IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case No.: A152/2016

In the matter between:

NXAKGANE JAMES MNGUNI Appellant

and

THE STATE Respondent

CORAM: DAFFUE, J *et* TSATSI, AJ

JUDGMENT BY: DAFFUE, J

HEARD ON: 24 OCTOBER 2016

DELIVERED ON: 3 NOVEMBER 2016

I INTRODUCTION

[1] The appellant together with the co-accused were arraigned in the regional court on two counts of stock theft in accordance with the provisions of Act 57 of 1959.

Appellant's three co-accused successfully applied for this charge in accordance with the provisions of section 174 of the Criminal Procedure Act 51 of 1977 ("the CPA"). On 16 March 2015 appellant was acquitted on count 1 but convicted on count 2 and sentenced to 5 years imprisonment in terms of section 276(1)(i) of the CPA.

[2] Appellant unsuccessfully applied to the court *a* quo for leave to appeal against conviction and sentence, but on 12 May 2016 Mocumie J (as she ten was) and Nicholson AJ granted leave to appeal. It must be stated at this stage that notwithstanding the uncertain wording of the notice of motion the legal representatives of appellant and the state were *ad idem* that appellant applied for leave to appeal as the founding affidavit does not contain any submissions pertaining to the sentence imposed upon appellant.

II GROUNDS OF APPEAL

[3] The following is a summary appellant's grounds of appeal.

1. When complainant testify that 7 cattle were missing, but when she was taken to accused 3's farm she identified 9 cattle as those belonging to her and were in her possession and under her control.
2. The V-marks on the ears of the cattle were exactly the same as those of a certain Mr Maduna.
3. Complainant was uncertain about the identity of the cattle and she and warrant officer Opperman contradicted each other pertaining to the pointing out of

the cattle and the presence of other owners.

4. Complainant did not observe any holes on the ears of her cattle where the ear tags had been removed.
5. Messrs Johannes Mofokeng and Joseph Dlamini contradicted each other pertaining to the branding of the cattle on instructions of appellant.
6. There was a conspiracy between warrant officer Opperman and Messrs Mofokeng and Dlamini in order to falsely testify against appellant.
7. The photos contained in the buddle handed in as exhibit “A” were incorrect photos and this influenced the court *a quo* in arriving at his decision and he therefore misdirected himself by relying on incorrect evidential material.

III EVALUATION OF THE JUDGMENT OF THE COURT *A QUO* TOGETHER WITH SUBMISSIONS OF LEGAL REPRESENTATIVES

[4] Mr Van der Merwe of Legal Aid South African who prepared the heads of argument on behalf of appellant summarised the evidence in detail and although he pointed out certain aspects that concerned him, he eventually conceded by necessary implication that he could not submit that the court *a quo* erred in considering the totality of the evidence. If his heads of argument are considered there is no doubt that he effectively conceded that the appeal could not succeed.

[5] The court *a quo* was satisfied that complainant and warrant officer Opperman were credible and reliable witnesses. Complainant testified that one black cow and six Angus cross-bread heifers (females) were missing. The black cow was marked with the letters of her late husband JVR whilst the heifers were too young to be marked although they had the same earmarks than the cow, to wit 2 triangular marks in the left ear and 1 triangular mark in the right ear. Upon inspection she found another black cow and her calf amongst her other cattle on the farm of accused 3. This cow was also marked as the others in her ears. Upon been questioned during cross-examination it was indicated to her that the cattle on accused three's farm were fries cattle, but she was steadfast in her approach that she knew her cattle and properly identified them. Warrant officer Opperman also testified that after the cattle had been pointed out, he was involved in driving them back to complainant's farm. These cattle passed several open gates on the way to complainant's farm without trying to enter but immediately entered the open gate leading to complainant's farm. It is significant that warrant officer Opperman testified upon arrival on the farm of accused three that the cattle did not belong to him but to a certain James who turned out to be the appellant. It was put to him on behalf of the accused three that that was not his precise words, but that James would be able to give more information about the cattle. Furthermore, significant from warrant officer Opperman's evidence is the fact that he searched for evidential material and eventually found metal pins in the ash of the coal stove

in accused three's house, these pins being used to fasten ear tags to cattle's ears. Warrant officer Opperman testified further that it was clear on these inspections that complainant's cattle as well as that of a Mr Tesner, the complainant in count 1 referred to *supra* were lightly branded with a different brand mark. This version going insides with the version Messrs Mofokeng and Dlamini referred to *infra*.

[6] It appears from the evidence as if there is a contradiction between the version of complainant and warrant officer Opperman pertaining to the timing of the identification of the cattle by complainant. According to complainant she pointed out her cattle amongst other cattle and she was unaware of other cattle owners that pointed out their cattle as well. According to warrant officer Opperman three cattle owners of Reitz were called upon by him to identify their cattle where after the remainder of the cattle to wit 10 in total was left. Complainant identified 9 of these as her property but could not possibly identify the one small calf as hers which they left on the property of accused 3. However if the evidence of warrant officer Opperman is read in proper context it is apparent that complainant's cattle were not remove from the camp after she had identified them as her property and the same applied to the cattle of the three Reitz cattle owners. Complainant's cattle were only removed and driven her farm after the cattle owners identified their cattle.

[7] In my view the court *a quo* was correct in concluding that complainant's cattle were found on accused three's farm and that the cattle were properly identified by her. There is also no reason to doubt complainant's version that the cattle had ear tags and that these were removed prior to her identifying her cattle. This is in line with the evidence of Messrs Mofokeng and Dlamini.

