DISTRIBUTABLE (26)

Judgment No. S.C. 66/98
Crim. Appeal No. 526/95

BERNADUS HERMANUS HOFFMAN v THE STATE

SUPREME COURT OF ZIMBABWE
GUBBAY CJ, EBRAHIM JA & SANDURA JA
BULAWAYO, MARCH 30 & MAY 8, 1998

J B Colegrave, with him *T A Cherry*, for the appellant

M M Takuva, for the respondent

SANDURA JA: The appellant was convicted of three counts of stock theft and was sentenced to twelve months' imprisonment with labour on each count. Of the total sentence of thirty-six months' imprisonment with labour, eighteen months' imprisonment with labour was conditionally suspended for five years. He now appeals against both conviction and sentence in respect of all the counts.

At the relevant time the appellant was the owner of Riversdale Farm in the Filabusi area of the Province of Matabeleland South and lived on the farm.

The complainant in the first two counts, a man called Ngwenyama ("Ngwenyama"), owned a neighbouring farm called Annadale but lived in Bulawayo. In the first count, the allegation against the appellant was that in June 1992 and at Riversdale Farm he shot and killed one of Ngwenyama's cows, intending to steal it. The cow had strayed onto his farm and had slipped and broken its leg as it was being

driven back to Annadale Farm by Ngwenyama's workers. It was alleged that after his workers had skinned the cow he took the meat and fed most of it to his crocodiles. The allegation in the second count was that on or about 10 June 1993 the appellant sold to a Mr Nash ("Nash"), a neighbouring farmer, one of Ngwenyama's cows which had strayed onto his (i.e the appellant's) farm. Finally, in the third count the allegation was that on or about 10 June 1993, and at Riversdale Farm, the appellant sold to Nash a cow which had strayed onto his (i.e. the appellant's) farm, and in respect of which the owner was not known. Alternatively, it was alleged that he had contravened s 4(a) of the Stock Theft Act [*Chapter 9:18*], in that he had been in possession of the cow and had failed to give a satisfactory account of his possession of the cow when there was a reasonable suspicion that it had been stolen.

The trial took about seventeen days but extended over many months. It started in January 1994 and was concluded in June 1995. Many witnesses gave evidence. Fortunately, it is not necessary for me to deal with the evidence of every witness before determining this appeal. I shall deal with the three counts separately.

COUNT ONE

Most of the facts in this count are common cause. They are as follows: In June 1992 some of Ngwenyama's cattle strayed onto the appellant's farm and Ngwenyama's workers were informed. The workers went to the appellant's farm to collect them. As they drove the cattle back to Annadale Farm, one of the cows slipped and fractured its leg. The workers left the cow at the scene where it lay injured and drove the rest of the cattle back to Annadale Farm, from where they

telephoned Ngwenyama in Bulawayo and let him know what had happened. The appellant, as well as the Department of Veterinary Services at Filabusi, also telephoned Ngwenyama about the injured cow. Subsequently, Mr Dube, the Animal Health Inspector based at Filabusi, and Mrs Redman ("Redman"), an Animal Welfare Officer employed by the Society for the Prevention of Cruelty to Animals ("the SPCA"), visited the appellant on different occasions and saw the injured cow. What they advised the appellant to do was not common cause, other than the fact that Redman advised him to kill the cow because it had been severely injured and was in agony. Acting upon that advice, the appellant shot and killed the animal. He then instructed his workers to skin it and thereafter took the meat to his homestead. He took the heart, liver and kidneys and placed them in his deep-freeze. He then gave the offal to his workers. The rest of the meat was placed in his butchery which did not have any refrigeration facilities. He later fed most of this meat to his crocodiles. When Ngwenyama subsequently arrived at the homestead and asked for the meat, the appellant told him that he had fed the meat to the crocodiles. He did not tell him that he still had some of the meat as well as the hide. All these facts were common cause.

Ngwenyama and some of his workers gave evidence. His own evidence was as follows: He was informed by his workers that the cow had fractured its leg. He instructed them to look after it and give it food and water whilst he made arrangements to come to the farm, slaughter the cow and take the meat to a butcher in Bulawayo. He also received telephone calls from the appellant and from the Department of Veterinary Services at Filabusi informing him about the cow. He informed the callers that his workers had already contacted him about the matter and that he had instructed them to look after the animal whilst he planned what to do.

However, before he went to the farm he was contacted by his workers and was informed that the appellant had shot and killed the cow on the previous day and had taken the meat to his (i.e. the appellant's) homestead. Having received that information after 4 pm, he left for the appellant's farm that evening. When he arrived there and asked for the meat, the appellant told him that he had fed the meat to his crocodiles. He then left and subsequently handed the matter over to his lawyers.

One of his workers, Raviro Sibanda ("Sibanda"), gave evidence to the following effect: Acting on his employer's instructions he sent some boys to the place where the cow was and instructed them to give it food and water. However, when the boys went there on a subsequent occasion, they discovered that the cow was no longer there. They saw a lot of blood and a foetus at the scene. When Sibanda was informed about this, he contacted the appellant by telephone in order to find out what had happened to the animal. The appellant told him that he had killed it and that the carcass was at his homestead, from where it could be collected. As Sibanda did not have any vehicle, he asked the appellant to assist him by delivering the carcass to Ngwenyama's homestead at Annadale Farm, but the appellant said he could not. Sibanda then telephoned Ngwenyama in Bulawayo and told him what the appellant had done. Thereafter, Ngwenyama visited the appellant that evening and was not given any of the meat.

The appellant's version was as follows: The cow had sustained a very bad fracture. The bones were protruding through the skin and the marrow was falling out of the bones. At the same time there was on his farm a donkey which had also fractured its leg. He telephoned the Department of Veterinary Services at Filabusi,

but there was no-one in authority to whom he could speak. He then telephoned the SPCA in Bulawayo and spoke to a lady who advised him to contact Redman about the donkey. As far as the cow was concerned, she advised him to contact the Department of Veterinary Services in Bulawayo. He did as advised and spoke to a Dr. Sibanda at the Department of Veterinary Services, who told him that someone would come to his farm and see the cow. In the afternoon a Veterinary Officer called Dube ("Dube") arrived. After seeing the animal, Dube recommended that it be killed but could not say who should kill it. When the appellant asked what would happen to the meat if the animal were killed Dube said: "Leave it to the birds to eat". I wish to pause here and comment on this evidence. Dube, who was called by the appellant as his witness, strongly denied having advised him to kill the animal or to "leave the meat to the birds to eat". He said that although he was of the opinion that the animal should be killed he advised the appellant to contact its owner and discuss the matter with him.

Shortly after Dube left the appellant's farm, Redman and a Mr Muller from the SPCA arrived and enquired about the donkey. He told them about the cow and they asked him to fetch his rifle and take them to where the cow was. When they arrived at the scene they were horrified by what they saw and Redman immediately instructed the appellant to shoot the cow, which he did in their presence. Redman then told the appellant to inform the owner of the cow that it had been killed. She also told him that if the owner did not come to collect the meat within forty-eight hours he could do what he liked with the meat. He and the two officers then left the scene. His workers, acting on his instructions, skinned the cow and took the carcass to his homestead. He later telephoned Ngwenyama in Bulawayo but did not speak to him as he was not at home. However, he left a message with his wife, requesting

Ngwenyama to contact him. He also sent a messenger with a letter to Ngwenyama, telling him what he had done. However, this was not put to Ngwenyama when he was cross-examined.

On the following morning, the appellant received a telephone call from one of Ngwenyama's workers who had discovered that the cow was no longer where it used to be. He informed the caller that he had shot and killed it and that the carcass was at his homestead, from where it could be collected. He also told him that if the meat was not collected within forty-eight hours he would feed it to the crocodiles. Two days later Ngwenyama came in the evening and asked for the meat. He told him that forty-eight hours had already expired and that he had already started feeding the meat to his crocodiles. Ngwenyama was upset and left, having promised to take legal action against him.

In the circumstances, it was argued on behalf of the appellant that he had acted on the advice of Redman and Dube and took all reasonable steps to comply with the law. Whilst it is true that Redman instructed the appellant to kill the cow, there can be no doubt that neither Dube nor Redman advised him to "give the meat to the birds to eat" or to "do as he liked with it". Both witnesses denied the appellant's allegations in this regard and would have had no reason for lying. Redman was adamant that she told the appellant to leave the carcass where it was and contact the owner and ask him to come and collect it.

The first issue which arises with regard to this count is whether the appellant shot and killed the cow with the intention of stealing it. I do not think so.

Had he been so inclined, he would have done everything surreptitiously and would not have contacted Ngwenyama or the Department of Veterinary Services in Filabusi or Bulawayo, nor the SPCA, about the animal. He would not have waited for Dube or Redman before killing it. In the circumstances, I am satisfied that when he shot and killed the cow he did so, not with the intention of stealing it, but with the intention of putting it out of its misery. It had suffered from excruciating pain for about four days.

The second issue to consider is whether the appellant committed any offence. Quite clearly he committed theft of the carcass. Having shot and killed the animal, he should not have taken the meat and distributed it as he did without Ngwenyama's consent. Furthermore, when Ngwenyama arrived at the appellant's homestead and asked for the meat, the appellant lied to him when he said that he had fed all the meat to his crocodiles when he must have known that he still had some of the meat and the hide at his homestead. In the circumstances, the appellant's behaviour demonstrated, beyond any doubt, his determination to permanently deprive Ngwenyama of the entire carcass.

The next question which arises for consideration is whether the appellant committed stock theft or simply theft of the carcass of a bovine. The distinction is important because if he committed stock theft then the Stock Theft Act [*Chapter 9:18*], which provides for increased jurisdiction in cases of theft of stock or produce, will apply. In s 2 of the Stock Theft Act, "stock" is defined as follows:-

"'Stock' means –

(a) any horse, mule, ass, bovine, sheep, goat, pig, poultry, pigeon or chinchilla; or

(b) any domesticated game; or

(c) any carcass or any portion of a carcass of any stock as defined in paragraph (a) or (b) which has been slaughtered."

In the present case, it is the definition in para (c) which is relevant. From that definition, it is clear that the carcass stolen by the appellant in this case is "stock" as defined in the Act. The cow was obviously slaughtered. In the circumstances, the appellant committed the crime of stock theft. However, this is a far less serious type of stock theft than the one which the appellant was convicted of, i.e. theft of a live cow.

With regard to sentence, I am satisfied that the sentence of twelve months' imprisonment with labour, which was imposed for the more serious type of stock theft, is inappropriate for the less serious stock theft committed by the appellant. In my view, a substantial fine would be an adequate punishment in the circumstances. In this regard, the case of *S v Dyer* 1988 (2) ZLR 395 (SC) is of some assistance. In that case the appellant, a farmer, had killed an ox which, unbeknown to him, had been stolen by his employees from his neighbour. He had instructed them to find one of his own cattle which had gone missing and which he intended to slaughter. It was only after he had killed the ox that he discovered that its hide bore his neighbour's brand. In spite of that, he sold the meat for his own benefit in his butchery. He was convicted of stock theft and sentenced to nine months' imprisonment with labour, of which four months' imprisonment with labour was conditionally suspended. On appeal McNALLY JA, with the concurrence of DUMBUTSHENA CJ, set aside the sentence and substituted a fine of two thousand dollars or, in default of payment, three

months' imprisonment with labour. In my view, that would be an appropriate sentence for the appellant in the present case. In addition to that, however, it will be appropriate to impose a short prison sentence, all of which will be suspended on condition that the appellant pay to the complainant the sum of one thousand dollars, which was the value of the cow.

