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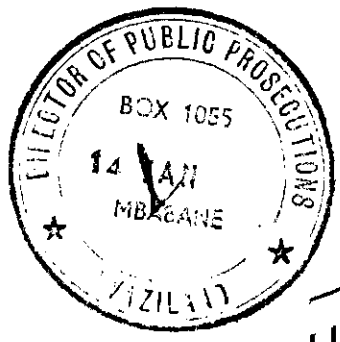
STOCK THEFT.
Sentence.

IN THE HIGH COURT OF SWAZILAND



In the matter between:

Stock Theft.

THE KING

vs.

REUBEN VILAKAZI

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REVIEW ORDER NO.27/79
MBABANE ON 28th DECEMBER, 1979

DISTRICT OF LUBOMBO
REVIEW CASE NO.172/79

JUDGMENT ON REVIEW

NATHAN, C.J:

The Accused in this case was convicted on two counts of stock theft as defined in Section 2 of Act 6 of 1904. The two counts were taken as one for the purposes of sentence; and the Accused was fined E400. or in default of payment to 2 years imprisonment. The Accused was a first offender aged 47. Count 1 involved the theft from one Msweli Mathebula of two head of cattle valued at E340 (E294 according to the charge sheet) on 29th August 1979; and Count 2 involved the theft on the same day of two head of cattle valued at E280, the property of one John Mamba. In each instance the Accused had sold the cattle which he had stolen.

The Accused stated in evidence that he thought all the cattle belonged to Msweli Mathebula. He said that Mathebula's cattle ate the Accused's cotton or destroyed 35 acres of his cotton field. He went to Mathebula to report this, and Mathebula threatened to stab him with some spears. He then reported to the charge office but the police said that Mathebula had not stabbed him so there was no case. He then tried to get removal permits so that he could impound the cattle, but he failed. He also went to the Agricultural officer to get him to examine his fields of cotton, but the officer said there were no exhibits as all was devoured. He said . he went to Mathebula's chief and reported the matter

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to him, but the Chief had failed to try the case to date. He said he felt frustrated and took all four head of cattle and sold them. In mitigation he said he was provoked; he felt very angry and had retaliated in this manner; he failed to get solace from the Police or from the Chief's Court.

None of this evidence was controverted by the Crown.

I requested the Magistrate to furnish reasons for his sentence, and pointed out that it appeared to be heavy, having regard to the fact that the Accused was a first offender and was acting (even though mistakenly and unjustifiably) under some sort of claim of right.

In his reasons for sentence the Magistrate states that the Accused has 12 cattle and is in a position to pay the fine. He says that stock theft is rife in his area and warrants salutary sentences if this evil is to be curbed. He says he concurs in the view that the Accused's "claim of right" was mistaken and unjustified but adds with the greatest respect that in his opinion it was grossly unreasonable. He said he did not think that the accused thought he was acting bona fide in selling the complainant's cattle. He then referred to the decision in R. v. de Kock, 1951 (2) S.A. 342 (T), in which the Appellant had taken a dressing table and contents valued at £70 which he intended to keep indefinitely as security until he was paid a debt of £11. It was held that the appellant was correctly convicted of theft. In regard to sentence the presiding judge said "The sentence was £20 or one month's imprisonment with hard labour suspended for one year on condition that the Accused be not convicted of an offence involving dishonesty. The appellant might very well have been sentenced to a substantial period of imprisonment."

The Magistrate closed his reasons for sentence with the observation "I by no means wish to fetter his Lordship's discretion should the Accused win his Lordship's sympathy; I can only humbly add that he is an extremely fortunate man".

Remarks of this nature are quite uncalled for. They only antagonise the Court and serve no purpose in advancing the

cause of justice.

The Magistrate further said that in de Kock's case the appellant had not sold the goods seized but only held them as security. In my opinion the Magistrate has misdirected himself in regard to sentence. He has glossed over the personal circumstances of the Accused and the extreme frustration which the Accused must have suffered in endeavouring to obtain suitable legal redress. In so far as the Magistrate founds upon unreasonableness it appears to me that he has overlooked the fact that in such cases as R. v. Geddes, 1964(4) S.A. 48 (S.R. A.D) it was said that it appeared to be settled law that reasonableness is not required in "claim of right" cases. It has been held that the Accused should have acted bona fide; but in my view this element should not be overstressed when one is dealing with an unlearned African labouring under a genuine sense of grievance. It is, moreover, important to bear in mind that we are here concerned with the question of mitigation, and not with the question whether a crime was committed.

In regard to the consideration that the Accused can afford to pay the fine imposed, I point out that this factor cannot justify an excessive sentence.

It was said in S. v. Zinn 1969(2) S.A. 537 (A.D) at p.540 G that in imposing sentence the Court must consider the tirad consisting of the crime, the offender and the interests of society. In the present case the Magistrate rightly took into account the crime and the interests of society; but in my view he had far too little regard for the circumstances of the offender, the Accused.

I should mention in conclusion that although no compensatory order was made at the trial, the Accused will be liable to pay compensation to the complainants, subject to any counter-claim for damage to the Accused's cotton fields.

The convictions are upheld; but for the sentence on the two counts taken as one there is substituted a fine of E100

or in default of payment imprisonment for six months.

C.J.M. NATHAN.
CHIEF JUSTICE