



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Reportable: YES/NO

Case No: A168/2019

In the matter between:

MBANGISENSI JOHANNES MADONSELA

Appellant

and

THE STATE

Respondent

Coram: Mbhele, J *et Opperman, J*

Heard: 18 November 2019

Delivered: 27 December 2019

Summary: Appeal - theft - conviction - evaluation of evidence

JUDGMENT

- [1] The appeal lies before this court against conviction only and with leave of the court *a quo*. The appellant was sentenced to six years imprisonment.
- [2] The appellant was convicted of theft of eighteen head of cattle. He was not charged of theft in terms of the Stock Theft Act 57 of 1959. Section 12 of the said Act will however take effect in that all cases where the charge is one of theft of stock or produce the provisions of this Act shall apply where “an accused is indicted, summoned or charged in respect of the theft of stock or produce, notwithstanding the fact that this act is not referred to in the indictment, summons or charge.”

[3] The grounds for appeal are:

1. The court erred in not accepting the version of the appellant and not making a credibility finding in favour of his testimony;
2. The court erred in finding that the State had proved its case beyond reasonable doubt;
3. The court erred in finding the appellant lied when he testified that he could not read;
4. The court erred in convicting the appellant for failure to ascertain the legitimacy of the cattle that was brought to him.

[4] The crux of the appeal is based on the evaluation of the version of the appellant as it stands within the totality of evidence adduced. The onus is on the State to prove its case beyond a reasonable doubt. If the subjective version of the accused is reasonably possibly true after the evaluation of the evidence as a whole, the accused must receive the benefit of the doubt and go free. Probabilities or improbabilities inferred must comply with the dictum in *R v Blom* 1939 AD 188 and follow the cardinal principles of logic:

1. The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
2. The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, there must be doubt whether the inference sought to be drawn is correct.

[5] The general principles according to which a court of appeal should consider a case are set out in *R v Dhlumayo* 1948 (2) SA 677 (A). The court of appeal must bear in mind that the trial court saw the witnesses in person and could assess their demeanour. That was stated seventy years ago and it is still true. If there was no misdirection of facts by the trial court, the point of departure is that its conclusion was correct. In *S v Hadebe* 1997 (2) SACR 641 (SCA) at 645 G – H it was held that the credibility findings and findings of fact of the trial court cannot be disturbed unless the recorded evidence shows them to be clearly wrong.

[6] It is common cause that sixteen head of cattle belonging to the complainant were delivered by accused two in the court *a quo* and the state witness Fana Khubeka at the appellant's farm. The said cattle were loaded in a truck that was hired by accused two from one Mrs Mbatha in Newcastle. The appellant sold some of the cattle to various people. It is, further, not in dispute that the cattle were stolen. What has to be answered is whether the trial court was correct in finding that the appellant was part of a conspiracy to steal the said cattle.

- [7] The evidence that led to the conviction of the appellant was mainly through the testimony of Khubeka, a co-accused who pleaded guilty in terms of section 112(2) of the Criminal Procedure Act 51 of 1977. He testified, inter alia, that he was approached by accused two who made him an irresistible offer to join a syndicate of people who were stealing cattle that she was part of. On the date on which the relevant cattle were stolen accused two arrived in a truck with certain individuals. Eighteen cattle belonging to the complainants were loaded into the truck and transported to the appellant's farm. On their arrival at the farm the cattle were offloaded and accused three handed over some documents to the appellant which documents he was convinced to sign as proof that he will be paid R47 000 as profit for the sale of the cattle. Later in December the appellant called him to his place whereafter he informed him that there were many people interested in the cattle and he was running short of removal certificates (Certificates in terms of section 8(1) of The Stock Theft Act). He told him to go to the police station and ask for the relevant forms which forms he signed and completed as required. The appellant gave him R5000 before he left.
- [8] The appellant testified that accused two phoned him to inquire whether she can leave some livestock with him. He indicated that he cannot accommodate the goats but only cattle. That was before the day of the theft. On the Sunday of the theft accused three phoned and requested, on behalf of accused two, if they can keep some cattle at his place. He agreed and immediately on their arrival he inspected the cattle and demanded the documentation prescribed by law.
- [9] Accused two and Khubeka noticed his suspicion and instantly put him at ease that the cattle belong to the two of them; Bongani Khubeka and accused two. The cattle were branded KB and this correlated with the name Bongani Khubeka. The agreement was that the cattle would be collected the next day. Monday came and went and the cattle were not collected.
- [10] On their departure the Sunday both Khubeka and accused two said that the cattle are for sale. Late on the Monday Khubeka phoned. The appellant complained to him that he does not have the space to keep the cattle. He also informed that there are some buyers interested and inquired about the price. Khubeka was willing to sell for between R4000 and R5000.

