CASE NO.: CA 02/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

LOUIS JOHAN WILLEMSE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: Willemse v The State (CA 2-2008) [2013] NAHCMD 371 (11 December 2013)

CORAM: **VAN NIEKERK J *et* BOTES, AJ**

Heard on: October 15, 2010

Delivered on: December 11, 2013

ORDER

1. The conviction of the appellant, on a charge of stock theft, in the Magistrate Court Khorixas, on the 27th day of May 2008, in respect of two head of cattle is set aside.

2. The sentence imposed, as well as the compensatory order made in terms of section 17(1)(a) of Act 12 of 1990 (as amended), consequential to the conviction, are also set aside.

JUDGEMENT

Botes, AJ.:

[1] The appellant, who at the time of the trial was 20 years of age, was prosecuted in the magistrate court, Khorixas, on a charge of stock theft read with the provisions of the Stock Theft Act, Act 12 of 1999, as amended.

[2] Appellant was convicted in the magistrate court, Khorixas, on the 27th day of May 2008 in respect of the theft of two head of cattle with a value of N$1,800.00 each. [1]

[3] After conviction, the magistrate, Khorixas, referred the matter to the regional court, Otjiwarongo, for sentence, where appellant was sentenced on 18 July 2008 to 8 years imprisonment of which 4 years were suspended for a period of 5 years on condition that the appellant is not convicted of theft of stock committed during the period of suspension. Appellant, furthermore, in terms of Section 17(1)(a) of Act 12 of 1990 as amended, was ordered to pay the amount of N$3,800.00 as compensation to the complainant and, in default of payment, appellant was sentenced to a further one year imprisonment. Payment of the amount should have been made with the Clerk of the Court, Otjiwarongo, on or before the 1st day in September 2008.

[4] Appellant, during the trial in the court *a quo*, as well as the sentencing in the regional court, was legally represented.

[5] Appellant noted his appeal against the conviction and subsequent sentence on 15 September 2008. He was granted bail pending appeal. It is evident from the notice of appeal that the appellant does not independently appeal against sentence as it is indicated in the notice of appeal in respect of the sentence that, *"As the conviction cannot stand, the sentence should also fall away".*[2]

[6] Due to the late filing of his notice of appeal, appellant filed an application for condonation on the 9th of August 2010.[3]

[7] The State, represented on appeal by Mr Kuutondokwa, opposed the application for condonation and submits that same should be dismissed on the grounds that:

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1 Record p 51

2 Record p 195

3 Rule 67 (1) of the Magistrate Court Rules, requires that convicted persons desiring to appeal on the s 309 (1) of the Criminal Procedure Act, 1977 – "*shall within 14 days after the date of conviction, sentence or order in question, lodge with the clerk of the court a notice of appeal in writing in which he shall set out clearly and specifically the grounds, whether of fact or law or both fact and law, on which the appeal is based."*

"8.1 There is not proper application for condonation for the late filing of the application for leave to appeal against the conviction and the sentence before Court;

8.2 There is no reasonable and acceptable explanation to the ordinate (sic) delay of up to 48 days before filing the application for leave to appeal (sic);

8.3 There are no prospects of success on appeal."

[8] In *Nakapela & Another v S,*[4] Gibson J said: "*In my opinion proper condonation will be granted if a reasonable and acceptable explanation for the failure to comply with the subrule is given; and where the appellant has shown that he has good prospects for success on the merits of the appeal; and where the appellant has a reasonable and acceptable explanation. In my opinion, the requirements must be satisfied in turn. Thus if the appellant fails on the first requirement, appellant is out of court. In determining what is a reasonable and acceptable explanation for the failure to comply with the rules of Court, the Court makes a value judgment on the particular circumstances of the case. This of necessity will vary according to each case."*

[9] As to what constitutes good cause, the following remarks of Maritz J, as he then was, in *Jose Ngongo v the State* are apposite;[5]

"Although no exhaustive definition can be given of the circumstances which will constitute good cause, it is clear that the circumstance advanced must be something which the Court considers sufficient to justify it in granting the indulgence. Although this Court has not always insisted on meticulous compliance with the rules of this court relating to applications of this nature in appeals brought without the benefit of legal assistance and has on occasion considered and granted such applications, even if no supporting affidavit has been filed in support thereof. The Court will exercise its judicial discretion upon a consideration of all the facts and circumstances including the tenets of fairness to the prosecutor and the applicant, and will, in general, be guided what is in the interest of fairness and justice. In the latter context, the extent of the delay directly impacts on the interest of the State and the accused to have finality in the case, the convenience of the court and the avoidance of undue delay in the administration of justice."

[10] In a similar vein Damaseb AJ, as he then was, in *Abraham Ruhumba v S* remarked:

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4 1997 NR 184 (HC) 185 F-I

5 Case no. CA 128/2003 unreported judgment, delivered on 22 July 2004.

"It is a notorious fact that applications for condonation for the late filing of appeals and leave to appeal by prisoners are now in vogue; such that this Court is inundated with applications of this kind. A fortiori applications that come to this Court seeking condonation must provide sufficient information as possible to enable the Court to decide whether or not the reasons for the delay are acceptable. Such applications must be bona fide."[6]

[11] If the aforesaid principles are applied to the facts of the matter germane to the application for condonation then the following picture emerges:

- Appellant, during the proceedings in the court *a quo,* was legally represented.
- Appellant was informed by the regional magistrate after sentencing of his right to appeal within 14 days against the conviction and sentence imposed.[7]
- The regional court magistrate also informed appellant that if the notice of appeal is not lodged within the prescribed period he should file an application for condonation.
- Appellant, apparently dissatisfied with his trial legal practitioner decided not to engage him for purposes of appeal and decided to make use of the services of the firm of legal practitioners, Stern & Barnard. This intention appellant already entertained at the time of his conviction.
- According to appellant, his family members are not trained in law and he is unable to recall whether any of them were in court at the time of his sentencing in the regional court, Otjiwarongo.
- Mr Jan Wessels of Stern & Barnard, on or about the 8th of August 2008 was telephonically contacted by a certain Mr Rodney Hawaeb, who introduced himself as a family member of the appellant. He informed Mr Wessels that the appellant wishes to appeal against the conviction and subsequent sentence and that appellant does not wish to proceed with the services of his previous legal practitioner. Mr Wessels, during this telephone conversation was instructed to, after the record of the court proceedings had been obtained, consider same, to draw up a notice of appeal should there be reasonable grounds of success on appeal and to thereafter take all necessary steps in order to complete the mandate.[8]

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6 Case no: 103/2003 of the High Court of Namibia, unreported, delivered on 20 February 2004 at p 6.

