

IN THE COURT OF APPEAL OF LESOTHO

HELD IN MASERU

C OF A (CRI) 02/2019

In the matter between:

SEHLOHO MPETSANA

1ST APPELLANT

MOABI SEKEITI

2ND APPELLANT

EREMANE MOCHOOANE

3RD APPELLANT

And

MAGISTRATE – MR. KHOELI

1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS

2ND RESPONDENT

CLERK OF COURT – BUTHA-BUTHE

3RD RESPONDENT

MINISTER OF POLICE

4TH RESPONDENT

**LESOTHO CORRECTIONAL SERVICES
BUTHA-BUTHE**

5TH RESPONDENT

**COMMANDER LESOTHO DEFENCE
FORCE**

6TH RESPONDENT

ATTORNEY GENERAL

7TH RESPONDENT

CORAM: M. MAHASE A.C.J

CHINHENGO A.J.A

MTSHIYA A.J.A

HEARD : 20 May 2019

DELIVERED : 31 May 2019

SUMMARY

Criminal Law - Stock Theft – Appellants having been charged with the offence of contravening section 13 (3) (a) r/w section 14 of the Stock Theft No. 4/00 as amended by Act 5/03 – Appellants having been convicted on their own pleas – Appellants having been tortured severely by members of the Lesotho Defence Force and the Police – Appellants, as a result having been hospitalized – One of them having died in the hands of their torturers – Offence having been committed in the Republic of South Africa – Appellants being subsequently tried, convicted and sentenced by the Botha-Bothe Magisterial Court – Issue of extra territorial jurisdiction raised meru moto by the Court of Appeal.

JUDGMENT

MAHASE A.C.J

- [1] The appellants were charged, convicted and sentenced by the Botha-Bothe Magistrates' Court on the 31 August 2016. They were each sentenced to pay a fine of M15,000.00 or to imprisonment of ten (10) years in default of payment.

[2] The appellants appeared before the Botha-Bothe Magistrate's Court on the 31 August 2016. They were charged with having contravened section 13 (3) (a) read with section 14 of the Stock Theft Act No. 4 of 2000 as amended by Act No. 5 of 2003.

[3] The particulars to the charge read as follows:-

In that upon or about the 18th day of August 2016 and at or near Ill Paradiso Farm, Clarens, Free State, Republic of South Africa the said accused did, each, the other or all acting together, wrongfully and unlawfully and intentionally steal thirty one (31) sheep of the following description: All while ewes, all tattooed "KVL" on their left cheek, and brought the same to Mononts'a in the district of Botha Bothe and within the jurisdiction of the Honourable Court; the property or in the lawful possession of Johan Hendrick Naude, thereby committing the offence as aforesaid.

[4] When on the 31 August 2016 the appellants appeared in Court, and after the charge was read to them, they are recorded to have all said they understood the charges put

to them. They were also informed of the right to legal representation of their own choice and that the matter was proceeding. They are recorded to have all said that they appear in person

[5] They all then tendered the pleas of guilty to this charge. The crown then summarized the evidence which it would have adduced had the accused not tendered pleas of guilty. Ultimately these unrepresented accused persons were each convicted and sentenced to pay a fine of fifteen thousand Maloti (M15,000.00) or to imprisonment of ten years in default of payment. They have all been kept in custody at the Botha-Bothe Correctional Service since then to date.

[6] **In brief the outline of facts is as follows:**

That one Mphale Mofokeng who is employed by the said Johannes at the said farm at Clarens in the Republic of South Africa would tell the court that on the 18 August 2016 he kraalled forty one sheep and ewes (here the record is not visible as it is partially torn.

[7] That he had later noticed four men entering the farm and only three of them later left the farm. That the members of the SAPS were later informed of the matter and he waited

for the investigations to take a full course till the 23 August 2016.

[8] I pause to note here that of particular interest there is no allegation in the summary of this witness's statement of facts that any sheep were found to have been stolen. It is also not said which matter it was exactly that the S.A.P.S was informed about.

[9] The summary of facts is that on the 23 September 2016 Mphale received a call from one Mokete of the Lesotho Defence Force (LDF) who told him that he (Mokete) had found four men and that one of them had died after having been arrested by the LDF members. That these men were villagers of Ha Napo Botha Bothe.

