



CASE NO.: CA 65/2011

**IN THE HIGH COURT OF NAMIBIA
NORTHERN LOCAL DIVISION
HELD AT OSHAKATI**

In the matter between:

ONESMUS NATANGWE

FIRST APPELLANT

NINGENISHENI ANGULA

SECOND APPELLANT

AND

THE STATE

RESPONDENT

Neutral citation: *Natangwe v The State* (CA 65/2011) [2013] NAHCNLD 26 (30 APRIL 2013)

CORAM: SMUTS, J *et* UEITELE, J.

Heard on: 30.04.2013

Delivered on: 30.04.2013

Flynote: Criminal procedure – Appeal – Sentence – Minimum sentence – Stock Theft Amendment Act 19 of 2004 – Minimum sentence declared unconstitutional in earlier decision – This court bound by that decision.

Summary: Criminal sentence – Stock Theft Amendment Act 19 of 2004 – Court finding that sentence imposed was primarily influenced by the impugned minimum sentence provisions in terms of Stock Theft Amendment Act 19 of 2004 – This court bound by decision of the court declaring minimum sentence under that Act unconstitutional – *In casu* court at large to impose appropriate sentence, considering the factors to be taken into account in sentencing – Having done so, court concluding that the sentence imposed by trial court induces a sense of shock in the mind of the court – Consequently court upholding the appeal.

ORDER

1. Condonation is granted for the late filing of this appeal in respect of sentence;
 2. The appeal against sentence is upheld;
 3. The appellants are sentenced to 10 years imprisonment, of which 2 (two) years are suspended for 5 years on condition that they are not convicted of Stock Theft during the period of suspension.
 4. The appellants' sentences are antedated to 01 December 2005.
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JUDGMENT

UEITELE J:

[1] The appellants appeared before the magistrate of Outapi on a charge of stock theft, read with the provisions of the Stock Theft Act, 1990 (Act 12 of 1990), as amended, for allegedly having stolen four cattle, valued at N\$11 900.

[2] Both appellants were convicted on their pleas of guilty and committed for sentence by the Regional Court in terms of s 114 (1) of the Criminal Procedure Act, 1977 (Act 51 of 1977) ('the Act'). In the Regional Court the appellants were both sentenced to twenty (20) years imprisonment.

[3] When I read through the record of the proceedings in the Regional Court I

noted that the regional magistrate made the following remarks:

‘I have read through the record of the District Court and I have satisfied myself that the proceedings in the District Court were in accordance with justice. Accordingly Accused persons are guilty as charged.’

[4] I can unfortunately not confirm that the proceedings in the District Magistrate’s Court were in accordance with justice for the simple reason that the part (containing the proceedings in terms of section 112 of the Criminal Procedures Act, 1977) of the record of the proceedings in the District Magistrate’s Court does not form part of the record of proceedings in the Regional Court which is before us. I pause here to observe that the omission to include the record of proceedings in the District Magistrate’s Court would justify the removal of this appeal from the roll until a proper and complete record is lodged with the this court, but for reasons which I have set out below we have allowed the appeal to be argued.

[5] From the incomplete record of the proceedings in the District Magistrate’s Court it appears that both appellants were convicted on 09 August 2005 and the matter transferred to the Regional Court for sentencing on 24 November 2005. On that day (i.e. 24 November 2005) when the matter was called in the Regional Court the first appellant was absent and the matter was then postponed to 01 December 2005. On that day (i.e. 01 December 2005) the appellants were each sentenced to 20 years imprisonment.

[6] On 18 April 2013 Ms. Mainga, who represents the first appellant filed a document titled ‘NOTICE OF WITHDRAWAL OF APPEAL.’ In that document she indicates that the appellant withdraws his notice of appeal filed on the 5th of July 2006. I again pause here and observe that I have read and perused the record but could not locate a notice of appeal dated 5 July 2006, the only document relating to a notice of appeal which I located on the record is a document titled “The Amend Notice of Appeal” and that document is dated and signed on 02 August 2012. To this document (i.e. “The Amend Notice of Appeal”) was attached an affidavit signed by

both the appellants in which affidavit they explain why the appeal is filed late.

