



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

CASE NO: HC-MD-CRI-APP-CAL-2020/00018

In the matter between:

ELIAS SHIKONGO

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Shikongo v The State* (HC-MD-CRI-APP-CAL-2020/00018) [2021]
NAHCMD 42 (15 February 2021)

Coram: LIEBENBERG J and JANUARY J

Heard: 29 January 2021

Delivered: 15 February 2021

Flynote: Criminal Procedure – Appeal – Conviction – Stock theft – Notice of appeal filed late - Reasons for delay reasonable – Prospects of success – Condonation granted – Misdirection by magistrate - Appellant’s version reasonably possibly true – Appeal succeeds – Appeal upheld

Summary: The appellant appeals against his conviction for stock theft read with the provisions of the Stock Theft Act, Act 12 of 1990. The appellant was the driver of a

motor vehicle that transported the meat of three slaughtered cattle from a farm in the Karibib district. The appellant testified that he was hired by one of his co-accused to transport the meat from the farm to Windhoek. The killing and slaughtering appeared legitimate to the appellant in the circumstances. The appellant, with co-accused as occupants of the motor vehicle, was stopped by a witness on their way to Okahandja. The evidence reflects that the appellant was fully co-operative after the vehicle was stopped. There is no evidence indicating that the appellant associated himself with the actions of his co-accused or acted in common purpose with them.

The magistrate rejected the version of the appellant not to be reasonably possibly true. The magistrate misdirected herself on the facts. The appeal succeeds. The conviction and sentence are set aside.

ORDER

1. Condonation is granted;
2. The appeal is upheld;
3. The conviction and sentence are set aside.

APPEAL JUDGMENT

JANUARY J (LIEBENBERG J concurring)

Introduction

[1] The appellant was charged with 6 other accused for theft of stock to wit 3 head of cattle, valued at N\$45 000 in contravention of section 2 read with sections 1, 11(1) (a), 15 and 17 of Act 12 of 1990. He was accused 5 in the matter. He was convicted and sentenced to 4 years imprisonment. This appeal is only against conviction

[2] The appellant is represented by Mr. *Brockerhoff* and the respondent by Mr. *Andreas*.

Background

[3] The appellant was convicted and sentenced on 23 July 2019. The first notice of appeal was filed out of time on 02nd September 2019 with no application for condonation. An application for condonation was eventually filed on 17th October 2020. Rule 67(1) of the Rules of the Magistrates Court stipulates that the appeal should be lodged within 14 days after the date of conviction, sentence or order in question.

Condonation

[4] When an appeal is filed out of time, the appellant must file an application for condonation supported by an affidavit explaining the reasons for the delay and failure to comply with the rules of court.¹ Mr. Brockerhoff deposed to the supporting affidavit and the appellant deposed to a confirmatory affidavit whereas it should be the other way round. The appellant should depose to the supporting affidavit and the legal practitioner to the confirmatory affidavit. The practice by legal representatives to file affidavits on behalf of their clients is again strongly discouraged and should be desisted from. We reiterate that it may only be resorted to in exceptional cases or instances.² The supporting affidavit is silent on whether the appellant for compelling or exceptional reasons was unable to depose to the supporting affidavit.

[5] Mr. Brockerhoff explained to this court that he deposed to the supporting affidavit because the facts for the explanation for the delay fell within his knowledge and not within that of the appellant. In addition, the appellant was at the time of filing the notice of appeal detained at Luderitz and to have waited for him to depose to the affidavit would have further delayed proceedings.

[6] This court has a discretion to condone a failure to file a notice of appeal timely. It is trite that two requirements must be met:

- a) There must be a reasonable, acceptable and bona fide explanation for the delay;
- and,

¹ See; *Kashire v S* 1978 (4) SA 166 (SWA) at 167 H.

² See: *Prosecutor-General v Paolo* 2017 (1) NR 178 (HC) at paragraph 16.

b) There must be reasonable prospects of success on appeal.³

The explanation for the delay by Mr. Brockerhoff

[7] Whereas the applicant/appellant was convicted and sentenced on 23 July 2019, a relative of the appellant, one Fillemon Moses, approached the offices of Mr Brockerhoff on 25th July 2019 with instructions to open a file for the prosecution of this appeal. Their office sought a copy of the transcribed record on 29th July 2019 to draft the notice of appeal. Mr. Brockerhoff did not participate in the trial and was thus unable to prepare a notice of appeal without the record of proceedings.

[8] The notice of appeal was eventually completed on 19th August 2019. The appellant was in the meantime detained at Luderitz Correctional Facility and could not sign a Special Power of Attorney which was prepared on 21st August 2019. A request for the appellant's transfer was sent on 22nd August 2019 to the correctional facility for his transfer to Windhoek to assent to the appeal process. The appellant was eventually transferred and signed the documents for the appeal.

[9] Mr. Brockerhoff subsequently faced a challenge to receive the complete transcribed record of proceedings because the presiding magistrate was transferred from Karibib, where the trial was held, to Keetmanshoop. The magistrate had to provide reasons as per the notice of appeal.

[10] Mr. Andreas initially did not raise any point *in limine* but subsequently filed supplementary heads of argument submitting that the fact that the appellant did not depose to the supporting affidavit on the application for condonation is fatal and that there is no reasonable explanation for the non-compliance with the court rules. It needs to be noted that Mr Andreas only filed heads of argument without any notice of opposition and supporting affidavits opposing the application for condonation and the appeal itself.

[11] Rule 66 (1) (a) of the Rules of the High Court stipulates amongst others that a person opposing the grant of an order sought in an application must file a notice in writing stating that he or she intends to oppose the application within the time stated in

³ *Nakale v S* (SA 04/2010) [2011] NASC 2 (20 April 2011) paragraph 7.

the notice; and within 14 days of the notice file an answering affidavit if any. The usual explanation for non-compliance of rules of court is that it has become common practice. This practice of deliberate non-compliance of rules of court is not condoned and is strongly discouraged.

