CRI/REV/130/90
CRI/APN/188/90

IN THE HIGH COURT OF LESOTHO

In the matter between:

REX

V

MAKOTOKO KHABO

Before the Honourable Chief Justice Mr. Justice B.P. Cullinan on the 6th day of July, 1990.

For the Crown : Mr. S.P. Sakoane, Crown Counsel
For the Accused : Mr. M.M. Ramodibedi

JUDGMENT

Cases referred to:

(1) R v Albasini (1967)4 SA 605;
(2) R v Brand (1960)3 SA 637 (A.D.);
(2) R v Peerkhan & Lalloo (1906) TS 798;
(3) R v Nkau Majara (1954) AC 235 (P.C.);
(4) R v Gani & Ors. (1957)2 SA 212 (A.D.).

The accused, aged 73 years, is a 'bewys' registrar at Fobane in the Leribe District. He was convicted of stock theft by the Magistrate's Court at Leribe and sentenced to the statutory minimum sentence of five years' imprisonment.

The accused's alleged involvement in the offence was that of an accessory. The principal or principals did not stand trial and the accused was charged thus:

> "That the said accused is charged with the crime of Theft of Stock. In that upon or about the 25th day of September, 1989 and at Ficksburg in the Republic of South Africa, the said accused did unlawfully and intentionally steal: 5 head of cattle, the property or in the lawful possession of Lucas Johanness Van Vuureen, and did unlawfully bring the said stock into Lesotho to wit at Fobane in the district of Leribe, where this court has jurisdiction of this case thus committing the crime of Theft of Stock."

Those particulars indicate that the accused acted as the principal in the matter. He pleaded guilty. The statement of facts revealed that his alleged involvement was not that of a principal. The statement of facts indicated that about nine head of cattle were "lost" by the complainant in the Republic of South Africa on 25th September, 1989. He reported the matter to the South African Police at Ficksburg.

No date is stated thereafter, the statement of facts reading thus:

> "Then two people came to accused driving 5 head of cattle black & white & they bringing there was of some suspicion. Then these two people told accused that the cattle were stolen but they asked him to register them as after selling them he is going to get his share. Accused prepared bewys for the cattle, and these two people left.
>
> Then accused on second thoughts supplemented the duplicates as he knew the authorities will check on these animals and registered as if

the registering was of wool not cattle.

On the original it's written the cattle but the duplicate has wool registered. Lesotho police in their investigation found other offenders involving livestock but they escaped police custody and are still at large. Then complainant came & identified the 4 cattle as part of his lost cattle. Accused assisted to continue the theft that was already committed in the R.S.A.

Complainant has not allowed anybody to take his cattle and bring them at Fobane where this court has jurisdiction, without his consent.

The two cattle, were in calves so they were released to their owner for safekeeping. Accused was then cautioned, and charged with theft as he assisted on committed offence, as socius criminis."

There is a good deal of conflict as to whether or not an accessory after the fact to the crime of theft, which is a delictum continuum, must himself effect a fraudulosa contrectatio before he can be convicted of theft as such. The learned author Hunt in his work South African Criminal Law & Procedure Vol.II at pp.605/606 submits that this is unnecessary. He points however to the contrary view of the Rhodesian Appellate Division in the case of R v Albasini (1) per Beadle C.J. In any event the test enunciated in that case of what constitutes a contrectatio, was, as Hunt observes, so wide as to indicate that there is little practical difference between the opposing views. That test, based on a dictum of Schreiner J.A. in R v Brand (2) at p.637, is whether what the accessory did in regard to the stolen property

"made it less easy for the owner to exercise

his rights in respect of it."

Applying that test to the present case it can be said that the accused's actions made it less easy for the complainant to exercise his rights of ownership. There are however defects in the trial otherwise.

Firstly, while an accessory may thus be charged with the substantive offence of theft (see section 140(1)(a) of the Criminal Procedure & Evidence Act 1981), nonetheless it is desireable that the exact role played by the accused be alleged in the particulars of the offence. It may be said that an accused charged with the commission of the substantive offence may nonetheless, under the invisible alternative provisions of section 182(2) of the Criminal Procedure & Evidence Act, 1981, be found guilty as an accessory after the fact in respect of that offence. Be that as it may, where the prosecution is fully aware of the role played by the accused, even though statutorily it may charge him with the substantive offence, nevertheless it is desireable that such details be alleged in the particulars of the offence. The common law rule in the matter, now given statutory form in sections 140 and 182(2), was stated as far back as 1906 by Innes C.J. in the case of R v Peerkhan & Lalloo (2) at pp.802/803. The learned authors of The South African Law of Criminal Procedure (Swift) (1957) at p.471 point out however that the wording of section 372(2) of the Criminal Procedure Act, 1955, of the Republic of

South Africa, upon which section 140(2) is based, are permissive, and that particulars should be alleged in keeping with the spirit of the Act (see section 127(1) of the Criminal Procedure & Evidence Act, 1981), so as to inform the accused of the case he has to meet. In the present case, with an unrepresented aged accused, where the particulars of the substantive offence and even the identity of the thieves was unknown, it seems to me to be entirely improper to have accepted a plea of guilty to the charge as framed. While I appreciate that the learned trial Magistrate was not initially aware of the role allegedly played by the accused, nonetheless the statement of facts clarified the situation, when the magistrate should have insisted on an amendment to the charge, so as to supply particulars, or altered the plea to one of not guilty.

In any event, the statement of facts did not disclose the identity of the thieves: more importantly, it did not allege that the two persons who approached the accused were the thieves: that may be an inference to be drawn, but it is certainly not the only reasonable inference: the inference that they were guilty receivers is equally consistent with the facts. I have repeatedly said that the Court should not be astute in drawing unfavourable inferences from a statement of facts: the prosecution is relieved by a plea of guilty from adducing evidence; it is not relieved of the duty of stating the facts, including each and every necessary ingredient of the offence, in clear and unequivocal language.

All the South African authorities indicate that for a person to become an accessory after the fact he must render assistance to the principal offender: see the Privy Council case of R v Nkau Majara (3) at p.242, an appeal from the then High Court of Basutoland in which the Roman-Dutch common law was applicable, though the expression of an 'accessory after the fact' is imported from English Law. In the present case it might be said that the two unknown persons were themselves accessories after the fact: but I do not see that it could be said that the accused was also an accessory in that he aided and abetted them: his acts cannot be construed as an aiding and abetting. It might be said nonetheless that he participated in the crime of the accessories (see e.g. R v Gani & Ors. (4) per Schreiner J.A. at pp.218/222) and thus is guilty of being an accessory after the fact. In essence it is there being said that the accused is an accessory after the fact in resect of an offence of being an accessory after the fact. While it may be that the law permits of such permutations and combinations, so that the guilty may be convicted and punished and crime prevented, nonetheless I take the view that in such a case the prosecution must clearly state its case, that is, in the statement of facts.

Further, the statement of facts is vague in the extreme. It discloses that the two unknown persons brought with them five head of cattle. Upon registration by the accused the two left, presumably with the five cattle. The statement mentions "other

offenders involving livestock but they escaped police custody...". The statement then reveals that the complainant "came and identified the 4 cattle as part of his lost cattle". Thereafter the statement refers to "the two cattle" as being in calf. In brief, the number of cattle involved is uncertain, but, more importantly, it is not stated as to who held possession of the cattle identified by the complainant, or rather where they had been found, and how the accused was connected with such cattle. The statement of facts did not disclose an essential ingredient and the plea of guilty was then equivocal.

I had thought of a retrial. The accused has now been in prison for six months, the equivalent of a sentence of nine months' imprisonment, that is, with remission. He is aged 73 years. That in itself attracts the exercise of the court's discretion in the matter. Under the circumstances I decline to order a retial. It would be unsafe to allow the conviction to stand. The conviction and sentence are set aside and the appellant is acquitted.

Delivered at Maseru This 6th Day of July, 1990.

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B.P. CULLINAN
CHIEF JUSTICE