- [11] Appellant again demanded that the prescribed documentation be completed before he can sell the cattle. Khubeka delivered it the subsequent Sunday and also collected R37 000. Appellant was careful to count the money in the presence of witnesses and issue a receipt that his son drafted and had Khubeka sign.
- [12] On the third Sunday after the theft Khubeka again fetched money from his place but appellant was not present. His sons handed the money over. Appellant made it clear that at that stage he had not received any compensation for the sale of the cattle because the buyers did not pay in full as yet. He again drafted a receipt but this time Khubeka did not sign. He does not know why Khubeka neglected to sign.
- [13] The police arrived at his place and inquired about the cattle. He handed all the documentation to them and gave them the particulars of the second accused and Khubeka. Only accused two was known to him before the incident. He assisted the police with the investigation.
- [14] Appellant again confirmed that he did inquire about the origin of the cattle and was convinced by accused two and Khubeka that it belonged to them and are from Vrede.
- [15] Appellant was cross examined extensively. It came to light that accused two is related to him and that she was known to possess cattle. There was nothing suspicious about the cattle being brought to him.
- [16] The rejection of the evidence of the appellant by the trial court is based on inferred improbabilities in his evidence. The improbabilities are however not the only inferences available to the court on the proved facts.
- [17] To the contrary; the investigating officer testified that accused two explained that they took the cattle to the appellant's farm because the owner of the truck was complaining about the distance they were to travel. She confirmed the explanation of the appellant. His testimony was as follows:

Attorney: When you arrested Ntate Madonsela were you given the same explanation?

Investigating Officer: That is correct the same explanation.

Attorney: The question remains why were you arresting him?

Investigating officer: I found cattle in his possession.

Attorney: Will I be correct to say that it is not that he gave you an explanation that does not make sense you were arresting him because he was found in possession of life stock.

Investigating officer: That is correct.

Attorney: But did you believe the explanation he gave you and then confirmed by accused 2?

Investigating officer: Yes. (Accentuation added)

[18] The presiding magistrate gave a well-reasoned and detailed judgment. We had to, however, revisit the conviction of the appellant. It often happens that there is a strong suspicion of the guilt of the perpetrator but that the evidence does not prove so beyond a reasonable doubt. The doubt was raised by the poor quality of the testimony of Khubeka. The magistrate was correct when she found that Khubeka's evidence was exaggerated and there were discrepancies in his testimony. Khubeka is an accomplice whose evidence must be approached with caution.

[19] The bottom line is; and trite in law, that:

When the evidence of an accomplice is lead, the question is not so much whether a crime has been committed as who committed it. In order to bridge this problem, the courts developed the cautionary rule which had the correct emphasis. In terms of this rule corroborating evidential material had to link the accused with the crime, or the court had to satisfy itself that the evidence of the accomplice was reliable.¹

[20] The evidence of the appellant could not be criticised by the court *a quo*. Reading of his testimony shows that he maintained his version and never deviated. His testimony is corroborated by Bheki Jele, the driver of the truck and accused two in that the appellant was just an incidental participant in the events of the day.

[21] There is not any evidence that negates the version of the appellant to such an extent that it can be rejected as not reasonably possibly true if measured against the evidence as a whole. His evidence is corroborated by the real facts and other witnesses. It ought to be accepted.

[22] **ORDER**

The appeal is upheld and the conviction and sentence of the appellant is set aside.

¹ Schmidt & Rademeyer, *The Law of Evidence*, Lexis Nexis, Updated July 2018, at 4-14.

I concur

M. OPPERMAN, J

N.M MBHELE, J

Appearances

For appellant: ADV V.C. ABRAHAMS
 Legal Aid SA Bloemfontein

For respondent: ADV A.M. FERREIRA
 Office of the Director of Public Prosecutions: Free State
 Bloemfontein