

**Moses Gomana
Versus
The State**

HIGH COURT OF ZIMBABWE
KAMOCHA AND CHITAKUNYE JJ
HARARE 2 December 2003 and 28 January 2004

Criminal Appeal

Mr *Mukome* for the appellant
Mr *Shava* for the respondent

KAMOCHA J: The appellant, together with two others was jointly charged with stealing a heifer on 16 July 2001 from Tititi Farm near Rusape. All the three pleaded not guilty but were found guilty as charged. They all were sentenced to 36 months imprisonment of which 2 months were suspended on condition each accused, through the Clerk of Court, Rusape, paid to the complainant a sum of \$1 000,00 representing the value of the unrecovered meat on or before 29 November, 2002.

In respect of the appellant and 3rd accused 6 months imprisonment was suspended on conditions of future good behaviour. The second accused who had a relevant previous conviction had his suspended sentence imposed on 30 January 2001 brought into effect.

The appellant appealed against both conviction and sentence. The second and 3rd accused did not appeal.

The following facts are not in dispute. The complainant Peter Bete had his heifer stolen from his cattle pen during the night of 16 July 2001. It was driven to Rusape dam where it was slaughtered. The meat was carried to the house of the appellant where it was loaded into his deep freezer. Nearly the full carcass was loaded in the deep freezer except for some offals such as lungs, liver, heart, tripe casings and neck. All in all meat weighing 85 kilograms was found in the appellant's deep freezer which had been locked. The meat was taken to the appellant's house under cover of darkness. All are agreed that it was around 5 a.m. which was still dark during the month of July. It was also common cause that the bags which had been used to carry the meat were found in the boot of a non runner vehicle of the appellant at his premises.

The second and third accused admit skinning the heifer which they claimed was already killed when they got to the dam where they allegedly found it. They claimed to have been hired by the appellant to go and skin it. The meat was found

loaded into appellant's deep freezer but he claimed to have innocently bought it from the second and third accused.

The questions to be answered are -

- a) who stole the heifer? Was it accused two and three or all the three accused?
- b) If it was only accused 2 and 3 how innocent was accused 1 - appellant - when he received the meat?

There were two opposing camps in this matter; that of the appellant which comprise of himself, his wife and his employee Never Mugocho and that of the 2nd and 3rd accused. Each camp tried to implicate the other as much as possible while it tried by all means to minimise its involvement. In short both camps were not candid with the court.

Dealing first with the camp of the two accused. It is a lie for them to suggest that appellant just hired them to go and skin the heifer which had already been slaughtered and that they believed that it was his. They would have found out where he got it from and why it was being skinned at night.

The second accused had been seen at the farm earlier that day. If he was not involved in the theft he at least knew that what he was skinning was a stolen beast. That explains why he took to his heels and jumped or scaled over a 2½ metre fence when an arrest was about to be effected on him. The story of being hired to go and skin a beast which had already been killed is untenable.

In the appellant's camp Never was a hopeless witness who finally admitted that he lied so much just to assist his employer by protecting him. He lied that he did not know what type of relish was being talked about when the discussion took place in the beerhall. Appellant also lied on that point. The fact is that they both knew what the subject matter was/. It was meat. They must have agreed at the beerhall that the two accused should bring the meat to the appellant's house. Bags with which to carry meat came from the appellant. That is why they were left at his home in a boot of a disused car. There is therefore no doubt that the appellant told the two to bring the meat to his house which they did.

Appellant knew the two accused very well. He had always seen them selling items like belts and gingers. He had never seen them selling meat before although he attempted to say under cross-examination that he had seen them on one occasion selling meat. That was an after thought and was correctly rejected by the trial court. He must have known that these simple vendors could not own cattle to

sell. He had hired them on a number of occasions to off load and carry his vegetables.

He was untruthful about just instructing Never to load the meat in the deep freezer before he had looked at it and ascertain the quantity. He was similarly untruthful about not telling his wife about the meat when she in fact said he did.

The wife was not candid with the police. She refused to give the keys to the deep freezer. When asked whether any meat was at their premises she would not co-operate. She clearly knew that what was in her deep freezer was stolen meat that is why she refused to hand over the keys until she had to be arrested. Her self and Never knew that the meat was stolen because it was brought home under cover of darkness.

Appellant provided the bags to be used to carry the meat. His suggestion that the bags belonged to the two accused who would collect them when they came to collect their money is simply not true because according to him the arrangement was that the money would be collected from town. It therefore follows that appellant sent the two to go and steal and bring the meet which would explain why nearly a whole carcass was found in his deep freezer. *Qui facit per alium facit per se* in which case he would be guilty of theft of stock.

Appellant stated that when the meat was bought he did not ask where the two accused had got it from. That of course was not necessary because he knew where it came from since he had planned with the other two accused in the beerhall to go and get the meat. If that had not been the case he would have asked the two accused since what they brought was out of the ordinary. It was not what he expected. He expected vegetables but the two brought a large quantity of meat under cover of darkness.

The court *a quo* was correct in finding that the appellant a businessman formed common purpose with the other two accused. He planned the crime with them. If he did not commit it with them, he, at the very least, used them to do the job. *Qui facit per alium facit per se*. He cannot escape liability. The conviction is therefore proper.

There is no reason why he should have been treated differently in as far as the sentence is concerned. He is a businessman and he is the one who gave the other accused the impetus to commit the crime since he had the money to pay them for the job. His moral blameworthiness is of a very high order. The approach adopted by the trial magistrate in relation to sentence cannot be faulted.

In the result the appeal is dismissed in its entirety.

4
HH 213-2003
CA 206/03

CHITAKUNYE J, I agree.

Mvingi & Mugadza, appellant's legal practitioners
Office of the Attorney-General, respondent's legal practitioners