

IN THE NOTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

In the matter between:

25 / 07 / 2013
CASE NO: A88/13

Lindeni Rostah Hlatswayo

Appellant

and

The State

Respondent

JUDGMENT

PHATUDI AJ

1. PRELUDE:-

- 1.1 The Appellant in this matter, Lindeni Rostah Hlatswayo and her co-accused, appeared before the Piet Retief Regional Court, Mpumalanga Regional Division, on 21st August 2012, on a charge of stock theft, to which they both pleaded not guilty. According to the particulars of the charge sheet, it was alleged that Appellant, who was accused No.1, committed the alleged offence between the 24-25 November 2010, it being alleged that the accused did unlawfully and intentionally stole 10 goats to the value of R9 000, being the property of the complainants, one Jabulani Ndodi Mayisela

- 1.2 The Appellant and her co-accused, who happened to be her son, were both represented by an Attorney.
- 1.3 It appears that during Plea explanation, the Appellant denied the charge of theft as alleged, and stated further that, on finding the goats referred to in the kraal, at her house, she then confronted or inquired from accused No.2, about them, who indicated that he got the goats from his uncle, and if anyone makes any inquiry, he will then handle the matter.
- 1.4 In order to establish its case against the accused, the State called the complainant, and Inspector Mandla Nkosi Thulane Buthelezi, the investigating officer in the case, to testify.
- 1.5 The Appellant and accused No. 2, also testified in their defence after the close of the State's case.
- 1.6 On the 21st August 2012, both the Appellant and Accused No.2, were convicted as charged on the Count of stock theft, and sentence was imposed against the Appellant on the 24th August 2012, whereupon a four(4) years imprisonment term, two(2) years of which was suspended for a period of five(5) years, was meted out.
- 1.7 Being displeased by the sentence so imposed, the Appellant applied for leave to appeal against both the conviction and sentence, which application was, however, turned down by the Learned Magistrate.
- 1.8 Persistent with its application as aforementioned, Appellant then petitioned the Judge President of this Court for leave to appeal against both the conviction and sentence, which leave was granted on the 06th December 2012, both the conviction and sentence.

2. **BRIEF FACTS GIVING RISE TO CONVICTION:**

What follows is a brief exposition of the facts that led to appellant's conviction. We consider it unnecessary to re-live the issues dealt with at the trial *in extenso*, save to refer to the salient points of the evidence.

- 2.1 The Charge Sheet, as already seen, alleged that both Appellant and her co-accused, committed the crime of theft of 10 goats. This it was said, took place between 24-25 November 2010.
- 2.2 The Complainant testified that he was the owner of the stolen goats, and that on the 24th November 2010, he ensured that his 38 goats were secured in the kraal. The next day he noticed that 10 of them were missing.
- 2.3 He said each goat was estimated to the value of R800.00 in the open market. He sells goats to the villagers when they perform cultural or traditional rituals.
- 2.4 On 26/27 November 2010, he accompanied Inspector Buthelezi to Dumbe Village, Paul Pietersburg. The purpose was to look for his lost or stolen goats in the area.
- 2.5 Be that as it may, it appears that acting on a tip-off, the parties were shown a house where some 7(seven) goats were locked in a shack, made of wiring mesh.
- 2.6 Accused No.2, was asked as to how the seven(7) goats happened to be in their yard in the shack. According to the witness, Accused No. 2 indicated that they were brought thereat by his brother the previous night.
- 2.7 The witness then asked to see the owner of the house, who was pointed as Appellant by Accused No. 2.
- 2.8 He testified that Appellant, on being asked how those goats were found to be in her property, she indicated to him that it was the house property, and that they were previously bought. Only the 7 goats were found at the premises.
- 2.9 On being hard pressed about the goats as being bought, Appellant then all of sudden changed her version, and sarcastically replied that:-

“die oog van die bokke sal weet hoe die bokke daar gekom het”

(See, p17, line 15, Record)

