



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: CA 123/2016

SAUL MBAISA

APPELLANT

versus

**THE
RESPONDENT**

STATE

Neutral citation: *Mbaisa v S* (CA 123/2016) [2017] NAHCMD 259 (8 September 2017)

Coram: SHIVUTE J et USIKU J

Heard: 30 June 2017

Delivered: 8 September 2017

ORDER

Appeal against conviction and sentence is dismissed.

APPEAL JUDGMENT

SHIVUTE, J (USIKU J CONCURRING)

[1] The appellant was charged in the magistrate court with theft read with the provisions of the Stock Theft Act, 12 of 1990, alternatively possession of suspected stolen stock in contravention of s 2 of the same Act as amended. It is alleged that he stole eight head of cattle, the property of Willem Petrus Swart or alternatively he was found in wrongful and unlawful possession of stock valued N\$28000 of which he was unable to give a satisfactory account as to how he came to possess them. Both offences were allegedly committed during June 2010. However, as the trial progressed it became apparent that the offences were allegedly committed during April 2010. The appellant pleaded not guilty to both counts and at the end of the trial he was convicted on the main count in that he stole in concert with another person who is now deceased. He was sentenced to five years' imprisonment.

[2] The appellant is aggrieved by both the conviction and sentence hence this appeal.

[3] The grounds of appeal may be summarised as follows:

- (a) The learned magistrate erred in law and in fact by overemphasizing the inconsistencies in the evidence of the appellant therefore shifting the burden of proof to the appellant by holding that the appellant failed to inform the Court about the correct number of cattle from Aminuis to Karoo Auction in Gobabis and by making a finding that the Appellant acted in common purpose with one Matobele who is now deceased.
- (b) The learned magistrate misdirected himself by ignoring the concession made by Mr Mandi and counsel for the State that the State did not have a strong case.
- (c) He further misdirected himself by failing to take into account the evidence adduced by the complainant in cross-examination where he

conceded that he did not have any proof that (5) five of the cattle had his earmarks, ear tags, and brand marks which are proof of ownership.

- (d) The learned magistrate erred in law or in fact when he held that the two cattle taken to South Africa belonged to the complainant. Furthermore the learned magistrate ignored the fact that the Appellant was not placed at the scene of crime.
- (e) The learned magistrate failed to analyse the evidence in cross-examination and failed to apply his mind to the facts.

Factual background

[4] The complainant in this matter lost about thirty three herds of cattle due to theft. He went to the River Camp together with the police and identified six cattle as his. One of the cattle was a heifer that had his brand mark. The other five cattle were young and without brand marks. However, the complainant identified the cattle as his immediately he saw them even before he observed his brand mark on the heifer. He knew his cattle by looking at them because of their breed. All six cattle had ear tags bearing the appellant's number. The cattle that were identified by the complainant as his were sold to Mr Engelbrecht at Karoo Auction Kraal. Mr. Engelbrecht provided proof to such effect.

[5] On a different occasion, the complainant was called by the police to have a look at a herd of cattle that was at the River Camp being rented by Mr Helsdingen. Although there were many cattle at the camp, the complainant identified one of the cattle as his from a distance. This heifer in question had the complainant's brand mark. Another heifer was recovered from Okahandja by the police and it was also identified by the complainant from a distance before he observed his brand mark on it. Complainant testified that the value of his eight head of cattle was N\$40 000. Mr Helsdingen testified that the cattle that were identified by the complainant on the second occasion were sold to him by the appellant. The appellant, before he sold the cattle to him, first phoned him and told him that he wanted to sell his six head of cattle. However, time had lapsed without the appellant bringing the cattle to the witness. It was only on 19 April 2010 when the appellant together with another person brought three cattle to his house and not the six as he promised. The

appellant was doing the talking and he was given a cash cheque of N\$8 700 for the three cattle he had sold. The heifer that was found at Okahandja was sold by Mr Helsdingen after he bought the three cattle from the appellant. Mr Helsdingen provided documentary proof of the cattle he bought from the appellant.

[6] Mr Erasmus, the manager at the Karoo Auction Kraal's evidence is that on 15 April 2010 he received eight cattle from the appellant that were transported from Corridor 1 and the departure form was in the appellant's name. Two of the cattle were sold to one Braams and the other six cattle were sold to Mr Engelbrecht. A cheque was issued in the name of the appellant. The cattle that were sold to Braams were taken to South Africa.

