as follows:

"The first accused is a first offender while the second accused is not and as such, I have no sufficient powers to impose the minimum sentence in respect of the accused. Although the first accused is a first offender, I propose in the interest of justice that first accused be sentenced by the same court that will sentence the second accused. In the result, I hereby commit both accused to the High Court at its next sessions for Southern Province for sentence."

The two accused are therefore before me for sentence only. They were supposed to appear before me for sentence at the Livingstone June Sessions but they were not present in court during the sessions. The case was accordingly adjourned and transferred to Lusaka.

Section 275 of the Penal Code as amended by Act No. 29 of 1974 reads as follows:

"If the thing stolen is any of the following, that is to say: a horse, mare, gelding, ass, mule, camel, ostrich, bull, cow, ox, ram, ewe, wether, goat or pig, or the young of any such animal, the offender is liable -

- (a) in the case of a first offence, to imprisonment for fifteen years;
- (b) in the case of a second or subsequent offence, to imprisonment for a period of not less than seven years and not exceeding fifteen years."

Section 7 of the Criminal Procedure Code Cap. 160, which provides for powers of the subordinate court reads as follows:

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"Subject to the other provisions of this code, a subordinate court of the first, second or third class may try any offence under the Penal Code or any other written law, and may pass any sentence or make any other order authorised by the Penal Code or any other written law:

Provided that -

- (i) a subordinate court presided over by a senior resident magistrate shall not impose any sentence of imprisonment exceeding a term of nine years;
- (ii) a subordinate court presided over by a resident magistrate shall not impose any sentence of imprisonment exceeding a term of seven years;
- (iii) a subordinate court presided over by a magistrate of the first class shall not impose any sentence of imprisonment exceeding a term of five years;
- (iv) a subordinate court other than a court presided over by a senior resident magistrate, a resident magistrate or a magistrate of the first class, shall not impose any sentence of imprisonment exceeding a term of three years."

The court in the instant case was presided over by a magistrate of the third class. The maximum

sentence of imprisonment that it could impose by law could therefore not have exceeded a term of three years. In my opinion, therefore the learned trial magistrate had power to impose any sentence on Edward Lupenge, a first offender, of up to three years' imprisonment. On the other hand he had no power to impose a minimum sentence of seven years as required by law on David Moola, who had a previous conviction of stock theft. With fairness to the learned trial magistrate it could be said (subject to what I will say in a moment) that in so far as the trial of this offence was concerned apart from the question of sentence he had the jurisdiction (s.7 of Cup. 160). But in so far as sentencing was concerned he definitely had no power. The learned trial magistrate as a way out of the predicament after conviction invoked the provision of s. 217 (1) of the Criminal Procedure Code which reads:

"Where, on the trial by a subordinate court of an offence, a person who is not less than the apparent age of seventeen years is convicted of the offence, then, if the court is of opinion that greater punishment should be inflicted for the offence than the court has power to inflict, the court may, for reasons to be recorded in writing on the record of the case instead of dealing with him in any other manner commit him in custody to the High Court."

The case was therefore committed to this court for sentence.

The case of *The People v Daniel Mubita Situmbeko* (1) was a case involving stock theft. In an attempt to ascertain whether the accused had previous convictions or not for purposes of what court should have heard the case and what sentence to have been imposed in the event of a conviction the prosecution caused several adjournments giving the reasons

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that they wanted to establish whether the accused had previous convictions. I pointed out in that case on review that to grant the prosecution adjournments to enable them to establish the previous convictions of stock theft of the accused before the trial commenced was a serious irregularity. The reason for this is that in the event it is established before trial when the case is already before court that the accused had a previous conviction of stock theft, then his subsequent trial would in my view have been prejudiced whether the case is transferred to another magistrate or not. In passing I said at p. 8 in that case:

"Assuming that the accused had a second or subsequent offence of stock-theft, it is clear that the learned magistrate would not have had the power to impose the minimum sentence of seven years. In my opinion such a situation would not have raised any difficulties since in terms of the provision of section 217 of Cap. 160 the learned magistrate would have committed the case to the High Court for sentence."

