STATE V. HEPLER, 1931-NMSC-065, 36 N.M. 9, 6 P.2d 933 (S. Ct. 1931)

STATE
vs.
HEPLER

No. 3684

SUPREME COURT OF NEW MEXICO

1931-NMSC-065, 36 N.M. 9, 6 P.2d 933

December 22, 1931

Appeal from District Court, Eddy County; Richardson, Judge.

Roy Hepler was convicted of unlawfully branding one head of neat cattle, and he appeals.

SYLLABUS

Syllabus by the Court

In the absence of evidence that a defendant unlawfully branded an animal, to wit, one head of neat cattle, it was the duty of the court to instruct the jury to acquit him. The failure to do so upon the motion of counsel for the defendant was erroneous and requires a reversal of the case.

COUNSEL

Hanna, Wilson & Dow, of Lovington, for appellant.

E. K. Neumann, Atty. Gen., and Quincy D. Adams, Asst. Atty. Gen., for the State.

JUDGES

Parker, J. Bickley, C. J., and Watson, J., concur. Sadler and Hudspeth, JJ., did not participate.

AUTHOR: PARKER

OPINION

*{*9}* **{1}** This is an appeal from the district court of Eddy county from a conviction for unlawfully branding one head of neat cattle. At the close of the testimony for the

prosecution, the attorney for appellant moved the court to instruct the jury to find a verdict of not guilty upon the ground that there was no evidence submitted by the prosecution which would authorize the conviction of appellant for unlawfully branding the animal. The counsel for appellant pointed out to the district court that while there was some evidence in the case tending to show the larceny of the animal, there was no evidence that the appellant branded the same. The same motion was renewed at the close of the entire case and was likewise refused by the court. In this refusal the court was evidently in error. Unless there was some atmosphere surrounding this case which cannot be committed to paper and is not here in the form of the transcript, there was no substantial evidence introduced by the prosecution, direct or circumstantial, to show that the appellant branded the animal. In fact, all of the evidence in the case was to the effect that the appellant did not brand the animal in question and the case should have been taken from the jury by the district court. The confusion which occurred in the case, and which prevented the court from taking the case from the jury, arose from the fact that the prosecution in its evidence seemed to proceed upon the theory that the appellant stole the animal in question. This was pointed out to the court by counsel for the appellant, but the court refused to heed the notice given by the motion for an instructed verdict.

*{*10}* **{2}** It follows that the judgment of the district court is erroneous and should be reversed, and the cause remanded with directions to discharge the defendant, and it is so ordered.