



CASE NO.: CR 06/2012

**IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI**

In the matter between:

THE STATE

and

- (1) IMMANUEL SIMEON
(2) SOSTENUS NGHIMBWASHA**

(HIGH COURT REVIEW CASE NO.: 27/2012)

CORAM: LIEBENBERG, J. *et* TOMMASI, J.

Delivered on: 02 March 2012

REVIEW JUDGMENT – SECTION 116 (3) ACT 51 OF 1977

LIEBENBERG, J.: [1] The accused persons were unrepresented when convicted in the Magistrate's Court, Eenhana on a charge of stock theft, read

with the provisions of the Stock Theft Act¹, for having stolen an ox valued at N\$4 500 from Hamukonda Kornelius Tuhafeni in July 2007. The matter was thereafter committed for sentence to the Regional Court.

[2] After perusal of the record of proceedings held in the trial court, the Regional Magistrate was of the view that the conviction of both the accused persons are not sustained by the evidence and decided to lay proceedings before a judge for review in terms of s 116 (3) of the Criminal Procedure Act, 1977.² The reasons advanced by the magistrate for his proposition were simultaneously forwarded which are twofold i.e. that the alleged stolen ox has not satisfactorily been identified as being that of the complainant; secondly, that where the said ox appeared to have been an abandoned and stray animal for nine years, can the possibility be excluded that accused no 1 acquired ownership by appropriation?

[3] Having pleaded not guilty to the charge, the State led the evidence of the complainant. In summary, his evidence amounts to the following: In 2007 he missed one ox described as *“red with white spot with a V cut on one ear and a finger cut underneath, the white is from the face up to the neck”*. Under cross-examination complainant changed course when asked for how many years his ox had been missing and said: *“For six years, while it was a bull with all the marks I mentioned. Nghilifa told me that it has been among Mr Gotlieb’s cattle for years and they casculated (sic) [castrated] it”*. Whereas Nghilifa was not a witness to the proceedings anything allegedly said by him

¹ Act No 12 of 1990 (as amended)

² Act No 51 of 1977

to the complainant and testified about as being the truth, would be inadmissible hearsay evidence. The State did not lead any further evidence and submitted that the accused persons should be discharged in terms of s 174 of Act 51 of 1977. The magistrate declined and after both the accused gave evidence, the court convicted.

[4] In their plea explanations first accused stated that a stray calf came at his place and which he later sold at Eenhana; while second accused (being the community police officer), said he only handed first accused the GRN brand iron to brand his cattle which were to be sold.

[5] From the scanty information placed on record through the testimony of the complainant, it is clear that after the complainant realised in 2007 that an ox of his was missing, he had not seen it again; hence, he could not have identified it at any later stage in order to confirm whether it is the same animal found to be missing. His complaint and identification seem to rely on information given to him by someone about an ox which was sold by the first accused, fitting the description of the animal as to its skin colour and pattern. This led to the arrest of the two accused persons two years after such sale. There is no explanation as to why it took two years to apprehend the accused persons. First accused did not dispute the description of the animal claimed by the complainant (he was in no position to do so as he had not seen it with the complainant), but was adamant that the one that joined his herd, was a bull-calf which he later ear-marked and castrated; and that it was in his herd

for nine years. The evidence given by accused no 1 was corroborated in every respect by an independent witness.

[6] Logic dictates that if the complainant's ox only went missing in 2007 then it could not have been the same animal which joined the herd of accused no 1 nine years earlier as a bull-calf – whether or not it fitted the description given by the complainant. In no way could they be speaking of the same animal. In any case, the complainant contradicted himself under cross-examination by saying that it was a bull (opposed to an ox) which went missing and that it had been missing for a period of six years (not two years, the time between it going missing and when sold by the accused). These are material differences and in the absence of an explanation satisfactorily explaining these discrepancies, the complainant's evidence cannot safely be relied on. The evidence of the first accused that the calf came to join his herd being a stray animal, was not rebutted; hence, his version is reasonably possibly true.

[7] There can be no doubt that the State failed to prove ownership of the ox sold by the accused and the trial court misdirected itself on the facts by finding otherwise.

[8] Section 11 (2) of the Stock Theft Act deals with the situation where the prosecution has failed to prove ownership over stock being the subject matter of an accused charged, *inter alia*, with theft of stock, and states:

“Any person charged with the 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.”

[9] A reading of the section makes plain that it only finds application if the accused person makes him/herself guilty of any of the offences mentioned therein. In other words, once the State has proved the commission of any such offence (i.e. theft), but is unable to prove ownership of the stock in question, only then will the provisions of ss 11 (2) find application.

[10] I now turn to consider the present facts and whether the first accused was guilty of any offence under ss 11 (2) of the Act, which brings me to the question raised by the Regional Magistrate whether or not ownership of the stray animal was acquired by appropriation.

[11] This Court in the case of *Fabian Nanduwa*³ dealt with a similar situation where ownership of a stray calf was claimed by the appellant and at p. 10, para [25] the following was said:

“The possibility cannot be excluded that the female calf was abandoned, given the long period that it remained at the farm of the complainant. Under these circumstances ownership would be acquired by appropriation. A person who lay claim to have acquired ownership by way of appropriation

³ Unreported Case No CA 63/2010 delivered on 25.11.2011 (as per Tommasi, J *et* Liebenberg, J concurring)

should prove that he had obtained physical control over the property in order to become owner thereof.⁴

Furthermore, in *S v Kariko and Another*⁵ at 16H-17A the following was said regarding *res nullius*:

“It seems that counsel for the appellants accepted the submission by the State that it is not incumbent upon the State, in order to secure a conviction, that the State must prove ownership of the stolen property. A reading of the authorities which we were referred to by Miss *Schnecker* bears that out and the concession was therefore correctly made in my opinion. See also *Hiemstra Suid-Afrikaanse Strafproses* 4th ed 249. The learned author however points out that when the State neglects to prove who the owner of the stolen property is the State cannot simply turn around and argue that the owner is unknown to it. It would under such circumstances be incumbent on the State to prove that the property was not *res nullius*.” (emphasis provided)

[12] Whereas the State in the present case failed to prove beyond reasonable doubt that the complainant, claiming ownership of the stray calf that ended up with first accused or for that matter, anyone else, was shown to be the lawful owner thereof, it bore the onus to prove that it was not *res nullius*, which it failed to do. In my view, the possibility cannot be excluded, taking into account the period of nine years that it had been with first accused, that the stray calf was abandoned by its owner after some time. Although it seems highly unlikely that an owner of a calf would simply abandon his

⁴*Reck v Mills en 'n Ander*, 1990 (1) SA 751 (A)

⁵ 1998 NR 13 (HC)

ownership over it for no good reason, such possibility cannot be excluded and it is for that reason that the prosecution had to show otherwise. This it failed to do. It is quite possible that the owner after some years gave up any hope of retrieving the lost animal and by so doing abandoned it. It is clear that first accused considered the calf to be without an owner (*res nullius*) and assumed ownership over it. In view of the State failing to prove that it was not a *res nullius* and that the accused on the facts could not have come to such conclusion, it cannot be said that the accused had committed an offence; at least not that he had the required *mens rea* to do so. It would equally apply to the second accused who, in the circumstances, could neither have been guilty of the offence of theft or any other offence stipulated in the Stock Theft Act.

[13] In the result, the convictions of both accused no's 1 and 2 are hereby set aside.

LIEBENBERG, J

I concur.

TOMMASI, J