

**REPUBLIC OF NAMIBIA**



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

**APPEAL JUDGMENT**

Case No.: HC-MD-CRI-APP-CAL-2022/00031

**BERNARD DE KOKER**

**APPELLANT**

*Versus*

**THE STATE**

**RESPONDENT**

**Neutral citation:** *De Koker v S* (HC-MD-CRI-APP-CAL-2022/00031) [2022] NAHCMD 456 (02 September 2022)

**Coram:** SHIVUTE J et CLAASEN J

**Heard:** 08 July 2022

**Delivered:** 02 September 2022

**Flynote:** Criminal procedure – Appeal against conviction of stocktheft – Appellant’s explanation that he was given a sheep by a co-accused residing on another farm – Explanation supported by evidence of three state witnesses – Misdirection to reject version of appellant on insufficient grounds – Appellant convicted of competent verdict of contravening s 3 of the Stock Theft Act 12 of 1990 as amended – Appeal partially succeeds.

**Summary:** The appellant was convicted for stock theft read with the provisions of the Stock theft Act No 12 of 1990 as amended. He was sentenced to 3 years' imprisonment without the option of a fine. He appealed against the conviction on the basis that the State has not proven the element of appropriation and that the court erred in rejecting his version as to the acquisition of a sheep which he slaughtered.

*Held*, in respect of the element of appropriation, the judgment by court a quo does not account for the explanation given by a state witness that a certain sheep arrived on their farm amongst the goats of another man. This fact does not link the act of removal of a missing sheep from the owner's farm to the appellant.

*Held further*, appellant's explanation was that he was given a sheep by a co-accused, which version is supported by the evidence of three state witnesses. In the circumstances it points to the explanation as one that is reasonably possibly true and it was a misdirection not to have given the appellant the benefit of the doubt.

*Held further*, the evidence shows that there was no paper trail that accompanied the acquisition of the sheep. Appellant thus convicted of competent verdict as there was a duty on the appellant to ensure that he was not unlawfully receiving stock.

*Held further*, appeal succeeds in part.

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## ORDER

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1. The appeal succeeds in part.
2. The conviction and sentence is set aside and it is replaced with the following:  
The accused is convicted for contravening s 3 of the Stock Theft Act 12 of 1990 as amended – absence of reasonable cause for believing the stock or produce are properly acquired.

3. The accused is sentenced to pay a fine of N\$3500 or 21 months' imprisonment. The sentence is backdated to 4 November 2020.
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## JUDGMENT

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Claasen J (Shivute J concurring)

[1] The appellant, a 29 year old man, was on 4 November 2020 convicted by the district court of Gobabis for stock theft read with the provisions of the Stock theft Act No 12 of 1990 as amended (the STA). He was sentenced to 3 years' imprisonment without the option of a fine. He was charged with two co-accused. Accused 3, Mr Aloysius Motonane was discharged in terms of s 174 of the Criminal Procedure Act 51 of 1977 as amended (the CPA) before the appellant was put on his defence. Accused 2, Mr Daniel Jors was acquitted at the end of trial.

[2] The appellant was legally represented during the proceedings at Gobabis and timeously filed a notice of appeal against the conviction. The first ground of appeal relates to an alleged error insofar as the court a quo found appropriation and the intent to appropriate to have been proven. The second ground was that the court a quo erred in its rejection of the accused's defence as false given that there was evidence of state witnesses that corroborated his version. The third ground expresses that it was an error by the magistrate have ignored the accused's version that he got a sheep from accused 3.

[3] The state raised a point *in limine* that the grounds of appeal are not clear and specific. Counsel for the appellant disagreed with that contention. After having heard the parties, this court ruled that the grounds were not fatally defective but that the 2<sup>nd</sup> and 3rd ground overlaps and will be construed as one ground.

[4] A summary of the relevant facts that were not in dispute follows:

4.1 At the material time Mr Ernest Puturi was the owner of cattle, sheep and goats and he farmed at a farm situated at Epukiro RC in Otjinene. His livestock included a prized white 'van Rooyen' stud ram to the value of N\$ 5000. His brand mark is 'SE000P1.

4.2 At the time, state witness Mr Johannes Araeb was employed as a herder and the appellant also worked at the same farm, but he worked with poles.

4.3 On a certain Thursday Mr Araeb left the farm as he had been called by doctors. He returned the next day and noticed that the 'van Rooyen' stud ram was missing. The appellant was not on the farm at the time that Mr Araeb returned.

