WILLIAM SIVAKO

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
TAKUVA & DUBE-BANDA JJ
BULAWAYO 18 MARCH 2020 & 29 APRIL 2021

Criminal appeal

L. Mcijo, for the appellant
E. Chavarika, for the respondent

DUBE-BANDA J: This is an appeal against the whole judgment of the Magistrate's Court, sitting at Filabusi Court. The appellant was charged in the court *a quo* together with three other persons, namely, Praymore Ncube; Christian Makoni; and Zibusiso Nkala (to whom I shall refer as Accused No 1, Accused No 2, and Accused No 3, respectively), with the crime of stock theft as defined in section 114(2)(a) (ii) of the Criminal Law [Codification and Reform] Act, Chapter 9;23. The appellant and his co-accused pleaded not guilty but were convicted as charged and each sentenced to a term of 9 years imprisonment. He appeals to this court against his conviction.

It is now convenient to set out the factual background relevant to the determination of this appeal.

Factual background

Arising out of this incident, the appellant and his co-accused, appeared before the trial court facing a charge of stock theft. It being alleged that on the 4th March 2019, the appellant and his co-accused teamed and connived with other persons still at large, and stole two beasts, being the property of the complainant. The cattle were stolen at Ekusileni grazing lands, in Filabusi. The two beasts were slaughtered and transported in two vehicles to Bulawayo. Meat from one beast was first taken to house 3919 Luveve 4, Bulawayo, and later to number 6717 Cowdray Park, Bulawayo. While meat from the second beast was taken to a butchery in Magwegwe, Bulawayo, for cutting and selling. It is the meat taken to the butchery in Magwegwe that led to the arrest of the Accused No. 1, Accused No. 2 and Accused No. 3. Their arrest led to the arrest of the appellant. The other persons who are suspected to have been

part of this syndicate escaped arrest, and as at the time of the trial they were still at large. The appellant and his co-accused were found guilty as charged, and each was sentenced as indicted above.

Judgment of the Court *a quo*

The court *a quo* found, among other things, that appellant was present when the meat was delivered to number 3919 Luveve 4. That he possessed the meat. It was placed in a van for transportation, and it was appellant who transported the meat to 6717 Cowdray Park. The Toyota Hilux was used to transport the meat to Cowdray Park. It is the appellant who drove the Toyota Hilux to Cowdray Park. The vehicle was operational because it was not towed to the police station but driven upon its seizure. The trial court found that the meat was taken to Cowdray Park for the purpose of hiding it from the police. The court *a quo* believed the evidence of the police about the reason why the Toyota Hilux was taken to the mechanic. The meat was transported to Cowdray Park after the arrest of the three co-accused persons. The meat was taken to Cowdray Park, to hide it. He did not disclose to his aunt in Cowdray Park, where the meat came from or who owned it. The appellant led to the recovery of some of the meat stolen by his three accused persons. The trial court found that appellant was involved in the concealing of the offence.

The trial court rejected the evidence of the defence witnesses, classified it as suspect because of their proximate relationship to the appellant, i.e. Audrey Sibongile Ndlovu, is aunt to appellant; Lloyd Makwati is a friend to appellant. The evidence of Hubert Farai Nyathi (mechanic) was rejected because the court found that he detracted from the disclosures he made to the police. The court found that their priority was to shield the appellant from a conviction.

The trial court found that appellant was involved in the concealing of this offence. His role qualified him to be an accessory, as defined in section 205 of the Criminal Law (Codification and Reform) Act. Furthermore, his actions fall under section 2018(1) of the same Act, as he intended to conceal the commission of the crime. It found that he is liable, in terms of section 210 of the Act to the same punishment as the actual perpetrators. The court *a quo,* then found appellant guilty as charged.

