REPUBLIC OF NAMIBIA

REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 99/2016

In the matter between:

PAUL MATHEUS DIERGAARDT **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Diergaardt v S* (CA 99/2016) [2016] NAHCMD 102 (31 March 2017)

Coram: NDAUENDAPO J and LIEBENBERG J

Heard: **14 December 2016**

Delivered: **31 March 2017**

Flynote: Criminal procedure – Appeal – Stock theft – Appellant convicted of theft of a calf – Sentenced to 5 years' imprisonment.

Law of property – Defence of *res nullius* raised – Calf not ear- or brand-marked and roamed freely among other cattle for one year – Calf in custody of a third person as per agreement with owner – Neither abandoned custody or ownership of calf proved – Court found calf was not *res nullius.*

Criminal law – Defence of mistake of fact – Must be reasonable – Theft – Of calf mistakenly believed to have been abandoned – Mistake not reasonable in circumstances – Conviction upheld.

Summary: The appellant appropriated one calf which had roamed freely on a farm where he and other farmers farmed jointly. The calf had no ear- or brand-marks. Ownership of the calf had duly been established and that by agreement the calf was left in the custody of one of the co-farmers. Appellant's evidence that enquiries were made as regards ownership had been rejected by trial court. Neither ownership nor custody of the calf had been abandoned and appellant's belief that it was *res nullius* was mistaken and not *bona fide* or reasonable in the circumstances. Appeal against conviction dismissed.

ORDER

1. The appeal against conviction is dismissed.
2. The appeal against sentence succeeds in that the sentence imposed is set aside and substituted with the following: Three years' imprisonment, wholly suspended for five (5) years on condition that the accused is not convicted of a contravention of s 11(1)*(a)* of the Stock Theft Act, 1990, committed during the period of suspension.
3. The sentence is antedated to 18 August 2016.

JUDGMENT

LIEBENBERG J (NDAUENDAPO J concurring):

[1] Appellant was arraigned on one count of theft of stock, read with the provisions of the Stock Theft Act, 1990.[1] He pleaded not guilty but after evidence was heard he was convicted of theft of one calf valued at N$3 000, and sentenced to 5 years' imprisonment. Dissatisfied with the outcome of the trial, he lodged an appeal against both the conviction and sentence.

[2] In the appellant's notice of appeal eight grounds against conviction are enumerated, not all of which satisfy the requirement of being clear and specific. These grounds mainly concern the manner in which the presiding magistrate conducted the trial and allegedly committed several irregularities to the extent that it vitiated the conviction. It is *inter alia* contended that the court wrongly upheld an objection by the prosecution against a question by defence counsel, aimed at impeaching the character of one of the State witnesses[2]; the court having posed leading questions to the appellant which elicited evidence favourable to the State[3]; the admissibility of and reliance placed upon hearsay evidence[4]; and generally, that the conclusion reached by the trial court not being consistent with the evidence adduced.

[3] The crux of appellant's appeal seems to lie in the first ground raised namely, that the evidence did not establish ownership of the calf to have been vested in the complainant at the time appellant slaughtered it. What this essentially means is that the stray animal (the calf), was *res nullius,* and the appellant's subsequent claim of ownership was therefore lawful.

[4] The established facts can briefly be summarised as follows: The complainant, Mr Gregory Brinkman, claimed ownership of a calf that got separated from its mother and which formed the subject matter of the trial in which the court *a quo* convicted the appellant of theft of one calf. According to the appellant this was a stray animal (a cow) which joined his herd and had been there for more than a year before he slaughtered it. Only thereafter did he learn that Mr Brinkman claimed ownership and during a conversation they

[1] Act 12 of 1990 (as amended).
[2] Ground 2.3.
[3] Ground 2.4.
[4] Ground 2.5.

had, appellant apologised to him for having slaughtered his calf. Negotiations between him and the complainant as regards compensation broke down which led to the appellant's prosecution. It is common cause that the particular calf did not have any ear- or brand-mark. The reason for this, as explained by the complainant, is that the calf went astray before it reached the required age for earmarking and branding.

[5] Mr Brinkman at the relevant time rented a farm situated in the Rehoboth district and neighbouring farm Moutonsvlei, Klein-Aub, on which appellant and members of the Isaaks family were jointly farming with cattle. The fence between the two farms were not properly maintained and this resulted in Brinkman's cattle crossing onto Moutonsvlei. One day when Mattie Isaaks took his cattle to Petrus Isaaks's side of the farm, it was found that some of Brinkman's cattle were amongst that of Mattie Isaaks, and after Brinkman's cattle were fetched, the calf in question remained among Petrus Isaaks's cattle. After satisfying himself that the calf was that of Brinkman, he phoned him and informed him accordingly. At the request of Brinkman, it was agreed that the calf would stay with Petrus until Brinkman could collect it at a later stage as he, that is Brinkman, was a part time farmer and resided in Walvis Bay. At some stage the calf ended up among Koos Isaaks's cattle from where the appellant took it. When the calf later on returned on its own, the appellant again fetched it where after it remained with him until it got slaughtered. According to Petrus Isaaks the calf was under his control as arranged with Brinkman and he did not give the appellant permission to take it; neither did the appellant make any inquiry with him about ownership of the said calf. He therefore later on contacted Brinkman to inform him that the calf had been slaughtered by the appellant. Witnesses Brinkman and Petrus Isaaks corroborated one another in all material respects of their evidence.

[6] The evidence of the witness Ralf Isaaks did not advance the State case in any significant manner, except for the witness stating under cross-examination that the calf had been on the farm for about one year and that there is no way that anyone, including the appellant, could *not* have known who the owner of the calf was.

[7] Mr Johan Drosky's evidence concerned the transportation of the carcass from the farm after the appellant had killed it. He said at that stage it was (still) without ear- or brand-marks. Appellant then told him that the neighbour gave him permission to sell the animal (tollie). It was only during court proceedings that he learned the name of the neighbour earlier referred to by the appellant, to be that of Brinkman. In cross-examination counsel for the defence started off by asking the witness whether he was a sentenced prisoner and what he was sentenced for to which the prosecutor objected. The court sustained the objection and counsel continued with cross-examination until its conclusion. The trial court having upheld the objection, according to the appellant, constituted a misdirection vitiating the entire proceedings.

[8] It is the appellant's evidence that the calf had been moving around on the farm for about one year, moving in and out the kraals of various farmers[5] before it came to his kraal. He tried to find out who the owner was and when no one claimed ownership, he took the calf for himself. He subsequently sold the calf because he experienced financial difficulties at the time. He disputes having known that the calf belonged to Mr Brinkman at the relevant time. Though claiming that he had made enquiries as to whom the calf belonged, evidence to the contrary was given by Petrus and Ralf Isaaks, evidence that remained unchallenged. This constituted a material shortcoming in the appellant's defence. Appellant further conceded in cross-examination that he made no report about the stray calf to the police or the veterinary services; neither were any of his other neighbours aware of the enquiries he had made in that regard. Although he disputes the evidence of Drotsky about him having told the latter that Brinkman asked him to sell the calf, he conceded that he made no mention about the calf having been a stray animal either. Appellant said the calf was among his own cattle for about one year before he sold it, but his evidence on this score was disputed by the two State witnesses, claiming it to have been for a much shorter period.

[5] There were six different farmers farming on the same farm.

[9] The evidence of the second defence witness, Willie Diergaardt, though having lived on the farm at the time and being present at the stage when the calf was killed, added nothing to the facts under consideration, except for saying that the appellant never mentioned to him that this was a stray animal; neither was he aware that appellant had approached anyone else on the farm to make enquiries about ownership of the calf.

[10] In deciding as to whom the calf in question belonged to at the time appellant slaughtered it, the evidence of the complainant, Brinkman, and that of Petrus Isaaks, is crucial; and more so where there is no evidence to the contrary. Appellant was clearly in no position to challenge the testimony of Petrus about him having established that the unknown calf which stayed behind on the farm after Brinkman's cattle were fetched, belonged to the latter. Neither could he dispute the agreement reached that Petrus would keep the calf until Brinkman is able to fetch it from him. That was the arrangement up to the time the calf was slaughtered. The fact that the calf had not been earmarked or branded had no bearing on the complainant's ownership. The evidence clearly established that circumstances on the farm were such that livestock belonging to different farmers living on the farm, regularly mixed and ended up in one another's kraals. It was therefore not strange that the relevant calf was seen moving in and out the kraals of different farmers, who seemed to have had no problem with this occurrence. According to Ralf Isaaks everyone knew to whom the calf belonged and to his mind, appellant equally knew that it was Brinkman's calf.

[11] What is evident from the evidence of Johan Drosky is that appellant knew that the calf belonged to the neighbour (Brinkman), as he made a report to that effect, and even explained that he was asked to sell it on Brinkman's behalf. Much is made on appeal about the credibility of the witness Drosky whom, it was argued, should not be believed because he is a sentenced prisoner. It is clear from the record that the witness was not discredited in cross-examination and except for the appellant's evidence, the witness' evidence had not been contradicted in any manner. The trial court was accordingly entitled to have regard thereto in its evaluation of the evidence

and, in the absence of any evidence showing otherwise, we are equally unable to come to a different conclusion. The conclusion reached is fortified by the appellant's own admission that he immediately apologised to Mr Brinkman for having slaughtered his calf (instead of challenging his claim to ownership).

[12] In the light of the evidence adduced that the calf identified as being that of the complainant, and it being the same one that got slaughtered, appellant's attempt to cast doubt on the appearance and age of the calf seems futile. Despite stating in his plea explanation that it was a female calf (cow), evidence about it being a male calf or tollie had not been challenged. The identity of the calf in dispute on the evidence adduced was clearly not in doubt and the trial court cannot be faulted when coming to that conclusion.

[13] It therefore seems inevitable to conclude that it had been duly established that the complainant was the lawful owner of the calf appropriated by the appellant. This court is accordingly satisfied that the trial court did not misdirect it when it came to this conclusion.

[14] To be decided next is whether the calf had been abandoned by its owner, Mr Brinkman.

[15] In the present instance it is the appellant's case that he acquired the calf by appropriation (*occupatio*) after its owner, a person unknown to the appellant, abandoned it and was therefore *res nullius*. In Silberberg and Schoeman's: *The Law of Property* (Fifth Edition) at 33 pertaining to things not owned by persons, it is stated thus:

'The mere physical loss of a thing is not sufficient to render it an unowned thing. Physical loss must be accompanied by the intention to relinquish ownership.[6] Such things are referred to as abandoned or derelict things (*res derelictae*) and they constitute unowned things.' (Emphasis provided)

[6] *Minister van Landbou v Sonnendecker* 1979(2) SA 944 (A) at 947A.

[16] From the evidence of Brinkman and Petrus Isaaks it is clear that at no stage did Brinkman abandon ownership of the calf. An agreement had been reached by which Petrus Issaks would take control of the calf until such time that Brinkman, who, in the meantime bought and occupied another farm, would collect it from Petrus. Despite the calf roaming into kraals belonging to different farmers living on farm Moutonsvlei, ownership of the calf was not lost or abandoned. What is clear from the evidence is that this is not an instance where the owner of the calf in dispute abandoned it.

[17] I turn next to consider the court *a quo's* finding that the calf in question was not *res nullius* and that appellant had the required *mens rea* when he assumed ownership over it. This finding formed the basis of the first ground of appeal.

