Judgment No. S.C. 43/85 Crim.
Appeal No. 108/85

PETRUS STEPHANUS VERMAAK NEL v THE STATE

SUPREME COURT OF ZIMBABWE,
BECK, JA, GUBBAY, JA & McNALLY, JA,
HARARE, MAY 13 , 14 & 21 , 1985.

E.W.W Morris, for the appellant

E Chatikobo, for the respondent

BECK, JA: This is an appeal against conviction on two counts of having contravened s 5 of the Stock Theft Act /Cap *12/.*

The appellant is a man of 72. He farms and owns a butchery in the Karoi District. The complainant owns a farm, “Utopia", adjoining the appellant's farm. Itayi Chikuwawu was a herdsman on the complainant's farm. On 29 May 1984 the appellant bought three oxen from Itayi. Five weeks later, on 6 July 1984, he bought three more oxen from Itayi. Both transactions were negotiated between the appellant and Itayi at the slaughter house on the appellant's farm. The six oxen all belonged to the complainant and were branded "4J". Itayi had no right to sell them and in fact had stolen them from the complainant. The appellant paid Itayi $570 in respect of the first transaction and $400 in respect of the second. He slaughtered the cattle and sold the meat in his butchery. On 20 July 1984 Felix Maoneke, the manager of the farm "Utopia", was given permission by the appellant to search the appellant's hide room at the butchery, where three hides from "Utopia" cattle were found. One bore the "4J" brand mark. The brand mark had been cut off the other two hides, but the pieces that bore the "4J" brand mark were still there. Almost six weeks later the police arrived at the appellant's butchery. The three hides and the pieces cut from two of them were all still in the hide room for the police to see.

It having been proved that the stock that the appellant acquired from Itayi were stolen it was necessary for the appellant to prove on a balance of probability firstly that he subjectively believed that the cattle were the property of Itayi, or that Itayi was authorised by the owner of the cattle to sell them; and secondly that, objectively considered, he had reasonable cause for that subjective belief. Unless the appellant successfully discharged both legs of that onus which the -section casts on him he was

correctly convicted.

It was persuasively argued by Mr Morris that the appellant discharged the first leg of that onus, and I am prepared to accept that this is so, That also appears to have been the finding of the magistrate. Certainly there are a number of aspects of the appellant's behaviour which are indicative of an innocent rather than a guilty mind. Thus, having enquired as to who Itayi was from one of his own trusted employees, the appellant was told that Itayi did indeed work on the adjoining farm "Utopia", as he claimed, and was told, it seems, that Itayi was employed as a manager there. The appellant obtained and recorded Itayi's name and personal identification number, accurately entered the transactions in his stock book, obtained Itayi's signature to the entries, kept the hides and did not seek to destroy either the hides or the excised pieces of hide with the "Utopia" brand mark nor to conceal them from Maoneke or from the police. The price paid was not shown to be below what the appellant may have been expected to pay for the cattle In question at a time when slaughter cattle were freely obtainable by reason of the prolonged drought.

As against these features the only fact that tends to show a subjectively guilty mind is the excision from two of the hides of the brand mark. However, the appellant testified that he did not instruct that to be done, nor did he do it himself, and those assertions have not been shown to be false. In any event, whatever sinister inference might be suggested by the fact of such excisions is set at naught by the circumstance that it was only two hides that were defaced in this way and that the tell-tale pieces were not destroyed but were kept with the hides from which they were cut.

In these circumstances I do not think that the magistrate can be faulted for concluding

that the appellant had shown, as a matter of probability, that he subjectively believed that the cattle were not stolen, although Mr Chatikobo, who appears for the State, contended that the evidence was insufficient to justify that conclusion.
Turning to the question as to whether a reasonable man would have believed in these circumstances that the cattle were the property of Itayi, or that he was duly authorised by the owner of the cattle to dispose of them, it was Mr Morris's. Submission that the evidence suffices to discharge this leg of the appellant's onus as well.

I do not agree. All the appellant had to go on was the assurance given him by a trusted employee that Itayi was a frequent visitor to the beerhall on the appellant's farm, and that he was either the owner or the manager of "Utopia" farm.
Itayi himself, so the appellant said, claimed to be the manager of "Utopia". *Even* if it be accepted that it was reasonable for the appellant to believe that Itayi was the manager of "Utopia", I do not accept that it was also reasonable to believe that Itayi was duly authorised by the owner of that farm to negotiate the sale of farm cattle and to receive the cash proceeds. The reason that Itayi gave for seeking to sell the cattle is that they were being troubled by lions and the impression that he created on the occasion of the first of the two transactions was that he had searched for the cattle after lions had scattered them and, having found them on the boundary between "Utopia" and the appellant's farm, decided to offer them to the appellant for sale. I do not consider that a reasonable man would accept on the basis of these circumstances that a manager such as Itayi would be clothed with the authority to make a decision to dispose of his employer's cattle, to proceed forthwith to transact the sale of the animals, and to receive into his possession the proceeds of the sale in the form of cash.
It is difficult to glean from the appellant's evidence whether he believed that Itayi was selling the cattle in his capacity as manager of "Utopia" farm, armed with authority to deal in that way with the farm cattle or whether he believed that the cattle were Itayi's own; for at one stage in the appellant's evidence he said that Itayi said the cattle belonged to him. It would, however, not have been reasonable to have accepted without further question that the cattle were Itayi's, if that is what the appellant believed, merely because of an assurance that Itayi was indeed employed on the neighboring farm. The cattle were all branded with the complainant's brand mark, although the appellant says he did not see that, and in my view a reasonable man in the appellant's position would have made further enquiry into Itayi's bald assertion that the animals were his. The protection that the section is designed to afford to owners of stock would be reduced to a mockery if stolen stock could be as easily and safely sold as in the circumstances relied on by the appellant.

Accordingly the appeal against conviction is dismissed.

There was no appeal against sentence. However, the sentence requires to be re-formulated in order to give proper effect to what, it is common cause, the magistrate intended to achieve. It is therefore ordered that the sentence must read.

Both counts are taken as one and the appellant is sentenced to a fine of $1 000, or to ten months' imprisonment with labour in default of payment. Half of this sentence is suspended for five years on condition that the appellant is not convicted of contravening, during the period of suspension, section 5 of the Stock Theft Act and sentenced to imprisonment without the option of a fine or to a fine in excess of $200.

GUBBAY, JA: I agree.

McNALLY, JA I agree.

Morris, Beale and Collins, appellant's legal representatives