Grounds of appeal

1. The court *a quo erred* at law in convicting and sentencing the appellant in the absence of a *nexus* or link between the commission of the offence and the appellant, the co-accused person he was jointly charged with and Christopher Sibanda and his uncle Musa who are still at large.
2. The court *a quo* misdirected itself by convicting and sentencing the appellant in the absence of any incriminating evidence against the appellant from the appellant's co-accused and the witnesses who testified in court.
3. The court *a quo* misdirected itself by convicting and sentencing the appellant where the state dismally failed to rebut the appellant's defence that he was simply asked by his uncle Musa who is still at large to refrigerate the meat upon which he took it to his aunt's residence at number 6717 Cowdray Park, Bulawayo, where it was recovered from.
4. The court *a quo* misdirected itself by convicting and sentencing the appellant on the mere fact that he is the one who usually drives and the one who drove his mother's vehicle which transported the meat to Cowdray Park without establishing whether he had any knowledge about the commission of the offence by his co-accused, Christopher Sibanda and his uncle Musa who are still at large.

   Wherefore, the appellant prays that the court a quo's verdict of guilty be altered to not guilty and acquitted.

Submissions in this court

Appellant's submissions

In the written submissions, it is contended that there is no connection between appellant and the commission of the offence. It is said none of the witnesses who testified for the prosecution placed him at the scene of crime. It is submitted that there is nothing on record which proves that when he received the meat he knew that the meat was from stolen cattle, and that when he took it to a house in Cowdray Park he intended to further the criminal enterprise. It is argued that the evidence shows innocent receipt of stolen property. It is said there is no evidence to rebut appellant's version that he was acting under Musa's instructions to refrigerate the meat and nothing else. It is contended that there is nothing criminal about appellant taking

the meat to house 6717 Cowdray Park, as there is evidence that it was common for his family to refrigerate large quantities of meat at that house.

Respondent's submissions

Respondent contends that in convicting the appellant for contravening section 114(2) (a) (ii) of the Criminal Law (Codification and Reform) Act, the court *a quo,* relied on the evidence of the *post facto* conduct of the appellant which was given by the police. It is submitted that this evidence consists of an indication the appellant made leading to the recovery of the meat at Cowdray Park as well as the court's finding that he drove his aunt's Toyota Hilux motor vehicle and transported the meat to Cowdray Park. It is contended that this evidence does not prove that appellant was present and participated in the taking of the livestock intending to deprive the owner permanently, an essential element of the offence he was convicted of. It is argued that there is no evidence at all to rebut the appellant's contention that he did participate in the taking of the livestock and the conviction is unsupportable.

It is submitted that the more appropriate charge against the appellant should have been contravening section 114(2)(d) of the Criminal Law (Codification and Reform) Act, and in the event of a conviction, the appellant would have been sentenced in terms of section 114(2) (f). It is contended that for a conviction of contravening section 114(2)(d) of the Criminal Law Code to be secured, two essential elements of the offence have to be proved, *viz;* that appellant acquired or received into his possession the 80 kg of meat and; that at the time of so acquiring or receiving the meat he had no reasonable cause (the proof of which lies on him) for believing that the meat belonged to his co-accused or that the two were authorised by the owner of the meat to deal with it or dispose of it.

It is contended that before the presumption or reverse *onus* becomes active or operational, there is always an *onus* on the prosecution to bring the accused's conduct within the general framework of a statute or regulation. Thus there is no duty that falls on the accused to discharge a reverse *onus* unless the prosecution has established the act or omission complained of, i.e. the *actus rea.* It is submitted that, the prosecution did not adduce cogent evidence of the elements of the offence, in order for the reverse *onus* cast upon the appellant to become operational or active.

It is contended that the only direct evidence as to who received the meat when it was delivered to house number 3919 Luveve 4, Bulawayo, on the 5th March 2019 comes from the appellant and accused 2 and 3. The evidence is that the meat was brought to that residence by one Musa in the company of accused 2 and 3. It is argued that appellant never personally assumed control over the meat at the time it was delivered. There is no positive evidence to that effect. His only direct association with the meat was when he accompanied one Marko to his aunt's place at Cowdray Park and left the meat there. It is argued that his contention that he was accompanying Marko who was driving the vehicle carrying the meat since Marko did not know the place where the meat was to be left for refrigeration was not gainsaid.

