THE STATE v. JONAS HEPUTE

CASE NO. CA 4/2001

2001/06/13

Maritz, J *et* Shivute, J.

EVIDENCE

Admissibility -behavior of animals - distinction drawn between evidence based on the instinctive behavior of animals uniform to a class or *species* and other (including trained or induced) behavior - evidential basis to be laid - no such basis laid and inferences simply conjecture - magistrate misdirected himself when relying thereon for conviction

Admissibility - customary practice not having status of customary law - traditional test performed to determine whether disputed cow associates with one or another herd - result of test no evidentiary value

Adequacy of proof - intention to permanently deprive the owner of the whole of his/her benefit of the thing in question - *bona fide* claim of ownership by accused of disputed thing - retention thereof by accused not manifestation of intent to steal.

CASENO. CA 4/2001

IN THE HIGH COURT OF NAMIBIA

JONAS HEPUTE **Appellant**

versus

THE STATE **Respondent**

CORAM: MARITZ, J. *et* SHIVUTE, J.

Heard on: 11 June 2001

Delivered on: 13 June 2001

REASONS FOR JUDGMENT

MARITZ, J. The appellant was charged with and convicted in the Magistrate's Court, Opuwo of the theft of a cow. This appeal is against that conviction and the resultant sentence of 18 months imprisonment of

which eight months were suspended for five years on the usual conditions.

The central issue on appeal is, as it was during the trial, the ownership of the cow: The complainant maintained that it was a gift from his aunt Theresia, whereas the appellant testified that the cow was born and raised in his herd. Both of them had witnesses corroborating their contradictory claims. Being cousins, both farming in a remote rural area of Namibia, the headman of Otavi and his council first endeavoured to resolve the dispute. During that hearing, both the appellant and the complainant were invited to present, what they claimed to be, the dams of the disputed cow. Those cows were placed together with the disputed cow in a kraal and their interaction and behaviour were observed. They were thereafter released into the veldt and again carefully observed. The councilors then mustered their collective experience about the behaviourisms of cattle in an attempt to determine whether the cow was born to the one or the other herd. There was apparently much dissent between the councilors about the deductions to be made of the disputed cow's behaviour. Unable to resolve it, they, as a last resort, questioned the disputing parties and some of their witnesses. On the basis of the answers given they tentatively concluded that the cow belonged to the complainant. That caused, in the words of the headman, "the eruption of a big quarrel" among the councilors who had tried the case with him. As the actual purpose of the assembly of councilors was to attend a funeral and the discord was threatening to detract from the decorum that was supposed to prevail at such a solemn occasion, the cow was returned to the appellant and the proceedings adjourned to another date and place. Continuation never materialized, apparently because the appellant raised certain jurisdictional objections and otherwise behaved himself contemptuously

towards the headman.

Thus, the matter landed before the Magistrate of Opuwo. He patiently received the conflicting evidence, and then, relying heavily on the behaviour of the disputed cow when she was placed together with the cattle from the two different herds, inferred that the cow recognised her dam amongst that of the complainant. He concluded that the complainant was the owner of the cow and, because the appellant retained the cow notwithstanding the complainant's claim of ownership, that he had acted unlawfully and had exhibited the intention to permanently deprive the complainant of his property. He therefore convicted the appellant of theft.

Sitting as a Court of Appeal and without the numerous advantages a trial magistrate enjoys in assessing the credibility of witnesses, this Court is normally reluctant to upset the trial magistrate's findings of fact (See: *R v Dhlumayo and Another,* 1948 (2) SA 677 (A) at 705 to 706). However, if it is apparent that the magistrate has misdirected him- or herself and that that misdirection materially impacted on the conclusion he or she arrived at on the guilt or innocence of the accused, this Court is charged with the duty to reassess the evidence and at liberty to make its own findings on the facts. Depending on the nature of the misdirection and the circumstances of the case, the Court of Appeal may" to a greater or lesser extent still rely on the credibility findings of the trial magistrate (See: S v Tshoko, 1988(1) SA 139 (A) at 142F-J).

Mr Damaseb, appearing on behalf of the appellant, argued that the

magistrate's strong reliance on the behaviour of the cattle for his findings, constitutes a serious misdirection on the facts. In the course of his submissions, he charged that the magistrate had erred in his approach to the issue when he premised his findings on the assumption that there were "no legal rules laid down with regard to the behaviour of animals". He then compounded the error by making inferences from the behaviour of the cattle and convicting the appellant on the basis thereof. Mr Damaseb submitted that evidence of animal behaviour was inadmissible in our courts and that the magistrate could not have relied thereon.

The admissibility of evidence that a dog has identified a suspect by scenting has been the subject matter of a number of judgments. In *R v Trupedo,* 1920 AD 58, following *R v Kotcho,* 1918 EDL 91 and *R v Adonis,* 1918 TPD 411, the South African Court of Appeals held it was not admissible. Innes, CJ reasoned as follows in favour of such exclusion:

"But to draw inferences from the actions of a trailing hound as to the identity of a particular individual is ...to enter a region of conjecture and uncertainty. We have no scientific or accurate knowledge as to the faculty by which dogs of certain breeds are said to be able to follow the scent of one human being, rejecting the scent of all others. But it is not contended that they act merely on instinct; it is admitted even by their optimistic instructors that they must be carefully trained before they can be relied upon. The discharge of their task and the identification expected of them involve processes closely akin to reasoning. If the dog is to be regarded as the real though not the legal witness announcing by his bark that he has found the person of whom he was in search the evidence on the point would be so closely analogous to hearsay as to come within the principle of the hearsay rule. But even if he is not so regarded there is too much uncertainty as to the constancy of his behaviour and as to the extent of the factor of error involved to justify

us in drawing legal inferences therefrom. And therefore it should not be regarded as

relevant... But I would remark that not only is there the possibility that the dog may fail to distinguish between one scent and another, or may desert one for the other; but also there is the possibility of a misunderstanding between the animal and his keeper...The whole experiment however contains too great an element of uncertainty to justify us in drawing inferences from it in the course of legal proceedings; and evidence of the behaviour of the dog is therefore inadmissible."

As Nestadt, AJA pointed out in S *v Shabalala,* 1986(4) SA 734 (A) at 741 to 742, the *ratio* in Trupedo's case has given rise to controversy about whether the Chief Justice intended to convey that such evidence is *per se* inadmissible or that it may be admissible if a proper scientific basis has been presented for its reliability in the circumstances of the case in question. After a thorough analysis of the Trupedo judgment, he concluded as follows on 742G - 743 C:

> "The judgment of INNES CJ did not rest simply on a factual finding concerning the reliability or otherwise of the particular dog whose activities were in issue. In my view, it decided that, in principle, evidence of the conduct of dogs, in identifying an accused person by scenting, is inadmissible. The approval of *R v Kotcho [supra)* and particularly the mention therein of the need for legislation if this sort of testimony is to be admitted, makes this clear.
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> It does not follow that *Trupedo's* case is to be taken as the final pronouncement on the matter in all circumstances. Despite the objection to the evidence based on its hearsay nature, its exclusion is not absolute. It is still necessary to determine the parameters of the principles to be extracted from the decision.

> To do this, it is legitimate, and necessary, to look at the reason(s) underlying it *[Pretoria City Council v Levinson* 1949 (3) SA 305 (A) at 317). As already indicated, the principal one was the (extreme) untrustworthiness of the evidence. Where, therefore, this element is sufficiently reduced, even though it be not removed, the actions of the dog would become relevant and evidence thereof admissible. It is not possible to define what would have to be established to achieve this. However, it is apparent from the judgment that mere proof that the dog came from stock having special powers of discrimination between the scent of one human being and another, that he was of pure blood and possessed these qualities himself and that he had been specially trained in tracking (being certain 'safeguards' applied by those American Courts which admit this type of evidence), will not suffice (see *R v Trupedo* at 61 - 2). On the other hand, additional evidence explaining 'the faculty by which (these) dogs... are... able to follow the scent of one human being, rejecting the scent of all others', would suffice."

Counsel did not refer me to any authority on the admissibility of evidence regarding the behavioral patterns of cattle and I have not been able to find any. There are material disputes between the witnesses precisely in which manner the cattle interacted with one another. The behavior on which the magistrate based his findings is that presented by the headman: The cow in issue was placed in the kraal together with other cattle, including the other cows that the disputing parties claimed to be her dam. When released the next day, the cow presented by the complainant to be the dam of the disputed cow left the kraal together with other cattle to graze on the far-side of a nearby river. The cow, which the accused claimed to be the dam of the disputed cow, went into another direction. The disputed cow followed the other cattle for some distance but stopped short of the river.

What, if anything, can be gained of such behaviour? The respondent readily concedes that it did not present any expert evidence to assist the court in evaluating the significance of the evidence or to substantiate the inferences it sought the magistrate to draw. The appellant, referring to the evidential thresholds alluded to in the *Shabalala* case before the evidence of sniffer-dog identification would gain sufficient reliability to become relevant and admissible, argued that, by parity of reasoning, the evidence of cattle behaviour should be excluded in the circumstances of this case.

The respondent, seeking to uphold the conviction, countered by inviting the Court to distinguish between trained and untrained animal behaviour: That of sniffer-dogs falls in the former category, whilst instinctive behaviour (for example, the urge of a calf to suckle) under the latter. Whilst evidence is required to establish the reliability of animal behaviour acquired by human intervention, the latter does not.

Support for the respondent's contention may be found in the remarks of

Innes, CJ in the Trupedo-case *{supra)* at 62-63:

> "Now there are cases in which, as it seems to me, inferences may be quite properly drawn from the behaviour of animals. A fact in issue in a proceeding may be whether A entered a certain room at night; the fact that a dog belonging to A and having no other friend was in that room and did not bark would be a fact from which it might be inferred that A was the person who entered there. It would not be a conclusive inference, for there are methods by which a dog may be silenced, or may be induced to refrain from barking at a stranger. But the inference

> would be a legitimate one, and the fact that the dog did not bark would be relevant and might therefore be proved. It would be easy to instance other cases in which inferences might properly be drawn from the behaviour of animals. The reason in such cases (which do not include instances where special tricks have been taught) will be found to be that the behaviour in question is instinctive and invariable on the part of all animals of the class concerned; it may therefore safely be acted upon. The habit of a dog to resent the entrance of a stranger at night, is independent of instruction or experience; it is based upon the instinct of self-preservation; and it is patent to our observation."

I am in respectful agreement with the distinction drawn by the Chief Justice between the admissibility of evidence based on the instinctive behaviour of animals which is uniform of a particular class or *species*, and the admissibility of evidence based on other (including trained or induced) behaviour of animals. Once an evidential basis has been laid that the behaviour of a particular animal is instinctive and that it is invariable on the part of the class or *species* to which that animal belong, the evidence becomes admissible (subject, of course, to other considerations such as relevance) and, depending on the nature of the evidence and the circumstances of the case, the Court may attach more or less weight thereto and draw inferences therefrom.

It is on that basis that the respondent is seeking to justify the magistrate's heavy reliance on the evidence of the disputed cow's behaviour. I confess, having analysed the evidence, I find no such justification. There is no evidential basis to suggest that the disputed cow followed the complainant's cow because of some instinctive urge. It should be borne in mind that the disputed cow was weaned some years before the "test" and there is no scientific evidence on record showing

what, if any, is the capacity of weaners, or, for that matter, mature cattle, to recognise their dams by smell or sight. But even if they do, there is no suggestion that there is some residual bond which instinctively and invariably causes a desire of the one to associate or be herded together with the other. As it is, even the headman's councilors, who, presumably have some acquired knowledge about the behaviour of cattle through keen observation as traditional cattle farmers, remained sharply divided on what significance could be attached to the disputed cow's behaviour. For all we know, she might have followed the one group of cattle rather than the other because she preferred the grazing oh the one side to that on the other. The reasons why the disputed cow behaved in that manner fall within the "realms of conjecture" and, in my view, should not have attracted any evidentiary weight.

In a last trench defense of the magistrate's approach, counsel for the respondent submitted that the "test" which the cow was subjected to is a "custom" in the particular traditional community and an acceptable method of settling disputes in that area. According to her, "native law and custom" are recognised by Proclamation 15 of 1928, and having been established during the trial, the magistrate was entitled to rely on the results of the customary test.

I intend no disrespect if I deal with these submissions rather briefly. The recognition of indigenous laws under section 9(1) of Proclamation 15 of 1928, typically in virtually all the colonized areas of Africa, introduced a rather unequal dualism of legal and judicial systems where the colonial

powers introduced their own laws as the laws of their occupied territories

but permitted "the regulated continuance of traditional African law and judicial institutions except where they ran counter to the demands of colonial administration or were thought repugnant to 'civilised' ideas of justice and humanity" (Allot: *New Essays in African Law,* p 11 - 12). So too, did section 9(1) initially limited the discretionary application of indigenous law to

> "the courts of native-commissioners in all suits or proceedings involving questions of customs followed by Natives, to decide such questions according to the native law applying to such customs except in so far as it shall have been repealed or modified: Provided that such native law shall not be opposed to the principles of public policy or natural justice... ".

The respondent does not contend that the "test" has acquired the status of customary law, but simply that it is a custom recognised in general terms by law. Inasmuch as the section recognised indigenous "custom" (See: *Kaputuaza and Another v Executive Committee of the Administration for the Hereros and Others,* 1984(4) SA 295 (SWA) at 298E) it did so for the limited application of indigenous laws to those customs in colonial courts established exclusively for indigenous peoples and presided upon by colonial appointees - not for application in any of the other courts of the country. Even before independence, section 9 was repealed by the provisions of section 5 of Act 27 of 1985 (National Assembly) and, although Proclamation R348 of 1967 conferred limited jurisdiction on chiefs and headmen to adjudicate civil and criminal cases according to indigenous laws and custom, it remains for the limited purpose of matters pending in those traditional courts. In short: The relevant

provisions of Proclamation 15 of 1928 on which the respondent relies for its submission has been repealed; the reference to "indigenous "custom" in those provisions in any event does not have the effect respondent is contending for; its application is limited to proceedings in courts other than the ordinary courts and, not having attained the status of a customary rule of law, it is not enforceable as contemplated in Article 66 of the Constitution.

For these reasons, I am of the view that the magistrate misdirected himself when he admitted and relied on the evidence of the disputed cow's behaviour in deciding the issue of ownership. The misdirection is central to the issues in the case. The respondent's attempt to dilute the importance of the misdirection by contending that, in the case of theft, it is not incumbent on the State to prove ownership by the complainant before a conviction can be secured, is misplaced in the context of this appeal. Although the proposition is sound in law (See: S *v Kariko and Another,* 1998(2) SA 531 (Nm) at 535f), the facts in this case do not suggest that the cow could have been the property of any other person: it was either that of the complainant or that of the appellant. If the respondent failed to prove beyond reasonable doubt that it was the property of the complainant, the appellant was entitled to his acquittal.

Moreover, the nature of the misdirection is such that it also significantly influenced the magistrate's findings on the credibility of the witnesses. This Court is therefore unable to rely on the magistrate's remarks about the credibility and is therefore at liberty to consider the facts afresh, uninhibited by the trial court's reasoning and findings.

As Mr Damaseb pointed out on behalf of the appellant, the description of the disputed cow is general in nature ("red with a white stripe on her stomach"). None of the witnesses referred to any unique characteristics which would have allow them to distinguish her from others with a similar colour or pattern. The earmarks she had were those of the appellant. Complainant alleged that she initially had his earmarks but that those were altered and that the alterations were still fresh when the cow was first observed in the appellant's herd. The appellant took issue with that and, in support called two of his herdsmen who testified that the cow was born in the appellant's herd during March 1996; that it was earmarked during February 1998 and that it had no fresh earmarks on when it was seen by the complainant's witnesses during August 1998. By the time the dispute came before the headman during December 1999, he could evidently no longer judge when the earmarks were made.

In the absence of any distinguishing identification marks on the cow which could have made the identification thereof by the prosecution's witnesses more reliable, there must, in my view, be a reasonable doubt whether they could not have mistakenly, albeit *bona fide*, identified the cow as that of the complainant. As the respondent had to discharge the burden of proving beyond reasonable doubt that the cow belonged to the complainant to secure a conviction in the circumstances of this case and has failed to discharge it, it follows that the appellant should have been acquitted.

There is a further reason why the appellant should succeed in this

appeal and, given the possibility that the appellant may still be stigmatized if he is simply found "not proven guilty", it is perhaps appropriate to mention it in this judgment.

The evidence suggests and the magistrate accepted that the appellant did not exercise direct control over his herd but that he did so through his herdsmen. When he first heard about the complainant's claim he indicated that he would investigate the matter. The cow was then, as the magistrate found, "pointed out to him by his herd boys". In his reasons, the magistrate sought to justify the appellant's conviction by reasoning as follows:

> "(a) Accused's attention was drawn to the fact that a cow not belonging to him was found among his" cattle...the fact that he kept it and exercised control over it is indicative of his intention to appropriate the cow and to permanently deprive the owner of his property. See R v Sibiya, 1955(4) SA 247 at page 250 par B-F.
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> (b) Appellant's continued possession and control of the cow despite being made aware of the fact that it does not belong
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> to him was unlawful.
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> (c) (a) and (b) above is indicative of the intention to steal."

It is trite law that theft is committed where the accused's continued possession of the thing in question is accompanied by an intention to deprive the owner permanently of the whole benefit of his or her

ownership of the thing in question. That much is clear from Sibiya's case and a plethora of other cases to the same effect. Implicit in this proposition, however, it the absence of any *bona fide* belief on the part of the accused that the thing in question belongs to him or her to the exclusion of any other person. If the accused so believes and does so *bona fide* (albeit later proven to be erroneous), he or she does not manifest an intention to steal.

The appellant acted on the assurances given to him by his herdsmen that the cow was born by one of his cows in his herd. There is no suggestion that, in acting on the information and claiming ownership thereof, he did not do so *bona fide.* To the extent that the complainant maintained the contrary, the appellant was entitled to assert his claimed rights and leave it to the complainant to vindicate his claim through recourse in an appropriate court. Inasmuch as the appellant was doing just that, the magistrate was not entitled to infer from his persistence that he had the intention to steal the cow from the complainant. The magistrate's reasoning, with respect, lacks cogency and logic and was premised on the incorrect application of the law to the facts.

It is for these reasons that the following order was made:

1. The appeal succeeds.
2. The appellant's conviction by the magistrate, Opuwo, on 8 November 2000 on a charge of theft and the resultant sentence of 18 months imprisonment of which 8 months were conditionally suspended for five years are set aside and

substituted for the following order: " The accused is found not-guilty and discharged."

I AGREE : SHIVUTE