LAWRENCE MOYO

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
TAKUVA & DUBE-BANDA JJ
BULAWAYO 20 FEBRUARY 2023

Appeal against sentence

Appellant in person
Ms. C Mabhena, for the respondent

DUBE-BANDA J

1. This is an appeal against sentence only. The appellant was arraigned before the Magistrate Court sitting at Nkayi on two counts of Stock Theft as defined in section 114 of the Criminal Law (Codification and Reform Act) [Chapter 9:23]. In count 1, it being alleged that on the 6th March 2008 and at Bubi Cresent, Inyathi the appellant unlawful took four cows and a heifer the property of the complainant. In count 2, it being alleged that on the 27 March 2008 and at Kennelworth, the appellant unlawfully took two oxen and one heifer the property of the State.

2. The appellant pleaded guilty to both counts and he was duly convicted. The court found no special circumstances and in count 1, he was sentenced to twenty-five years imprisonment, and in count 2 he was sentenced to 15 years imprisonment. Of the total forty years imprisonment ten years were suspended for five years on the usual conditions of good behaviour. Leaving an effective thirty years imprisonment.

3. Aggrieved by the sentence the appellant noted an appeal to this court. The sentence of the trial court is appealed on the following grounds:

    i. The sentence imposed on me (*sic*) was too harsh and excessive as to induce a sense of shock as it was so disproportionate to my (*sic*) conduct in the circumstances.

ii. The trial court made a serious error in failing to take into account and ignoring my (*sic*) personal circumstances and the circumstances surrounding the commission of this offence in sentencing me as it did. In this it totally failed to take into account and lend sufficient weight to all mitigating factors that were apparent in my (*sic*) situation.

iii. The court that sentenced me (*sic*) had an interest in the matter which impaired its impartiality in excessing its judicial discretion in passing sentence resulting in a clearly vindictive and disproportionate sentence.

4. In summary the first and second grounds of appeal speak to the fact that the sentence is excessive and induces a sense of shock, and that the court *a quo* down played the weighty mitigating factors, and elevated the aggravating factors. The third ground of appeal raises an issue that does not appear *ex facie* the record of proceedings. There is no evidence that the trial Magistrate had an interest in the matter.

5. The State concedes that the sentence imposed on the appellant was too excessive and induces a sense of shock. Ms *Mabhena* counsel for the State submitted that what seemed to have played on the mind of the trial court is that in the first count there were five beasts involved and in the second count there were three beasts involved. Counsel argued that the jurisprudence in this jurisdiction is that a minimum mandatory sentence of nine years is *per* count not *per* beasts. Counsel argued further that the trial court fell into a misdirection and the result was the imposition of a severe sentence that induces a sense of shock.

6. It is by now established law that sentencing is pre-eminently within the discretion of the trial court. This court of appeal has limited power to interfere with the sentencing discretion of a court *a quo.* A court of appeal can only interfere; where there is a material irregularity; or a material misdirection on the facts or on the law; or where the sentence was startlingly or disturbingly inappropriate; or induced a sense of shock; or is such that a striking disparity exists between the sentence imposed by the trial Court and that which the court of appeal would have imposed had it sat in the first instance; or irrelevant factors were considered and when the court *a quo* failed to consider relevant factors. See: *S v Ramushu & Ors* SC 25/03; *S v Anderson* 1964(3) SA 494 (AD) at 495 D-H; *S v Rabie* 1975(4) SA 855 (AD) at 857 E.

7. In *casu* the sentence is startlingly or disturbingly inappropriate and induced a sense of shock. There were strong mitigating factors in favour of the applicant. The appellant was twenty three years old at the time of the commission of these crimes. He was indeed a youthful offender. A sentence of forty years on a youthful offender must be reserved for the most heinous crimes. He pleaded guilty to the charges. The appellant did not benefit in the commission of these crimes. All the beasts were recovered. The trial court misdirected itself in overemphasising the aggravating factors and down playing the mitigating factors. The sentence in the circumstances of the case is strikingly inappropriate and the trial court *erred* by imposing a sentence that is out of proportion to the totality of the accepted circumstances in aggravation and mitigation. Counsel for the State was rightly constrained to concede that the sentence was excessive.

8. It is important to underscore that the jurisprudence in this jurisdiction is that a minimum mandatory sentence of nine years is *per* count not *per* beasts. See: *Mamoche v The State* HH 80/15; *The State v Zhakata* HH155-22; *Lucas v The State* HH 105/18; *S v Takawira & Another* HH 75/15; *S v Mhoya* HB 79/13; *S v Huni* HH 149/09; *The State v Sibanda* HB 159/22. The sentences therefore stand to be set aside. Ms *Mabhena* submitted that a minimum mandatory sentence of nine years *per* count to run concurrently would have been deterrent enough considering the weighty mitigating factors in favour of the appellant. I agree.

9. In the circumstances, it is my view that the court *a quo* misdirected itself in that the sentence imposed on the appellant is disturbingly inappropriate, and was afflicted by a misdirection. It is for these reasons that this appeal must succeed.

10. The appellant has already served a total of fifteen years imprisonment.

In the result it is ordered that:

i. The appeal against sentence succeeds.
ii. The sentence of the court *a quo* is set aside and substituted with the following:
The accused is sentenced as follows:
Count 1 - 9 years imprisonment

Count 2 - 9 years imprisonment

The sentence in count 2 be and is hereby ordered to run concurrently with the sentence in count 1.

The appellant has already served the imprisonment term and he is entitled to his immediate release.

TAKUVA J …….. AGREES

National Prosecuting Authority, respondent's legal practitioners