7 Record p 13

8 Application for condonation paragraph 3.4 to 3.6

- Stern & Barnard, on the 13th of August 2008 received the required deposit whereafter a letter dated 14 August 2008 was forwarded to the clerk of the criminal court, Otjiwarongo, requesting a copy of the existing typed case record including the judgment and sentence by the Regional Court Magistrate.

- A partially typed copy of the case record, as well as the hand written record were provided to Stern & Barnard during the first week of September 2008 whereafter Mr Wessels proceeded to compile and file a special power of attorney, as well as a notice of appeal against the conviction and subsequent sentence. Both these documents were filed on the 15th of September 2008.[9]

- After receipt of the notice of appeal, appellant applied for and was granted bail, pending appeal.

- The State did not file any opposing affidavit. As such, the facts deposed to by the applicant and Mr Wessels are not in dispute.

[12] Although Mr Kuutondokwa correctly submitted that the notice of appeal was filed approximately 47 days late, appellant, in my view, on the uncontested facts advanced a reasonable and acceptable explanation for this delay.

- Appellant was incarcerated from the date of his sentencing and had to rely on the goodwill of his family members to employ the services of Stern & Barnard and also to obtain the necessary funds to do so. This was done within a reasonable period of time from the date of sentencing.

- Mr Wessels, on receipt of the required funds, immediately requested the available transcripts of the proceedings to peruse and study to enable him to compile the necessary power of attorney and notice of appeal once the grounds of appeal could be established from the record of the proceedings.

- Neither Mr Wessels, nor the appellant, had any other choice but to await the delivery of the record of the proceedings from the court *a quo*, to establish and formulate the grounds of appeal, if any.[10]

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[9] Record pages 189 and 195

[10] In *S v Kakololo* 2004 NR 7 (HC) Maritz J, as he then was, who wrote for the court, on pg 9 said: *"Expounding on what those consequences are, Watermeyer J in Hashe v Minister of Justice and Another 1957 (1) SA 670 (C), when dealing with a "notice" in which no grounds were mentioned, said (at 675) that it "was not a valid notice of appeal, and as such it was no notice of appeal at all." The same view was echoed by Galgut J in R v Zive 1960 (3) SA 24 (T) at 26 F and Erasmus J in S v Matuba 1977 (2) SA 164 (O) at 166. Such a notice is a nullity (per Kirk-Cohen J in S v Maliwa and Others (supra) at 726 F) and does not have any force or effect (per Bresler J in S v Nel (supra) at 134 F)."*

- After receipt of the record Mr Wessels prepared and filed the necessary power of attorney, as well as a detailed notice of appeal, within a reasonable period of time.

[13] In the circumstances of this case I am of the opinion that on the detailed information provided, the appellant's reasons for the delay in filing his notice of appeal timeously indeed are acceptable and *bona fide.* Appellant throughout displayed a serious intention to appeal.

[14] As such it is now necessary to consider the merits of the appeal of appellant directed against his conviction.

THE MERITS

[15] Appellant, originally, was charged with two other co-accused, with the crime of theft, taking into consideration the relevant provisions of the Stock Theft Act (Act 12 of 1990, as amended). The charge preferred against appellant provided as follows:

"In that upon or about the 18th day of July 2005, and at of near Springbok Farm in the district of Khorixas, the accused did unlawfully and intentionally steal stock, to wit: 7 cattle, value N$9200.00, the property of or in the lawful possession of Thomas Ndjavera." [11]

[16] Appellant and his two other co-accused who were legally represented during the trial, pleaded not guilty, to the charge and it is evident from the record of the proceedings that appellant alleged he was the owner of the two head of cattle found in his possession.

[17] As such, as correctly accepted by the learned magistrate in his judgment, as well as counsel appearing on behalf of the appellant and the State during the appeal, the identification of the cattle of the complainant which allegedly went missing of which two allegedly were found on the farm of the appellant, stands central in this matter. The question that therefore comes to the fore is whether, on the admissible evidence on record, the court *a quo* was correct in finding that the State has proved beyond reasonable doubt that the two head of cattle found in the possession of appellant had been correctly identified by the complainant and his witnesses as the property of complainant and not of appellant.

[18] At this juncture I believe it is necessary to pause and mention that the two co-accused were discharged after the close of the State's case in terms of

[11] *Record p30*

section 174 of the Criminal Procedure Act, Act 51 of 1977 as amended. None of the two co-accused's names, at any stage during the evidence, were even mentioned by any of the witnesses called to testify. As such, it remains a complete mystery why, as well as on what grounds the State has decided to charge the two accused together with appellant.

