

**IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA**

CASE NO: AR514/15

In the matter between:

SANDILE ZONDO

First Appellant

SANDILE MAPHISA

Second Appellant

VS

THE STATE

Respondent

APPEAL JUDGMENT

Delivered: 09 June 2016

MBATHA, J

[1] The appellants before court were convicted in the Regional Court sitting at Vryheid on 26 May 2015 of stock theft. They were sentenced to 8 years imprisonment of which four (4) years was suspended for a period of five (5) years on condition that the accused were not convicted of stock theft or produce during the period of suspension. The appeal against conviction is with the leave of the court *a quo*.

[2] The charges arose under unusual circumstances, in that the stolen cattle were recovered before the theft thereof had been discovered by the owner or the manager of the farm.

[3] A call from a community member was received by Constable Ntombizodwa Princess Ngobese, stationed at Nondweni Police Station at about 07h30 reporting that two men were seen driving the cattle past Phoqukhalo area. She together with Constable Amon Dlamini proceeded to the place where the cattle were sighted. They travelled in a marked police motor vehicle. As they approached a mountain they saw a herd of cattle driven by two male persons. Upon reaching the place where the two men were, they alighted from their motor vehicle and introduced themselves as police officers to the two males who gave their names as Sandile Maphisa and Sandile Zondo. Upon enquiring where they were headed, appellant 2 informed them that the cattle in their possession were to be used as lobolo at his home and that the cattle had gone missing. The cattle belonged to his brother, Sifiso.

[4] It was then that Constable Ngobese decided to make a call to Captain Mbongiseni Elphas Mtshali, a member of the Stock Theft Unit in Nqutu to come and investigate as she wanted the Stock Theft Unit to confirm the allegations that the accused were saying to her.

[5] Captain Mtshali arrived and upon interviewing the appellants was informed by the appellants that the cattle belonged to Sifiso, who was in Gauteng. They were taking the cattle back to the Dube family homestead at Maduladula. Appellant 1 was there merely to assist appellant 2. They then left with appellant 2 for the Dube family homestead. Dube was not available. Upon inspection of the homestead Mtshali and his team found that though there was a kraal it was overgrown with grass and there was no dung in the kraal indicating that any cattle were kept in that kraal.

[6] To further verify the ownership of the cattle Mtshali then proceeded to appellant 2's place of residence, where they found that no one knew about the cattle. Appellant 1 had informed Mtshali that he was there to assist appellant 2 to search for the missing cattle from his homestead.

[7] Mtshali's investigation led him to Sandfontein Farm Gluckstadt, Vryheid, whereupon he enquired if they had missing cattle. This was after he realised that he

had seen cattle with a similar branding to the cattle found in possession of the appellants. He arrived there before the discovery of the missing cattle was made by the Manager, Mr Hlatswayo, as they had just started with the counting of the cattle. It was then discovered that ten head of cattle were missing. Coincidentally the cattle missing from the farm were the same number of cattle found in the possession of the appellants. Hlatswayo also identified the cattle at the police station by their brand mark “C L” and the swallow earmark on the earlobe of each cattle. The appellants who were already under arrest were charged and arraigned before the court for stock theft.

[8] Besides the evidence of Captain Hlatswayo the state had evidence from all police officers involved in the investigation including Constable Ngobese, Constable Dlamini, Sergeant Madela and Mandla Hlatswayo, the farm manger. The two appellants also gave evidence in their defence.

[9] It is submitted on behalf of the appellants that it has not been proved beyond a reasonable doubt that the appellants were indeed stealing the cattle on that day; that the cattle removed by the appellants from the farm on the date alleged on the charge sheet and that the trial court erred in rejecting the version of the appellants as it was reasonably possibly true.

[10] The respondent is opposing the appeal on the basis that though there was no direct evidence of the theft of the cattle, the state was able to prove its case on the circumstantial evidence of the crime, that the version given by the appellants is inconceivable with the proven facts and not reasonably possibly true and that the state proved the case beyond a reasonable doubt against the appellants.

[11] It is trite that as we sit as the Court of Appeal, we can only interfere with the trial court’s judgment if there is a misdirection either on law or fact as stated in various *dicta*, including *S v Bailey*,¹ where the court had this to say:

¹ 2007 (2) SACR 1 (C) para 16.

‘The powers of the Court of appeal findings of a trial court were strictly limited. If there had been no misdirection on the facts, there is a presumption that the trial Courts’ evaluation of the factual evidence is correct.’

We accept that although the court *a quo* has the advantage in seeing, and hearing the witnesses and being steeped in the atmosphere of the trial process, this court must be satisfied that on the evidence before it, that the case has been proved beyond a reasonable doubt.

[12] As stated by the respondent’s counsel the crime of theft is the unlawful appropriation of another person’s movable corporeal property with the intention to permanently deprive the owner of the property. The appellants were charged in terms of the Stock Theft Act. Section 2 of the Stock Theft Act² also states that any person who is found in possession of stock or produce in regard to which there is a reasonable suspicion that the stock or produce was stolen and is unable to give a satisfactory account of such possession shall be guilty of an offence. This does not shift the onus of proof to the accused person, but the state bears the onus of proof in proving all the elements of the offence.

[13] Where there is no direct evidence the circumstantial evidence tendered by the state will prevail. In *R v Difford*³ the appellate division stated as follows:

‘The fundamental rule in considering circumstantial evidence is that, in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis.’

Similarly the principles laid out in *R v Blom*⁴ were applicable in this case.

[14] It is common cause that there is no direct evidence showing how the cattle were stolen from Sandfontein Farm, save that a spoor of the cattle was observed from the main gate which ended up to where the road to Nondweni starts. The

² Act 57 of 1959.

³ 1937 AD 370 at 371.

⁴ 1939 AD 188.

appellants were only spotted by a community member as they went past Phoqukhalo area driving a herd of cattle on a misty morning of 21 November 2013.

[15] The evidence given by Constables Ngobese and Dlamini indicate that they found the appellants in the early misty morning on the mountain and they were in the presence of the ten head of cattle. They felt that the explanation given by appellant 2 that they were his brother's missing cattle, which had been missing for a week, had to be verified. The appellants had also informed the officers that they found the missing cattle and were taking them back to a Dube homestead in Maduladula where they are kept. This evidence confirms that the appellants were in possession and control of the ten head of cattle on that morning.

[16] The investigations carried out by Captain Mtshali show that at the Dube homestead there was no evidence that the kraal had recently been occupied by such a number of head of cattle. The kraal was overgrown with grass and there was also no evidence of the presence of cow dung inside the kraal. At appellant 2's homestead no one knew about the existence of the cattle. The telephone number of Sifiso given by the appellants to Captain Hlatswayo was also found to be inaccessible as it was non-existent to verify with Sifiso if indeed he had lost any cattle which he had purchased for lobolo purposes.

[17] The appellants could not produce any invoices or receipts as proof of such purchase. The evidence of Hlatswayo confirmed beyond any reasonable doubt that the missing cattle were from Sandfontein Farm as they bore a "C L" branding mark, of which the "C" was branded upwards and appeared like a "U" and that the earlobes had a swallowtail mark. This is in line with Exhibit "A", a photo album showing the ten head of cattle with their identification marks. This evidence went unchallenged by any of the appellants.

[18] The appellants could not advance any form of identification of the cattle save that they belonged to appellant 2's brother, Sifiso. They could not show how they had identified the cattle as belonging to Sifiso. In his defence appellants 2 stated that

Sifiso's cattle bore an "E M" brand mark and an ear mark which he could not describe. This evidence was only mentioned by appellant 2 for the first time when he gave evidence in court. It is clear to this court that the cattle that were recovered from the appellants did not bear the "E M" branding mark but had a different mark.

[19] The version of the appellants that at the time of the arrival of Constable Ngobese and Constable Dlamini they had just started inspecting the cattle, is unacceptable, as they could not advance what they were checking them for. This could not be true as the cross-examination of appellant 1 elicited that he had no knowledge of what to look for in the lost cattle. Appellant 2 had no reasonable explanation why he had to wait for a week before searching for the lost lobolo cattle or reporting to the police. His version is improbable as it is not reasonably possibly true that at his homestead no one knew about the existence of the cattle. The appellants' version is that they were prompted by the early morning call from Sifiso who was in Gauteng to go and look for the missing cattle, is also improbable as it would mean that had there been no call from Sifiso, the cattle would have remained missing.

[20] Appellant 1 lives about 500 meters away from appellant 2's homestead, however, he denied that he ever saw the alleged missing cattle at appellant 2's homestead. His version was rightly rejected as no reasonable person would just proceed to assist appellant 2 without enquiring about the basic details of the lost cattle, like their colours, brand marks and any other relevant details.

[21] Appellant 2's evidence that he admitted theft because of the assault upon him by the police officers is without merit. In all the statements that were deposed to by the police officers shortly after their arrest, which form part of the record, there is not a single one that states that he admitted to stealing the cattle.

[22] It is apparent from the evidence before the court *a quo* that the appellants stole the cattle which were in possession of Hlatswayo. Hlatswayo's evidence was that the cattle are counted each and every morning. They had been counted on 20

November 2013 and they were counting them on 21 November 2013 when Captain Mtshali arrived on the farm. As a result of the counting Hlatswayo discovered that nine cows and one bull were missing.

[23] It must be accepted that the cattle had not strayed as they were found 16km away from Nondweni in the presence of the two appellants. The evidence of Constable Ngobese should be accepted as she stated that it was conclusively clear to her that the cattle were driven from behind by the two appellants who were in possession of sticks.

[24] The appellants' version that Sifiso was the owner of the cattle is not sustainable as Sifiso was not called as a witness. If Sifiso was the owner of the cattle he had a lot to lose, his lobolo cattle and his bride, but Sifiso was not called as a witness by the appellants.

[25] I accept the submission made by counsel for the respondent that theft is a continuing crime as there are no accessories to the fact in the crime of theft. The theft continues as long as the stolen property remains in the possession of a thief. Appellant 1, whether he was present at the time when the cattle were moved away from the farm or not or whether he rendered his assistance at the time when the cattle were already on the mountain is immaterial. He is also guilty of theft, not as an accessory, as he had tried to portray in his evidence.

[26] In light of the evidence that was presented in the trial court we accept that the state proved the case against the two appellants beyond a reasonable doubt.

[27] I propose that the following order should be made:

- (a) That the appeal be dismissed.
- (b) The conviction by the court *a quo* of accused 1 and 2 is confirmed.
- (c) The sentences imposed by the trial court are confirmed in respect of both accused.

- (d) There is a mistake in the way that the sentence was pronounced by the trial court. It is therefore corrected and must read as follows:
“sentenced to eight (8) years imprisonment of which four (4) years is suspended for a period of five (5) years on condition that the accused are not convicted of stock theft or produce committed during the period of suspension.”

MBATHA J

I agree:

KOEN J

Date of Hearing: 02 June 2016

Date of Judgment: 09 June 2016

Appearances

Counsel for the Appellant: Adv EX Sindane

Instructed by: Legal Aid South Africa
Pietermaritzburg

Counsel for the Respondents: Adv K Radyn

Instructed by: The Director of Public Prosecutions
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