[7] The investigating officer, Mr Mandi, testified that he investigated the theft of cattle belonging to the complainant that were stolen from Kalkpan. During his investigation, two cattle were recovered from Mr Helsdingen that had the complainant's brand mark and another brand mark belonging to one Dawid Matobele who is now deceased and he was the appellant's co-accused. The deceased's brand mark was newer comparing to the complainant's brand mark. The investigating officer further testified that among the six cattle that were recovered from Mr Engelbrencht, the heifer that had the complainant's old brand mark had also the appellant's brand mark that was fresh. When the appellant was confronted about the cattle, he mentioned that he was with the deceased during the sale of cattle.

[8] The appellant on the other hand, testified that he was approached by the deceased, one Matobele who requested him to transport cattle from Corridor 18 to Gobabis. However, he did not go to Corridor 18. Instead, he told the deceased to take his cattle to corridor 13. On 14 April 2010 the appellant transported his eight cattle namely; four heifers and four tollies from Corridor 1 to Corridor 13 where he found the deceased's cattle. Although he initially said his cattle were four heifers and four tollies he changed his version and said his cattle were three heifers and five tollies. He further testified that he found the deceased at Corridor 13 with six cattle. Before the appellant transported his cattle and the deceased's cattle to Karoo auction in Gobabis the deceased gave the appellant one heifer as payment for transport. The deceased also informed the appellant that his ear tags were finished.

That is how the appellant put his ear tags on one of the six cattle that he was allegedly given by the deceased as payment. According to the appellant, his cattle that he transported from Corridor 1 had ear tags and his brand marks. The appellant transported the animals to Karoo auction on 15 April 2010 accompanied by a permit. The appellant gave the permit to the official at Karoo auction. However, the appellant further said, whilst they were offloading the cattle from the truck at Karoo auction pen three of the cattle ran away and were only recovered on 19 April 2010. These three cattle were kept at Karoo auction pen after they were recovered and on 20 April 2010 the appellant and the deceased transported them to Mr Helsdingen. The rest of the cattle that did not run away were sold to Karoo auction. The appellant was paid by cheque issued in his name and he did not know how the deceased was paid by Karoo Auction. Concerning the cattle that were sold to Mr Helsdingen, the appellant testified that they were issued with a cash cheque in the amount of N\$ 8 700. They shared the money of that amount N\$6 200 was given to the deceased as payment for his cattle whilst the appellant was given N\$ 2 500 for his cattle. Apart from the deceased requesting the appellant to transport his cattle, the deceased had also borrowed N\$ 2 500 from the appellant.

[9] The evidence of the appellant was contradicted by the evidence of the deceased's brother, Mr Bukatsani, who testified that he and the deceased brother were farming together and it was the witness who was looking after their cattle which they inherited from their mother. After some time his cattle became three and that of his deceased brother became four. The highest number of cattle they had combined were only 14. However, during 2010 the total number of cattle they had were five because some of the cattle died as a result of drought and they were of Brahman breed. At the time of the deceased's death he only had two cattle which are in the custody of the witness. The witness further testified that they had a brand mark ' S 723 C'. The witness was responsible for branding their cattle. However, during 2010 the deceased requested the witness to send him the branding iron because he wanted to prepare some documents. The witness then sent the branding iron to the deceased in Gobabis. On their branding iron one letter namely 'C' was missing and the deceased told the witness that he would also cause it to be fixed. According to the witness, at no stage were their cattle or deceased's cattle removed from Corridor 18. When the witness was shown photographs of cattle allegedly belonging to the

deceased, the witness testified that none of those cattle belonged to his deceased brother.

[10] Having given the factual background, I will now proceed to deal with the grounds of appeal. It has been argued on behalf of the appellant that the learned magistrate ignored concessions made by the complainant, that five of the cattle did not have his ear tags or brand marks and concessions made by counsel for the State and police officer Mandi that the State did not have a strong case.

[11] Complainant testified that the five cattle he identified as his did not have his ear tags or brand marks because they were stolen whilst they were young. The identification of the cattle is a material issue. It is essential that a cattle should be identified because of its identification mark or brand. However, in the present matter although the five cattle identified by the complainant did not have his ear tags or brand mark it could be said that the complainant was able to positively identify his cattle because immediately he sported a herd of cattle at River Camp, he recognised six of them and identified them as his out of 61 herd of cattle. He was able to identify his cattle because of their breed. Out of the six cattle he identified as his one heifer had his brand mark. The complainant was able to identify his heifer even before he saw the brand mark. The six cattle that were identified by the complainant were bought from Karoo Auction by Mr Engelbrecht and there is evidence from the appellant that they were delivered there by the appellant and Matobele, the deceased. The heifer that had complainant's brand mark also had deceased Matobele's brand mark. However, Matobele's brand mark was new compared to complainant's brand mark.

