



CASE NO.: CA 114/2009

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

In the matter between:

HAFENI JACOB

APPELLANT

and

THE STATE

RESPONDENT

***CORAM:* LIEBENBERG J & TOMMASI J**

Heard on: 7 November 2011

Delivered on: 05 March 2012

APPEAL JUDGEMENT

TOMMASI J: [1] This is an appeal against the conviction by the district court of Tsumeb of theft of stock. ¹

¹read with section 11(1)(a), 1, 14, and 17 of the Stock Theft Act, 12 of 1990, as amended

[2] The appellant was convicted in the magistrate court and was committed for sentence in the regional court. The divisional (regional) court magistrate, having limited powers of review was not satisfied that the conviction was in accordance with justice and referred the matter for a special review before this Court. The divisional/regional court magistrate raised, *inter alia* the concern that no caution was applied to the evidence of the accomplice and the identification evidence. The same issues are now forming the basis of the appellant's grounds of appeal. Mainga J, as he then was, with Parker J concurring, dealt with both these issues comprehensively and I need not repeat what was stated in that judgment.² The Court held therein that the proceedings were in accordance with justice and remitted the matter to the regional court for sentence. The divisional/regional court magistrate sentenced the appellant to 8 years imprisonment on 27 February 2008.

[3] The appellant withdrew his initial notice of appeal and filed a new notice of appeal. He applied to this Court for condonation for the late filing of the new notice of appeal. The application was not opposed by the respondent and counsel for the respondent conceded that there were reasonable prospects of success. The Court accordingly allowed counsel to argue the appeal on the merits.

[4] The grounds of appeal herein are that the trial court erred by:

1. *relying on the evidence of an accomplice which was neither truthful nor reliable and which evidence contradicted that of other state witnesses in material respects;*
2. *relying on the accomplice's evidence without cautioning itself of the dangers inherent in such evidence;*

² See CR176/07 delivered on 12 December 2007

3. *allowing the State to lead and accepting inadmissible evidence of the investigating officer regarding admissions and indications allegedly made by the appellant at the scene of the crime. Such evidence was tainted by material irregularities as the appellant was not informed of his rights before making such admissions.*
4. *failing to approach and evaluate with caution the evidence of identification which placed the appellant at the scene where bovine meat was allegedly found and recovered;*
5. *convicting the appellant when the value of the stock was not properly established and determined by the evidence;*
6. *finding that the State proved the stock theft charge against the accused beyond reasonable doubt.*

[5] At the outset it must be stated that the 5th ground of appeal is without merit simply because the value of the stock is not an element of the crime of theft although it is crucial for the purposes of determining the penalty provision which is applicable.

[6] In the appeal before us, both Mr Bondai for the appellant and Mr Lisulu for the respondent argued that the magistrate failed to apply caution in respect of the evidence of the accomplice and the evidence of the police officer who identified the appellant and that the conviction ought to be set aside.

[7] The point of departure for the Court of appeal is that it will not easily interfere with the trial court's assessment of the evidence unless it is shown that the trial court misdirected itself on the facts or on the law. The judgment of the trial court was brief and it was not clear that what the magistrate took into consideration when assessing the evidence. The magistrate in his statement in terms of rule 67(3) of the Magistrate's Court

Rules indicated that he applied caution and found that the evidence of the accomplice was satisfactory.

[8] The State led evidence that the appellant was seen by a police officer, Evista Nambala, on 26 February 2006 at approximately 11H00 crossing the national road between Tsumeb and Oshivelo carrying two plastic bags. She also observed another person standing on the side where the appellant was coming from but was unable to identify this person. She had met the appellant whilst he was detained at the Tsumeb Police station and she became suspicious when she saw the appellant carrying bags. She requested the driver to stop and to turn the vehicle around. When they came to place where she saw the appellant she saw him running away. The other person had also disappeared. They searched the area and found bovine meat and hoofs in the vicinity where she had observed the appellant coming from and on the side where he ran away. She described the clothing the appellant was wearing at the time. This meat was later identified by the foreman of farm Maseus at Oshivelo police station as being that of an ox belonging to his employer. The latter evidence was not disputed at all by the appellant. It appeared that the appellant was arrested shortly thereafter.

[9] Both counsel argued that the magistrate should have applied caution as this witness was a single witness giving evidence on the identity of the appellant. They argued that the magistrate should have considered the fact that the witness was in a moving vehicle, no evidence was led as to where she was seated, the appellant was running away, the fact that she failed to give details as to how long she knew the appellant and when last she had seen him.

[10] It is indeed so that this witness was a single witness and her evidence should be carefully assessed to determine whether it is satisfactory in every material respects. It is not enough to conclude that she was an honest witness but her ability to identify the appellant should be subjected to scrutiny given the fallibility of human observation.³ This witness testified that she knew the appellant well as she had regular contact with him whilst he was in the cells. She gave him food in the cells on a daily basis and had accompanied him to the clinic on several occasions. The appellant did not dispute this during cross-examination. In *S v MEHLAPE 1963 (2) SA 29 (A)*, WILLIAMSON JA on page 32 -33 stated the following:

“But what is always important in a case in which the witness says he knew the person he saw, is to test both any degree of prior acquaintance or knowledge claimed and the opportunity for a correct identification, having regard to the circumstances of the case; see the remarks of JAMES, J., quoted with approval in the judgment of HOLMES, J.A., in this Court in R v Dladla and Others, 1962 (1) SA 307 (AD) at p. 310C.”

