

IN THE COURT OF APPEAL OF BOTSWANACRIMINAL APPEAL NO. 14 OF 1994

In the matter of:

BIKIRI PHUTHE Appellant

and

THE STATE Respondent

APPELLANT IN PERSON  
MISS ATTORNEY P. KUPE FOR THE RESPONDENT

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J U D G M E N T

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CORAM: T. A. AGUDA, J.A.  
P.H. TEBBUTT, J.A.  
J. H. STEYN, J.A.


TEBBUTT J.A.:

The Appellant in this matter was charged before a Magistrate with stock theft. It was alleged that he had stolen nine (9) <sup>or</sup> herd of cattle. He was charged together with another man to whom I shall refer as Accused No. 1. The version given by the Appellant at his trial was that he had merely driven the cattle from an auction sale to the kraal of Accused No. 1 and that he was not involved in the theft of the cattle. The evidence against Accused No. 1 that he stole the cattle was overwhelming but the evidence against the Appellant was merely that he had driven the cattle to the kraal. There is some evidence that he assisted in the marking of the cattle on the day following the day that he drove the cattle but this evidence is inconclusive in itself and also conflicts with a denial by the Appellant that he took part in the marking. The Magistrate disbelieved the

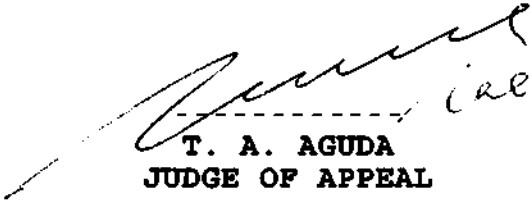
Appellant because the Magistrate found that Accused No. 1 who was clearly a lying witness had, according to the Appellant, told him that he had bought the cattle which was not true. The Magistrate rejected this evidence by the Appellant because he disbelieved Accused No. 1. This was a clear misdirection on the part of the Magistrate. There is no other evidence which supports the conviction of the Appellant and, indeed, Miss Kupe who appears for the Attorney General today has conceded that there is not sufficient evidence to sustain the conviction. In the light of the concession by the representative of the Attorney General this morning and because I agree that there is insufficient evidence upon which the Magistrate could have convicted the Appellant, his appeal must succeed.

In the result therefore, the appeal succeeds and his conviction and sentence are set aside.

DELIVERED IN OPEN COURT THIS 5TH DAY OF JULY, 1994

  
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**P. H. TEBBUTT**  
**JUDGE OF APPEAL**

I AGREE.

  
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**T. A. AGUDA**  
**JUDGE OF APPEAL**

I AGREE.

  
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**J. H. STEYN**  
**JUDGE OF APPEAL**