[10] Once again, this summary of facts does not say why the said men were arrested by the LDF members, nor why the other man had died. There is no mention of any sheep suspected to have been stolen being found by the LDF members from the said four men including the one who had died.

[11] The next summary of the facts is allegedly that of Johannes Nandric Naude who would tell the court that he had proceeded from the Republic of South Africa to the Bothe Bothe police station where he had learned that only twenty three (23) of his sheep had been found from the three accused before court.

[12] That he would tell the court that all the sheep bore fresh marks from both ears. Further on, he would tell the Court that the tatooes on the left check were still visible. There is no description of the tatooes which are said to have still been visible. From the summary of facts or evidence, there is no mention of the fact that Johannes would tell the court that his sheep were tattooed “KVL”.

[13] Lastly, on the summary of facts, it is said that Johannes would tell the court that his said allegedly stolen sheep were worth seventy five thousand Rands (R75,000.00) in monetary terms and there is no analysis of how that was arrived at.

[14] The next summary of the evidence is that of No.5327, private Mokete, a member of the LDF stationed at Lesotho, Free State border at the village of Ha Napo, Mononts’a.

[15] That while on duty thereat he received a report about the said stolen sheep and that he followed the track which led him to accused 2 and 3 and later to one Mahlomola Jessie who died.

[16] That at the time he found these accused persons they had with them only seventeen sheep and not forty one of same. He then asked the suspects where they were taking the sheep to but that the explanations of the suspects were not satisfactory.

[17] There is nothing told about what explanation they gave nor are the sheep found by Mokete described as to their markings or tatooes. He then apprehended these suspects and had them handed over to the police.

[18] He would then tell the court that he later followed after yet another suspect (A1) to the place of Ngoajane where he found some six sheep with him. There is here, no description of the said six sheep found with accused number 1 at Ngoajane. This witness, so the summary of

facts goes on, would tell the court that he had met the Chief of accused number 1 who had informed him (Mokete) that he (the chief) knows the earmarks of accused No.1, without saying which those earmarks are.

[19] The evidence of all other witnesses which the crown would have called to testify is basically based on how and from whom they found the sheep allegedly stolen from the complaint's farm in the Republic of South Africa. One such witness is Fusi Sekeiti whose evidence is briefly that his brother had stolen sheep sometime in August 2016 but the number of such sheep was not disclosed.

[20] This witness would tell the Court that A2 took nine of the sheep to A1. That in fact A1 took those sheep from A2 from where the members of the LDF found them.

[21] I pause to observe that this summary of facts/evidence borders on hearsay, inadmissible evidence because this witness, Fusi Sekeiti was never anywhere near the Republic of South Africa where the sheep was allegedly stolen, nor did he go to A1's home and witnessed A2 giving the nine sheep to A1.

[22] The crown further summarized the evidence which would be adduced by one No. 57102 Police Constable Motsapi whose evidence would be that one private Mokete of the LDF stationed at Mononts'a handed to him the three suspects/appellants herein and that Mokete reported to him about the death of one Mahlomola Jessie who had died in the hands of the LDF members who had initially arrested the said suspects.

[23] He would further testify that fourteen sheep were found from accused 2 and 3 and that nine were found from accused No. 1. That he would tell the Court that he subsequently prepared exhibit "1" and "A" which are respectively in relation to the sheep found with the accused and the LMP12 form itself.

[24] It is however noted by this court that no such exhibits, the LMP12 forms are attached to the record of proceedings both hand-written and typed. This therefore means that the record of proceedings herein is defective in this regard.

[25] Lastly, the crown summarized the evidence which would be adduced by the veterinary a doctor Rantlabole. Her evidence would briefly be that is he had examined the alleged stolen sheep and found that they all bore fresh earmarks, and were tattooed. He/she did not say what the tatooes were. A description of the tatooes was not made by this doctor (veterinary).

[26] At the close of the summary of the crown case, the court inquired from the three accused/appellants in the following way:-

Q “Do you all accept the facts as outlined by the crown”.
The court then recorded the appellants’ response as follows:-

A We all accept the facts as outlined.

The appellants were not asked individually if each accepts the facts.

The Court then passed its verdict as follows”

Verdict:-

“One the basis of the fact outlined by the crown and on the basis that all the accused accept the facts they are all found guilty as charge.

[27] There is absolutely nothing said by the court a quo explaining to the accused persons which factors or elements the court has taken into consideration in arriving at the verdict as pronounced.

[28] As already alluded to above, the issue of extra territorial jurisdiction was raised mero moto by the Court and as such, nothing much was done about the submissions filed on behalf of the appellants dated the 25 March 2019.

[29] It was the court's considered view that the extra territorial jurisdiction of the Botha Bothe Magistrates' Court to preside over this trial was of particular importance, regard being had to international laws and norms in relation to the alleged criminal activities committed outside the borders of Lesotho, but whose impact was exerted and felt in Lesotho.

[30] To that extent, both counsel were ordered to prepare and file the appropriate supplementary submissions in this regard. They both obliged.

[31] However, before I deal with same; I wish to indicate that the appellants have in fact strongly complained about the brutal torture they had been subjected to by the members of the LDF and later by the police; which torture or assault resulted in the death of one Mahlomola Jessie who was together with accused number 2 and 3 who are now appellants in this appeal.

[32] This fact has never been denied by the crown and was not interrogated before this Court. However, as a matter of procedural fairness, this Court is enjoined by law to come to the conclusion that indeed the appellants herein were subjected to this cruesome torture and brutality in the hands of the LDF and Police members who initially arrested them.

[33] This Court is also fortified in the above view by the fact that, as a matter of common cause, the appellants were allegedly arrested on or around July 2016 and from the record of proceedings of the court a quo, they appeared or were brought to the Botha Bothe Magistrates' Court for the first on the 31 August 2016 when they were then convicted and sentenced on their own pleas.

[34] There is absolutely no explanation, other than that offered on behalf of the appellants as to what was happening to them from when they were first arrested in July 2016 to the 31 August 2016. Refer to the appellants founding and supporting affidavit filed of record.

[35] Having made the above observations, it is the considered view of this Court that the inescapable inference which it draws from the above is that indeed the appellants had been subjected to the brutal torture by the members of the LDF and the Police as alleged, and that from date their health books still remain in the hands of their torturers; despite demands that same be released to the appellants.

[36] Effectively, what the police at Botha Bothe did was to take the appellants to Ts'epong hospital before the appellants could be brought to court and the sole purpose was so as to hide the fact of their brutal torture to court.

[37] Now by having refused to release the appellants health books, the police have effectively denied the appellants the right to proof that they had not only been so brutally tortured, but they have also denied the appellants to proof

that they have been detained in police custody beyond the prescribed period of 48 hours and that no warrants of their further detention were ever sought and obtained.

[38] I now deal with the submission with regard to the issue, whether the Botha Bothe Magistrates' Court had extra territorial jurisdiction to have tried the appellants, regard being had to the circumstances of this case.

[39] The brief submissions on behalf of the appellants on this issue is that the security agents of this country forcibly took the appellants to the crown (he must have meant to the court) after torturing them and disregarding the extradition procedures available between the government of the Republic of South Africa. It is accordingly submitted that it was wrongful for the crown to prosecute the appellants for commissions of crimes committed outside the country's borders.

[40] In its written submissions filed on behalf of the crown, counsel for the crown point out, and correctly so, that the principle of extra territorial jurisdiction entails that "*a country through its courts cannot try and prosecute offences*

or crimes which were committed outside its national boundaries”

[41] It is however, argued on behalf of the crown that this rigid principle of the law was later given a different approach by the courts of law taking into account that in recent days elements of crime can occur in different countries.

[42] Of course both counsel have relied on the cases of **S. v. Mharapara 1986 (1) S.A. 556**, a Zimbabwean Supreme Court of Appeal judgment as well as that of a Lesotho Court of Appeal judgment in C. of A. (CIV) No. 5 of 2002 – Masupha Sole case.

[43] In the latter case, the appellant had been charged with having committed sixteen counts of bribery and two of fraud. All of the said crimes had been committed out of the boundaries of Lesotho by a Lesotho National who was the chief executive of the Lesotho Highlands Development Authority (LHDA).

[44] The issue was whether the Lesotho courts had jurisdiction to deal with the cases wherein there was no evidence that bribery and fraud deals were executed in Lesotho.

