



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: HC-MD-CRI-APP-CALL-2017/00023

In the matter between:

**FREDDIE DIERGAARDT**

**APPELLANT**

v

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Diergaardt v S* (HC-MD-CRI-APP-CALL-2017/00023)  
[2019] NAHCMD 51 (15 March 2019)

**Coram:** NDAUENDAPO J et D USIKU J

**Heard:** 19 January 2019

**Delivered:** 15 March 2019

**Flynote:** Criminal Procedure – Appeal against conviction of stock theft – Appellant *bona fide* believed that cattle belonged to him – Misdirection to reject the version of appellant on insufficient grounds – Appeal succeeds.

**Summary:** The appellant was convicted of stock theft. His appeal lies against conviction. The complainant's version was that he purchased the cattle from the appellant and took it to his farm. Appellant, on the other hand, testified that in 2007 he entered into an oral lease agreement for grazing on complainant's farm. In return for grazing, they will share the off springs. He testified that the N\$60 000 he received from the complainant was a loan. In 2008 he visited the farm and informed the complainant that he wanted to sell some of the cattle, the complainant refused. He laid a complaint with the Maltahohe police station, but he did not get assistance. He again contacted the complainant to try and resolve the dispute amicably, but the complainant chased him away. He laid a charge of stock theft with Inspector Tsuseb at Windhoek police station. Inspector Tsuseb contacted the complainant several times for a meeting between them to resolve the matter, but to no avail. In December 2009 the appellant and 2 others went to the farm of the complainant. Mr Klaas, a worker at the farm, showed him where his cattle were. They were in a separate camp. They chased the cattle totalling 90 plus out of the camp. The initial cattle were 33, and pregnant but he reasoned that by 2009 they should have multiplied to reach 90 plus. The complainant laid a charge of stock theft and the appellant was arrested and later convicted. All the cattle were retrieved.

Held, that, there were two mutually destructive versions placed before court and the magistrate failed to approach the case in terms of the law.

Held, further that, the state failed to call important witnesses who were present when the alleged purchase price was negotiated to corroborate the version of the complainant and that was to the detriment of the state's case.

Held, further that, appellant harboured a *bona fide* belief that the cattle were his and therefore he lacked the intention to steal.

Held, further that, the appeal succeeds.

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**ORDER**

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In the result, the appeal succeeds. The conviction and sentence are set aside.

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**JUDGMENT**

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NDAUENDAPO J (USIKU J concurring):

Introduction

[1] The appellant was convicted of stock theft in contravention of the provisions of s 11(1) 1, 14 and 17 of the stock theft Act, Act 12 of 1990, as amended. He was sentenced to 16 years imprisonment of which 5 years were suspended on the usual conditions. The appeal lies against conviction. The allegations are that between 1 – 5 December 2009 and at or near the farm Glukauft in the Maltahohe district, the accused did wrongfully and intentionally steal stock, to wit 96 cattle, valued at N\$60 000.

Background of facts - The respondent's case

[2] The complainant, Mr Ockhuizen, testified that during 2007 the appellant called him in Windhoek and told him that he was selling cattle. He drove to the farm of the appellant to inspect the cattle. The appellant was not there. He inspected the cattle and telephonically offered him N\$48 000 for 33 cattle. The appellant told him that he wanted N\$60 000 and the complainant said, he could only offer him N\$48 000. Appellant then offered to sell him a trailer for N\$12 000, he agreed. He further testified that Mr. Johr and his son were present when the purchase price was discussed telephonically and that he even asked Mr. Johr about the price and he suggested N\$35 000. The cattle were then loaded and transported to his farm. He returned to Windhoek

and made out a cheque in the amount of N\$60 000 to the wife of the appellant on his instruction because his bank account was overdrawn. On the counterfoil of the cheque book he wrote: 'Freddy Diergaardt, reason 33 cattle and calves.'

[3] He further testified that in 2008 the appellant came to his farm with 3 people demanding the return of his cattle. He refused to give him the cattle as he had purchased them. He was also contacted by Inspector Tsuseb about appellant's complaint and he explained to Inspector Tsuseb that he had purchased the cattle. In December 2009 he was informed that his cattle were stolen. He drove to the farm and discovered 96 of his cattle at various farms and in the corridors of the farms.

