

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
APPEAL JUDGMENT

CASE NO.: HC-MD-CRI-APP-CAL-2019/00024

In the matter between:

STEPHANUS NAOBEB

APPELLANT

and

THE STATE

RESPONDENT

Neutral Citation: *Naobeb v S* (HC-MD-CRI-APP-CAL-2019/00024) [2020] NAHCMD 226 (15 June 2020)

Coram: USIKU J et UNENGU, AJ

Heard: 3 June 2020

Delivered: 15 June 2020

Flynote: Criminal Procedure – Appeal against conviction and sentence – Appellant convicted of stock theft and sentenced to four years’ direct imprisonment – Appellant opting to remain silent where there is sufficient incriminating evidence against him – Appellant alleging to have been punished for having exercised his constitutional right to remain silent – Such right not absolute.

Identification – No proper identification of all the stolen cattle – Evidence of identification in cases of stock theft essential – Failure to properly identify stolen stock fatal to the State’s case – Appeal against conviction partly succeeds – Sentence altered on appeal.

Summary: The appellant was charged with eight counts of theft of stock and was subsequently found guilty on four counts of theft of stock, whereafter he was sentenced to four years’ imprisonment. Being dissatisfied with his conviction and sentence, the appellant appealed against both. Appellant has not testified in his defence and opted to remain silent. Appeal against conviction partly succeeds. Sentence set aside and substituted with another sentence.

ORDER

(a) Appeal against conviction partly succeeds. Conviction on four counts of theft of stock set aside and substituted with a conviction of stock theft of two cattle in respect of count one and three. Sentence set aside and substituted with the following sentence:

‘For purposes of sentence, the two count are taken together, and accused is sentenced to two years’ imprisonment of which six months imprisonment is suspended for five years on condition that the appellant is not convicted with the offence of theft of stock, committed during the period of suspension.’

(b) The sentence is antedated to 4 February 2019.

APPEAL JUDGMENT

USIKU, J (UNENGU, AJ concurring):

[1] The appellant was charged with eight counts of stock theft in the Magistrate's Court sitting at Usakos. He pleaded not guilty to all the charges preferred against him however, at the end of the trial, he was convicted on four counts of theft of stock and was subsequently sentenced to four years imprisonment.

[2] Aggrieved by both his conviction and sentence he filed this appeal. The grounds of appeal may be summarized as hereunder:

(a) The learned magistrate erred in law or in fact by holding that it was common cause that both appellant and his co-accused committed the offence.

(b) The learned magistrate erred in law and or fact by holding that the appellant knew that the cattle were stolen despite there being no evidence to base such findings on;

(c) The learned magistrate erred in law and or fact by inferring that the appellant acted in common purpose to commit the offence;

(d) The learned magistrate erred in law and in fact by punishing the appellant who exercised his constitutional right to remain silent;

(e) The learned magistrate failed to analyse the evidence in its totality and failed to apply his mind to the facts;

(f) The Court erred in fact by finding that the appellant knew that the cows was stolen as this finding.

With regard to the sentence, the appellant raised the following grounds:

(a) That the appellant was a first offender aged 36 years at the time the offence was committed and could be rehabilitated.

- (b) That the appellant was the sole bread winner and the stolen stock had all been recovered.
- (c) That the learned magistrate inputted circumstances that were not part of the record on the appellant and convicted appellant on those false misapprehensions.
- (d) That the leaned magistrate overemphasized the seriousness of the offence and the interest of society over the personal circumstances of the appellant.
- (e) That when sentencing the appellant, the learned magistrate erred in law and or in fact when he charged that appellant had pleaded guilty to the charge of stock theft when in fact there is no plea of guilty in the record of proceedings;
- (f) That the sentence induces a sense of shock and is so unreasonable that no reasonable Court would have imposed it;
- (g) That the imprisonment term imposed by the court in the prevailing circumstances is shockingly inappropriate.

The factual background

[3] The different complainants in this case lost a number of their herds of cattle due to theft. Amongst the stolen herd of cattle, the first complainant, Ms Alfrieda Gorases, who had lost two cattle, was only able to positively identify one of her cattle found at Salomon post through its ear tag number 40432544. She could not positively identify her other lost cow. She valued her cow at N\$5000-00. She could however not identify the appellant as the person who had stolen her herd of cattle. The complainant's cattle would usually stay in the river and could go and drink water at the water point situated across her house.

[4] Mr Helmut Namiseb, a farmer at Verhuis, testified that he received a call about his missing cattle on 05 June 2015. He later on visited a place called Harmony where he

recognised his cattle by its earmark. The cattle were valued at N\$5000-00. He did not give anyone permission to take his cattle. He could also not identify the person who stole his cattle.

[5] Ms Rosemary Gawanas, also a farmer for many years, testified that she received a report about stolen cattle at farm Harmony. When she got to Harmony, she was able to positively identify one of the cattle by the number of the ear tag which was 442442350. She did not authorize anyone to take her cattle to either farm Harmony or Salomon post. Neither did she see the person who stole the cattle.

