

CHRISPEN MATIBIRI  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
ZHOU & CHIKOWERO JJ  
HARARE, 21 and 24 March 2022

### **Criminal Appeal**

Appellant in person  
*C Muchemwa*, for the respondent

CHIKOWERO J: This is an appeal against the judgment of the Magistrates Court convicting the appellant of stock theft as defined in s 114(2) (a) (i) and (ii) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Act).

There is no appeal against the sentence of 9 years imprisonment.

### **FACTUAL BACKGROUND**

The appellant was jointly charged with three others. Accused 2 and 3 were unemployed male adults of no fixed abode. They shared such status with the appellant, who was the first accused at the trial. In addition, the appellant and the third accused are siblings. The fourth accused was a female adult who operated a shebeen at her Norton residence.

The appellant and the second accused were convicted of stock theft in the sense of having taken livestock or its produce knowing that another person is entitled to own, possess or control the livestock or produce or realizing that there was a real risk or possibility that another person may be so entitled and intending to deprive such person permanently of ownership, possession or control. As for the third and fourth accused, they were convicted of stock theft as defined in s 114(2) (b) (ii) of the Act on the basis that they had taken possession of stolen livestock or its produce realizing that there was a real risk or possibility that it had been stolen.

The facts found proved were as follows. The appellant, second and third accused persons were regular patrons at the fourth accused's bar. The four knew each other. On or about 14 November 2018 around midnight the appellant and the second accused took the carcass of a bovine to Tendai Munemo's house, in Norton, for safekeeping. The following day, during the afternoon, the appellant returned to Munemo's house, on his own, and took away some of the meat. During the evening the appellant was back at the residence, accompanied by the second accused person. The two argued over some missing meat and nearly traded blows. While so engaged, they were joined by the third and fourth accused. The quartet loaded the meat into the fourth accused's vehicle and left but not before the third accused had rewarded Munemo with about ten kilograms of meat.

Some of the meat was taken to the fourth accused's residence. So was a twenty-litre bucket, jacket, rope and axe. All these things were blood-stained.

Still under cover of darkness, the second and fourth accused persons proceeded to four other houses where they sold portions of the meat.

The matter came to light the following morning when the fourth accused rushed to the police station to file a stock theft report against the other three pursuant to an altercation between the fourth accused on the one hand and the appellant and second accused on the other.

The police recovered portions of the meat from Munemo, the third accused's girlfriend, as well as the four buyers. The bloodied items we have already referred to were recovered from the fourth accused's residence. The police failed to recover the hide because the second and third accused persons had, on the way from Munemo's house, opened the fourth accused's car boot, pulled out the hide, and thrown the same into a sewage pond. This destruction of a potential exhibit was undertaken at night as was the transportation and sale of the meat.

Having found that the four-some had acted in common purpose, the court convicted them as aforesaid.

We pause to record that the court fell back on the provisions of s 114 (8) of the Act because it was satisfied that the carcass was of a stolen bovine despite the respondent's failure to prove that the same was that of the complainant's ox, which had been stolen and slaughtered on or about the same period.

## **THE GROUNDS OF APPEAL**

The grounds of appeal are:

- “1. The learned magistrate grossly erred in allowing the trial to sail through with a wrong complainant.
2. The court *a quo* failed to account evidence collectively instead of individualizing evidence before the Court. The provision of C.P&E Act s 268 were not complied.
3. The court *a quo* erred to apply common purpose doctrine and connivance whereas there was no prior and arrangements of.
4. The court *a quo* error was on adoption of implicatory confessions proffered by the implicating and in possession of bovine.
5. The court *a quo* erred by failing to realize that appellant before him were not legally represented and forcibly use technical terms to explain essential elements of this case.
6. The court *a quo* erred by not taking into account that the appellant is a victim of mistaken identity. Nothing was found in appellant’s possession which can create nexus between him and the said offence in question.”

The trial magistrate did not comment on the grounds of appeal because he has left the bench.

## **SUBMISSIONS BY THE PARTIES AND THE DISPOSITION**

It was common cause that the respondent’s witnesses found it difficult to describe the colour of the hide and the trotters. Munemo’s description of the colour varied with that spoken to by the complainant as the colour of his stolen ox. The witness who prepared the trotters for cooking came with another version. It seems to us that the variations on the colour were really a matter of degree. But all this is not material because the trial court convicted on the basis that the respondent had proved that the appellant had stolen a bovine or its produce despite its failure to prove that such livestock or produce belonged to the complainant, Samuel Tsveta. Section 114 (8) of the Act reads:

“Any person charged with the stock theft involving livestock or its produce belonging to a particular person may be found guilty of stock theft, theft or any other crime of which he or she may be found guilty in terms of [*Chapter XV*] notwithstanding that the prosecution has failed to prove that such livestock or produce actually did belong to such particular person.”

The issue is governed by legislation. Nothing turns on the first ground of appeal.

There are hints of generality and irrelevance in the second ground of appeal. However, this ground was not argued on this basis. The court assessed the evidence in respect of each of the four accused persons in order to determine whether the prosecution had proved its case against each. It is criticized for taking such an approach. There can be no merit in such an argument. We agree

with Mr Muchemwa that the judgment is detailed, well-articulated and the verdict correct. Further, s 268 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which provides that the evidence of an accomplice who testifies as a witness for the prosecution cannot be used against him if he is later charged with the same offence, does not arise for consideration in the present matter. No accomplice testified for the prosecution. In the circumstances, we are satisfied that there also is no merit in the second ground of appeal.

There was no need for direct evidence of a prior arrangement between the appellant and the first, second, third and fourth accused to commit the offence before the doctrine of common purpose could apply. The liability of co-perpetrators is governed by s 196A of the Act. There was cogent evidence proving beyond reasonable doubt that the appellant and his accomplices committed the stock theft in association with each other. We shall discuss such evidence in disposing of the last ground of appeal.

The fourth ground of appeal is hardly comprehensible. However, the court did not convict the appellant merely because the fourth accused implicated him. In a desperate bid to evade criminal liability, the fourth accused had presented herself as an innocent transporter who had simply been hired by the appellant to ferry his goods, which turned out to be a carcass of a bovine, around midnight. The court reposed credibility in Munemo, who incriminated the appellant. In the circumstances, the conviction of the appellant not having been predicated on the evidence of the fourth accused, the fourth ground of appeal, to the extent that its meaning is discernible therefrom, is misplaced.

The appellant did not advance argument on the fifth ground of appeal. We proceed on the basis that this ground was abandoned.

Finally, the appellant contends that the court erred in rejecting his defence that he was a victim of circumstances. He says he was caught in the cross- fire, so to speak. He is innocent. He did not steal any stock. Nothing was recovered from him. The learned magistrate misdirected himself on the evidence in not finding that there was no link between the appellant and the commission of the crime. Sitting as an appellate court, we are persuaded that there is on record overwhelming evidence justifying the conviction of the appellant. He approached Munemo at midnight. He sought permission to keep the fresh carcass of a bovine at that witness' house overnight. He was granted that permission. In the company of the second and fourth accused, the

appellant deposited the carcass, as well as the hide, at Munemo’s house. He returned the following day, in the afternoon, and took away some of the meat. He was alone, and was seen by Munemo. In the evening, he was back at that residence, this time in the company of the second accused. The two argued over some missing meat. The altercation nearly degenerated into a fight. The third and fourth accused appeared in time to witness the war of words. Munemo beheld all this and was rewarded with the generous portion of ten kilogrammes of meat for her services. The meat was ferried from Munemo’s house at night and sold under cover of darkness. It matters not that no meat was recovered from the appellant and that he did not accompany the second and fourth accused persons on the trips to sell the same. What he had already done up to that stage was enough to prove that he regarded himself as owning and that he possessed and controlled the meat. The second accused also featured prominently not only at Munemo’s house but also during the sales conducted under cover of darkness. The fourth accused not only provided the car required to ferry the meat at all material times but participated in selling the meat. The third accused demonstrated his active involvement in, among other things, lavishing ten kilogrammes of the meat on Munemo. Ultimately there was not only evidence of common purpose but what is striking about the circumstances of the matter is that not only the theft but the disposal of the produce of the livestock was conducted at night. This was to avoid detection. No wonder the hide was concealed in a sewage pond and the trotters prepared to erase identification of the livestock which was stolen and slaughtered. The acts of each of the accomplices in furtherance of their common design are attributable to the others. Indeed, most of the facts were common cause.

There is no merit in this appeal.

**ORDER**

The appeal be and is hereby dismissed.

ZHOU J agrees.....

*The National Prosecuting Authority, respondent’s legal practitioners*