- 2.10 The police, Inspector Buthelezi then placed the two suspects under arrest and drove them to the Paul Pietersburg Police Station.
- 2.11 In identifying his lost live-stock, complainant testified that he marked the "right ear", ("oor merk by die regteoor" and with black tail(2 black marks on tail) and black mark under the tail.
- 2.12 The 7 goats were retrieved and transported back to complainant's homestead at Tafelberg, but the other 3 were not recovered.
- 2.13 The complainant did not know Appellant and Accused No. 2 prior to the incident, but his family knew Accused No.3.
- 2.14 On the other hand, Appellant's co-accused, i.e. Accused No. 2 conceded in his plea explanation, that 7 goats were found at their premises in a shack or kraal.
- 2.15 The complainant, as already shown, testified that he could identify his stolen goats by their colour and the marks he made on them.
- 2.16 Upon arrival at the Police Station, the appellant again changed their version, and said the goats were brought to their home by Accused No. 3 the previous night.
- 2.17 What remained obscure to the Court below, and quiet correctly so was, as to why Appellant did not inform the Police about the goats she found on her property kraal? Clearly these goats were allegedly delivered on 25th November 2010 thereat, and that was when Complainant lost his goats. One wonders whether was this a strange coincidence.

(P99, line 10-20, Record)

- 2.18 From the record, it became apparent that Appellant's versions, which were mutually contradictory, also contradicted in many material respects, Accused No. 2's version.
- 2.19 The Learned Magistrate expressed dissatisfaction on the credibility character and demeanour of Appellant in her self-destructive version to the Court below.

(See P102-105, Record)

2.20 Turning to the improbabilities of the Appellant's version, as captured on the record, the following facts were common cause:-

1. That, the 7 goats were found in her kraal at her premises
2. That, no reasonable or credible explanation was offered as to how the goats happened to be there
3. That, the said goats, which were clearly identified by Complainant as his, were undisputedly his.
4. That, Appellant and Accused No.2's version were mutually contradictory, particularly as to how and why complainant's live-stock were found at her property.
5. Further that, Appellant was found to be an unreliable and less credible witness who spoke "met soveel verskillende tonge".

3. **AD CONVICTION:-**

3.1 Having had regard to the totality of the evidence, it seems clear that the Court of first instance, had established the Appellant's guilt beyond a reasonable doubt. The facts as well as the evidence, as it appears on the record, were carefully assessed by the trial Court, and were found to have weighed heavily against the Accused's version, which was reasonably possibly not true, let alone that it was more often than not, fraught with inherent improbabilities.

(See, S v Chabalala 2003 SACR 134(SCA) @ 140A-B)

3.2 Both the Appellant and her co-accused, i.e. her son, testified in their defence, even though the quality of their version, tended to contradict one another, and therefore, made it untenable. The Appellant's submission before this Court that, her evidence should be treated as that of a single witness, cannot be sustained.

(See, Appellant's Heads of Argument, paragraph 6.2, p.3)

3.3 It is an established law or rule that an accused person in criminal trial does not have to prove his innocence, nor the Court every time has to believe his/her version as truthful. All what is indeed required is that the accused's version, seen in its totality, be reasonably possibly true in the circumstances. In terms of our modern constitutional law jurisprudence, which is underpinned by the Bill of

Rights, it is trite that: “every accused person has a right to a fair trial, which includes the right:-”

Section 35(3)(h) of the Bill of Rights:-

“to be presumed innocent, to remain silent, and not to testify during the proceedings”.

- 3.3 In the present instance, however, Appellant chose to testify in her own defence, and the Court below found her evidence inherently improbable to be characterised as one that was reasonably possibly true, to redeem her.

(See, S v Schackel 2001(4)SA 1(SCA)

- 3.4 In the light of the foregoing considerations, we find sufficient persuasion that the Appellant was properly convicted on that count. To that extent, the appeal against her conviction fails.

