



NORTH WEST HIGH COURT, MAFIKENG

CASE NO.: CA 36/2010

In the matter between:-

**GAOSITWE MOILOA
GODWIN TSITSI
PAUL MOTHIBEDI**

1st Appellant
2nd Appellant
3rd Appellant

and

THE STATE

Respondent

CRIMINAL APPEAL

LANDMAN J; GURA J

DATE OF HEARING: 05 AUGUST 2011
DATE OF JUDGMENT: 09 SEPTEMBER 2011

COUNSEL FOR APPELLANTS: ADV R. S. KUAPANE
COUNSEL FOR RESPONDENT: ADV M. F. RASAKANYA

JUDGMENT

GURA J

Introduction

[1] The three appellants were accused 2 to 4 during the trial in the Regional Court. They were convicted on two counts of stock theft and each was

sentenced to eight years imprisonment of which three years were suspended on appropriate conditions. Accused 1, who is accused 2's father, was found not guilty on both counts. For purposes of convenience, the three appellants will be referred to as accused 2 to 4. With leave of the trial court, they now appeal against both conviction and the sentence.

Factual Background

- [2] The following facts are either common cause between the parties, are admitted or are not denied. The family of Pieterse at Boons speculate in livestock. Whenever they buy cattle from the area of Rietspruit from anyone, they use accused 1's kraal to load them onto their truck because there seems to be no other loading place in that vicinity.
- [3] On 7 January 2007, accused 1 left a message on Mr Pieterse's cellphone requesting him to call him back. Before Pieterse could call him, however, accused 2 called and spoke to Mrs Meisie Pieterse (Meisie).
- [4] Accused 2 told Meisie that his father had been calling them without success on their cell phone. He further said that his father had fourteen (14) cattle which he wanted to sell. He invited Pieterse to come and purchase those cattle. The cattle were alleged to be at accused 1's kraal. Meisie told accused 2 that their truck had a mechanical problem and that after repairing it on Monday, they would come to collect the cattle.
- [5] On the said Monday, the truck was repaired late in the day at 17H00. Meisie's son, who is called Deon, was assigned the duty to go and

collect the cattle from accused 1's kraal. He was with Johannes Makgato. They travelled that late afternoon to go there. Meanwhile accused 2 called to ask where the truck was. He was told that Deon was on his way to them.

- [6] When Deon arrived at accused 1's kraal at Kopman, it was already night. He found accused 2, 3, 4 and one Modise Sello there. The latter was introduced to Deon as the owner of the cattle which were offered for sale.
- [7] Accused 4 is the herdsman of accused 1's cattle and he stays in a house near that kraal. Accused 2 confirmed to Deon that the cattle belonged to Modise Sello. They then went to the house so that Deon could write out a permit for the stock. Accused 2 gave Deon a tissue paper on which he had written the brand marks of the cattle. Accused 2 then requested Deon to transcribe the information from the tissue paper onto the permit. Thirteen (13) head of cattle was involved.
- [8] After the permit was written out, the cattle were loaded on the truck by all the men (accused 2, 3, 4, Modise Sello, Johannes Makgato and Deon). Accused 1 was not present. Accused 2 then told Deon that he should drive the truck with its lights off. Deon complied.
- [9] Accused 2 drove a BMW vehicle, with lights on from that place, at a distance of 150 to 200 m in front of the truck which travelled in darkness.
- [10] When Deon reached Kopman, the BMW was nowhere to be seen. Suddenly, a landrover vehicle emerged and the truck was pulled off the road by security officers of the Royal Bafokeng Nation. They were arrested there. Whilst still there they saw accused 2's BMW driving on

the tarred road which leads to Rooikraal. Deon even pointed to the police that “there are the people who sold the cattle to us”. The police were not interested in a man who was not conveying cattle. Deon and Makgato were taken to Rietspruit police station.

[11] Around 20H00 Deon informed Meisie telephonically that they were behind bars. Meisie called accused 1 but there was no answer. She then called accused 2 and when he answered, she asked him where was Deon and accused 1. She did not tell him that Deon was under arrest. Accused 2 said his father sent him to go and load cattle at his cattle post. She finally asked him to go and check whether the truck had not give Deon some problems on the road. Later Meisie called accused 1 and accused 2 repeatedly but none of them answered their cellphones.

[12] Ten of the thirteen cattle which Deon was transporting were stolen. Modise Sello was not arrested.

[13] Accused 1, 2, 3 and 4 then came to the police station. The four of them denied knowing Deon and they further denied that they had loaded any cattle on his truck that night.

[14] None of the four accused gave evidence.

The Issues

[15] The issues are whether

15.1 accused 2 is guilty of theft or any offence;

15.2 accused 3 and 4 are guilty as accomplices.

Trial Court's findings

[16] The trial court accepted that Modise Sello was the main perpetrator who was selling the cattle and that the only role of accused 3 and 4 was to drive them onto the truck. They were therefore liable as accomplices. In relation to accused 2, it found that he was a co-perpetrator and therefore he had made himself just as guilty as Modise Sello.

Evaluation of evidence

[17] There is no evidence to the effect that accused 3 and 4 knew that the cattle were stolen. Accused 4 was the herdsman of accused 1's cattle. It is normal, under the circumstances, for accused 4 to have carried out the instructions of his master's son. There is nothing on record to suggest that he had any knowledge of wrongfulness. The only case against accused 3 and 4 is that when they arrived at the police station, together with accused 1 and 2, they all told lies. They said that they did not know Deon and that they had not loaded any cattle on his truck. These lies, of accused 3 and 4, do not in any way strengthen the State case against them. Their failure to testify cannot justify any adverse inference against them. What is clear throughout is that there is a reasonable possibility that accused 3 and 4 may be innocent.

[18] Accused 2 was an active participator in the sale of the stolen cattle. His activities involve the following: he called the Pieterse family and told them that his father had been trying, in vain, to contact them and that his father had 14 cattle for sale which had to be collected. The subsequent day, late after 17H00 he called again to verify if the Pieterse were coming. At the cattle post, he had already written down the brand marks of the cattle which he gave to Deon. He confirmed that he knew that the

cattle belonged to Modise Sello. He was incorrect because these were stolen cattle. He instructed Deon to convey the cattle that night with the truck lights switched off. He drove the BMW car 150 – 200m in front of the truck. Around Kopman, he disappeared and it is there where Deon came across his arrestors.

- [19] After the police had arrived at the scene, accused 2's BMW passed by at a distance. He would have noticed that there was a problem there yet he disappeared under the cover of darkness. When Meisie called him later, accused 2 admitted that Deon had been to their kraal and that they loaded cattle on his truck. Later that night at the police station, he claimed that he did not know Deon and that they never loaded cattle on his truck. Meisie had asked him to verify whether Deon had had a problem with the truck on the way back home. When she made a follow-up call, accused 2 did not answer Meisie's several calls.
- [20] In my view, the behaviour of accused 2 on that day was not commensurate with innocence. All of a sudden, Modise Sello has disappeared. In the face of all this evidence, accused 2 elected not to testify. He did that at his peril. See **Osman and Another v Attorney General, Transvaal** 1998 (2) SACR 493 (CC) at 501 par.22 where the following was stated:

"Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a *prima facie* case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove beyond reasonable doubt. An accused, however, always runs the risk that absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence."

It is clear, as the trial court found, that accused 2, just like Modise Sello, is an ordinary cattle thief.

Sentence

[21] In meting out punishment the trial court took into account the age of accused 2 who was 18 years old and a student. It took into account further that he may have been influenced by his father in the commission of this offence. Because of the prevalence and seriousness of stock theft however, it deemed it appropriate to impose a custodial sentence of five years effectively.

[22] Although accused 2 is of tender age, he displayed a high degree of mental maturity in the perpetration of this crime by instructing Deon to drive the truck with its lights off and by taking the extra precaution of escorting the truck from the cattle post. In doing so, he wanted to make sure that the truck would not be detected. In cases involving theft of stock it is at times not easy to detect the wrongdoers. Even so against all this background, accused 2's youthfulness comes to the fore as a strong mitigatory factor. He is a first offender. All the stolen cattle were recovered. He did not gain from his unlawful act. This court is of the opinion that the sentence which was imposing is disturbingly inappropriate in that it is too harsh.

[23] Consequently, the following order is made:

23.1 Accused 3 and 4's appeal against their conviction and sentence is upheld;

23.2 The conviction and sentence in respect of accused 3 and 4 are set aside;

23.3 In respect of accused 2, the appeal against his conviction on both counts is dismissed;

23.4 Accused 2's appeal against sentence is upheld. The sentence is set aside and substituted with the following:

“Four (4) years imprisonment in terms of Section 276(1)(i) of the Criminal Procedure Act, No. 51 of 1977.

Both counts are treated as one for the purpose of sentence.”

SAMKELO GURA
JUDGE OF THE HIGH COURT

I concur

A. A. LANDMAN
JUDGE OF THE HIGH COURT