It is submitted that there is no evidence of sufficient probative value adduced to prove that the appellant received the meat knowing that it was stolen or in circumstances where he should have had a reasonable apprehension that it was stolen. It is contended that the totality of the evidence adduced does not bring the appellant's conduct within the framework of the provision which creates the offence and does not trigger the operation of the reverse *onus.* It is argued that in the circumstances for contravening section 114(2((d) of the Criminal Law (Codification and Reform) Act is also unsupportable.

Evaluation

The appeal turns, in the main, on whether the State has proved the guilt of the accused beyond reasonable doubt. Indeed, our courts have recognised the fact that there is only one test in a criminal trial, namely whether the State has proved the guilt of the accused beyond reasonable doubt. In *S v Sithole and Others* 1999 (1) SACR 585 (W) the test applicable to criminal trials was explained thus (at 590 g-i):

> "There is only one test in a criminal case, and that is whether the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that an accused is entitled to be acquitted if there is a reasonable possibility that an innocent explanation which he has proffered might be true. These are not two independent tests, but rather the statement of one test, viewed from two perspectives. In order to convict, there must be no reasonable doubt that the evidence implicating the accused is true, which can only be so if there is at the same time no reasonable possibility that the evidence exculpating him is not true. The two conclusions go hand in hand, each one being the corollary of the other. Thus in order for there to be a reasonable possibility that an innocent explanation which has been proffered by the accused might be true, there must

> at the same time be a reasonable possibility that the evidence which implicates him might be false or mistaken."

See: *Tshiki v The State* (358/2019) [2020] ZASCA 92 (18 August 2020).

Before dealing with the merits of the appeal, it is necessary to dispose of some issues of evidence. Amongst other witnesses, the prosecution adduced the evidence of the following police witnesses; Trymore Simogo; Milos Rutendo Nyamubachoto; Simbarashe Goredema; and Power Musaka. These police witnesses testified at length and in detail about statements made to them by the appellant and his co-accused, e.g. Trymore Simogo testified as follows:

> "At the police station we interrogated the accused on how they got possession of the cattle. They then disclosed how they slaughtered the beasts in Filabusi a day prior. From there they disclosed how they went there. They told us they had slaughtered two cattle. We noted that the meat or carcass was for one beasts and we then made efforts to recover the rest. Accused No. 2 then disclosed that he had left the carcass at Accused 4 (appellant) residence."

No evidence was adduced to prove that such statements were freely and voluntarily made by the accused persons without them having been unduly influenced thereto. See: Section 256(1) of the Criminal Procedure and Evidence Act. In fact, appellant raised allegation of assault against the police. Admissibility of evidence is a question of law, and a court may not rely on such evidence, notwithstanding the fact that the accused did not object to its admissibility, unless there is evidence that such statements were given freely and voluntarily by the accused persons without him having been unduly influenced.

In *S v Nkomo* 1989 (3) ZLR 117 (SC) the court said, no statement to a person in authority by an accused person, made outside the court room, may be produced (if it is in writing) or quoted (if it was oral), unless the rules have been observed, that is to say, unless the court is satisfied that it was made freely and voluntarily and without undue influence being brought to bear. That is what s 242(1) of the Criminal Procedure and Evidence Act means. A statement is a statement, that is, it is something said by the accused. It may be recorded on paper, in which case it is called a written statement, or it may not, in which case it is an oral statement, it may be a formal statement made in an office before assembled witnesses; or it may be an informal statement, for example, chit-chat on the way to the scene of the crime. A police officer may not give evidence of any such statements unless he first satisfies the rules

about admissibility. See: *S v Ndlovu* 1988 (2) ZLR 465 (SC). In the result, I will not consider the statements made by the appellant to the members of the investigating team.

