

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Appeal No: 164/14

In the matter between:

ERIC MOKUNYANE PHUME

Appellant

and

THE STATE

Respondent

CORAM:

C.J. MUSI, AJP *et* G.J.M. WRIGHT, AJ

JUDGEMENT:

G.J.M. WRIGHT, AJ

HEARD ON:

9 MARCH 2015

DELIVERED ON:

7 May 2015

[1] This appeal is directed at the Appellant's convictions in the magistrate's court. Even though the judgment of the trial court is in Afrikaans, the Appellant's Heads of Argument and oral argument were presented in English. I find it convenient therefore to give this judgment in English.

[2] The Appellant (as Accused 1) stood trial on the following charges:

- (i) Count 1: Stock Theft (with alternative charges);
- (ii) Count 2: Fraud;
- (iii) Count 3: Unauthorized use of a motor vehicle.

Accused 2, ALFRED MOKUZAYI, was discharged at the end of the State's case.

- [3] The Appellant pleaded guilty to count 3, but persisted in his innocence on the other charges. He was however found guilty as charged and sentenced in the following manner:

- (i) Count 1: three years imprisonment, of which 1 year was suspended for five on certain conditions;
- (ii) Count 2: 12 months imprisonment;
- (iii) Count 3: A fine of R 1 200 – 00 or 3 months imprisonment.

- [4] The trial court granted the Appellant leave to appeal against his convictions on counts 1 and 2.

- [5] The facts underlying the convictions may be summarized as follows: Sometime between February and March 2011 a Bonsmara cow, belonging to Jan Hendrik Jansen van Rensburg (the complainant), was stolen together with 6 others. On 8 March 2011 the Appellant took the cow to the Bothaville Abattoir with instructions for it to be slaughtered. The next day, and only after he was requested to do so, the Appellant produced a handwritten document under the auspices of it being a removal certificate in terms of section 6 of the Stock Theft Act, Act 57 of 1959 ("the

Act”). The personnel at the abattoir became suspicious as the cow appeared to be of stud quality and the handwritten document did not comply with the requirements of the Act. After they contacted the complainant, the cow was positively identified as one of several cows stolen during the time that the complainant was away from his farm Boshhoek.

- [6] After his arrest, the Appellant took the police to the farm of the complainant and pointed out Accused 2 as the person from whom he allegedly bought the cow. Accused 2 denied knowing the Appellant or knowing of any transaction involving the cattle of the complainant. Other than the say so of the Appellant, there was no evidence linking Accused 2 to the crimes mentioned in the charge sheet.
- [7] At the time of his arrest, the Appellant was a police officer. Count 3 is based on the unauthorized use of the vehicle designated for use during the performance of his official duties. In his plea explanation the Appellant admitted that on the day in question he took a route for which he did not have the necessary authority and that this was done for purposes of buying the cow (*“tydens die aankoop van die bees”*).
- [8] The Appellant attacks the findings of the trial court on several grounds. The main grounds of appeal are:
- (i) The magistrate erred in finding that the so-called removal certificate is meaningless and irrelevant in regard to the charge of stock theft.

(ii) The magistrate erred in finding that the certificate was merely drafted to disguise the theft of the cow.

(iii) The trial court erred in rejecting the Appellant's version as false.

[9] The principles governing the adjudication of appeals against findings of fact are well-established. A short summary will suffice. If there has been no demonstrable misdirection on the facts, it is presumed that the trial court's evaluation of the evidence as to the facts is correct, and a court of appeal will interfere only if it is convinced that that evaluation is wrong (**S v Hadebe and Others** 1998 (1) SACR 422 (SCA) at 426 a – b). If the court on appeal is in doubt, the trial court's judgment must remain in place. See for example: **S v Robinson** 1968 (1) SA 666 (A) at 675 H.

COUNT 1: THEFT

[10] The Appellant's conviction on the count of stock theft is based on circumstantial evidence. The approach to circumstantial evidence has been set out in the well-known case of **R v Blom** 1939 AD 188 at 202 – 203. It follows the following cardinal principles of logic:

- (i) The inference sought to be drawn must be consistent with all the proved facts.
- (ii) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn.

