

GEOFREY MUSHAUUKWA v THE PEOPLE (1987) Z.R. 17 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER, J.S., AND BWEUPE, AG. J.S.
3RD NOVEMBER, 1987
(S.C.Z. JUDGMENT NO. 22 OF 1987)

Flynote

Sentence - Mandatory sentence for second offence - Untried offence - Whether constitutes second offence.

Headnote

The appellant was tried and convicted of stock theft. At the time of sentencing the appellant disclosed that he was already serving another sentence for theft of another two head of cattle from the same complaint. The High Court imposed a mandatory minimum sentence pursuant to section 275 of the Penal Code on the basis that this was his second or subsequent offence. On appeal against sentence the court ascertained that the prosecution had not taken all cases which were known to be outstanding against the appellant before the same court at the same time.

Held:

- (i) the offence was committed as part of a course of conduct and was not a second or subsequent offence for the purpose of attracting the enhanced mandatory minimum sentence.
- (ii) the provision does not apply simply because not having been previously convicted and sentenced, the offender appears in court at a time when he has already committed two or more untried cases which are outstanding against him for which he is subsequently convicted, whether under one indictment or under separate indictments.

Case cited:

(1) Mweene v The People (1977) Z.R. 349

Legislation referred to:

Penal Code, Cap. 146, s. 275.

For the appellant: In person.

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

Judgment

NGULUBE, D.C.J.: delivered the judgment of the court.

The appellant was tried and convicted on a charge of stock theft. The particulars alleged that on 16th August, 1985, at Livingstone, jointly and whilst acting with two other men, he stole two head of cattle valued at K1,580.00, the property of the complainant. At the time of sentencing him, the appellant disclosed in his mitigation

that he was then already serving another sentence of four years imprisonment with hard labour for stealing another two head of cattle from the same complainant. We have ascertained the facts of that other case and it transpires that the appellant committed that other offence a few days after he had committed the offence now before us. The problem which arose in this case could have been avoided if the prosecution had taken all the cases which were known to be outstanding against the appellant before the same court at the same time. Had that happened it would have been noticed that in fact what was considered to be a conviction for a second or subsequent offence should not have been so considered. The appellant was committed to the High Court which imposed a sentence of twelve years consecutive to the sentence of four years on the basis that this was his second or subsequent offence.

The issue whether an offence is a second or subsequent one has been considered in a number of cases in England but more important, it was considered by this court in *Mweene v The People* (1). It is quite clear on that authority that there must be a previous conviction in existence before the commission of the second or subsequent offence if the mandatory provisions of section 275 of the Penal Code are to apply. It seems to us that the rationale behind minimum mandatory sentences for a second or subsequent offence is that a minimum sentence must be inflicted because the offender has repeated the offence after previously being convicted. The provision does not apply simply because, not having been previously convicted and sentenced, the offender appears in court at a time when he has already committed two or more untried cases which are outstanding against him for which he is subsequently convicted, whether under one indictment or under separate indictments. It seems to us that the object of the law is to deter and to punish persons who have not learnt their lesson from previous convictions and who repeat the same offence after such convictions. We should also observe, however, that the law has since been amended again and it provides for a mandatory sentence even for first offenders.

We have taken into account the appellant's plea for mercy and his arguments in mitigation against the effective sentence now standing at sixteen years imprisonment with hard labour. For the reasons which we have given, there was in fact no second or subsequent offence for the purpose of attaching the enhanced mandatory minimum sentence. We allow the appellant's appeal against sentence. The sentence of twelve years imprisonment with hard labour in this case is set aside and in its place we impose a sentence of five years imprisonment with hard labour. Since this offence was committed as part of a course of conduct, the five years will run concurrently with the four years in the other case; that is to say, the appellant will serve five years instead of the original sixteen years. There was, of course, no merit in the appeal against conviction and the appellant did not press it.

Appeal allowed.