COURT'S POWER ON APPEAL

[19] The general principles according to which a court of appeal should consider a case on appeal are set out in *R v Dhlumayo* 1948 (2) SA 677 (A), which principles are also embraced by the courts in the Republic of Namibia. The principles can be summarized as follows:[12]

> *"The court of appeal must bear in mind that the trial court saw the witnesses in person and could assess their demeanour. If there was no misdirection of facts by the trial court, the point of departure is that its conclusion was correct. The court of appeal will only reject the trial court's assessment of the evidence if it is convinced that the assessment is wrong. If the court is in doubt, the trial court's judgment must remain in place (S v Robinson 1968 (1) SA 666 (A) at 675H). Courts of appeal have greater liberty to disturb findings of a court a quo when dealing with inferences and probabilities (Minister of Safety and Security v Craig 2011 (1) SACR 469 (SCA) PAR [58]). The court of appeal does not zealously look for points upon which to contradict the trial court's conclusion, and the fact that something has not been mentioned does not necessarily mean that it has been overlooked."*

[20] In applying the aforesaid general principles, it also is important to keep in mind that:

(a) The court of appeal's doubts on the trial court's correctness on the facts are insufficient to set aside the decision. Nevertheless, it is the duty of the court of appeal to reject the conclusion of the trial court on a factual question if the appeal court is convinced that the conclusion is wrong. [13]

(b) It therefore is not only the findings which must be considered, but also, and especially, the trial court's reasons. Therefore, such reasons ought to be properly formulated and mentioned in the trial court's judgment. [14]

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[12] *Lexis Nexis, Hiemstra's Criminal Procedure*, Issue 5, Chapter 30, p45

[13] *Taljaard v Sentrale Raad* 1974 (2) SA 450 (A), see also *Protea Assurance Co Ltd v Casey* 1970 (2) SA 643 (A) at 648E

[14] *S v Nkosi*, 1993 (1) SACR 709 (A) at 711E-G.

(c) When the trial court did commit a misdirection in relation to the facts, the court of appeal is at liberty to disregard the trial court's factual findings, depending on the nature of the misdirection and circumstances of the case, and to reach its own conclusion. [15]

(d) If the trial court committed a misdirection, on a point of law, the court of appeal has to determine whether the evidence nevertheless establishes beyond reasonable doubt whether the accused is guilty. A point of law can thus be decided in favour of an accused and the conviction nevertheless upheld.[16]

ONUS OF PROOF IN CRIMINAL MATTERS

[21] The onus of proof in criminal matters rest on the State to proof the commission of the offence beyond reasonable doubt. In this regard Denning J, as he then was in the judgment in *Miller v Minister of Pensions* [1972] 2 All ER 372 at 373 in a well-known passage says the following: *'Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable", the case is proved beyond reasonable doubt, but nothing short of that will suffice.'*

An almost similar *dictum* is to be found in a judgment of the South African Court of Appeal in the decision in *S v Glegg* 1973 (1) SA 34 (A). An excerpt from the headnote reads as follows: *" The phrase "reasonable doubt" in the phrase "proof beyond reasonable doubt" cannot be precisely defined but can well be said that it is a doubt which exists because of probabilities or possibilities which can be regarded as reasonable on the ground of generally accepted human knowledge and experience. Proof beyond reasonable doubt cannot be put on the same level as proof beyond the slightest doubt, because the onus of adducing proof as high as that would in practice lead to defeating the ends of criminal justice."* [17]

[22] In the application of the aforesaid test, it is also important to keep in mind that no onus rest on the accused to convince the court of the truth of his explanation. In this regard, the following remarks are apposite.

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15 *Hiemstra supra*. Chapter 30 p45

16 *S v Bernardus* 1965 (3) SA 287 (A) at 299F

17 *S v Ngunovandu* 1996 NR 306 (HC) at 317H-318C

"An accused's claim to the benefit of a doubt when it might be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case."[18]

"It is trite that there is no obligation upon an accused person, where the State bears the onus, 'to convince the court'. If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A Court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true but whether one subjectively believes him is not the test. As pointed out in many judgments of this Court and other courts the test is whether there is a reasonable possibility that the accused's evidence may be true." [19]

and

"*...no onus rests on the accused to convince the court of the truth of any explanation which he gives. If he gives an explanation, even if that explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal."* [20]

THE STATE'S EVIDENCE

[23] It is evident from the appellant's notice of appeal, his main heads of argument as well as the submissions made during the appeal that appellant *in esse* submits that the learned magistrate erred in the law or on the facts to find that the State has established beyond reasonable doubt that the two head of cattle found in the kraal on the accused's farm on the 9th of August 2005 was the property of the complainant. As such, it is now necessary to turn to the evidence of the State witnesses, whose evidence, on this very issue, can be summarized as follows:

23.1 Witness 1 – Thomas Ndjavera [21]

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[18] *S v Mlambo* 1957 (4) SA 727 (A) at 738B-C; See also *S v Auala (No 1)* 2008 (1) NR 223 (HC) AT 235F-H; *S v Van Wyk* (*supra)* at 438-439

[19] *S v V* 2000 (1) SACR 455 (SCA) 455A-C

[20] *S v Difford* 1937 AD at 373

[21] Record pp38-40

This witness is the complainant in this case who, at the time of the trial, was 49 years of age. In the year 2005 seven cows, belonging to him went missing. After one Tjambiru, a neighbour, made a certain report to him, he reported the incident to the Namibian Police in Khorixas whereafter he, Alfonso Muteze and one Namaseb, went together to the farm of appellant. On the farm he identified two cows, the ears of both the animals were completely cut off. There were fresh brand marks on both animals. Two men were picked up from Sprinbokvlakte and his two children were picked up from Donkerhoek to go identify the cows. [22] His seven cows had ear marks which consisted of a half-moon at the bottom. [23] Upon arrival he recognized two of his cows. The heifer had a brand mark at the time that the cows went missing, but the calves did not have. [24] He identified the two cattle at appellant's farm in June 2005 and according to him the cattle therefore must have been stolen in May 2005. [25] He identified the two cattle based on their skin only. No mention was made by this witness (complainant) as to the colour of the skin and/or any other unique feature of the skin. The heifer was of the Afrikaner breed, whilst the cow was a Simentaler.

23.2 Witness 2 – Simon Tjambiru [26]

This witness farms on the neighbouring farm in respect of the complainant. In June 2005 he saw three cows passing through his farm. The cows had ear marks, described as a cut on top and bottom of right ear and a cut at the bottom of the left ear only. There, according to his evidence, in fact, were two cows and one heifer. The one cow was brown while the other was yellow. The heifer was almost yellow with a white spot on the head. One was big and the other two were small.