[4] The complainant testified that he was with Mr. Johr and his son when he offered to purchase the cattle for N\$48 000 because the conditions of the cattle were bad, he even asked Mr. Johr and he said N\$35 000. Yet these crucial witnesses who would have corroborated the version of the complainant were not called.

#### Appellant's case

[5] The appellant testified that he had entered into a lease agreement with the complainant for grazing on the farm of the complainant. The terms were that he will lease grazing on the farm and in return, they will share the off springs. Thirty three (33) of his pregnant cattle were taken to the farm of the complainant as per the lease agreement. He also testified that he loaned an amount of N\$60 000 from the complainant as he was in financial difficulties. He received the N\$60 000 cheque in Windhoek from the complainant 3 days after the lease agreement was concluded.

[6] He further testified that during 2008 he visited the farm twice to check the cattle. In 2008 when he was there he told the complainant that he wanted to sell some of the cattle, but the complainant refused. In 2009 he went to the complainant's farm again demanding the return of his cattle as there was a feud between them. The complainant refused to hand over the cattle to him.

He also visited the complainant at his office in Windhoek and told him that they must talk about the cattle, complainant told him to leave his office, a fight ensued between them. He went to Maltahohe police station to lay a charge against the complainant, but did not get assistance. He then went to Inspector Tsuseb at Windhoek stock theft unit and laid a charge of stock theft against the complainant. He told Inspector Tsuseb about the lease agreement of grazing and the trailer. He denied that he sold the cattle to the complainant. He further testified that out of desperation and after trying so many times he went to collect the cattle from the complainant's farm. He had the *bona fide* belief that the cattle were his and that is why he decided to go and fetch the cattle. He had no intention to steal the cattle, he genuinely believed that he was still the rightful owner of the cattle. At the farm, Mr Klaas, an employee of the complainant, showed him the camp in which his cattle were and he removed the cattle.

[7] Inspector Tsuseb corroborated the version of the appellant in all material respects. He added that he tried to contact the complainant several times to arrange a meeting to solve the problem, but the complainant was not available. The complainant spoke to him and said he was prepared to bring the trailer, but that did not happen.

[8] Grounds of appeal

The grounds can be summarised as follows:

1. The learned magistrate erred in law or fact in the manner she dealt with mutually destructive versions between the complainant and the appellant.
2. The magistrate erred in fact or in law by finding that the state proved positively the identity of the 96 heads of cattle and value mentioned in the charge sheet.
3. The learned magistrate erred in fact or law in accepting the version of the complainant, a single witness, that he purchased the cattle from the appellant and rejecting the version of the appellant as reasonably possibly true.

Appellant's submissions

[9] Counsel argued that the learned magistrate erred in law by finding that the only reasonable version of what transpired between the complainant and the appellant at the time when the livestock were handed to the complainant was the version of the complainant when he testified that he purchased the livestock from the appellant. In addition the learned magistrate erred in law by accepting the version of the single witness concerning the alleged sale of the livestock particularly in the light of the fact that the testimony of the complainant was on this issue not credible in all material aspects. Counsel further argued that the learned magistrate erred in fact by determining that the testimony of the complainant and Christian Bok properly and positively identified the 96 head of cattle mentioned in the charge sheet as the livestock of the complainant. The state witnesses rendered destructive versions to the court regarding the identification of the livestock and the court failed to apply the correct evidentiary principles to acquit the appellant thereon. In addition, the learned magistrate erred in fact by finding that the state proved that the 96 cattle referred to in the charge sheet were properly branded for the purpose of identification and that the ear tags affixed to the cattle were sufficiently matched with the required ear tags affixed to each and every head of cattle so mentioned.

[10] Counsel further argued that learned magistrate disregarded crucial evidence which negatively reflected on the credibility of the complainant's testimony inter alia the following; (a) the inability of the complainant to explain why the tear sheet of the cheque book did not reflect the purpose of the payment of N\$60 000; (b) the unlikelihood that the complainant would have purchased the cattle with a cheque made out to the appellant's wife; (c) the fact that the probabilities favour the appellant's version that the cheque was for a loan and made out to be paid to the appellant's wife to avoid the money being paid into the appellant's account; (d) the fact that the complainant only at a later stage in his testimony remembered that the N\$60 000 included the purchase price of a trailer; (e) the fact that the complainant undertook to Inspector Tsuseb to return the trailer to the appellant in contrast with his claim that he purchased the trailer; (f) disregarding of Jacky Isaack's testimony

confirming the unlikelihood that anyone would have sold 37 cattle to the complainant for N\$48 000 within the prevailing market conditions at the time when the transaction took place; (g) the learned magistrate disregarded the fact that the complainant only saw the majority of the cattle from a distance and thus could not have identified same on the ear tags as testified by the complainant; (h) the learned magistrate ignored crucial evidence in the form of the photo plan which indicated that the brand marks affixed to the cattle was not clearly visible, some being placed on top of older brand marks, others in wrong areas and showing different lettering from that of the complainant's brand mark. Similarly that the alleged stolen stock was properly identified on the earmarks they carried. (i) the learned magistrate ignored crucial evidence from Ernst Danster inter alia that the brand mark of the complainant was affixed to the right hand leg of the cattle reflecting EWO lettering whilst Christian Bock testified that the lettering WON appeared on the cattle.'

#### Respondent's submissions

[11] Counsel argued that on the issue of sale of the cattle the complainant was a single witness and the court is entitled to convict if the evidence was reliable and clear and the complainant's evidence was reliable and clear. Counsel further argued that the evidence of identification of the cattle by the complainant and Mr. Bok were not mutually destructive and they corroborated each other. The complainant testified that the brand mark and ear tags found on the retrieved cattle were his and Mr. Bok corroborated that. Counsel argued that sufficient evidence was placed on record to prove that the cattle identified by the complainant was in fact his.

[12] Counsel further argued that the mere fact that the issue of mutually destructive versions was not mentioned in the judgment does not mean that it was not considered and from the reading of the judgment it was clear that the magistrate appreciated that two mutually destructive versions existed and that she needed to deal with it. Counsel argued that if regard is had to the merits and demerits of the case, one issue amongst others stands out, the cattle that were discovered were the complainant's as opposed to claims by the appellant that it was his cattle.

[13] The fact that the appellant called accused 3 while the complainant was standing there and instructed him to remove the ear tags and replace it with his own indicates the urgency by the appellant to remove all traces that the animals belonged to the complainant and that evidence was not contested by the appellant and stands.

[14] Counsel further argued that the fact that the appellant had no removal permits, the fact that appellant had buyers already on route to buy the cattle showed that the appellant stole the cattle. Counsel further argued that if the appellant relied on the agreement, why did he come and take more animals than he was entitled to. Counsel submitted that if the merits and demerits of both the appellant's case and the state's case is weighed up, the probabilities favour the state's case. Counsel further argued that not much turn on the evidence of Inspector Tsuseb, he advised the appellant that it is a civil matter, yet he did not pursue that avenue and he decided to take the law into his own hands.

[15] The appellant's version was that he entered into an agreement with the complainant, Mr. Ockhuizen, the terms of which were that he will lease grazing from his farm and in return, they will share the offsprings. The complainant on the other hand stated that he purchased the cattle (33) from the appellant for an amount of N\$48 000 plus N\$12 000 for the trailer. The learned magistrate found that there were no indicators of the appellant's brand mark on any of the animals that he chased out of the camp and accepted the version of the complainant as true. The approach to resolve two mutually destructive versions was set out in *S v Engelbrecht*<sup>1</sup>, where the court stated: on a situation like the one this case presents Leon J's remarks in *S v Singh*<sup>2</sup> are apposite:

'Because this is not the first time that one has been faced on appeal with this kind of situation, it would perhaps be wise to repeat once again how a court ought to approach a criminal case on fact where there is a conflict or fact between the

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<sup>1</sup> *S v Engelbrecht* 2001 NR 224 HC at 226 para D.

