

ZENZO DUBE

And

REVERENCE DUBE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE & MOYO JJ
BULAWAYO 22 OCTOBR 2018

Criminal Appeal

S. Mawere for the appellants
Ms N. Ndlovu for the respondent

MAKONESE J: The appellants appeared before a magistrate sitting at Gwanda Magistrates' Court facing one single count of stock theft, that is to say a contravention of section 114 (2) (a) of the Criminal Law (Codification and Reform) Act Chapter 9:23. The allegations against them were that sometime in November 2016, together with Peter Ncube (who was convicted and sentenced before the appellant's trial), they stole complainant's 8 head of cattle from Dwala grazing lands. Two of these beasts found their way back to the owner while the remaining 6 were not recovered. The appellants pleaded not guilty but following a full trial they were both convicted and sentenced to 15 years with 3 years suspended on the usual conditions of future good conduct. A further 3 years was suspended on condition the appellants compensated the complainant the value of the 6 missing beasts.

Dissatisfied with both the conviction and sentence, the appellants now appeals to this court.

The state does not support the conviction and contends that the state failed to prove its case against the appellants beyond reasonable doubt. After perusing the record of the trial

proceedings in the lower court, it is abundantly clear that there were several inconsistencies in the state case.

It is trite that in criminal law the state bears the onus of proof. The state led evidence from four state witnesses. The complainant was the first to testify. He told the court that after losing his cattle in November 2016 he was approached by one Cosmas Shoko who told him that he had met Peter Ncube, Nhlanhla and Ree driving head of cattle that fitted the description of the ones he was missing. When he was probed further on why in his statement to the police there was the name “Richard” mentioned, and then altered and replaced by the name “Ree”, the witness stated that he was not sure of the suspect’s full names. He had later learnt from Peter Ncube that the name “Ree” was an acronym for the name Reverence Dube (2nd appellant). Upon taking the witness stand **COSMAS SHOKO** testified that he knew the appellants prior to the commission of the offence. He was also known to Peter Ncube. On the day he met the three driving complainant’s cattle he only spoke to one Peter Ncube. This witness conceded that in his statement to the police the only person he mentioned was Peter Ncube. The witness disputed that he ever mentioned the name Nhlanhla to the complainant. It was not disputed that Nhlanhla was once heavily assaulted for stock theft in respect of the same missing beasts. The evidence revealed that the identity of the persons who were seen driving the cattle whilst in the company of Peter Ncube was not ascertained beyond reasonable doubt. The discrepancy between the state witnesses’ testimony was material and dealt a fatal blow to the state case.

Peter Ncube, who led to the arrest of the appellants, having implicated them after his conviction, made a dramatic u-turn in court. In his testimony during evidence in chief this witness completely exonerated the appellants. The convicted accomplice instead, averred that he had stolen the beasts in question with one Godwin Ndou. The witness gave hostile evidence to the state, case. No effort was made to impeach his testimony. The evidence of the convicted accomplice’s testimony coupled with the unreliable evidence of the other state witnesses left the state case with insufficient evidence to sustain the convictions.

On the requirements of proof beyond reasonable doubt reference is made to; *Chudu v The State* HB-214-17; *Sv Makanyanga* 1996 (2) ZLR 231 and *R v Difford* 1937 AD 370. In cases involving the identity of a perpetrator of a crime, it is the duty of the court to exercise special caution, more particularly where there is only one single witness who has made the visual identification. The issue has been exhaustively dealt with in the following Supreme Court decisions: *Mutters & Anor v State* S-166-89; *Makoni & Ors v The State* S-67-89; *Nkomo & Anor v The State* 1989 (3) ZLR 117 (S) and *Madziwa v The State* S-191-90.

For the foregoing reasons we are satisfied that the appeal is merited.

Accordingly it is ordered that:

- 1) The appeal is upheld.
- 2) The conviction and sentence is hereby set aside.

Moyo J I agree

Morris-Davies & Co. appellants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners