

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

TANKISO NTHAU

v

R E X

J U D G M E N T

Delivered by the Hon. Chief Justice Mr. Justice
T.S. Cotran on the 18th day of September 1984

The appellant (who was the second accused at the trial) and another accused (who did not appeal) were charged with stock theft (two heads of cattle) contrary to Proclamation 80 of 1921. The Stock Theft Proclamation as amended by Act 33 of 1967 abolished theft as formerly defined in the Proclamation. It was therefore wrong to have mentioned the Proclamation but there was no prejudice to the appellant. He was found guilty of theft whilst the first accused, who did not appeal, was found guilty of receiving the stock knowing it to have been stolen.

The appeal is against conviction and sentence.

The facts were simple. Two beasts were stolen from the complainant some time in January 1982, a red cow and a brown bull.

A few days later one Motsololo Tom (P.W.3) the younger brother of the complainant saw the stolen red cow in the cattle kraal of Tlalo Naleli who was the first accused at the trial. The appellant however was not present at the time and the only evidence of his connection with the theft was a "confession" by the first accused, not made on oath at the trial, but extrajudicially in the absence of the appellant, when he was

/beaten

beaten up, that it was the appellant who had brought the two animals to him. When the appellant was arrested and taken first to the complainant and then to the police he allegedly confessed to an officer that he stole the two beasts. The magistrate, in convicting the appellant of theft, relied on the statement of the first accused (made extrajudicially in the absence of the appellant after a beating) followed by a confession to the police officer some time later.

The statement by the first accused against the appellant is utterly worthless.

The magistrate in his acceptance of the appellant's confession to the policeman, relied on the Judgment of Jacobs C J, in Mabothotsa v R. 1967-1970 LLR 235 who in turn relied on the Judgment of Ramsbottom J, in R. v Malakeng 1956 (4) SA 232 but with respect there was nothing in common between the cases. The essential point in Mabothotsa and Malakeng, supra, is that the accused was found in possession of the stolen property. Here the appellant was never found in actual possession. The "confession" to the policeman that he stole the two heads of cattle was therefore inadmissible.

Without this nothing remains. It follows that the appellant should have been found not guilty and acquitted.

The appeal is allowed and the appellant is to be released unless he is held on some other charges.

CHIEF JUSTICE

18th September 1984

For Appellant : Mr. Phakoana

For Crown : Mr. Kabatsi