



NOT REPORTABLE

CASE NO. CA 28/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

SIMON GANEB

APPELLANT

versus

THE STATE

RESPONDENT

CORAM: HOFF, J. *et* VAN NIEKERK, J

Heard on: 2008.11.14

Delivered on:: 2008.11.14 (*Ex tempore*)

Reasons on: 2009.11.27

APPEAL JUDGMENT:

HOFF, J.: [1] The appellant together with a co-accused was charged in the magistrate's court Karibib with theft of seven head of cattle (valued at N\$21 000.00) in contravention of the provisions of the Stock Theft Act, (Act 12 of 1990).

The appellant and his co-accused pleaded not guilty to the charge. The State led the testimonies of eight witnesses and the appellant testified in his own defence.

[2] The appellant was convicted at the end of the trial of the theft of seven head of cattle and was sentenced to 5 years imprisonment. The co-accused of the appellant was convicted of possession of suspected stolen property (three carcasses) and sentenced to a fine of N\$5 000.00 or 24 months imprisonment.

[3] On the day when the appeal was argued the conviction of theft of seven head of cattle was substituted with the conviction of theft of three head of cattle (from unknown individuals). The sentence imposed in the court *a quo* was confirmed. We indicated then that the reasons for our finding would be provided in due course. These now are the reasons.

[4] It must be mentioned that a Mr Michael initially presided as magistrate but subsequently when the case was part-heard resigned from the Ministry of Justice and the matter was heard *de novo* by magistrate Ms Kröhne and it is against the latter magistrate's conviction and sentence which the appeal lies.

[5] It was not disputed that the seven head of cattle referred to in the charge sheet belonged to the three different complainants.

[6] It was alleged in the charge sheet that three head of cattle belonged to Elizabeth Nanus, one head of cattle belonged to Michael Uirab, and three head of cattle belonged to Engelhard Noabeb.

[7] Levi Jagger, the son of complainant Engelhard Noabeb testified that on 1 December 2001 he opened the kraal and let the cattle out for grazing. The cattle never returned and the next day he went in search of the cattle. He eventually reached a place where he observed seven blood spots where animals had been slaughtered. The police arrived on the morning of the 4th of December 2001 and he accompanied the police to the place where the animals had been slaughtered. He identified three skins of their cows and one skin of an animal which belonged to Ms Elizabeth Nanus. He also observed at the slaughtering place tracks of a motor vehicle as well as footprints of a number of people.

[8] Michael Joseph Uiras testified that on 2 December 2001 he was informed that a number of animals had been slaughtered in their area and that he was accompanied to the scene where he observed a number of bloodstains on the ground, about seven skins, as well as the tracks of a vehicle which appeared to have pulled a trailer. The police was called to investigate. Two days later he was summoned to the police station where he identified one of the heads of the slaughtered cattle as one of his head of cattle.

[9] Engelhard Noabeb confirmed that his son informed him that three of their cows had been slaughtered. Elizabeth Nanus testified that she received a telephone call regarding the disappearance of some of her cattle. She was shown skins of cattle in the garage of Michael Uirab where she identified three of those skins as skins which belonged to her cattle.

[10] Solomon Naobeb testified that he was a senior headman and attached to a specific traditional authority. It was not clear from the record to which traditional authority he was attached to but it appears from the exhibits (A and B) handed in

through him, that he was in all likelihood at that stage the headman for Anker in the Kamanjab area.

[11] According to him his traditional authority may not issue permits to individuals in order to transport stock from one place to another but may issue an acknowledgement. An individual may obtain a permit from the relevant authorities to transport stock.

Exhibit A purports to authorize the appellant to transport the carcass of one head of cattle from Anker to Walvis Bay.

Exhibit B purports to authorize the appellant to transport the carcasses of two heads of cattle from Anker to Walvis Bay.

