

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: CA 14/2012

In the matter between:

**ISACK THAKUWO**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Thakuwo v The State* (CA 14/2012) [2012] NAHCNLD 07  
(19 November 2012)

**Coram:** LIEBENBERG J and TOMMASI J

**Heard:** 02 November 2012

**Delivered:** 19 November 2012

**Flynote:** **Criminal law** – Appellant convicted on a charge of stock theft – Appellant found driving cattle in direction of Namibian/Angolan border – Evidence proved appropriation (contrectatio) by the appellant of the complainant's cattle when driving them away.

**Criminal procedure** – Accused at close of the State’s case under no obligation to give evidence – However he takes a risk which increases where there is direct evidence implicating the accused in the commission of the crime – *Prima facie* case left uncontradicted, becomes proof beyond reasonable doubt.

**Criminal procedure** – Appeal – Generally – Findings on credibility – Court on appeal will not easily interfere in with credibility findings of trial court – Such interference necessary only where irregularity or misdirection by trial court occurred.

**Evidence** – Identification of accused – Evidence of single witness – No misdirection by trial court on evaluation of single evidence.

**Summary:** Appellant was convicted on a charge of stock theft (read with the provisions of the Stock Theft Act 12 of 1990) involving three head of cattle. He was convicted on the evidence of a single witness who found him driving the cattle about 2-3 km from complainant’s home, going in the direction of the Namibian/Angolan border. At the close of the State’s case the appellant elected to remain silent whereafter he was convicted. On appeal appellant questioned his proper identification by the witness and whether there was sufficient proof of appropriation (*contrectatio*) of the cattle, as element of the offence of theft. Court on appeal satisfied that no irregularities or misdirection on the part of the trial court in its assessment of the evidence proved. Court further satisfied that the driving away of the complainant’s cattle and the appellant’s assumption and his exercising of rights of the owner in respect of the cattle, sufficiently proved appropriation on his part of the complainant’s property.

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### ORDER

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1. The application for condonation is refused.
2. The matter is struck from the roll.

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## JUDGMENT

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LIEBENBERG J (TOMMASI J concurring):

[1] The appellant was unrepresented when he appeared in the magistrate's court for the district of Outapi on a charge of theft of three head of cattle, read with the provisions of the Stock Theft Act 12 of 1990 (as amended). He pleaded not guilty to the charge and after evidence was heard he was convicted as charged and committed for sentence to the regional court, which on the 10<sup>th</sup> of April 2011 sentenced him to six years' imprisonment. During the latter proceedings he was also unrepresented. The appeal lies against his conviction only.

[2] When the appellant appeared before us on appeal he was represented by Ms *Kishi*, while Mr *Lisulo* appeared for the respondent.

[3] Although the appellant initially noted his appeal against both conviction and sentence, he has in the interim, and on the advice of his legal representative, withdrawn the original notice and substituted same with a notice of appeal dated 01 October 2012, setting out the six grounds on which his appeal against conviction is founded. Whereas the appeal is noted out of time and is not in compliance with Rule 67 (1) of the Magistrates' Court Act 32 of 1944, the appellant seeks condonation from this court for his non-compliance with the rules.

[4] It is well established that in order for an application for condonation for the late noting of an appeal to succeed, the applicant must satisfy two requirements. The first is that there must be an acceptable and reasonable explanation for the delay in filing the notice of appeal; and secondly, there must be reasonable prospects of success on appeal.

[5] We are satisfied that the appellant satisfactorily on oath explained the reasons for his decision to withdraw the original notice and have same substituted with a new notice setting out proper grounds on which the appeal is founded. In view of the respondent not opposing the application for condonation counsel were invited to argue the appeal against conviction on the merits.

[6] The grounds enumerated in the notice can be summarised as follows: The State failed to prove that appellant was in actual possession of the cattle; that there was no actual contrectatio from the complainant of the alleged stolen cattle; appellant lacked intention to steal; evidence about appellant 'driving the cattle' was not clarified; appellant was not identified by the only eye witness; and lastly, the court failed to apply caution when considering the single evidence of this witness.

[7] The fifth ground pertaining to the identification of the perpetrator seems to be the central and most important ground of the appeal and I intend dealing with it first, because if the appeal succeeds on this ground, the consideration of the other grounds then becomes unnecessary.