23.3 Witness 3 – Mdwohamba Andreas [27]

The witness is 50 years old and resides at the farm and his cows used to graze together with the pastor's cows (the pastor presumably is the complainant). The calves that he used to see went missing and he then saw them in Mr Oohez's, car, together with the pastor's cows. He

[22] It is necessary to pause and state that it is completely unclear whether this was done before or after the identification made by the witness or simultaneously with him.

[23] Record p38; During complainant's evidence, the State handed exhibit "A" into court, allegedly depicting the complainant's earmarks, but this sketch differs from the description given by the complainantDespite this, the complainant only orally testified of his earmark consisting of a half-moon at the bottom.

[24] Record p38, lines 10-12; This averment of complainant is contradicted by all the evidence on record, which clearly indicates that the heifer did not carry any brand mark, other than appellant's father's brand mark when same was found.

[25] Record p38, bottom and p39 top

[26] Record pp40-41

[27] Record pp41-42

knows the complainant's cattle well because he is the one that brought them up. The cattle of the complainant had ear marks, but no brand marks,the ear marks being a cut on each ear. Of the three cattle that he saw in the possession of Mr Oohez's, one was male and was castrated and was bleeding and the other two were females.

23.4 Witness 4 – Simon Joseph [28]

This witness is the farm worker of appellant. He had been working on the farm for 5 years. In July 2005 he arrived on the farm from Khorixas, after being away for a week, and found a cow and a calf he had not seen previously. Appellant informed him that these were his cow and calf. The cow was slaughtered at a later stage. The cow was grey in colour and had no brand marks. After the cow was slaughtered there were no other strange cows and/or cattle remaining besides the calf, as he testified that he knew all the cattle there. [29]

23.5 Witness 5 – Alfonso Muteze [30]

This witness is the investigating offices in this particular case. On 9 August 2005 the complainant reported the theft of complainant's cattle to him. [31] He and the complainant drove to the farm Morrison where he had information that the cattle could be. The complainant went into the kraal and identified two cattle in the kraal. The ears of the cattle so identified, were totally cut off. The complainant was then asked by this witness *"if there was any other person who knew the cattle and he said that they were there."* [32] Sergeant Howoseb went to collect the witnesses who were kept a distance from the kraal. The complainant was kept away from these witnesses. The witnesses pointed out the same cattle that complainant had pointed out. The witnesses were the two children of the complainant and a neighbour. Photos were taken and were described as follows:

"Photo 5 – a picture of an animal pointed out by the neighbour.

Photo 7 – is an animal pointed out by the complainant.

Photo 9 & 11 – photos of animals pointed out by complainant's child.

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28 Record pp41-42

29 Record p43, lines 6-10

30 Record pp43-44

31 Record p43

32 Record p43, 5th last line.

Of the two animals, one was male and one was a female. [33] According to this witness, and contrary to the complainant's evidence, a total of seven cows and calves were missing. The witness, during cross-examination admitted that on photo 7 and 11 it can clearly be seen that the ears were not totally cut off as previously attested to by him and the complainant. In fact, on the photographs of the male calf (tollie), handed in as part of exhibit "B" in the court *a quo,* it is evident that the animal still had its ears and that it, on the photograph, seems that only the tips of the ears were removed. In the appellant's kraal there were similar cattle of similar colour to those identified by the witnesses. The brand marks were still fresh as flies were around the marks. [34] The witnesses could only identify the animals based on the colour of their skin *"because the ear marks were removed"*. He did not remove the cattle pointed out from the farm of the appellant because appellant as well as complainant claimed ownership of the two cattle. The witness did not find any trace of the seven missing cows. The witness furthermore investigated the information in respect of the cattle allegedly seen with Mr Oohez's and it was established that it was incorrect.

23.6 Witness 6 – Jerry Urimowandu [35]

This witness is the son of the complainant, the latter being State witness no. 1. In July 2005 he lost some cattle. He, according to his evidence, in fact, already searched for the cattle and could not find them during June and July 2005. After a week, presumably after the initial discovery of the missing cattle, during June 2005, he went to his father and informed him about the missing cattle. After some days, the Police approached him and took him to identify their cows. He was taken to the appellant's farm. The police took *"them to a kraal"*, he identified two calves. He identified the calves based on their colour. One was brown and one was yellow with *"a white colour on the face*". He was taken by the police to the farm of the appellant during the month of July 2005. [36] There were no other cattle of similar colour, i.e. brown and yellow in the kraal as those that he identified. The seven cattle that went missing consisted of four female calves, two heifers and one cow.

23.7 Witness 7 – Eliah Urimuvandu [37]

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[33] Record p44

[34] Record p44, lines 1-6

[35] Record pp44-45

[36] Therefore not on the 9th of August 2005 as alleged by the investigating officer.

[37] Record pp45-46

This witness is 17 years of age and presumably the child of the complainant. He and other persons were collected by the police and taken to a farm where they had to identify cattle. They were taken from the car one by one to identify the cattle. He identified two of the seven missing cattle. He knows the cattle well, the one was yellow in colour with a white face and the other was brown. The identification was made in during July 2005. The seven cattle that went missing consisted of three adult cattle and four calves, i.e. *"three big ones and four same size, and we found two same size."* The witness indicated that he does not know of any other cattle with the type and colour of their cattle and that he only identified the cattle on their colour.

[24] After the close of the State's case, the two other co-accused were discharged in terms of section 174 of the Criminal Procedure Act, Act 51 of 1977.

[25] The appellant then also testified in his defence and was cross-examined by the State. The appellant's evidence can be summarized as follows:

Appellant testified that he is the accused in this matter and he is charged with the theft of seven cows. [38]

Appellant testified on the 16th of August 2005, the police came to their farm. He was informed that they were looking for cattle and he indicated that he had no problem if they want to go to the kraal. At the kraal the owner pointed out a calf and Sergeant Howoseb then said *"this one is also marked like the one you have pointed out and is not one of them."* Two calves were pointed out by the complainant. The calves had appellant's father's brand marks as they only used the one brand mark. It however carried the appellant's earmarks which is a straight cut at the points of the ear. At the stage when the police arrived, it was only the two calves remaining as the mothers of the calves, which appellant received from his uncle during January that same year, were slaughtered when the calves turned six months. According to the appellant he farms with Brahmans, Afrikaners, Bruin Switser, Simentaler and Bonsmara.