[12] A stamp "*KING COUNCIL, Private Bag 5006 KAMANJAB, NAMIBIA*" appears on each of the exhibits and on each one the date "*2001-12-01*" appears. A signature purporting to be the signature of the person who authorised the transportation of the carcasses appears on each of the exhibits (A and B).

[13] Solomon Naobeb testified that exhibits A and B had not been issued by his office and that the signatures which appear on the two "*permits*" did not belong to any one of the officials at his office. In addition the stamps appearing on exhibits A and B differ from the stamp used by his office. He testified that the appellant was known to him but that he was unable to testify whether the appellant visited the traditional authority for a permit to transport meat to Walvis Bay since he was absent at the stage the permits had allegedly been issued.

[14] Rheinhard Aruseb testified that he was a traditional councillor and that from 1st of December 2001 he was in charge of the offices of the same traditional authority. Exhibits A and B had not been issued by him to the appellant. The stamps appended

on exhibits A and B were not the stamps of the relevant traditional authority and the signatures on the exhibits were unknown to him. He testified that he had never met the appellant and that he was the only one in the office who could have issued acknowledgements.

[15] Walter Adriaan Rutz testified that during December 2001 he was a member of the Namibian Police attached to the Criminal Investigation Department at Walvis Bay. On 4 December 2001 he received information regarding theft of stock in Usakos area. During the course of his investigation in Walvis Bay he, together with his colleague Cst Hoëseb, visited a house where meat was being sold and there the owner produced a permit and informed him that he bought the meat from a certain man without disclosing the identity of the alleged seller. This person however directed him to a house where the alleged seller apparently resided. Whilst they were at this specific house the accused arrived there and was pointed out by this unknown person as the person who had allegedly sold the meat to him.

[16] Andreas Nekwaya testified that on 2 December 2001 the appellant together with his co-accused arrived at his house and informed him that he had meat to sell. He bought the carcasses of two heads of cattle for the amount of N\$1 500.00. The co-accused was the driver of the vehicle and the appellant did the off-loading from a trailer. The vehicle used was a sedan vehicle. The appellant wrote on a piece of paper in his presence that he had bought the meat from the appellant. On the paper appeared a stamp of "*Kamanjab district*". Both of them signed on the piece of paper. The piece of paper received from the appellant was neither exhibit A nor exhibit B.

[17] The appellant testified that on 1 September 1998 whilst serving a sentence in the Windhoek Prison a fellow inmate, Jacobus Hamaseb, borrowed N\$2 000.00 from

him. They agreed that Hamaseb would pay him three cows after his release from prison. Appellant was released during 2001 and he asked his co-accused Michael Narib to assist him to get the promised livestock. Narib provided the transport. On 1 December 2001 appellant drove to the region of Anker where he met "*the man*" (presumably Hamaseb). Heads of cattle were slaughtered and thereafter appellant travelled to the house of senior headman Ernst Gurirab, where proof of ownership was shown to the headman.

[18] On Sunday 2 December 2001 between 08h00 and 09h00 he arrived in Walvis Bay with the carcasses of three head of cattle. Appellant requested Narib to assist him in driving the motor vehicle since appellant apparently was too tired to do so. Appellant however volunteered to off-load the carcasses from the vehicle himself. Two of the carcasses were off-loaded at the house of one Andreas Nekwaya and the third carcass was off-loaded at the house of a certain lady. Appellant gave pieces of paper to the two respective buyers on which each of the buyers signed.

[19] During cross-examination the appellant testified that Jacobus Hamaseb resided in the Kunene region; that the permits were issued to the owner of the cattle by the headman; that appellant had asked for two permits to be issued since there were two buyers; that Hamaseb's name appeared on the permits but that the permits were given to him since he had to travel with the meat; that the permits were issued by the King Council of Anker and that the original permit (paper) issued to appellant got lost.

[20] Michael Narib testified and confirmed that on 2 December 2001 the appellant borrowed his vehicle and trailer in order to collect 3 head of cattle. The next day he returned with the meat and they went to off-load the meat. Two days later he was arrested by the police.

