"Special Interest"

CASE NO.: CA 92/2009

IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI

In the matter between:

PETRUS LWISHI **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: LIEBENBERG, J *et* TOMMASI, J.

Heard on: 11 November 2011
Delivered on: 18 November 2011

APPEAL JUDGMENT

LIEBENBERG, J.: [1] Appellant appeared in the Ondangwa Magistrate's Court on a charge of theft (read with the provisions of the Stock Theft Act 12

of 1990), of three head of cattle; and after a trial, was convicted as charged. The accused was thereafter committed for sentence in the Regional/Divisional Court where he was sentenced to 20 (twenty) years' imprisonment of which 10 (ten) years' imprisonment suspended on the usual conditions. The appeal lies against sentence only.

[2] Ms *Horn* appeared before us *amicus curiae* for the appellant, while Mr *Lisulo* represented the respondent. We are indebted to counsel for the assistance provided to the Court in this regard.

[3] Appellant noted the appeal outside the prescribed time limits[1] and made proper application for condonation of the late filing of the notice, explaining the delay. The respondent, in my view correctly, considers the explanation to be acceptable and furthermore conceded that there are prospects of success on appeal against sentence, which, in Mr *Lisulo's* view, was on the harsh side. As will be shown *infra*, the concession is well made.

[4] The gist of the appellant's appeal is that he wants the sentence, imposed by the Regional/Divisional Court, to be "reduced". In the Notice of Appeal the appellant enumerated several points on which the sentencing court misdirected itself in sentencing by giving no or insufficient consideration to the personal circumstances of the appellant. In summary these are: The appellant being a first offender; he is self-employed and the only breadwinner of his school-going children as their mother is unemployed; he furthermore

[1] Rule 67 of the Magistrate's Court Rules

supports his siblings; and lastly, that the appellant's property (the nature thereof not mentioned), would suffer damage in his absence.

[5] The appellant testified in mitigation and said that he is single with two children of school-going age, residing with him; that he has stock and that there are no one else who could take care of his stock and mahangu fields during his absence. Although unemployed, he makes a living from his cattle. His evidence in mitigation was not challenged and no further submissions were advanced by the appellant. The public prosecutor thereafter submitted that the offence of stock theft was very serious and prevalent in the area; hence, asking for a deterrent sentence.

[6] The magistrate in sentencing, pronounced himself in a single sentence in the following terms:

> *"Court is off the opinion that the compelling and substantial circumstances are present in the source [sense] that accused is the sole provider of his two minor children." (sic)*

In additional reasons submitted in terms of Rule 67 (3) the learned magistrate submitted that, due to the value of the cattle involved, the court deemed it proper to impose a sentence of twenty years' imprisonment, half of which is suspended. The value of the stock was found to be N$5 400.

[7] It is obvious from the record that the sentencing court found the fact that the appellant was the sole provider for his two minor children, in itself, a substantial and compelling factor. What is not apparent from the record is whether the court, in reaching that conclusion, intended imposing a *lesser* sentence as provided for in the Act.[2] Mr *Lisulo* submitted that although the court *a quo* found substantial and compelling circumstances to exist, it did not impose a *lesser sentence* by suspending part thereof, as it apparently intended doing.

[8] It is a well-established principle that *"the sentence passed for a particular offence consists of both the unsuspended and the suspended portions thereof"*[3] and the Full Bench, in *The State v Mbahuma Tjambiru and Two Others*[4] at p. 5 (para [4]), said the following in this regard:

> *"When it comes to sentencing the correct approach of the trial Court is to decide on an appropriate term of imprisonment and thereafter to determine whether to suspend such sentence wholly (where permissible) or partially. The portion of the sentence suspended thus remains an integral part of the sentence and cannot be treated as something separate from or additional to the non-suspended portion of the sentence."* (emphasis provided)

[9] If the sentencing court intended to impose a lesser sentence (having found that substantial and compelling circumstances existed) by suspending half thereof, then it misdirected itself on the law; because, as stated above,

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[2]Section 14 (2) of Act 12 of 1990 (as amended)
[3]*S v Labuschagne and 19 Others*, 1990 (1) SACR 313 (E) at 315f-g
[4] Unreported Case No's CR 47-49/2008

the suspended portion of the sentence remains an integral part of the sentence. An effective sentence of twenty years' imprisonment was imposed in the present case, which is the mandatory minimum sentence under s 14 (1) (a) (ii) of the Act.