4.4 The next day the appellant rode a horse and passed the Mr Araeb whilst having some bags and fodder. During the night the appellant came to the house, but left again the next day.

4.5 On Sunday morning Mr Araeb noticed that the children were eating intestines. At some point that day he followed horse tracks. He located a slaughtering place and recognized the appellant's shoeprints, which he was able to identify as the appellant resided with him.

4.6 On 19 August 2017 at about 19h00 the appellant and accused 2 sold a fat sheep carcass, for which they had no papers, to state witness Imgard Makgone. He told her that he got the meat from Pottie, whom she does not know. The appellant brought the meat from the bushes.

4.7 The next day the police arrived and confiscated the meat from Ms Makgone. They returned the meat to the complainant's mother, as the farm's owner was out of town. It was just meat and there was no head, no skin and thus no ear-tag.

4.8 The grandchild of accused 3, Mr Procarius Paulus testified that a certain sheep arrived at Kanaan with the goats of Tjika. The description given by him was that it

was a big white sheep with horns wearing an ear-tag with a mark bearing letters PT and the last letter as a C or an M.

4.9 Mr Paulus testified that the appellant arrived at Kanaan with 3 dogs and a spear and that his grandfather asked the appellant whose sheep it was. The appellant initially said it was Ernest's sheep, but when asked a second time he said it was that of a white man, Pottie. Mr Paulus said he deduced it to be the property of Ernest, because he is the only one that farms with sheep on the farm next to them.

4.10 State witness Mr Sameul Dekop testified that the appellant went to Kanaan on that given day to buy supplies and this witness heard that accused 3 said appellant must go and look at the sheep as he can perhaps recognize it. He said that accused 3 farms with cattle only.

4.11 State witness Warrant Officer Brian Kandoni of Du Plessis Police Station testified that he suspects the sheep to be that of Mr Puturi because no one else, apart from Mr Puturi, farms with stud sheep.

4.12 The appellant's explanation was he got a sheep from accused 3, whom the appellant knows at Pottie, at farm Kanaan. The appellant also testified that he believed it to be Pottie's sheep as he was an elderly man and there were sheep and goats in the kraal from where they took the sheep. The accused testified that he enlisted the help of accused 2 for the slaughtering exercise as it was a difficult and unruly sheep.'

[5] An appeal court is not inclined to disturb the factual findings of a court a quo unless the appeal court is convinced that the findings are misdirected or erroneous.<sup>1</sup> The situation is somewhat different when it comes to circumstantial evidence. In such a case the appeal court is at greater liberty to disturb findings of a court a quo when dealing with

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<sup>1</sup> *R v Dhlumayo* 1948 (2) SA 677 (A).

inferences and probabilities.<sup>2</sup> In the matter before us the case is solely based on circumstantial evidence as there was no single eye witness that observed the appellant stealing a sheep.

[6] We return to the grounds of appeal. The first ground deals with the issue of appropriation, which is an element which needed to have been proven by the State. In looking towards the reasons for judgment for an answer, it is a terse judgment that is silent on this aspect. It does not account for the explanation given by Mr Paulus that: 'This sheep came with the goats of another man Tjika'.<sup>3</sup> Mr Paulus attested to that. That fact was not called into question or refuted by any of the parties, nor was 'Tjika' called to shed light on the issue. This fact does not link the act of removal of a missing sheep from the owner's farm to the appellant, making it questionable that an act of appropriation has been proven.

[7] Related to the above enquiry is whether the sheep that the appellant admitted to have slaughtered is indeed the 'van Rooyen' stud of the complainant. The owner Mr Puturi testified that his brand mark was 'SE000P1.' He could not recall if the missing stud had the brand mark, and ended up saying that in his recollection the stud had an ear-tag. Mr Paulus was asked about the identification features of this white sheep that arrived at Kanaan. He answered that: 'it was PT and the other I don't know if it was a C and an M as the last letter.'<sup>4</sup> Clearly that differs from the mark described by the owner. A carcass, moved hands from the appellant and accused 2 to Ms Makgone. She gave a generic description of it being fat sheep meat. The problem is that it was just meat without any unique identification features that specifically link it to the 'van Rooyen' stud ram. As it is, there is doubt as to whether the sheep slaughtered is indeed the stud ram in question.

[8] The second ground of appeal revolves around the plausibility of the appellant's explanation as to his acquisition of a sheep that he slaughtered. Axiomatically, an accused need not put forth a version that is more than reasonably possibly true and an

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<sup>2</sup> *Minister of Safety and Security v Craig* 2011 (1) SACR 469 (SCA) at para 58.