[6] Mr Joseph, an employee of Mr Michael Narib, testified that he knew the appellant. On 29 May 2017, when he returned from the field, he found the appellant and another male person at the farm. They had brought eight cattle to the farm. In the meantime, the owner of the farm also arrived and spoke to the appellant and the other male person, where after he left them with the owner of the farm. Mr Joseph persisted that it was the appellant and his friend who brought the cattle to the kraal.

[7] Ms Maria Ogus's testimony is that she worked at the farm of Mr Narib at the time. She came to know the appellant when they brought the cattle to the farm on 29 May 2017 and put them in the kraal. They were later on joined by Mr Narib, the owner of the farm. The cattle were eight in number.

[8] Ms Maria Muramba, corroborated Ms Ogus evidence that the appellant had brought cattle to Mr Narib's farm and put them in the kraal.

[9] Mr Tembo's evidence is that he lost six cattle. On 2 June 2017, he received a call from the police informing him about cattle found at farm Harmony. A description of the ear tag was given to him and the ear tag number. The police also requested him to go and identify the cattle. The six cattle were recovered at farm Harmony. The farm owner was contacted but did not turn up. The six cattle were taken to Salomon post. Mr Tembo did not know the appellant neither could he identify the people who stole his cattle.

[10] It has been argued on behalf of the appellant that the learned magistrate erred in law and or fact by holding that it was common cause that both appellant and his co-accused committed the offence.

[11] Both Ms Maria Ogus and Maria Muramba's evidence corroborated each other that the appellant and another male person arrived on horseback and chased after eight cattle which they managed to place in the kraal of Mr Narib at Farm Harmony. Thus, the magistrate's conclusion that they acted together cannot be faulted.

[12] Beside that, the two cattle that were positively identified by their lawful owners were amongst the cattle driven by the appellant and his male friend to farm Harmony. It was only by sheer luck that these cattle were recovered by the police, otherwise the owners could have been permanently deprived of their cattle.

[13] The cattle identified by their rightful owners were moved from one place to another without the owner authorization to do so. On the issue of the appellant being punished because of him having exercised his Constitutional right to remain silent, indeed, the appellant has a right to remain silent, but by doing so he did not place any evidence on record to contradict the prosecution's evidence, therefore the State's case remain unchallenged.

[14] It is trite law that if at the close of the State's case, if there is sufficient evidence upon which a reasonable court could convict, then the accused is put to his defence. Furthermore, that if he exercises his right to remain silent and calls no evidence in answer to the prosecution's case, then he runs the risk of being convicted, but it is not a necessary consequence.

[15] In *casu*, the appellant was positively identified by two State witnesses, Maria Ogus and Maria Muramba, as one of the person that brought the eight cattle to farm Harmony. Amongst the eight cattle, Ms Elfrieda Gorases identified one cow positively though her ear tag number. That piece of evidence was never contradicted by any other evidence.

It is a requirement that cattle should be identified by its owner either by an identification mark or brand. That was done.

[16] Indeed, the appellant faced eight charges of theft of stock in contravention of s 2 read with ss 1, 11 (1) a, 15 and 17 of Act 12 of 1990 as amended. 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 committed 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.'

[17] Therefore, in terms of s 11(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 only established that two cattle were stolen and were positively identified by their rightful owners and as such, the appellant ought to have been only convicted on two counts of theft of stock, namely counts one and three. That being the case, the conviction of the appellant on the four counts of stock theft by the *court a quo* cannot be allowed to stand and is hereby set aside and substituted with a conviction on two counts of theft of stock, respectively.

[18] With regard to the sentence imposed by the *court a quo*, the court indeed misdirected itself when it sentenced the appellant who was a first time offender to a term of four years' imprisonment because the appellant's personal circumstances and the crime he had been convicted of had not been properly and adequately considered. Hence, this Court finds it appropriate to interfere with the sentence imposed by the *court a quo*. In effect, the appellant was sentenced for the theft of four cattle on insufficient evidence.

[19] As a result, the sentence of four years imprisonment is set aside and is substituted with the following sentence:

(a) Appeal against conviction partly succeeds. Conviction on four counts of theft of stock set aside and substituted with a conviction of stock theft of two cattle in respect of count one and three. Sentence set aside and substituted with the following sentence:

'For purposes of sentence the two count are taken together, accused is sentenced to two years imprisonment of which six months imprisonment is suspended for 5 years on condition that the appellant is not convicted with the offence of theft of stock, committed during the period of suspension.'

(b) The sentence is antedated to 4 February 2019.

D USIKU

JUDGE

E P UNENGU

ACTING JUDGE

APPEARANCES:

For the Appellant:

N Kauari

Tjituri Law Chambers

Windhoek

For the Respondent:

BL Lilungwe

Of the Prosecutor-General's Office

Windhoek