Appellant testified that the cattle are his and that he knows nothing about the four cows found on Mr Oohez's trailer. According to the appellant - *"The calves belonged to different mothers. I told the police and complainant that I slaughtered the two mothers and sold the meat to Mr Ooshez and the skin to the bottle store, but they did not want to listen to me and locked me up."*

During cross-examination appellant testified that the cow he slaughtered, as testified to by Mr Simon, when the latter returned from Khorixas, was a cow that he exchanged with goats and when Simon arrived there he did not know about the cow which he, in the meantime, acquired and as such was informed

[38] The original charge sheet compiled referred to seven cows. This however was on the face of the charge sheet deleted and substituted with 7 cattle only.

that he purchased the cow. The appellant also admitted that he was mistaken in respect of the date of when the police came to his farm being the same date as on which he was arrested, which was the 11th of August 2005 and not the 16th of August 2005 as originally testified to.

[26] Mr Wessels, as part of the appellant's heads of argument annexed an annexure thereto (annexure "A") which crystallizes and summarizes some of the material differences in the evidence of the State witnesses in respect of the identification of the complainant's alleged stolen cattle. This annexure is reproduced hereunder.

	Witness 1	Witness 2	Witness 4	Witness 5	Witness 6	Witness 7
Type of Animal	Cows	Three cows	Cow and calf	Cattle	Two calves	Two cattle
Number of animals missing	Seven cows	Not mentioned	N/A	Not mentioned	Seven (four calves, two heifer, one cow)	Seven (three adult animals and four calves)
Ear marks of animals	Half moon at the bottom	Half moon on top and bottom right ear Half moon on bottom left ear	Not mentioned	Not mention	Not mentioned	Not mentioned
Ears cut off or not	Ears cut off completely	Not mentioned	Not mentioned	Ears totally cut off / ear marks only tampered with	Not mentioned	Not mentioned
Time duration between time that animals went missing and the date on which they were identified	One month	This witness saw the three cows passing his farm during June 2005	Cow and calf arrived in July 2005 on the farm	Not mentioned	Two months	Not mentioned
Months in which animals were identified	June 2005	Saw animals June 2005	Not mentioned	9 August 2005	July 2005 / not 9 August 2005	July 2005
Month which animals went missing	May 2005	Not mentioned	Not mentioned	9 August 2005 – first report	June/July 2005	Not mentioned
Breed of animals identified	One heifer – Afrikaner One cow Simentaler	Not mentioned	Not mentioned	Not mentioned	Not mentioned	Not mentioned
Colour and/or description of animals identified	Not mentioned	One brown cow, one heifer – yellow with a white spot on head	Grey in colour	Not mentioned	One brown animal and one yellow animal with "a white colour on the fact"	One yellow cow with white face and one brown
Brand marks of animals	Not branded	Not mentioned	No brandmarks	Not mentioned	Not mentioned	Not mentioned
Gender of animals	Female	Not mentioned	Not mentioned	One male & one heifer	Not mentioned	Not mentioned
Method of identification – separately or individually	Does not mention any other person identifying	N/A	N/A	Separate identification by two brothers	Not mentioned	Separate from his brother

[27] Appellant in his notice of appeal against conviction raised various grounds in respect of which appellant submitted that the magistrate in the court *a quo* erred in the law and/or on the facts. [39]

[28] Appellant submitted that the learned magistrate erred in the law and/or on the facts in *inter alia* the following respects:

28.1 The finding of the learned magistrate that complainant positively identified two of his cattle in the kraal of the appellant based on the colour of the skin of the animals. In this regard the learned magistrate remarked as follows:

"He, (witness 1) identified the cattle through the skin colour and says they were calves born at his kraal. He said there were similar cattle in the kraal, but he identified his, because he knew they were born in his kraal."

This finding of the learned magistrate is not correct as the complainant (witness 1) never ever indicated the colour of the skin of the animals, he so identified. This witness also never stated that there were similar cattle in the kraal at the time of the identification. It is only the 6th state witness who testified in respect thereof.

28.2 The finding of the learned magistrate that the second state witness, Simon Tjambiru, correctly described the cattle that he saw, cattle belonging to the complainant, their size, their colour and their earmarks. [40] This finding of the learned magistrate is also, as Mr Wessels, correctly submitted, not borne out by the evidence as the complainant testified that his cattle carry' earmarks of a half-moon at the bottom', while Mr Simon Tjambiru (witness 2) described the earmarks that he saw on the cattle as a <u>cut on top and on the bottom of the right ear and a cut at the bottom of the left ear, which is in total contradiction with the what the complainant testified</u>. Mr Simon Tjambiru in fact was the first witness to refer to the heifer as an animal with an <u>almost</u> <u>yellow hide/skin</u> and a white face. This was never testified by the complainant.

28.3 That the complainant's witnesses and Jerry Urimowandu and Eliah Urimuvandu all identified the cattle at the kraal of the appellant on the same date. [41] This is not borne out by the evidence on record. Complainant testified that he identified the cattle at the kraal of the

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[39] Record p190-195

[40] *"The second witness saw the cattle pass by his homestead. He described the cattle he saw from the size, colour and earmarks and his description fitted in well with the cattle that complainant was looking for and later found at accused 1's kraal."*

[41] Although this has not been explicitly stated by the magistrate, it is evident from his reasoning that he at least accepted that it took place on the same occasion; alternatively he did not consider the difference in the evidence at all.

appellant during June 2005 while the investigating officer in this matter, state witness 5, Constable Alfons Muteze testified that he accompanied the complainant on the 9th of August 2005, some two months later for an identification of the cattle. On the uncontested evidence, it seems that the complainant identified his cattle at the kraal of the appellant on more than one occasion and as such, it would have been very easy for complainant to give a description of the cattle allegedly involved to his two sons in order to allow them to also identify the same cattle at a later stage. Both sons, as indicated in the summary of evidence hereinbefore, testified that they were taken to the kraal of the appellant by the police in order to identify the alleged stolen cattle. According to Jerry Urimowandu this was during July 2005.