[10] However, subsequent thereto, the Full Bench in *Protasius Daniel and Another v The Attorney-General and Two Others,*[5] struck down and set aside the mandatory minimum sentences set out in s 14 (1) (a) (ii) and (b) of the Stock Theft Act, 1990 as being in conflict with the Constitution. The Prosecutor-General thereafter appealed against that judgement to the Supreme Court and the matter is still *sub judice*. The effect of the appeal lodged against the judgment in the *Protasius Daniel*-matter[6] was considered by this Court in *The State v Ismael Huseb*[7] and it found that "*the appeal against the declaration of invalidity of the two sections in the Stock Theft Act by the Full Court would not have the effect of suspending the operation of that judgment"*[8] The Court's reasoning was that the relevant potions of s 14 of the Stock Theft Act were in conflict with the Constitution since it was promulgated into legislation and not only once the Court pronounced it to be such in the *Protasius Daniel*-case. The Court applied, with approval, the *dictum* pronounced in *Minister of Health and Another v new Clicks South Africa (Pty) Ltd and Others: In Re Application for declaratory relief*[9] that:

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[5] Unreported Case No's A 238/2009 and A 430/2009, delivered on 10.03.2011
[6] The common law principle is that the noting of an appeal has the effect of suspending the execution or operation of a judgement and order of the Court appealed against.
[7] Unreported Case No CR 95/2011 delivered on 21.10.2011
[8] Para [18] at p. 9
[9] 2006 (80 BCLR (872) CC

> *" Any law inconsistent with the Constitution is therefore invalid. When a court considers and upholds a challenge to the validity of a law, it then declares the law to be invalid, but the law's fundamental invalidity flows from its inconsistency with the Constitution, not from the court order."*
>
> (emphasis provided)

I respectfully agree.

[11] For purposes of this judgment, there is no need to restate what has been decided in either of the cases referred to above. Suffice it to say that sections 14 (1) (a) (ii) and (b) – the latter not applicable to this case – have been found unconstitutional and therefore, are without force and effect. Accordingly, as far as it concerns this appeal, the mandatory minimum sentence of not less than twenty years' imprisonment is no longer applicable. However, the court is not permitted to impose *any* sentence, for example, a fine, because sections 14 (1) (a) (ii) and (b) remains unaffected by the judgment and limits the sentencing options to that of imprisonment.[10] The courts are (still) enjoined to impose custodial sentences only. The effect of the striking down is that, as far as it concerns stock valued at N$500 and more, the court is now permitted to impose any *custodial sentence* within its sentencing jurisdiction without first having to determine the existence or not of substantial and compelling circumstances. It further brings about that the Magistrate's Court is under no obligation to remit to the Regional/Divisional Court for sentence, those cases in which the value of the stock is N$500 or above; and that court would be permitted to pass sentence itself: Provided

[10] See *The State v Mbahuma Tjambiru and two Others (supra)* at p. 8 para [7]

that it is a custodial sentence and falls within the court's sentencing jurisdiction, namely 5 (five) years. Whereas the mandatory minimum sentence has been struck down, s 297 (4) of the Criminal Procedure Act[11] no longer finds application; hence, the courts are permitted to impose wholly suspended sentences where it sentences under s 14 (1)(a)(ii) and considers that to be an appropriate sentence.

[12] In instances where the Magistrate's Court is of the opinion that the sentence ought to be imposed exceeds that court's sentencing jurisdiction of five years imprisonment, then it should invoke the provisions of either s 114 (1) or s 116 (1) of the Criminal Procedure Act – depending on whether or not the conviction came as a result of a plea of guilty or a trial – and remit the matter for sentence to the Regional/Divisional Court.

[13] A further consequence of the striking down of s 14 (1)(b) of the Stock Theft Act is that where the Regional/Divisional Court (before the *Protasius Daniel* judgment) was permitted to impose *"any penalty or additional penalty provided for in this Act"*[12], it may no longer impose sentences exceeding its normal sentencing jurisdiction of twenty years imprisonment, because the mandatory sentence of thirty years upon second and subsequent convictions, has now been struck, and is no longer "provided for in the Act". It brings an end to the uncertainty brought about by the enactment of s 15A, which seemingly, gave *unlimited* jurisdiction to the Regional/Divisional Court (ordinarily having *limited* jurisdiction) when it came to second and subsequent

[11] Act 51 of 1977
[12] Section 15A of Act 12 of 1990

convictions, because the Act only provided for mandatory *minimum* sentences without stating the maximum that may be imposed. Of course, it could be argued that the Regional/Divisional Court was restricted to a sentence of thirty years imprisonment, being the penalty *"provided for in the Act"*. However, s 14 (1)(b) clearly states that imprisonment for a period of *not less than thirty years* may be imposed, thereby implying that a sentence in *excess* of thirty years could be imposed. Fortunately the ambiguity that was brought about by s 15A, read with s 14 (a) and (b) has now come to an end.

