REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: HC-MD-CRI-APP-CAL - 2019/00001

In the matter between:

ESRIA KAMURO	**FIRST APPELLANT**
FANUEL KAMURO	**SECOND APPELLANT**
JOSEF MICHAEL OMPOETSE	**THIRD APPELLANT**
ALBINUS MOKHE	**FOURTH APPELLANT**

and

THE STATE	**RESPONDENT**

Neutral citation: *Kamuro v The State* (HC-MD-CRI-APP-CAL 2019/00001) [2021] NAHCMD 135 (29 March 2021)

Coram: LIEBENBERG, J *et* SHIVUTE, J

Heard: **12 March 2021**

Delivered: **29 March 2021**

Flynote: Criminal Procedure – Appeal – Notice of Appeal – The purpose of the Notice of Appeal – Grounds of Appeal –– Grounds of appeal must apprise all interested parties as fully as possible of what is in issue and to bind the parties to those issues – The manner in which notice of appeal must be drafted – The notice of appeal must set out clearly and specifically the grounds on which the appeal is based.

Criminal Procedure – Appeal – Conviction – Stock Theft – Appellate court slow to interfere on appeal – Common purpose – Circumstantial Evidence – Inference to be drawn from proven facts – Appellant's failure to testify in the court *a quo* – Accused under no obligation to testify – Failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt – There are consequences for failure to testify – Prosecutor's case may be sufficient to prove the elements of the offence.

Criminal Procedure – Appeal – Sentence – Stock theft – Harsh sentence – Sentencing is a matter for the discretion of the trial court – The trial court has a judicial discretion – Exercise of its discretion is not to be interfered with merely because an appellate court would have imposed a heavier or lighter sentence – The power of a court of appeal to ameliorate sentences is a limited one – Interference only occurs when the sentence is startlingly inappropriate and/ or induces a sense of shock.

Summary: The appellants in this matter faced a count of stock theft in the Magistrate's Court sitting at Aranos. They pleaded not guilty to the charge and the matter went to trial. The state led evidence by calling three witnesses. The evidence placed before court is that a vehicle was seen on the road in the vicinity of a farm from which sheep were stolen. The police, acting on a report, arrived signalled to the driver of the said vehicle to stop, but he refused and continued driving. They pursued and eventually forced the vehicle off the road. When it stopped the four appellants were the

occupants; three in front and one in the loading box under some live sheep. None of the occupants could explain the transportation of the 16 sheep when the police asked them to do so and they were subsequently arrested. The sheep were positively identified by its owner on their ear tags. After the close of the state's case, the appellants brought an application for a discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977 which was dismissed. The appellants chose not to testify or call witnesses and closed their case. The magistrate found that in the absence of any rebuttal from the appellants, there was evidence of sufficient weight upon which the appellants could be convicted. Consequently they were convicted as charged and after being transferred to the Regional Court for sentence, each was sentenced to 10 years' imprisonment of which 2 years suspended for a period of 5 years on condition that they are not convicted of stock theft during the period of suspension. On appeal, the appellants argued that the trial magistrate improperly assessed the evidence which led to their conviction. The contention of the first, second and third appellants is also that the court at sentencing, failed to properly consider their personal circumstances and the value and quantity of the sheep stolen. The court of appeal dismissed the appeal against conviction of the first, second and third appellants on the basis that there was sufficient and unchallenged evidence which established the appellants' guilt beyond reasonable doubt. As for the fourth appellant, whose Amended Notice of Appeal was filed outside the prescribed time limit and first had to bring an application for condonation for the late filing of his notice of appeal, the application was refused on the basis that, although a reasonable explanation was given, there is no prospect of success on appeal. The appeal against sentence by first, second and third appellants was dismissed for reason that there is no basis upon which the sentence imposed could be interfered with by the court of appeal. The sentence imposed is neither startlingly inappropriate or induces a sense of shock; nor is it out of sync with sentences ordinarily imposed in similar cases.

Held, that the purpose of grounds of appeal as required by the Rules is to apprise all interested parties as fully as possible of what is in issue and to bind the parties to those issues.

Held, that the appellant's Notice of Appeal must set out "clearly and specifically" the grounds on which the appeal is based.

Held, that the fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial.

Held, that if there is evidence calling for an answer and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight accorded to the evidence.

Held, that the power of a court of appeal to ameliorate sentences is a limited one. This is because the trial court has a judicial discretion in sentencing.

Held, that the imposition of sentence is the prerogative of the trial court and the exercise of its discretion is not to be interfered with merely because an appellate court would have imposed a heavier or lighter sentence.

Held, that an appeal court may only interfere if the sentence imposed by the trial court is so inappropriate, that if the appeal court had sat as a court of first instance, it would have imposed a sentence which would markedly have differed from that imposed by the trial court.

ORDER

It is hereby ordered that:

a) The First, Second and Third Appellants' appeal against both the conviction and the sentence is dismissed.
b) The Fourth Appellant's application for condonation is refused.

JUDGMENT

LIEBENBERG J (concurring SHIVUTE J)

Background

[1] The appellants appeared in the Magistrate's Court sitting at Aranos on the following charges: count 1 – stock theft; count 2 – transporting livestock without a removal certificate; and count 3 – transporting livestock during the night, all read with the provisions of the Stock Theft Act 12 of 1990. The appellants also faced a fourth count of failing to comply with instructions or direction of a police officer. The state withdrew the second, third and fourth counts and proceeded to trial with only count 1. The state called three witnesses. After the close of the state's case, the appellants, through their respective legal representatives, jointly brought an application in terms of section 174 of the Criminal Procedure Act 51of 1977 to be discharged. The application in respect of each was dismissed. The appellants elected not to testify and remained silent. They closed their case without calling any witnesses. On 5 November 2015 the appellants were convicted on count 1 for theft of 27 sheep where after the matter was transferred for sentencing in terms of section 116 of the Criminal Procedure Act 51 of 1977 to the Regional Court, sitting at Mariental. The presiding Regional Court magistrate, having been satisfied that the conviction is in accordance with justice, proceeded to sentence and on 18 May 2017 imposed on each appellant a sentence of 10 years' imprisonment, of which 2 years' imprisonment is suspended for a period of 5 years on condition that the appellant is not convicted of theft, read with the provisions of the Stock Theft Act 12 of 1990, committed during the period of suspension. The appeal before this court in respect of all four appellants lies against conviction while the first, second and third appellants also appealed against sentence.

Application for condonation

[2] The first, second and third appellants' Notice of Appeal was filed within the prescribed period but the fourth appellant's Notice of Appeal and Amended Notice of Appeal were both filed out of time. Hence, the fourth appellant has also filed an application for condonation.

[3] Mr. *Andima* appeared on behalf of the first, second and third appellants while Mr. *McNally* represented the fourth appellant. Mr. *Muhongo* appeared on behalf of the state.

[4] It is trite law that the court will condone an application for the non-compliance with the rules of court if the following two requirements are met:

a) There must be a reasonable, acceptable and *bona fide* explanation for the delay; and,
b) There must be reasonable prospects of success on appeal.[1]

[5] Mr *Muhongo* submitted that no reasonable explanation was placed before court as the affidavit filed in support of the application is not of the appellant, but that of Mr Van Zyl, fourth appellant's erstwhile legal representative, who represented him in the lower court on the instructions of the Directorate of Legal Aid. His instructions were terminated when the matter was finalized therein. According to Mr. Van Zyl, he filed the Notice of Appeal on time but the Clerk of Court in Mariental misplaced it. He thereafter filed another Notice of Appeal which also went missing, while the appellant was waiting for a new legal practitioner to be instructed by the Directorate of Legal Aid to prosecute the appeal in the High Court. Mr McNally, now acting on behalf of the appellant, in response, argued that the delay for the late filing of the Notice of Appeal has duly been explained by Mr. Van Zyl, supplemented by a confirmatory affidavit by the fourth appellant. Hence, it was said, the procedure followed in this instance by the fourth appellant should be an exception to the general rule that the affidavit in support of an

[1] *Nakale v S* (SA 04/2010) [2011] NASC 2 (20 April 2011), para 7.

application for condonation should be filed by the appellant and not his legal representative.

