HB 145/18
HCA 37/17
X REF PT 483/16

JAMES MULEYA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE & MOYO JJ
BULAWAYO 11 & 14 JUNE 2018

Criminal Appeal

Advocate L. Nkomo for the appellant
Ms N. Ngwenya for the respondent

MAKONESE J: The appellant, an ex-member of the Zimbabwe Republic Police appeared before a magistrate sitting at Plumtree facing charges of contravening section 114 (2) (a) of the Criminal Law Codification and Reform Act (Chapter 9:23), stock theft. The brief allegations against the appellant as gleaned from the charge sheet are that on the 22nd October 2016 and at Sizanani Farm, Figtree, the appellant stole 3 beats and loaded them into his truck. The appellant was intercepted by the police along the Plumtree – Dombodema road at around 2am. He failed to produce a veterinary animal movement permit and a police clearance authorising him to move the cattle. Appellant pleaded not guilty and in his defence averred that he had been hired by one Fanekiso Ncube to transport the cattle from Marula to Dombodema. Despite his protestations, the appellant was found guilty and sentenced to 10 years imprisonment of which 1 year was suspended on condition of future good conduct. The effective sentence was 9 years imprisonment.

Dissatisfied with both conviction and sentence appellant now appeals to this court against the whole judgement of the court *a quo.* The appellant's grounds of appeal were set out as follows:

1. The court *a quo* erred in failing to appreciate that the state has not discharged the onus of proving beyond reasonable doubt that the appellant was guilty of stock theft as defined in section 114 (2) of the Criminal Code.
2. The court *a quo* erred by failing to appreciate that the evidence led by the state was purely circumstantial and as such there were other reasonable inferences that could be drawn from such evidence.
3. The court *a quo* misdirected itself by failing to appreciate that the appellant's explanation that he had been hired to ferry the cattle by one Fanekiso Ncube could be true.

The appellant prayed that the conviction and sentence be set aside.

Appellant is challenging his conviction on the basis that he was charged for contravening section 114 (2) (a) and yet he was convicted for contravening subsection 2(b) of the same section. He has argued that it was improper at law as he had not pleaded to the subsection for which he was convicted. A reading of section 114 (2) indicates that sub-paragraph (a) – (d) simply provide scenarios which would amount to stock theft. Any conduct that falls within any of the said sub-paragraphs renders whoever commits them liable for stock theft. On the facts of the present case although the charge proffered against appellant made specific reference to sub-paragraph (a) the evidence led in court proved beyond reasonable doubt that the accused's defence is not only a phony defence by false. The only conclusion that could be drawn that was consistent with the proved facts is that accused stole the bovines in common purpose with Fanekiso Ncube. I observe that section 114 (2) (b) of the Code provides as follows:

"Any person who takes possession of stole livestock or its produce -

(i) knowing that it has been stolen;
(ii) realising that there is a real risk or possibility that it has been stolen shall be guilty of stock theft …"

The appellant a former police officer who had served for more than 20 years before retirement was well versed with the requirements regarding the movement of cattle. He denied

that he was into the business of cattle buying, and that he was a transporter. He conceded that he was aware that one needs a movement of cattle permit issued by the veterinary department. He also admitted that he was aware of the requirement to procure a police clearance before any stock could be moved. The appellant was found in possession of the cattle in the dead of the night at 2am without the alleged owner of the cattle whom he claimed had hired him. The appellant conceded that when the cattle were loaded at Mathibane Farm there was no one present apart from Fanekiso. No one assisted in the loading of the beasts. The appellant avoided using the loading bay at Sizanani Farm in order to avoid detection. On his way to the police station, appellant was at the back of a truck when he told Mbekezeli Mpofu in a conversation that he had erred in buying the stolen cattle from the boys. Appellant did not dispute the conversation but merely disputed that Fanekiso could be described as a boy. The appellant admitted under cross-examination that the Investigating Officer, one Frank Chinhapa testified that the appellant claimed a first that he had bought the cattle from Fanekiso, but later changed his story to say that he had been hired. The appellant's version of events did not simply add up and was not reasonably possibly true. The standard practice is that when the police clearance is issued, it will reflect the name and address of the transporter as well as the place of origin of the cattle. The police clearance will also indicate the destination of the cattle. The appellant who claimed to be a transporter, would be expected to know these requirements. He would also know that cattle are not transported at night.

In any event, section 123 (1) of the Criminal Code provides that were a person is found in possession of property that had been recently stolen and the circumstances of the person's possession are such that he or she may be reasonably be suspected to give an explanation for his or her possession, a court may infer that the persons is guilty of either the theft of the property or stack theft, or of receiving it knowing it to have been stolen, whichever crime is more appropriate on the evidence, if the person;

(a) cannot explain his possession or
(b) gives an explanation of his or her possession of which is false or unreasonable.

It is common cause that the appellant was found in possession of cattle that were later proved to be stolen. The appellant upon being asked to produce documentation for the cattle claimed that the the papers were with Fanekiso. Records kept at the police station proved that Fanekiso had never cleared cattle for movement from Sizanani Farm. It was established that Fanekiso was a 20 year old employed as a herd-boy at the complainant's farm when the police confronted him he fled and disappeared. The appellant claimed that Fanekiso had gone to see a girlfriend when his truck broke down and that he had not returned. If at all the appellant's version was true he would have been reasonably expected to call the mechanic who attended to his breakdown to corroborate his story, that Fanekiso had left him when the car broke down.

It is an established principle of our law that an accused person bears no onus to prove his defence. An accused person is presumed innocent until proven guilty. The state bears the burden of proof, and to sustain a conviction by placing before the court evidence credible, showing the guilt of the accused beyond reasonable doubt. In *S* v *Kuiper* 2000 (1) ZLR 113 (S) the court held that an accused person bears no onus to prove his innocence nor to convince the court of the truthfulness of any explanation he gives. However, as was held in *Chudu* v *The State* HB-214-17, where an accused person elects to give an explanation in order for the court to acquit on the basis of such explanation, there must be a reasonable possibility of the explanation being true.

I do not find any misdirection on the part of the magistrate in his assessment of the evidence. The state is not required, in criminal cases, to prove the guilt of the accused beyond any shadow of doubt. Section 203 of the Criminal Procedure and Evidence Act (Chapter (9:07) provides that a defect in an indictment, summons or charge may be cured by evidence. The trial magistrate would have erred had he sought to import a completely different charge. In this particular case, the main charge was stock theft and it was therefore competent for the court *a quo* to convict the appellant of stock theft as defined in section 114 (2) (b) of the Criminal Code.

I am satisfied that the appellant was properly convicted and that the appeal has no merit.

I would, accordingly dismiss the appeal.

Moyo J …… I agree

Mathonsi Ncube Law Chambers, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners