

S. v. MADITO AND ANOTHER.

(NORTHERN CAPE DIVISION.)

1970. February 5. VAN RHYN and VAN DEN HEEVER, JJ.

Criminal law.—Stocktheft.—Conviction of theft of a cow which had strayed within the district as a calf.—Owner or lawful possessor to the prosecutor unknown.—Possibility that it was res derelicta.—Conviction set aside on review.

On the review of a conviction of theft of a cow, the property or in the lawful custody of a person to the public prosecutor unknown, it appeared that the cow, which was about two years old, had been away from its owner for a period which could have been as long as 20 months, and that when it strayed as a calf it could have been of such little value that the owner might have just mentally written it off, so that it was actually *res derelicta*. Held, that the conviction and sentence should be set aside.

Review.

VAN DEN HEEVER, J.: Accused were charged in the magistrate's court of stock theft. They allegedly

"stole one cow the property or in the lawful possession of a person to the prosecutor unknown".

during August, 1969 at Mabelo, district of Mafeking.

Accused, who had no legal representation both pleaded not guilty. No. 1 added:

"We asked Shorty for the cow."
and No. 2:

"He gave the cow."

Shorty Simane testified that a strange heifer calf had arrived on his employer's farm "Frenchdale" during 1968. The owner of the calf never turned up with the result that the calf remained on the farm.

During August, 1969 accused No. 1 came to Frenchdale to buy a beast.

"He did not buy a beast. I showed him the strange calf there on the farm . . . He asked whether the beast belongs to the farm and my employee and I answered in the negative. Then he said: 'If that is the case I will take it.' He then took it."

Shorty later received some of the meat.

[After the Honourable Judge had dealt with the evidence and the reasons for judgment, the Judge proceeded as follows].

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Accused No. 1 was convicted as charged and No. 2 of contravening sec. 11 (b) of Act 57 of 1959. No. 1 has no previous convictions but No. 2 has one of theft, of R4 worth of mealies, in respect of which a sentence of R15 or 30 days was imposed on him in 1967.

In respect of the present conviction both accused were sentenced to nine months' imprisonment. A compensatory fine of R39 or in default of payment a further 15 days' imprisonment was also imposed.

The magistrate concedes that the compensatory fine cannot be upheld. As regards the conviction he says:

"The court was satisfied that the accused slaughtered this animal with a guilty conscience and that accd. No. 1 stole it and accd. No. 2, when he received it well knew it to have been stolen.

The Court was satisfied beyond a reasonable doubt that the animal was not a *res derelicta* but that it was an animal belonging to the farm where Shorty worked or that vicinity."

From his reasons it is clear that accused No. 1's version of events is accepted for so far as Shorty's contribution is concerned.

In my opinion the magistrate erred in his above-quoted findings.

The converse of the maxim, *actus non facit reus nisi mens sit rea* applies as much as the maxim itself. I may mask myself and creep about in the dark, wholly convinced that I am contravening the seventh commandment; but if the book or buck or whatever it is that I take is my own or *res nullius*, my evil intent or moral blameworthiness has no criminal result.

The guilty conscience of the accused was also not evidence *per se* that the animal concerned has an owner. The finding that it had been proved beyond a reasonable doubt that the animal "belonged to the farm where Shorty worked or that vicinity" is contrary to the only evidence which was adduced, viz. that of Shorty himself; and that of the investigating officer that the latter could not *trace* the owner does imply that he looked for him; and would this search not have been centred around the place from which the animal disappeared, as a matter of logic?

In the particular circumstances of the present case, there is in my opinion no proof beyond a reasonable doubt that theft had been committed. The animal concerned, which was about two years old, was absent from its previous owner for a period which could have been as long as 20 months. If its value when it was slaughtered was only R40, it is possible that when it arrived at Frenchdale it had so small a value that the owner wrote it off in his mind so that it was in fact *res derelicta*. Cf. *R. v. Coetzee*, 1944 C.P.D. 298.

The convictions and sentences are set aside.

VAN RHYN, J., concurred.