

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

PRACTICE DIRECTION 61

<b>Case Title:</b> <i>The State v Riviaan Seibeb</i>	<b>Case No:</b> CR 1/2024
<b>High Court MD Review No:</b> 1522/2023	<b>Division of Court:</b> High Court, Main Division
<b>Coram:</b> Shivute J et D Usiku J	<b>Delivered on:</b> 18 January 2024
<b>Neutral citation:</b> <i>S v Seibeb</i> (CR 1/2024) [2023] NAHCMD 5 (18 January 2024)	
<b>ORDER:</b> <ol style="list-style-type: none"><li>1. The conviction on stock theft is confirmed.</li><li>2. The phrase 'with common purpose' is deleted from the conviction.</li><li>3. The sentence of four (4) years is set aside and substituted with the following: 30 months' imprisonment of which six (6) months are suspended for five (5) years on condition that the accused is not convicted of stock theft read with the provisions of the Stock Theft Act 12 of 1990 as amended, committed during the</li></ol>	

period of suspension.

4. The sentence is backdated to 23 August 2023.

### **REASONS FOR ORDERS:**

SHIVUTE J (USIKU J concurring):

[1] This is a review matter which came before me in terms of s 302(1) of the Criminal Procedure Act 51 of 1977 as amended (the CPA).

[2] The court directed a query to the magistrate dealing with two points. The first point deals with the review cover sheet reflecting that accused 2 was convicted and sentenced, whilst the charge was withdrawn against him and the reviewing judge remarked that the review cover sheet has to be amended accordingly. Such amendment has been effected on the record.

[3] The second point deals with whether or not the sentence imposed is too severe. The accused, unrepresented, appeared in the Magistrate's Court for the district of Khorixas on a charge of stock theft. The accused tendered a plea of guilty and the magistrate proceeded to question him in terms of s 112(1)(b) of the CPA. After questioning the accused, the court was satisfied that the accused admitted all the allegations set out in the charge. The accused was convicted as charged.

[4] The court in the present matter, after mitigation and aggravation of sentence, sentenced the accused to five (5) years' imprisonment of which 1 year is suspended on conditions.

[5] The reviewing judge queried the magistrate on whether the sentence of five (5) years' imprisonment is not shockingly inappropriate under the circumstances. The magistrate responded that he does not consider the sentence to be shockingly inappropriate because it serves as deterrence to the accused and would-be offenders.

He further reasoned that s 14 of the Stock Theft Act 12 of 1990 sets a benchmark of two (2) years' imprisonment without the option of a fine where the value of the stock is less than N\$500 and therefore, it follows that, where the value of stolen stock is N\$1000, four years' imprisonment is justified considering the benchmark set by section 14.

[5] Reference for comparison, was also made by the magistrate to the case of *Petrus Lwishi v The State*<sup>1</sup> where the accused was sentenced to 10 years' imprisonment for theft of stock (cattle) valued at N\$5400. The circumstances of the case quoted is different in that the aggravating factors considered, included the manner in which and the purpose for which the cattle was stolen, namely that the accused acted cunningly when he sold the cattle to the complainant only to steal it back in order to resell that same cattle to other buyers, while slaughtering one cow for himself.

[6] In the present matter, the accused is a first offender who pleaded guilty and the stock stolen was one goat valued at N\$2500. In the *Petrus Lwishi* matter, the court, although stating the need to impose deterrent sentences, also rehearsed the sentencing court's duty to consider the usual factors applicable to sentencing.

[7] It has been held that one of the factors that may persuade a court to interfere with a sentence is where a trial court has failed to consider a material fact or has overemphasised the importance of one factor at the expense of another.<sup>2</sup>

[8] It is apparent from the magistrate's response to the query that, the magistrate in imposing the sentence, took a rigid approach in interpreting s 14 of the Stock Theft Act, thereby overemphasising the crime. The magistrate also accorded too little weight, if any, to the personal circumstances of the accused.

[9] Considering the above, this court is of the opinion that the punishment is harsh and shockingly inappropriate because it does not fit the criminal nor the crime. The

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<sup>1</sup> *Petrus Lwishi v The State* 2012 (1) NR 325 HC.

<sup>2</sup> *S v Tjiho* 1991 NR 361 (H) at page 366A-B.

sentence is thus, not in accordance with justice and falls to be set aside.

[10] In addition, although not queried, this court takes note that the amended review cover sheet, as well as the charge sheet of record reflect that the accused was charged with and convicted of, stock theft with common purpose. The accused was the only person charged, therefore, the conviction ought to be amended to stock theft only.

[11] In the result, it is ordered:

1. The conviction on stock theft is confirmed.
2. The phrase 'with common purpose' is deleted from the conviction.
3. The sentence of four (4) years is set aside and substituted with the following: 30 months' imprisonment of which six (6) months are suspended for a period of five (5) years on condition that the accused is not convicted of stock theft read with the provisions of the Stock Theft Act 12 of 1990 as amended, committed during the period of suspension.
4. The sentence is backdated to 23 August 2023.

**N N SHIVUTE**  
**JUDGE**

**D USIKU**  
**JUDGE**