

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

Case Nr: CA&R 88/2012
Case Heard: 13/02/2012
Date delivered: 17 /02/2011

In the matter between:

RUBEN MORGAN

APPELLANT

and

THE STATE

RESPONDENT

Coram: OLIVIER J et PHATSHOANE J

JUDGMENT

Olivier J:

- 1]. The appellant and his two co-accused were charged with theft of 11 head of cattle, alternatively receipt of such cattle in contravention of the provisions of 3 (1) of the Stock Theft Act¹. Accused nr 1, the brother of the appellant, was found guilty of theft and was sentenced to a fine of R10 000,00 or 2 years imprisonment, as well as an additional 2 years imprisonment, conditionally suspended for a period of 5 years. Accused nr 3 was acquitted.
- 2]. The appellant was found guilty of having knowingly assisted accused nr 1 in the disposal of the said cattle, as envisaged in

section 11 (d) of the Stock Theft Act, and he was sentenced to 3 years imprisonment in terms of section 276 (1) (i) of the Criminal Procedure Act². The appellant's application for leave to appeal against both his conviction and sentence was refused, but he was granted such leave on petition.

- 3]. The appellant and his co-accused pleaded not guilty to both the main and alternative counts.
- 4]. Accused nr 1 stated, in his plea explanation, that he had bought and sold four head of cattle. From his plea explanation and his subsequent evidence it appears that his version was that he had bought the cattle from one Frank Butata, that his only means of contacting Butata had been by phoning accused nr 3 and that accused nr 3 had been present when the cattle were handed over to accused nr 1.
- 5]. In his plea explanation the appellant denied any knowledge of the theft of the cattle. He stated that he had met with accused nr 1 at a hiking spot, after having been requested by accused nr 1 to take his driver's license to him. He furthermore stated that accused nr 1 had at that stage already been in possession of four head of cattle, and that he then accompanied accused nr 1 to where the cattle were off-loaded.
- 6]. Accused nr 3 also denied any knowledge of the theft of stock and simply stated that he had been arrested after being confronted by, *inter alia*, accused nr 1 and police officials.

7]. The evidence tendered by the prosecution was to a large extent common cause, or at least not seriously in dispute.

7.1] The complainant, Mr Nelson, farms on property adjacent to the town or village of Majeng. On 16 October 2009 he discovered that eleven head of cattle had been stolen during the previous night under the cover of darkness. He observed tyre tracks in the vicinity of a load ramp on his property, and he also noticed that a fence in the vicinity of the ramp had been run over. He reported the theft to the police.

7.2] On the same day, and acting upon information received, Warrant Officer Vermeulen of the South African Police Service approached mr Carstens, a cattle-dealer, on his farm near Kimberley. Four of the missing cows were found in the possession of Carstens.

7.3] Carstens reported that he had purchased the cows from accused nr 1. His version was that he had been approached by accused nr 1 the previous day, and that accused nr 1 had on that occasion offered the cattle for sale. He had then made a trailer available to accused nr 1 for the purposes of the transport of the cattle. Later, during the evening of 15 October 2009, accused nr 1 and another person returned with the trailer, with the cattle on it. The cows were off-loaded, but because Carstens had not been prepared to conclude the transaction

without properly viewing them during day-time, it was agreed that accused nr 1 would return the next day. According to Carstens accused nr 1 indeed returned during the course of the following morning, at which stage an agreement was reached between them that he would purchase the cows for R12 000,00, as well as ten sheep. Shortly after accused nr 1 had left with the money and the sheep, the police arrived.

7.4] At the request of Vermeulen Mr Carstens telephoned accused nr 1 and requested him to return to his farm. Upon the arrival of accused nr 1 he was arrested. Vermeulen testified that accused nr 1 explained that he had purchased the cows from two persons in Majeng.

7.5] Accused nr 1 also stated that the appellant had been with him, and he subsequently took the police to the appellant, who was then also arrested.

7.6] At the request of the police accused nr 1 then telephoned accused nr 3, and arranged a meeting with accused nr 3 and the person from whom accused nr 1 had allegedly bought the cows. Accused nr 1, the appellant and police officials then drove to Majeng. On their way there they came upon accused nr 3 and another person. When confronted by the police, the other person fled, and accused nr 3 was arrested.

8]. The evidence of accused nr 1 that he had bought the cows from

Butata and that the cows were loaded onto the trailer by Butata and accused nr 3, was rejected. It was found that accused nr 1 had in fact stolen the cattle, and that he had done so by loading them onto a trailer at the complainant's loading ramp, after running over the complainant's fence.

- 9]. As far as the appellant is concerned, it was found that he had not only accompanied accused nr 1 to where the cattle were off-loaded, but that he had in fact been with accused nr 1 when the cattle were loaded onto the trailer. Having then already found that the cattle were loaded onto the trailer at the complainant's loading ramp, under cover of darkness and after the fence was run over, the regional magistrate found that the circumstances under which the cattle had been loaded onto the trailer, in the presence of the appellant, had been suspicious to such an extent that the appellant "*should have known*" that the cattle did not belong to accused nr 1. In this regard it was also found that the farm did not belong to accused nr 1, that accused nr 1 did not own cattle and that the appellant had been aware of this.
- 10]. Whether the appellant had been present when the cattle were loaded onto the trailer, was clearly placed in dispute in the appellant's plea explanation. His statement that the cattle had already been on the trailer when he met with accused nr 1, formed an integral part of the basis for his denial of any knowledge of theft. This meant that the prosecution bore the onus of proving that the appellant had been aware of the theft ("*knowingly*"³), and

³ Section 11 (1) (d) of the Stock Theft Act

of rebutting the appellant's version in this regard⁴.

11]. The prosecution did not, however, tender any evidence at all to the effect that the appellant had been present when the cows were loaded unto the trailer, or that the appellant had been aware that accused nr 1 could not be entitled to sell the cattle. In my view there was definite merit in the appellant's application for a discharge in terms of section 174 of the Criminal Procedure Act. It most definitely did not deserve being labelled as a waste of time⁵.

12]. It was only after the refusal of the appellant's application for his discharge that accused nr 1 testified that the appellant had been present when the cattle were loaded onto the trailer.

12.1] In this regard it should be noted, in the first place, that accused nr 1 did not testify that the cattle were loaded onto the trailer on the property of the complainant, or at the loading ramp on that property. It was also not his evidence that any fence had been run down in the process. In fact, he testified that a gate was opened to gain access to the cattle and he denied having driven over a fence.

12.2] The regional magistrate rejected the evidence of accused nr 1 that he had received the cows from two men in Majeng. As already mentioned, it was found that accused nr 1 had stolen the cattle from the complainant's property. It follows that the regional magistrate also

⁴ **S v Mothlaping en 'n Ander** 1988 (3) SA 757 (NC)

⁵ Record: p59

rejected accused nr 1's evidence that access to the loading ramp had been gained through a gate and his denial of having driven over any fence.

- 12.3] The evidence of accused nr 1 that the appellant had been present when the cattle were loaded, formed an integral part of his version regarding how the cattle had come into his possession and about how and where they had been loaded.
- 12.4] It is trite that the rejection of one aspect of a witnesses' evidence would not necessarily result in the rejection of the rest of the evidence of such a witness.
- 12.5] In this case there is, however, no logical basis for accepting the evidence of accused nr 1 that the appellant had been present when the cattle were loaded. Accused nr 1 was a single witness as far as this aspect is concerned. He was also a co-accused. His evidence, insofar as it may have incriminated the appellant, therefore had to be approached with caution.
- 12.6] It does not appear from the judgment why the regional magistrate would have been prepared to extract this piece of evidence from the rest of the evidence of accused nr 1 about how he came into possession of the cattle, and to accept it as credible. It is also not corroborated by any other evidence.

- 13]. It is not clear on what evidence the regional magistrate found that the appellant had known that accused nr 1 was not entitled to sell cattle. The evidence of accused nr 1 that he sometimes sold not only vegetables, but also stock, was not disputed. The same applies to the evidence of Carstens that he had sold sheep to accused nr 1 in the past.
- 14]. The regional magistrate also appears to have overlooked the undisputed evidence that the appellant had not been with accused nr 1 when the latter initially approached Carstens and offered to sell cattle to him, and that the appellant had also not been with accused nr 1 when the sale was eventually concluded and when accused nr 1 received payment for the cattle.
- 15]. The fact that the appellant did not testify, does not take the matter any further. The evidence simply did not establish *prima facie* proof that the appellant had known that the cattle had been stolen, and did not call for an answer.
- 16]. In my view the conviction should be set aside. Mr Kgatwe, counsel for the respondent, correctly conceded this. I therefore find it unnecessary to deal with the appeal against the sentence.
- 17]. I would therefore make the following order in this matter:

The appeal against the conviction succeeds and the appellant's conviction and sentence are set aside.

C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

I agree:

M V PHATSHOANE
JUDGE
NORTHERN CAPE DIVISION

For the Plaintiff: **Adv L Setouto**
On behalf of: **Justice Centre, KIMBERLEY**

For the Respondent: **Adv K Kgatwe**
On behalf of: **Director of Public Prosecutions, KIMBERLEY**