- [11] It is possible that several independent facts can separately be reconciled with innocence. It is however their combined persuasive force that should be assessed (R v Mtembu 1950 (1) SA 670 (A) at 679 – 680).
- [12] It is common cause that the Appellant had in his possession a cow stolen from the complainant and that he presented it at the abattoir for slaughter. The Appellant dealt with the cow as if he was the owner thereof. It is therefore necessary to evaluate the Appellant's version as to his possession of the cow in order to establish whether the magistrate's finding that he is guilty of theft, was correct.
- [13] The Appellant related his version of events in (i) a statement prepared with the assistance of his attorney and (ii) his plea explanation. He did not testify and did not call any witnesses. A further portion of his version was put to one of the state witnesses namely that, as the seller of the cow was unable to write in Afrikaans, the Appellant took it upon himself to prepare the purported removal certificate. The Appellant further admitted that he used an official police vehicle to transport the cow to the abattoir.
- [14] The Appellant's plea explanation presents with the following version of his possession: He bought the cow from a person who identified himself as Samuel Motsumi. The Appellant bought the cow as he was running a butchery. The Appellant only later learned that the person that sold him the cow is in actual fact Accused 2. The Appellant received the necessary document from

the seller, where after he took the cow to the abattoir and organized for it to be slaughtered.

[15] In **S v Mothlaping** 1988 (3) SA 757 (NC), at 761 I – 762 G, the court conveniently summarised the status of statements made as part of a plea explanation.

- (i) What the accused says in a plea explanation is not evidence.
- (ii) A plea explanation is evidential material in the sense that the accused has made a statement.
- (iii) The plea explanation cannot be used as evidential material in favour of the accused.

[16] The Appellant chose not to substantiate his plea explanation with any oral testimony. The plea explanation itself does not contain the full details of his version. For example, it does not explain that it was indeed the Appellant who prepared the removal certificate. This version only became known during statements put to one of the state witnesses. Other portions of the Appellant's version emerged as the trial progressed, such as a statement prepared by his attorney in answer to questions by the investigating officer.

[17] While the investigating officer was taking down the Appellant's warning statement, he questioned the Appellant. The Appellant answered some of the questions. However his response to several of the questions was to the extent that his attorney will answer those questions. The attorney later prepared a written

statement on the Appellant's behalf, presumably to provide answers to the issues raised by the investigating officer, but also to provide an exculpatory version of the Appellant's possession.

[18] It is significant that the questions which the Appellant did not initially answer, were the pertinent ones relating to the very essence of his defence. No explanation has been forthcoming as to why the Appellant was amenable to answer certain questions, but not others. It is also not explained why he needed the assistance of an attorney in order to respond to simple questions posed by the investigating officer such as:

(i) *"Ken jy die persoon op die brief soos bystuk [sic] A6 by wie jy die bees aangekoop het?"*

(ii) *"Wie het die brief geskryf m.a.w die koopkontrak?"*

(iii) *"Wie het die brief onderteken?"*

[19] The State handed in the statement prepared by the Appellant's attorney. This is a crucial piece of the evidentiary puzzle presented against the Appellant as it creates more questions than it answers. I quote the following pertinent extracts to illustrate this point:

"Die persoon by wie ek die tersaaklike bees aangekoop het was voor die voorval aan my onbekend gewees. Hierna verwys as die "Verkoper".

3.

Die Verkoper het 'n boodskap gelaat dat hy 'n bees het om te verkoop.

4.

Ek het hom gekontak en nadat ek en hy by die veekrale naby Kgotsong Bothaville was en die tersaaklike bees aan my uitgewys was het ons gereël dat die prys van die bees was R4 000-00 en dat ek sou reël vir vervoer om dit die volgende dag na Bothaville slagpale te neem.”

And later:

“Tydens die oplaai van die bees het ek R4 000-00 kontant aan die Verkoper oorhandig en hom ook versoek om ‘n brief aan my te gee dat hy die bees aan my verkoop het.”

7.

Hy het ‘n boek wat lyk soos ‘n faktuurboek uitgehaal maar toe ek hom versoek om die brief in Afrikaans te skryf omdat die slagpale nie ‘n brief in ‘n ander taal aanvaar nie, het hy my versoek om in my eie handskrif die brief in Afrikaans te skryf wat ek gedoen het omdat hy my meegedeel het dat hy nie goed in Afrikaans kan skryf nie.”

[20] As the Appellant was willing to set out his version in a written statement, prepared by an attorney no less, one would have expected him to give the full picture. As such the statement leaves at least the following burning questions unanswered:

- (i) If the Appellant met the seller at the cattle pens at Kgotsong, how did he know that this person works and resides at the farm Boshoeck?
- (ii) How did he and the seller contact each other?
- (iii) How did it happen that the seller knew that the Appellant would be interested in buying cattle?

(iv) Why did the Appellant find it necessary to request the seller to provide him with a “letter” indicating that the cow was sold to the Appellant (especially if he was not conversant with the exact requirements of the Stock Theft Act)?