[44] Ultimately, and I think that this is now settled law, the Lesotho Appeal Court concluded; after reference to many cases from other jurisdiction; that the trial Judge was correct to conclude that jurisdiction existed to try the appellant (sole) in Lesotho on bribery courts.

[45] Among the many cases cited in the Sole matter (supra) one is that of Mharapara (supra) and that of Attorney-General v. Yeung Sun-Shun and Another (1987. (1987 LRC (Crim) 94; (1989) LRC (Crim). 1 CHK CA in which the Hong Kong had to deal with a conspiracy concluded out of its boundaries. This Court concluded that ((quote)

“In our view, the Hong Kong Courts have, and should assume jurisdiction to try those who are charged with a conspiracy formed out of the jurisdiction if any act has been committed within the jurisdiction in furtherance of the agreement”

[46] Now, in the instant matter, there is evidence that the theft of stock in question occurred in the Republic of South Africa

and that such stock was brought within the Lesotho boundaries and as such a Court in Lesotho (Botha Bothe) where the effects of that crime are felt and have an impact; has jurisdiction to the appellants. The crown further submitted that in fact, since the crime of theft allegedly committed in this case is a continuing crime, then the Lesotho Courts have jurisdiction.

[47] In this regard, counsel for the respondents, has submitted that where the theft occurs outside the jurisdiction of a country but the stolen property is taken to a different area, one can be tried and found guilty of the theft by a court in that area even though the original contractatio took place outside the court's jurisdiction.

[48] Reliance for the above is based on the cases **of S. v. Dayisana 1981 (1) S.A. 919 E** and that of **S. v. Kruger 1981 (1) S.A. 785**. Whilst the facts in the above cases are more or less similar and whilst it is trite that theft is a continuous crime, the issue of extra territorial jurisdiction has not been canvassed or dealt with in the above cases cited by the crown.

[49] It has been submitted on behalf of the appellants that the security agents of this country forcefully took the appellants before the court in Botha Bothe for an offence which had occurred outside the boundaries of Lesotho, and so that Court had no jurisdiction to have tried, convicted and sentenced the appellants.

[50] The reason in support of the above submission being that the Lesotho security agents did so in total disregard of the extradition procedures operative or available between the two countries. Unfortunately, such procedures have not been spelt out by counsel for the appellants; as such this Court cannot refer to same.

[51] Be that as it may, it is now settled law that those that maintain and promote human rights, good relations between states and the sound administration of justice are bound by common and international law to have an individual protected against unlawful detention and that the limits of territorial jurisdiction and the sovereignty of states has to be respected; the fairness of the legal process guaranteed and the abuse thereof prevented so as to protect an individual.

[52] In effect, what the above entails among others, is the fact that states agents must always seek and strife towards respecting the limits of territorial jurisdiction and to protect and promote the dignity and integrity of the judicial system.

[53] While the facts in the case of S. v. Ebrahim may not be on all fours with the case now on this appeal; I subscribe to the motion of the respect of territorial jurisdiction etc. and the protection and promotion of the dignity and integrity of the judicial system.

[54] As already stated above, the brutal torture of the appellants in the hands of the state agents has not been denied and as such it remains admitted.

[55] Whilst also the appellants had not been abducted into Lesotho by the state agents, the court a quo was bound to have carried an enquiry into firstly; the alleged torture which has been included and recorded in the proceedings of the court a quo at pages 52, 53 and 54.

[56] Obviously the torture, hospitalization and death of Mahlomola and all the attended unlawfulness surrounding the arrest and detention of the appellants beyond 48 hours were brought to the attention of the court a quo by the crown itself in its summary of the facts leading up to their arrest and their subsequent appearance in Court.

Nowhere has the court a quo made any enquiry about these unlawful facts as well as about the fact that in mitigation, A1 has clearly indicated that he only received the sheep from A2 not knowing that it had been stolen.

[57] At least, if an inquiry had been made as suggested, the court a quo would have at least found A1 guilty of having committed a lesser offence to that of the actual theft of the stock in question.

[58] The issue that an enquiry should have been made by the presiding officer in this case becomes very important, relevant and critical because the appellants did not have legal representation. There is therefore a high likelihood that they had indeed been coerced to tender pleas of guilty upon which they have ultimately been convicted and sentenced.

[59] Also, I note with concern that there is no sentence recorded as per the attached record. True, enough, sentence imposed is clearly reflected on the or ex facie the standard charge sheet; but normally at least in this jurisdiction, that should also have been recorded in the actual court proceedings. Anyway, this may not have prejudiced the accused in anyway.

[60] I deal now with the charge sheet and its contents; refer to page 19 of the paginated record. Here it is written that the accused are charged with the offence of contravening section 13(3) (a) v/w section 14 of the Stock Theft Act No. 4 of 2000 as amended by Act No. 5 of 2003. I need not repeat the particulars as same have already been captured above.

[61] Now, a proper reading of the alleged contravened section of the Stock Theft Act does not at all disclose any offence at it. This section provides and reads as follows: (I quote) 13 (3) (a)

“A person who:- incites hires or assists another person to contravene the provisions of this Act: commits an offence”.

[62] In other words, and as per the charge sheet; annexure “A” – at page 20 of the paginated record, the accused have been charged with completely different charges which have no bearing to the actual particulars outlined as spelt out on the charge sheet nor to the summary of facts as outlined by the crown.

[63] The said contravened section according to annexure “A” creates some offences in respect of completely different offences from the Stock Theft Act. For completeness and for removal of doubt, section 13 (3) (a) reads as follows:-

13 (1) “*A person who (a) incites, hires, directs or assists another person to contravene the provisions of this Act; Commits an offence*”.

[64] Section 14 of the Stock Theft Act provides penalties where one has been found guilty for having contravened the Stock Theft Act No. 4 of 2000. It is a penalty section.

[65] Put differently, it is clear that the appellants have been charged, convicted and sentenced in respect of having contravened a completely different section from that of

Stock Theft Act No. 4 of 2000. They have therefore pleaded guilty to having contravened section 13 (3) (a) which has nothing to do with theft of stock.

[66] Furthermore, they have also been sentenced incorrectly because the sentence of a fine of fifteen thousand Maloti (M15,000.00 or ten (10) years imprisonment in default of payment is not provided anywhere in penalty sections in both the 2000 and the amended 2003 Stock Theft Acts.

[67] The appellants have, clearly been made to plead to another offence other than to stock theft as spelt out in the particulars of the charge sheet in annexure "A". There has obviously been a miscarriage to justice much to the prejudice of the appellants herein in this appeal.

[68] Having made the above observation and this Court having mero moto raised the issue of extra territorial jurisdiction as noted above, it is no longer relevant for the Court to deal with some other issues which have no bearing to the jurisdiction and the contents of annexure "A".

[69] For the foregoing reasons and regard being had to the surrounding circumstances of this, there is no doubt in the

mind of this Court that the appellants have gravely suffered injustice not only from the way that the first respondent has handled their case but also from the brutal inhuman torture upon them by the security agents of this country; namely, the LDF and police officers of this country who had arrested the accused.

[70] The point of law in relation to jurisdiction is upheld only to the extent of the brutal torture, over detention in police cells and of course in relation to the fact that currently phrased and put to the accused does not create an offence of stock theft contrary to what the summary of the crown case indicates.

[71] The above constitutes an abuse of court processes prejudicial to the appellants and much to the detriment of the proper administration or justice. There is however no doubt in my mind that the principle of territorial jurisdiction would apply on the basis of the case of **Ephraim Masupha Sole v. The Crown** (supra) but for the fundamental irregularities committed by the crown in the phrasing of the charge sheet and in the way in which the first respondent has handled and dealt with the matter,

particularly taking into account that the appellants had not been legally represented.

[72] As indicated above, the appellants were made to plead to a different case than that outlined in the facts by the crown.

[73] In the circumstances the order of this Court is

1. The appeal is allowed and the conviction of the appellants and the sentence are set aside.
2. The appellants shall be released from prison with immediate effect.

MASEFORO MAHASE
ACTING CHIEF JUSTICE



I agree:

M.H. CHINHENGO A.J.A
ACTING JUSTICE OF APPEAL

I agree:

N. MTSIYA A.J.A
ACTING JUSTICE OF APPEAL

For Appellants: Adv. C.J. Lephuthing

For Respondents: Adv. I. Lekena Ntsatsi