

SIMON MBOZI AND PAUL NYAMBE v THE PEOPLE (1987) Z.R. 101 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., CHOMBA AND SAKALA, JJ.S.
21ST APRIL, 1987.
(S.C.Z. JUDGMENT NO. 11 OF 1987)

Flynote

Sentence - Stock theft - Defendants sentenced to corporal punishment in addition to prison sentence - Whether corporal punishment appropriate.

Sentence - Stock theft - Mandatory minimum sentence - Commercial gain - Appropriate ground for exceeding minimum.

Headnote

The appellants were convicted of stock theft on their own pleas of guilty. They stole one cow, slaughtered it, and sold the meat. They were committed to the High Court for sentence where each appellant was sentenced to ten years imprisonment, and, in addition to ten strokes of corporal punishment. They appealed against sentence. They argued that corporal punishment was inappropriate in the case of stock theft.

Held:

- (i) Corporal punishment should be invoked sparingly and only in the most serious circumstances as where brutality was used in committing the offence or where there is a serious outbreak of crime. It was inappropriate when a long prison sentence was imposed.
- (ii) Where an accused has made a commercial gain from stock theft there is a ground for increasing the mandatory minimum sentence.

Cases cited:

- (1) Adam Berejena v The People (1984) Z.R.19
- (2) Robson Shahuma v The People S.C.Z. No. 10 of 1987
- (3) Nasilele v The People (1972) Z.R. 197

For the appellant: In person.
For respondent: K.C.Chanda, Senior State Advocate.

Judgment

CHOMBA, J.S.: delivered the judgment of the court.

The appellants were convicted of stock theft on their own pleas of guilty. The short facts of the offence were that on the 30th of April, 1986, at Mazabuka jointly and whilst acting together they stole one cow valued at K750 property of Charles Siddle, a farmer. An investigation into the matter revealed that the two appellants had slaughtered the cow in one of the complainant's paddocks, and, after skinning it, left its hide and head there. Upon information received, the appellants were found in Zambia Compound selling the meat from the stolen cow. The two readily admitted the charge during their appearance in the magistrate's court. Upon convicting them the trial magistrate

committed them to the High Court for sentence because the magistrate considered his powers inadequate to impose sentence. In the High Court the learned Mr Justice Mainga sentenced each appellant to ten years imprisonment

p102

with hard labour plus ten strokes of corporal punishment.

The appellants are, according to their grounds of appeal, aged fifty-five years in respect of Paul Nyambe and forty-six years in respect of Simon Mbozi. Both of them said in their grounds that the sentences were nearly fatal to them. Perhaps that is a suggestion that if they received corporal punishment they would expire. In the case of *Adam Berejena v the People* (1), this court, dealing with the imposition of corporal punishment, held that this punishment should be invoked sparingly and only in the most serious circumstances such as where brutality was used in committing the offence, or when there is a serious outbreak of crime. We also held in that case that corporal punishment was uncalled for when a long custodial punishment have been imposed. Having regard to the facts of this case as just outlined, no question arises of a serious outbreak of crime, nor can it be said that brutality, in the sense pertaining to offences against the person, was used in committing the offence. Further and as we have already stated, a sentence often years imprisonment was meted out in this case. That is undoubtedly a long custodial sentence. Therefore, on the authority of the case of *Berejena* we find that corporal punishment was uncalled for in this case. We set it aside.

Coming to the prison sentence, we wish to repeat what we have stated in several cases before and which was underscored in the *Berejena* case, namely that an appellate court may interfere with a lower court's sentence only for good cause, as where the sentence is wrong in law, in fact or in principle, or where the sentence is so manifestly excessive or totally inadequate that it induces a sense of shock, or where there are exceptional circumstances to justify an-interference. in the case of the second appellant we notice that he had at the - time of his conviction for the present offence one previous conviction for stock theft committed in 1980. In laws therefore, he was liable to the mandatory minimum sentence of seven years imprisonment. In this case he got ten years imprisonment and we have to decide whether that was a proper sentence given the circumstances in which the present offence was committed. In a recent case of *Robson Shahuma v The People* (2), which we dealt with only a fortnight ago, the appellant was convicted of stock theft involving two head cattle valued as in this case at K750.00. The sentencing judge imposed twelve years imprisonment with hard labour. In that case we cited our earlier case of *Nasilele v The People* (3). The passage we referred to reads as follows and I quote:

"It is trite that a bad record must not be a basis for imposing a heavier sentence than the offence itself warrants. In other words the first decision must always be what is the proper sentence for the offence, and ignoring at this stage the presence or absence of mitigating factors; only after deciding what is the proper sentence for the offence itself does the court proceed to consider to what degree that sentence may properly be reduced because of the presence of mitigating factors. These principles are no less applicable when the offence is one for which Parliament has prescribed a minimum sentence; by doing so Parliament has expressed the intention that all offences of the particular type be treated

more seriously than previously. The effect is that for the least serious offence of stock theft or where there are mitigating factors to enable the court to exercise maximum leniency, the minimum sentence should be imposed, while for more serious offences and where there are insufficient mitigating factors to enable the court to exercise maximum leniency a more severe penalty should be imposed."

We wish to underscore from this passage in particular that part of the dictum stating that for the least serious offence of stock theft after a previous conviction the minimum sentence should be imposed, while for the more serious offences a more severe sentence should be imposed. We do not consider as a master of principle that theft of one cow valued at K750 should attract anything more than the mandatory minimum of seven years imprisonment with hard labour. The only aggravating circumstances we find in the present case is that the second appellant and his colleague, that is the first appellant, commercialised that theft by selling the meat from the stolen animal. In our view that aggravating circumstances does not justify the imposition of three years over and above the mandatory minimum of seven years imprisonment. We feel that an addition of only one extra year meets with the aggravating circumstance in this case. We, therefore, consider that a proper sentence in this case is one of eight years imprisonment with had labour. We accordingly impose that sentence of eight years imprisonment with hard labour in place of ten years imprisonment with hard labour, which we set aside. To this extent only this appeal of the second appellant is allowed.

As regards the first appellant the record shows that he has no previous convictions for stock theft. Therefore, the mandatory minimum statutory sentence does not apply to him. However, he has nine previous convictions, but on examination of his record we find that he has mainly been a petty thief, stealing property valued at not more than K12.00 at any one time. He has mostly been a chicken thief. The heaviest sentence he has received for any one offence has been imprisonment for eighteen months with hard labour imposed in 1981. As we have seen, for the present offence he was treated on the same footing as the second appellant and was sentenced to ten years imprisonment with hard labour. We are of the undoubted view that that sentence, having regard to his antecedents was wrong in principle. We set it aside. In considering what the proper sentence to impose on him is, we have taken into account that by reason of his past and persistent petty thieving he has forfeited some of his claim to leniency. We have then taken into account that in this case the stock theft was commercialised as already indicated when referring to the second appellant. We further take cognisance of the fact that in a number of cases which the learned Mr Justice Mainga has dealt with relating to stock theft he has constantly and persistently observed that cattle rustling is gaining frightening frequency in Southern Province. Considering all these factors, we are of the view that a proper sentence in respect of the first appellant is one of five years imprisonment with hard labour. We accordingly impose that sentence in place of the one imposed by the court below. To this extent only the appeal is allowed.

Appeal allowed in part
