CRI/A/49/91
CR 166/89 (Mokhotlong)

IN THE HIGH COURT OF LESOTHO

In the matter between:

PAULOSI BADELA

v

R E X

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 19th day of August, 1994

When, on the 12th December 1989, the Appellant, was convicted by the Magistrate of Mokhotlong, he was an old man of Seventy Five years. He had been charged with theft of stock, it having been alleged that upon or about the month of March 1989, and at or near Mats'aneng cattle post, Moremoholo in the District of Mokhotlong, the said Accused did unlawfully and intentionally steal one ox the property or in the lawful possession of one TSIELO TATAPA. The Appellant admitted guilt and was convicted accordingly. At the time of his conviction the minimum sentence legislation was still in operation hence the Appellant was sentenced to a term of imprisonment of five years "without an

option of a fine."

Miss Ramafole appeared for the Appellant. The original Counsel in the Court a quo for the Appellant had been one Advocate K. Lesutu. There had been not fewer than three postponements in this appeal. Ultimately Miss Ramafole appeared and had to attend to this appeal whose record was even accompanied by a notice of review. Counsel for Appellant chose not to address the question of review. She abandoned it. This Court allowed the Appellant's Counsel to depart from the grounds contained in the notice of appeal. This is one of the few fortunate appeals in which Counsel was honest enough to concede that the grounds of appeal on which the appeal was being prosecuted were not helpful (to put it mildly). I am of the view that departure from the original grounds of appeal ought to be allowed on very rare and exceptional cases. Such intended departure should be on notice giving both the Crown and the Court a reasonable time to weigh the application. I however allowed the introduction of the new grounds. The abandoned grounds of appeal had included one of the traditional whipping boys of Appellants. These are, that the prosecutor's outline (in terms of the Criminal Procedure and Evidence Act 1981) did not disclose all the elements of the offence. Secondly that the Accused was not represented, is illiterate and could not understand the charge, its seriousness or the nature of the proceedings.

The new grounds of appeal were as follows:

(a) That the charge preferred against the Appellant in the Court below was defective in as much as the Appellant should have been charged under section 16(1) of the Stock Theft Proclamation.

(b) The charge, in issue, does not comply with section 154 (2) of the Criminal Procedure and Evidence Act 1981, therefore there has not been proper evidence led regarding when the ox in issue was lost.

The issue whether or not to proceed under section 16 (1) of the Stock Theft Proclamation is a matter guided purely by attendant circumstances. Put in another way the Prosecutor is at liberty to charge under the Stock Theft Proclamation or under common law depending on the facts of the case at hand.

In this appeal the facts were as follows. Tsielo Tatapa, the Complainant, has these following ear marks designated to his stock: R/E Winkelhaak in front and, L/E Winkelhaak in front. This ear marks are also allocated to his son Mputana. At a certain point in time the Complainant "mafisaed" his mouse colour cow to one Teboho Sepiriti, which gave birth to a black bullock. The bullock was marked using the said Complainant's earmarks.

Teboho Sepiriti castrated the bullock. In March 1989 the ox went missing and was found at the pound with its earmarks still intact. It is the same ox which the Appellant had earlier brought to his chief stating that he had allocated to his three years grandson Karabo, and was donating the animals to his said grandson.

The chief's suspicion was aroused by the fact that the ox did not bear the Appellant's known earmark and this clearly old ox was being brought to be registered for the first time. The Appellant's chief handed over the ox to the police. At the time that the Complainant and Teboho Sepiriti, had reported the ox to be missing the Appellant also reported to the police that his ox (the same ox) was missing. His chief having handed over the ox to the police, the Appellant then followed it up and the ox was released to the Appellant.

Sometime in October 1989, the ox was found with the Appellant. Another report was given to the police as a result of which the Appellant was given a charge of Stock Theft. It was not clear as to when in relation to March 1989 and October 1989, the Appellant had first brought the ox to his chief as said above.