[8] The trial court correctly in its judgment identified two main issues for consideration namely, whether it was proved that the complainant's cattle were stolen; and secondly, if so found, whether the evidence proved that it was the appellant who was the perpetrator.

[9] As regards the identification of the appellant as the perpetrator, the court found that the witness Nembungu and the appellant had known each other prior to the incident when Nembungu allegedly found the appellant driving three head of cattle, belonging to one Petrus Sheetekela (complainant), in the direction of the Namibian/Angolan border. There was an exchange of words between them before the appellant ran away. The nature of this encounter was that when Nembungu, who is a police officer, asked the appellant where he was going, he replied that he was taking the cattle home; though facing in the direction of the Angolan border. The court found that the incident

happened during the day and that the witness and the appellant not only stood a short distance apart, but also exchanged words; thus, there was no possibility of mistaken identity. The court was further satisfied that the witness Nembungu was a credible witness and that there was no reason for the court not to rely on his evidence. Whereas the appellant elected to remain silent, there was no evidence before the court that rebutted Nembungu's version of the incident when appellant was found driving away the complainant's cattle.

[10] The conclusion reached by the trial court is sound and is supported by the facts. Constable Nembungu testified that he was on duty and whilst patrolling (on foot) the Namibian/Angolan border, he came across the appellant who was driving three head of cattle in the direction of Angola. He identified the cattle as being the property of the complainant. He called out at the appellant enquiring as to where he was taking the cattle and the reply came that he was going home; though the cattle were driven in the direction of the border. When the witness approached him, appellant ran away. This incident took place at around 17h00 on 13 September 2008 and they were about 80 m apart. Nembungu testified that he had an unobstructed view of the appellant who was known to him; also that appellant and the complainant were residing in the same area.

[11] Counsel for the appellant submitted that it is not clear from the evidence whether the sun had already set the time when they met, and whether the appellant had a clear view of the appellant when he allegedly identified him. The submission is conjectural and amounts to nothing more than speculation, not supported by the evidence adduced at the trial because Nembungu said it was 17h00 *in the afternoon* (not 19h00 as counsel stated in her heads) and that there was nothing that obstructed his view. He was adamant that he had not only identified the complainant's cattle over the same distance, but also the appellant. The appellant was well known to him and they even spoke to one another when he asked the appellant about the cattle and his reply about taking the cattle home.

[12] When objectively considering the evidence set out above, I am unable to come to a different conclusion than the court *a quo* as to the veracity of the witness Nembungu, albeit him giving single evidence. It is well established that a court on appeal will not easily interfere with credibility findings made by the trial court and only where an irregularity or misdirection was committed by that court, would such interference be justified. See *S v Slinger*<sup>1</sup> at p 10 where the Full Bench said:

‘It is trite law that the function to decide on acceptance or rejection of evidence, falls primarily within the domain of the trial court.

In this case, no such irregularities or misdirections have been proved or are apparent. The findings on credibility by the trial court must therefore stand.’

See also *R v Dhlumayo and Another*<sup>2</sup> where the court laid down principles which should guide a court of appeal where an appeal is purely based upon fact.

[13] As mentioned, the appellant elected not to give evidence during the trial, despite there being direct evidence against him for committing the offence under consideration. Where the court in such instance on the one hand must be mindful of an accused’s constitutional right to remain silent, it must on the other hand decide what weight should be given to the uncontroverted evidence implicating the accused, and in this regard the court in *S v Nangombe*<sup>3</sup> stated the following at 280E-H:

‘It was not contradicted because appellant chose to remain silent which he was entitled to do. But his failure to testify strengthens the State case against him.

“On the other hand it is right to bear in mind that there is no obligation upon the accused to give evidence in any sense except that if he does not do so he takes a risk. The extent of that risk cannot be analysed in terms of logic: it

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<sup>1</sup>*S v Slinger*, 1994 NR 9 (HC).

<sup>2</sup>*R v Dhlumayo and Another*, 1948 (2) SA 677 (AD).

<sup>3</sup>*S v Nangombe*, 1994 NR 276 (SC).

depends on the correlation and assessment of the factors by the trier of fact, that is, on his judgment.”

Per Schreiner JA in *R v Ismail* 1952 (1) SA 204 (A) at 210.

In this case there was direct and circumstantial evidence, implicating appellant in the commission of the crime. The risk was therefore greater than in cases where guilt is sought to be proved by inference. While the appellant has a constitutional right to silence, the direct evidence against him could not be ignored.

“But the situation is different where there is direct evidence of the commission of the offence. In such a case the failure to testify or the giving of a false alibi, whatever the reason therefor - *ipso facto* tends to strengthen the direct evidence, since there is no testimony to gainsay it and therefore less occasion or material for doubting it.”

Per Holmes JA in *S v Nkombani and Another* 1963 (4) SA 877 (A) at 893G.’

[14] An accused’s constitutional right to silence cannot prevent logical inferences drawn from the proved facts: the circumstances of a case may be such that a *prima facie* case, if left uncontradicted, becomes proof beyond reasonable doubt. The present case falls into this category, and in our view, the assessment of the evidence by the court below cannot be criticised. Consequentially, the identity of the appellant as the person found in the circumstances described by the witness Nembungu, despite him giving single evidence, was duly established; hence, there is no merit in this ground of appeal.

[15] Although not raised in the notice as a ground of appeal, Ms *Kishi* submitted that, at the close of the State case the court failed to properly explain to the unrepresented appellant his rights and therefore he was unable to take an informed decision. This explains, so it was argued, why the appellant elected to remain silent, not appreciating the consequences of his decision.

[16] What was explained to the appellant is apparent from the pro forma (Annexure E) used by the court during the trial, setting out the rights of an accused at the close of the State’s case. Appellant was duly informed of his

rights to give evidence under oath or to remain silent; and to call witnesses. It was further explained to him that if he chose to remain silent, the court would decide the case solely on the evidence presented thus far, and that his plea explanation did not constitute evidence as it was not given on oath. The appellant thereafter indicated that he understood the explanation and opted to remain silent. From the foregoing it is clear that the appellant knew what options were open to him and the consequences of each option. Although it would have been prudent to also include in the explanation that, should he elect to remain silent, it may adversely affect his case, I am otherwise satisfied that the explanation of the appellant's rights satisfies the demands of a fair trial. Accordingly, there is no merit in this submission.

[17] I now intend dealing with the remaining grounds all in one. Constable Nembungu found the appellant *driving* three head of cattle, the property of the complainant, towards the border which was a mere 80 m from there. These cattle belonged to the complainant who at the time was unaware that his cattle were removed from his custody. The place where the appellant was found with the cattle is approximately 2-3 km from where it was kept by the complainant. Against this background it is not exactly clear to me what the appellant means when he contends that 'the State failed to prove that there was actual contrectatio from the complainant of the alleged stolen cattle' and that he was not found in 'actual possession' of the cattle.

[18] It is well established law that appropriation (contrectatio) as a description of the act no longer requires the physical handling or touching of a thing before it can be stolen.<sup>4</sup> Appropriation consists in an act in respect of which the offender (a) deprives the lawful owner or possessor of his property; and (b) himself exercises the rights of an owner in respect of such property. When applying these principles to the present facts, there can be no doubt that appropriation by the appellant of the complainant's three head of cattle, when removing them from his control by driving them away towards the Angolan border, was duly proved. The evidence further clearly shows that this act was intentional and unlawful. When found driving the cattle away, the

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<sup>4</sup>*Snyman Criminal Law 5ed at p 487 et seq.*



appellant had already deprived the complainant of his control over the cattle in that he had assumed physical control or took possession thereof, whilst exercising the rights of an owner over the said cattle through his actions. The appeal on the remaining grounds, thus, cannot succeed either.

[19] In view of the abovementioned I conclude that there are no prospects of success of appeal against conviction, and the application for condonation is accordingly refused.

[20] The matter is struck from the roll.

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**JC LIEBENBERG**  
JUDGE

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**MA TOMMASI**  
JUDGE

## APPEARANCES

APPELLANT

F Kishi

Of Dr Weder, Kauta &amp; Hoveka, Oshakati,

RESPONDENT

D M Lisulo

Of the Office of the Prosecutor-General,  
Oshakati