FERDINAND KUTAMUNDU v THE STATE

CASE NO. CA 167/2003

2005/06/03

Hannah, J *et* Maritz, J.

LAW OF EVIDENCE

Evidence – accomplice – dangers inherent in evidence of – witness of that class not always wholly consistent, reliable or truthful – must assess evidence as part of the evidence as a whole – importance of corroboration

CASE NO. CA 167/2003

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**FERDINAND KUTAMUNDU**

**APPELLANT**

versus

**THE STATE**

**RESPONDENT**

(HIGH COURT APPEAL JUDGMENT)

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

Heard on: 2004-03-18
Delivered on: 2005-06-03

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**JUDGMENT**

**MARITZ, J:** The appellant was one of three accused charged and convicted in the Magistrate's Court, Opuwo, of the theft of six head of cattle to the value of N$7 500-00. The appellant was sentenced to the payment of a fine of N$7 000-00 or, in default of payment, 7 years imprisonment of which N$1 000-00 or 1 year imprisonment was conditionally suspended for a period of 5 years. This appeal lies against the appellant's conviction and sentence.

The main thrust of the grounds advanced in the appellant's Notice of Appeal on Conviction is that the evidence did not establish his involvement in the theft of the cattle beyond reasonable doubt. That is also the position taken by Mr Christiaans, counsel who appeared for the appellant *amicus curiae.*

The undisputed evidence adduced by the Prosecution establishes the following as background to the findings concerning the appellant's alleged involvement in the commission of the crime: Mr Ndjai, an elderly communal farmer (the "complainant"), received a report from his son on 20 October 2001 that the appellant's two co-accused ("accused 1 and 2") had been seen two days earlier driving six of the complainant's cattle along a road near Ombombo Village, a rural settlement in the Opuwo district. The complainant reported the theft of his cattle to the local police, but, doubtful that his

complaint would not trigger an immediate investigation, he departed in search of his cattle.

He came across accused 1 and 2, well-known to him as two half-brothers from a nearby village, and enquired from them about his cattle. They claimed that the cattle they had driven and sold belonged to an Oshiwambo-speaking man but, when he insisted that they should take him to the man, they changed their tune and said that the cattle belonged to them and that they had sold them. In the course of their further interrogation by the complainant, both accused informed him that, by agreement with the appellant, they had to take the cattle to Oshakati to sell. They also produced an official permit for the removal of the cattle on which the name of the appellant appeared.

They accompanied the complainant to point out the places where and the persons to whom they had sold the cattle and, as a result thereof, five of the six cattle were recovered. The complainant thereupon handed accused 1 and 2 to the police for further investigation of his complaint. Two further witnesses, Simon Shinana and Tobias Shaningua corroborated the sale of some of the cattle. According to them accused 1 was in charge of the negotiations and the appellant was not present.

A copy of the permit handed to Constable Joram Hamukwaya by one of the purchasers, led the investigating officer to the appellant and to Angatha Kashiyere. The latter was an assistant clerk in the Ministry of Agriculture stationed at Opuwo where she was tasked with the issuing of permits for the removal or transportation of livestock. She testified that on 15 October 2001 the appellant approached her with -what purports to be - a document issued by headman Gerson Razapi Kavari of Kaoko Otavi relating to six head of cattle. She recognised the signature as that of the headman but noticed that particulars of the owner of the cattle had been omitted. She therefore enquired from the appellant about ownership of the cattle. The appellant stated that he owned them and requested that a permit be issued to him for the removal of the cattle from Opuwo to Oshakati. She thereupon issued a “permission to travel with animals” to the appellant under her signature. The document authorises “Ferdinand Kutamundu to travel with six head of cattle from Opuwo to Oshakati” and, in addition, contains particulars of the name of the headman and the area of his jurisdiction. The permit, she testified, would not have been issued if it had not been authorised by the headman.

About two weeks after she had issued the permit the police presented a copy thereof to her which she immediately identified. She informed the police officer that she did “not know the person” to

whom it had been issued, but, upon a further question whether she would be able to identify the person to whom she had issued it, she said that she knew the person. She accompanied the police to the police station where she identified the appellant. She explained the apparent contradiction by saying that although she could not recall the appellant's name when the police approached her, she could identify him by his appearance. She mentioned that she knew him by sight even before he had called at her office on 15 October 2001, "because he had an interesting case here in Opuwo and I personal like coming to attend it." *(sic)*

Her immediate identification of the appellant at the police office was corroborated by Constable Hamukwaya. Hamukwaya also testified that, after their arrest, both accused 1 and 2 had informed him that the appellant had instructed them to take the cattle to Oshakati and to dispose of them there. They also informed him that the appellant had said to them that he could not accompany them as he had to report twice daily at the Opuwo Police Station. According to them, the appellant gave them the permit to take along.

These assertions by accused 1 and 2 were repeated in the course of their evidence. They added that they had agreed to a fee of N$500-00 each to take the cattle to and sell them at Oshakati. In terms of

the agreement they were required to hand over the proceeds of the sale to the appellant whereafter they would be paid for their efforts.

The appellant maintained throughout the police investigation and during the trial that he knew nothing about the cattle. He admitted that he knew accused 1 by sight prior to his arrest and testified that he only met accused 2 when the investigation into the theft commenced. He claimed to be surprised by the insertion of his name on the permit and could not explain why he would be falsely incriminated by his co-accused.

Mr Christiaans submits that the evidence of accused 1 and 2 does not pass the muster of the cautionary rule applicable to accomplices. He referred us to the well-known cases of *R v Ncanana*, 1948(4) SA 399 (A), *S v Hlapezula & Others*, 1965(4) SA 439 (A) and *R v Mokoena*, 1932 OPD 79 at 80. In *Ncanana*'s case Schreiner, JA underlined the need to approach the evidence of an accomplice with caution. He pointed out that "the trier of fact should warn himself ... of the special danger of convicting on the evidence of an accomplice; for an accomplice is not merely a witness with a possible motive to tell lies about an innocent accused but is such a witness peculiarly equipped, by reason of his knowledge of the crime, to convince the unwary that his lies are the

truth." In Hlapizula's case, Holmes JA elaborates on the reasoning behind this approach (at 440D-F):

> "It is well settled that the testimony of an accomplice requires particular scrutiny because of the cumulative effect of the following factors. First, he is a self-confessed criminal. Second, various considerations may lead him falsely to implicate the accused, for example, a desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency. Third, by reason of his inside knowledge, he has a deceptive facility for convincing description – his only fiction being the substitution of the accused for the culprit."

In assessing the evidence of accused 1 and 2 the Court had to bear in mind that they made previous inconsistent statements when they were confronted by the complainant about ownership of the cattle. They admitted guilt to an offence involving dishonesty and it had to be appreciated that they could have had some interest in incriminating a third person in attempting to reduce their own moral blameworthiness in the perpetration of the crime. It must, however, be borne in mind that "one cannot expect a witness of that class to be wholly consistent and wholly reliable, or even wholly truthful in all that he says. If one had to wait for an accomplice who turned out to be a witness of that kind – or indeed anything like it – one would, I think, have to wait for a very long time" (per Davis AJA in *R v Kristusamy*, 1945 AD 549 at 556).

Their conflicting statements made during the first confrontation with the complainant must be considered against the backdrop of the realisation that they had been found out and the not-so-unexpected urge to cover their crime by lies. After their arrest however, they consistently maintained that they had acted upon the directions of the appellant. Their version is supported by the permit issued in the appellant's name which they had in their possession; the details of the agreement they had with the appellant and the knowledge they had about the circumstances which the appellant found himself in. Their statement that the appellant had said that he could not accompany them because he had to report at the Opuwo Police Station twice daily has a clear ring of truth to it. It was admitted by the appellant that he had to comply with an order to that effect and, if he is to be believed about the remoteness of the relationship between him and his co-accused, one cannot but wonder how they would have otherwise become privy to such information.

Most importantly though, is the corroboration accorded to their evidence by that of the officer who had issued the permit to the appellant, Angatha Kashiyere. She is a disinterested witness with no reason to falsely incriminate the appellant. She could recall the circumstances under which the licence had been issued some 14 days before the appellant arrest with great clarity. She explained that although she had not known the appellant by his name before

that date, she had developed a keen interest in another court case against the appellant and therefore, knew him by sight. When asked to do so, she identified the appellant without hesitation at the Police Station. Her identification is corroborated by the fact that the person so identified indeed bore the name she had entered on the permit two weeks earlier. The identification, although not made at an identification parade, is for that reason reliable.

Faced with evidence of such magnitude against him, the appellant's denial of any knowledge of the theft, is, to say the least, unconvincing. It was, in my view, correctly rejected by the Magistrate as false beyond reasonable doubt. The combined weight of the evidence adduced by the Prosecution and those of his co-accused established his guilty beyond reasonable doubt and the appeal against his conviction falls to be dismissed for that reason.

Although the appellant initially also appealed against his sentence, that part of his appeal was abandoned during argument.

In the result, the appeal is dismissed.

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MARITZ, J.

I concur

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HANNAH, J.