[6] The explanation provided by Mr. Van Zyl in his affidavit falls within his personal knowledge and has also been confirmed by the appellant. In our view it appears to be reasonable in the circumstances; hence the application satisfies the first requirement. It must however be reiterated that the practice by legal representatives to file affidavits on behalf of their clients in support of applications for condonation is strongly discouraged and should be desisted from.[2]

[7] In respect of the fourth appellant's application for condonation, the ruling thereon was reserved and counsel allowed to address the court on the merits of the appeal and the prospects of success on appeal.

Grounds of appeal

[8] As mentioned, the appeal by the first, second and third appellants is against both conviction and sentence. In respect of the conviction, the first ground advanced by the appellants is that the learned magistrate misdirected himself in convicting the appellants in an instance where the elements of stock theft have not been proven. The second ground is that the court *a quo* failed to properly and correctly assess the evidence in total to determine whether the accused are guilty of stock theft. The third ground is that the prosecution conceded that they have not established the elements of stock theft.

[9] The fourth appellant is only appealing against his conviction on count one. Following, are the fourth appellant's grounds of appeal as they appear *ex facie* the record:

> '1.That the learned magistrate erred in finding that the State has proved the elements of the offence of stock theft in respect of 27 sheep against the Appellant, despite the fact that:
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> a) The State did not prove that the Appellant was at the scene of crime, or at any stage thereafter took possession of the alleged stolen stock.

[2] *Shikongo v The State* (HC-MD-CRI-APP-CAL-2020/00018), para 4.

b) The State did not prove that the plea explanation of the Appellant in terms of Section 115, namely that he was merely a passenger who hitched a ride on the vehicle of the co-accused, namely accused 3 and 4, and that at the time that he embarked upon the vehicle, sixteen of the sheep in question was already on the vehicle, and he had no knowledge thereof, to be false or not reasonably possibly true.

c) The State did not prove that the Appellant at any time was aware of, or had possession of the remaining eleven sheep which was tied or corralled next to the farm road.

d) The State did not prove that the vehicle upon which the Appellant was a passenger stopped at or near the sheep corralled next to the road.

2.That the learned Magistrate erred in failing to make a distinction between the Appellant and his co-accused and thereby failing to evaluate the evidence against each accused individually in view of circumstances of the case, specifically:

a) That the Appellant was merely a passenger on the vehicle, while accused 3 was the driver of the vehicle.

b) That the Appellant was not the owner of the vehicle, which vehicle belonged to accused 4.

c) Appellant's contention that he hitched a ride on the vehicle only, and had no further interest in the vehicle or its load, specifically sixteen sheep.

d) That the learned magistrate erred in convicting the accused despite the Prosecutor conceding that the State did not prove the elements of stock theft against the Appellant.' (*sic*)

[10] I now turn to address the nature of the grounds of appeal advanced by the first, second and third appellants in relation to their conviction. In their grounds of appeal, the appellants contend that the elements of stock theft were not proven, without specifying the elements they are referring to; or expressly stating that all the elements were not proven. The appellants also base their appeal on the ground that the state conceded not to have proven some of the elements of stock theft, without providing adequate details in relation to the assertion. Another ground is in relation to the evidence considered by the trial court which, in their view, was not correctly and properly assessed. Again, in relation to this ground of appeal, the appellants failed to be specific

as to which aspects of the evidence the learned magistrate failed to properly and correctly assess in order to determine the guilt of the appellants.

[11] The courts have pronounced themselves numerous times with regard to the purpose that the grounds of appeal serve and the preferred manner in which it should be drafted. In *S v Gey van Pittius*,[3] *Strydom* AJP at 36H stated as follows:

> 'The purpose of grounds of appeal as required by the Rules is to apprise all interested parties as fully as possible of what is in issue and to bind the parties to those issues. (See further in this respect the judgment of my Brother *Frank* AJ in the matter of *S v Wellington* (1990 NR 20) and the cases referred to therein.)' (Emphasis Added)

Also see *S v Wellington*[4] where *Frank J* quoted *Diemont J*, in *S v Horn*[5], at 631 H, stating thus:

> '..the rule provides in simple unambiguous language that the appellant must lodge his notice in writing, in which he must set out "clearly and specifically" the grounds on which the appeal is based. He must do this for good reason. The Magistrate must know what the issues are, which are to be challenged, so that he can deal therewith in his reasons for judgment. Counsel for the State must know what the issues are so that he can prepare and present argument which will assist the court in his deliberations and finally, the court itself will wish to be appraised of the grounds so that it can know what portions of the records to concentrate on and what preparation, if any, it should make an order to guide and stimulate a good argument in court.'

