



Reportable:	YES / <u>NO</u>
Circulate to Judges:	<u>YES</u> / NO
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

CASE NO: CA&R 85/2015
DATE HEARD: 30/05/2016
DATE DELIVERED: 03/06/2016

In the matter between:

DAWID CORNELIUS DU PLESSIS

Appellant

and

THE STATE

Respondent

Coram: Olivier J et Phatshoane J

JUDGMENT

Olivier J

- [1.] The appellant was convicted in the Magistrate's Court of the theft of 24 sheep. The Magistrate then referred the matter to the Regional Court for sentencing. After concluding that the proceedings in the Magistrate's Court were in

accordance with justice¹ the Regional Magistrate sentenced the appellant to a fine of R30 000.00, alternatively 2 years imprisonment, and to a further 5 years imprisonment, conditionally suspended for a period of 5 years. This appeal is against the conviction only.

- [2.] It is trite that a court of appeal will not readily interfere with the factual findings of a trial Court. This approach should not, however, be applied in such a way that it would “*render appeals on fact illusory*”².
- [3.] While a trial court will obviously be in a better position to observe the demeanour of a person as a witness³, a court of appeal should not hesitate to interfere where it appears that “*laudatory epithets (have been) applied by a trial Court when the record shows that their performance, judged by the written word, was obviously far from satisfactory*”⁴.
- [4.] It was not in dispute that 26 Dorper sheep, marked with a half-moon on the left ears, went missing from the farm of the complainant, Mr Kotze, in the period between 5 December 2010 and 19 January 2011.
- [5.] Although the evidence in this regard was far from satisfactory I am prepared to assume, for purposes of this appeal, that Mr Frederick Philander had been involved in the theft of 24 of those sheep.
- [6.] Mr Philander appears to have been employed, at least part-time, by the appellant and his brother as a farm labourer. He was raised by the appellant’s family. After having lived with them for approximately 15 years Mr Philander left, after discord between himself, on the one hand, and the appellant and his brother, on the other hand.

¹ Section 116(3)(a) of the **Criminal Procedure Act**, 51 of 1977

² **RH v DE** 2014 (6) SA 436 (SCA) para [5]

³ Compare **Minister of Safety & Security and Others v Craig and Others** 2011 (1) SACR 469 (SCA) para [58]

⁴ **S v Heslop** 2007 (1) SACR 461 (SCA) para [13]

- [7.] Mr Philander testified that on 9 January 2011 he accompanied the appellant to the farm where the sheep were. On their way there the appellant phoned one Kelvin, who appeared to have been the appellant's neighbouring farmer, to bring the appellant two containers of diesel. According to Mr Philander he and the appellant went there in the appellant's green Isuzu vehicle. The appellant broke two locks and he then assisted the appellant in loading the 24 sheep onto the vehicle. They drove to a commonage, where they downloaded the sheep and received the diesel from Kelvin. The next day he assisted the appellant in moving the sheep to a different area. This, briefly, was the evidence of Mr Philander.
- [8.] The sheep were never found in the possession of the appellant, and were apparently never recovered. About a year later, when Mr Philander was confronted with various charges of stock theft, he made a statement in which he admitted having been involved in this theft, and in which he then implicated the appellant on the above basis.
- [9.] The appellant pleaded not guilty to the charge. He denied having stolen the complainant's sheep. The sole issue was therefore simply whether the appellant had indeed been involved in this theft, as described by Mr Philander.
- [10.] Mr Philander was quite clearly a single witness in respect of this crucial issue. Moreover, he would clearly also on his own version have been an accomplice. For both these reasons his evidence had to be approached with caution⁵. The Magistrate, with respect, appears to have paid mere lip service to these cautionary rules.
- [11.] It was only in cross-examination of Mr Philander that it for the first time appeared that the relationship between him and the appellant (and the

⁵ Compare *Stevens v S* [2005] 1 All SA 1 (SCA) para [17]; *R v Ncanana* 1948 (4) SA 399 (A) at 405

appellant's brother) deteriorated at some stage after Mr Philander had made some statement about a cow. It was according to him then that the appellant's brother assaulted him and made some video recording. There was also discord about Mr Philander's use of the vehicle of the appellant's brother.

[12.] Although Mr Philander initially pretended that this problem had only been between him and the appellant's brother, he went on to say that the appellant had caused it by telling his brother lies.

[13.] In his judgment the Magistrate stated that Mr Philander had impressed him as a witness. This is difficult to reconcile with the Magistrate's finding that the evidence of Mr Philander was open for criticism and that he had contradicted himself about whether he had implicated the appellant in this theft before or after their friendship ended.

[14.] The Magistrate described this contradiction as the only one of note. In my view it was a material contradiction, because it was the appellant's case that Mr Philander had falsely implicated him out of revenge, and after their friendship had come to an end. The undisputed evidence of the appellant was that their friendship had ended at the end of 2011. Mr Philander made the statement, implicating the appellant, in 2012.

[15.] Mr Philander eventually conceded, at least, that at the stage when he made the statement incriminating the appellant, he did not trust the appellant, which would also correspond with the appellant's evidence regarding the end of their friendship.

[16.] Mr Hollander, counsel for the respondent, argued that Mr Philander's problem had in actual fact been caused by the appellant's brother and that, if Mr Philander had wanted to falsely incriminate someone on a charge of theft, one would have expected the appellant's brother to have been the target.

- [17.] This argument loses sight of Mr Philander's complaint that the appellant had caused the trouble between him and the appellant's brother, and that the appellant had also been involved in the taking away of privileges that Mr Philander had earlier enjoyed, until Mr Philander eventually left them and moved away.
- [18.] The Magistrate found that the explanation for the delay between the time of the theft and the making of the incriminating statement was clearly that Mr Philander had kept quiet to protect at least himself. This, however, misses the real question, and that is whether it was a coincidence that it was only after the friendship between Mr Philander and the appellant had come to an end, that Mr Philander decided to not only admit the theft of the complainant's sheep, but also to implicate the appellant in the process.
- [19.] When asked in cross-examination why he was not himself charged with this theft, Mr Philander answered that he had been charged, and that he did not know whether the particular charge had been withdrawn against him. This was also never cleared up by the prosecutor. Why would Mr Philander have contemplated the possibility of this charge against him being withdrawn? Could it be that he was promised this or at least expected it, in return for his evidence against the appellant? In **S v Hlapezula and Others**⁶ it was held, at 440D, that "*various considerations may lead (an accomplice) to falsely implicate the accused, for example a desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency*". Another possible motive could be "*to obtain immunity for himself*"⁷.
- [20.] The Magistrate found it unlikely that Mr Philander would have concocted a story with so much detail, and the Magistrate made specific reference to the broken locks, the description of the stolen sheep and the fact that tyre tracks

⁶ 1965 (4) SA 439 (A)

⁷ **S v Van Vreden** 1969 (2) SA 524 (N) at 531H

and human tracks were observed by the complainant when the theft of the sheep was discovered. The Regional Magistrate fell into the same trap in referring, with apparent approval, to the Magistrate's finding that Mr Philander could only have provided such detail if he had indeed been involved in the theft himself. This, however, is exactly why the evidence of an accomplice should be approached with caution. In **Hlapezula**⁸ it was held that an accomplice, "*by reason of his inside knowledge ... has a deceptive facility for convincing description – his only fiction being the substitution of the accused for the culprit*".

[21.] It is precisely because of this that "*Corroboration not implicating the accused but merely in regard to the details of the crime is no guarantee of the truthfulness of an accomplice, the very fact of him being an accomplice enables him to furnish the Court with details of the crime which is apt to give the Court, if unwary, the impression that he is in all respects a satisfactory witness*"⁹.

[22.] Also of concern is the fact that the Magistrate seemed to have rejected the appellant's version only because he regarded Mr Philander's evidence as credible. Not a single aspect of the appellant's version and evidence was discussed in the judgment, let alone criticised. The Magistrate seems to have lost sight of the fact that the test should be whether the version of the accused person is reasonably possible (not necessarily even probable¹⁰), not whether the Magistrate actually believed it to be true.

"Whether I subjectively disbelieve him is, however, not the test. I need not even reject the State case in order to acquit him. I am bound to acquit him if there exists a reasonable possibility that his

⁸ See paragraph [19] and footnote 6 above.

⁹ **S v Van Vreden**, *supra*, at 531 to 532; See also **S v Wilson-Forbes** 2015 JDR 0725 (WCC)

¹⁰ Compare **R v Difford** 1937 AD 370 at 373; **S v Jaffer** 1988 (2) SA 84 (C) at 88H - I

evidence may be true. Such is the nature of the onus on the State”¹¹.

[23.] The position is exacerbated by the unexplained failure of the prosecution to present the evidence of Kelvin, or to at least tender an explanation for its decision not to call him as a witness¹². Mr Hollander argued that the reason may be that an admission of having received two sheep from the appellant would have incriminated Kelvin on the charge of theft. This is speculation, because there is no indication in the record that an attempt had been made to obtain a statement from Kelvin. In any event, the prosecution had no hesitation in presenting the evidence of Mr Philander, who had on his own version been directly involved in the theft.

[24.] The appellant bore no onus, and therefore no duty to call Kelvin as a witness.

[25.] Although there may have been a suspicion that the appellant was guilty of the theft, there was in my view at the very least ultimately a reasonable possibility that Mr Philander had falsely implicated the appellant out of revenge.

[26.] The following order is therefore made:

THE APPEAL SUCCEEDS AND THE CONVICTION AND SENTENCE ARE SET ASIDE.

¹¹ *S v Kubeka* 1982 (1) SA 534 (W) at 537F – H; See also *S v Shackell* 2001 (2) SACR 185 (SCA), para [30]; *S v Abader* 2010 (2) SACR 558 (WCC)

¹² Compare *S v Teixeira*, 1980 (3) SA 755 (A) at 763D – 764B



C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

I concur



V M PHATSHOANE
JUDGE
NORTHERN CAPE DIVISION

For the Appellant: Adv. P. F. Pistorius
Instructed by: Elliott Maris Wilmans & Hay

For the Respondent: Adv Q. H. Hollander
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