

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

ADAM COETZEE

(HIGH COURT REVIEW CASE NO.: 888/2010)

CORAM: MULLER, J et NAMANDJE, AJ

Delivered on:

REVIEW JUDGMENT

MULLER, J.: [1] The accused was convicted of stock theft and sentenced to 2 years imprisonment.

[2] I addressed the following queries to the Magistrate on 31 May 2010:

- 1. Where does it appear on the record that the Magistrate explained to the undefended accused what substantial and compelling circumstances mean and what the effect thereof would be in terms of the Act?*
- 2. The reasons for not finding that substantial and compelling circumstances (in terms of the Act) existed as set out in the second paragraph on page 6 are not understood.*

3. *Even if no substantial and compelling circumstances were found to exist, why did the Magistrate not consider, and perhaps impose, a partly suspended sentence in terms of S 14(4) of the Act(as amended)?*

Please explain”

[3] On 23 September 2010 I received the Magistrate’s reply which reads as follows:

The handwritten record page 6 records as follows:

COMPELLING AND SUBSTANTIAL CIRCUMSTANCES.

The Act 12/90 section 14 has been amended by Act 19/2004, which provides for a mandatory sentence of two years imprisonment. The court will afford you any opportunity to mitigate before sentence. The court will take a good care of every thing that you will say, that will enable the court to opiniate if there could be any substantial or compelling circumstances. Once the court forms an opinion that there exists such circumstance, then the court will deviate from imposing such mandatory sentence and impose a lesser sentence.

Do you understand sir?

A: Yes

The court failed to find any compelling or substantial circumstances because of the following:

- 1) Accused is employed therefore able to support himself.*
- 2) His part-time employer was looking for him to go and work.*
- 3) He is a father of six children who need his support and maintenance but care little about them, that is deducted from the fact that he went out to take someone else 'sheep while he is employed having a salary to cater for his needs. The Magistrate remarks that he involved in an activity without productivity. In short there is no gain or profit in criminal activities except drawing jail term to oneself.*

In the event that the Honourable the reviewing Judge finds that a suspended sentence will be in the interest of justice, it is suggested that 14 fourteen months imprisonment be suspended for three years.

[4] The Magistrate clearly misunderstood the first query. He was not asked whether he informed the undefended accused that he (as Magistrate) will take care to decide whether there are substantial or compelling circumstances for not imposing the prescribed applicable sentence. The question is whether he **explained** to the undefended accused what the effect of such substantial and compelling circumstances may be and what may constitute such circumstances. This was clearly not done and the undefended accused did not know what the Magistrate may consider to be such circumstances. The undefended accused then proceeded to state certain

mitigation circumstances. The Magistrate in his judgment on sentence said “*No compelling circumstances **detected***”.

[5] With regard to the possibility of suspending part of the sentence, the Magistrate left it in my discretion to decide and suggested that if I should so decide, 14 months of the 2 years may be suspended for 3 years.

[6] It has often been said by this Court that a Magistrate has a duty to explain to an undefended accused what the effect of substantial and compelling circumstances are and to comply with that an undefended accused has to be informed what such circumstances may be. I have considered whether to remit this matter to the Magistrate to properly comply with his duties in this regard. However, in the light of the fact that the accused has already been sentenced on 25 February 2010, more than 7 months ago, as well as the fact that if the sentence is conditionally suspended as the Magistrate suggests that he only serves 10 months direct imprisonment, I believe that the interest of justice would be better served not to delay this matter any further by remitting it, but that I should rather suspend part of the sentence myself.

[7] In the result the following orders are made:

1. The conviction of the accused is confirmed; and
2. The sentence imposed is set aside and substituted with the following sentence which will operate from 25 February 2010:

“Two years imprisonment of which 14 months are suspended for 3 years on condition that the accused is not convicted of any contravention of the Stock Theft Act no. 12 of 1990, as amended, within the period of suspension.”

MULLER, J

I agree

NAMANDJE, AJ