

SOUTH AFRICA / JUDGMENT

Mosotho and Another v S (A373/16) [2017] ZAGPPHC 1068 (18 September 2017)

[2017] ZAGPPHC 1068

COURT

North Gauteng High Court, Pretoria

BEFORE

Mokoena, Mudau

CASE / FILE NUMBER

A373/16

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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE

NO: A373/16

18/09/2017

(1)

NOT REPORTABLE

(2)

NOT OF INTEREST TO OTHER JUDGES

(3)

REVISED

In

the matter between:

LUCKY
JOHN MOSOTHU
1ST APPELLANT
THEMBA
ANNANIAS SIBIYA
2ND APPELLANT
And
STATE
RESPONDENT

JUDGMENT

MOKOENA A.J

- [1] The Appellants, Messrs Lucky John Mosotho and Themba Annanias Sibiya, were charged with contravening Section 1 of the Stock Theft Act 57 of 1959, in that between 19 April 2011 and 20 April 2011 they allegedly stole 14 herd of cattle to the value of R100 000.00 in the lawful possession of Mr Hendrik Tobias Esterhuizen ("the Complainant"). Alternative to the main charge is a charge that they failed to give satisfactory account of possession of the herd of cattle.
- [2] They appeared at the Mboko Regional Court on 12 March 2014, and were convicted on the main count of Stock Theft on 27 October 2014. They were each sentenced to a term of 5 years' imprisonment on 24 November
2014. This appeal is before us with leave of this court, the application for leave to appeal having been dismissed by the Court a quo. The grounds upon which their appeal is founded are the following:-

"The Court a quo erred in not finding that there is no corroboration for the cattle theft, particularly identification of the First and Second Appellants on the scene. It is submitted that there is no evidence in the entire record of the state's evidence that corroborates the identity of both Appellants as the people who stole the cattle.

The Court a quo erred in finding that the state witnesses were credible witnesses. It is submitted that the Court a quo should have considered that the nature and the effect of the contradictions and inconsistencies and discrepancies found were of a material nature.

The Court a quo erred in finding that the Appellants version must be rejected and the State's evidence be acceptable. It is submitted that, that was the wrong approach. The First Appellant testified and indicated that he was nowhere near the vicinity of the farm where the cattle were recovered.

It is submitted that the Court a quo was faced with two conflicting versions and further that there and no objective factors to support the state's case. It is submitted that Mr Johannes Mashiya testified that he had doubts about the Second Appellant and did not dispute the Appellants alibi when put to him under cross-examination.

It is submitted that the Second Appellant stated that on the date in question he was not in the vicinity but he was on his way to Dennilton . Therefore, the version of the Second Appellant cannot on the totality of evidence and concessions and the probabilities be said to be not reasonably and possibly true or false beyond reasonable doubt.

The Court a quo erred in finding that the Appellants version must be rejected and amongst others evidence of the independent witness, Mr Aaron Skosana. It is submitted, this is the wrong approach. Mr Aaron Skosana should have been found to be an independent witness whose evidence weighs in favour of the Appellants".

- [3] The facts giving rise to the conviction of the Appellants were that: On the morning of 20 April 2011, the Complainant noticed that 14 herd of cattle, the property of Mr Kruger, were stolen from the kraal by cutting off the fence at a farm known as Klipfontein. The value of the cattle was R100 000.00.
- [4] He then sought the assistance of Mr Johannes Mashiya ("Mr Mashiya") to help him look for the stolen cattle. He specifically sought his assistance because Mr Mashiya knew the people who were associated with stock theft in the area. They commenced their arch for the cattle on 20 April 2011, and where accompanied by Mr Kruger and two of his other employees.
- [5] They searched the nearby farms and they could not trace the cattle on that specific day. They called off the search as it was getting dark at night. They resumed their search the following day on 21 April 2011. When they reach a farm close to the farm of -one Mr. S Skosana, they saw a herd of cattle under the trees in the bushes. The Complainant managed to notice two men who were herding those cattle. The two men ran away when they saw them.
- [6] He identified two of those men as the Appellants. It was not the first time he saw them. He had seen them before around Verena. He was told their names by Mr Mashiya who was also able to identify them, but was not sure about the identity of the Second Appellant.
- [7] He also identified the cattle as that of Mr Kruger by their brand mark. Only 12 cattle were discovered on that day. Three days later, he received a call from one gentleman at Verena informing him that the other two cattle are on his farm.
- [8] Mr Mashiya also testified, on behalf of the state, and corroborated the Complainant's version that he was called by him to assist with the search of the stolen cattle and they located them in the bushes near Mr S Skosana's farm. They identified the cattle as the ones of Mr Kruger by their brand mark.
- [9] He testified further that when they approach Mr S Skosana's farm, he met his Shepherd. He asked him if he had ever seen the stolen cattle. The Shepherd directed them to a valley where he said he seen a herd of cattle for the past two days in the bushes. When they approached, he was in front of the Complainant and he managed to see three men who were herding the cattle. When they saw them, they ran away. He knew two of them as Kwekwezi Mosotho ("1st Appellant") and the other one as Ananias ("2nd Appellant"). He was however not sure about the 2nd Appellant but he was 100% sure about the 1st Appellant.

