

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

CASE NO.: HC-MD-CRI-APP-CAL-2019/00032

In the matter between:

CLEMENCE NEUMANN

APPELLANT

and

THE STATE

RESPONDENT

Neutral Citation: *Neumann v S* (HC-MD-CRI-APP-CAL-2019/00032) [2019] NAHCMD 453 (01 November 2019)

Coram: USIKU J et MILLER, AJ

Heard: 18 October 2019

Delivered: 01 November 2019

Flynote: Criminal Law – Appeal against conviction and sentence – Proof beyond reasonable doubt required in criminal cases – Such burden discharged by the State.

Summary: The appellant was charged with the offence of stock theft on the first count. On the second count, he was charged with the offence of prohibited branding of stock. He was consequently found guilty on both counts where after he was sentenced to 18 months imprisonment on the first count. On the second count, he was sentenced to pay a fine of N\$1000 or three months imprisonment.

Held – Evidence on record supported by the circumstances of the case established that the calf belonged to the complainant. It was competent to find the appellant guilty of theft of stock and the prohibited branding of stock in terms of the Stock Brands Act 24 of 1995.

ORDER

- a) The appeal against convictions are dismissed.
- b) The appellant's bail is cancelled with immediate effect and he is to be taken into custody to start serving his sentence forthwith.

APPEAL JUDGMENT

USIKU, (J MILLER, AJ concurring):

Introduction

[1] The appellant was charged with one count of stock theft and a count of prohibited stock branding. He was subsequently found guilty as charged on both counts. He was sentenced to a period of 18 months' imprisonment in respect of count one. In respect of the second count, he was sentenced to pay a fine of N\$1000 or three months' imprisonment. The matter was sent to the High Court for review wherein both the

convictions and sentence were confirmed. The appellant now appeals against the convictions and sentence.

Grounds of appeal

[2] The appellant raised the following grounds of appeal as summarized hereunder:

a) The learned magistrate misdirected himself in fact and in law when he found the appellant guilty of count one, i.e. theft of one calf valued at N\$1700, the property of or in the lawful possession and control of Hendrik Willem Smit.

b) The learned magistrate misdirected himself in fact and in law when he relied on the evidence of Hendrik Willem Smit to convict the appellant despite the fact that the complainant had contradicted himself on material aspects, such as the fact that he initially said he bred the calf in question and later said he bought it; and despite the fact that he contradicted another State witness on a material aspect regarding determination of ownership of the calf.

c) The learned magistrate misdirected himself in law and in fact, when he found the appellant guilty as charged on the offences under the Stock Brands Act 24 of 1995, despite the fact that there were no investigations and findings made by authorized persons as contemplated under s 13 of the Stock Brands Act.

d) The learned magistrate misdirected himself in law and in fact when he found the calf in question was rebranded at the specific behest, request or instance of the appellant when same is not borne out by the facts.

e) The learned magistrate misdirected himself in law and in fact when he found that the calf in question and the brand "F3D" belong to the complainant, when same is not borne out by the facts, and more specifically when the State did not produce the complainant's certificate of registration of brand as contemplated in s 6 (2) of the Stock Brands Act read with regulation 4 of the Stock Brand Act.

f) The learned magistrate misdirected himself in law and in fact when he found the appellant guilty on a widely couched and unintelligible charge, which charge is bad in law in that it amounts to a fishing expedition for a conviction of all offences under s 16 of the Stock Brands Act and does not tell the appellant, with sufficient particularity, what case he is required to meet.

g) The learned magistrate erred in law when he, without a proper basis in law, unfairly and in the manner inconsistent with the established evidence evaluation approach, rejected the appellant and his witness' evidence.

h) The learned magistrate erred in finding that the State, on both counts, proved its case beyond reasonable doubt, and in particular the magistrate erred in finding that the evidence presented is sufficient to prove the charges preferred against the appellant beyond reasonable doubt.

[3] With the above, I will proceed to summarize the submissions by counsel, firstly with the submissions by the appellant.

Appellant's submissions

[4] Counsel for the appellant submitted that as a general principle, the burden rests on the State to prove the guilt of the accused beyond reasonable doubt and that if the accused's version is reasonably possibly true in substance, the court must decide the matter on the acceptance of that version and acquit the accused.