[21] The statement becomes problematic when compared with other portions of the state’s evidence, such as the pointing out of Accused 2 at the farm and the presence of the Appellant’s car in the vicinity of the farm.

[22] The Appellant took the police to the farm of the complainant and pointed out Accused 2 as the person who allegedly sold the cow to him. This followed the consultation between the Appellant and his attorney. Warrant officer Greeff testified how this came about as follows:

“Op Maandag die 28ste het ek en mnr. Phume saam sy regsverteenwoordiger mnr. Viljoen by die kantoor gaan ontmoet. Daar is vergun dat ek sekere vrae rondom die dokumentasie aan mnr. Phume gestel het en ook die klagte aan hom verduidelik. Daar is hulle toe verdaag of nie verdaag nie laat hulle wat mnr. Phume en sy regsverteenwoordiger toe eers afsonderlik gepraat het en toe het hulle my later weer in geroep. Mnr. Viljoen het my toe meegedeel dat sy kliënt mnr. Eric Phume bereid was om vir my die verkoper naamlik die op die dokumentasie, Samuel Motsumi, bereid was om vir my die man te gaan uitwys.”

[23] On the Appellant’s version it would seem to be a mere coincidence that Accused 2 happens to be a worker (the “veewagter”) on the farm where the cattle were stolen. If Accused

2 was indeed unknown to the Appellant before their transaction, it is inexplicable how the Appellant then knew to take the police to the farm (and not to the cattle pens at Kgotsong where they allegedly met).

- [24] The letter provided to the Appellant as evidence of the alleged legitimacy of the transaction was handed in as exhibit 6. This document again lacks pertinent information and cannot in itself be connected to the transaction. The essential portion of the document simply reads:

“Verkoop van bees

Ek Samuel Motsomi verklaar dat ek verkoop my rooi vers bees vir Eric Phume van Jocy M. Market met sonder beswaar.”

- [25] The document does not contain a date or any specific description of the cow. It does however contain the registration number of the vehicle to be used in transporting the cow. The registration number appears to belong to the official vehicle that forms the subject of the charge of the unauthorized use of a vehicle. And it was this vehicle which the Appellant admitted to using during the buying of the cow. But more importantly, according to evidence provided by the tracking system of the vehicle, this vehicle was in the vicinity of the farm, not Kgotsong.

- [26] Exhibit 6 also contains the cellphone number of the alleged seller of the cow. During the police investigation the owner of that number was traced as being George Molelekwa Masike. Mr. Masike testified that he does not know the Appellant and that he

took no part in preparing exhibit 6. The owner of the Bothaville Abattoir, Isabel Stoltz, called the number. A person answered who identified himself as “*Samuel*”. When asked how he came into possession of the cow, he responded by saying that he traded one of his cows for that particular red one which he then sold to “*Eric*” (the name of the Appellant). No one testified to confirm this version of how the transaction went down.

[27] The existence and contents of the “certificate”, when compared with the Appellant’s version, creates more problems for the Appellant than it actually solves. According to the Appellant’s plea explanation he himself prepared the document as the seller indicated that he is not conversant with Afrikaans. But on behalf of Accused 2 it was put to witnesses that Accused 2 is completely illiterate and cannot write in any language. The document furthermore does not comply with the provisions of the Stock Theft Act. As a police officer who had on occasion investigated cases of stock theft, the Appellant would have been aware of the requirements of the Act. And furthermore, he had brought cattle to the abattoir before. If he obtained possession of the cow through legitimate means, he could easily have ensured that the document was in line with all the necessary requirements. In the premises the magistrate was correct in not placing any reliance on exhibit 6 as evidence of the Appellant’s innocence. The magistrate correctly found that the document cannot be linked to the specific cow or the alleged transaction.

[28] The first state witness, Isak Kotze, testified that the cow was branded. The brand read “JVR”. This was not disputed by the

Appellant. It was not the Appellant's case that he was unaware of the brand. It would be reasonable to expect from a police officer who had investigated cases of stock theft, such as the Appellant, to be aware of the significance of a brand on a cow. At the very least it should have caused the Appellant to make proper enquiries from the seller as to how he came into possession of the cow. Finding a branded cow of stud quality at cattle pens should have raised at least some level of suspicion with the Appellant.

- [29] The Appellant chose not to testify in his own defence and he closed his case without calling any witnesses. It was argued on behalf of the Appellant that there was no duty on the Appellant to testify as the State failed to make out a *prima facie* case. It was further argued that no negative inference should be drawn from the Appellant's failure to testify.