28.4 In not considering, at all, that the only two animals in the kraal of the appellant, at the time of the alleged identification, who carried fresh brand marks and earmarks, were those allegedly identified by the witnesses, and as such, therefore it would have been easy for the two sons of the complainant to merely identify the two calves/cattle having been freshly branded and freshly earmarked.

28.5 In taking into consideration that the two calves, pointed out by some of the state witnesses were visibly not of the same size and for that reason cannot be calves born in the same period of time. This finding indeed is in contrast with the clear evidence on record that the calves were born from different mothers and as such it must be accepted that the type of breed, the size of the bull and the size of the cow will be determining factors that the size of the calf eventually will be. [42] This finding furthermore is contrary to the evidence of witness 7 as he testified that: *".... and we found two same size."*

28.6 In accepting the evidence of the fourth state witness, Simon Joseph, the farm worker of the appellant in respect of some issues and rejecting it in respect of others. This state witness testified that in July 2005, when he returned to Khorixas to the farm, after a week's absence, he found one cow and calf that he did not know. The appellant told him that the cow and calf belong to him and that the cow was slaughtered shortly afterwards. The colour of the cow was grey and the cow had no brand mark. After the cow was slaughtered, the only foreign animal that remained on the farm of the appellant was the calf that came with

[42] In this regard the learned magistrate also overlooked the evidence of the seventh state witness, Eliah Urimuvandu who testified *"when they went missing, there were three big ones and four same size and we found two same size."* See record p45

the slaughtered cow. This uncontested evidence in my view is destructive of the evidence of the other state witnesses.

28.7 In not considering that the cattle identified by the complainant and his two sons possessed no unique or distinguishing mark or feature in the form of a brand mark and earmark or an unique colour or any other unique feature by way of which it could have been identified positively. In this regard one should keep in mind that it only was the two sons that described the cattle and the colour of their skins while the complainant never mentioned that feature.

28.8 In accepting and/or relying on the investigating officer's evidence that the neighbour of the complainant, who was never called to testify under oath, also positively identified the same cattle. What this neighbour allegedly told the police in respect of identification of cattle, is inadmissible hearsay evidence. Even if this person is the same person as witness 2 that testified on behalf of the State, the fact of the matter remains that his report to the investigating officer, as to a possible identification, was not supported by his own evidence in court and therefore remains inadmissible. [43]

[29] It is evident if the summary of the witnesses' evidence as referred to hereinbefore is compared with the submissions made by appellant in respect of the grounds on which appellant relies for and in respect of the misdirections of the court *a quo* that most, if not all, indeed are correct and as such must be accepted. These misdirections, having regard to their cumulative effect, indeed are material as they have an important bearing on the question whether the State proved beyond reasonable doubt that the complainant indeed was the owner of the two head of cattle in question. As such, this court, in my opinion, is entitled to consider the matter afresh.

[30] There are, on the evidence on record, material discrepancies in respect of the evidence of the state witnesses in respect of the identification of the two head of cattle in the kraal of the appellant, when the identification(s) took place, as well as the identification procedure followed. These contradictions and/or discrepancies are apparent from not only the contents of the spread sheet and the evidence of the witnesses, referred to *supra,* but also from the following.

30.1 None of the information provided by witness 1 was in fact confirmed by any of his sons (witness 6 and 7), save for the number of animals missing. In respect of each and every other aspect referred to in the

[43]Record – Judgment p54 *"The other person to identify was a neighbour according to the officer's evidence and he too identified the same cattle complainant had identified and this is indicated on the photographs."*

spread sheet, they either completely differed or alternatively did not make mention of that specific fact. Witness 1, for example, refers to animals identified as two cows, while witness 6 refers to two calves and witness 7 to two cattle. One, certainly, can expect that a person who is called on the identification of his cattle on general features at least will be able to differentiate between cows, bulls, heifers, oxen and tollies[44]. This distinction the complainant apparently was not even remotely aware of as he identified in the kraal a heifer and a cow, whilst on the photographs, handed in as exhibit "B" in the court *a quo*, he pointed out a tollie and a cow/heifer.

The complainant therefore can be described on the same footing as to his knowledge of his own cattle as Pickering J, ascribed to one inspector Mostert of the South African police services, when he said.

"A "heifer" is authoritatively defined in the Concise Oxford English Dictionary as being "a cow that has not borne a calf or has borne only one calf." Not so, however, according to Inspector Mostert of the South African Police Services who, bringing the weighty authority of his 8 years experience in the Middelburg Stock Theft Unit to bear upon the matter, proclaimed a "heifer" to be "a breed"; declared that the heifer with which this case is concerned was in fact "a bull but I think we can say it is an ox" and then nailed his colours to the mast with the categorical assertion that "the heifer is an ox." He therefore confidently sallied forth on Thursday, 7 August 2008 to arrest and detain the plaintiff upon a charge of having stolen this bovine chimera from one Sabelo Sikunana." [45]

30.2 In respect of the earmarks of the animals, it seems as though complainant does not even know his own earmarks as he referred to same as half-moon at the bottom. He did not testify as to which of the two ears. Witness 2 however refers to earmarks as per annexure "A", which forms part of the case record.

30.3 According to witness 1, the animals were missing for approximately one month, while witness 6, his son, refers to a period of double that time, being two months.

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[44] 'Tollie'is described in the Oxford Pocket Dictionary as a castrated bull calf.

[45] *Nqweniso v Minister of Safety and Security* (2267/2010) [2012] ZAECGHC 84 (18 October 2012)

30.4 According to witness 1 the missing animals were identified in June 2005, while according to the police, witness 5, it was on 9 August 2005, while the two sons attested to the fact that it was in July 2005 and not on 9 August 2005.

