

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

NOOE THIBELLA  
MOTANTSI LIAU

Appellants

v

R E X

Respondent

J U D G M E N T

Delivered by Hon. Mr. Justice F.X. Rooney  
on the 1st day of November, 1982

Mr. Ramodibeli for the Appellants  
Mr. Peete for the Crown

At the end of 1981 the appellants were charged before Mr. R. Nkuebe with the crime of stock theft. It was alleged that on or about the 1st January, 1981 at or near Nene cattle post in the Quthing district, they did steal 8 cattle the property or in the lawful possession of Zenzele Hesmane Xakekile Setlole and Semasele Qubu respectively.

On the 15th November 1981 they were convicted as charged and sentenced to 24 months imprisonment each. Three days later they were released on bail. I am informed that the second appellant, Motantsi Liau has since died.

The three complainants who kept their cattle at Nene cattle post lost between them fifteen head in January, 1981.

On the 15th March, Trooper Fosa (PW.4) found 8 cattle at Tsatsanyane cattle post grazing in the open veld. There were no herdboys looking after them. He told the court that all these beasts bore fresh earmarks and brand marks. He drove them away to the pound at Quthing. Later two of the complainants identified and claimed the cattle as theirs. Subsequently the appellant in this case also claimed that 5 of the cattle belonged to him. He denied that the animals bore fresh earmarks. This witness did not identify which of the five animals were claimed by the appellant.

Headman, Phatela Lebona (PW.5) inspected the cattle at the pound and confirmed the existence of fresh ear-marks on 5 of them and additional ear-marks on others.

When the poundmaster Katiso Ntho (PW.6) gave evidence, he referred to 7 cattle before the court which he said were the same as those impounded earlier in the year and which at that time bore fresh ear-marks.

Nine of the witnesses were asked to identify to the Court the cattle they were speaking about. This was an unsatisfactory feature of the trial. In many cases heard in the subordinate courts the unwarranted assumption is made that witnesses are referring to exhibits although they are seldom asked to identify them specifically.

In his defence, the appellant claimed that, of the seven cattle before the Court, five were his own property. He said that they all bore his ear-marks and four of them had his brand mark on the right hip. Again he was not asked to identify the beasts about which he was testifying. He denied the allegation that when the cattle were found in the first instance they bore fresh ear-marks. He called two witnesses to support his claim to be the owner of the cattle, neither of whom was asked to identify the animals during their evidence. They did not assist the appellant to any degree.

Mr. Peete who appeared for the Crown conceded that the evidence heard in the Subordinate Court was insufficient to support the verdict of stock theft but, he submitted that the appellant should have been convicted of an offence under section 16 of the Stock Theft Proclamation.

Mr. Peete submitted that because the cattle bore the earmarks and brand marks of the appellant when they were found they must be deemed to have been in his possession although they were wandering in the veld unattended. It was held by the Appellate Division in the State v. Wilson 1962 (2) S.A. 619 that it has not been universally accepted that in order to be "found in possession" within the meaning of the Stock Theft Act of South Africa, it is imperative that the accused should have been actually present when the stolen stock is first found. (per Ogilvie Thompson J.A. at 623). However, it was held in R. v. Tsotilsie 1953(1) S.A. 239 that the meaning of the word "possession" cannot be extended to circumstances in which the stock is not under the direct control of the accused.

Trooper Fose did not tell the court *a quo* the reason why he brought the cattle to the Outhing pound, although it can be inferred that he did so because he saw that they had fresh ear marks and brand marks. Had the Trooper reasonable ground for believing that in the words of the section

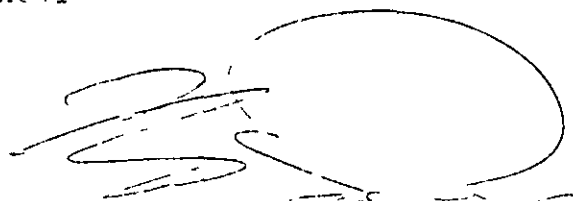
"that any person who is found in possession of stock or produce has obtained the possession of such stock or produce unlawfully"

Alternatively, can it be said of the accused that he was proved to have been in possession of the stock unlawfully? Either condition must exist before Section 16 can be applied and the person required to give an explanation. ('Nete Tsoeunyane v Rex 1967-70 LLR 271). The reasoning behind Jacobs C.J 's decision in the latter case was subjected to a critical evaluation by Cotran C J in Suhlane v Rex CRI/A/30/82, unreported. But, in the present instance the arrest of the accused took place not because the accused was found in possession of the stock, but on account of the fact that he laid claim to their ownership after they were impounded by the police.

It seems as if the accused may have abandoned the cattle after he had caused them to be branded. He subsequently claimed them when they were already in the effective custody of the police. Such a possible inference can be drawn from the evidence, and if it was so, then an intention to deprive the owners of the cattle permanently was not shown to exist at the time of any possible contractatio and section 16 cannot be extended to convict the appellant as at the time the stock were taken he was not suspected

This appeal is allowed and the appeal fee returned to the appellant.

The case against the deceased appellant was no better. If the proceedings had not lapsed with his death, his appeal would have succeeded. The appeal fee paid by him should likewise be refunded to his heir



F X Rooney  
JUDGE

1st November, 1982.

Attorney for the Respondent . The Law Office.