CRI/APN/71/84

IN THE HIGH COURT OF LESOTHO

In the Application of :

MOHAKA RAMMOPUOA Applicant

v

R E X Respondent

REASONS FOR JUDGMENT

Filed by the Hon. Acting Mr. Justice J.L. Kheola on the 15th day of October, 1984

The Appellant was charged in the Subordinate Court at Leribe with theft of stock in that during the period between the 1st and 30th of September, 1983 and at or near Die River district in the Republic of South Africa, the said accused each or both of them did unlawfully and intentionally steal 3 horses the property or in the lawful possession of Reinow Visser and brought the same to Leribe District where this Court has jurisdiction. At the commencement of the trial the prosecution withdrew the charge against accused No.2 who later gave evidence for the Crown as P.W.5. The Appellant was convicted and sentenced to two years' imprisonment.

The matter came before me in the form of a petition for condonation of the late noting of an appeal and for leave to appeal out of time. The petitioner states that immediately after he was convicted and sentenced he

/instructed ...

instructed his counsel Advocate G.N. Mofolo to note an appeal on his behalf "but it appears that owing to the fact that the matter went on review and counsel was engaged in other matters the appeal was not lodged timeously This flimsy reason given by the petitioner as to why he failed to lodge his appeal timeously is most untenable. Mr. Mofolo represented the Appellant at the trial and cross-examined the witnesses and also addressed the Court. He heard the Magistrate deliver his reasons for judgment. There was no reason why Mr. Mofolo had to wait for the record of proceedings that had been forwarded to the High Court for review. He knew everything about the case. All he had to do was to file his grounds of appeal as soon as the appellant instructed him to do so. The counsel may have to read the record of proceedings before lodging an appeal only in a case in which he did not represent the appellant at the trial.

The second ground that the counsel was engaged in other matters is also totally unacceptable and irrelevant. On these grounds alone I would have dismissed the petition for condonation for the late noting of the appeal, but I decided to hear arguments on the merits because it was clear to me that it was the fault of the counsel that the appeal was not noted timeously.

It is not in dispute that in about September, 1983 the complainant, Revion Visser, discovered that four of his horses were missing from his farm. He was subsequently summoned by the police to come to Lesotho where he identified three of his horses. They were a brown stallion with a white face and white hind and fore legs, a brown

/mare ...

mare with a star and white hind legs and a yellow mare.

Sgt. 'Mutsi (P.W.2) met the appellant on the 19th October, 1983 at his home in the village of Chachole. He found the brown stallion at the home of the Appellant. In his evidence in chief Sgt. 'Mutsi had said he found the stallion at the home of the Appellant. It was under cross-examination that he explained that the stallion was found in the village near the home of the appellant. The Appellant led him to certain places at Chachole mountains where he (Appellant) pointed out two horses. They were the brown mare and the yellow mare described above. The search was continued for the fourth horse but in vain. On the 28th October, 1983 he handed the Appellant to Hlotse police and he finally appeared in Court on the 2nd November, 1983. He denied having assaulted the Appellant at any time while he was in his custody. He merely handcuffed the Appellant because he did not trust him. He denied that he tied the handcuffs so tightly that the wrists of the appellant bled.

Makhalemele Motlokoa (P.W.3) is a bugle in Shebang village in which the Appellant lives. As far as he knew the Appellant owned some goats and cattle but no horses. One day the police came to him accompanied by the Appellant who was handcuffed. At that time there was a brown stallion near the home of the Appellant. The police asked who was the owner of that horse. He told them that he had seen the Appellant driving it and alleging that it was his property. The Appellant denied any knowledge of

/the horse ...

the horse. P.W.3 further said that one day he ordered the appellant to remove the brown stallion from the reserved pastures in the village but the Appellant said that his horse (referring to the brown stallion) was lame.

Ponts'eng Mokhoabo (P.W.4) is the nephew of the Appellant. One day he found the Appellant on Matolane mountains where he (Appellant) was herding three horses, viz. a brown mare with a star, a yellow mare and a brown stallion with a white face and white legs. The Appellant asked him to look after the horses and stop them from going into the village. He agreed to look after them for only one day because he had to drive his cattle home. He admitted under cross-examination that the police threatened him and accused him of being an accomplice. They also warned him to tell the truth and not to implicate the Appellant falsely.

The Appellant denied that P.W.2 found him at his home. His version is that he found him at Malefetsane's store where he had gone to buy some fertilizer. He was on horseback and drove a donkey. P.W.2 arrested him and forced him to leave his donkey and horse at the store. He also handcuffed him and pressed the handcuffs in such a way that they severely injured his wrists. He was taken to his home where he was not confronted with his chief. He was later escorted to the mountains where P.W.2 showed him horses he did not know. He denied ever asking his nephew to look after the horses before Court. He also denied that he ever spoke to his bugle about the horses.

/The trial ...

