

IN THE HIGH COURT OF LESOTHO

In the Appeal of

MOTLALEPULA MOTLALEPULA
TLELOSE MOTLALEPULA

1st Appellant
2nd Appellant

v

R E X

Respondent

J U D G M E N T

Delivered by the Hon. Mr B K. Molai on the
14th day of March, 1986.

The appellants pleaded not guilty to but were convicted on a charge of Stock Theft by the Magistrate Court of Maseru, it being alleged that on or about 15th November, 1983 and at or near Hobhouse in the district of Ladybrand in the Republic of South Africa, they unlawfully and intentionally stole fifteen (15) cattle the property or in the lawful possession of Michael Olivier and brought them to Roma - Mokhokhong within the jurisdiction of the Court. A sentence of 4 years imprisonment was imposed on No. 1 appellant while No.2 appellant was sentenced to 2 years imprisonment. Portion of the sentences was suspended for 3 years on conditions

It is against their convictions only that the appellants have now appealed to this court on the following grounds

- "1. That the learned magistrate erred in proceeding with the case against the appellants in the absence of their legal representatives,
- 2 That the learned magistrate erred in convicting the appellants on the evidence before court in that there was no proof that the hides before court belonged to animals alleged to have been found in appellants' possession,
- 3 That the learned magistrate erred in rejecting the appellants's defence that the cattle found in their possession

2/ belonged

belonged to 2nd appellant and that 2nd appellant had bewyses for some of them whilst the rest were pro eny of same."

I think the first ground of appeal may be disposed of right away. It emerges from the record of proceedings that when the trial started on 19th June, 1986, the appellants were represented by Advocate Mphutlane. It could not be completed on that day and the hearing had to be postponed to 20th June, 1985. For no given reason Mr. Mphutlane did not attend the hearing on 20th June, 1985. The appellants then felt that Mr. Mphutlane had abandoned them and decided that the trial should continue in his absence. The appellants were perfectly entitled to take that decision if they so wished and they cannot now be heard to say the magistrate erred in continuing with the hearing in the absence of their legal representative. There is, therefore, no substance in this ground of appeal, which must fall away.

The evidence heard by the trial court was that of P.W.1, Michael Olivier, who told the court that he was a cattle farmer at Hobhouse in the district of Ladybrand in the Republic of South Africa. He described the earmarks he used on his cattle as L/E swallowtail, R/E- Nil and brandmark BGO on the right thigh. As his cattle were looked after by an old man who was illiterate, P.W.1 himself was in the habit of counting them twice every week. He was, therefore, in a position to identify his cattle by their features.

On 15th November, 1983, as usual P.W.1 counted the cattle when he found that fifteen (15) of them were missing. He had not authorised anyone to take away the cattle and so he reported the loss to the police. On 3rd January, 1984, he was called to Roma police pound in Lesotho where he identified nine (9) cattle as part of his missing property..

Two (2) of the cattle still had their ear and brand marks in tact. He had, therefore, no difficulty in identifying them as his property. The third one had not yet been earmarked at the time it went missing. It had, however, been brandmarked

3/BGO on the

BGO on the right thigh when he found it at Roma police pound both its ears and the brandmark had not been tempered with. He had, therefore, no difficulty in identifying it. The fourth one was still suckling from its mother and bore no earmark or brandmark when it went missing. He, however, identified it by its features and the fact that it was going along with its mother. The fifth, a calf with neither earmarks nor brandmark was also still suckling and going with its mother. The sixth, seventh, eighth and ninth cattle were toleleys/heifers not yet branded but earmarked at the time they disappeared from his farm. When he found them at Roma police pound, P.W.1 noticed that the swallowtail on their left ears had been destroyed by superimposing a stump which was still fresh. A strange fresh earmark (halfmoon in front) was also made on their right ears. Notwithstanding the tempering with their earmarks, P.W.1 was able to identify the cattle by their features.

It has been suggested that P.W.1's identification of some of the cattle by their features was unsatisfactory. I do not agree. P.W.1 had testified that he was in the habit of counting his cattle twice a week. He was, therefore, seeing them at least twice a week. Anybody who has been a herdboys knows that it is possible to identify one's animals by features only without scrutinizing them for the earmarks. The trial magistrate was satisfied that P.W.1 had positively identified those cattle as part of his missing property. There is nothing unreasonable in the trial magistrate finding, as he did, that in the circumstances of this case, P.W.1 positively identified the cattle as his property by their features and/or earmarks as well as brandmarks.

After he had identified them, the cattle were released to P.W.1 for safekeeping. The reason for this was because they had deteriorated in condition and were in danger of dying. This is confirmed by P.W.2, Tpr. Moorosane, and P.W.4, Tpr. Mabohla. According to P.W.1 five (5) of the cattle were subsequently stolen again from his farm. The other four (4) had since died and only their hides were produced before the trial court.

