



CASE NO.: CR 15/2011

"Not Reportable"

/IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

VS

THEOPLAT MBAARI NDERURA

(HIGH COURT REVIEW CASE NO.: 1563/2010)

CORAM: PARKER, J et, UNENGU, AJ

Delivered on: 2011 February 23

REVIEW JUDGMENT

PARKER, J [1] The accused person was convicted in the Omaruru District Magistrates' Court on a charge of theft which takes into account s. 11 (1) (a), s. 14 and s. 17 of the Stock Theft Act, 1990 (Act No. 12 of 1990) (as amended) ('the Act'). The accused pleaded guilty, and was convicted on his own plea of guilty. Accordingly, the learned magistrate sentenced the accused as follows:

'24 months' imprisonment of which 18 months (are) suspended for four years on condition that the accused is not convicted of contravening s. 11 (1) (a), s. 14 and s. 17 of the Stock Theft Act 1990, as amended, committed during the period of suspension.'

[2] I directed the following query to the learned magistrate:

(1) It is not clear what circumstances the learned Magistrate found to be 'compelling and substantial'. If as the learned Magistrate says, she found such circumstances to exist, justifying the imposition of a sentence less than the statutorily prescribed minimum sentence, why then did she impose a sentence of 24 months' imprisonment?

(2) Would the learned Magistrate please explain?'

And the learned Magistrate responded in the following terms (quoted verbatim):

The record indicates on page 3 that s.14 (1) and 2 of Stock Theft Amendment Act 19/2004 was explained as per annexure C. Accused indicated that he is a first offender he pleaded guilty to the charge he further stated that most of the meat was recorded. He requested for a suspended sentence.

Several decided cases were looked at to find out if compelling and substantial circumstances exist. Court was guided by *S v Maglas*

2001 (2) SA 1222. The starting point is that the prescribed

minimum sentence is to be imposed, if court is satisfied compelling and substantial circumstances exist then it can depart from the minimum sentence.

It was the court's view that the fact that accused person was first offender, pleaded guilty and that he did not benefit anything from the

offence is weighty enough to justify a lesser sentence. Further, the value of the stolen goat is N\$300.00 so it was this court's view that if accused is given the prescribed minimum sentence it will be overly harsh. Accused was not given direct 24 months imprisonment it was suspended for 4 years on the usual conditions. '

[3] The learned magistrate says the substantial and compelling circumstances she found to exist are that: the accused is a first offender; he pleaded guilty; and most of the meat was recovered. In my view, those factors must in their circumstances and in their combined impact, be 'substantial' (i.e. of 'real importance - *Concise Oxford Dictionary*, 10th edn) and 'compelling' (i.e. 'rousing strong attention (or) conviction, -*Concise Oxford Dictionary*, 10th edn). Thus, there must exist, on the facts and in the circumstances of the case, in favour of the accused, a factor that is of real importance, compared with any of the traditional factors (that is, 'substantial') and which is also, at the same time, capable of rousing strong attention or conviction compared with any of the traditional factors (that is, 'compelling'). It is such a factor that, in my opinion, can be said to be 'substantial and compelling' within the meaning of s. 14(2) of Stock Theft Amendment Act, 2004 (Act No. 19 of 2004). The traditional factors in themselves, without more, cannot be said to be capable of measuring up to the 'substantial and compelling' mark contemplated in s. 14(2) of the Act. *In casu*, the factors the learned magistrate says she found to exist are, indeed, the traditional factors: there is nothing more.

Accordingly, as I have said previously, the factors that the learned magistrate says he found to exist do not, in my view, measure up to the mark of 'substantial and compelling' within the meaning of s. 14(2) of the

Act.

[4] Nevertheless, I have no good reason to fault the learned magistrate for

suspending a part of the sentence, for the reasons given; but, as I say, she was only entitled to so suspend a part of the sentence, i.e. the minimum sentence (i.e. 24 months) which, as I see, she was minded to impose. In this respect, I do not agree with the learned magistrate that by suspending 18 months of the minimum sentence of 24 months' imprisonment she has thereby imposed a sentence less than the statutorily prescribed minimum sentence of 24 months' imprisonment. To illustrate the point; if a sentence of, say, 10 months' imprisonment is imposed on X, and four months of the 10 months are suspended on the usual conditions, that does not ipso facto mean that X has been *sentenced* to six month's imprisonment. The absurdity of such conclusion comes into sharper focus in this second illustration. If a sentence of, say, 10 months' imprisonment is imposed on Y and the sentence is wholly suspended, on the usual conditions, it cannot be seriously argued that the court did not impose a custodial sentence of 10 months. In suspending a custodial sentence for any period of time, as in the instant case, what is suspended is the *servicing* of the period of time that is suspended and not the *imposition* of the sentence itself. Thus, the records of previous conviction of X and Y (in our illustration above) will indicate a sentence of 10 months' imprisonment in either case, although X served a prison term of six months, while Y did not serve any prison term. The fact that remains is, therefore, that the court had imposed a 10-month prison sentence on X and on Y.

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

- (1) The conviction of the accused is confirmed.

(2) The sentence imposed by the learned Magistrate is set aside and the following is put in its place:

24 months' imprisonment, of which 18 months are suspended for five years on condition that the accused is not convicted of the crime of theft which takes into account s. 11 (1) (a), s. 14 and s. 17 of the Stock Theft Act, 1990 (Act No. 12 of 1990) (as amended).

PARKER, J

I agree.

UNENGU, AJ