30.5 According to the complainant, the missing animals went missing in May 2005, while according to witness 6, his son, the animals only went missing in June/July 2005.

30.6 Witness 1 is the only witness who makes mention of the type of animal as far as the breed is concerned. The breed is not mentioned by any other witness.

30.7 As far as the gender of the two animals are concerned, that were identified, State witness 1 refers to them as female, while the state witness 5 refers to the identified animals as one male and one female. The gender of the animals was not mentioned by his son, witness 7. Witness 6, his other son, first testified that two calves were found and later referred to two cows.

30.8 The only common ground to be found is between witness 2, 6 and 7 in the mentioning of one brown animal and one yellow animal with a white spot on the head. (according to witness 6 a white colour on the face, whilst witness 7 testified, *"with white face")*

30.9 In respect of the process in which the animals were allegedly identified, witness 1 does not make mention of any other witness or person who allegedly identified any cattle at the time that he was with the police at the farm/kraal of the appellant. Witness 5, the police officer, and witness 7 testified to separate identifications of animals on the farm of the appellant. This fact is however contradicted by witness 6 who stated *"they took us to the kraal."*

30.10 The evidence of witness 5, the investigating officer, where he testified that the complainant was asked by him whether there were other persons who could identify the cattle. The first state witness answer was *"they were there."*

30.11 The State never led evidence as to the position where the state witnesses 6 and 7 were allegedly kept. No evidence therefore is on record whether it was in viewing distance of the kraal, where photographs were taken or what the distance between themselves and

the kraal was. The onus clearly rests on the State to prove the facts to render the identification process and procedure followed to be reliable and not irregular. It is for the State to prove the facts that one witness did not witness the manner in which other persons identify cattle and specifically which cattle they identified. This, the prosecution failed to do.

30.12 The contradicting evidence between the evidence of witness 5 that there were similar cattle of similar colour in the kraal of the appellant as those identified by witness 6 and 7 at the time of the identification. In direct contrast to this fact, state witness 6, clearly, stated that there were no other cattle similar in colour to those that they identified in the kraal other than those identified.

[31] The State, represented by Mr Kuutondokwa, in his heads of argument, as well as during submissions made, submitted in respect of the evaluation of the evidence on record, that there is no direct evidence against the appellant other than circumstantial evidence. As such, the court was referred to the cardinal rules pertaining to reasoning by inference as laid down in the well-known matter of *R v Blom*, 1939 AD 188. [46]

[32] It is trite law that a court, in this reasoning process, may not decide a case in the light of inferences which arise only from selected facts considered in isolation, but the evidence must be weighed as a whole and as such it is required that the State must satisfy the court, not that a separate item of evidence is inconsistent with the innocence of the accused, but only that the evidence taken as a whole is beyond reasonable doubt inconsistent with such innocence. [47]

[33] Insofar as pointing out of the cattle may constitute circumstantial evidence and/or be part thereof, then the material contradictions, flowing from the evidence on record, in my view, is of such a nature that the proved facts cannot be said to be such that they exclude every reasonable inference from them, save the one sought to be drawn by the State, namely that the two head of cattle found in the possession of the appellant indeed were the property of the complainant.

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[46] At p202 to 203 of the judgment where it was held that – *"In reasoning by inference, there are two cardinal rules of logic which cannot be ignored: (1) The inference sought to be drawn must be consistent with all the proved facts. If not, the inference cannot be drawn. (2) The proved fact should be such that they exclude every reasonable inference from them, save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."*

[47] *R v Sacco* 1958 (2) SA 349 (N) 353; *S v Van der Meyden* 1999 (1) SACR 447 (W) 450; See also: *R v De Villiers* 1944 AD 493 at 508-509; *S v Reddy & Others* 1996 (2) SACR 1 (A) at 8

[34] The State in its heads referred to the review judgment, in the matter of *S v Kapuika,* where Mainga J, (as he then was) who wrote for the court, indicated that *"Our courts by now should recognize and accept that a Herero and perhaps anyone else can recognize his animals by their colours even though that form of identification could be misleading."*

[35] It is evident from the reading of that review judgment, as well as passage quoted, that Mainga J,qualified the very statement made by the using of the words *"even though that form of identification could be misleading."*

[36] There, in any event, is no suggestion in the court's reasoning in the matter of *S v Kapuika*, which indicates explicitly or even impliedly that the court was of the opinion that the normal rules pertaining to opinion evidence, as well as evidence of identification which had developed over the years, are not applicable in respect of items that one commonly find in the market place.

[37] As such, it is of the utmost importance, for obvious reasons, that any identification made during the course of a criminal trial, which is of importance, should be correct in most, if not in all respects. In the event of an identification it is usually required that a unique or distinguishing feature be pointed out in respect of the items so identified, should such item be regularly available on the market, like cattle. Reference to a colour of an animal in a general manner cannot constitute a unique or distinguishing feature at all as there are in this country thousands of bovines which are brown and yellow in colour with or without white spots on their faces or other parts of their body.

[38] If the colour of a bovine indeed amounts to a unique and/or distinct feature on which the State intends to rely for identification of same, then the onus rests on the State to place cogent and reliable evidence before the court in respect of the said unique and/or distinguishing feature in respect of the colour of the bovine so as to enable the court to come to the conclusion, beyond reasonable doubt, that the distinguishing mark and/or unique feature indeed is of such a nature that it distinguishes the said animal from other animals of the same breed and colour.

[39] Prosecutors therefore, in their preparation for and in respect of cases where the identification of animals and/or bovines is material, should take all necessary steps during the preparation of the case and the presentation of the State's case in court that cogent, admissible and reliable evidence is placed before the court, not only as to the general features of the animal concerned, i.e. breed, age, gender, sex etc, but also in respect of the distinguishing feature or unique feature relied upon for the identification of the animal concerned. Experience has shown that care is often not taken in establishing

precisely what kind of bovine is concerned, e.g. is it a cow or a heifer, is it an ox or a heifer, is it a male calf or a female calf, is it a bullock, or a tollie, or a steer, or a bull. Care should be taken during the proceedings that interpreters also realize that their interpretation pertaining to the description and features, whether general or not, is of the utmost importance to arrive at a just conclusion of the matter and therefore, where a witness may refer for instance to 'cows' in his evidence that same should not be interpreted as 'cattle' and/or 'calves' only. Depending on the circumstances such a difference can be fatal to either the State or an accused's case.