Again, I will not consider statements made to the investigating team by the appellant's co-accused and not repeated in evidence in court. It is a trite position of the law that no confession made by any person shall be admissible as evidence against any other person. See: section 259 of the Criminal Procedure and Evidence Act. This is a question of law. However, the indications made by the appellant leading to the recovery of the Toyota Hilux and the meat in Cowdray Park are admissible in terms of section in terms of section 258(2) of the Criminal Procedure and Evidence Act.[1]

The trial court found that the witnesses called by the appellant did not fare well if their testimonies are scrutinised, compared and contrasted. The most obvious reason why their evidence was considered suspect was their proximate relationship with the appellant. The court reasoned that the priority of the defence witnesses was to shield the appellant from a conviction. It is trite that factual and credibility findings of the trial court are presumed to be correct unless they are shown to be wrong with reference to recorded evidence. The acceptance by the trial court of oral evidence and conclusions thereon are presumed to be correct, absent misdirection. See: ***S* v *Francis*** 1991 (1) SACR 198 (SCA) at 204 e-d. A court of appeal may only interfere where it is satisfied that the trial court misdirected itself or where it is convinced that the trial court was wrong. See*:* ***R v Dhlumayo*** *&* ***Another*** 1948 (2) SA 677 (A) at 705-706.

I take the view that the trial court misdirected itself in using a different criterion in scrutinising the evidence of these witnesses. There is no rule of law or practise which enjoins the court to treat witnesses as "suspect" simply because of their proximate relationship with an accused. There is no rule of law or practise which says such witness evidence is potentially unreliable and untrustworthy. Their evidence must be evaluated without this tag of "suspect."

[1] Section 258(2) of the Criminal Procedure and Evidence Act [Chapter 9:07]: It shall be lawful to admit evidence that anything was pointed out by the person under trial or that any fact or thing was discovered in consequence of information given by such person notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible against him on such trial.

The trial court by saying witnesses called by the appellant did not fare well if their testimonies are "scrutinised, compared and contrasted," suggested their evidence contradicted each other. The trial court neither referred to any contradictions in the evidence of these witnesses, nor have I seen any in the record. In any event, contradictions must be material to warrant rejection of a witness' evidence. In dealing with contradictions the following was said in *S v Mkohle* 1990 (1) SACR 95 (A) at 98f that contradictions *per se* do not lead to the rejection of a witness' evidence, they may simply be indicative of an error. See: *S v Oosthuizen* 1982 (3) SA 571 (T) at 576 G. I am convinced that the trial court was wrong in rejecting the evidence of appellant's witness. The record shows that the evidence from these witnesses was rejected because it corroborated the appellant's version.

It is necessary, firstly, to say something about the time-line. This is important to put the whole factual matrix into context. On the 4th March 2019, at night, two beats were slaughtered at a grazing area at Ekusileni, in Filabusi. On the 5th March 2019, between 5 a.m. and 6 a.m. the meat from one beast was put in a Toyota Hilux vehicle at number 3910 Luveve 4. On the 5th March 2019, between 7 p.m. and 8 p.m. appellant left meat at number 6717 Cowdray Park. From the evidence, the meant must have been recovered by the police from Cowdray Park on the 6 March 2019. The Toyota Hilux was taken to the mechanic in the morning after 8 a.m. on 5th March 2019. Accused No. 1, Accused No. 2 and Accused No. 3 were arrested on the 5th March 2019, at a butchery in Magwegwe. Appellant surrendered himself to the police on the 6th March 2019. Again on the 6th March 2019, the appellant and his co-accused were transferred from Magwegwe Police Station to Filabusi Police Station.

Applicant was convicted of stock theft in terms of section 114(2) (a) (ii) of the Criminal Law [Codification and Reform] Act. This provision provides that any person who takes livestock or its produce intending to deprive the other person permanently of his or her ownership, possession or control, or realising that there is a real risk or possibility that he or she may so deprive the other person of his or her ownership, possession or control; shall be guilty of stock theft. In its heads of argument respondent contends that:

> "In convicting the appellant for contravening section 114(2) (a) (ii) of the Criminal Law (Codification and Reform) Act, the court *a quo,* relied on the evidence of the *post facto* conduct of the appellant which was given by the police. The evidence consists of indication the appellant made leading to the recovery of the meat at Cowdray Park as

well as the court's finding that he drove his aunt's Toyota Hilux motor vehicle and transported the meat to Cowdray Park. This evidence does not prove that appellant was present and participated in the taking of the livestock intending to deprive the owner permanently, an essential element of the offence he was convicted of. In fact there is no evidence at all to rebut the appellant's contention that he did participate in the taking of the livestock and the conviction is unsupportable. "

I agree with this analysis.