[12] Evident through the relevant case law above, I am of the view that the manner in which the grounds of appeal drafted by the first, second, and third appellants defeats the purpose which they ought to serve, namely, to apprise all interested parties as fully as possible of what is in issue and to bind the parties to those issues. That is because the grounds of appeal in question are too vague and stated in general terms. This makes it difficult, if not impossible, for the parties to know what is in issue. This much Mr

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[3] *S v Gey Van Pittius and another* 1990 NR 35 (HC).
[4] *S v Wellington* 1990 NR 20 (HC) at 22 H-I.
[5] *S v Horn,* 1971(1) SA 630(C).

Andima conceded. Therefore, the grounds raised by first, second and third appellants against conviction, cannot be relied upon by this court in the determination of the matter. The same cannot be said about the grounds of appeal advanced by the fourth appellant, which seem to be clear and specific. It follows that, because the appellants were jointly charged, having acted with common purpose, and the same evidence relied upon to prove the charge (and ultimately secure convictions against all the appellants), the appeal of the first, second and third defendants will be considered based on the grounds of appeal advanced by the fourth appellant. Moreover, because each appellant is inadvertently intertwined with the role his co-accused played during the commission of the alleged offence. Mr Andima, counsel for the first, second and third appellants agreed to this approach being followed when deciding the appeal against conviction.

Grounds of appeal of the fourth appellant

[13] The contention is that the trial court erred in its finding that the state has proved the elements of the offence of stock theft in respect of 27 sheep against the fourth appellant; also that it erred in failing to make a distinction between the appellant and his co-accused, thereby failing to evaluate the evidence against each accused individually in light of the circumstances leading up to their arrest.

[14] The evidence placed before the court and upon which the appellants were convicted, in summary, is that all four appellants were occupants in a vehicle that was intercepted by the police at midnight. The vehicle failed to stop after having been signalled to do so by the police. The police pursued the vehicle which was eventually forced off the road. The vehicle was carrying 16 live sheep in its loading box where the third appellant was found hiding underneath the sheep. The four appellants were asked to explain the transportation of the sheep found on the vehicle but none of them responded. The sheep were later identified by the owner on their ear tags. Another 11 sheep were later found trussed up on the complainant’s farm in a makeshift kraal. The appellants were then taken to the police station. I pause to observe that, before the stopping of the vehicle by the police, reports were received about a suspect vehicle and

that sounds were heard which were associated with the loading of livestock, coming from the same area where the vehicle was noticed on the road.

[15] The third and fourth appellants in their heads of argument are claiming to have been mere passengers who hitch-hiked the vehicle in question. One was found sitting in the front seat while the other was in the loading box of the vehicle. It should be noted that the defence of an innocent hitch-hiking was made in the plea explanation of the fourth appellant. Whereas they (as the other appellants) chose not to testify, third and fourth appellants did not place their evidence before court to support their hitch-hiking claim and their version remains untested in cross-examination. This left the court with only the version of the state witnesses; evidence the court assessed and found to carry sufficient weight to convict the appellants on.

[16] Relevant to the silence of the appellants, the Constitutional Court of the Republic of South Africa in *Thebus and Another v S*[6] had to determine whether it is permissible to draw an adverse inference of guilt from the pre-trial silence of an accused. And, whether it is permissible to draw an inference on the credibility of the accused from pre-trial silence. The court had the following to say in that regard at para 59:

> '[59] A distinction may properly be made between an inference of guilt from silence and a credibility finding connected with the election of an accused person to remain silent. In the dissenting judgment in *Doyle v Ohio*[7] a comparable distinction is drawn between the "permissibility of drawing an inference on the credibility of the accused from silence and the impermissibility of drawing a direct inference of guilt". In the latter, the presumption of innocence is implicated. In the former, a court would have regard to the factual matrix within which the right to silence was exercised.'

[17] As alluded to earlier, the evidence considered by the learned magistrate is that all the appellants were occupants in the vehicle loaded with 16 sheep, but chose to remain silent when they were asked by a police officer to explain the transportation of the sheep. None of them claimed or denied ownership or lawful possession of the sheep.