[12] In our view, the explanation for the delay seems reasonable in the circumstances.

The prospects of success on appeal

[13] We have reserved judgment on the application for condonation and allowed arguments on the prospects of success on appeal. Counsel were also allowed to address the court on the merits of the appeal as it is closely intertwined with the prospects of success.

The grounds of appeal

[14] The following grounds of appeal are raised:

1. The court erred in fact by finding that the appellant knew that the cow was stolen as this finding is not supported by evidence;
2. The court erred in law by rejecting the appellant's version of events when considering the totality of evidence, it is not false beyond reasonable doubt;
3. The court erred in law when it failed to give the appellant the benefit of the doubt as the appellant's version of events were reasonably possibly true in the circumstances in view of the undisputed evidence that he was merely hired to provide transportation and that a transportation permit was provided to him which satisfied him that the meat he was transporting belonged to accused 1 and his friend;
4. The court erred in law by finding that the appellant associated himself with the conduct of his co-accused whilst it is not in dispute that he did not in any way participate in the negotiations for the sale of cattle and the slaughtering thereof.

The merits

[15] The following facts are common cause:

1. The three head of cattle in the case were positively identified and belonged to the complainant Dirk Jacobus van Rhyh;
2. The three head of cattle were slaughtered at farm Waldheim on 02nd December 2018 in the district of Karibib;
3. The appellant was at all material times the driver of motor vehicle with registration number N 104039 W on 02nd December 2018;
4. He drove the said motor vehicle to farm Waldheim together with some of his co-accused who were occupants in the said motor vehicle;
5. The appellant was present during the slaughtering of the cattle;
6. The co-accused slaughtered the cattle and loaded the meat on the motor vehicle;
7. The killing and slaughtering took place during the night;
8. The appellant drove the motor vehicle from the scene with six co-accused;
9. They were stopped shortly before Okahandja on the Karibib-Okahandja road;
10. The meat was discovered in the loading box of the motor vehicle;
11. A person who was allegedly one of the sellers of the cattle ran away;
12. The appellant and 5 other co-accused were arrested.

[16] From the evidence it is clear that when the motor vehicle was stopped, the appellant fully co-operated with the witness who stopped them and who enquired what was transported. The person who ran away produced a purported transport permit for the meat. This document was also produced and handed to the appellant when he was requested for the transport of the meat. The appellant was not part of the discussions in relation to the sale of the cattle. It emerged that the appellant was convinced that the transaction of sale of the cattle by one Stanley and accused no.1, whom they met with on the farm was legitimate and he agreed to assist only with the transportation of the meat. At face value, it would appear that there was nothing sinister in the circumstances during the negotiations about the sale of the cattle, the circumstances when they were killed, slaughtered and loaded onto the vehicle to alert the appellant that the cattle were stolen.

The magistrate's reasons for the conviction

[17] The magistrate found that there was no valid sale of the cattle. This finding was based on the fact that there was no exchange of money for the cattle on the farm where the cattle were slaughtered. There was an agreement that the transaction would only

have been finalized at the Okahandja police station because the purported permit for transportation did not bear an official date stamp. The conviction was also based on the fact that the magistrate found that the appellant acted in concert with the other co-accused. He was jointly found in possession of suspected stolen property for which he, according to the magistrate, could not give a reasonable explanation.

[18] The magistrate rejected the explanation of the appellant. The appellant testified that he was the driver of the motor vehicle on which the meat was found. He was requested by accused 3 and 4 to provide transport for meat that they were going to buy between Okahandja and Karibib. He testified that accused 3 and 4 filled up the motor vehicle with fuel. Accused 4 did not know the place where the meat was to be collected and was directed (it seems telephonically) by one Stanley who was selling the meat. The accused drove to the farm and reached a kraal as directed. They found Accused 1 and Stanley at the kraal.

[19] Accused 3 and 4 went to Stanley and talked to him. The appellant was just standing around and did not participate in the discussions. Accused 1 at one stage stood with accused 4 whilst completing a document (the permit). He collected the ID of accused 4 during the completion of the document. The appellant observed that cattle were tied with a rope and dragged out of the kraal. These cattle were subsequently killed and skinned. It seems that the slaughtering took place in the dark as the appellant was requested by accused 3 to alight the scene with the motor vehicle headlights. The meat was eventually loaded onto the motor vehicle where after appellant drove the motor vehicle in the direction of Okahandja. They were stopped 4 to 5 km from Okahandja. The appellant fully co-operated with the person who stopped them. The appellant confirmed that Stanley ran away from the scene and that accused no.1 was apprehended by accused no. 4 in fear of him also taking flight as Stanley did; the very same persons who sold them the cattle.

[20] The appellant's version was corroborated in material respects by his co-accused. There is no iota of evidence indicating that the appellant associated himself or acted with common purpose with any of his co-accused. We find his explanation for his presence to be reasonably true. In the circumstances there are prospects of success. The application for condonation accordingly succeeds.

Conclusion

[21] The magistrate erred and misdirected herself to reject the version of the appellant. In the circumstances the appellant ought to have been acquitted.

[22] In the result:

1. Condonation is granted;
2. The appeal is upheld;
3. The conviction and sentence are set aside.

H C JANUARY
JUDGE

I agree

J C LIEBENBERG
JUDGE

APPEARANCES

APPELLANT:

Mr. T. Brockerhoff
Brockerhoff & Associates

RESPONDENT:

Mr. J. Andreas
Office of the Prosecutor-General