As regards the costs, we have come to the conclusion that the defendant should bear the costs connected with the first issue raised in the plea and on which so much evidence was heard, the issue, namely, that the site on which plaintiff erected his buildings was occupied by him without reference to defendant and was not leased or purported to be leased or indicated to plaintiff by the defendant.

On this issue I agree with the JUDGE-PRESIDENT in rejecting the evidence of the defendant and his witnesses.

We think that the defendant should also bear the costs of the last amendment, and of the postponement on the 10th August to take evidence of Messrs. Manning and Dower, as also the costs of the postponement to take the evidence of Mr. Burton.

As regards the rest of the costs we think there should be no order. Personally I feel that the costs are primarily due to the defendant's conduct.

The order will therefore be judgment for the defendant; defendant to pay such costs as relate to the first issue—*i.e.*, the question whether the site was indicated to plaintiff by defendant—as also the costs of the last amendment to the plea and costs of the two postponements on the 10th August and the subsequent postponement. No order as to the rest of the costs.

Attorneys for plaintiff: *Roux & Jacobsz*; Attorneys for defendant: *Rooth & Wessels.*

[A. D.]

REX v. PITSANI.

1915. *September* 13. MASON, BRISTOWE and CURLEWIS, JJ.

*Criminal law.—Stock theft.—Possession of carcase.—What constitutes.—*Ord. 6 of 1904, sec. 2.*

Where a sheep had been stolen and thereafter a portion of its carcase was found under a tub on the verandah of a native's hut, *Held*, that there was *prima facie* evidence of possession by the native as required by sec. 2 of the Stock Theft Ordinance (No. 6 of 1904).

* Sec. 2 of Ord. 6 of 1904, reads: "'Theft' shall embrace besides actual stealing, (3) being or having been in unlawful possession of stock and not being able to give a satisfactory account of such possession. 'Stock' means . . , . sheep and carcase or portion of the carcase of any slaughtered stock."

Appeal from a decision of the resident magistrate of Lichtenburg.

The accused, together with two native lads, one of whom was his son, was convicted of stealing a sheep, and sentenced to twelve months' imprisonment with hard labour, and the two children were directed to be detained in a reformatory.

Further facts appear from the judgments.

T. J. Roos, for the accused: No portion of the meat was ever found in the possession of the accused, and he could therefore not have been convicted. As to what constitutes possession in law: see *R.* v. *Letsabo* (1912, T.P.D. 667).

He further argued that the sentence was excessive.

I. P. van Heerden, for the Crown: There is *prima facie* evidence that the accused had possession of the meat, and the *onus* was thrown on him to prove that he knew nothing about the meat. *Letsabo's* case (*loc. cit.*) is conclusive against the accused.

Roos replied.

MASON, J.: This appeal presents some difficulties. The appellant, together with two native lads, one of whom was his son, was convicted of stealing a sheep and sentenced to twelve months' imprisonment with hard labour, and the two children were directed to be detained in the Diepkloof Reformatory.

The appeal is brought by the elder man, the father of one of the two children. The evidence for the Crown is that traces of a slaughtered sheep were found, including the skin. While the skin and the entrails were being investigated, the appellant, with another native, came up. He was asked if he knew anything about the matter and said "No." He said he thought the sheep must have died. Mr. Engelbrecht, who was investigating the matter, said "No, it had been killed." Thereupon the appellant said: "Well, you had better work with the case before it becomes cold." Mr. Engelbrecht thereupon reported the matter to Mr. Slabbert, the owner of the sheep, and Mr. Slabbert went with Mr. Engelbrecht and another gentleman to the hut of the accused, where he met the accused and asked leave to search the hut, which leave was given. Under a tub on the verandah half a sheep was found and a head, undoubtedly portion of the sheep of which the skin had been found on the veld. Now I do not think there is any need to go into the evidence upon which the magistrate came to the conclusion that that sheep had been killed and had not died of disease as alleged by the two younger accused. We have, there-

fore, the fact that half a slaughtered sheep was found under a tub on the stoep of the accused. The case made by the defence is this. The two boys say that they found this sheep dead on the veld; they skinned it; one of the boys took half home, where it was eaten that night by his sister, brother and himself, without the assistance of his father. The other half the second accused said he took to his father's hut, the appellant's hut, and put under the tub in order to protect it from dogs. The appellant says that that night he had gone to a neighbouring kraal to drink beer, that he came home late, that he left next morning early and he never heard of the sheep and knew nothing about it until it was found in front of his house, to his astonishment. The magistrate disbelieved the appellant and the two boys, and convicted.

The first fact which the Crown has to establish in a case of this kind is that the accused was in possession of portion of the sheep. The evidence, as I have said, is that that portion of the sheep was found hidden under a tub on the verandah and remained there at any rate for some considerable time. Is that fact sufficient to prove, without any other circumstances, possession by the appellant of the sheep? Having considered the case carefully, and referred also to the case of *R.* v. *Letsabo* (1912, T.P.D. 667), it seems to me that that is *prima facie* proof. I will not say it is a strong case, but, having regard to all the circumstances, and particularly what we know with reference to native habits in connection with meat, it seems to me that that is *prima facie* evidence that the meat was in the possession of the accused.

Then comes the question, that being *prima facie* evidence and of itself sufficient to convict the accused, has the defence of the accused cast such doubt upon that evidence that the magistrate ought to have acquitted him, that is, is there any real doubt as to whether the appellant must have known of the presence of that portion of the sheep? That is really the most difficult point in the case.

The story told by the two boys as to the sheep is clearly untrue. The story told by them that they never mentioned it to anybody, never mentioned the meat to anybody, is also probably untrue. Having regard to native habits, it seems very unlikely that a boy would go and kill a sheep without any sort of sanction or any knowledge on the part of the elder people of the kraal. We also have the fact that a story was told about the other half of the sheep being eaten by three or four persons at one sitting, without a grown-

up man amongst them. Under these circumstances, I do not think we should be justified in saying that the magistrate was wrong in entirely rejecting the defence. I do not think that we should be justified in saying that the defence was such as to have created some doubt in the magistrate's mind. If that is the position we are not justified in reversing the decision. It is a case of considerable difficulty, and I have had some hesitation in arriving at this conclusion; but on the whole I do not see my way to reversing the decision of the magistrate on this question of fact.

Then the appeal is also based on the ground that the sentence is excessive. There is no question that it is a severe sentence, viz., twelve months' imprisonment with hard labour, the maximum term of imprisonment which can be given by a magistrate for a first offence. But are we bound to say that it is excessive, that is, so unreasonable that we cannot think the magistrate would be justified for a first offence in inflicting such a sentence? The magistrate, of course, knows the state of affairs in his neighbourhood; he knows how far it will be necessary to impose severe sentences in these cases. Therefore we must assume that there are circumstances justifying a severe sentence. The magistrate could have imposed a sentence of twelve months' imprisonment with twenty-four lashes. I think such a sentence would have been excessive for stealing one sheep, in the case of a first offence; but he could have imposed six months and six lashes, and I think we might say we should not have interfered. If he had imposed, perhaps, nine months and a few lashes, we might not have interfered. It, therefore, comes to the question whether this is such an excessive sentence, having regard to the nature of the offence, that we ought to interfere. I do not think that we should be justified in interfering with the sentence, because it is quite clear that the legislature treats this crime of stock theft as one of extreme gravity, requiring severe punishment. Under these circumstances I do not think this appeal can succeed; we are bound, therefore, to confirm the sentence which the magistrate has imposed.

BRISTOWE, J.: I am of the same opinion. I think that possession of this meat, on the part of the first accused, is established. This case differs from that of *R.* v. *Letsabo*. In that case the liquor was buried. But I think the decision would have been the same if it had not been buried, and, if I am not mistaken, there have been cases where individuals have been convicted of the

possession of liquor where the evidence of possession is no stronger than it has been in this case. I think that a man is deemed to be in possession, not only of what is actually inside the four walls of his house, but of what is within the precincts of the premises that he occupies, whether it is inside the yard or standing on the stoep. The evidence of the constable shows that the meat was on the stoep when he got there. Whether it was put there in the first instance, or whether it was put there afterwards does not much matter; in any event it got there, and that is the gravamen of the offence. It is practically admitted by the first accused that the tub was his. I do not think it is possible to come to any other conclusion than that if it had not been his he would have disputed that in his evidence. I think, therefore, the question of possession is established. The *onus* was then cast upon the accused. Was the magistrate wrong in disbelieving the story told by the first and second accused that this meat had been brought to the first accused's house without his knowledge? It was half a sheep, and also the head of a sheep which was brought there by a little boy and put under the tub. I find it very difficult to believe that the father of that little boy did not know that the meat was there. I agree that the case is not very strong, but I do not think there is sufficient in the evidence to justify us in holding that the magistrate was wrong in the conclusion to which he came. The sentence is severe. But severe sentences are authorised by the legislature in cases of stock theft. Cases come before us on review where the sentences even for stealing a single animal, a sheep or a goat, appear very severe, but I do not think we have ever interfered with them. The fact is that the punishment for stock theft is severe, and it is necessary, in a community like this, that it should be so. I do not think, therefore, that we should be justified in interfering with the sentence.

CURLEWIS, J.: There are several unsatisfactory features in this case, principally due to the fact that evidence was not fully laid before the Court, and the magistrate has not given his reasons in sufficient detail; but on the whole I have come to the conclusion that we ought not to interfere with the decision of the magistrate. It would have been more satisfactory if it had appeared clearly what lapse of time had intervened between the time when Engelbrecht discovered the skin and spoke to the accused and the other native, and the time when Engelbrecht, together with Slabbert and the other visited the accused's hut. That is not clearly shown. It is possible that it may have only been a very short interval of

time, and that the accused would not have had an opportunity of concealing the carcase more effectively had he wished to do so. But we have this fact, that the skin was found in the veld about 800 yards from the accused's hut, and the accused's hut was the nearest hut to the spot where it was found; that half of the carcase of the sheep, together with the head, was found hidden under a tub on the stoep of appellant's hut, and that seems to me sufficient to establish possession on his part. He must be taken to have been in possession. It was then open to him to give an explanation and satisfy the Court that he was ignorant of the presence of the meat on his stoep hidden under the tub. The evidence he gave, and that of the little boy, was not accepted by the magistrate, and knowing the habits of natives, and taking into consideration the improbability of a boy of fifteen years slaughtering a sheep and taking half the carcase to his house, without letting his father, sister, or anybody else, know about it, I am not surprised that the magistrate did not accept the explanation offered by the appellant.

The sentence is a severe one; but the legislature clearly intended that stock theft should be severely punished, and gave the magistrate far higher jurisdiction than he has in ordinary cases. He has jurisdiction, for a first offence, to impose twelve months' imprisonment and twenty-four lashes. Had the magistrate given six months' imprisonment and eight lashes, I do not think we should have interfered. The magistrate probably thought it better to give a longer term of imprisonment in view of this being a first conviction, and I have no doubt he made it twelve months in consideration of the fact that he has not given lashes, which he could have done under the law. Therefore, although it is a severe sentence, I do not think we should interfere with the magistrate's discretion.

[G. v. P.]

GABASHANE v. KAPLAN.

1915. *September* 15. MASON, BRISTOWE and CURLEWIS, JJ.

Costs.—Criminal cases.—Magistrate's court.—Taxation not necessary.

There is no provision for taxing an attorney's bill of costs in a criminal case in a magistrate's court, and in the absence of any agreement, the attorney is entitled to recover a reasonable remuneration for his services.