

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case Title: <i>The State v Venoviwa Tjivinda</i>	Case No: CR 32 /2021
High Court MD Review No: 424 / 2021	Division of Court: Main Division
Heard before: Mr Justice Liebenberg <i>et</i> Lady Justice Claasen	Delivered on: 10 May 2021
Neutral citation: <i>S v Tjivinda</i> (CR 32 /2021) [2021] NAHCMD 215 (10 May 2021)	
It is hereby ordered that: a) The conviction of the accused on count one and two is confirmed. b) The sentence imposed on count one is set aside and substituted with a sentence of 3 years' imprisonment. c) The sentence on count two of housebreaking with intent to steal and theft is confirmed. d) In terms of section 280 of Act 51 of 1977 one year of the sentence imposed on count two is ordered to run concurrently with the sentence imposed on count one. e) The sentence on count one is antedated to 16 February 2021.	

Reasons for the order:

[1] This is a review matter which came before me in terms of section 302 (1) and section 303 of the Criminal Procedure Act 51 of 1977.

[2] The accused person appeared in the Magistrate's Court for the district of Grootfontein on charges of stock theft (count 1) and house-breaking with intent to steal and theft (count 2).

[3] In relation to the charge of stock theft it was alleged that he stole a female goat valued at N\$ 3000.00 from his employer, whilst on the same day he broke into the house of his employer and stole a blanket valued at N\$ 1000.00 and a jacket valued at N\$ 600.00.

[4] The accused pleaded guilty to both counts and the court proceeded to question the accused in terms of section 112 (1)(b) of the Criminal Procedure Act 51 of 1977.

[5] The accused was convicted and consequently sentenced to 5 years' imprisonment on count one and 3 years' imprisonment on count two.

[6] In a query directed to the magistrate an observation was made that, despite both offences committed by the accused being serious and the imposition of custodial sentences for each justified, the sentences imposed are severe, especially in count one which involves theft of stock.

[7] In the same query, the learned magistrate was asked if the fact that the accused was a first offender who pleaded guilty to both charges, should not have been given more weight. The learned magistrate was also asked if the court gave consideration to a partly-suspended sentence. Further, the magistrate was asked if the cumulative effect of the total sentence imposed is not disproportionate to the accused's blameworthiness in

relation to the offences in respect of which he had to be sentenced.

[8] The learned magistrate, in response to the query, held the view that sufficient weight was given to the relevant factors taken into consideration in the process of determining the sentences imposed and is of the opinion that, in the present circumstances, the sentence imposed on each count is appropriate.

[9] In mitigation of sentence the accused testified that he is a 33 years old married man with 2 minor children and worked on the complainant's farm for 7 months before committing the said offences. He further added that he broke up with the mother of his children and looks after his children at present (presumably financially as they are staying with his girlfriend at Opuwo). In view thereof, he begged the court's leniency.

[10] The complainant testified in aggravation of sentences and informed the court that the accused started working on her farm in December 2020. She added that the value of the goat stolen (ewe in lamb) is N\$ 3000. She testified that the theft of that goat is a loss to her and she felt bad about. The animal was slaughtered and only half a leg was recovered. She also testified to the value of the items stolen from the house, which totalled N\$ 1600.

[11] The prosecution in aggravation of sentence highlighted the seriousness of the offences the accused has been convicted of, referencing the value of the goat vis-à-vis the penalty clause of the Stock Theft Act 12 of 1990 (as amended), and relied upon various authorities in which the seriousness of the offence of housebreaking with intent to steal and theft was referred to. The Public Prosecutor further added that it is an aggravating factor that the accused was an employee of the complainant and, by stealing from his employer, he breached the trust bestowed upon him by the complainant. Also that the offence was pre-meditated.

[12] The court, in determining the appropriate sentence, considered the personal circumstances of the accused as put before court in mitigation, including the fact that he

is a first offender. It further considered the nature of the crimes the accused was convicted of and the interests of society. In the sentencing judgment, the learned magistrate took the position that the accused, being a first time offender whilst convicted of serious offences such as the ones at hand, this does not really amount to a circumstance of great importance. The learned magistrate emphasised the seriousness of stock theft with reference to the 'hefty penalties' provided for by the legislature through section 14 of the Stock Theft 12 of 1990; the value of the stolen goat; and the fact that it could have reproduced in the future. In the end he found that the offence is 'indeed very serious.'

[13] The learned magistrate equally found that the offence of housebreaking with intent to steal and theft is prevalent in the district and equally very serious. The court further made reference to the authority of a high court case in which the accused was convicted on a charge of housebreaking with intent to steal and theft wherein goods to the value of N\$ 1600 were stolen and the accused sentenced to 3 years' imprisonment. In that case the appeal against sentence to the high court was dismissed. I pause to note that that there is no precise method in place to calculate or determine sentences and in each case the appropriate sentence must be determined, based on its own unique facts and circumstances as placed before court. The learned magistrate further discussed the duty to safeguard the interests of society in relation to the offences the accused has been convicted of. The trial court was also of the view that although the two offences were committed on the same day, they are distinct offences which were planned and committed separately with different intention; hence punishment must be meted out separately on each of the two counts. In the result, the accused was effectively sentenced to 8 year's imprisonment.

[14] It is trite that sentencing is a matter for the discretion of the trial court and a court of appeal or review 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.¹

[15] In *S v Sevenster*², the court held that 'if an accused is sentenced in respect of two or more related offences, the accepted practice is that the sentencing court should have regard to the cumulative effect of the sentences imposed in order to ensure that the total sentence is not disproportionate to the accused's blameworthiness in relation to the offences in respect of which he or she has to be sentenced.'³ The court further added that this approach appears to be particularly apposite where the offences are closely interrelated in time and place.

[16] In the present matter, the offences were committed on the same day and against the same complainant on her farm. Although they are distinct offences as noted by the learned magistrate, they are closely interrelated in time and place. This called for regard to be had to the cumulative effect of the sentences imposed. From the sentencing judgment of the learned magistrate it is apparent that no regard was had to the cumulative effect of the sentences which resulted in the sentences imposed being disproportionate to the accused's blameworthiness. In the circumstances the court could have considered a partly suspended sentence on one or both counts to deter the accused from committing similar offences in the future, or could have ordered the sentences to run concurrently in terms of section 280 of the CPA.

[17] Next I turn to the sentence of 5 years' imprisonment for theft of one goat. In sentencing the accused, the court attached excessive weight to the seriousness of the offence, as apparent from the sentencing judgment, and was also cognisant that the stolen goat would have reproduced in the future. On the other hand, insufficient weight was attached to the personal circumstances of the accused. This included the fact that he was a first offender (despite the magistrate being of the view that this does not amount to a circumstance of great importance when the accused has been convicted of serious

¹ See *S v Tjiho* 1990 NR 361 at 366.

² *S v Sevenster* 2002 (2) SACR 400.

³ See also *S v Coales* 1995 (1) SACR 33 (A) at 36e-f; *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA) at 523g-h.

offences). No consideration was given to the fact that the accused also pleaded guilty to the charges which, in the absence of anything showing otherwise, could be construed as an indication of remorse. Sufficient weight should have been given to those factors to avoid the severe sentences imposed by the learned magistrate.

[18] The fact that the accused person pleaded guilty, although he has been convicted of a serious offence, as highlighted by the trial court, should have been considered by the trial court in determining the appropriate sentence. In that regard, it was held as follows in *S v Seas*:⁴

'Besides the accused's personal circumstances alluded to, the courts lately lean towards a reduction in sentence where the accused pleads guilty in cases where serious crimes were committed. In circumstances where the court is satisfied that the accused's contrition is sincere and had manifested itself in a plea of guilty, this in itself should have a significant impact on the sentence to be imposed. Firstly, it must be emphasised that there is no duty on an accused person to plead guilty on any charge. But, by pleading guilty and confess to the offence committed, the court takes the view that the accused should gain some benefit from a guilty plea without wasting time and, in suitable circumstances, is likely to be given a lesser sentence. A reduction in sentence should therefore serve as an incentive to the accused when knowing that he or she is guilty of the offence and a conviction inevitable.'

[19] In addition to that, with regard to the consideration and attachment of weight to a guilty plea in the determination of an appropriate sentence, it was also held as follows in *S v Majiedt*:⁵

'This court in the past opined that in circumstances, as the present, where a plea of guilty is tendered and is fortified by sincere contrition and repentance, the accused should gain some benefit from doing so when it comes to sentencing. It should therefore serve as incentive to an accused, knowing he or she is indeed guilty of the offence charged, to take the court fully into his or her confidence by pleading guilty from the onset and repent, rather than taking the chance of the matter going to trial and only when convicted, then try to persuade the court during sentence of being genuinely remorseful. In the latter instance the court is likely to accord less weight

⁴ *S v Seas* (CC 17/2017) [2018] NAHCMD 245 (17 August 2018), para. 25.

⁵ *S v Majiedt* (CC 11-2013) [2015] NAHCMD 289 (1 December 2015)

thereto as a mitigating factor, if at all.'

[20] It is in light of the authorities cited and reasons given above that this court finds the sentence of 5 years' imprisonment imposed for the theft of one goat to be inappropriate in the circumstances. Hence, we are of the view that there is a basis for this court to interfere with the sentence imposed on count one.

[21] Turning to the sentence of 3 years' imprisonment on the count of housebreaking with intent to steal and theft, this court is of the view that although the sentence imposed on the second count appears to be severe/harsh, the sentence imposed is appropriate in the circumstances when taking into consideration the aggravating factors. There is no basis in law for interference with the sentence merely because this court would likely have imposed a more lenient sentence, or partly suspended sentence, had it sat as court of first instance. This approach is taken in light of what was held in the Supreme Court appeal matter of *Schiefer v S*,⁶ (summary), which also finds application *mutatis mutandis*:

'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.'

[22] This court is of the view that, taking into consideration the nature of the offences committed, the personal circumstances of the offender and the interests of society, weighed against the blameworthiness of the accused in the context within which the crimes were committed, there is a striking disparity between the cumulative sentence

⁶ *Schiefer v S* (SA 29-2015) [2017] NASC (12 September 2017).

imposed by the learned magistrate and that which this court would have imposed, had it sat as court of first instance. Taking into consideration all factors, the appropriate cumulative sentence would be one of 5 years' effective imprisonment.

[23] For the stated reasons, there is a basis upon which this court could justifiably interfere with the sentences imposed by the learned magistrate. Hence, it is ordered:

- a) The conviction of the accused on count one and two is confirmed.
- b) The sentence imposed on count one is set aside and substituted with a sentence of 3 years' imprisonment.
- c) The sentence on count two of housebreaking with intent to steal and theft is confirmed.
- d) In terms of section 280 of Act 51 of 1977 one year of the sentence imposed on count two is ordered to run concurrently with the sentence imposed on count one.
- e) The sentence on count one is antedated to 16 February 2021.

J C LIEBENBERG JUDGE	C CLAASEN JUDGE