

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Confirmation Case Number 516 of 2002

THE REPUBLIC

Versus

MABVUTO JOSEPH

In the Second Grade Magistrate court sitting at Midima Criminal case number 179 of 2002

CORAM: DF MWAUNGULU (JUDGE)

Kalaile, Senior State advocate, for the state

Defendant, present, unrepresented

Kamanga, Official Interpreter

Mwaungulu, J

JUDGMENT

The judge who reviewed this matter set it down to consider the sentence. The court below convicted the defendant, Mabuto Joseph, of theft of cattle. Theft of cattle is an offence under section 281 of the Penal Code. The lower court sentenced the defendant to five years' imprisonment. The judge thought the lower court's sentence for theft of cattle manifestly excessive.

The defendant stole a pig. The defendant admitted the charges at the police. He pleaded guilty in the lower court. The defendant is 18 years old. The defendant admitted to a previous conviction for theft for which he served a prison term of four months. The lower court's reasoning on the

sentence is meager. The lower court considered the offence's gravity from the sentence the legislature prescribed. Clearly, however, the lower court imposed a heavier sentence because of the defendant's previous conviction

The sentencing approach is the same in theft of cattle as with other offences. The sentencing court must regard the nature and circumstances of the offence, the offender and the victim and the public interest

Sentences courts pass, considering the public interest to prevent crime and the objective of sentencing policy, relate to actions and the mental component of the crime. Consequently, circumstances escalating or diminishing the extent, intensity or complexion of the actus reus or mens rea of an offence go to influence sentence. It is possible to isolate and generalize circumstances affecting the extent, intensity and complexion of the mental element of a crime: planning, sophistication, collaboration with others, drunkenness, provocation, recklessness, preparedness and the list is not exhaustive. Circumstances affecting the extent, intensity and complexion of the prohibited act depend on the crime. A sentencing court, because sentencing is discretionary, must, from evidence during trial or received in mitigation, balance circumstances affecting the actus reus or mens rea of the offence.

Besides circumstances around the offence, the sentencing court should regard the defendant's circumstances generally, before, during the crime, in the course of investigation, and during trial. The just sentence not only fits the crime, it fits the offender. A sentence should mirror the defendant's antecedents, age and, where many are involved, the degree of participation in the crime. The defendant's actions in the course of crime showing remorse, helpfulness, disregard or highhandedness go to sentence. Equally a sentencing court must recognize cooperation during investigation or trial.

While the criminal law is publicly enforced, the victim of and the effect of the crime on the direct or indirect victim of the crime are pertinent considerations. The actual circumstances for victims will depend, I suppose, on the nature of the crime. For example for offences against the person in sexual offences, the victim's age is important. An illustration of circumstances on indirect victims is the effect of theft by a servant on the morale of other employees, apart from the employer.

Finally, the criminal law is publicly enforced primarily to prevent crime and protect society by ensuring public order. The objectives of punishment range from retribution, deterrence, rehabilitation to isolation. In practice, these considerations inform sentencing courts although helping less in determining the sentence in a particular case.

Applying these principles to theft of cattle, theft of cattle involves the intention to deprive the owner of cattle. Section 281 includes many animals, some large, some small, some ordinary an

others exotic. Consequently, the sentence a court chooses as a way of disposing the matter will depend on the number, type and size of the animals. Generally the sentence will be higher for larger and more exotic animals. The larger the number of animals involved, the greater the sentence. The court may enhance the sentence where there were more crimes are more than one person participated in the crime.

In this matter five years imprisonment was manifestly excessive. A pig, just one, was all the defendant stole. A pig is neither the largest nor the most exotic of animals section 281 of the Penal Code lists. It is, no doubt, a useful possession for ordinary people as the complainant is known to be. Moreover, the lower court should have considered from trends in that court and this Court establishing that more often than not more pigs are involved. If five years, *ceteris paribus*, is what a sentencing court imposes for theft of a pig, difficulties there will be if more pigs, larger and more exotic animals are stolen and stolen in larger numbers. Besides, there were many matters calling for lesser sentence: the pig was restored to the owner; the defendant pleaded guilty and was entitled to a reduction of up to a third of the possible sentence; the defendant is 18 years old; and the defendant cooperated during investigations.

Of course, the defendant had a relevant previous conviction. It was only one. The defendant, in my judgment, had not lost his whole right to leniency. The sentence of four months indicates the previous conviction was petty. In an appropriate case, and this was one, a sentencing court may overlook petty previous convictions (*Rendall-Day v Republic* (1966-68) ALR (Mal) 155. Moreover, previous convictions are no reason for a sentence higher than one the offence and the offender, after considering the circumstances of the victim and the public interest, deserve. Decisions of this Court (*R v White* (1923-61) 1 ALR (Mal) 401; *Bwanali v R* (1964-66) ALR (Mal) 329) and the Supreme Court (*Maikolo v R* (1964-66) ALR (Mal) 584) are to the similar effect.

The sentence of five years imprisonment is, as the reviewing judge and the state observed, inappropriate. I set it aside. I sentence the defendant to a sentence as results in his immediate release.

Made in open court this 8 August 2002

D F Mwaungulu

JUDGE

