IN THE HIGH COURT OF LESOTHO

In the Appeal of:-

MONA FEKA Appellant

vs

R E X

JUDGMENT

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 6th day of June, 1988

The appellant was charged before the Roving Central Court at Mokhotlong with the theft of two cattle the property of Noebejara Tikiso. He pleaded not guilty to the charge but was found guilty as charged and sentenced to twelve (12) months' imprisonment or to a fine of M500-00. An application was made to the magistrate for review of the proceedings in terms of section 26 of the Central and Local Court Proclamation No.62 of 1938 as amended.

The magistrate came to the conclusion that there was no irregularity and confirmed the conviction and sentence. The complaint was that at the end of the Crown case the President explained that the appellant was entitled to:

(a) give a sworn statement; or

(b) give an unsworn statement in which case he would not be cross-examined, but that an unsworn statement shall not be given the same weight as a sworn statement; or

(c) remain silent.

Mr. Lesuthu, for the appellant, was under the impression that in terms of section 217 (3) of the Criminal Procedure and Evidence Act 1981 the appellant could not be allowed to give an unsworn statement. Mr. Lesuthu was unaware that the procedure in the Roving Central Court is governed by Government Notice No. 21 of 1961 and not by the Criminal Procedure and Evidence Act 1981. Section 89 (e) of Government Notice No. 21 of 1961 makes it quite clear that an accused person is still entitled to give an unsworn statement in his defence.

The evidence of the Crown is to the effect that the cattle in question went missing in May or June 1986 and that about two months after their disappearance they were found in the possession of the appellant. (See page 2 of the record of the proceedings). It is alleged by all the Crown witnesses that when the cattle in question were found they had been recently earmarked and had those fresh earmarks superimposed on the old marks.

It seems to me that P.W.2 must be mistaken when he says that the cattle were found two months after their disappearance because according to P.W.4, P.W.5, who is a policeman the cattle were found in the possession of the appellant in NOvember, 1986

and had fresh earmarks. It is not clear what the witnesses mean when they say the earmarks were fresh. Do they mean that they were still bleeding; or that clots had already formed; or that they were not as old as those claimed by the complainant as his earmarks?

The Crown ought to have made it quite clear what they meant by saying that the earmarks were fresh. As soon as he was arrested the appellant denied that the two cattle had any fresh earmarks and claimed them to be his property. As a result of the appellant's argument and denial that the cattle bore any fresh earmarks, the police decided to seek the assistance of a neutral person who had nothing to do with the investigations. It was decided that they should be taken to a veterinary officer who was asked to make a written report of his findings.

It is common cause that the veterinary officer found that the cattle had no fresh earmarks. At the trial the Crown did not call the veterinary officer and decided to rely on the evidence of untrained people. It seems to me that the evidence of a veterinary officer is like that of a medical doctor in a criminal case. Both are experts in their own fields and their evidence cannot be lightly discarded by the court. The police went to the veterinary officer because they regarded him as an expert. However, when he gave a report adverse to their case, they not only decided not to call him as a witness but also concealed his report. The public prosecutor is an officer of the court and as such should never conceal any evidence from the court. It is his duty to make sure that the court comes to a just decision. A conviction of the accused person when some evidence has been concealed from the court is not a just

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decision. The report of the veterinary officer ought to have been given to the defence.

Fortunately the appellant knew about the report and called the veterinary officer as a witness. As I have already stated above his evidence was that there were no fresh earmarks on the two cattle. His evidence confirms what the accused had been saying throughout the investigations and as well as at the trial. The case for the Crown heavily depended on the allegation that although the cattle in question were no longer calves, they had fresh earmarks superimposed on old ones. Normally cattle are earmarked while they are still young and it is unusual to find old animals bearing fresh earmarks.

The Court President did not give any reasons for his judgment and I do not know why he did not believe the appellant and the veterinary officer that the cattle had no fresh earmarks in NOvember 1986 when they were found in the possession of the appellant. A judicial officer must always give his or her reasons for judgment so that the appellate court may know why he or she came to that decision. Sometimes he comes to a certain decision because of the demeanour of the witnesses but that must be stated in the reasons for judgment.

Looking at the evidence as it stands in the record it cannot be said that the Crown proved beyond a reasonable doubt that the cattle had fresh earmarks when they were found in the possession of the appellant. He ought to have been given the benefit of that doubt.

In the result the appeal is allowed and the conviction and sentence imposed by the Roving Central Court are set aside. I make no order as to the release of the cattle because there is a very serious dispute over ownership and it seems to me that such a dispute may conveniently be settled in civil proceedings.

B.L. KHEOLA
JUDGE

6th June, 1988.

For the Appellant - Mr. Lesuthu
For the Crown - Miss Moruthoane.