[12] With regard to the concession made by counsel for the State and police officer Mandi that the State did not have a strong case in respect of the five herd of cattle, counsel for the State even suggested that the appellant should only be placed on his defence in respect of the herd of cattle that bore his brand marks. This was rightly rejected by the learned magistrate because what counsel for the State was suggesting was unprocedural. The appellant was charged with one count of theft of eight cattle therefore it would have been irregular to discharge the appellant in respect of five cattle in terms of S174 of Act 51 of 1977 and place him on his defence

in respect of three cattle, even if there was no sufficient evidence in respect of the five cattle. However, the concession made by the State witness and the learned prosecutor was misplaced because looking at the evidence in its totality, there is sufficient evidence that the five cattle also belonged to the complainant. The learned magistrate cannot therefore be faulted that by holding the complainant successfully identified his six cattle found among Mr Engelbrecht's herd of cattle. In any case, witnesses or even the prosecution counsel may have different opinions about the case, however, it is not for the witnesses or the prosecutor to decide the case. Such duty lies with the court.

[13] With regard to the criticism by counsel for the appellant levelled against the learned magistrate that he convicted the appellant in respect of the two cattle taken to South Africa, I do not find any merit in this argument as this is not borne out by the record. Apart from the six cattle recovered from Mr. Engelbrecht, the complainant identified two of his cattle that were sold to Mr Helsdingen. This herd of cattle was sold to Mr. Helsdingen by the appellant who was accompanied by another person who turned out to be deceased Matobele. The appellant initiated the sale and he is the one who received payment in both instances. I therefore agree with counsel for the respondent that the learned magistrate cannot be faulted for convicting the appellant in respect of the herd of cattle.

[14] Another criticism levelled against the learned magistrate by counsel for the appellant is that the learned magistrate failed to apply his mind and analyse the evidence properly. Again, I find this argument unmeritorious. The learned magistrate carefully analysed the evidence before him and applied his mind to the facts. The evidence revealed that the appellant together with Matobele, transported the herd of cattle including the eight cattle sold to Mr Engelbrecht and Mr Helsdingen. There is proof beyond reasonable doubt that the appellant conducted the sale of eight cattle in issue two cheques were handed over to him. I do not find any misdirection on the part of the learned magistrate by making a finding that the appellant acted in common purpose with Matobele who was originally charged with the appellant.

[15] Furthermore, the highlighting of the inconsistencies in the appellant's version with regard to the number of cattle he transported to the auction place does not

amount to a misdirection as this is necessary for the evaluation of the evidence. It goes to the credibility of the appellant as a witness. Therefore, it cannot be said that the court shifted the burden of proof from the State to the defence.

[16] With regard to the appellant's argument that the appellant was not placed at Kalkpan where the cattle were stolen from, theft is a continuous offence. If the perpetrator knowingly disposed of or knowingly assisted in the disposal of stock which has been stolen or which has been received with the knowledge of it having been stolen, the appellant can be convicted of theft. See S 11 (d) of Act 12 of 1990.

[17] Furthermore, counsel for the respondent rightly argued that the appellant failed to establish that the cattle in question were his and even if the State had failed to prove beyond reasonable doubt that they belonged to the complainant which is not the case, Section 11 (2) of the Act as amended would find application. Section 11 (2) of the Stock Theft Act 12 of 1990 reads as follows:

'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.'

Therefore, in terms of s11 (1) (a) it is competent to find the appellant guilty of theft of stock. However, evidence on record supported by the circumstances of the case established that the eight cattle belonged to the complainant.

[18] With regard to the appeal against sentence there are no grounds stated to warrant this Court to interfere with the sentence. We also do not find any reason to interfere with the exercise of the trial Court's discretion. We are not persuaded that it has failed to exercise its discretion judicially or properly. The sentence does not induce a sense of shock and it is not disturbingly inappropriate. The appellant is found guilty of theft of eight herd of cattle and the sentence imposed is appropriate and fit in the circumstance. In view of the reasons given in respect of the appeal against conviction and sentence, we do not find any material misdirection committed

by the magistrate. Therefore, the appeal against both conviction and sentence is bound to be dismissed.

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

Appeal against conviction and sentence is dismissed.

N N SHIVUTE
Judge

D USIKU
Judge