- [30] Where a *prima facie* case is proved against an accused, which case rests upon circumstantial evidence and to which a reply from an innocent person would be expected, the fact that the accused does not reply to it may be a factor which, together with other factors in the case, leads to an inference of guilt. The weight to be attached to the accused's silence depends on the facts of the case. (**S v Letsoko** 1964 (4) SA 768 (A); **S v Boesak** 2000 (1) SACR 633 (SCA) at 646 d – g)

- [31] If during the state's case, the state hands in an exculpatory statement and the accused does not testify, the court cannot simply ignore the contents of the statement (**S v Mali** 2002 (2)

SACR 597 (EC) at 599 c – f). As has already been stated, the exculpatory statement which was prepared by the Appellant's attorney and which was handed in as part of the state's case against the Appellant, created issues which the Appellant needed to explain through evidence. It was at his own peril that the Appellant chose not to explain it.

[32] The State did succeed in presenting a *prima facie* case against the Appellant. Several aspects of the case and the available evidence called for an explanation. Of these aspects the most troubling is the relationship between the Appellant and the alleged seller. As stated above, the Appellant's attempt to vaguely deal with this aspect in the statement prepared by his attorney, does not assist him as he would have liked.

[33] In the circumstances of the case, the magistrate rightly drew a negative inference from the Appellant's failure to testify. The court *a quo* was also fully aware of the fact that it had to apply the test applicable to circumstantial evidence. And the test was correctly applied to the specific circumstances of the case. The magistrate evaluated the evidence in a coherent and persuasive manner. He properly appreciated the significance of the certificate (exhibit 6) and duly drew negative inferences from the contents thereof. The trial court went further and also drew appropriate negative inferences from the Appellant's statement and his responses to questions by the investigating officer.

[34] The trial court correctly found that the Appellant's version (as presented in various ways other than oral testimony) cannot

reasonably possibly be true. The portions of the State's case that, individually, point in the direction of the innocence of the Appellant are not sufficient to assist the Appellant with a finding of innocence. Here the warning expressed in **S v Hadebe and Others** 1998 (1) SACR 422 (SCA) at 426 f – h is apt:

“The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently on the separate and individual parts of what is, after all, a mosaic of proof.”

See also: **S v Mbuli** 2003 (1) SACR 97 (SCA) at 110 e; **S v Van Aswegen** 2001 (2) SACR 97 (SCA).

[35] The trial court correctly found the Appellant guilty of theft by considering the conspectus of all the evidentiary material. The inference is irresistible that the Appellant, together with Accused 2, stole the cow. Theft is a continuing crime. At the very least, the Appellant knew that the cow was not obtained through any lawful means and still dealt with it as if he is the owner thereof.

[36] In the premises the trial court was correct in finding the Appellant guilty on the main charge in count 1.

COUNT 2: FRAUD

[37] This charge is based on the contents of exhibit 6, the so-called certificate. Various pieces of information show that the facts contained in the document are not true. The document was

intended to present to the world that the Appellant had obtained the cow through legitimate means.

- [38] It is a rule of practice in our criminal courts that “*where the accused has committed only one offence in substance, it should not be split up and charged against him in one and the same trial as several offences.*” (**Ex Parte Minister of Justice: In Re R v Moseme** 1936 AD 52 at 59) The test is “*whether, taking a common sense view of matters in the light of fairness to the accused, a single offence or more than one has been committed.*” (**S v BM** 2014 (2) SACR 23 (SCA) at 26 b – d)

- [39] If there are two acts, each of which would constitute an independent offence, but only a single intent, and both acts are necessary to realize this intent, there is a continuous criminal transaction and only one offence. See: **R v Sabuyi** 1905 TS 170.

- [40] When evaluated against the background of the fact that the Appellant’s version has been rejected, the existence of exhibit 6 calls for only one reasonable inference: it was produced and presented in order to facilitate the Appellant’s presentation of himself as the rightful owner of the cow. The misrepresentation was a means of furthering or hiding the theft. As such it cannot be said that the production of the document amounts to fraud and therefore a separate conviction on count 2. The conviction on count 2 should be set aside.

ORDER

- [41] In the result the following order is made:

1. The appeal against the Appellant's conviction on count 1 is dismissed and the conviction and sentence on count 1 are confirmed;
2. The appeal against the conviction on count 2 succeeds and the conviction and sentence on count 2 are set aside.
3. The conviction and sentence on count 3 are confirmed.

G.J.M. WRIGHT, AJ

I concur.

C. J. MUSI, AJP

On behalf of the applicant: Adv. J. Nel
Instructed by:
McIntyre & Van der Post Attorneys
BLOEMFONTEIN

On behalf of the respondent: Adv. M. Strauss
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN