



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 06/2012

In the matter between:

**SAKARIA JOSEPH**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Joseph v State* (CA 06/2012) [2012] NAHCMD 40 (24 September 2012)

**Coram:** MILLER AJ and PARKER AJ

**Heard:** 24 September 2012

**Delivered:** 24 September 2012

**Flynote:** Criminal procedure – Appeal – Sentence – Minimum sentence – Stock Theft Amendment Act 19 of 2004 – Minimum declared unconstitutional in earlier decision – This court bound by that decision.

**Summary:** Criminal sentence – Stock Theft Amendment Act 19 of 2004 – Court finding that sentence imposed was primarily influenced by the impugned minimum sentence provisions in terms of Stock Theft Amendment Act 19 of 2004 – This court bound by decision of the court declaring minimum sentence under that Act

unconstitutional – *In casu* court at large to impose appropriate sentence, considering the factors to be taken into account in sentencing – Having done so, court concluding that the sentence imposed by trial court induces a sense of shock in the mind of the court – Consequently court upholding the appeal.

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### ORDER

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The appeal against sentence is accordingly upheld. The conviction of appellant is confirmed. The sentence imposed by the Regional Court is set aside and substituted with the following: The appellant is sentenced to 10 years' imprisonment which is backdated to 29 July 2010.

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### JUDGMENT

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PARKER AJ (MILLER AJ concurring):

[1] The appellant, accused number 2 in the trial court was charged with two other accused persons before the Otavi District Magistrates Court with the offence of theft in terms of s 11 (1)(a) of the Stock Theft Act 12 of 1990 as amended.

[2] The appellant and accused number 2 were found guilty and accused number 3 not guilty of the theft of four head of cattle, that is, one bull and three cows valued at (N\$22 000,00). The trial district Magistrate Court accordingly referred the matter of sentencing to the Regional Court in Otjiwarongo in terms of s 116 of the Criminal Procedure Act 51 of 1977.

[3] On 29 July 2010 the Regional Court found that the conviction was in accordance with justice and sentenced the appellant and the other accused to 20 years' imprisonment each, with five years suspended on conditions, after finding that there were no compelling and substantial circumstances for the court to impose a lesser sentence than that prescribed by the Stock Theft Amendment Act 19 of 2004.

[5] The appellant now appeals against both conviction and sentence. In the course of her submission the appellant's counsel Ms Hamutenya abandoned the appeal against conviction. And the counsel for the state, Mr. Moyo, opposed the late filing of the appellant counsel's heads of argument, but in the course of his oral submissions he abandoned his challenge. We now pass to consider the appeal on sentence.

[6] We do not accept the submission by Mr. Moyo that because arguments have been heard by the Supreme Court on the constitutionality of s 14 (1) of the Stock Theft Amendment Act 19 of 2004 in the matter of *Daniel v Attorney General & others and Peter v Attorney General & others*, the prescribed minimum sentence still apply. It has not been established that the decision of the High Court is wrong and, therefore, cannot be followed. In any case, that decision has been applied in two cases by the High Court, e.g. in *S v Hoeseb* 2012 (1) NR130. The irrefragable fact is that as we consider this appeal the prescribed minimum sentence under the Stock Theft Amendment Act 19 of 2004 is unconstitutional.

[7] Having said that, it cannot escape our observation that the sentence imposed on the appellant was influenced primarily by the impugned legislation. We are therefore at large to consider an appropriate sentence. Mr. Moyo submits along those lines also.

[8] The trial court considered, as the appellant's counsel concedes in her heads of arguments, that the sentencing court took into account the personal circumstances of the appellant and other important factors required to be taken into account in sentencing. But, as we have said, the sentencing court was influenced primarily by the impugned legislation. Furthermore, the trial court found that the loss suffered by the complainant was N\$16 000,00. Without the prescribed minimum sentence, it is our view that the sentence imposed on the appellant comes to us with a sense of shock. Ms. Hamutenya submitted that the case of *S v Swartboo*i referred to us is disguisable on the basis that the appellant in that case was a repeat offender and his 30 years' sentence was cut into half by the Appeal Court. Mr. Moyo agrees.

[9] As counsel for the appellant submitted, while an effective sentence of 15 years may be an appropriate sentence for murder or culpable homicide, it is not so appropriate in this case taking into account the value of the stock involved, the personal circumstances of the appellant and other factors taken into account by the sentencing court. Nevertheless, we accept Mr. Moyo's argument that this court should take into account the fact that stock theft is serious and prevalent. We have done that.

[10] Having considered all the facts and circumstances of the case, we conclude that the appeal against sentence should be upheld. For these reasons we make the following orders:

1. The conviction of the appellant is confirmed.
2. The sentence imposed by the Regional Court is set aside and the following is put in its place: The appellant is sentenced to 10 years' imprisonment, and it is backdated to 29 July 2010.

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C Parker  
Acting Judge

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P J Miller  
Acting Judge

APPEARANCES

APPELLANT:

L HAMUTENYA

Instructed by Directorate of Legal Aid

RESPONDENT:

E MOYO

Of Office of the Prosecutor-General,  
Windhoek