

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

DATE:

6 JUNE 2008

CASE NUMBER:

A488/2007

5 In the matter between:

STATE

And

NATHANIEL MORRIS

NICO MORRIS

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JUDGMENT

(Appeal against convictions and sentences)

DESAL, J.:

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This appeal relates to the alleged theft of a cow which was recovered by the owner a few days later. Pursuant to their arrest the accused appeared before Oudtshoorn magistrate, Mr RJ Gerber, on 26 occasions until the matter was finally concluded almost 2 years later. It seems that a disproportionate amount of time and resources were employed in pursuing this prosecution.

In any event, the accused were convicted on the said charge.
25 They were sentenced differently as accused number two was

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barely 16 years old. Accused number one was sentenced to 18 months' imprisonment of which a half was conditionally suspended. Accused number two received a postponed sentence. With the leave of the trial court, the accused appeal to this court against their convictions.

Bluntly stated, their convictions are incapable of fair-minded support. Besides the weight of the evidence militating in favour of the accused, there were also several procedural irregularities committed in the course of the trial.

In respect of the latter I refer to one such irregularity. At the stage when accused number one was unrepresented the trial court permitted cross-examination of the said accused on what appears to be a confession which was not properly admitted in evidence. That "confession" was patently inadmissible for different reasons which I do not propose setting out herein.

Perhaps of greater importance in this matter is the evidence in favour of the accused. The *dramatis personae* in this matter, were the accused themselves, a Mr Danie Kok, who identified the cow, and a Ms Nora Zazini. Ms Zazini is accused number one's mother and accused number two's grandmother. Her evidence was, or should be, of some significance, in that it is alleged by the defence that the cow which was appropriated

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belonged to her late husband. More importantly, that she gave permission for the cow to be sold.

At the outset of the trial the accused admitted selling the cow for R1 200. They denied, however, that the cow was the property of the farm Van Wykskraal. They maintain that it belonged to Ms Zazini. Mr Kok's evidence was simply to the effect that he is the manager of Van Wykskraal and the cow sold and recovered was the property of the said farm. His identification of the cow cannot be faulted and it appears that this aspect was not in dispute at the end of the matter.

Did the accused knowingly sell the cow belonging to the farm or did they have a reasonable basis upon which to conclude that the cow belonged to their family? Essentially this was the issue which the trial court had to decide.

Mr Kok's evidence is significant in one other respect. He admitted that Ms Zazini's late husband, in fact, purchased cattle from the farm. He stated that they were male and not female cattle. This evidence was watered down somewhat when he conceded that on at least one occasion a cow had been sold.

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As Ms SFA Raphael's, who appeared on behalf of the state, has correctly pointed out it is unfortunate that the state omitted to lead any evidence of the circumstances in which the cow was transferred from the farm.

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With regard to the brand markings, if that is the correct translation of the Afrikaans 'brandmerk', on the cow, the evidence is not conclusive that the accused could have seen or did see such markings.

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The evidence tendered by the accused was not of a high standard. Besides the fact that they were at some stage unrepresented there are several different reasons for the quality of their evidence. In particular, they are poorly educated farm workers lacking in sophistication. Despite that the magistrate did not make an express finding that their explanation was not reasonably possibly true. If such finding can be inferred from his judgment, compelling reasons for such a conclusion are not set out therein.

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One aspect, however, finally resolves this matter to the advantage of the accused. Neither the state nor the defence called Ms Zazini to testify on their behalf. She was, in fact, called to testify by the magistrate as a witness of the court in terms of the relevant provisions of the Criminal Procedure Act

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51 of 1977. She confirmed, in unequivocal terms, that the cow sold had been sold on her instructions and that her late husband had acquired cattle, including cows, from Van Wykskraal. Though she was cross-examined at length by the prosecutor, her evidence cannot be faulted in any material respect.

In his judgment the magistrate refers very briefly to her evidence. He does not, in fact, make any adverse finding in respect of this witness. In the light of her evidence, the evidence of the accused, more specially their belief that the cow belonged to their family, cannot be excluded as a reasonable possibility. The failure by the magistrate, to attach due weight to the evidence of this key witness, amounts to a misdirection of sufficient significance to vitiate these proceedings.

Viewing the evidence in its totality, this court cannot exclude the possibility that the evidence of the accused may be, and probably is, reasonably possibly true. In the circumstance

THE APPELLANTS CONVICTIONS AND SENTENCES ARE SET

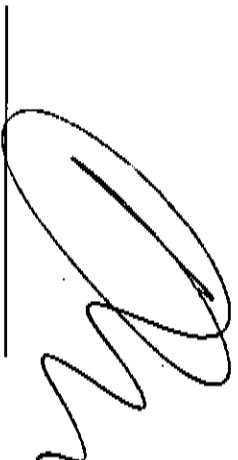
ASIDE.

Before I conclude this matter I have one further observation to make. It has been brought to my attention that attorney Clyde

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Avontuur of Ouidshoorn appeared on behalf of the accused on a *pro amico* basis. This court is indebted to him for averting what might otherwise have been a miscarriage of justice. Thank you very much Mr Avontuur.

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DESAI, J

I agree.

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J.H. ROUX, AJ