[21] The appellant in his notice of appeal set out as grounds of appeal, *inter alia*, that the magistrate erred in law and/or on the facts by convicting him of theft of stock in contravention of the provisions of Act 12 of 1990 and in particular that the evidence presented by the State did not link him to the theft of those head of cattle alleged to have been stolen from the complainants.

[22] The magistrate in her reasons for convicting the appellant, *inter alia*, stated as follows:

“The appellant never denied selling carcasses to Andreas Nekwaya and he admitted to selling a carcass to a certain lady. It was suspicious to the court’s mind that the appellant borrowed a vehicle with a trailer on 2nd December 2001 to collect cattle which was owed to him, the every same date that the stock theft incident occurred in the Usakos area. Furthermore the tracks of a vehicle pulling a trailer were observed on the scene and the seven heads of cattle were stolen and slaughtered on 2nd December 2001. The skins found at the scene were burned (sic) by the appellant in an attempt to avoid identification of the cattle via their skins.

The “permits” furnished by the appellant to Andreas Nekwaya was forged as it was not issued by the traditional authority officials of the Kamanjab district. It was furthermore suspicious to the court’s mind that two permits were issued in respect of three heads of cattle. The two traditional authority members testified that only one acknowledgement is issued in respect of a number of livestock or carcasses.

The two “permits” exhibit A and B did also not contain the earmarks and landmarks which a standard acknowledgement must contain.”

[23] I agree with the magistrate if one has regard to the evidence presented by the State, that a suspicion must have been formed that the appellant must have been one of the persons who had stolen the cattle of the complainants. However to convict an accused for any criminal conduct, a suspicion alone is not sufficient. The State must prove the commission of the offence beyond reasonable doubt. There is no evidence that the tracks of the motor vehicle and trailer observed on the scene of crime (as

testified to by some State witnesses) were compared with the tracks of the motor vehicle and trailer used by the appellant and found to be similar. Andreas Nekwaya testified that when the appellant came to off-load the two carcasses he saw the heads of two cows. However no evidence was presented as to what happened to these two heads and thus there is no evidence that the two heads referred to by the witness Nekwaya were heads of two of the cows stolen from any one of the complainants.

[24] Section 11 (1) of Act 12 of 1990 reads, *inter alia*, as follows:

*“Any person who is charged with the theft of stock or produce may be found guilty of –
(a) the theft of or an attempt to commit the theft of such stock or produce;*

Subsection 2 reads as follows:

“Any person charged with theft of stock or produce belonging to a particular person may be found guilty of any of the offences mentioned in subsection (1) notwithstanding the fact that the prosecution has failed to prove that such stock or produce actually did belong to such particular person.”

[25] It is common cause that the three carcasses appellant sold did not belong to any cattle of which he was the owner, but to someone else. Appellant’s explanation was that he received these carcasses as payment of a debt owed to him by one Jacobus Hamaseb. He received these carcasses from Hamaseb in the region of Anker and he was authorised (by way of two permits) to transport these carcasses to Walvis Bay. The evidence presented by the State was that exhibits A and B (in which appellant had allegedly been authorised on 1 December 2001 to transport the carcasses) had been forged.

[26] Solomon Naobeb testified that before the traditional authority issues any authorisation the official must physically inspect the carcass or livestock in order to verify ownership of such carcass or livestock by inspecting the landmarks or earmarks. My understanding of his evidence is that this would be possible where the carcass is accompanied by the skin and the head of the animal. He further testified that where meat is given to an individual, that the owner of such animal would give a letter to the transporter of the meat stating the origin of the meat and the fact that the meat had been given to such transporter.

[27] The appellant never disputed this evidence neither did he dispute the evidence that no authorisation was given to him by any official of the traditional authority to transport three carcasses.