[14] I turn now to the appeal under consideration. The sentencing court clearly adhered to the provisions of the Stock Theft Act (as it was obliged to do at the time) and after finding substantial and compelling circumstances to exist, it, notwithstanding, imposed the mandatory minimum sentence of twenty years' imprisonment. Although the court had a discretion to impose a lesser sentence,[13] it imposed the mandatory minimum of twenty years' imprisonment, of which half is suspended; and which, so it would appear, the court considered to be a *lesser sentence*. As stated above, it is not a lesser sentence; accordingly, no effect was given to the court's initial intention to impose a lesser sentence. The sentencing court clearly misdirected itself in this respect.

[15] The fact that the Court has struck down the mandatory minimum sentences of not less than twenty and thirty years' imprisonment respectively,

[13] Section 14 (2) states: *"If a court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence prescribed in subsection (1)(a) or (b), it shall enter those circumstances on the record of the proceedings and* ***may*** *thereupon impose such lesser sentence."*

in my view, does not imply that the Court was of the opinion that the offence of stock theft is not at all a serious offence; or as serious as made out by the Legislature. Had that been the case, then it would undoubtedly also have interfered with the mandatory sentence set out in s 14 (1)(a)(i), which it clearly declined to do. This means that in cases of theft where the value of the stock is less than N$500, the courts are still enjoined to invoke the provisions of the section and impose the minimum of two years' imprisonment in circumstances where the accused is eighteen years of age and older; and where the court finds no substantial and compelling circumstances to exist. There is nothing in the *Daniel*-case from which it can be inferred that the Court did not consider stock theft to be a serious offence; neither does the striking down imply that. The current position is that the sentence prescribed by the Legislature for stock, valued below N$500, is (still) two years imprisonment, which the Court did not consider to be in conflict with the Constitution. This remains the bench mark for stock theft cases falling in that category, and where it involves stock valued above N$500, the court's approach should be to commensurate the sentence with the value of the stock involved. The offence of stock theft has always been considered by the courts to be a serious offence, and from this Court's perspective, the position has not changed at all.

[16] Although the courts now have an unfettered discretion when it comes to sentencing in cases where the value of the stock is N$500 and more, the approach of the sentencing court, in my view, should be to consider the usual factors applicable to sentence, whilst mindful of the need to impose deterrent sentences. Where appropriate, lengthy custodial sentences should be

imposed to serve as deterrence in a particular case, as well as generally. Ultimately, that would give effect to the Legislature's intention to address the problem of stock theft (which is rampant in this country), by the imposition of deterrent sentences. Hence, deterrence, as an objective of punishment, in cases of this nature, and where appropriate, should be emphasised.

[17] Appellant, in the present instance, stole three head of cattle from the complainant after having sold the same cattle to her some two months earlier for N$5 400. He thereafter sold the two stolen cows to other buyers and slaughtered the ox, the meat of which he exchanged for mahangu. It appears from the record that the complainant recovered only one cow and seized the mahangu when the appellant failed to collect it. The other cow died during the drought. Appellant was not only cunning by first selling the animals for N$5 400 and thereafter stealing them back and again sold them for a further N$3 620, but clearly planned his actions in advance. These are indeed aggravating factors. Cattle breeding forms the backbone of the economy in this part of the country – and throughout Namibia – and the loss of cattle to a farmer through theft, is usually a severe blow to the owner; hence the need to discourage it by the imposition of deterrent sentences. Cattle owners are forced to rely on the honesty of fellow beings, for it is virtually impossible to protect their stock all hours of the day or night.

[18] Despite the appellant being a first offender and the father of two minor children, I am unable to fault the court *a quo* for having come to the conclusion that a custodial sentence, in the circumstances of this case, is

called for. However, the term imposed is unduly harsh and requires intervention by this Court.

[19] In the result, the Court makes the following order:

1. The application for condonation of appellant's non-compliance of the Rules is granted.
2. The appeal against sentence is upheld.
3. The appellant is sentenced to 10 (ten) years' imprisonment.
4. The sentence is antedated to 25.03.2009.

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LIEBENBERG, J

I concur.

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TOMMASI, J

ON BEHALF OF THE APPELLANT **Ms. Horn**

Instructed by: ***Amicus Curiae***

ON BEHALF OF THE RESPONDENT **Mr. D. Lisulo**

Instructed by: **Office of the Prosecutor-General**