

ANDREW MOKUELE NDLOVU
versus
THE STATE

HIGH COURT OF ZIMBABWE
GUVAVA and BLACKIE JJ
HARARE 4 September 2001 and 23 January 2002

Mr *O. Mutero*, for the applicant
Mr *M Nemadire*, for the respondent

GUVAVA J: The appellant has appealed against both the conviction and sentence of stock theft which was imposed by the Magistrates Court sitting at Gwanda on the 13th September, 1996. The appellant, was sentenced to 3 years imprisonment of which 1 year was suspended for 5 years on the usual conditions of good behaviour. The appellant was jointly charged with two other persons but the second accused passed away whilst awaiting judgement and the third accused was sentenced after the appellant as he was ill during the relevant period.

The allegations against the appellant were that on 8 November, 1994 he had, in common purpose with the other two accuseds, connived to steal 3 head of cattle from an unknown person in the Gwanda area. On the same day that the cattle were driven to his farm, two of the beasts were slaughtered for sale in appellant's butchery. The meat together with the one unslaughtered beast was recovered by the police.

The background to this appeal is that the appellant's former

legal practitioner lodged an appeal against conviction and sentence and he was admitted to bail after having served 49 days in prison. Thereafter nothing was done to prosecute the appeal despite being called upon by the Registrar of the Supreme Court to do so in August 1998. The appeal lapsed and the appellant was arrested on 5 March 1999 and resumed serving his sentence. Appellant's present legal practitioners then filed an application for condonation of late noting of an appeal and re-admission to bail pending appeal which application was granted on 29 October 1999. On his release on 1 November, 1999 the appellant had served a total of 9 months and 19 days of the sentence.

The appellant appeals against conviction firstly, on the basis that the trial magistrate erred in failing to appreciate that for one to convict on circumstantial evidence the inference that the court draws must be the only reasonable one whereas in the circumstances of this matter there were other explanations which were reasonably acceptable which had been proffered by the appellant.

It was accepted by the court *a quo* that there was no direct evidence linking the appellant to the offence and that it had relied on circumstantial evidence in convicting him. The leading authority on circumstantial evidence is the case of *R v Blom* 1939 AD 202, where it was held that -

“The inference sought to be drawn, unless it is consistent with all the proved facts, that the proved facts must be such that they exclude every reasonable inference from them save the one sought to be drawn and that, if they do not exclude every reasonable inference from them, save the one sought to be drawn, there must be a doubt whether the inference sought to be drawn is justified.”

The evidence on record shows that the second and third accused stole the 3 head of cattle and drove them to appellant's farm. This is borne out by the evidence of Patrick Dube and Israel Ncube. There is also clear evidence on record that two of the beasts were slaughtered soon after arrival with the full knowledge of the appellant. Nation Sibanda's evidence confirms this and the appellant himself does not deny

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slaughtering the cattle for the purposes of selling the meat in his butchery.

The appellant's defence was that he had bought the beasts from accused two. There is no clear evidence of such sale on record. There were no cattle movement permits, no stock cards and no stock registers of any sales which had been undertaken by the appellant. Although there is some evidence of a sale receipt which was produced in court there were however a number of anomalies in relation to the sale receipt which was produced as Exhibit 1. As the trial magistrate correctly pointed out at page 12 of this judgment receipt 16 of Exhibit 1 is the only receipt which shows cattle supplied to the butchery for sale. All other transactions in Exhibit 1 reflect meat supplied to various places by appellant's butchery. It was also noted that all the other receipts in the book were signed as an acknowledgment of receipt of payment except for the one relating to the transaction in issue and despite the fact that appellant claimed in his evidence that the receipt was written in the presence of accused two. This is indeed surprising particularly if it is accepted that accused two was not the owner of the beasts but that they belonged to his grandmother. In the circumstances it would have been expected that the appellant would have insisted on accused two signing for receipt of the cash so that in the event of a dispute he would be able to prove to the grandmother that he had made the requisite payment. In our view this shows that the receipt was clearly an afterthought, written and made out by the appellant, in an effort to bolster his story long after the event. The court *a quo* in our view also properly discounted Exhibit 3, the accused's diary, which he said he used as a stock register as the entry relating to this particular transaction is lodged between two entries which took place in 1995. The appellant's explanation that there was an error in writing the date of the first transaction was properly rejected by the trial court as it was only raised in cross examination. The trial magistrate dealt with the matter and commented as follows: -

"The lack of detail and confusion point towards a mere afterthought by accused 1 to create circumstances of sale as alleged by the State when in fact the only conclusion that can be drawn in the circumstances is that no sale took place."

Mr *Mutero* also submitted on behalf of the appellant that the trial magistrate erred in finding that there was no agreement of sale between the appellant and second accused when all the factors pointed to the fact that there was a genuine sale. It was argued by Mr *Nemadire* for the respondent that the appellant did not show that he had reasonable cause to believe that the beasts had not been stolen. He relied on the case of *Hamadziripi v S* AD 49/71 where it was stated that it is for the appellant to satisfy the court on a balance of probability that he positively believed that the cattle he was buying were not stolen cattle. The court *a quo* correctly found that there was no basis for believing that appellant was unaware that the cattle were stolen but that there was a genuine sale transaction. There was no indication as to when appellant had entered into agreement with accused two for the sale of the cattle. There was no evidence led by the appellant to show that accused two owned the cattle or that he was given the cattle to sell by his grandmother. His explanation that he sent accused two to collect the stock cards leaving behind the beast he had not bought without any indication of when he would return shows the weaknesses by his story. The evidence of accused two and three in our view could not be relied upon to exonerate the appellant as the court found that they had not been honest with the court.

Clearly, from the evidence on record we are satisfied that there was no misdirection by the trial magistrate in his finding that the only reasonable inference that he could draw in the circumstances was that the appellant, acting in common purpose with his two accomplice had stolen the 3 beasts. Thus the appeal against conviction is dismissed.

Turning to the appeal against sentence, we were persuaded by the submissions made on behalf of the appellant by Mr *Mutero*. The offence involved stray cattle and the courts have always treated such thefts more leniently than those stolen from another person (see *S v Chikonye* HH 227/87). The appellant did not benefit at all from the offence as all the meat and the one beast were recovered. The appellant was only 33 years old at the time of the commission of the offence and a first offender. The appeal itself has taken 5 years to prosecute due to the ineptitude of appellant's former legal practitioners. Although it

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is accepted that the appellant cannot be completely exonerated due to these problems as he had chosen his own legal practitioners he has no doubt suffered as he was imprisoned and released on no less than 2 occasions and served a total of about 10 months imprisonment.

Indeed the respondent has conceded that in these circumstances it would be proper for the court to interfere with the sentence.

Accordingly the appeal against sentence succeeds and the sentence imposed by the court *a quo* is set aside and substituted as follows:-

“24 months imprisonment of which 12 months is suspended for 5 years on condition that the appellant does not commit an offence involving dishonesty to which he is convicted and sentenced to a term of imprisonment without the option of a fine.”

Blackie J, I agree.

Sawyer & Mkushi, legal practitioners for the appellant.

Attorney-General's Office, legal practitioners for the respondent.