[18] In deciding the issue of lawful ownership, the trial court in particular took issue with the time period of one year the calf had been drifting on the farm in circumstances where the complainant and custodian, as well as other occupants of the farm, well knew of its whereabouts. Also the fact that, despite appellant's claim to have made enquiries with persons living on the farm as to who the owner of the calf was, his claim was not supported by the testimony of any of his co-occupants that he had pertinently asked them. To establish whether the calf was *res nullius* was easily discernable, the court reasoned, by simple enquiry – something the appellant clearly did not do. Neither did he take those steps the reasonable farmer would have done i.e. to report the presence of the calf to the police or make a public announcement of the finding of a stray calf; options he was aware of and could easily have exercised. The court in the end found that appellant had not acted in good faith when he isolated the calf from other herds, and shortly thereafter claimed ownership and slaughtered it.

[19] Evidence about appellant having removed the calf from where Petrus Isaaks stayed and taking it back to where he farmed on more than one occasion, had not been challenged. In the absence of evidence that he had permission of either the owner (Brinkman) or Petrus Isaaks, under whose

control the calf was at the relevant time, the appellant's appropriation would clearly have been unlawful if his defence were to be rejected.

[20] Appellant's defence in essence is one of mistake of fact i.e. that he formed the impression that the calf is *res nullius* and that he was entitled to appropriate it, thus lacking *mens rea*. He was mistaken and his mistake was one of fact as the owner had not abandoned the calf. It is well settled that in order for mistake of fact to succeed as a defence to a criminal charge, it must be both *bona fide* and reasonable. In *Rex v Ndara*[7] at p. 185, Schneider, A.C.J., said:

> 'For a mistaken belief to operate in favour of an accused person it is commonly said that the belief must be reasonable (Gardiner & Lansdown Criminal Law, 5th ed. p. 42) and the circumstances of this case provide a strong argument in favour of this view.'

See also: *S v Griffen.*[8]

[21] In the present matter appellant claims to have acted in good faith when he appropriated the calf in the belief that it had no owner. As shown above, he was mistaken as Mr Brinkman was the owner of the said calf. What must however be decided is whether his belief was reasonable in the circumstances of this case.

[22] The evidence established that the calf had been roaming freely on the farm for about one year before the appellant appropriated it. Everyone on the farm seemed to have known that the calf belonged to Mr Brinkman which, according to the witness Ralf Isaaks, included the appellant. This much is evident from the appellant's report to the witness Drotsky when the calf was slaughtered. Although appellant is adamant that he before laying claim to the calf made enquiries with his co-farmers, none of those called to testify at the

[7] 1955(4) SA 182 (AD).
[8] 1962 (4) SA 495 (ECD).

trial was aware thereof, including the witness Willie Diergaardt who testified for the defence and who had been living on the farm at the relevant time. His evidence in this regard is simply not true and the trial court was accordingly entitled to reject it as false.

[23] It was further argued on the appellant's behalf that the witnesses who testified for the State merely speculated as to whether the appellant knew to whom the calf belonged (as no one informed him who the owner was), and thus inadmissible evidence. The argument fails to appreciate the undisputed evidence presented that all persons on the farm knew that the calf was that of the complainant, including the appellant. Furthermore, there was no need for anyone to have informed appellant *mero motu* as they were unaware that he had laid claim to the calf as he never conveyed this to them. The argument therefore bears no prospects of success.

[24] A disquieting feature of the appellant's case is the fact that not long after appellant assumed ownership of the calf, he sold it off for financial reasons. There was no explanation forthcoming as to why this particular calf had to be sold instead of his own cattle.

[25] When the appellant's alleged *bona fide* belief that the calf was *res nullius* is considered against all the evidence adduced, it appears to me inescapable to reach the conclusion that his belief was neither *bona fide,* nor reasonable. The trial court can therefore not be faulted for having come to the same conclusion. Consequently, there are no prospects of success as regards the first ground of appeal.

[26] Appellant further took issue with the manner in which the court disposed of an objection raised by the prosecutor during cross-examination of State witness Ralf Isaacks, claiming to have been irregular. Ms Husselman who represented the appellant in the court *a quo* started her cross-examination by asking the witness whether he was a sentenced prisoner and when he confirmed this, he was asked of which offence he was convicted. The record of the proceedings thereafter reads that the objection was sustained and if

any argument was made by counsel before the court's ruling, then it had not been recorded. Counsel continued with cross-examination without any further issues arising therefrom. It was argued that appellant's counsel attempt to have the witness impeached was summarily blocked by the court which prejudiced him in his defence.

[27] Evident from the questions put to the witness by counsel for the appellant before the prosecutor's interjection, is that it had the effect of imputing that the witness was dishonest as he was a sentenced prisoner. It was argued that, had he been convicted of fraud or theft, then this would show that he has a propensity to be dishonest and therefore his evidence should have been approached with caution. At the trial no basis was laid as to why evidence pertaining to the character of the witness was relevant to the proceedings, and why the defence should be allowed to pursue that line of questioning. It is settled that the maxim *falsus in uno falsus in omnibus* finds no application in our law and the argument is therefore without substance. In the absence of any reasons advanced on behalf of the appellant as to why the line of questioning was crucial to the defence case, the questions were irrelevant and the court acted within its powers by disallowing same. There is accordingly no merit in this ground of appeal.

[28] Appellant further took issue with questions posed to him by the court before re-examination by his counsel. It is asserted that the court 'cross-examined' appellant by posing questions to him aimed at supplementing the State's case. From a reading of the record it is clear that the nature of the questions put to the appellant was to enquire into the basis on which he claims ownership of the calf and whether he was aware of any law, custom or practice that would entitle him to appropriate an unmarked animal as his own. It is my considered opinion that by no stretch of the imagination could the court's questioning be regarded as cross-examination, as it was purely aimed at establishing on what basis did the appellant claim to have become the lawful owner of the calf, thereby clarifying uncertainties the court entertained at the time. Neither could it be inferred from the extent of the questioning that it was aimed at supplementing the State's case. There is simply no room for

such finding made by counsel for the appellant. I am satisfied that the court acted within its powers provided for by s 167 of the Criminal Procedure Act, 1977 and this ground is equally without merit.

[29] A further issue raised by the appellant concerns contradictions between the evidence of the State witnesses pertaining to the time the calf came onto the farm and its general appearance pertaining to colour and breed. As pointed out by the court during argument, it has been the appellant's case all along that the calf which had been roaming on the farm was *res nullius* and is the same calf that got slaughtered. It only concerned one calf and none other; neither was it alleged that a different calf was slaughtered. As ownership of the said calf was duly proved, any argument about the appearances of the calf became superfluous as there can be no doubt that it is one and the same calf appellant claims to have been *res nullius.*

[30] The remaining grounds of appeal concern the court *a quo's* assessment of various aspects of the evidence, all of which to be dealt with simultaneously.

[31] It is a well-established principle that a court of appeal when called upon to reconsider the credibility of witnesses who testified in the court *a quo,* must be mindful of the fact that the presiding officer in that court has advantages over the court sitting on appeal, namely having observed the demeanour of the witnesses during their testimony, and the court being steeped in the atmosphere of the trial. An appeal court will thus be slow to intervene with or reject findings of credibility by the trial court, unless satisfied that an irregularity or misdirection has been committed that vitiates that court's verdict. In the absence of any irregularity or misdirection, the appeal court will usually proceed on the factual basis as found by the trial court.[9]

[9] *S v Ameb* 2014 (4) NR 1134 (HC).

[32] Mr *Mokhatu,* on behalf of the appellant, submitted that not much could be said on the credibility findings made by the trial court. However, in his view, when regard is had to various misdirections committed by the court during the trial, these significantly impact on the credibility findings made by the court and ultimately, the verdict.

[33] The learned magistrate in a well-reasoned judgment dealt with each aspect complained of by the appellant. From a reading of the record it is evident that the court had not misdirected itself in any way from which it could be said that an irregularity was committed, vitiating the outcome of the trial. In view thereof, there is in law no basis for this court sitting as court of appeal to upset the credibility findings of the trial court. The findings relied upon by the trial court when convicting are supported by established and duly proved facts, and its rejection of the appellant's defence was accordingly justified. Consequently, the appeal on this ground is unmeritorious.

[34] Appellant also lodged an appeal against his sentence[10] namely, on the single ground that the trial court gave insufficient weight to the appellant's personal circumstances and over-emphasised deterrence as objective of punishment. It was particularly asserted that sight was lost of the appellant's advanced age[11] and that he was a first offender.

[35] Appellant at the stage of sentencing was 58 years of age, a widower and incapacitated by a medical condition of the back. He is himself a farmer and as many others, he was severely affected by an ongoing drought. He is a first offender and although appellant only after evidence was heard and upon his conviction expressed his remorse, he immediately apologised to the complainant for having slaughtered his calf when learning that it was his. The estimated value of the calf in question is N$3 000. It is common cause that some portion of the meat was recovered and returned to the complainant. It took two years to have the matter finalised in the court below and it was submitted that this delay adversely impacted on the appellant's health. Except

[10] Five (5) years' imprisonment.
[11] Fifty-five years.

for one night he spent in custody, appellant was released on bail and still is, pending the appeal.

[36] At sentencing, the court was cognizant of the triad of factors relevant to sentence and found deterrence, as objective of punishment, apposite. In dealing with the offence, the court described appellant's conduct as 'bold and stealthy' for having isolated the calf from the co-farmer's herds and shortly thereafter slaughtering it. The court recognised the fact that this is not the ordinary case of stock theft and made a distinction between those instances where small stock, like goats and sheep, are stolen by impoverished and hunger accused. To this end, the court found the appellant to have been motivated by greed as he could easily have slaughtered one of his own cattle to alleviate his financial constraints suffered from at the time.

[37] It is settled law that punishment pre-eminently falls within the discretion of the trial court and that a court on appeal only have limited powers to interfere. This will only be permitted where the trial court failed to exercise its discretion judicially or improperly on either the facts or legal principles relevant to sentencing. The court in *S v Van Wyk*[12] at 447H-448A quoted with approval *S v Whitehead*[13] at 436D-E where it is stated thus:

> 'It will also be inferred that the trial Court acted unreasonably if -
> "(t)here exists such a striking disparity between the sentences passed by the learned trial Judge and the sentences which this Court would have passed (*Berliner's* case supra at 200) - or, to pose the enquiry in the phraseology employed in other cases, whether the sentences appealed against appear to this Court to be so startlingly (*S v Ivanisevic and Another* (supra at 575)) or disturbingly (*S v Letsolo* 1970 (3) SA 476 (A) at 477) inappropriate - as to warrant interference with the exercise of the learned Judge's discretion regarding sentence".'

[38] In its approach to sentence the court *a quo,* in my view, misdirected itself when stating in its *ex tempore* reasons on sentence that 'one factor may not be allowed to outweigh any other'. The court was further of the view that

[12] 1993 NR 426 (SC).
[13] 1970 (4) SA 424 (A).

the starting point of a custodial sentence must be above the prescribed minimum sentence of two years' imprisonment for stock like goats and sheep,[14] as large stock is involved in this instance.

[39] In *S v Van Wyk* (*supra*) the court at 448D-E on sentence stated:

'As in many cases of sentencing, the difficulty arises, not so much from the general principles applicable, but from the complicated task of trying to harmonise and balance these principles and to apply them to the facts. The duty to harmonise and balance does not imply that equal weight or value must be given to the different factors. Situations can arise where it is necessary (indeed it is often unavoidable) to emphasise one at the expense of the other.

(Emphasis provided)

[40] Whereas the trial court acknowledged that this case was not the ordinary case of stock theft, the court's view, unfortunately, did not resonate in the sentence ultimately imposed. This likely came about because of the court's approach that all factors must be given equal weight. From the passage above it is evident that, pending on the circumstances of the case, the court is often enjoined to give more weight to certain factors and less to others in order to find a suitable sentence, one that 'fit(s) the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances'.[15] (Emphasis provided)

[41] The distinction made by the trial court between the present case and 'ordinary' cases of stock theft was that appellant's conduct was more reprehensible in that he did not steal small stock out of need, but rather large stock (a calf) which is indicative of his greed. The court clearly regarded this fact to be an aggravating factor for purposes of sentence. In my view, the court misdirected itself by completely disregarding the fact that this calf had been roaming the farm for about one year and that the appellant appropriated

[14] Stock below the value of N$500.
[15] *S v Rabie* 1975(4) SA 855 (A) at 862G-H.

it in the mistaken belief that it was *res nullius.* This was a material factor the court should have taken into account in sentencing the appellant. Though appellant's belief was not *bona fide* and reasonable in the circumstances of the case and his conduct inexcusable, there is no justification for a finding that the manner in which the offence was committed, constituted an aggravating factor.

[42] From a reading of *S v Lwishi*[16] it is clear that the court *a quo* had an unfettered discretion to impose any sentence of imprisonment, and whereas the penalty provision in respect of stock valued at N$500 and more had been struck down as being unconstitutional, the imposition of a wholly or partly suspended sentence was an option open to the court. Though the seriousness of the offence must be emphasised and the need to impose deterrent sentences in cases of this nature still exists, the approach of the court to give effect thereto will largely depend on the circumstances of each case.

[43] The trial court in considering what an appropriate sentence would be reasoned that if the minimum of two (2) years' imprisonment for small stock is the norm, the court cannot use that as the point of departure in this instance as the circumstances justify harsher punishment. The approach of the court to determine an appropriate sentence by being guided by the prescribed minimum sentence of two years applicable to stock valued at less than N$500, was clearly wrong and constituted a misdirection.

[44] As earlier stated, the court had an unfettered discretion and could impose any custodial sentence as dictated by the circumstances of the case. Having acknowledged that this was not the ordinary case of stock theft, the court should carefully have evaluated the facts surrounding the commission of the offence and, in view thereof, determined the appellant's moral blameworthiness. Other factors besides the personal circumstances of the appellant that should equally have been considered are that it was only after negotiations between the complainant and appellant broke down pertaining to

[16] 2012 (1) NR 325 (HC).

compensation that charges were laid. From this it would appear that complainant was at first inclined to find an amicable solution for appellant's misdemeanour. Also that a portion of the meat was recovered and returned to the complainant, though he would still have suffered some loss, albeit limited.

[45] When regard is had to appellant's personal circumstances, particularly that at the age of 58 years he is a first offender, is a less-abled person, considered together with the unusual circumstances under which the offence was committed, I am respectfully of the opinion that it constitutes exceptional circumstances justifying the imposition of a lesser sentence compared to what ordinarily would have been deemed appropriate in cases of this nature. There is furthermore nothing in the judgment to show that the court even considered the possibility of suspending the sentence or part thereof. From a reading of the court's reasons on sentence it is clear that the court failed to take into account material circumstances favourable to the appellant, whilst at the same time over-emphasising the need for a deterrent sentence. By so doing, the court in sentencing failed to exercise its discretion judiciously. For all the aforesaid reasons, I find a sentence of five years' imprisonment startlingly inappropriate.

[46] In the result, it is ordered:

1. The appeal against conviction is dismissed.
2. The appeal against sentence succeeds in that the sentence imposed is set aside and substituted with the following: Three years' imprisonment, wholly suspended for five (5) years on condition that the accused is not convicted of a contravention of s 11(1)*(a)* of the Stock Theft Act, 1990, committed during the period of suspension.
3. The sentence is antedated to 18 August 2016.

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JC LIEBENBERG

JUDGE

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GN NDAUENDAPO

JUDGE

APPEARANCES

APPELLANT	L Mokhatu Instructed by Du Pisani Legal Practitioners, Windhoek.
RESPONDENT	D Lisulo Of the Office of the Prosecutor-General, Windhoek.