The essential element of this offence is presence and participating in the taking of the livestock or its produce intending to deprive the owner permanently. The evidence is clear, the appellant was not present when the two beasts were slaughtered in the bush. He was not present and did not participate in transporting the caucuses to Bulawayo. There is no evidence that appellant knew or must have known that such beasts would be slaughtered and that the caucuses were to be transported to Bulawayo. My view is that section 114(2) (a)(ii) by using the phrase any person who takes livestock or its produce, is reserved for the actually perpetrators of the crime. On the evidence on record, appellant is not the actual perpetrator of the crime and cannot be guilty of stock theft in terms of section 114(2) (a) (ii) of the Criminal Law (Codification and Reform) Act.

It is contended for the State that the more appropriate charge against the appellant should have been contravening section 114(2) (d) of the Criminal Law (Codification and Reform) Act. It says any person acquires or receives into his or her possession from any other person any stolen livestock or produce without reasonable cause (the proof whereof lies on him or her) for believing at the time of acquiring or receiving such livestock or produce that it was the property of the person from whom he or she acquired or received it or that such person was duly authorised by the owner thereof to deal with it or dispose of it; shall be guilty of stock theft.

I take the view that this court has jurisdiction and competence, if satisfied that the conduct of the appellant falls foul of any other provision in section 114, to substitute the verdict of guilty in terms of section 114(2)(a)(ii) with guilty in terms of such appropriate provision. Section 39 (2) of the High Court Act [Chapter 7:06] accords this court such jurisdiction and

competence.[2] Section 114(2) (d) is a competent verdict of 114(2) (a) (ii) of the Act. Section 114(2) (d) of the Act criminalises the conduct of those persons who acquire or receive into their possession stolen livestock without or produce reasonable cause (the proof where of lies on him or her) for believing at the time of acquiring or receiving such livestock or produce that it was the property of the person from whom he or she acquired or received it or that such person was duly authorised by the owner thereof to deal with it or dispose of it. The internet dictionary defines "acquire" as to buy or obtain an asset or object for oneself, and "receive" is defined as to be given, presented with, or paid something. Possession consists of two elements, namely a physical or corporeal element (*corpus* or *detentio*) and a mental element *(animus*, that is, the intention of the possessor). The physical element consists in an appropriate degree of physical control over the thing. The *animus* element of possession relates to the intention with which somebody exercises control over the thing. See: Snyman CR *Criminal Law* (5th ed. LexisNexis 2008) 429-430.

For the presumption or reverse *onus* contained in section 114(d) of the Act to become active or operational, there is an *onus* on the prosecution to prove beyond a reasonable doubt that the accused was in physical control of the livestock or its produce. In *S v Kuruneri* HH 59/2007, the court said the presumption must not place the entire *onus* onto the accused. There is always an *onus* on the State to bring the accused within the general framework of a statute or regulation before any *onus* can be thrust upon him to prove his defence. See: *S v Broughton's Jewellers (Pvt) Ltd* 1971(2) RLR 276(A) at 279 E-G, 1971(4) SA 394 (RA) at 396 E-F; *S v Marwane* 1982(3) SA 717(A) at 755 H-756 C. Thus there is no duty that falls on the accused to discharge a reverse *onus* unless the prosecution has proved beyond a reasonable doubt that the accused was in physical control of the livestock or its produce. Once the prosecution has

[2] Section 39(2) of the High Court Act [Chapter 7:06]:Where an appellant has been convicted of an offence and the trial court or tribunal could on the indictment, summons or charge have found him guilty of some other offence, whether because it was, according to law, a competent verdict or because that other offence had been alleged as an alternative count, and on the finding of the trial court or tribunal it appears to the High Court that the trial court or tribunal must have been satisfied of facts which proved him guilty of that other offence, the High Court may, when quashing the conviction, instead of allowing or dismissing the appeal, substitute for the judgment of the trial court or tribunal a judgment of guilty of that other offence, whether or not the appellant had been acquitted of that offence at the trial, and may—
(*a*) pass such sentence; or
(*b*) remit the case to the court or tribunal concerned for the passing of such sentence;
in substitution for the sentence passed at the trial, whether more or less severe, as may be warranted in law or that other offence.

met the threshold of such proof, the *onus* shifts to the accused who has peculiar knowledge of the circumstances of his physical control, to prove on a balance of probabilities, that he had reasonable cause for believing at the time of acquiring or receiving such livestock or produce that it was the property of the person from whom he or she acquired or received it or that such person was duly authorised by the owner thereof to deal with it or dispose of it. See: *Attorney General v Makamba* SC 30/05.

Therefore, in the first instance, the prosecution must prove beyond a reasonable doubt that appellant was at some moment in time in physical control of the stolen livestock or its produce. First, the evidence in respect of what happened at 3910 Luveve 4, must be considered. Appellant, in his defence outline which he adopted as his evidence in chief testified that the meat was brought to number 3910 Luveve 4, on the 5th March 2019, between 5a.m and 6.am. It was brought by Musa, Accused No.2 and Accused No. 3. Musa is appellant's uncle. Musa said he wanted to load his things in the car, appellant found him having already loaded his property in the car. He says he told Musa that the car had broken down. Appellant says he went back to sleep, on walking up he observed blood stains in the car. He cleaned the blood stains, and requested a friend to help him push the car to a mechanic because it had a clutch fault. Appellant was asked in cross-examination whether he saw what Musa and company were in possession of, he answered that they had a funny parcel in the back seat of their Honda Fit vehicle. He denied that he saw the meat in the Toyota Hilux. When he woke up, he saw some blood in the boot of the Toyota Hilux, and he washed it.[3] From this evidence I do not read that appellant had physical control of the meat at number 3910 Luveve 4.

Accused No. 2 testified that Musa requested that part of the meat be taken to appellant's residence, i.e. 3910 Luveve 4. He averred that he left the meat in the car with appellant. He was cross-examined by the prosecutor.[4] First, he says he took the meat to Musa who then took it to appellant. Pressed by the prosecutor, he said he left the meat at appellant's home. Pressed

[3] p. 69 of the record.
[4] p. 61 record: The following exchange took place in cross examination between the prosecutor and Accused No. 2:
Q. Confirm you took the carcass to accused 4 (appellant)?
A. I took it to Musa who then took it to William (appellant).
Q. In your defence outline you said you left the meat with accused 4 (appellant)?
A. I left it at William's home.
Q. You left it without handing it over to anyone?
A. Accused 4 (appellant) was present and we left it in the van. Musa directed me to leave the meat with accused 4 and I put it in the van.

further he said appellant was present and the meat was left in the van. I do not read Accused's 2 evidence to be showing that the meat was left in the physical control of the appellant. The tenor of his evidence is that the meat was left in appellant's home inside a car. In his defence outline, which he adopted as his evidence in chief Accused No. 3 testified that they were instructed to take one beast to Sivako. In cross examination all he could say was that they took the meat to Luveve, at appellant's residence, appellant was present and they put the meat in the blue Toyota van.[5] This evidence does not suggest that the meat was left in the physical control of the appellant.

The prosecution must prove beyond a reasonable doubt that the appellant had physical control of the meat at number 3910 Luveve 4. There is no clear evidence that appellant acquired or received the meat at 3910 Luveve 4. Correct he was present at 3910 Luveve 4 when the meat was brought by Musa, Accused No. 2 and Accused No. 3.The fact that Musa made a unilateral decision to put the meat in the back of the Toyota Hilux was not disputed. The meat was not handed over to the appellant. In any event the appellant was not the only person present at number 3910 Luveve 4 at the material time. The fact that he woke up and witnessed the meat being put in the Toyota Hilux, does not mean he assumed physical control of it. Furthermore, even if the circumstances were such as to justify the inference that he knew of the presence of the meat in the Toyata Hilux, and lied about his knowledge, it would not necessarily follow that he had physical control of it.

The State concedes that the appellant never personally assumed control over the meat at the time it was delivered at number 3910 Luveve 4. I agree. On the evidence on record, I find that there is no cogent and satisfactory evidence that appellant had physical control of the meat at number 3910 Luveve 4.

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[5] p. 66 record: The following exchange took place in cross examination by the prosecutor:
Q. Where did you take the meat in Bulawayo?
A. Luveve.
Q. At whose residence?
A. All I know is that it is accused 4's (appellant) residence.
Q. Who did you find?
A. Accused 4 (appellant).
Q. Where did you put the meat?
A. A blue Toyota van.
Q. That is where the meat was offloaded?
A. Yes.

Second, did the prosecution adduce cogent and satisfactory evidence that the appellant transported the meat to number 6717 Cowdray Park? The relevant evidence in respect of who transported the meat to number 6717 Cowdray Park is from the appellant, Nobuhle Khumalo, and Hubert Farai Nyathi. Appellant told the court that he accompanied Marko to leave the meat in Cowdray Park. The appellant was cross-examined by the prosecutor.[6] He told the court that Marko was sent to Cowdray Park by Musa. Marko drove a Camry motor vehicle. He accompanied Marko to ask for permission to leave the meat in the fridge. He put the meat in the fridge. It was between 7p.m and 8 p.m. He does not know where the meat was all along.

The prosecution called the evidence of one Nobuhle Khumalo, she told the court that appellant is his cousin's son. She resides at number 6717 Cowdray Park. Appellant came to her residence on Tuesday, 5 March 2019, evening, and made a request to leave his meat in the fridge and promised to collect it the following morning. She did not see Marko, only saw the appellant. This witness told the court that she did not suspect the meat to be stolen, because appellant's mother who is a cook at a place called Renkini, usually asked to refrigerate her meat at this witness's house, i.e. at 6717 Cowdray Park. On the 6th March 2019, the police in the company of the appellant collected the meat from her residence.

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[6] The following is the exchange that took place in cross examination between the prosecutor and the appellant:
Q. Confirm you drove to Cowdray Park with Marko?
A. I never drove. He drove me there he was sent by Musa.
Q. What car did he use?
A. A sort of Camry.
Q. What were you going to do there?
A. To ask for permission to leave the meat in the fridge.
Q. Whose meant?
A. Musa.
Q. Confirm you then went to your aunt to request meat to be stored there?
A. Yes.
Q. And you loaded it in the fridge?
A. Marko helped me but I am the one who put it in the fridge.
Q. What time was it?
A. 7p.m. – 8p.m.
Q. Where was the meat all along?
A. I do not know.
Q. Do you deny you touched the meat?
A. I deny I touched it in the morning from the Honda Fit to the van. I don't deny I look it from Marko to the fridge.
Q. Confirm you loaded all sixteen bags into the fridge?
A. Yes.
Q. And you said you will collect the meat the next day?
A. Yes.

The court *a quo* subpoenaed and examined Hubert Farai Nyathi (mechanic) in terms of section 232(b) of the Criminal Procedure and Evidence Act [Chapter 9:07]. He testified that he is a mechanic. The Toyota Hilux was brought to his home for repairs. It had a malfunctioning clutch master cylinder. As he was waiting for the spares to repair the vehicle, the police approached him and made enquiries about the same vehicle. He explained to the police that he was waiting for spares so that he could repair the vehicle. He said the clutch was finished and the car could not engage gears. It could only function with one gear. The police asked this witness to assembly the parts and drive the vehicle to the police station. He drove the vehicle to the police station, no one could have driven it because of its malfunction. The vehicle had no battery. He had to remove a battery from one other car he was working on, to enable him to drive the car to the police station. He left the battery and his tool-box in the car at the police station. He denied that he told the police that the car was brought to him for safekeeping. He denied that he told the police that he was told to remove the master cylinder as a disguise because the car had no problem. He denied that he offered to return the master cylinder. He denied that the police witnesses told the court the truth. He had never seen the appellant driving the car. He had always seen it been driven by appellant's mother. In the circumstances of this case, it was not appropriate for the trial court to accept the evidence of police witnesses and reject that of the mechanic.

The finding by the court *a quo* that the Toyota Hilux was used to transport the meat to Cowdray Park, is not consistent with the evidence on record. It is a misreading of the evidence. The record shows that the meat was taken to Cowdray Park, between 7 p.m. and 8 p.m. on the 5th March 2019. It could not have been transported by the Toyota Hilux, because at that time it was with the mechanic. It was taken to the mechanic in the morning of the 5th March. There is no evidence that appellant drove the Toyota Hilux to deliver the meat in Cowdray Park. The probabilities of the case are in sync with appellant's version, that the meat was transported in a Camrey vehicle driven by Marko. This also is in sync with his version that the reason he accompanied Marko is because he (Marko) did not know the location of the Cowdray Park house. The State concedes that appellant's contention that, he was accompanying Marko to Cowdray Park, that it is Marko who was driving the vehicle carrying the meat, and Marko had to be accompanied because he did not know the Cowdray Park house was not gainsaid. I agree. In Cowdray Park, he carried the meat from the car and put in the house, i.e. put it in a refrigerator and promised that he would return the following morning to collect it. Again, there

is no evidence of where the meat was before it was taken to Cowdray Park. The evidence shows that it was no longer in the Toyota Hilux, because this car was now with the mechanic. Again, the trial court reasoned that the meat was taken to Cowdray Park for the purpose of hiding it from the police, even if it is so, apart from speculation there is no evidence that shows that appellant was in physical control of the meat. The fact that appellant led police to recovery of the meat in Cowdray park is just a colourless or neutral factor. It shows that he knew where the meat was, but not that he was in physical control of it. The reasoning applies with equal force to the fact that he led police to the recovery of the Toyota Hilux, he knew it was with the mechanic, not that he drove it there, or he was hiding it. In the circumstances, I do not consider that there is cogent and satisfactory evidence that appellant had physical control of the meat when it was taken to Cowdray Park. On the faxcts of this case, appellant's version is reasonably possibly true. I take the view that the evidence on record does not show that the State proved beyond a reasonable doubt that appellant, had at any moment been in physical control of the meat.

Conclusion

The trial court committed a further misdirection by trying to hook in the appellant to the offence by invoking the provisions of 205, 208(1) and 210 of the Criminal Law (Codification and Reform) Act, instead of confining itself to section 114 of the Act. Section 114 of the Act is all embracing, it takes care of all and sundry, i.e. the actual thieves of livestock or its produce, those found in possession of stolen livestock or its produce, those who have been in possession of stolen livestock or its produce, and those acquire or receive stolen livestock or produce. Therefore, there is no useful purpose to be served by looking outside section 114.

Counsel for the State wisely conceded that the prosecution did not adduce cogent evidence on whether appellant was in physical control of the meat, in order for the reverse *onus* cast upon the appellant by section 114(2) (d) of the Criminal Law [Codification and Reform] to become operational or active. The facts of this case, taken together, militate against the application of the presumption. See: *S v Maiola* 1975(2) SA 727 (A) at 732C. As pointed out in *S v Mulliqan & Another* 1975(2) SA 111 (N) at p115 in fin -116C the reverse *onus* is one which may be extremely difficult to discharge in some situations and the court must appreciate this and ensure that the prosecution has adduced cogent and satifactorily evidence to shift the

onus to an accused, otherwise serious injustices may result. The threshold has not been crossed in this matter, and in the circumstances I do not consider that appellant had at any point in time had physical control of the meat. In my judgment, the State also failed to prove beyond reasonable doubt the facts necessary to bring into operation the presumption contained in section 114(2)(d) of the Act, and the appeal must succeed.

Disposition

In the result, the appeal succeeds and the conviction and sentence are set aside. Appellant is found not guilty and acquitted.

Takuva J ……. I agree

Liberty Mcijo, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners