

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

PRACTICE DIRECTIVE 61

Case Title: <i>The State v Gustaph Garab</i>	Case No: CR 8/2023
High Court MD Review No: 2127/2022	Division of Court: High Court, Main Division
Coram: Liebenberg J <i>et</i> Claasen J	Delivered: 6 February 2023
Neutral citation: <i>S v Garab</i> (CR 8/2023) [2023] NAHCMD 33 (6 February 2023)	
ORDER: 1. The conviction is confirmed. 2. The sentence is set aside and substituted with a sentence of 24 months' imprisonment.	

3. The sentence is antedated to 28 November 2022.

REASONS FOR ORDERS:

LIEBENBERG J (CLAASEN J concurring):

[1] The unrepresented accused appeared in the magistrate's court for the district of Outjo on one count of stock theft.

[2] The particulars of the charge are that, on or about the 23rd day of November 2022 and at or near Farm Kransport in the district of Outjo, the said accused did unlawfully and intentionally steal stock, to wit one goat valued at N\$ 6500, the property of or in the lawful possession of Jesaya Kambwa.

[3] The accused pleaded guilty and was sentenced to 40 months' imprisonment. The conviction is in order and will be confirmed on review. My qualm, however, lies with the sentence imposed which *prima facie* appears to be excessive.

[4] In view thereof, I directed a query to the presiding magistrate to wit:

'Despite the aggravating factors taken into account at sentencing, a sentence of 40 months' imprisonment for theft of one goat exceeds the norm of sentences imposed in similar cases by far. The value of the goat is clearly way above the market value – even where the accused admitted the value as alleged in the charge.

Is a sentence of such severity justified in the circumstances?'

[5] The presiding magistrate's response to the query is that sufficient weight was given to the relevant factors taken during sentencing and, in his opinion, in the present circumstances the sentence imposed is appropriate, based on the undisputed value of the goat. He further stated that it would have been unable for the court to ascertain the

market

value 'as that can maybe be a stud ram goat of that value as it's not unfamiliar that they go for that price'. The magistrate further relies on *S v Lwishi*¹ where it is said that the court's approach to sentence should be to commensurate the sentence with the value of the stock involved.

[6] Though the magistrate's reliance on *Lwishi* in his approach to sentence cannot be faulted, it is clear from the present facts that the high value of the goat was the sole reason for the sentence of 40 months' imprisonment imposed. No attempt was made by either the state or the court to verify the value of the goat and why it had such a high value. When during the court's s 112(1)(b) questioning under the Criminal Procedure Act 51 of 1977 (the CPA), the value of N\$6500, as per the charge, was put to the accused who said he does not dispute it. Neither did the court enquire from the accused how he knows the value and whether or not it was a stud animal. Without eliciting further information from the unrepresented accused who probably had no idea of the actual value of the said goat, the court misdirected itself by simply accepting that the value of the goat had been admitted by the accused. It could indeed have been a stud ram but that information was not before the court at sentencing and neither verified from anyone like the owner; nor had it been proved in any other way.

[7] With the amendment of the penalty provisions of the Stock Theft Act 12 of 1990, the value of the stock involved has become a material factor at the stage of sentencing, (depending on the value of the stock) as prescribed minimum sentences are now applicable. These provisions are not applicable in this instance as the value of one goat clearly exceeds the N\$500 threshold.

[8] It then raises the question what sentence would be appropriate in the circumstances of this case?

¹ *S v Lwishi* 2012 (1) NR 325 (HC).

[9] In mitigation of sentence the accused testified that he is 25 years of age, single and the father of a son, aged 4 years. At the time when the offence was committed, the accused worked on the complainant's farm and therefore in a position of trust.

[10] 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 crime 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 a serious offence such as the one in this present matter, does not really amount to a circumstance of great importance and that the accused should not just be given a 'slap on the wrist'. The learned magistrate emphasised the seriousness of stock theft with reference to the penalties provided for by the legislature through s 14 of the Stock Theft 12 of 1990 and the value of the stolen goat.

[11] The offence of stock theft is serious and has always been treated as such by our courts; I hold no different view to that. Also during sentencing, to commensurate the sentence with the value of the stolen stock. There can be no doubt that the court *a quo* in sentencing, gave considerable weight to the value attached to the goat as per the charge, which, in turn, led to a distorted sentence being imposed. In an instance as the present where the value of the stock is excessive (opposed to similar stock) and that in itself being an aggravating factor at sentencing, the court should not have accepted the alleged value to be correct but rather to have called for proof by inviting the state to lead evidence in terms of s 112(3) of the CPA. The court's failure to do so constituted a misdirection and was prejudicial to the accused and resulted in an inappropriate sentence being imposed.

[12] 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.²

[13] In *S v Moloji*³ the court reiterated that uniformity of sentences imposed on accused persons in respect of the same offence, or similar offences, is desirable, however, such desire shall not interfere with the free exercise of the court's discretion on sentence. The principle of uniformity dictates that if the crime is similar and the personal circumstances of the offender are more or less similar to another case, the court should as far as possible impose a sentence that would assert public confidence in the criminal justice system in the sense that it cannot be said that the courts impose substantially different sentences for any particular offence where the circumstances are similar.⁴

[14] Regard being had to similar cases sent on review from other districts within this jurisdiction, it is evident that the norm is to impose sentences ranging between two to three years' imprisonment on first offenders for theft of one goat/sheep. The sentence of 40 months' imprisonment imposed in this instance clearly exceeds outside the range of sentence considered to be reasonable and just by far. Accordingly, the sentence imposed by the court *a quo* falls to be set aside and substituted with an appropriate sentence.

[15] After due consideration of the seriousness of the offence, the personal circumstances of the accused and the fact that he pleaded guilty, as well as the interest of society, I consider the following sentence to be appropriate in the circumstances of the case.

[16] In the result it is ordered:

² *S v Tjiho* 1990 NR 361 at 366.

³ *S v Moloji* 1987 (1) SA 196 (A) at 219I-220B.

⁴ *S v Strauss* 1990 NR 71 (HC) at 76D-F.

1. The conviction is confirmed.
2. The sentence is set aside and substituted with a sentence of 24 months' imprisonment.
3. The sentence is antedated to 28 November 2022.

J C LIEBENBERG
JUDGE

C CLAASEN
JUDGE