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\ihg CASE NO 326/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

NOOR MOHAMMED GANGAT Appellant

and

THE STATE Respondent

CORAM: HEFER, FH GROSSKOPF JJA et MAHOMED AJA

DATE OF HEARING: 23 MAY 1994

DATE OF JUDGMENT: **1 JUNE 1994**

J U D G M E N T

MAHOMED, AJA:

The appellant was charged with stock theft in the Regional Court for the Eastern Cape. He was found guilty and sentenced to five years imprisonment of which two years were suspended for five years on the condition that he was not found guilty of theft committed during the period of suspension (and in respect of which he was sentenced to an unsuspended term of imprisonment without the option of a fine).

The Magistrate made two further orders. He directed the appellant to pay compensation to the complainant in the sum of R1 160. The liability of the appellant was to be joint and several with the other accused in the trial who had perpetrated the theft. Secondly the Magistrate made an order in terms of Section 35 of Act 51 of 1977 forfeiting the rights of the appellant in two motor vehicles.

An appeal against the sentence imposed on the appellant was pursued in the Eastern Cape Division. That

appeal was unsuccessful but leave to appeal to this Court was granted by the Court a quo.

The appellant was found guilty of stealing 85 sheep. These sheep were the property of the complainant, Mr. Robert King, and were part of a group of 343 sheep which the complainant had on his farm in a camp known as Top Dairy Camp.

The theft took place on the 28th February 1992. On that day, the appellant used a motor vehicle ("the car") to convey one Phindile Skoti and his son, Benjamin, to some point in the vicinity of the Top Dairy Camp. The Skotis were dropped by him in that area.

Later that night the Skotis unlawfully removed 85 of the sheep from this camp to a camp called "Skuinskraal" on a neighbouring farm. From Skuinskraal, 44 of these sheep were later taken to the appellant's house in a "bakkie". At the instance of the appellant some of his employees assisted in the delivery.

36 of these sheep and the 41 sheep still remaining at Skuinskraal were recovered, but the complainant never regained possession of 8 of the stolen sheep. The actual damage suffered by him was R1 160. His potential damage exceeded R17 000.

The effective sentence of imprisonment imposed by the Magistrate was three years. It was contended that this was not an appropriate sentence in the circumstances of this case.

The appellant was a first offender. He was 42 years old and suffered from diabetes. He was under considerable financial pressure and his father's recent death had left him with burdensome problems on the business and in the administration of the deceased's estate under the Group Areas Act. His dependents included a wife, two children and his widowed mother. There can be little doubt that imprisonment for three years would impact severely on such a person and his family. As

Melunsky J, concluded in the Court **a quo** it is "undoubtedly a substantial sentence".

That conclusion, however, does not itself entitle this Court, to interfere with the sentence imposed by the Magistrate. Sentencing is a matter pre-eminently falling within the discretion of the sentencing officer, and this Court is not entitled to interfere with the exercise of that discretion unless it is influenced by some demonstrable misdirection, or unless it is so manifestly unreasonable as to permit the inference that the sentencing officer must have failed to apply his mind properly to the matter, or applied some wrong principle or otherwise committed some irregularity.

Counsel for the appellant submitted that the Magistrate had indeed misdirected himself and had applied a wrong principle, in the following passage:

> "Hierdie is nie die gewone veediefstal waarmee die howe te doen kry waar 'n enkele stuk vee of twee of drie gesteel word nie. Nog minder

> is dit gepleeg as gevolg van honger en nood. Dit is baie duidelik dat dit gepleeg was en soos deur beskuldigde 1 erken in sy getuienis vir finansiële gewin. Die wetgewer beskou hierdie tipe van misdaad in 'n baie ernstige lig en daarom verleen dit aan die gewone landdroshof bevoegdheid om swaarder vonnisse op te lê in hierdie spesifieke gevalle".

Counsel contended that the Magistrate had considered stock theft to be a more serious kind of offence than other theft, simply because the Stock Theft Act of 1959 grants authority to Magistrates to impose in respect of stock theft, sentences which would otherwise be outside their jurisdiction. If this is what the Magistrate meant in the passage I have quoted it would indeed be a misdirection.

Stock theft still remains theft. The Act does not authorise or prescribe greater penalties for stock theft. It simply confers jurisdiction on the Magistrate Courts to impose in respect of the theft of stock

sentences which would be beyond their ordinary limits of jurisdiction, but only if such sentences are indicated in the particular circumstances of any case. [R v Hemley en 'n Ander 1960 (1) SA 397 (GW) at 399 A - 400 A; S v Tshawana 1969 (2) SA 252 (E) at 252 H - 253 C; S v Pittele 1975 (4) SA 229 (NC) at 229 G - 230 A].

