

THE HIGH COURT OF SWAZILAND

NELSON SHODI ZIKALALA

Vs

REX

Criminal Appeal Case No. 24/2002

Coram MAPHALALA - J

ANNANDALE - J

For the Appellant MR. SIBANDZE

For the Respondent MRS WAMALA

JUDGEMENT

(15/04/2003)

Maphalala J

The Appellant was convicted in the Magistrate's Court, Piggs Peak of contravening Section 3 (a) read with Section 18 (1) of the Stock Theft Act No. 5 of 1982 (as amended). He appeared with two others of which one was discharged in terms of Section 174 (4) of the Criminal Procedure and Evidence Act (as amended) at the close of the Crown case. The other was convicted and sentenced together with him after the close of evidence in

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the court below. We gathered in the course of this Appeal that his co-accused has since died. The accused persons in the court a quo were charged with two counts of contravening the provisions of the Stock Theft Act. The Appellant was then sentenced to two (2) years imprisonment. Half of the sentence was suspended for a period of three years on condition accused is not convicted of an offence in contravention of the Stock Theft Act No. 5 of 1982 committed during the period of suspension. Both counts taken as one for purposes of sentence.

The Appellant now Appeals against both conviction and sentence. The grounds of Appeal are couched in the following language:

1. In Respect of Conviction.

1.1. The learned Magistrate erred in fact and in law in finding that the Appellant acted in common purpose with the 1st accused whereas the Crown failed to show any unlawful conduct that could be imputed to the Appellant.

1.2. The learned Magistrate erred in law and in fact in finding that when PW12 Johannes Maphalala Mncina said in his evidence that he had not sold any cattle across the Nkomazi river at Mnisi dipping tank or to any of the accused people (including Appellant), he meant that no cattle had been transferred from his kraal for any reason whatsoever during the period in question.

1.3. The learned Magistrate in fact and in law in disregarding the fact that the cattle which are the subject matter of the case were in fact all branded with the same mark being two cuts on the left ear whereas complainant on both counts stated in their evidence specifically that their cattle were not

branded in any way. At no stage during the proceedings did the complainants speak of their cattle being branded, not even after the inspection in loco carried out by the court.

1.4. The learned Magistrate erred in ignoring the fact that the stock removal permits exhibits A and B were not connected with the crimes complained of as the crown led no evidence whatsoever of their (exhibits) connection with the crimes. In particular, the learned Magistrate erred in not taking into account that the exhibit B was issued on 4th October 1996 whereas the Crown led evidence that some of the cattle described in exhibit B were transferred from accused no. 2's kraal in September 1996 and whereas the exhibit indicates that these cattle reached Accused no. 2's kraal in November 1996.

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1.5. The learned Magistrate erred in not taking into account the fact that the cattle described in exhibit A could have come from the kraal of Abel Mabuza and in concluding that they could only have come from the kraal of Maphalala Mncina.

1.6. The learned Magistrate erred in finding that the stock removal permits exhibits A and B were issued for the purposes of committing the crimes complained of whereas no such evidence was led by the Crown and whereas such conclusion is not supported by the evidence led.

1.7. The learned Magistrate erred in drawing a negative inference from the fact that it was not put to PW13 Mtete Patrick Dlamini that he had pointed out the cattle described in exhibit B when they were being transferred despite the fact that there is no evidence to the contrary and the said PW13 admitted in cross-examination to not being candid with the court in his testimony particularly with regard to the transfer of cattle from his kraal.

1.8. The learned Magistrate erred in law in returning a verdict of guilty against the weight of the evidence and where he should, at the very least, found that there existed a reasonable doubt.

1.9. The learned Magistrate erred in finding that the Appellant should have checked if the cattle had been de-registered from PW13's kraal in view of his experience and his knowledge of the farmers in his area whereas there was no legal duty on the Appellant to do so.

1.10. The court erred in not taking into account accused's actions as being consistent with innocence, inter alia, the fact he did not deny making out and signing the stock removal permits (exhibit A and B) and the fact that he co-operated with the police and at no stage did he attempt to frustrate the police investigation.

2. SENTENCE.

In the event this honourable Court concludes that the Appellant was lightly convicted, then, the appeal against the sentence is on the following grounds;

2.1. The court erred in not finding the existence extenuating circumstances based on the immature manner in which the crime was committed.

The Crown paraded a total of fifteen witnesses to prove its case. The Appellant and his co-accused gave their evidence under oath in their defence and the learned Magistrate gave a lengthy judgment convicting the two accused persons. In respect of the Appellant the learned Magistrate in his judgment stated that the Appellant did not deny that he filled

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in exhibits "A" and "B" which he later gave to his supervisor for his signature. The Appellant was a Veterinary Officer stationed in the area during the material time. The Magistrate found that the Appellant knew accused no.1 from Bulembu as he used to see him at the check-point. The Appellant told the court

that he did not recall the person who applied for exhibit "A" and "B". Appellant told the court that the animals whose colours are written at the back of exhibit "B" were pointed out to him at the dip tank by one Mtete Dlamini. Surprisingly this was never put to Mtete Dlamini. The learned Magistrate therefore rejected the Appellant's evidence that animals whose colours appear at the back of exhibit "B" were pointed out by Mtete Dlamini, because if that was the case it would have been put to this witness. The learned magistrate based on the above-mentioned evidence concluded that the Appellant facilitated the theft of these animals from both complainants' kraal.

The question which confronts us in this Appeal is whether the above-mentioned evidence which was led before the court below proved a case against the Appellant beyond a reasonable doubt. Mr. Sibandze who represented the Appellant is of the view that the Crown has not proved its case beyond a reasonable doubt in casu and has advanced formidable arguments in support thereto. The Crown on the other hand as represented by Mrs. Wamala advanced equally forcefully arguments to show that the Crown has proved a case against the Appellant beyond a reasonable doubt.

Both counsel filed very comprehensive Heads of Argument for which we are grateful.

We have considered the evidence in toto and the submissions advanced by counsel. It appears to me that it has not been established as a matter of fact or law that the Appellant acted in common purpose with the 1st accused whereas the Crown has failed to show any unlawful conduct that could be imputed to the Appellant.

The essence of this doctrine is that, where two or more people associate in a joint unlawful enterprise, each will be responsible for any acts of his fellows which fall within

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their common design or object (see C.R. Snyman, Criminal Law (2nd ED) at page 260 and the cases cited thereat).

It has not been established that Appellant agreed to commit the crimes with 1st accused or that he actively associated himself with the commission of the crimes. It has not been shown that the stock removal permits (exhibits "A" and "B") issued by the Appellant were issued for an unlawful purpose. PW13 Mtete Dlamini admitted that certain cattle moved from his kraal through a stock removal permit. He further admitted that he could not say whether it was the one shown to him by the police. It is my considered view that this raises some doubt in this matter.

All in all, I am inclined to agree with the submissions by Mr. Sibandze for the Appellant that there is a doubt that the Appellant was in unlawful cohort with 1st accused in the commission of this offence. Therefore, the benefit of the doubt ought to be in his favour.

For the reasons advanced above I would propose that the Appeal succeeds and it is so ordered.

S.B. MAPHALALA

JUDGE

I agree

J.P. ANNANDALE

JUDGE