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[6] *Thebus and Another v S* (CCT36/02) [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC) (28 August 2003).
[7] See n 87 at 635.

One would then wonder why the third and fourth appellants who claim not to have acted in association with the other appellants, chose to remain silent in a situation that calls for an explanation; though they were under no obligation to speak. This is undoubtedly a situation in which they ought to have spoken out, protesting their innocence. This they did not do. From their conduct (to keep quiet) an inference on their credibility can safely be drawn, rendering the claim of the third and fourth appellants that they were just passengers, a mere after-thought. As for the first and second appellants, in the absence of a reasonable explanation at the relevant time which was also not forth coming, they find themselves in the same position as their co-appellants; hence the same consequences await them.

[18] The totality of the evidence shows that all four appellants pursued the same goal and in association with one another, having acted with common purpose when rounding up and appropriating the complainant's sheep.

[19] Another argument advanced is that the appellants were wrongly convicted of theft of a total of 27 sheep, while they were actually found in possession of only those 16 sheep loaded onto the vehicle. However, the evidence presented to the court *a quo* is that a further 11 sheep were found trussed up on the complainant's farm. This happened in the same vicinity, with spoor of sheep leading from the complainant's farm towards the road where the sheep were loaded. All 27 sheep were identified by the owner on their ear tags. In light of such evidence and the surrounding circumstances, it can safely be concluded that the court *a quo* correctly convicted the appellants for theft of the total of 27 sheep.

[20] In the assessment of the evidence presented in this case, regard must particularly be had to the fact that, after a failed application in terms of section 174 of the Criminal Procedure Act 51 of 1977 the appellants, notwithstanding, chose to remain silent and closed their case. In such instance the law is clear and it seems apposite to restate what was said in *S v Boesak* at 923E-F:

'The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence.'

The court also recited with approval what was held by Madala J in *Osman and Another v Attorney-General-Transvaal,* 1998(4) SA 1224 (CC) (1998(2) SACR 493; 1998(11) BCLR 1362) para [22]:

'Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a *prima facie* case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecutor's case may be sufficient to prove the elements of the offence. The fact that an accused had to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice.'

[21] The only inference that can be drawn from the proven set of facts and the evidence of adequate weight before court is that the appellants stole the 27 sheep. Furthermore, based on the totality of evidence adduced, it has been established beyond reasonable doubt that they acted with common purpose.[8] It is therefore, in the absence of any version from the appellants, safe to find that the learned magistrate did not err, but correctly assessed the evidence presented and consequently convicted all the appellants as charged. Very little or no weight can be attached to the versions of the appellants as put to the witnesses in cross-examination, or what was said in plea explanation. See *S v Katoo*[9] where the court of appeal criticised the weight attached by the trial judge to the defence version which was put to State witnesses under cross-examination and stated that 'it was treated as if it were evidence when the trial court considered the verdict on the merits. As respondent failed to place any version before

[8] See *R v Blom,* 1939 AD 288.
[9] *S v Katoo* 2005(1) SACR 522 (SCA).

the Court by means of evidence, the Court's verdict should have been based on the evidence led by the prosecution only.' In the present matter, the verdict of the learned magistrate was correctly based on the evidence led by the prosecution, which is sufficient and of adequate weight to prove the guilt of the appellants, in the absence of an explanation. Where the accused's state of mind is involved and he fails to testify, the court may find it difficult to find in his favour.[10]

Grounds of appeal in respect of sentence

[22] The first, second and third appellants also appealed against sentence on the basis that the learned magistrate failed to adequately take into account the personal circumstances of the appellants; the fact that the value of the livestock was never proven; the fact that the number of the livestock was in dispute; and lastly, that the sentence handed down by the learned magistrate was too harsh, considering the totality of the facts in the matter.

[23] For the theft of 27 sheep on count one, each appellant was sentenced on 18 May 2017 in the Regional Court to 10 years' imprisonment of which 2 years' imprisonment is suspended for a period of 5 years on condition of good behaviour.

[24] It is trite that sentencing is a matter for the discretion of the trial court and a court of appeal will only interfere with the sentence where, amongst others, the sentence imposed is startlingly inappropriate, induces a sense of shock, and where there is a striking disparity between the sentence imposed by the trial court and that which would have been imposed by the court of appeal, had it sat as court of first instance.[11] This would include sentences that are out of sync with sentences usually imposed for similar offences.[12]

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[10] See *S v Haikele & Others* 1992 NR 54.
[11] See *S v Tjiho* 1990 NR 361 at 366.
[12] *Mwaamenange v S* (CA 54/2016) [2017] 120 NAHCNLD (29 December 2017).

[25] When considering appeals such as the present, the Supreme Court in *Gariseb v The State*[13] stated as follows:

'..it is well settled and does not merit repetition, that the power of a court of appeal to ameliorate sentences is a limited one. This is because the trial court has a judicial discretion. In sentencing the appellant the trial court went into finer details in placing his personal circumstances and previous convictions on record...'

The Supreme Court further stated the following in *Schiefer v S,*[14] (summary):

'The approach to appeals against sentence on the ground of excessive severity or excessive leniency where there has been no misdirection on the part of the trial court. The imposition of sentence is the prerogative of the trial court and the exercise of its discretion is not to be interfered with merely because an appellate court would have imposed a heavier or lighter sentence. An appeal court may only interfere if the sentence imposed by the trial court is so inappropriate, that if the appeal court had sat as a court of first instance, it would have imposed a sentence which would markedly have differed from that imposed by the trial court. In such situations it would be said that the sentence imposed by the trial court was shockingly or startlingly or disturbingly inappropriate or that the trial court has unreasonably exercised its discretion.'

[26] Taking into consideration the case law as cited above, there is no legal basis for this court to interfere with the sentence imposed by the court *a quo* despite the appellants' assertion that it is too harsh. Furthermore, the appellants did not specify the specific personal circumstances of the appellants which the learned magistrate failed to take into consideration or had given inadequate weight to. What is apparent from the judgment on sentence is that the court extensively dealt with each appellant's personal circumstances and gave consideration thereto during its evaluation. The personal circumstances of the appellants were further weighed against the crime and the interests of society i.e. the process of striking a balance between various competing interests.

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[13] *Gariseb v The State* (SA6-2014)[2016] NASC (12 May 2016) p.6.
[14] *Schiefer v S* (SA 29-2015) [2017] NASC (12 September 2017).

[27] In addition to that, it is the contention of the appellants that the sentence imposed is harsh; not that it is startlingly inappropriate or induces a sense of shock. Neither is it contended that it falls on other grounds upon which this court could justifiably interfere with the sentence imposed. If anything, the sentence seems to be appropriate and in sync with sentences imposed in cases of similar offences, as the learned Regional Court magistrate has aptly demonstrated in his judgment by giving examples from decided cases in the High Court, taking into consideration the quantity and the value of the stolen sheep.

[28] The argument that the learned magistrate failed to take into account the fact that the value of the sheep was never proven does not hold water. The learned magistrate engaged in an extensive discussion in this regard which showed that the disputed value of the sheep would not adversely affect the determination of the appropriate sentence in the circumstances. The court reasoned that although the complainant in his testimony did not confirm the value, the supposed lacuna could not have a bearing on the ultimate sentence which the court were to impose. Though acknowledging that the value of the stolen sheep may in appropriate circumstances have a direct bearing effect on the offenders' moral culpability, this was not such an instance. The court acknowledged that there is no method in place through which a precise mathematical formula is adopted to determine the exact sentence in relation to the value of the stolen stock. The court further noted that the value of stolen stock is not an essential element of the offence of theft.

[29] For reasons stated hereinbefore, there is no need to consider the contention that the learned magistrate failed to take into account the fact that the quantity of the sheep was disputed, as the appeal against conviction falls to be dismissed

[30] In the result, it is ordered:

a) The First, Second and Third Appellants' appeal against both the conviction and the sentence is dismissed.
b) The Fourth Appellant's application for condonation is refused.

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J C LIEBENBERG

Judge

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N N SHIVUTE

Judge

APPEARANCES:

For the 1st, 2nd, and 3rd Appellants:	Mr Thomas Andima Van Der Merwe-Greeff Andima Inc. 28 Church Street Windhoek
For the 4th Appellant:	Mr Percy Mcnally Lentin, Botman & Van Den Heever G Building Hampie Plichta Street Keetmanshoop
For the Respondent:	Mr Henry Muhongo Office of the Prosecutor - General Windhoek