The application of the 16(1) of the Stock Theft Proclamation

is to be found in the instructive case of Mapota Napo v Rex LLR 1971-73 (5) where at page 8 (A-B) approval of the South African Case of R v May 1924 OPD was made. I had occasion to deal with a case in some ways analogous to the present case. It was the case of Moshao Ramabanta vs Director of Public Prosecutions CRI/A/122/93 (15/06/94). It was decided on the basis of a defective charge. The Court refused to accept the submission that the Crown had no choice in all stock theft cases but to charge under 16 (1) of the said Stock Theft Proclamation. Where there is a claimant and all the elements of theft are present, it is erroneous to submit that the Appellant should have been charged with section 16 (1) of the Stock Theft Proclamation. Section 4 of the Stock Theft Proclamation clearly envisages that a person may be charged with theft of stock simpliciter or produce. A list of competent verdicts is shown where there is charge of stock theft or produce. That is why the Appellant in Mapota Napo vs Rex (supra) had been charged with theft of stock under common law and two other counts with contravening the said section 16 (1) of the Stock Theft Proclamation. I think the proper question should always be: whether the charge been proved and if not what the proper charge should have been. That is why, in my view, it is neither here nor there whether the charge under section 16 (1) of the Stock Theft Proclamation would be valid. The accused was under that charge. It should be clear therefore that the first ground of appeal does not hold water.

I now come to the second ground of appeal. Appellant reasons that there is vagueness in stating the date of the theft, much as the charge sheet alleges that the ox was stolen upon or about the month of March 1989 and/but was only found with the Appellant in October 1989. That therefore the charge does not comply with section 154 (2), time being of the essence. Furthermore that in as much as there was no evidence to indicate the whereabouts of the animals as between the time of its alleged missing from Teboho Sepiriti and its being found in possession of the Appellant the charge ought to fail. I am sure that the Appellant misses the practical implications of the fact that he does not deny that the animal was in his possession. Firstly it was when he reported it to his chief and secondly it was on the last occasion when the police seized it after a report was given by Teboho Sepiriti. What it literally means is that he is the person to explain where the animal has been. If not immediately after its disappearance but immediately before he himself got into its possession. He ought to know. This is besides the question of onus which is always with the Crown.

In determining whether or not section 154 (2) is applicable there are two cardinal issues which come into play, viz;

(i) whether or not time was of essence in this case and

(ii) whether or not the Appellant suffered any prejudice in

his defence upon the merits.

I found merit in the Crown's submission that time was not of essence of the offence in as much as theft is a continuing crime. The learned author P.M.A. Hunt in his South African Criminal Law and Procedure. volume II at page 603 aptly describes theft as a continuing offence as follows:

> " the theft continues as long as the stolen property is in possession of the thief or of some person who was a party to the theft or some person acting on behalf or even possibly in the interests of the original thief or party to the theft." (my underlining)

I did not find that there was any prejudice (potential or actual) suffered by the Appellant in the statement of the alleged time, in the charge, of the theft of the ox. I have already made my remarks about the time when the ox was found in possession of the Appellant. This can never redound in favour of the Appellant. This more so flowing from the very definition of theft as a continuing offence, which I have referred to earlier in this judgment. I would not hesitate to say that the Appellants ground of appeal was not only unsupportable but fallacious. I would confirm the conviction.

In coming to the sentence of the Appellant much anxiety has been caused by the Appellant's extremely advanced age. Not only that. At the time of sentencing Appellant the office with which he was charged was liable to a minimum sentence of five years (see Revision of Penalties Order No. 10 of 1988). The order was subsequently amended by the Revision of Penalties Order No.11/1991. As to what constitutes a minimum, mandatory sentence and a maximum treatment, see the instructive treatment of the subject in S v Tom, S v Bruce 1990 (2) SA 802 (A). I have carefully considered the provisions of section 314 of the Criminal Procedure and Evidence Act 1981 with regard to the postponed and suspension of sentence where compulsory minimum sentences are prescribed. I do not see that it is permissible to postpone the sentence in as much as a sentence has already been passed. I do however observe that a compulsory minimum sentence may be suspended unless the legislature expressly provides that no suspension may take place. The relevant legislation did not provide that the sentence may not be suspended. (See also S v Asmal 1964 (4) SA 732 (T). I would in the circumstances suspend the operation of the whole of the Appellant's sentence for a period of three years on condition that the Appellant does not commit any offence involving dishonesty.

T. MONAPATHI
JUDGE

19th August, 1994

For the Appellant : Mr. Ramafole

For the Respondent : Mr. Thetsane