[7] Council for the State raised two points *in limine*. The points *in limine* relate to the incompleteness of the record of proceedings in the District Magistrate’s Court and the late filing of the notice of appeal. At the time when counsel for the respondent filed his heads of arguments there was no application for the condonation of the late filling of the notice of appeal. On 29 April 2013 Ms Mainga for first appellant and on 30 April 2013 Ms. Nathaniel-Koch for second appellant respectively filed applications for the condonation of the late filing of the notices of appeal.

[8] It is indeed so that this court has on many occasions emphasised the fact that where an appeal is noted out of time a substantive and proper application for the condonation of the late filing of the notice to appeal must be filed. I, however, also take note of the pronouncements by Strydom C J in the matter of *S v Wasserfall*¹ when he said:

‘In circumstances such as these, where an accused acted without any assistance from a legal representative, to require strict compliance with the Act may be prejudicial to such an accused. To avoid this no hard and fast rules should be laid down, but the Court should be led by the circumstances of each case. Mostly, so it seems to me, the fact that the merits of the appeal may be good will be conclusive.’

[9] In the cases of *Nakale v The State*², Shivute CJ held³ that, in considering whether or not to grant condonation for the late filing of an appeal “even if the explanation for the delay be suspect – the fact that the appellant has reasonably good prospects of success on the merits may well tip the balance in favour of granting leave to appeal.”

¹ 1992 NR 18 (HC). at page 19 I-J

² Case No. SA 04/2010 (unreported) delivered on 20 April 2011

³ In paragraphs 8 and 15; Also see; *Aib & Another v State*; Case No. CA 66/2010 (unreported) delivered on 30 November 2011; *Muhenje v State*; Case No. CA 182/2008 (unreported) delivered on 10 February 2012;

[10] In this matter Mr Matota who appeared for the respondent made the following concession (in my view correctly so) in his heads of arguments:

'In light of the decision of this Honourable in *Protasius Daniel*⁴ matter, relating to the striking down of certain Provisions in the Stock Theft Act, 19 of 1990, the respondent will not oppose the application for condonation for the late filling of the notice of appeal, should the Honourable court decides to hear this matter in its current form as far as the case record is concerned.'

I am satisfied that in the case of the present appellants, justice demands that the appellants be granted condonation to pursue their appeal outside the time limits provided for in the Act and the rules.

[11] Mr Matota furthermore made the following concession, he said:

'...it is conceded that the sentence of twenty years imprisonment imposed in this case, for 4 herds of cattle which were recovered, induces a sense of shock. It is inevitable that due to the seriousness of this offence, the proper sentence still remain a custodial one. What need to be decided by this honourable court is what is the appropriate sentence given the circumstances in this case.'

[12] I agree with Mr Matota, in the *Aib*⁵ matter Smuts J⁶ argued that the Regional Magistrate in that matter felt bound to and was obliged to impose the statutory mandatory minimum sentence of 20 years in the absence of substantial and compelling circumstances. He continued and said:

'In the absence of this mandatory minimum sentence, it is clear to me that a 20 year sentence would not have been imposed for first offenders who were convicted of stock theft of a single cow valued at N\$4 500. Plainly such a sentence is so shockingly disproportionate that no reasonable court would have imposed it in the

⁴ *Protasius Daniel & Another v The Attorney General & 2 others* Case no: A 238/2009 (unreported), delivered on 10 March 2011

⁵ Supra footnote 3

⁶ In paragraph 9

absence of a mandatory minimum prescribed in a statute compelling it to do so'.

[13] After the concession Mr Matota urged us to impose a custodial sentence of twelve years on the appellants. His submission is based on the sentences imposed by this court in stock theft matters. He referred us to the following cases.

- (a) The case of *Petrus Lwishi*⁷, where a sentence of 10 years was imposed on appeal involving the theft of 3 herds of cattle valued at N\$ 5400;
- (b) The case *Mavetumbujami Kareke Mbendura & Another v State*⁸ where a sentence of 10 years of which 2 years suspended on usual conditions, was imposed on appeal, involving the theft of four herds of cattle valued at N\$ 3 706 and all four herds of cattle were recovered.
- (c) The case *Meningivi Tjinana v State*⁹ Similarly, where a sentence of 8 years of which 3 years were suspended, was imposed on Appeal, involving the theft of one calf valued at N\$ 1300.

