CRI/APN/88/89

IN THE HIGH COURT OF LESOTHO

In the matter between:-

RAKOTSOANA MPOPO Applicant

and

THE DIRECTOR OF PUBLIC PROSECUTIONS Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 14th day of July, 1989.

The applicant is applying for leave to appeal out of time in CR 60/88 of Quthing Subordinate Court delivered on the 18th October, 1988. He was convicted of theft of stock and sentenced to five (5) years' imprisonment.

In an application of this kind the applicant must prove that his failure to note his appeal was not wilful and that he has reasonable prospects of success in the appeal. The appellant has deposed in his affidavit that after he was convicted and sentenced he indicated to the clerk of court that he wanted to appeal. The clerk of court advised him to instruct a lawyer to

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handle the appeal. He was taken to prison and his wife came to see him after two months. He informed her that he wanted to appeal against his conviction and sentence and that she must get a lawyer for him. His wife complied but by then he was already out of the statutory period within which to note an appeal.

I come to the conclusion that the applicant's failure to note his appeal timeously was not wilful. It was probably due to circumstances beyond his control that failed to appeal within the statutory period but I doubt that if the applicant had reported to the prison authorities he would not have got assistance immediately.

The next question is whether or not he has reasonable prospects of success in the appeal. He has deposed that after giving a summary of evidence as deposed, the learned magistrate came to an abrupt conclusion that he was guilty as charged without giving reasons for his conclusion. That the learned magistrate was not justified in accepting the Crown evidence lock, stock and barrel more specifically the evidence of Maseithati Thakholi (P.W.5) and Seobotsoana (P.W6) upon whose evidence he was convicted. The said witnesses were clearly implicated in the offence charged. There is nothing in the judgment of the learned magistrate to show that he exercised the necessary caution before he convicted him.

He deposed further that his defence version could reasonably possibly be true and that its falsity was not demonstrated by the Crown.

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The judgment of the court below is criticised on the ground that no finding was made as to the credibility of the witnesses.

The evidence of the Crown was to the effect that on the 5th March, 1988 one Tiisetso Mokhachane discovered that five of his hammels were missing from the cattle post. Swelakhe Nokoa later saw those hammels near the sheep of the applicant. He asked the applicant about them and he said they were his sheep. He says that it was his first time to see those sheep.

Khotso Ramafikeng (P.W.3) assisted the applicant to separate the five hammels from his (applicant's) sheep and after that the applicant drove them away. After he had left the complainant came searching for his sheep. P.W.3 told him about the hammels which the applicant had just driven away which fitted the description given by the complainant.

Moleleki Ramonoana Mpopo was a shepherd of the applicant's elder brother and herded the sheep of the applicant as well as those of his elder brother. One day the applicant brought the said five (5) hammels to the cattle post and left them about 50 metres from the rest of the sheep. P.W.2 asked him about them and he said they were his sheep. He later drove them away.

'Maseithati Thakholi (P.W.5) is the wife of Litelu Thakholi (P.W.7). She testified that during February, 1988 she was at her husband's butchery when the applicant brought the aforesaid

hammels and said that he was selling them. As her husband was absent she could not buy them but the applicant decided to leave them at the butchery and to come back on Wednesday. It was on a Monday. She demanded a bewys for the sheep but the applicant said she could not leave a bewys because the sale had not been completed. She agreed to keep the sheep without any bewys. Her evidence is confirmed by Seobotswana Qekiso who was present during the negotiations. He looked after the animals which were due to be slaughtered at the butchery. P.W.5 says that when her husband came he showed him the sheep and he took them to his home.

A few days later the police and complainant came to the butchery looking for the aforementioned sheep. She says that she denied any knowledge about them because she was afraid that they would assault her. The sheep were eventually found in the possession of Litelu Thakholi. His evidence was to the effect that the applicant had earlier told him that he had some hammels for sale. He says that when he found the sheep at the butchery he took them to his home. The applicant eventually came and offered them for sale but they failed to agree because the applicant had no bewys for them. As the rivers were in flood at the time the applicant was unable to drive them and left them behind. When his wife reported that the police were looking for the said sheep, he voluntarily drove them to Mount Moorosi police station and made a statement about them.

The applicant's defence was that he knew nothing about the said sheep which were not even found in his possession.

Mr. Mda, counsel for the applicant, submitted that the charge sheet in the present case was fatally defective in that the offence relating to stock created by the Stock Theft Proclamation No.80 of 1921 (as amended) is "the offence of inability to give a satisfactory explanation of possession. He referred to section 16 of the Proclamation and to the case of Mapota Napo v. Rex 1971 - 1973 L.L.R. 5 at p. 7. He submitted that the stage at which the duty is cast upon the accused to give a satisfactory account of his possession arises only after being:

(a) Found in possession of stock when there is reasonable belief that he obtained same unlawfully, or

(b) When there is actual possession that his possession is unlaful. (Mpesi v. Rex 1967 - 70 L.L.R. 112 at p. 115).

He submitted that noeivdence was led indicating that the applicant was ever found in possession of the stock and that he failed to give a satisfactory account of his possession.

Mr. Sakoane, counsel for the Crown, submitted that the charge against the applicant is that of theft simpliciter and not failure to give a satisfactory account of possession.

I agree with Mr. Sakoane that the applicant was actually charged with common theft of stock as it clearly appears in the charge sheet where it is alleged that "charged with the offence of Theft of Stock Proclamation No. 80 of 1921, in that upon (or about) the 5th March, 1988 and at or near Thaba-Ntso Cattle Post in the ditrict of Quthing the said accused did wrongfully and unlawfully and intentionally steal 6 hammels, the property or in the lawful possession of Tiisetso Mokhachane."

The mere fact that the Proclamation was mentioned does not mean that reference was made to section 16 of the Stock Theft Proclamation. It is not correct that the offence created by the Stock Theft Proclamation No.80 of 1921 is the inability to give satisfactory account of possession. There are other offences such as those created by sections 13, 17A, 22, 23, 24 and 25. The offence of failure to give a satisfactory explanation of possession is created by only section 16 of the Proclamation. In Mapota Napo's case (supra) and Mpesi's case (supra) this Court was interpreting section 16 of the Proclamation.

Section 4 (1) of the Stock Theft Proclamation No. 80 of 1921 (as amended) reads as follows:

> "The provisions of this Proclamation apply in every case in which a person is indicted, summoned or charged in respect of the theft of stock or produce, notwithstanding the fact that this Proclamation is not referred to in the indictment, summons or charge. "

I am of the opinion that the above section 4 allows the Crown to mention the Proclamation in all theft of stock cases, if they so wish.

The next point is that the trial court did not make a finding on the credibility of witnesses and that it amounts to a misdirection. I do not agree with this submission. In Rex v. Dhlumayo and another, 1948 (2) S.A. 677 (A.D.) at p. 705 - 706 certain principles which should guide an appellant court in an appeal purely upon facts were set out. I shall refer only to principles Nos. 3, 4, 5, 8 and 12 which read as follows:-

> "3. The trial Judge has advantages - which the appellate court cannot have -. in seeing and hearing the witnesses and in being steeped . in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked.
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> 4. Consequenrly the appellate court is very reluctant to upset the findings of the trial Judge.
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> 5. The mere fact that the trial Judge has not commented on the demeanour of the witnesses can hardly ever place the appeal court in as good a position as he was.
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> 8. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellate court will only reserve it where it is convinced that it is wrong.
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> 12. An appellate court should not seek anxiously to discover reasons adverse to the conclusions of the trial Judge. No judgment can ever be perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned therefore it has not been considered."

The last point of law raised by Mr. Mda was that the learned magistrate failed to caution himself when he dealt with the evidence of P.W.5 and P.W.6. I am of the opinion that the two witnesses were not accomplices and that he had treated their evidence in the same manner as the evidence of the other witnesses.

I come to the conclusion that the applicant has no prospects of success because the evidence against him was overwhelming.

The application is refused.

J.L. KHEOLA
JUDGE

14th July, 1989.

For the Applicant - Mr. Mda
For the Respondent - Mr. Sakoane.