I must confess that in making these remarks (which were merely *obiter dicta*) my attention was not drawn to the case of *The People v Chilembe* (2) whose ruling has been recently adopted by the Supreme Court in the case of *Andrew Mabeta Mapowa v The People* (3). The brief facts in the case of *Chilembe* (2) as they appear from the headnote are that the accused was convicted on his own plea of guilty by a subordinate court of the third class in Mumbwa on three counts of stock theft.

When it came to sentence the trial magistrate recorded that the accused had five previous convictions including one of stock theft. He therefore transmitted the case record to the High Court for sentencing. The trial magistrate was presumably invoking the provisions of s. 217 of the Criminal Procedure Code. The court held that - (i) The provisions of s. 217 of the Criminal Procedure Code were not enacted to cover the case of statutory minimum sentences outside the sentencing powers of a subordinate court but were framed to cover the situation where a subordinate court having the power to impose a sentence in respect of a particular offence, nonetheless decides that a sentence exceeding the court's powers under s. 7 of the Criminal Procedure Code should be imposed; (ii) s. 217 of the Criminal Procedure Code clearly indicates an exercise of discretion by a subordinate court, qualified as it is by the provisions of sub-s. (2), namely the discretion of imposing a sentence within the court's powers or of committing the High Court for sentence; (iii) the proviso to s. 7 of the Criminal Procedure Code not only limits the sentencing powers of subordinate courts but also inhibits their powers to try offences where minimum statutory punishments exceed their sentencing powers; (iv) if there is no power in a court to punish offenders it cannot have any jurisdiction to try them." Meaning no disrespect to anyone, while agreeing that the provisions of s. 217 of the Criminal Procedure Code were not enacted to cover the cases of statutory minimum sentences and that they indicate an exercise of discretion, I cannot agree, and certainly the law is not clear on the point, that the proviso to s. 7 of the Criminal Procedure Code, not only limits sentencing powers of subordinate courts but *that also* inhibits their

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powers to try offences where minimum statutory punishments exceed their sentencing powers. In my considered opinion if the legislature wanted to limit the jurisdiction to certain courts in cases attracting minimum punishment it should have been said in clear terms just as it is provided that courts may not suspend a sentence imposed for any offence in respect of which any written law imposes a minimum punishment (fifth schedule to Cap. 160). As I have said the ruling in *Chilembe* (2) (a High Court decision) has been adopted in a judgment of the Supreme Court. In both cases the trial was held a nullity. But in my humble opinion, again meaning no disrespect to anyone, I do not think these decisions have actually resolved the problem posed by the offences that attract minimum statutory punishments. In my view, the problem is both practical and procedural. Do we have enough Senior Resident Magistrates and Resident Magistrates to try cases of stock and motor vehicle thefts in the country? Perhaps this is not a serious issue. But there is then the problem presented by the instant case. One of the accused is a first offender the other one is not. Is it the whole trial which is a nullity or only the trial in respect of the accused with a previous conviction? I am not quite sure whether the Supreme Court considered a situation of this nature.

In my considered opinion, the best way out of all this may be to amend s. 217 of the Criminal Procedure Code by adding a new subsection empowering subordinate courts also to commit to the High Court cases where the law imposes a minimum punishment for which they have no power. In this way, the argument of discretion and opinion would not arise. Above all the long delays and possible prejudice experienced in cases of stock and motor vehicle thefts would not in my view arise.

Turning to the case before me, I have already said that I am bound by the decision of the Supreme

Court. Consequently, as regards David Moola who has a previous conviction of stock-theft, I hold that the purported trial in the court below was a nullity and I order that, he, David Moola be retried by the subordinate court of the first class for the Namwala District to be presided over by a resident magistrate or a senior resident magistrate.

In respect of Edward Lupenge, he was a first offender. It cannot in my humble opinion be said that the trial was a nullity in respect of him I find therefore that Edward Lupenge's trial was not a nullity. Since the trial in respect of the other accused has been held a nullity and since Edward Lupenge's committal to the High Court for sentence was dependant on his co-accused, that trial having been declared a nullity the reasons given by the learned trial magistrate for the committal of this accused fall away. In the circumstances, I order that the record be sent back to the trial court for that court to impose a sentence on Edward Lupenge, it will deem fit in the circumstances. I hope, however, that in imposing sentence that court will not overlook the fact that the accused has all along after he was committed been in custody.

Trial of second accused declared a nullity