

SOUTH AFRICA / JUDGMENT

S v Galekwakweng (19/2012) [2013] ZANWHC 9 (7 February 2013)

[2013] ZANWHC 9

COURT

North West High Court, Mafikeng

BEFORE

GURA, R.D HENDRICKS

CASE / FILE NUMBER

19/2012

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NORTH WEST HIGH COURT, MAFIKENG

CASE NO.: 19/2012

In the matter between:-

SANNYBOY GALEKWAKWENGAPPELLANT

And

THE STATERESPONDENT

JUDGMENT

GURA J

Introduction

- [1] The appellant was sentenced to five years imprisonment for stock theft by the Regional Court. The present appeal against conviction is with leave of the trial court.

Factual Background

- [2] The conviction of the appellant was based mainly on the evidence of Sergeant Chris Louw. On 4 February 2010 he received information that one Sonnyboy was selling cattle. It was on a Thursday around 22H00 and they left Vryburg for Matlabana (Pudomoe). The police took along a cattle truck so that they could load those cattle after “buying” them.
- [3] The police met Sonnyboy who turned out to be the appellant, on the way at Matlabana. He was in the company of the police informer. The appellant then offered to sell six cattle (which were not yet there) to Louw at R2 000 – 00 each. Seemingly, he was not aware that Louw was a Detective Sergeant. At that stage, the other officers were not within his

(appellant's) sight. The appellant said that his problem was that he did not have a loading bay for the cattle. He (appellant) tried to telephone someone who had a loading bay but he could not get through. Louw then wanted to see the cattle before they could finalise the deal.

- [4] They drove to the cattle post where they found six cattle and a horse inside a kraal. The appellant pointed out the cattle to Louw and the latter illuminated them with the headlights of the truck. The appellant edged him to switch off the headlights of the truck so that the people would not see them.
- [5] Louw left the kraal for a short while pretending to be looking for a trailer. In the meantime, he contacted his colleagues who were driving around the tarred road. When they joined him, the appellant was arrested. He then waited to escape by attempting to jump on top of the truck through its windscreen. He then said the cattle belonged to his brother-in-law. The stock as well as the people remained at that kraal until it was in the morning because there was no loading bay.
- [6] In the morning, they saw another kraal which had a loading zone in the vicinity. They drove the cattle and the horse thereto. In their attempt to load them in the truck, four cattle bolted. They managed to load only one beast and the horse. The police suspected that the horse had been used as an instrument of crime – to drive the cattle to that first kraal. Louw followed the four cattle on foot for about four kilometres whilst his colleagues and the appellant came with motor vehicles. The cattle finally went into a certain kraal.
- [7] The second witness was Jabang Eshane, the complainant. On 4 February 2010 he received a telephonic message from the police as a result of which he hastened to his cattle post. Thereat, he found the appellant, the police, two cattle and a horse on the truck and four cattle in his kraal. The latter four cattle as well as one on the truck belonged to him (Jabang) whereas the second one on the truck belonged to Jabang's younger brother, Lesego. The latter beast had been under Jabang's care.
- [8] The evidence of the appellant is that Mpho Samune came to his house whilst he was sleeping and asked him to come along to help him to load some cattle. He refused to assist him initially but after he (Mpho) persuaded him, he went along with him. At a certain kraal, they found a truck parked on the loading zone and there were some cattle which were kraaled. When it was time to load the cattle on the truck, he refused to assist them. He said "I can't load cattle at this time of the night and further that I know the cattle owner." These cattle, he said, belonged to his brother-in-law. When he adopted this attitude, they grabbed and arrested him.

The Issues

- [9] Ms. Smit, for the appellant, submitted that:
1. There was a police trap which went beyond providing an opportunity to commit an offence;

The State failed to call the police informer as a witness or any other person who would have corroborated the version of Louw;

Inadmissible hearsay evidence was admitted; and

Louw was a single witness and he was unreliable. The trial Court failed to adopt a cautious approach in dealing with his evidence.

Police Traps

[10] Section 252A(1) of the Criminal Procedure Act, No. 51 of 1977 (the Act) provides that:

“ Any law enforcement officer, official of the State or any other person authorised thereto for such purpose (hereinafter referred to in this section as an official or his or her agent) may make use of a trap or engage in an undercover operation in order to detect, investigate or uncover the commission of an offence, or to prevent the commission of any offence, and the evidence so obtained shall be admissible if that conduct does not go beyond providing an opportunity to commit an offence: Provided that where the conduct goes beyond providing an opportunity to commit an offence a court may admit evidence so obtained subject to subsection (3).”

Sub. Sec. 3 empowers the Court to disallow such evidence if it was obtained in an improper or unfair manner and when the admission thereof would render the trial unfair or would be detrimental to the administration of justice.

[11] In *S v Kotze* 2010 (1) SACR 100 (SCA) the Court distinguished between traps and undercover operations. The court stated that an undercover operation might involve no element of a trap, e.g the infiltration by an undercover agent into a gang planning a bank robbery. Where the proposal for the criminal conduct emanates wholly from the accused, who does all the running around until the final stage where the police create the opportunity for the culmination of the chain of events, it cannot be said that the police conduct amounts to a trap (*S v Lachman* 2010 (2) SACR 52 (SCA)).

