

CASE NO.: CA 200/2007

REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:
MATHEUS NAKATHINGO
and
THE STATE
CORAM:

Heard on: 23 October 2009
Delivered on : 24 February 2011

APPELLANT

RESPONDENT
HOFF, J et SWANEPOEL, J

APPEAL JUDGMENT

HOFF, J: [1] This is an appeal against sentence only. The accused was convicted in the magistrates' court sitting at Outapi for stock theft in contravention of the provisions of Act 12 of 1990, section 11 (1) (a).

Due to the fact that the value of the stolen two heads of cattle was N\$3 800.00 the case was transferred to the Regional Court for purpose of sentencing. The appellant was sentenced to 20 years imprisonment.

[2] It is settled law that punishment falls within the discretion of a trial court. This discretion is not easily interfered with on appeal if it had been exercised judicially.

[3] A Court of appeal will only interfere with the discretion of the trial regarding sentence on limited grounds, namely:

"When the trial court has not exercised its discretion judicially or properly. This occurs when the trial court has misdirected itself on facts material to sentencing or

on legal principles relevant to sentencing. This will also be inferred where the trial court acted unreasonably and it can be said that the sentence induces a sense of shock or there exists a striking disparity between the sentence passed and the sentence this court would have passed or if the sentence appealed against appears to this court to be so startlingly or disturbingly inappropriate as to warrant interference by this court. (S v Van Wyk 1993 NR 426 (SC) at 443 also 1992 (1) SACR 147 Nms at 165)."

(See S v Gaseb and Others 2000 NR 139 (SC) at 167 H -1).

[4] Section 14 (1)(a)(ii) of Act 12 of 1990 (as amended by Act 19 of 2004) prescribes an imprisonment of not less than 20 years in those circumstances where a person has been convicted of theft of stock of which the value is N\$500.00 or more.

[5] Section 14(2) of Act 12 of 1990 provides that if a court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.

[6] The complainant during the trial in the district court testified that two heifers and one ox had been stolen by the accused person. He further testified that the value of each heifer was N\$1 900.00 and the value of the ox was N\$700.00. The value of these stock had not been disputed by the accused during cross-examination. The accused was convicted of 2 head of cattle valued at N\$3 800.00.

[7] The accused person is a lay person and was unrepresented during the trial in both the district and regional court.

[8] The accused was a first offender. In mitigation he stated that he is single, with no dependants. That he was a farm labourer who worked for the complainant and earned a wage of N\$100.00 per month. It is also clear from the record that the accused person showed

some contrition. His age as reflected on the charge sheet was 22 years.

The magistrate asked the accused the following question:

"Court: Do you have any substantial and compelling reasons why this court should not send you to prison for not less than twenty years ?

A: Salary or wage was very little compared to what I used to do for the complainant. I have my clothes and blankets at complainant's cattle post. That is all."

[9] To ask a lay person like the accused whether he wants to furnish substantial and compelling circumstances to court is with all respect meaningless. How does a lay person know what is meant by these terms, if even legally trained persons grapple with this concept ?

[10] The accused was not legally represented and it was thus the duty of the magistrate to explain to him the provisions and implications of section 14 of the Act. (See *S v Kauleefelwa* 2006 (1) NR 102 at 105 C). This the magistrate failed to do.

[11] In particular the magistrate must have explained to him the difference in gravity of a sentence in respect of stock below the value of N\$500.00 and stock to the value of N\$500.00 or more. The magistrate failed to do so.

The accused must then be afforded the opportunity to take issue with the value of the stolen cattle and this must appear from the record.

The accused must further be afforded the opportunity to adduce proof of the existence of substantial and compelling circumstances. Where the accused person is a lay person and unlikely to fully understand this concept the court must explain to him that the court will take into consideration all facts and factors the accused wishes to advance, in order for the court to come to a just decision regarding the existence or otherwise of substantial and compelling circumstances.

It has been stated (cf *S v Victor Mbishi Mishe* Review Case No. 1425/2006 delivered on 14 November 2006; *S v George Johannes Kambonde* Review Case No. 1480/2006; appeal

judgment of *Levi Gurirab v The State* Case No. CA 190/2004 delivered on 12 July 2005) that it is imperative that the accused must be assisted during this process.

It is the duty of the magistrate to put such relevant questions to the accused in order to obtain sufficient information in order to be put in a position to evaluate the information and to come to a just decision on this issue.

Some of the questions that could have been asked include: for how long he had been employed by the complainant, what additional (if any) benefits he received e.g. rations or clothes, whether he indeed sold the cattle, for what price, and what he did with the money, if he had received any money from the buyer, and whether there exists a possibility of retrieving the animals.

The accused indicated during questioning by the magistrate in the district court that he *intended* to sell the two heads of cattle to one "*Mateus*". Who was *Mateus* ? One would have expected that this would have been further investigated.

[12] It must be stated, despite the submission by counsel that the magistrate passed sentence without receiving evidence of the value of the stock, that the complainant testified regarding the value of two heifers. What the magistrate failed to do however, even at the stage where his right to cross-examination was explained to the accused, was also to bring to his attention the provisions of section 14 of the Act and to afford him the opportunity at this stage where testimony was being led regarding the value of the stock, to take issue with the value thereof especially in light of the fact that the accused during questioning in terms of section 112 (1) (b) of Act 51 of 1977 valued the

two heifers at N\$1 800.00.

[13] *In casu* it does not appear from the record whether or not the magistrate before passing sentence considered whether substantial and compelling circumstances exist in this matter. It can only be inferred from the sentence imposed that no substantial and compelling

circumstances were found to exist.

[14] It appears to me even with the available information on record that substantial and compelling circumstances do exist in particular if one has regard to the age of the accused, that he believed that he was financially exploited by the complainant, the fact that his parents were unemployed and not in a position to financially assist him, the fact that he is a first offender and the fact that he showed contrition, which justifies the imposition of a sentence less than the prescribed minimum of 20 years imprisonment.

[15] This Court is alive to the fact that stock theft is a serious offence and that a large majority of owners of stock depend on their livestock as a means of generating income.

[16] In dealing with first offenders presiding officers should keep in mind the provisions of section 14 (4) of the Stock Theft Amendment Act 19 of 2004 which reads as follows:

"The operation of a sentence, imposed in terms of this section in respect of a second or subsequent conviction of an offence referred to in section 11 (1) (a), (b), (c), or (d), shall not be suspended as contemplated in section 297 (4) of the Criminal Procedure Act, if such a person was at the time of the commission of any such offence eighteen year of age or older."

[17] The provisions of this section in my view are not applicable to first offenders.

[18] Section 297 (4) of Act 51 of 1977 reads as follows:

"Where a court convicts a person of an offence in respect of which any law

prescribes a minimum punishment the court may in its discretion pass sentence but order the operation of a part thereof to be suspended for a period not exceeding five years on any condition referred to in paragraph (a) (i) of subsection (1)."

[19] In *S v David Sacky Kharuchab* High Court Review Case No. 192/2008 delivered on 26-02-2007 Silungwe, AJ (Liebenberg J concurring) stated the following at paragraph 5:

"However, once substantial and compelling circumstances are found to be present, and such circumstances are necessarily entered on the record of the proceedings, the court has two options, to wit, it may simply impose a lesser sentence than the minimum sentence prescribed in subsection (1) (a)(i) or (ii) of section 14 aforesaid; or in the case of a first conviction for stock theft (vide section 14 (4) of the Act), it may impose such lesser sentence but order that a part thereof be suspended for a period not exceeding five years on such conditions as it may deem appropriate, in terms of section 297 (4) of the Criminal Procedure Act, Act 51 of 1977."

[20] I have considered referring the matter back to the sentencing magistrate but since the magistrate acted as a relief magistrate at that stage and is no longer holding such position I shall impose a sentence which is appropriate in the circumstances in view of the irregularities referred to (*supra*).

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

1. The conviction is confirmed.
2. The sentence is set aside and substituted with the following sentence:

10 years imprisonment of which 2 years are suspended for a period of 5 years on condition the accused is not convicted of theft of stock in contravention of the provisions of section 11 (1)(a) of Act 12 of 1990, committed during the period of suspension.

3. The sentence is in terms of the provisions of section 282 of the Criminal Procedure

Act, Act 51 of 1977 antedated to 9 March 2006.

HOFF, J

I agree

SWANEPOEL, J

ON BEHALF OF THE APPELLANT:

MR RUKORO

Instructed by:

LORENTZ ANGULA INC. (AMICUS

CURIAE)

ON BEHALF OF THE RESPONDENT:

ADV. EIXAB

Instructed by:

OFFICE OF THE PROSECUTOR-GENERAL