[28] I am alive to the fact that an accused person has no onus to prove his innocence but where the State has presented *prima facie* evidence of the commission of a crime it is trite law that an accused person must provide an explanation which is reasonably true in the circumstances. The explanation must be an innocent one i.e. it must be inconsistent with guilt of theft.

(See *R v Parrow 1973 (1) SA 603 A; S v Letoba 1993 (2) SACR 614 (w)*).

[29] Where an accused person gives false evidence his version may be discarded and the same adverse inferences may be drawn as if he had given no evidence at all.

[30] The defence of the appellant in essence was that he could not have been the thief since firstly, he was not at the place where the head of cattle had allegedly been slaughtered (an alibi), and secondly, that he received the carcasses from the lawful owner as payment for an outstanding debt. The “*permits*” authorising the transportation of the carcasses had been forged. The appellant failed to call Jacobus

Hamaseb (the alleged owner of the carcasses) and failed to call Ernst Gurirab (the senior headman who allegedly issued the two “permits”). These persons were available and there appears on record no acceptable explanation why the appellant chose not to call them as defence witnesses.

[31] In *Elgin Fireclays Ltd v Webb* 1947 (4) SA 744 (A) Watermeyer CJ stated the following at 749, 750:

“It is true that if a party fails to place the evidence of a witness, who is available and able to elucidate the facts, before the trial Court, his failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him. (See Wigmore ss 285 and 286). But the inference is only a proper one if the evidence is available and if it would elucidate the facts.”

(See also *R v Phiri* 1958 (3) SA 161 (A) at 165; *Minister Estates (Pty) Ltd v Killarney Hills (Pty) Ltd* 1979 91) SA 621 (A) at 624). It however depends upon the particular circumstances of each case whether a negative inference ought to be drawn.

[32] I cannot find any misdirection by the magistrate when she rejected the appellant’s version as not “*reasonably possibly true*”.

[33] It is not disputed that seven head of cattle had been stolen from the three complainants mentioned in the charge sheet.

[34] The appellant shortly afterwards sold three carcasses of cattle and his explanation under what circumstances he acquired ownership of those carcasses was correctly rejected by the magistrate. I have no doubt that these carcasses were stolen from some person or persons

[35] I am however not satisfied that on the facts of this case that the State succeeded in proving beyond reasonable doubt that the appellant stole seven the head of cattle belonging to the complainants. Although there is a suspicion that the appellant stole all seven head of cattle, the evidence linking him to the theft of those specific head of cattle is simply not conclusive. It was for these reasons that the conviction in respect of seven head of cattle had to be set aside and substituted with theft of three head of cattle. In terms of section 11 (2) of Act 12 of 1990, a conviction of theft may be made even in those instances where the State failed to prove that stolen stock belonged to a particular person, as was the case in this matter.

[36] The magistrate did not in her reasons deal with the sentence imposed. The appellant was sentenced to 5 years imprisonment. The appellant has a number of previous convictions including three convictions for theft (other than stock), one conviction for receiving stolen property, two convictions for housebreaking with intent to steal and theft, and two convictions of theft of stock (cattle) in contravention of the provisions of Act 12 of 1990.

[37] It appears from the record that the appellant admitted those previous convictions. I am of the view that the magistrate did not err in any manner by imposing a sentence of 5 years imprisonment. I am further of the view that even where this Court has confirmed the conviction of theft of only three head of cattle that a period of 5 years imprisonment was an appropriate sentence.

[38] In the event the following orders were made:

1. The appeal is in part upheld and in part dismissed.

2. The conviction of theft of seven head of cattle is set aside and substituted with a conviction of theft of three head of cattle from persons unknown to this Court.
3. The sentence of 5 years imprisonment is confirmed.

HOFF, J

I agree

VAN NIEKERK, J

ON BEHALF OF THE APPELLANT:

IN PERSON

Instructed by:

ON BEHALF OF THE STATE

MR MATOTA

Instructed by:

OFFICE OF THE PROSECUTOR-GENERAL