[12] The evidence against the appellant is that he stole cattle, thereafter, he wanted somebody who could buy the stolen stock. This information came to the attention of the police informer who blew the whistle. The police then, with the assistance of the

informer, posed as the buyer. The appellant, when he met the police, pointed out the six cattle and offered to sell them to the police for R2 000 each. He was then arrested and charged for theft of stock. In my view, neither the police nor the informer did anything that “goes beyond providing an opportunity to commit an offence”. The conduct of the informer cannot be regarded as constituting a trap. See *Lachman* case supra. At best, the conduct of the informer is closely allied to that of an undercover operation which is still authorised by Section 52A of the Criminal procedure Act. Even in this latter situation the informer got involved in this matter only after the crime of theft had been committed, all what was outstanding, was the disposal of the stolen stock.

Failure by the State to call the informer or any person to corroborate Louw's evidence

[13] The identity of a person who has secretly given information to the police concerning the commission of a crime may not be disclosed in a Court of law (Commentary on the Criminal Procedure Act at page 1-4P: Du Toit et al). If the informer had been called to testify the veil of secrecy would have been removed. Apart from that, the statement of the informer (if it was ever taken) was not part of the documents in the police docket. There is no evidence that there were other statements of potential witnesses in the docket. Under these circumstances it would be unfair to draw an adverse inference against the state for its failure to call "other witnesses." See *S v Texiera* 1980 (3) SA 755 (A).

Admission of inadmissible evidence

[14] Counsel for the appellant referred us to page 21 and 62 of the trial record to support her view that hearsay evidence was improperly allowed. On page 62 after hearsay evidence was tendered through Louw, the court ruled it inadmissible consequent upon an objection by the defence. On page 21 Louw told court that at one stage, the informer called him on his cell phone to say that the appellant (the suspect by then) had requested that they (Louw and others) should come to load cattle. Despite the defence's objection against reception of hearsay evidence, the court unfortunately made no ruling. This is unfortunate. In its judgment however, it does not appear that the court used this information against the appellant. In my view, the appellant did not suffer any prejudice as a result of reception of hearsay evidence. The reception of this evidence, in my view, does not have the effect of a gross irregularity in the proceeding because there is independent viva voce evidence by Louw about the conversation between him and the appellant, face to face, where he offered the cattle for sale and where he complained that he had no loading bay and where he tried to call someone who could avail a loading bay.

Louw as a witness

[15] Section 208 of the Act provides:

"An accused may be convicted of any offence on the single evidence of any competent witness".

An account is entitled to convict on the evidence of a single witness if it is satisfied beyond reasonable doubt that such evidence is true. The court may be satisfied that a witness is speaking the truth notwithstanding that he/she is in some respect an unsatisfactory witness (*R v Abdoorham* 1954 (3) SA 163 (TPD)). In brief, the evidence of a single witness has to be satisfactory but not necessarily perfect.

[16] A rule of practice has evolved in terms whereof there is a need to approach the evidence of a single witness with caution. The trier of fact must forever be mindful of the possible dangers inherent in convicting on the uncorroborated evidence of a single witness (*R v Mokoena* 1932 OPD 79). In *S v Sauls and Another* 1981 (3) SA 172(A) at 180 E-G the Court laid down the following approach which the trial court should adopt:

“The is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness. The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcoming or defects or contradictions in the testimony, he is satisfied that the truth has been told.”

[17] The trial court was alert about the cautionary rule and it referred to two relevant cases in that regard. It went on to state that Louw did not make a good impression on the court because he did not answer all questions in a straight forward manner but when

the question was repeated, he would answer it. The trial court however found that he did not contradict himself. It accordingly

accepted his account despite this unsatisfactory feature.

[18] The cross examination of Louw was long and tedious. His evidence in chief covers some eleven pages whereas the cross examination goes to sixty pages. It was during the cross-examination where some questions had to be repeated for him to answer. It is worthy to note that despite the detailed cross-examination he did not contradict himself. The trial court found him to be a reliable witness. I am also satisfied that “the truth has been told” by Louw despite the single unsatisfactory feature in his behaviour.

Conclusion

[19] The version of the appellant was rejected by the trial court as not being reasonably possibly true. In my view, his version is false beyond reasonable doubt. The informer would not have kraaled complainant’s cattle some four kilometres from their

actual kraal and thereafter call the police in order to incriminate the appellant. Again, after the arrival of the police he would not have gone to call the appellant at his house so late at night – with the risk that he may not find him at home or that he may refuse to come. The appellant’s version is so far fetched that it defies common sense and logic.

[20] In the result, the following order is made:

The appeal against conviction is dismissed.

SAMKELO GURA

JUDGE OF THE HIGH COURT

I agree

R.D HENDRICKS

APPEARANCES

DATE OF HEARING: 19 OCTOBER 2012

DATE OF JUDGMENT: 07 FEBRUARY 2013

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ATTORNEYS FOR RESPONDENT: STATE ATTORNEYS

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Prepared on 11 October 2026 · Esheria