

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

NKOE MOTABA

Appellant

V

R E X

Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M.P. Mofokeng
on the 1st day of March, 1982.

The appellant was charged before the Court of the Senior Resident Magistrate Leribe with the crime of theft, it being alleged that on or about 15th May 1980 and at or near Mathokoane he unlawfully and intentionally stole two (2) head of cattle the property or in the lawful possession of a person unknown to the prosecutor. He pleaded not guilty but was found guilty of the theft of only one cow and sentenced to undergo imprisonment for a period of two (2) years. He appeals to this Court against such conviction and sentence. The appeal has already been upheld and what follow now are the reasons thereof :

According to the evidence of Peko, who lives in the same village as the appellant, the latter owns no stock. He was detailed by his chief to accompany the police to appellant father's home, one Paul Motaba. In the cattle-kraal they found four head of cattle. The police asked Paul Motaba

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about the fresh earmarks on two of them. Instead, appellant answered and said they were his cattle. He was asked why a younger animal had long been earmarked and yet the two older ones had just been earmarked. The witness does not reveal if the appellant gave any reply at all. However, the appellant was arrested.

Under cross-examination he says he kept quite when he heard appellant lay claim to the two cattle because he had been instructed only to accompany the police. He mentioned that in September 1981 appellant and his father had been charged with stock theft but were acquitted as the evidence against them had been rejected by the trial Court. He says that the police did ask what his earmarks were and he said they were the same as those on the two cattle. Apparently the appellant must have said something about other animals in the mountain because policeman Gekoane, had then said that that did not interest him. Again the witness said nothing when he heard the appellant mention his other stock in the mountain. Ultimately he conceded that he did not know the appellant's earmarks.

Trooper Gekoane was the next witness. He inspected appellant's stock after he had asked him what his earmarks for his stock were and was informed. He said those with different earmarks belonged to his father. However, he had forgotten how many animals appellant had claimed as his own. He found two animals with fresh earmarks superimposed on the old ones. He asked appellant why this was so. Appellant said that they were the "progeny of his stock". There was a young animal which bore old earmarks. He then asked

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appellant why it was that much older animals bore fresh earmarks. Without stating what appellant's explanation was, he says, simply, "I did not find the accused's explanation satisfactory because the two animals bore fresh earmarks together with old ones."

Under cross-examination he said that the previous witness lied when he said there were only four animals in the kraal. When he asked appellant about the fresh earmarks which had been superimposed on the old ones accused had denied that there were any old earmarks. The answer to the question about the younger animals bearing old earmarks and the two older one fresh earmarks was that these latter animals had been to the mountain at the cattle-post and had recently arrived home for earmarking. He denied that appellant had said to him that the reason why they were not earmarked at the cattle-post was because previously when he did so, at the mountain, the animals died as a result of a disease called "serotsoana". He said he investigated the matter further as a result of appellant's explanation but found that the mothers of two animals in question "were not there". He had gone to the cattle-post although he did not remember the date. He says that if the previous witness had made no reference to the old earmarks that was his (that witness's) observation. He conceded that animals could be earmarked at the same age as the two cattle in question.

Kaizer Mofephe stated that he was also instructed by the chief to accompany the police to Paul Motaba's kraal. They inspected his stock and found two animals "about which they had suspicion." They asked him to whom they belonged

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and appellant said they were his. Appellant was then asked why he had earmarked the two animals at such "late age". Appellant said they were at the cattle-post all the time. The witness had suspicion because the earmarks were "fresh" whereas "normally animals are earmarked while they are still very young."

Under cross-examination the witness was emphatic that "no earmarks were superimposed on others." He says there were only four animals in the cattle-kraal. He never heard the previous witness talk about fresh earmarks being superimposed on the old ones. He was near him and would have heard him. He did not hear the accused say that he had earmarked the two animals then because previously four animals which had been marked at the cattle-post had died suffering from "Serotsoana" disease; neither did the appellant say that the mothers of the two animals were somewhere.

That was the Crown's case.

Appellant gave evidence under oath. He said that two of his cattle were driven away because they had fresh earmarks. He explained why he had earmarked them at that age and said "on previous occasion calves which were earmarked at the mountain died." He says nobody complained that there had been superimposition of the earmarks. He informed them that the mothers of the two cattle in question were alive and at the mountain. Nobody chose to go and investigate the matter any further.

The cross-examination of the appellant did not take the matter any further, as in fact it consisted of asking the

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appellant who had assisted him when he so earmarked the two cattle.

The explanation of the events as described by the appellant is, to a large measure, borne out by the evidence of the Crown witnesses. That there was no talk of superimposition of fresh earmarks on the old ones is supported by witness Kaizer Mofephe and certainly witness Peko never heard of or saw earmarks which had been superimposed. This must be a telling point against the witness Trooper Qekoane. It becomes difficult to understand why he ever gave such a piece of evidence. This evidence is most damaging against the appellant. However, it is plain to everybody that he was just lying.

The appellant is corroborated by witness Peko when he says that nobody ever investigated the matter further. It will be recalled that when appellant said that if there was any doubt about the two cattle he should be allowed to go to the moutain to fetch his animals. Trooper Qekoane had then replied and said that "he did not care" about that.

If the explanation the appellant gave to the police is the same as he gave to the learned Senior Magistrate, then I honestly do not understand why the trooper thought it was unsatisfactory. Although in his evidence in chief Trooper Qekoane did not reveal the nature of the unsatisfactory explanation given by the appellant he later revealed it under cross-examination. It was exactly as the appellant later told to the learned Senior Resident Magistrate. The latter has not furnished any written reasons or any judgment so that I do not know what his attitude was concerning this explanation. But speaking for myself, I find it at least

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reasonable more especially as it had been conceded that it is not unusual to earmark cattle for the first time at that age.

Although I have accepted the evidence of witnesses Peko and Mofephe it was not in its entirety that I did so. There are portions of their evidence which were false such as alleging that the appellant had no stock whatever and yet ^{kept} keep quite when they hear the appellant make allegation after allegation of having stock in the mountain. One would have expected them to have then and there denied such allegations in appellant's face. But they chose to keep quite.

I have not had the benefit of reading the learned Senior Magistrate's reasons for conviction. They were never filed. I do not know, for instance, why appellant was finally convicted of the theft of one cow and not as charged if the evidence of Trooper Oekoane was accepted nor do I have any reasons if that was the case, why the evidence of the Crown was preferred to that of the appellant. Again speaking for myself the evidence of the appellant was far more probably^e than that of the Crown. The onus was on the Crown.

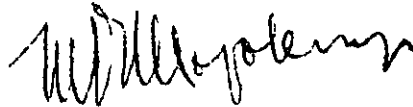
In the circumstances of this case the Court came to the inevitable conclusion that the appellant ought to have been given the benefit of the doubt and it was consequently ordered that

(a) the appeal be upheld;

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- (b) conviction and sentence be set aside;
- (c) Appeal deposit be refunded to the appellant;
- (d) Appellant be refunded the cash bail deposit;
- (e) the exhibit(s) be returned to the appellant.

The Crown did not seek to support the conviction.



J U D G E,
1st day of March, 1982

For the Appellant : Advocate Monaphathi

For the Defence : Mr. Lenono.