<sup>2</sup> *S v Singh* 1975 (1) SA 227 (N) at 228F-H.

evidence of the state witnesses and that of an accused. It is quite impermissible to approach such a case thus: because the court is satisfied as to the reliability and the credibility of the state witnesses that, therefore, the defence witnesses, including the accused, must be rejected. The proper approach in a case such as this is for the court to apply its mind not only to the merits and the demerits of the state and the defence witnesses but also to the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond all reasonable doubt. The best indication that a court has applied its mind in the proper manner in the abovementioned example is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses.'

The learned magistrate, with respect, was not alive to that approach and did not apply it.

[16] The central issue on appeal is, as it was during the trial, the ownership of the cattle. The appellant testified that he had a *bona fide* belief that the cattle were his that is why he opened a case of stock theft against the complainant. He also conveyed to Inspector Tsuseb that the cattle were his and they were at the appellant's farm for grazing. He also went to the office of the complainant to discuss the issue of this cattle and they fought when the complainant did not want to discuss same.

[17] The appellant testified that when he went to collect the cattle, Mr Klaas, a worker of the complainant, showed him the camp in which his cattle were and he went to chase them out of that camp. That evidence was not disputed at all. In addition he testified that when his cattle were brought to the farm of the complainant in 2007 they were 33 and pregnant and his reason for taking 90 plus cattle was that by 2009 they must have trebled to that figure of 90 plus.

[18] In his plea explanation the appellant made it clear that he denied any intent to steal 96 cattle as those cattle belonged to him. The state new from the very beginning that the issue of ownership of the cattle will be central, they should have called witnesses Mr. Johr and his son who heard when the

alleged purchase price was allegedly discussed with the appellant to corroborate the complainant's case. Failure to do that was detrimental to the state's case.

[19] In my respectful view the version of the appellant was reasonably true. After the cattle were taken to the farm of the complainant, he went there twice in 2008 and again in 2009 to check on the cattle. He went to the police station in Maltahohe and in Windhoek to report a case of stock theft against the complainant. In my respectful view the appellant had a *bona fide* belief that the cattle were his and his intention was to go and remove the cattle from the farm of the complainant. His cattle were pregnant when they were brought to the farm of the complainant and that was not strongly denied by the complainant and after 2 years the number may have trebled from 33 to 96.

[20] Counsel for the appellant submitted that the cattle were not properly identified by the brand marks and ear tags. In my respectful view the issue of identification is immaterial. The appellant does not dispute that he collected the cattle from the complainant's farm. His version was that the cattle he collected were his because they were all in a separate camp as shown to him by Mr. Klaas, a worker of the complainant.

[21] In *S v Hepute*<sup>3</sup> it was stated that: 'it is trite law that theft is committed where the accused's continued possession of the things in question is accompanied by an intention to deprive the owner permanently of the whole benefit of his or her ownership of the thing in question.' That much is clear from Sibiya's case and a plethora of other cases to the same effect. Implicit in this proposition, however, is the absence of any *bona fide* belief on the part of the accused that the thing in question belongs to him or her to the exclusion of any other person. If the accused so believes and does so *bona fide* (albeit later proven to be erroneous), he or she does not manifest an intention to steal. (my emphasis)

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<sup>3</sup> S v Hepute 2001 NR 242 at 249 para E-F.

[22] In this particular case, the appellant in good faith believed that the cattle belonged to him and he therefore lacked the intention to steal. The court was faced with two mutually destructive versions and there was insufficient grounds for holding that the state discharged the onus of proving that the version of the complainant was true and rejecting the appellant's version as false. The magistrate's reasoning in rejecting the version of the appellant lacks convincing and rationale and was premised on the wrong application of the law to the facts.

[23] In passing I must state that the appellant's conduct by taking the law into his own hands by removing the cattle from the farm without a court order should be condemned in the strongest terms. We are a society of the rule of law and nobody should take the law into his own hands. The courts are there to adjudicate disputes between citizens and the appellant should have followed that course.

[24] In the result, the appeal succeeds. The conviction and sentence are set aside.

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N G NDAUENDAPO  
JUDGE

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D USIKU  
JUDGE

**APPEARANCES:**

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