[14] In his heads of arguments Mr Matota referred us to the case of *S v Tjiho*¹⁰ where it has been held that sentencing is within the discretion of the trial court. In that case Levy J furthermore said¹¹

'Whatever the nature of the crime may be, it is the person who committed the crime who is to be punished. His or her personal circumstances play an important role and must not be ignored. The net result of this approach is that sentences for similar offences frequently differ because personal circumstances differ.

The personal circumstances of the accused must be weighed in relation to the interests of society. It is in the interests of society that the accused receive an appropriate sentence. Furthermore, law and order must prevail in society and society expects the court's protection against lawlessness. The accused must be prevented

⁷ Case No. CA 92/2009 (unreported), Delivered on 18 November 2011

⁸ Case No: CA 48/2010 (unreported) Delivered on 25 November 2011,

⁹ Case No. CA 04/2010 (unreported) Heard on 26.04.2011

¹⁰ 1991 NR 361

¹¹ At page 365

from repeating his crime and, if possible, reformed and other persons must be deterred from doing what the accused did...I have previously said that according to our law, sentences are individualized and regard is had to personal circumstances and the nature of the crime. Consequently, sentences differ from one case to the next. There is a certain virtue in uniformity but in the case of murder the only principle which is uniform to all cases is that the Courts regard murder as the ultimate crime deserving a severe punishment.'

[15] It is against that background that I will now proceed to look at the personal circumstance of the appellants. The first appellant testified in mitigation and said that he was twenty years of age at the time of committing the crime, he is single with one child aged approximately five years of age, the child was residing with his mother; appellant lived with his mother as his father had passed on, he dropped out of school while in grade 9, he was often employed as cattle herder, but at the time of his arrest he was unemployed, that he is sick, that of the four herd of cattle that he stole two belonged to his uncle and the other two belonged to him, he inherited them from his father when he passed away, that he did not have permission from his uncle to take the livestock but he took it because he was always asking his uncle but his uncle will not answer him. His evidence in mitigation was not challenged (except the evidence relating to his sickness and ownership of the cattle) and no further submissions were advanced by the appellant.

[16] The second appellant testified in mitigation and said that he was twenty years of age (but it transpired after questioning that he was twenty one) at the time of committing the crime, he is single with two children one aged one and the other aged two years, the children were residing with his mother; he dropped out of school while in grade 5, he was employed as driver at Tjiiko, but at the time of his arrest he was unemployed, that he inherited a house from his father when his father passed away, and his aunt was looking after the house when he was in custody, his mother passed away long time ago. His evidence in mitigation was not challenged and no further submissions were advanced by the appellant

[17] I agree with Liebenberg J, where he said¹² :

¹² In the matter of *Lwishi supra* footnote 7 at paragraphs 1

'Although the courts now have an unfettered discretion when it comes to sentencing in cases where the value of the stock is N\$500 and more, the approach of the sentencing court, in my view, should be to consider the usual factors applicable to sentence, whilst mindful of the need to impose deterrent sentences. Where appropriate, lengthy custodial sentences should be imposed to serve as deterrence in a particular case, as well as generally. Ultimately, that would give effect to the Legislature's intention to address the problem of stock theft (which is rampant in this country), by the imposition of deterrent sentences. Hence, deterrence, as an objective of punishment, in cases of this nature, and where appropriate, should be emphasised.'

[18] Taking the personal circumstances of the appellants into account and the fact that they were:

- (a) youthful at the time of the commission of the crime,
- (b) first offenders,
- (c) the value of the cattle,
- (d) that all the cattle were recovered

I am of the view that their terms of imprisonment are to be set aside and replaced with lesser custodial sentences which remain justified in the face of the prevalence of this serious offence. Given the fact that they are first offenders, a portion of their sentence should be suspended.

[19] In the result, the following order is made:

1. Condonation is granted for the late filing of this appeal in respect of sentence;
2. The appeal against sentence is upheld;
3. The appellants are sentenced to 10 years imprisonment, of which 2 (two) years are suspended for 5 years on condition that they are not convicted

of Stock Theft during the period of suspension.

4. The appellants' sentences are antedated to 01 December 2005.

UEITELE, J

I agree

SMUTS, J

ON BEHALF OF THE 1ST APPELLANT

Ms. Mainga

Instructed by:

Directorate of Legal Aid

ON BEHALF OF THE RESPONDENT

Mr. D. Lisulo

Instructed by:

Office of the Prosecutor-Gener