

IN THE COURT OF APPEAL OF BOTSWANA

Court of Appeal No. CA 17 of 1984

in the matter of:

TUTULELE KWEFANE

Appellant

vs.

THE STATE

Appellant in person
S. A. Afful for the State

CORAM: I. A. MAISELS JP.
L. S. BARON JA.
N. MURRAY JA.

J U D G M E N T

MURRAY, JA.

This is an application for leave to appeal by Tutulele Kwefane. It comes before this court in the following way. On 7th September, 1982 the applicant appeared before a Chief Magistrate sitting at Mochudi charged on an indictment containing two counts jointly with Teetsi Molefe. Both were charged in each count with stealing stock contrary to Section 279 as read with Section 276 of the Penal Code. In the first count theft of a tshumo ox was alleged and in the second theft of a khunou ox was alleged. Both accused pleaded not guilty and on 7th December, 1982 this applicant was convicted on both counts. Teetsi Molefe was convicted only on the first count. Both accused received sentences totalling 4 years effective imprisonment. This applicant's sentence was, however, made consecutive to another stock theft sentence which he claimed would expire at the end of 1984. The matter came before the

Chief Justice by way of review on 8th June, 1983 who confirmed the decision of the learned magistrate. Thereafter the applicant and his co-accused appealed to the High Court. Unfortunately the Notice of Appeal is not before this court but it is safe to assume that the appeal to the High Court was initiated subsequent to the review as that appeal was disposed of as long ago as 30th November, 1983. When she dealt with the appeal Hannah J. decided that the evidence against Tsetai Molefe was not strong enough to establish any more than suspicion that he was involved. The learned judge therefore allowed the appeal of Tsetai Molefe against his conviction.

It is convenient to notice at this stage that in this judgment Hannah J. dealt fully with the case against the applicant. His conclusion was:-

"In his judgment, the learned Chief Magistrate accepted the evidence given by PW6 that it was the second appellant (so the applicant in this court) who had claimed the tsumo ox as his own. As it quite clearly was not the second appellant's ox, and as the second appellant must have realised this from the brand mark, he found the second appellant guilty of theft of this ox. In my opinion, no grounds exist for disturbing this decision....."

"The learned Chief Magistrate also found a case of theft had been proved against the second appellant on count two which alleged the theft of the red ox. He was satisfied that the second appellant and the first appellant had brought this ox to Mochudi knowing it was not theirs and he was also satisfied that the second appellant had sold it for slaughter knowing he had no right to do so. Again, I can find no reason to disturb the magistrate's decision so far as it concerns the second appellant."

It is quite clear that the learned judge carefully considered the evidence and the decision of the learned magistrate. This applicant was however dissatisfied with the decision of Hannah J. and he sought leave to appeal to this Court on 19th December, 1983. He

set out the following grounds

"I am applying for leave to Court of Appeal on the following grounds:-

1. The car I was convicted for and sentenced was stolen by Tsotai Molefe who was released by the High Court on 30th November, 1983.
2. When Mr. Tsotai Molefe came to my home and asked me to help him find a buyer for the car, I did not know it did not belong to him.
3. When the High Court dismissed my appeal on the 30.11.83 I was told that although my grounds were correctly stated, they (were) weakened by the fact that I did not change docks (quere give evidence?) during the first Court proceedings but I did not know the Court procedure."

It will be observed the first two grounds are repetitions of pure questions of fact; these were obviously in the mind of both the learned magistrate and of Hannah J. and they had been specifically raised in the applicant's unsworn statement. Nothing can possibly arise on these grounds in this court. Nothing arises out of the oral submissions the applicant has made before this court today. So far as the third ground is concerned in the notice of appeal it appears that the applicant now protests that he was not allowed to give evidence as he did not understand the procedure of the court of trial. This is nonsense. Ignoring this appellant's previous familiarity with courts as shown in his history of convictions, it is clear to this court that he must have appreciated the procedure at his trial. The magistrate on ruling that both accused had a case to answer duly explained to the accused their rights and their alternative courses of action. To this he recorded that the first accused said "I understand my rights: I will give evidence on oath. No witness to call."

The applicant replied "I will make a statement from the dock. No witness to call." Thereafter the first accused gave evidence and doubtless had the applicant wished to give evidence he could have asked to do so. Instead he elected to make an unsworn statement. This Court considers that no complaint can now be made as the applicant had his chance to give evidence and freely chose not to do so.

When the application for leave to appeal was received by the Registrar to this Court the matter was referred to Isaacs Ag. J.A. and by Order dated 6th June, 1984 he referred this case to the Full Court for decision without making any comments thereon. This Court does not therefore know why the question of leave was referred to it.

There appears to be no material upon which leave should be granted and I would dismiss the application.

Nigel Murray

 N. MURRAY JA.

I agree

 I. A. MAISELS JP.

I agree

 L. A. BROWN JA.