[8] Messrs Mofokeng and Dlamini know appellant well and they even attended the church service on the farm of accused three at a particular Sunday soon after complainant become aware that cattle were missing from her farm. They corroborated each other in all material respects although they also contradicted each other on smaller issues such as how many people attended the church service. They were asked to help with appellant with the branding of the cattle and they testified as to what their jobs were, how the iron rod was heated up on the stove within accused three's house and thereafter used to brand mark several head of cattle. There is no reason to doubt the version of these two witnesses and the court *a quo* correctly accepted that.

[9] Appellant testified in his defence. It needs to be pointed out at this stage that he never at any stage, either during the plea explanation or during the cross-examination of any of the state witnesses put it to them that they, that is complainant (her deceased husband was apparently involved in a certain killing), warrant officer Opperman and

Messrs Moffokeng and Dlamini conspired to falsely accused appellant of the theft of complainant's cattle. However when he testified, the court heard for the first time that appellant was the victim of a conspiracy. In my view this is clearly an afterthought and the court *a quo* was correct to reject his version as false.

[10] Appellant came with a different version in respect of the cattle. According to him the owner of the cattle was a Mr Madoena who by a written agreement transported his cattle to appellant, he being a co-owner of the farm where the cattle were found by complainant and warrant officer Opperman. At a later stage he indicated that the cattle were in truth his grandfather's cattle and that he inherited them. None of the cattle belonging to him were brand marked. Although Mr Madoena's cattle were brand marked with the letters PPR .

[11] The stage version which were conveyed to the court for the first time during appellant's testimony is the fact that after he had heard rumours about _____ cattle found on his farm, he went to the investigating officer, Mr Ntenyana where after the investigating officer accompanied him to QwaQwa to obtain the iron rod with which Mr Madoena's cattle were marked EPR, that Mr Ntenyana observed the cattle and noticed the brand marks where after he showed the iron rod to warrant officer Opperman who denied that it was the same iron rod use to mark the cattle on accused three's farm. Later Mr Ntenyana informed appellant that

complainant had identified cattle on accused three's farm but he has never sent his cattle. This version was never put to any of the state witnesses and warrant officer Opperman in particular, especially in so far as appellant wanted the court *a quo* to believe that Mr Ntenyana accepted his version that he was not involved in the theft of either the complainant or Mr Tesner's cattle.

[12] I am satisfied that the court *a quo* did not make any misdirection of fact and that it, being in a more favourable position and the court of appeal a form a judgment, came to a correct conclusion pertaining to the inference _____ from the proven facts and that is that appellant was guilty of stock theft and that he was correctly convicted as charged in respect of count 1. I refer to **Rex v Dhlumayo**1948 (2) SA 677 (AD) at 705 to 706 and **S v Monyane and Others** 2008 (1) SACR 543 (SCA) para [15] for the test to be applied by a court of appeal.

[13] I am also satisfied that the court *a quo* considered the evidence holistically, considered the inherent probabilities and improbabilities – see **S v Chabalala** 2003 (1) SACR 134 SCA at para [15] and that it correctly rejected appellant's version as so improbable that it could not be reasonably possibly true. It is also significant to point out that it was put to complainant on behalf of the appellant that he would testify that the cattle identified by her belonged to him and contained his brand mark. However, as indicated, this is indirect contrast with appellant's eventual version in

that the cattle actually to Mr Madoena who was the registered owner of the BPR brand mark. It appears from the record as if Mr Madoena to which appellant's legal representative referred to, was in fact accused four. See **S v Chakel** 2001 (2) SACR 185 SCA at para [30]. A perusal of the record indicates quite clearly that the photo album shown to complainant during her testimony was not handed in as exhibit at that stage and at the evidence pertaining to cattle depicted in the photographs also do no correspond with the photographs forming part of exhibit "A" eventually accepted by the court *a quo*. Although there is no indication when the court *a quo* accepted exhibit "A" as such, the probabilities are overwhelming that the photographs depicted in exhibit "A" referred to the cattle of Mr Tesner pertaining to count 1. As the court *a quo* correctly pointed out, he did not rely on these photographs in order to come to the conclusion that the appellant was guilty of stock theft. There is therefore no merit in the appeal and it should be dismissed.

IV SENTENCE

[14] As indicated there is some doubt as to whether appellant intended to apply to the High Court to appeal against his sentence as well. No submissions were made by any of the legal representatives in the heads of argument pertaining to sentence and as mentioned, appellant did not make any averments and/or submission in his founding affidavit in this regard. When I indicated to advocate Bester on behalf of

the state that this court might consider the sentence based on our inherent jurisdiction, she submitted that the sentence was not excessive and that we should not interfere, therewith even on review. At this stage when the matter was argued before us, I was under the impression that the sentence was imposed in terms of 276(1)(b) but in preparation of this judgment, I notice for the first time that sentence was actually imposed in terms of section 276(1)(i), the effect being that the appellant may be placed under correctional supervision in the discretion of the Commissioner or parole board on condition that he has served at least 1/6 of the effective sentence before being considered of placement under correctional supervision. See section 73(7) of the Correctional Services Act 111 of 1998. This being the case, appellant can count himself extremely lucky in so far as a very lenient sentence has been imposed upon him. There is therefore no reason to interfere with the sentence _____, notwithstanding the fact that the court *a quo* misdirected itself by taking into account four offences of stock theft and violet crime dating back as far as 1990 and therefore not _____ appellant as a first offender.

V **ORDERS**

[15] Consequently the following orders are made.

1. The appeal is dismissed.
2. The conviction of stock theft and sentence imposed by

the court *a quo* are confirmed.

_____
J. P. DAFFUE, J

I concur.

_____
E. K. TSATSI, AJ

On behalf of the appellant:	Adv. Tshabala Instructed by: Legal Aid BLOEMFONTEIN
On behalf of the respondent:	Adv. A. Bester Instructed by: Director: Public Prosecutions BLOEMFONTEIN

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