- [10] That was the evidence of the Complainant and that of Mr Mashiya in brief. Their evidence that 14 cattle of Mr Kruger were stolen and 12 of them were found near the farm of Mr S Skosana on 21 April 2011, was never disputed or challenged during cross-examination. It was also not disputed that the other 2 cattle were found three days thereafter. In addition, the records indicate that it was common cause that the 14 cattle in the possession of the Complainant were stolen.
- [11] The only dispute was that the men whom the Complainant and Mr Mashiya had seen on 21 April 2011 herding the 12 cattle, were not the Appellants. They deny being at the scene where the 12 cattle were found. That is the thrust of their appeal. I turn to deal first with this aspect of wrong identity.
- [12] The evidence of the Complainant in so far as identification of the 1st Appellant as the person who was found herding the 12 cattle was not challenged during cross-examination. The 1st Appellant offered a bare denial that he was at the scene. His whereabouts on 21 April 2011 was never put to the Complainant or Mr Mashiya to challenge their testimony that they saw him on the scene where the cattle were found.
- [13] In *President of the RSA v South African Rugby Football Union* 1999
- [10] BCLR 1059 (CC), the Constitutional Court reaffirmed as part of our law the common law rule that a failure to challenge the witness on a particular issue during cross-examination, the party calling the witness is entitled to assume that the unchallenged
- witness's testimony is accepted as correct. The Constitutional Court reasoned as follows:-
- "The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct".[1]*
- [14] The comments by the Constitutional Court were accepted by the Supreme Court of Appeal in *S v Boesak* [2000] ZASCA 112; 2000 (3) SA 381 (SCA). The Supreme Court of Appeal said the following:-
- "In this respect, we are in full agreement with the comments made by the Constitutional Court in President of the Republic of South Africa and others v South African Rugby Football Union and others"[2]*
- [15] In his judgment the Magistrate considered the evidence of both the Complainant and Mr Mashiya that they knew the 1st Appellant by his name as Kwekwezi and, nothing obscured the view of the Complainant to positively identify the 1st Appellant. The Magistrate took into account also that Mr Mashiya was 100% sure that the 1st Appellant was the person he saw at

the scene where the cattle were found. He however, approached his evidence cautiously when he took into account that Mr Mashiya was open to the Court when he testified that he was not sure about the identity of the 2nd Appellant.

- [16] This evidence of both the Complainant and Mr Mashiya was never challenged by putting the version of the 1st Appellant's whereabouts on 21 April 2015.
- [17] It must therefore be accepted that the failure by the 1st Appellant to explain his whereabouts on 21 April 2011, through cross-examination, is sufficient proof that he was at the scene where the cattle were found. Accordingly, the acceptance of the evidence of both the Complainant and Mr Mashiya by the Magistrate regarding the identity of the 1st Appellant as one of the persons they saw herding the cattle cannot be faulted.
- [18] The 2nd Appellant in his evidence in chief also denied being at the scene on 21 April 2011. He raised an alibi defence that on the day in question he was on his way to Dennilton driving together with late .Ronnie and Mr Aaron Skosana. He further testified that on the day in question he saw Mr Mashiya at the shop at Verena.
- [19] During cross-examination, the 2nd Appellant failed to give an answer to his whereabouts on 19 April
2011. Later he said he was at Verena. He was also unable to state with certainty when was he arrested. He raised the usual defence that the incident took place long time ago.
- [20] The legal position with regard to a valid alibi defence is that the accused person does not bear an onus to prove his alibi. If his alibi evidence is reasonably possibly true he must be acquitted. In *R v Hlongwane* 1959 (3) All SA 308 A the Court set the test as follows:-
- "[...] But it is important to point out that in applying this test. the alibi does not have to be considered in isolation. I do not consider that in *R v Masemang* 1950 (2) SA 488 (A) VAN DER HEERDE JA, had this in mind when he said at p494 and 495 that the trial Court had not rejected the accused alibi "independently". In my view, he merely intended to point out that it is wrong for a trial Court to reason this: "I believe the crown witnesses. Ergo, the alibi must be rejected.[...]
- The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the Court's impressions of the witnesses." [3]
- [21] The Magistrate considered the 2nd Appellant's alibi defence, and correctly rejected it having considered his evidence in chief and his response during cross examination. He correctly came to the conclusion that the 2nd Appellant was not a reliable person and did not impress the Court. In my view, the approach the Magistrate took in evaluating the evidence of the 2nd Appellant in its totality is the correct one and his reasoning for rejecting the alibi defence cannot be interfered with by this Court.
- [22] As regard the evidence of Mr Aaron Skosana is concerned, Counsel for the Appellants made a submission in his Heads of Argument that the evidence of Mr Aaron Skosana should have been accepted on the grounds that Mr Skosana was an independent witness. I do not agree.

The reason thereof is that the evidence of Mr Aaron Skosana cannot be viewed in isolation from the evidence of the Appellants. He was called by them to corroborate their version that they were not on the scene. In the absence of such corroboration and in light of the contradictions that exist in his evidence and that of the Appellants, his version cannot be accepted. To accept his version would mean that this Court must turn a blind eye to the inherent improbabilities and contradictions that exist in the evidence of the Appellants and the unchallenged evidence of both the Complainant and Mr Mashiya.

[23] Counsel for the Appellants also argued that the trial court erred by not accepting the evidence of Mr Skosana that Mr Mashiya was

the one who stole the cattle. That cannot be possibly true. For how can Mr Mashiya assist with the search and locating of those cattle if he was the one who stole them? He could have easily misled the Complainant and Mr Kruger with regard to where the cattle could be found. That was not the case. There is also no evidence to support Mr Aaron Skosana's allegation that the cattle were stolen by Mr Mashiya.

[24] The record further reveals the contradictions that exist between the evidence of Mr Aaron Skosana and the 2nd Appellants with regard to the alleged discussions that took place between them when they allege they met with Mr Mashiya at the petrol station at Verena on 21 April 2011.

[25] The 2nd Appellant said nothing about Mr Aaron Skosana having pointed out Mr Mashiya and told them that he was going to buy the cattle from him. What it means is that the evidence of Mr Aaron Skosana that he told both the 2nd Appellant and late Ronnie that he was going to buy the cattle from Mr Mashiya is the evidence of Mr Aaron Skosana alone. And in the absence of any corroborating evidence from the 2nd Appellant, a reasonable conclusion is that the 2nd Appellant and Mr Aaron Skosana were not together on 21 April 2011 as alleged by the 2nd Appellant.

[26] This conclusion is strengthened, firstly by the fact that it was reasonably expected of the 2 Appellant to have told the trial court that when they met with Mr Mashiya, Mr Aaron Skosana pointed him out and told them that he was going to buy the cattle from him, especially after Mr Mashiya has implicated him of theft of those cattle. Secondly I cannot find any reason why Mr Mashiya would choose to implicate the 2nd Appellant of all the people around Verena. They both confirmed to know each other and that there was no misunderstanding between them. With those facts in mind, the version of the 2nd Appellant that he was not the one seen by the Complainant and Mr Mashiya herding the cattle is simply not reasonably possibly true.

[27] In my view, the Magistrate came to the correct conclusion to reject the evidence of Mr Aaron Skosana on the basis that he was not a reliable witness. His finding that both Appellants were positively identified cannot be faulted. The question that remains to be answered is who stole the cattle.

[28] Counsel for the Appellants made a submission that there is no evidence in the entire record of the state evidence to corroborate the identity of both Appellants as the people who stole the cattle.

[29] It may well be so that the Appellants were not seen actually stealing the cattle. It is, however, proven from the objective facts that the Appellants are the ones who were in possession of the cattle for the

reasons

already stated, and they failed to provide an explanation for the possession of the cattle except to deny being at the scene where

the cattle were found.

[30] The position of our law under those circumstances is that where an accused person is found in possession of the recently stolen property and he failed to account for his possession, the inference can be drawn that he is the one who stole the property. The drawing of such an inference is based on the doctrine of recent possession. This doctrine was considered and applied in a number of cases. In *R v Mandele* 1929 CPD 96 the Court stated as follows:-

"It seems to me that the doctrine amounts to this, that when articles have recently been stolen, and are found in the possession of a person, the probability is that he is the person who stole them, but everything depends on what is recent and recent possession must vary very much with the nature of the articles stolen [....] In fixing what is recent, one has to depend upon the nature of the articles. The question the Court has to put to itself is, is the article one which would easily pass from hand to hand, and was the lapse of time so short as to lead to the probability that this particular article has not yet passed out of the hands of the original thief'.[4]

[31] In *S v Parrow* 1973(1) SA 603 (A)_the Supreme Court of Appeal referred to the doctrine by stating the following:-

"I pause here to refer briefly to the so-called doctrine of recent possession of stolen property. In so far as here relevant; it usually takes this form; on proof of possession of recently stolen property, the Court may (not must) convict him of theft in the absence of an innocent explanation, which might reasonably be true. This is an epigrammatic way of saying that the Court should think its way through the totality of facts of each particular case, and must acquit the accused unless it can infer, as the only reasonable inference, that he stole the property. [. . .] The onus of proof remains on the State throughout. Hence, even if, after the closing of the cases for the State and the defence, it is inferentially probable that the accused stole the property, he must be acquitted unless only reasonable inference is that he did so; for the law demands proof beyond reasonable doubt. I agree with the statement in South Africa Criminal Law and Procedure, Vol 2, by Hunt, at p811, that 'the doctrine' Of it can be given such an elevated name) of recent possession is simply a common-sense observation on the proof of facts by inference"[5]

[32] The question of what constitutes "recent possession" and what factors must the Court take into account in determining what is recent, was dealt with in *S v Skweyiya* [1984] ZASCA 96; 1984 (4) SA 712 (A). The Supreme Court of Appeal said the following:-

"[...] it is the requirement that the goods must have been recently stolen. The nature of the stolen article is an important element in the determination of what is recent. [. ..] If the article stolen is of the type which is usually and can easily and rapidly be disposed of, anything beyond a relatively short period will usually not be recent. The Court has accordingly to ask itself.[.. .] "Is the article one which could easily pass from hand to hand, and was the lapse of time so short as to lead to the probability that this particular article has not yet passed out of the hands of the original thief'.[6]

[33] It is not disputed, as the record reveals, that the Complainant realised only on 20 April 2011 that the 14 cattle were missing from the kraal and 12 of them were found on 21 April 2011. The other 2 were found two days later. It appears that the cattle must have been stolen between 19 and 20 April 2011 . From these established facts, common sense dictates that fourteen herd of cattle with a brand mark, are the types of article which cannot be easily and rapidly disposed of

within two days. Based on these facts and the failure of the Appellants to give an explanation of their possession of the cattle,

the only reasonable inference that can be drawn from these facts, in my view, is that the Appellants were the ones who stole the cattle as the Court a quo found.

[34] In light of the conclusions reached, the following Order is made:-

(1) The appeal against conviction is dismissed.

M.B. MOKOENA

ACTING JUDGE OF THE HIGH COURT

I Agree

T.P. MUDAU

JUDGE OF THE HIGH COURT

Date of Hearing

: 08 June 2017

Judgment

Delivered : 18 September 2017

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[1] President of the RSA v South African Rugby Football Union 1999 [10] BCLR 1059 (CC) para 61

[2] S v Boesak [2000] ZASCA 112; 2000 (3) SA 381 (SCA) para 51

[3] R v Hlongwane 1959 (3) All SA 308 A at 311- 312

[4] R v Mandele 1929 CPD 96 at 98

[5] S v Parrow 1973 (1) SA 603 (A) at 604 B- E

[6] S v Skweyiya 1984 (4) SA at 715 C-E

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