4. **AD SENTENCE:**

- 4.1 Turning to the issue of whether the sentence imposed was proper, and one fitting both the crime and the criminal, and whether it reflects the moral indignation and interests of the society, it is the duty of the Appeal Court, such as the present one, to be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court, and should, therefore, be loath to erode such a discretion, which is corroborated by the further principle that sentence should only be altered where the discretion has not been “judicially and properly exercised”, the test, in essence, being whether the sentence was vitiated by irregularity or misdirection, or was disturbingly inappropriate.

(S v Rabie 1975(4) SA 855(AD) @ 862 G; See also S v Pieters 1987(3)SA 717(AD)

- 4.2 The general principle, which has for a long time been considered one of the corner-stone of our penal law, is one of personalization or individualization of punishment.

- 4.3 In this case, the Court below did not find any previous convictions against the Appellant established

(P111, line 5, Record)

- 4.4 The Court below recorded the following mitigating factors in respect of the Appellant:-

- 4.4.1 She was 52 years old, and a widow.
- 4.4.2 She has 7 children with ages ranging between 17 to 30 years old.
- 4.4.3 She is the First Offender.
- 4.4.4 The 7 stolen goats were recovered.

- 4.5 Roundly speaking, first offenders are not readily imprisoned, except in certain instances, where e.g. where violent crime has been committed. This does not, by any means, suggest that first offenders who committed heinous crime, cannot be directly incarcerated.

(See, S v Victor 1970(1)SA 427(AD)

- 4.6 In *S v Zinn 1969(2) SA 537(AD) @ 541, Rumpf JA*, with apparent reference to the appellant's age remarked as follows:-

"Appellant's age undoubtedly requires consideration. He is 58 years old and has been submitted to a very long period of imprisonment---- It has also been submitted that the purpose of punishment, in a case like the present, should not destroy the offender completely".

The Learned Judge, with reference to the duties of a Judge in imposing punishment, referred to some old rather ancient authorities(Voet Vol.1. p.57) which we find necessary to quote an extract from the passage as it finds application to the circumstances of the present appeal matter:

"It is true, as CICero says in his work "Duties" 1 Chapter 25, that ---- anger should be especially kept down in punishing, because he who

comes to punishment in wrath, will never hold that middle course which lies between the too much and the too little. It is also true, that it would be desirable that they who hold the office of Judges, should be like the laws, which approach punishment not in a spirit of anger, but in one of equity”.

- 4.7 Applying these sentiments to the present appeal before us, the record reveals that the Learned Magistrate was, with the greatest of respect, actuated by extraneous considerations completely foreign to our traditional principles of punishment.

The Learned Magistrate in sentencing the Appellant, erred in considering irrelevant issues, and also misdirected himself over emphasising the prevalence of the crime, and its seriousness, while on the converse, under-scaled the personal interests of the Appellant in mitigation of sentence.

(P.118, line 5-20; and pp.119 et seq)

The remarks made by the Court below furthermore demonstrated lack of balance, and failure by it to “hold the middle course which lies between the too much, and the too little”, and which turned out that the sentence imposed was also approached in a spirit of anger, referred to and cited in Zinn’s case, supra. *(own emphasis)*

(See, also p.128-130, Record)

- 4.8 In the circumstances, our view is that the sentence imposed was not only gravely harsh, but was also shockingly a discord in relation to the gravity of the offence, the more so that, on the evidence, Appellant did not physically drive the live-stock to her house, as the Court below found to be the case. Her role, therefore, was less reprehensible.

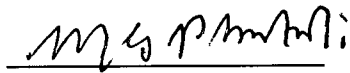
(See p.123, line 15-20, Record)

- 4.9 Consequently, the appeal partly succeeds, as we make the following Order:-

COURT ORDER:-

1. That, the sentence of four(4) years imprisonment imposed which was suspended for a period of two(2) years conditionally, is set aside, and it is substituted for the following sentence:-
 - (a) "The accused is sentenced to a period of two(2) years imprisonment, wholly suspended for a period of five(5) years, on condition that accused is not convicted of any similar crime during the operation of the suspension period".
2. The sentence is predated to 24th August 2012.

Date delivered: 25 July 2013



PHATUDI AJ



KHUMALO J

I CONCUR AND IT IS SO ORDERED