Although no testimony was given as to the duration this witness knew the appellant it was evident that she had regular contact with him. The fact that she had prior knowledge of the appellant minimizes the risk of a mistaken identification.

[11] Ms Nambala testified that she saw a man crossing the road and it was only upon coming closer that she recognized the appellant. She also observed the person standing on the other side but she testified that she did not have the opportunity to observe him properly. This happened during broad daylight. Although no evidence was led as to exactly where she was seated in the vehicle it was not disputed that she did not have a clear view of the appellant and crossing the road. The witness was in a moving vehicle and could not have had much opportunity to observe the appellant. Although the opportunity was limited it must be borne in mind that it was

³ See *S v Mthetwa 1972 (3) SA 766 B (A)* at 768A-C:

broad daylight and the witness knew the appellant well. The witness was further able to give a detailed description of the clothes the appellant was wearing at the time. In *S v Mtetwa*⁴ the appeal Court stated that: "*These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities.*"

[12] This prosecutor withdrew the charges against the co-accused and requested the magistrate to warn the appellant in terms of section 204. Apart from the fact that this witness was not properly warned by magistrate, it was not recorded by the magistrate whether the witness was discharged or not. Both counsel raised this issue in argument. The manner in which this issue was handled was completely unsatisfactory but it has no bearing on the case against the appellant. It may be an issue which could be raised by the witness in any case where he is prosecuted and it thus falls outside the ambit of this appeal.

[13] The question is whether the evidence of the accomplice corroborates that of Ms Nambala and as such, is reliable. Mr Julius's evidence was that the appellant approached him to sell him some meat. He was then taken to the place where the meat was by the appellant. The meat was shown to him under a bridge 40 km from Tsumeb on the national road leading to Oshivelo. Whilst they were there a vehicle stopped and the appellant informed him that it was the police and he decided to leave. This witness' exonerated himself when it was clear that his involvement was far more than he was willing to admit. It is highly improbable that a legitimate sale of meat would take place at such a remote venue.

⁴ Supra at page67C

[14] Despite the poor credibility of this witness he confirms the evidence of Ms Nambala that the appellant was in the vicinity of a bridge near the national road between Tsumeb and Oshivello, in possession of bags of meat, that a vehicle stopped and that the appellant recognized that it was the police. There are some discrepancies as to where they were standing when the vehicle stopped but his evidence corresponds in material respects with that of Ms Nambala. His testimony did not only implicate the appellant but placed him at the scene where meat was found, although he denied that he knew it was stolen. Whilst his denial of his involvement is patently false, his testimony that he was with the appellant at the scene where the meat was found, has a ring of truth to it.

[15] The criticism leveled against the evidence of the pointing out by the appellant, is justified. No evidence was led that the appellant was advised that there was no obligation on him to make the pointing out and that it would be used as evidence against them or of his constitutional right to legal representation.⁵ The appellant however disputed the fact that he did the pointing out and testified that it was the co-accused who led the police to the place. The investigating officer testified that both the appellant and the co-accused took them to the place where they found a hide and intestines. He however testified that "*they stopped them*" and "*they walked in front.*" The co-accused failed to mention at all that he accompanied the appellant and the police to the scene where the one head of cattle was slaughtered. The investigating officer testified that a knife was confiscated from the appellant but that same was subsequently lost. The appellant denied having been in possession of a knife. The evidence of the investigating officer around the pointing out was not satisfactory and the version of the appellant that the

⁵S v MALUMO AND OTHERS (2) 2007 (1) NR 198 (HC)

co-accused was in fact the one who did the pointing out, could thus be reasonably possibly be true.

[16] The appellant, apart from denying that he did not point out anything, did not testify where he was on the date in question. The appellant testified only in respect of his arrest and that he was found to have been in possession of CDs. The two State witnesses namely Ms Nambala and the accomplice placed the appellant at the scene where meat was found. The State witness Mr Protasius, the foreman of the farm Maseus farm, identified the ox which belonged to his employer and this was not disputed. The appellant denied that he had stolen cattle. His defense essentially was that he was not the person which Ms Nambala had seen. The evidential burden after close of the State's case was clearly on the appellant to explain where he was at the time the State alleges he was seen 40 km outside Tsumeb close to the national road. This he failed to do.

[17] Although there is merit in the ground that the State did not prove that the appellant pointed out where the ox was slaughtered, the remaining evidence still support the conclusion reached by the magistrate. I am in respectful agreement with the sentiments expressed by Mainga J in paragraph [15] of the review judgment that: "*the evidence of Nambala was enough to convict the accused without evidence of the accomplice*". I am satisfied that the magistrate correctly concluded that the State had proven beyond reasonable doubt that the appellant is guilty of stock theft.

[18] In the result the following order is made:

1. Condonation for the late filing of the notice of appeal is granted;
2. The appeal against conviction is dismissed.

Tommasi J

I concur

Liebenberg J