[5] On this notion, counsel formed the view that the evidence led by the State was very poor, inconsistent and contradictory in material respects. Counsel based this view by referring to the evidence of the key witness for the State, Henry Willem Smit (referred to as the complainant during the criminal trial), who testified that he is the owner of the alleged stolen calf, to which counsel stated that his testimony was very shaky,

contradictory and replete with afterthoughts when he attempted to explain how he became the owner of the alleged stolen calf.

[6] Counsel highlighted that the contradictions arose when under cross-examination while being questioned on the position where the brand mark was on the body of the calf, his testimony being that it was on the left thigh. This contradicted the testimony of another witness for the State, Todeus Munipolla, who testified that he noticed the complainant's brand mark "F3D" on the left shoulder.

[7] Counsel further highlighted that the witness when questioned on where he got the calf from, testified that he bred it himself and later on when court proceedings commenced after lunch and whilst under cross-examination, he changed his version indicating that he bought the calf at an auction together with its mother. Counsel formed the view that the change in his stance was that if he were to proceed with the version that he bred the calf, it would be a big problem that his brand mark would be on the left shoulder as opposed to the left thigh.

[8] Counsel forms the view that considering the two versions depicted from this witness on the material aspect of the brand mark are contradictory, irreconcilable and totally demolish the credibility and reliability of the State's evidence and the learned magistrate therefore erred in relying thereto to convict the appellant. Further to this point, counsel referred to the point where the complainant testified that he heard from the appellant that the mother of the calf was at his farm. The complainant decided to take the calf to the applicant's farm and offloaded it together with two other calves, where others ran to their mother while his stood alone there. He submitted that Munipolla, on the very same aspect testified that they did not offload anything at the farm of the appellant.

[9] It was further submitted that with the material inconsistencies, discrepancies, contradictions and improbabilities in the State's case, it patently shows that the learned magistrate misdirected himself and acted irregularly when he relied on the poor, inconsistent, contradictory and sometimes improbable evidence led by the State and

more particularly that of the complainant to convict the appellant when it was not safe to do so.

[10] Furthermore, counsel submitted that the State did not appreciate the true nature of the charge under the Stock Brands Act and the kind of evidence it had to lead to make out a case in that regard which led it to lead poor, irrelevant and therefore inadmissible evidence, based on the fact that, the State charged the appellant with a widely couched and unintelligible charge, which charge is bad in law and that it amounted to a fishing expedition for a conviction on all offences under s 16 of the Stock Brands Act and does not tell the appellant, with sufficient particularity, the case that he was required to answer.

[11] With the above charges in mind, counsel further submitted the State failed to allege and lead evidence to the effect that the offence preferred against the appellant in terms of the Stock Brands Act, investigations were conducted and findings made by authorized persons as contemplated under s 13 of the Stock Brands Act, basically providing that the Registrar in terms of the Stock Brands Act may authorize one or more staff members in the public service under his or her control, to conduct investigations relating to offences under the said Act.

[12] Counsel further submitted that there was no evidence that the Registrar in terms of the Stock Brands Act, authorized one or more staff members in the public service under his or her control, to conduct investigations relating to offences under the Stock Brands Act.

[13] In conclusion, counsel submitted that on account of fact and law, the State's case was poor to the extent that it suffered from material, inner contradictions on the basis of which it cannot be said that the State has proved the allegations made against the appellant beyond reasonable doubt. Therefore, the appeal should be upheld and conviction and sentence be set aside.

Respondent's submissions

[14] Counsel for the respondent submitted that the court a quo carefully considered all the facts presented before it, rejected the appellant's version and found it to be false beyond reasonable doubt, finding that the only reasonable conclusion which could be drawn from the facts was that the appellant placed his brand mark on top of the pre-existing ones to conceal the identity of the owner. He highlighted the court's finding that the brand mark of the complainant and that of the previous owner were carefully and specifically superimposed by that of the appellant.

[15] Counsel further submitted that the court was satisfied that the actions of the appellant were wrongful, unlawful and intentional, leading to the court not having any other choice but to convict the appellant.

[16] In response to the issue of witnesses' contradictions, counsel submitted that the contradictions pointed out by the appellant were not sufficiently material to warrant the rejection of the State's version and further that the contradictions cannot be viewed in isolation.

[17] Counsel further formed the view that the learned magistrate cannot be faulted for finding the complainant to be an honest and credible witness. He submitted that this is based on the notion that the court a quo found that the contradictions, which were not made with the intent to mislead the court, but rather by way of human error, do not render the evidence of the witness unreliable. Counsel further highlighted that the learned magistrate pointed out the contradictions in his judgment between the versions of the State witnesses and in the end, the learned magistrate was clearly satisfied that the contradictions pointed out did not affect the credibility of the complainant and the two other witnesses and concluded that, on the totality of evidence adduced, that the State had proven beyond reasonable doubt that the appellant was guilty as charged.

[18] Regarding the argument that there were no investigations and findings made by authorized persons in terms of s 13 of the Stock Brands Act, he submitted that s 13 (1)

(c) of the Police Act 19 of 1990, provides that the police force have the overall function to investigate any offence or alleged offence committed.

[19] Counsel forms the view that the learned magistrate cannot be faulted for finding the appellant guilty when sufficient evidence was placed before him to prove that the appellant had contravened s 16 of the Stock Brands Act, bearing in mind that s 16 read with s 17 (1) (c) of the Stock Brands Act makes the conduct of prohibited branding of stock a criminal offence. Counsel submitted that the police has the inherent power to investigate any alleged offence and was just and duly authorized to investigate the appellant's alleged offence, as an authorized person as contemplated under s 13 of the Stock Brands Act.

[20] With regard to the argument that the appellant was found guilty on a widely couched and unintelligible charge, counsel submitted that anyone reading the charge as it was put to the appellant, would have been able to understand it. Besides that, neither the appellant nor his legal representative placed the unintelligibility of the charge in issue at any stage prior to the trial, thus the State could not be faulted for simply choosing to cover each angle in the charge.

[21] In conclusion, counsel submitted that the learned magistrate applied his mind to all the relevant facts presented to him and that he did not err in convicting the appellant.

Evaluation of the evidence

[22] Reading from the record, the learned magistrate applied various tests to determine ownership of the calf and the court found that both the water test and shaving test revealed the appellant's brand mark having been superimposed on the complainant's brand mark, which was located on the left shoulder of the calf. Further, the court a quo considered the reasoning behind the appellant's brand mark being superimposed on top of another brand mark belonging to a Mr. Tjihoro and found that the only reasonable inference to be drawn was that the appellant, who was allegedly selling the calf as his own, placed his brand mark on top of the first one, to conceal that first

brand mark, which in turn means that the appellant wanted to conceal the identity of the legal owner.

[23] I agree with the holding of the court a quo in that if the branding of the calf was one that was done out of ignorance rather than one done with a criminal intent, the expectation would be that the branding would have been done at random, for example, being done on the right shoulder of the calf, as opposed to being superimposed on the pre-existing brand marks.

[24] Furthermore, I do not agree with the submissions by counsel for the appellant in that the charge was widely couched. Looking at s 16 of the Stock Brands Act, it clearly stipulates for prohibited branding of stock as follows:

- a) brand any stock with a registered brand without the authority of the owner of such brand;
- b) brand any stock with a registered brand otherwise than in the prescribed manner;
- c) brand any stock with a brand which is registered in the name of a person who is not the owner of such stock;
- d) use more than one registered brand in respect of stock in the same stock brand area.

[25] Considering the above, it would be clear what the charges consist of, being the conduct of branding stock that is viewed to be prohibited. It cannot be said that the above failed to set out specific allegations in that the prohibited conduct referred to is the branding of stock, with qualifications of how the prohibited conduct is carried out.

[26] On the issue of the investigations not having been carried out by authorized persons in terms of s 13 of the Stock Brands Act, it cannot be argued that the intention of the Legislature was to exclude the inherent powers of the police force to investigate

matters involving prohibited stock branding. Section 13 (2) of the Stock Branding Act stipulates that the Registrar may appoint an authorized member and does not intimate that the Registrar should. To rely on this proposition would mean that all investigations carried out involving suspected prohibited branding of stock is in effect, a nullity and void. If the intention of the Legislature were that the Registrar alone under the Stock Branding Act was to be charged with criminal investigations involving prohibited branding of stock, such would have been abundantly made clear under the Act.

[27] Accordingly, this court is not satisfied that the learned magistrate erred in his findings and consequential judgment.

[28] In the result:

- a) The appeal against convictions are dismissed.
- b) The appellant's bail is cancelled with immediate effect and he is to be taken into custody to start serving his sentence forthwith.

D USIKU

JUDGE

K MILLER

Acting Judge

APPEARANCES:

For the Appellant:

N Mhata

Sisa Namandje & Co. Inc.

For the Respondent:

T Iitula

Of the Prosecutor-General's Office