The evidence of P.W 2 was that on 29th November, 1983 and as a result of information received, he proceeded to a place next to the village of Ha Chele along the intercational boarder between Lesotho and the Republic of South Africa. He noticed hoof prints leading from the Republic of South Africa into Lesotho. The hoof prints led him into the village of Ha Chele where he carried out investigations. It was in the course of his investigations that he met No. 2 appellant who gave him certain information. Following the information, No 2 appellant offered to take him to his (No 2 appellant's) home at Roma - Mokhokhong where he would show him cattle that his son (No.1 appellant) had brought from the Republic of South Africa. He had, however, not seen the bewyses covering those cattle

When they approached his home at Roma - Mokhokhong No.2 appellant and P.W.2 met P.W.4 and other police officer driving cattle which No.2 appellant said they were the ones he had been talking about. They then joined P W.4 and his party to Roma police post. This was confirmed by P.W.4.

P W.4 told the court that on 29th November, 1983 and as a result of a certain information he and other police officers proceeded to No.2 appellant's home at Roma - Mokhokhong. They found P.W 3, Phenya Makhotla, in the veld herding cattle which he said belonged to NO.2 appellant. They took possession of altogether 15 cattle and drove them to the police pound at Roma. This was confirmed by P.W.3 who told the court that he was No.2 appellant's herdboy.

Both P.W.2 and P W 4 testified that after they had driven the cattle to the police post, six of them were returned to No.2 appellant's home following an explanation that they were the property of his son-in-law, one Chigando. They confirmed the evidence of P.W.1 that he later identified the remaining nine (9) cattle as part of his stolen property and they were released to him for safekeeping.

After the close of the crown case, No. 1 appellant elected to remain silent and close his case without leading any evidence. No.2 appellant, however, gave evidence on oath and told the court that the nine (9) cattle taken

5/ possession of

possession of by the police and subsequently released to P.W.1 were his property. With the exception of three (3) that he had bought he had inherited the cattle from his late father. He conceded that although he did not use a brandmark the earmarks R/E - halfmoon in front, L/E - stump made on those cattle was his earmark and that P.W.3 was his herdboys. There is not the slightest doubt therefore that at the time of the finding the cattle were in the possession of No.2 appellant.

It may be mentioned that at the hearing of the appeal an application was moved on behalf of No.2 appellant to lead fresh evidence which could not be led at the trial. The evidence was that of bewyses covering the 3 cattle allegedly bought by No.1 appellant from a place called Ha Rampoetsi. According to No.2 appellant the evidence could not be led at the trial because the bewyses were in the possession of Mr Mphutlane who for reasons already explained was absent during part of the trial. I took the view that the appellant was not to blame for the failure to hand the bewyses at the trial and accordingly allowed the application. The bewyses which were handed in as exhibits, however, showed that one of the cattle, earmark R/E-Nil L/E Swallow-tail and undescribed brandmark on the right thigh, was sold by one Seabata Lesenyeho of Majara Moshoeshe. The other two were sold by Makhunoane Ntsukunyane of Habofanoe Seeiso. They were earmarked R/E-Nil L/E-Swallowtail. One was brandmarked "T" while the other one had undescribed brandmark on the right thigh.

It is to be observed that none of the cattle described in the bewyses had been bought from Ha Rampoetsi. At least one of them was brandmarked "T" and not BGO. Indeed before me No 2 appellant conceded that the cattle were bought by No.1 appellant in his absence so that his evidence that they were bought from Ha Rampoetsi was inadmissible hearsay.

As has been pointed out earlier, I have found nothing unreasonable in the finding of the trial magistrate

6/ that the

that the nine (9) cattle that were released to P.W.1 were positively identified as his property. I am not convinced that any of them was covered by the bewyses that were handed to me. Nor do I find any evidence supporting the contention of No.2 appellant that the cattle were the progeny of his animals. That granted, the third ground of appeal must fall away.

As regards the second ground of appeal, P.W.1's evidence that the nine cattle were released to him for safe-keeping was corroborated by that of P.W.2 and P.W.4. P.W.1 in whose custody the animals were therefore kept gave evidence on oath that 4 of the cattle died and the hides which he produced before court were those of the 4 cattle. No evidence was adduced to rebut P.W.1's evidence on this point. The trial magistrate before whom all witness appeared was a better judge on their credibility. He accepted P.W.1's story on the issue and the appellants cannot be heard to say there was not proof that the hides belonged to animals allegedly found in their possession.

By and large, I am satisfied that the nine (9) cattle that were identified by P.W.1 at Roma Police pound were part of his cattle that had been taken from his farm in the Republic of South Africa and brought into Lesotho without his permission. The cattle were found in the possession of No.2 appellant. The fact that when they were found in his possession No.2 appellant had already earmarked at least some of them leaves me with no doubt that his intention was to steal them. No.2 appellant was, in my opinion, rightly convicted in this case. There is, however, no admissible evidence connecting No.1 appellant with the commission of this offence. No.2 appellant's statements purporting to implicate him in this regard could not form the basis for his conviction for the simple reason that No.2 appellant was a co-accused and his evidence could not therefore be used against No.1 appellant.

The appeal is allowed in respect of No.1 appellant but dismissed as regard No.2 appellant. It is ordered that No.1 appellant be refunded his appeal deposit.

For Appellant
For Respondent

Mr. Mohau
Mr. Lenono

B.K. MOLA'I
JUDGE

14th March, 1986.