COUNT TWO

As already indicated, the allegation in this count was that on 10 June 1993 the appellant sold to Nash one of Ngwenyama's heifers which had strayed onto his (i.e. the appellant's) farm. It was alleged that before that date the heifer used to stray onto the appellant's farm frequently, but was retrieved from time to time until it could not be found on the appellant's farm. The appellant did not deny selling the heifer to Nash but alleged that the heifer was one of the forty-eight head of cattle which he purchased from Amos when he bought Riversdale Farm from him in July 1991.

The principal witnesses relied upon by the State on this count were Raviro Sibanda, Enock Siziba, Beacon Siziba and Sergeant Chapasuka. Raviro's evidence was as follows: He was first employed by Ngwenyama as a general worker at Annadale Farm in 1991. When he came to the farm the heifer in question was there but had the habit of straying onto the neighbouring farm owned by Amos from where it was retrieved from time to time. Amos would telephone him and he and other workers would go and collect it. However, after Amos sold the farm to the appellant, the heifer went missing and could not be found on the appellant's farm.

Subsequently, in 1993 the police took him to a cattle enclosure near Filabusi Post Office where he identified the heifer as Ngwenyama's heifer which had gone missing. He said that Ngwenyama's brand on the heifer was still very visible.

Enock's evidence was as follows: He used to work for Amos before Amos sold Riversdale Farm to the appellant. He worked in the garden and looked after the well-being of the cattle on the farm. He knew the heifer in question because it strayed from Ngwenyama's farm and was always on Amos' farm, i.e. Riversdale Farm. It was on the farm when the farm was sold to the appellant in July 1991 and was separated from the forty-eight head of cattle sold to the appellant together with the farm. After the farm had been sold, he worked for the appellant but left in July 1992. This witness contradicted himself in material respects: Firstly, he stated that when the appellant purchased the forty-eight head of cattle at Riversdale Farm, the heifer was on the farm but had been separated from the rest of the cattle. However, when cross-examined, he stated that on the day of the sale the heifer was not on the farm, but was there immediately before the sale and immediately after the sale. Secondly, he was evasive as to whether or not he was present when the forty-eight head of cattle were handed over to the appellant. At first he said he was present. However, when questioned further he said he was not present, and that it was only Amos and the appellant who were present on that occasion. Thirdly, he was evasive when asked whether his wife had not been dismissed from employment by the appellant for theft. He was also reluctant to admit that his wife had been convicted and sentenced for that theft until the provincial magistrate put it to him. It was only after the commission of that offence by his wife that he left the appellant's farm in

July 1992. In the circumstances, not much weight should have been given to his evidence.

Beacon's evidence was as follows: He was first employed by the appellant in 1988 as a mechanic but also did other jobs. When the appellant bought Riversdale Farm in July 1991 he, too, moved to that farm. He first saw the heifer in question at the farm in November 1991 after it had strayed from Ngwenyama's farm. When he arrived at the farm on 27 July or 27 August 1991, the heifer was not there but the appellant had already bought the farm and the forty-eight head of cattle from Amos. He was not sure when he first became aware of the presence of the heifer on the farm, although he was certain that it was on the occasion when the appellant first impounded cattle which had strayed onto his farm, which was in November 1991. The appellant knew that the heifer had strayed from Ngwenyama's farm, and when he sold it to Nash in June 1993 it had been on his farm for two years. He later left the farm because the appellant dismissed him. This was after he had made the allegation that the appellant and his workers were thieves because he had visited the cattle pen and found the heifer missing. At the time he was dismissed he owed the appellant the sum of $490,00. However, because the appellant did not want him to report to the police the fact that he (the appellant) had sold the heifer to Nash, the appellant told him to forget about repayment of that sum. As a result, in his statement to the police he did not mention the fact that the appellant sold Ngwenyama's heifer to Nash. Before his dismissal he had another quarrel with the appellant, as a result of which he threatened to make sure that the appellant and his workers would end up in jail. I would now like to comment on this witness: When cross-examined he attempted to deny or qualify what he had said on the occasion he threatened the appellant and was

very evasive about it. Although he later admitted that he had been dismissed by the appellant, initially he was very evasive about whether he had resigned or had been dismissed. He did not tell the police that the appellant had bribed him in order to keep him quiet about the sale of the heifer to Nash, and gave no satisfactory explanation for his failure to give the police such damning evidence if it were true. In the circumstances, not much weight should have been given to the evidence of this witness.

Sergeant Chapasuka's evidence was as follows: Whilst investigating charges of stock theft against the appellant he was informed that the appellant had sold a number of cattle to Nash. He went to Nash's farm and, acting on information received, took possession of the heifer and the cow which is the subject of count three, which I shall deal with later. He took the two animals to an enclosure near Filabusi Police Station where they were guarded by two members of the Special Constabulary. That was in September 1993. Subsequently, after questioning the appellant, the latter told him that he had purchased the two cows from Amos. He then arrested Amos and brought him to Filabusi Police Station on 20 November 1993. He showed him the heifer and the other cow, and asked him to comment on what the appellant had said. In reply, Amos said that the heifer was not one of the cattle he had sold to the appellant. However, with regard to the other cow, he could not say whether or not it was one of the cattle he had sold to the appellant. Thereafter, on 5 February 1994, he made arrangements for two Doctors of Veterinary Science to examine the brands on the heifer. The request for this to be done had been made by the appellant. The examinations by the two doctors were carried out in the presence of the police. When Ngwenyama's brand on the heifer was scratched with a finger-nail it bled.

As already indicated, the appellant's defence was that the heifer was one of the forty-eight head of cattle which he bought from Amos in July 1991. He called a number of witnesses, most of whom were unsatisfactory. These were witnesses whom the State initially intended calling but did not call. However, the most important evidence for the appellant was that of Dr Maphosa and Dr Dando, the two Doctors of Veterinary Science who examined Ngwenyama's brand on the heifer. The circumstances in which the appellant made arrangements for the heifer to be examined are important and need narrating.

Shortly after the trial commenced on 24 January 1994 the provincial magistrate, the two public prosecutors and the appellant's counsel viewed the heifer in the presence of the appellant and some of the State witnesses. They observed that Ngwenyama's brand on the heifer was very clear. During that examination the appellant informed his counsel that he believed that the heifer had been re-branded because when he sold it to Nash it did not have Ngwenyama's brand. Bearing in mind the fact that the heifer had been in police custody at all material times, counsel for the appellant readily appreciated the seriousness of the allegation made by his client, i.e. that the heifer had been re-branded after it had been removed by the police from Nash's farm. Counsel was, therefore, anxious to have the brand in question examined by independent experts before making such a serious allegation against the police. Arrangements were then made for Dr Maphosa and Dr Dando to examine the brands on the heifer.

At the time of the examination Dr Maphosa was the Government Veterinary Officer stationed at Filabusi and Dr Dando was a veterinary surgeon in

private practice who had previously been employed by the Department of Veterinary Services as a Veterinary Officer for three years. After examining the brand in question on 5 February 1994, both men were convinced that it was three to six months old. They were certain that the heifer could not have been branded in 1990 or 1991, as alleged by Ngwenyama, unless it was subsequently re-branded three to six months before the examination. This evidence supports the appellant's contention that when he sold the heifer to Nash on 10 June 1993 it did not have Ngwenyama's brand. The evidence could also mean that the heifer had Ngwenyama's brand which may have been indistinct at the time, and that subsequently somebody re-branded the heifer whilst it was in police custody to make the brand clearer and thereby bolster the State's case against the appellant. In the circumstances, it was unsafe to reject the appellant's contention that the brand was a new one. There was a reasonable possibility that what he said was substantially true. He should not have been convicted on this count.

The provincial magistrate criticised the appellant for raising the issue of the re-branding of the heifer rather late. That criticism was unfair. The appellant did not see the heifer from the time it was taken by the police from the Nash brothers in September 1993 to the time it was viewed by the court in January 1994. He did not, therefore, know of the existence of the new brand and could not have mentioned it in his defence outline. When he saw it for the first time he immediately informed his counsel who took immediate steps to have it examined by independent and impartial experts before bringing the matter to the attention of the court.

In the circumstances, the conviction and sentence on count two should be set aside.

COUNT THREE

As already indicated, the allegation on this count was that on 10 June 1993 the appellant sold to Nash a cow which had strayed onto his (the appellant's) farm and in respect of which the owner was not known. The appellant's defence to this charge was that the cow was one of the forty-eight head of cattle which he bought from Amos in July 1991 when he purchased Riversdale Farm from him. The appellant's contention was corroborated in two respects:

Firstly, it was Sergeant Chapasuka's evidence that when Amos saw the cow on 20 November 1993 he could not say whether or not it was one of the forty-eight head of cattle which he had sold to the appellant, and could not rule out the possibility that it was one of them. In my view, that should have been the end of the matter as far as this count was concerned.

Secondly, when the cow was examined by the court on the third occasion, the examination revealed a brand which very much resembled the appellant's brand. However, for some unknown reason, the results of that examination did not form part of the transcript. Consequently, the appellant filed a chamber application in the High Court at Bulawayo seeking an order rectifying the transcript by the inclusion of the evidence which had been omitted. The order was granted in January last year. Quite clearly, the existence on the cow of a brand which

very much resembled the appellant's brand corroborated the appellant's contention that the cow was one of the cattle which he had purchased from Amos, bearing in mind the fact that he had taken over the brand from Amos.

The appellant should not, therefore, have been convicted on this count.

Finally, I would like to comment on the manner in which the provincial magistrate questioned the appellant and his witnesses. The questioning was so intense and protracted that the provincial magistrate ran the risk of descending into the arena. The broad limits within which judicial questioning should be confined were spelt out in *S v Hall* 1982 (1) SA 828 (A). The headnote accurately sums up the broad limits at 828 C-E as follows:-

> "While it is difficult and undesirable to attempt to define precisely the limits within which judicial questioning should be confined, the following broad, well-known limitations should generally be observed: (1) The trial judge should so conduct the trial that his open-mindedness, his impartiality and his fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused. The judge should consequently refrain from questioning any witnesses or the accused in a way that, because of its frequency, length, timing, form, tone, contents or otherwise, conveys or is likely to convey the opposite impression. (2) A judge should also refrain from indulging in questioning witnesses or the accused in such a way or to such an extent that it may preclude him from detachedly or objectively appreciating and adjudicating upon the issues being fought out before him by the litigants. (3) A judge should also refrain from questioning a witness or the accused in a way that may intimidate or disconcert him or unduly influence the quality or nature of his replies and thus affect his demeanour or impair his credibility."

These broad limits apply to all judicial officers. I hope that the provincial magistrate will take note of them.

In the circumstances, the convictions and sentences in respect of counts two and three are set aside. The conviction on count one is altered to one of stock theft involving theft of the carcass of a cow which had been slaughtered. The sentence in respect of that count is set aside and the following is substituted:

> "A fine of two thousand dollars or, in default of payment, two months' imprisonment with labour. In addition, one month's imprisonment with labour, all of which is suspended on condition that the appellant pay to the complainant the sum of one thousand dollars, through the Clerk of Court at Gwanda Magistrate's Court, by 8 June 1998".

GUBBAY CJ: I agree.

EBRAHIM JA: I agree.

Joel Pincus, Konson & Wolhuter, appellant's legal practitioners