I am not convinced, however, that in the passage quoted, the Magistrate intended to say that the stock theft was considered by the legislature to be more serious per se than other forms of theft. In its context what he was seeking to emphasise was that this type of case, where a businessman uses his transport and employees to facilitate the theft of a large amount of stock for his own gain and profit is more serious than the usual type of stock theft in which a farm worker steals two or three sheep to satisfy his own hunger and need. But even if I am wrong in this interpretation of the passage, the Magistrate's punishment of the appellant

was not premised upon the proposition attributed to him on behalf of the appellant, but on the inherently aggravating features in the conduct of the appellant, disclosed by the circumstances of this case. What the appellant did was to use the infrastructure of his business, his transport and his employees, to cause the theft of a large number of sheep from an isolated farm with the obvious motive to make what would have been for him a very handsome gain running into thousands of rands, and to protect himself from detection by using others to do the more dangerous work of removing the sheep from the camp of the complainant and then transporting them to the appellant's premises.

This kind of conduct is inherently reprehensible. It would be no less serious if what was stolen were not sheep but some other assets not subject to the provisions of the Stock Theft Act.

It is conduct which justifies severe censure

from the Courts. The sentence imposed by the Magistrate is clearly a strong and vigorous expression of that need. But it is not so severe as to attract the inference that the Magistrate failed to apply his mind properly to all the relevant factors or so strikingly different from the sentence we would have imposed if we had been sitting as a Court of first instance, as to permit us to interfere with that sentence.

Counsel for the appellant contended that in considering the impact of the sentence on the appellant regard must be had not only to the substantial term of imprisonment imposed upon him but also to the order of forfeiture made in respect of the two vehicles used in the commission of the offence and the order directing payment of compensation to the complainant.

The order of compensation has the effect of a civil judgment in terms of Section 300 (3) of Act 51 of 1977. It simply gives effect to what is in any event a

civil liability of the appellant and does not in any way add to his punishment.

A forfeiture order in terms of Section 35 of Act 51 of 1977 is different. Whether or not it constitutes punishment **stricto sensu**, it is an additional sanction, which can and often does impact very prejudicially on an accused. The cumulative effect of such an order upon the substantive sentence of a fine or imprisonment, might be such as to punish the accused more severely than is justified by the relevant circumstances of a case. For this reason its possible impact can be relevant both in considering the substance of the sentence itself and in considering whether such a declaration of forfeiture should be made at all. [S v Khan 1965 (3) SA 783 (A) at 791 F - G; S v Tshezi 1961 (2) SA 276 (E) at 278 B - C; S v Marais 1982 (3) SA 988 (A) at 1000 G - H; S v Hlangothe en 'n Ander 1979 (4) SA 199 (B)].

In the present matter the accused was sentenced after he had given evidence in mitigation. At the end of the judgment on sentence the Magistrate simply declared that the appellant's interests in the car (used to convey the Skotis to the vicinity of the complainants camp) and the bakkie (used to transport the stolen sheep to the appellant's house) were forfeited to the State in terms of Section 35 of Act 51 of 1977.

I have a number of difficulties with this order.

Section 35 (1) provides that

(1) "A court which convicts an accused of any offence may, without notice to any person declare -

(a) any weapon, instrument or other article by means whereof the offence in question was committed or which was used in the commission of such offence; or
(b) if the conviction is in respect of an offence referred to in Part 1 of Schedule 2, any vehicle, container or other article which was used for the purpose of or in connection with the commission of the offence in question or for the conveyance or removal of the stolen property,

and which was seized under the provisions of this Act, forfeited to the State: ....."

1. According to the record, the appellant was not made aware that the Magistrate was considering a forfeiture order in respect of these vehicles so as to afford the appellant an opportunity of being heard on this issue. A declaration of forfeiture in terms of Section 35 (1) is permissive and not mandatory. It potentially affects an accused person adversely. The audi alteram partem should therefore have been applied. [S v Hlangothe en ' Ander (supra) at 202 C; S v Khunong 1989 (2) SA 218 (W) at 222; S v Dedekind 1960 (4) SA 263 (T); S v Xhosa 1991 (2) SACR 22 (7); Hiemstra: Suid-Afrikaaanse Strafproses 5th ed. J.C. Kriegler 66].

2. There was no enquiry into and no sufficient facts on the record to determine what impact any forfeiture order in respect of the vehicles

would have on the appellant. All that was known about the bakkie was that it belonged to the appellant's deceased father. What its objective value was, what the appellant's interest therein was, and what its use or value was to the appellant in his business was never established. The same applies to the car. It was known that it belonged to Stannic, and that the appellant had paid ten monthly installments. There was no investigation of its value, the amount still outstanding on the purchase price or the effect of a forfeiture of this vehicle on the appellant's business or finances. This kind of information was necessary to enable the Magistrate to exercise what is a judicial discretion in terms of Section 35 (1) of Act 51 of 1977 [S v Hlangothe (supra) at 202 C - D; S v Moodley and Another

1962 (1) SA 842 (N); Du Toit: Commentary on the Criminal Procedure Act page 2 - 16]

In my view the declaration of forfeiture made by the Magistrate cannot therefore be justified.

It is accordingly ordered that -

1. The conviction of the appellant the sentence of imprisonment imposed by the Magistrate and the order of compensation made by him in terms of Section 300 of Act 51 of 1977 are confirmed.

2. The declarations of forfeiture made by the Magistrate in terms of Section 35 of the Act are set aside.

I. MAHOMED

J. HEFER JA)
F.H. GROSSKOPF JA) Concur