

IN THE HIGH COURT OF LESOTHO

In the Appeal of

FOKOTSANE MAKOPO

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 31st day of October, 1983.

The appellant was charged before the Subordinate Court Thaba-Tseka with contravening the Stock Theft Proclamation 80 of 1921 (as amended) it being alleged that during November 1980 he stole 53 sheep at a cattle-post being the property or in the lawful possession of the complainant (Botsonyana Seema). He pleaded not guilty but was ultimately convicted and sentenced to serve a term of imprisonment of two years.

The evidence is briefly to the effect that the animals were, in fact, in the care of one Sebolai Paki (PW.2) as the true owner was working in the Goldfields. The complainant's evidence is that in 1980 he received a report concerning his sheep. However, he did not come home immediately but after a year. His earmarks are

• R/E : Winkelhaak behind  
and  $\frac{1}{2}$  moon in front.

L/E : Winkelhaak behind  
and  $\frac{1}{2}$  moon in front.

He conceded that he was not sure as to how many rams and ewes were missing as "I was not at home, all is what I was told."

/He searched

He searched for his missing sheep until he found 33 of them at the police-pound. This was in 1983. They still had their "usual earmarks" but another had been added viz a stump. Under cross-examination of the appellant (who was unrepresented) he admitted that they lived very far apart and that he did not know the appellant's cattle-post. Appellant then put to the complainant that his earmark was :

"Winkelhaak behind both ears and Thejane  
infront of both ears."

Complainant further disputed that the animals, which were the subject-matter of the charge, had no Thejane mark.

Sebolai deposed that the 53 sheep disappeared while they grazed together with his goats. He wrote a letter to the complainant about the occurrence. This was in 1980. He looked for them and found 33 of them at the police compound. The rams were nomore there. The earmarks were not removed and were still visible. However, to the earmarks had been added a stump earmark. Nobody had been allowed to temper with the earmarks (that is if they were at all). Only full grown up sheep disappeared in 1980. When asked by the Court he said the sheep before Court bore no Thejane earmark. He had seen them. There were also hamels amongst them.

Moreruoa Selebalo is a veterinary officer. In May 1982 he was called to examine many animals at the pound Amongst these animals were the 33 sheep before Court They had old and fresh earmarks. He says "I do  
/not . .

not know earmarks, but, stump, was one of the fresh earmarks". He did not remark because "in fact I know very little about earmarks "

Tpr. Okolo is a police officer He, and Tpr. Mahamo were on what is called stock theft drive. It is a raid They reached the cattle-post of the accused. He was absent They found his herdmen (one of whom is his mother). The police were allowed to inspect the animals. They found some with fresh earmarks. There were 33 sheep They had both old and fresh earmarks.. The earmarks were as follows.

R/E old Winkelhaak behind, Old  
 $\frac{1}{2}$  moon infront fresh stump,

L/E old Winkelhaak behind, old  
 $\frac{1}{2}$  moon infront fresh stump

Some animals had only old earmarks. They were marked.

- (1) R/E Winkelhaak behind, Thejane infront  
L/E Stump and  $\frac{1}{2}$  infront and behind (monoto)
- (11) R/E Winkelhaak behind Thejane (two  $\frac{1}{2}$  moons)  
infront.  
L/E Winkelhaak infront and Thejane infront
- (111) R/E Winkelhaak infront and  $\frac{1}{2}$  moon behind  
L/E Stump and "monoto"

The herdmen gave explanations concerning these three set of earmarks. They, themselves, said they had no animals of their own. They were asked for an explanation concerning the sheep with fresh earmarks They did so in the absence of the accused It is then said that accused was "confronted with his herdmen." His explanations were "many". Firstly he said that the sheep had been

/earmarked ...

earmarked for his younger mother (one of the herdmen) without the latter's consent. Secondly, he said that the sheep were from one Tsupa from Lesobeng

The witness was not satisfied with both explanations. He went to verify the explanation concerning Tsupa. It was discovered he had died long time ago. Only his wife and son Moletsane were found. Moletsane was brought to the pound. Whether the accused was present it is not stated. However, accused's own brother denied what the former had said. Accused was cautioned and arrested.

Under cross-examination he stated that he had arrested only one herdman because he was in actual possession.

The prosecutor informed the Court publicly that he would call two witnesses. One would depose to the usual earmarks of the accused and the other (Malefetsane) that the animals before Court are not "those he paid Lobola with to accused." However, he never called these witnesses and there is an insinuation that the accused agreed to all this as a result the witnesses were not called. The Crown then closed its case.

Accused elected to give evidence. He said that the sheep before Court were his property. They were found in his kraal. His brother, Masole had earmarked the sheep. He had informed his wife about that incident. He came home and found that Masole had been arrested. He had only been to Maseru.

He mounted his horse and went to Thaba-Tseke. He found his brother and the 33 sheep. Masole explained that the sheep were his (accused) property. He had

/earmarked . .

earmarked them without his (accused) consent. He then asked the police to release his sheep to him. They said investigations were still underway as they suspected that the sheep were stolen.

Masole was actually charged with the theft of those sheep. Okolo never asked him to bring any documents from Tsupa. He said he lived quite near the complainant who, therefore, ought to have seen the sheep a long time before.

Under cross-examination an issue was made of the fact he did not cross-examine witnesses on certain points and therefore that evidence becomes the complete truth. He said he took action immediately he received a report that Masole had earmarked the sheep without his consent. He agreed that his earmarks were more or less the same as those of the complainant except that his had "thejane." He had been with his chief when he went to the Charge Office.

Chief Shoaepane together with accused brought Masole to the charge office. He had been found with sheep with fresh earmarks. They had been earmarked by Masole. He had said they were his brother's animals. The animals were in the pound. The fresh earmark was stump. He was not sure whether accused's old earmarks were as a result thereof obliterated.

Accused has two families. For one the earmarks are,

Stump and Monoto (He forgets the ear) One ear is winkelhaak behind and Thejane in front two  $\frac{1}{2}$  moons)

For Mafolane

Winkelhaak behind two ears and  $\frac{1}{2}$  moons in front both ears.

/For

For the third wife Winkelhaak in front of one ear and  $\frac{1}{2}$  moon behind stump and monoto one ear He does not remember the other car

Under cross-examination he stated that the sheep he saw at the police pound were not those of the accused Masole has no earmarks of his own. The animals ought to be earmarked before a chief and not in the veld. Accused did bring animals to be registered for earmarks because the old marks had been obliterated. He had reported that his animals had been earmarked by somebody else.

Masole gave evidence for the defence. He told the police that some animals had fresh earmarks and that he had done so He had added the stump. He had also added winkelhaak and  $\frac{1}{2}$  moons in front to some. He in fact, effected many additions He did all this because he was tired of living in the mountains He had asked the accused for his share but did not get it. He had said he would give him 33 sheep That is why he earmarked that number Gokolo did not tell the truth when he said accused had earmarked them He, Masole, had never said so Complainant is not truthful either when he says those are his sheep

The sheep earmarked were those with two teeth in that year and all others had full teeth

Another herdboyc of the accused gave evidence for the defence The police found sheep which had been earmarked by Masole They were accused's sheep. He knew them. He went to report to Fokotsane but found him away. So he only found women. Accused on his arrival had taken him to the police where he gave a full explanation to Gokolo. However, what the latter told the

Court what he is alleged to have said about the earmarks is all a falsehood. It is Masole who earmarked the sheep. He had identified the sheep in the police pound. He corroborated Masole as to the earmarks after the additions Masole had destroyed the thejane and only left the ½ moons. He denied that accused would dismiss him if he did not give evidence favourable to him (accused).

The question now is: has this resulted in a substantial miscarriage of justice occurring. In other words, would the jury properly directed inevitably have nevertheless acquitted the accused (Woolmington v The Director of Public Prosecutions 1935 A C at 485 and 492 )

There are very disquieting features in this case. The lapse of time between the disappearance of the sheep and their finding is far too great to allow the doctrine of recent possession to be brought into play. It is true that an owner of an animal can possess it through his herdboys but it will be stretching the doctrine of recent possession too far if in the circumstances of the present case it can be safely inferred that the accused stole the animals. The lengthy lapse of time may lead to very unsafe identification of the animals. (Mphuthi v Rex, 1974 5 L L R 423 at 246B C) Mokebane Phaleso v Rex C/A/56/1969)

The learned magistrate, in my view, did not exercise that degree of caution which is so necessary when he has an unrepresented accused before him he led in evidence which was highly prejudicial to the accused. He allowed the prosecutor through his police witness, Cokolo, to say that accused's herdmen said he had tempered  
/with . .

ear-marks of animals. However, when this was said, it is alleged that the accused was not there. It was only later that accused and the herdmen are alleged to have been confronted. This should not have been allowed by the learned judicial officer. It is never a fair method of investigation to confront accused with another co-accused. However, this alone, does not entitle the appellant to have his conviction set aside (R v Mthlongo, 1949(2) SA 552 (A))

It must be stated quite clearly that a legal practitioner is not entitled as of right to add to the grounds of appeal and he may certainly not do so as in the present case, after the expiry of the periods laid down by the Rules of the Subordinate Court. The question whether or not this should be done is one of discretion by this Court. There must be an explanation why it is necessary to amend the grounds of appeal. All these things have not been done in this case (R v Mohamed, 1954(3) SA 317 R v Kruger & Others 1954(3) SA 816). The learned magistrate, consequently, has not commented on the new grounds of appeal.

The accused is alleged to have made two conflicting statements about his possession of the animals before Court. That is all the Crown could say and no more. On the other hand, the accused has been emphatic that the sheep before Court are his property. He has called evidence, which has not been contradicted. It however, negates what the herdmen are alleged to have said to Gololo. It will be recalled that one was in custody and the other not. They could not have had time to concoct  
/a story ..



a story such as they told the Court. The evidence of kokolo could have been made stronger by the production of the conflicting statements wherever they might have been recorded at the time they were made, even though it is not explained how it came about that he made two conflicting statements to the same police officer, such evidence was not produced. Where, therefore, there is a possibility that accused story as it stands may be true, he should be acquitted (Khoto Mahata v Rex, HCTLR 177). It is not proper to convict an accused person on evidence which is doubtful. However, it is sometimes explained that for the Court to accept an explanation by an accused, the explanation need not be true. If it is reasonably, possibly true the accused would be acquitted.

The evidence of the Veterinary officer is shocking. If he did not know earmarks, who then told him that the additional earmark was a stump? The whole of his evidence is just a lot of hear say which the magistrate should have disallowed particularly as he had such an onerous duty of having an unrepresented accused before him. As I said he should have been extremely cautious or alert. He did not do so.

The learned magistrate's conclusion at the inspection in loco that there had been no thejane earmark was a devastating piece of evidence against accused. The accused could not, of course, cross examine the learned magistrate as to how he arrived at that important conclusion.

The learned magistrate allowed the prosecutor to adopt a strange procedure whereby an unrepresented accused is purportedly made to dispense with two Crown witnesses. I am at a loss as to what this procedure was

supposed to achieve. If it is meant that the accused had admitted the statements they had made to the police I have not heard of such a procedure before. In any event, no such statements form part of the evidence in this case. The sole purpose of this strange exercise, was to further prejudice the accused in his defence. It was to intimidate him.

The Crown's case is doubtful and the general rule is that the accused must be given that benefit. There are too many irregularities which, in my view, have resulted in the failure of justice which simply means that the Crown has failed to prove its case beyond reasonable doubt.

In the result the appeal ought to be upheld, and it is accordingly so ordered.

In terms of Sec 56(a) of C P & E 1981 it is hereby ordered that 33 sheep taken from the accused's cattlepost be returned to him.

*L. M. M. M. M.*  
 \_\_\_\_\_  
 J U D G E  
 31st October, 1983

For the Appellant	Mr Tsotsi
For the Crown	Miss Nku