The trial Court found that the Crown witnesses were truthful and it rejected the story of the Appellant as being "false and unreasonable". One of the Crown witnesses (P.W.4) is Appellant's own nephew and his evidence is that the appellant asked him to look after the horses and to stop them from going to the village. There is nothing to show that he had any grudge against his uncle. His evidence is being challenged on the ground that he is an accomplice because he agreed to look after the horses which he very well knew were not the property of the Appellant. He also failed to make any report to the authorities. P.W.. 4 is only a herdboy and it is unfair to expect him to behave like a sophisticated adult. To expect him to have demanded a bewys or any proof of ownership of the horses from his uncle is to expect too much from such a young rustic. He was not an accomplice. I am of the view that the trial Court rightly accepted his evidence.

Mr. Mofolo also argued that P.W.4's evidence cannot be said to have been free and voluntary for according to him the police threatened him. In my view the terms "free and voluntary" do not apply to a witness. In terms of Section 215 of the Criminal Procedure and Evidence Act 1981 "every person not expressly excluded by this Act from giving evidence is competent and compellable to give evidence in a criminal case in any Court in Lesotho or before a Magistrate on a preparatory examination." It is clear from this section that a person who is competent and compellable to give evidence can be legally obliged

/to give ...

to give such evidence. There is no question of voluntariness. The so called threat was not a threat at all because the police said the witness was an accomplice in the theft of the horses and that he was not telling the truth when he said he was merely preventing the horses from going to the village in accordance with the instruction of the Appellant.

Mr. Mofolo has argued that the pointing out of the two horses by the Appellant amounted to a confession in that:

(a) the pointing out was induced by force - the handcuffing.

(b) according to the law, the pointing out must be accompanied by accused's statements and/or admissions and if his statements materialise, i.e. they lead to the finding even although the pointing out may have been induced by force and fear and therefore not free and voluntary. He referred me to the case of R. v Duetsimi, 1950 (3) S.A. 674 (A.D.). He also argues that since the pointing out was to a peace officer, it was inadmissible as a confession; for an accused person cannot confess to a peace officer.

I do not think that the submissions made by Mr. Mofolo are the correct statement of the law regarding pointing out by an accused person. Section 229 (2) of the Criminal Procedure and Evidence Act 1981 reads as follows:

" Evidence may be admitted that anything was pointed out by the person under trial or that

/any ...

> any fact or thing was discovered in consequence of information given by such person notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible in evidence against him on such trial."

It is absolutely clear from the section that the pointing out is not a confession even if it forms part of a confession or statement which would not normally be admissible. It is not correct that the pointing out to a police officer is an inadmissible confession. In almost all the reported cases in this country the pointing out had been to a police officer investigating the case. In Stephen Tsatsane v. Rex, 1974-1975 L.L.R. 105 at p.112 Maisels, P., said:

> "It seems to me that the case for the prosecution, disregarding the record as such of the proceedings against the appellant in the magistrate's Court, may be summed up as being based upon the pointing out and certain admissions that the appellant made in the Court a quo. As to the pointing out, this matter was dealt with fully by Cotran; J. in the Court below. Having found that the appellant pointed out the spot where the money was to the police, the learned judge said:
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> > " The Courts are extremely wary in convicting on the evidence of 'pointing out' standing on tsi own. In some cases the Court felt justified in taking such course, but there were good reasons, e.g. in S. v. Kanyile and Another 1968 (1) S.A. 201, where the accused elected to remain silent. I think, however, that, as stated by de Villiers, J.P. in S. v. Gwevu 1961 (4) S.A. 536, in order to convict solely on the evidence of pointing out, the Court must exclude two other possibilities, viz.

/1. That ...

1. That the accused had knowledge because he saw others committing the offence, and

2. That he had this knowledge on information supplied to him by someone else.""

In the present case the trial Court did not rely solely on the evidence that the appellant "pointed out" the stolen horses to the policeman; there was the evidence of two witnesses who previously found the appellant in possession of the stolen horses and he made certain statements to them indicating that the horses were his property. The "pointing out" has also been challenged on the ground that it was preceded by severe assault upon the appellant. In S. v. Ismail and Others (i), 1965 (1) S.A. 446 it was held that the intention of the Legislature in enacting Section 245 (2) of Act 56 of 1955 (which is similar to our Section 229 (2)) was to make admissible evidence of a pointing out forming part of a confession as such, notwithstanding that the pointing out followed upon considerable physical violence done to the accused. I think the pointing out in the present case was perfectly admissible even if the appellant had been assaulted. The reasoning behind this is that no amount of violence can make one guess where stolen property is hidden unless one has personal knowledge. The possibilities that the appellant saw some people drive the hourses in that direction is most unlikely.

It seems to me that there was overwhelming evidence against the appellant and there are practically no prospects of winning the appeal. The application for leave

/to appeal ...

to appeal out of time is refused.

ACTING JUDGE
15th October, 1984

For the Applicant : Mr. G.N. Mofolo

For the Respondent : Mr. Seholoholo