

PRACTICE DIRECTIVE 61  
**REPUBLIC OF NAMIBIA**



**IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK**  
**REVIEW JUDGMENT**

<b>Case Title:</b> <i>The State v Daniel Kandundu and Benjamin Gaseb</i>	<b>Case No:</b> CR43/2021
<b>High Court MD Review No:</b> 858/2021	<b>Division of Court:</b> Main Division
<b>Heard before:</b> Judge Claasen <i>et</i> Judge Usiku	<b>Delivered on:</b> 18 May 2021
<b>Neutral citation:</b> <i>S v Kandundu</i> (CR 43/2021) [2021] NAHCMD 238 (18 May 2021)	
<b>The order:</b> <ol style="list-style-type: none"><li>1. The conviction is confirmed.</li><li>2. The sentence imposed is set aside and the fine, if paid, ought to be refunded.</li><li>3. The matter is remitted to the district court sitting at Otavi to sentence afresh.</li><li>4. The sentencing court must have regard to the period already served by the accused.</li></ol>	
<b>Reasons for order:</b>	
Claasen J ( concurring Usiku J) <ol style="list-style-type: none"><li>1. This is a criminal review matter. The accused appeared in the district court of Otavi on a charge of Stock Theft in contravention of s 11(1)(a) of the Stocktheft Act<sup>1</sup> (the Act). The allegations were that of theft of 8 goats, each valued at N\$ 1 100. with a combined value of N\$ 8 800.</li><li>2. Initially it was two accused persons but a separation of trial was granted and the matter proceeded</li></ol>	

<sup>1</sup> Stocktheft Act, No 12 of 1990

against the current accused. At the end of the proceedings he was convicted for the theft of 4 goats. He was sentenced to pay a fine of N\$ 10 000. Or 2 years' imprisonment and 2 years imprisonment wholly suspended for a period of 5 years.

3. The conviction is in order, but the sentence does not comply with the provisions of the Act. It is our view that a query will delay the inevitable and prejudice the accused. As such we give an order without having sought a statement from the magistrate, so that the accused can be sentenced afresh.

4. The penalty clause is contained in S 14 of the Act:

'(1) Any person who is convicted of an offence referred to in section 11(1)(a), (b), (c) or (d) that relates to stock other than poultry-

(a) of which the value-

(i) is less than N\$500, shall be liable in the case of a first conviction, to imprisonment for a period not less than two years without the option of a fine;

(ii) is N\$500 or more, shall be liable in the case of a first conviction, to imprisonment without the option of a fine; '

5. In *S v Tjiveze*<sup>2</sup> J Van Niekerk gave a comprehensive explanation of the sentencing parameters that came into effect after the full bench judgment of *Daniel v Attorney-General and others; Peter v Attorney General and others*.<sup>3</sup> We set out the description given in para 13 of *Tjiveze* that pertains to the sentencing category of the case at hand:

' 2. Cases where the value of the stock is N\$500 or more, (s 14(1)(a)(ii)) and the accused is a first offender

1. The prescribed sentence is any period of imprisonment without the option of a fine, but not exceeding the normal sentence jurisdiction of the magistrate.

2. Section 14(2) does not apply, i.e. the court is not concerned with substantial and compelling circumstances.

3. The court may wholly or partly suspend the period of imprisonment.'

6. Returning to the matter at hand. According to the judgment given by the court a quo, the accused was convicted for stocktheft of 4 goats, which bring the combined value to an amount of N\$ 4 400. Thus the sentence resorts under s 14(1)(a)(ii) of the Act which is the category where the value of stock is N\$ 500 or more.

<sup>2</sup> *S v Tjiveze* 2013 (4) NR 949 (HC)

<sup>3</sup> *Daniel v Attorney General and others; Peter v Attorney General and others* 2011 (1) NR 330 (HC)

7. It means that s 14(2) of the Act does not apply and the learned Magistrate erred in applying substantial compelling circumstances to the matter. Moreover, the learned Magistrate also erred in his imposition of a fine, as that is not permissible under the Act.<sup>4</sup> The court is limited to a custodial sentence that falls within the jurisdiction of the district court and the court may in the exercise of its discretion invoke the provisions of s 297(1) (b) of the CPA.

8. For the above reasons the sentence imposed is irregular and has to be set aside.

9. In the result the following order is made:

1. The conviction is confirmed.
2. The sentence imposed is set aside and the fine, if paid, ought to be refunded.
3. The matter is remitted to the district court sitting at Otavi to sentence afresh.
4. The sentencing court must have regard to the period already served by the accused.

<b>C CLAASEN</b> <b>JUDGE</b>	<b>D N USIKU</b> <b>JUDGE</b>

<sup>4</sup> S v *Lwishi* 2012 (1) NR 325 (HC)