[40] In this regard the remarks of Ndou J, in the matter of S v Shereni[48] are apposite:

"*The learned trial magistrate rightly observed in her judgment:*

> *"The only issue before this court is to establish whether or not the cattle belong to the accused or whether indeed they belong to the complainant."*

The complainant in count 1, Abraham Chitimbe identified his beast as follows. It was brown with short horns facing "o/wards" I can only discern that this means outwards.

Complainant in count 2 Batsirayi Muzengeza described his two missing beasts in the following manner. One was black with one of its horns bent downwards. The other was black with white head (The horns were not described for the latter beast). The complainant in count 3, Enock Mushore, described his missing beast as brown and having the tips of its horns chipped off. It is apparent that many beasts fall in the descriptions given by the complainants. There are many brown head of cattle with short horns facing outwards. There are many black beasts with horns bent downwards. There are many black beasts with white spots on the head. There are many brown beasts with tips of horns chipped off. There are no distinguishing features used by the complainants to describe their cattle. In such issues even a plausible witness may make a genuine error on the identification of his stolen/missing bovine. It is for this reason that owners of cattle use brand or other distinguishing marks. In the rural herd mutilation of the beats' (sic) ears is a common way of identifying the cattle with the owners.

The issue here cannot be resolved by a mere finding on credibility. On account of the so-called presumption of innocence, the general rule of policy

[48] [2005] ZWBHC 103

requires that the prosecution should ordinarily bear the onus on all issues – R v Britz 1949(3) SA 293(A) at 302, R v Mabole 1968(4)SA 811(R) and Kombayi v S HB-27-04. The state has to prove all elements beyond reasonable doubt. The onus to prove the case beyond reasonable doubt lies on the state and not on the accused. All the accused needs to do is to put forward a defence which is reasonably true – S v Dube 1997(1) ZLR 225 (S); S v Nziradzepatsa 1999(1) ZLR 568(H) and Masuku v S HB-101-04."

[41] In my view, steps should be taken to limit the possibility of an incorrect identification, whether *mala fide* or not, The police therefore, whenever and wherever possible, should first require the complainant and the witnesses to give a detailed description of all the cattle that were lost, including any unique and/or distinguishing features in order to establish to what extent any cattle identified at a later stage in fact compare with the initial description so given. If this is not done it will be easy for any complainant or a witness to identify an animal that ever so slightly resembles the animal that he or she lost or which the complainant *bona fide* believed that he or she lost.

[42] *In casu,* no such safeguard was employed. The complainant in fact merely said that he identified his cattle on their skin. He did not even bother to mention the colour(s) and/or features of the animals. One would at least have expected of the State, who bears the onus of proof, to lead full evidence in respect of the gender, the age, the colour, the brand marks, the earmarks and any unique or distinguishing feature pertaining to the two animals identified.

[43] The State, as a result of the material differences in the state witnesses' versions as to the relevant and material aspects referred to hereinbefore and in the absence of any evidence as to distinguishing and/or unique features of the two bovines failed to prove beyond reasonable doubt that the cattle indeed was the property of the complainant.

[44] The learned magistrate, in his judgment, levied criticism directed against the appellant's evidence in the court *a quo.* This, according to the learned magistrate, was due to the uncertainty as to the alleged exchange by the appellant of the strange cow and calf that witness 4 of the State found on appellant's farm after his return from Khorixas. This criticism of the magistrate was centred on the following questions and answers on the record that read as follows: [49]

[49] Record p48 – According to this witness the colour of the cow was in any event grey.

"*Q: You earlier said that your cattle had been in the kraal since they were born had you forgotten about this.*

A: You had not asked about the mothers.

Q: But they are your cattle also.

A: I was not asked specifically about the two cows.

Q: Mr Simon your employee said the cattle came in June.

A: While Mr Simon was here in Khorixas I exchanged that cow and goats and when he came the cow was there and did not know the cow. He asked me about it and I said it was my new cow that I brought.

Q: Is it the same cow that you slaughtered a week after.

A: When Mr Simon arrived we slaughtered the cow the following day because it was thin and old.

Q: You are saying the cow which came from your uncle you exchanged it with goats and it came and you slaughtered it.

A: No the one from my uncle I exchanged it and the new one I got I slaughtered it. "

[45] The last answer given is not entirely clear. After re-examination the matter was clarified when the magistrate asked the accused, '*Which cows were exchanged with the goats*? And the accused replied, '*It is one cow and a calf that Simon did not know about and it is not the one from my uncle*.'

[46] In my view, having regard to the evidence on record, as well as the appellant's testimony, as a whole, the learned magistrate in his approach was over critical of the appellant's evidence. Appellant's evidence was not of such a nature and poor quality, taking in consideration all the material discrepancies and contradictions in the State's evidence that a court can conclude, in the absence of any unique or distinguishing feature of the bovines in question having been established, that appellant's version is false beyond reasonable doubt and as such therefore should be rejected.

[47] In the circumstances the following order is made

3. The conviction of the appellant, on a charge of stock theft, in the Magistrate Court Khorixas, on the 27th day of May 2008, in respect of two head of cattle is set aside.

4. The sentence imposed, as well as the compensatory order made in terms of section 17(1)(a) of Act 12 of 1990 (as amended), consequential to the conviction, are also set aside.

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BOTES, AJ

I concur.

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Van Niekerk, J

ON BEHALF OF THE APPELLANT: Mr Wessels

Stern & Barnard

ON BEHALF OF THE RESPONDENT: Adv Kuutondokwa

The office of the Prosecutor-General.