<sup>3</sup> Page 43 of court record.

<sup>4</sup> Page 44 of court record.

accused's version need not even be believed. The court a quo justified the rejection on the appellant's explanation by stating it to be strange and funny to be told 'you like meat, take the sheep and go and eat'.

[9] From the outset the appellant admitted to have slaughtered a sheep, which sheep he said he got from accused 3 who farms at Kanaan. This version is corroborated by evidential aspects from the state witnesses. Firstly Mr Araeb confirmed that the shoeprints he saw at the slaughtering place was from the direction of Kanaan. Mr Paulus also testified about the white sheep at Kanaan, the appellant arriving there with dogs, his grandfather asking the appellant about the white sheep, and that at the end of the day he did not see the sheep there again. Mr Dekop repeated a similar storyline that the appellant went to Kanaan to buy supplies and that accused 3 told the appellant to go and look at the sheep as he can perhaps recognize it. In the circumstances it points to the explanation as one that is reasonably possibly true and it was a misdirection not to have given the appellant the benefit of the doubt. Incidentally accused 3, who would have been in a position to refute this explanation was discharged in terms of s 174 thus leaving that theory in a vacuum.

[10] Having said that, it does not mean the appellant walks away a free man as this court can examine the evidence to determine if he is guilty of a competent verdict. Given that the appellant was legally represented it would be permissible to convict him of a competent verdict in the event that the evidence proves that. Section 3 of the STA criminalizes the absence of reasonable cause for believing stock or produce was properly acquired. The version of the appellant is that he received a sheep from accused 3 at Kanaan and did not know whether accused 3 owns livestock, which makes it difficult to prove that the accused was dishonest when he received the sheep. Regardless, this court is satisfied that the appellant acquired this sheep otherwise than at a public sale. The term public sale is defined in s 1 of the STA as follows:

(a) at any public market; or

(b) by any shopkeeper during hours when his or her shop may in terms of any law remain open for the transaction of business; or

- (c) by a duly licensed auctioneer at a public auction; or
- (d) in pursuance of an order of a competent court.

[11] In *S v Elumba*<sup>5</sup> it was held at para 21 that there is a duty on a person buying stock to be in lawful possession of such stock. Likewise, there is a duty on a person who receives stock to ensure that he is not unlawfully receiving stock. We endorse these sentiments. The evidence herein unequivocally proves that there was no paper trail that accompanied the acquisition of the sheep. In particular, Ms Makgone attested that there appellant and accused 2 had no documents for the meat which they have sold to her. That being so, this court convicts the appellant of the competent verdict of absence of reasonable cause for believing that the stock or produce was properly acquired in contravention of s 3 of the STA.

[12] We turn to the question of an appropriate sentence. Counsel for the State, submitted that the punishment for competent verdicts is the same than for the offence of stock theft. He thus proposed direct imprisonment whereas counsel for the appellant asked for a fine. A contravention of s 3 of the STA is excluded from the offenses listed in s 14 of the STA for which the mandatory minimum sentences are prescribed. As such the penalty clause under s 15 of the STA finds application, which provides for a fine not exceeding N\$4000 or imprisonment not exceeding 2 years or both such fine and imprisonment.

[13] The appellant was a first offender aged 29 years and had 2 minor children. He explained that he had little formal schooling. At the time of the incident he was employed to cut poles at the farm of the complainant in the matter. In aggravation the State emphasized that the community depends of farming in that area and that the prevalence of these offences calls for a deterrent sentence. Being mindful of these considerations the court deems a sentence of N\$ 3500 or 21 months' imprisonment appropriate.

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

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<sup>5</sup> *S v Elumba* (CA 15/2016)[2018] NAHCNLD 43 (24 April 2018).



1. The appeal succeeds in part.

2. The conviction and sentence is set aside and it is replaced with the following:

The accused is convicted for contravening s 3 of the Stock Theft Act 12 of 1990 as amended – absence of reasonable cause for believing the stock or produce are properly acquired.

3. The accused is sentenced to pay a fine of N\$ 3500 or 21 months' imprisonment. The sentence is backdated to 4 November 2020.

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C M CLAASEN

Judge

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N N SHIVUTE

Judge

## APPEARANCES:

FOR THE APPELLANT:           E T Shiikwa  
  Directorate Legal Aid  
  Gobabis

FOR THE RESPONDENT:        T Gaweseb  
  Of the Office of the Prosecutor General  
  Windhoek