

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: CA 07/2010

In the matter between:

JAMBEE TJARIMBA

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Tjarimba v The State* (CA 07/2010) [2013] NAHCNLD 03
(25 January 2013)

Coram: LIEBENBERG J and TOMMASI J

Heard: 21 January 2013

Delivered: 25 January 2013

Flynote: Sentence – Stock theft – Appellant convicted of theft of three head of cattle and sentenced to 20 years' imprisonment of which half suspended – Court sentencing found no 'substantial and compelling' circumstances – Since the mandatory sentences set out in s 14 (1)(a)(ii) and (b) of the Stock Theft Act 12 of 1990 (as amended) found to be

unconstitutional, a sentencing court no longer required to make a finding whether or not 'substantial and compelling' circumstances exist – In the circumstances of this case a sentence of 20 years' imprisonment unjustified and inappropriate – Sentencing court misdirected itself – Sentence substituted.

Summary: Appellant was convicted under the Stock Theft Act 12 of 1990 of theft of three head of cattle (valued at N\$11 500) which were subsequently retrieved. The buyer of these cattle however had suffered a financial loss as he had to return the cattle to their rightful owner. Appellant was throughout the trial unrepresented and the magistrate failed to assist the appellant in putting forward as much as possible information in mitigation, failing which constituted a misdirection. The period of one year which appellant was in custody prior to and during his trial was not taken into consideration. The sentence set aside and substituted with a sentence of 11 years' imprisonment of which 4 years' imprisonment suspended on the usual conditions. The sentence is antedated.

ORDER

1. The appellant's late noting of the appeal is condoned.
2. The appeal against sentence succeeds and the sentence imposed by the court *a quo* is set aside but substituted with the following sentence: 11 years' imprisonment of which 4 years' imprisonment is suspended for 5 years on condition that the accused is not convicted of theft in contravention of the Stock Theft Act 12 of 1990 (as amended), committed during the period of suspension.
3. The sentence is antedated to 11.05.2009.

JUDGMENT

LIEBENBERG J (TOMMASI J concurring):

[1] The appellant was convicted in the magistrate's court for the district of Opuwo on a charge of theft, read with the provisions of the Stock Theft Act 12 of 1990 (as amended), of three head of cattle valued at N\$11 500. He was subsequently committed for sentence to the regional court where he was sentenced to 20 years' imprisonment of which half was suspended on the usual conditions. He now appeals against that sentence.

[2] Whereas the appellant withdrew his original notice of appeal and subsequently filed a substituted notice, this notice is clearly out of time and the appeal would only be considered once condonation has been granted for the non-compliance with the rules of the Magistrate's Court. The respondent does not oppose the appellant's application for condonation and concedes that there are prospects of success. Appellant has made a substantive application – albeit with reference to the original notice which was later withdrawn – and the explanation advanced therein seems reasonable and acceptable in the circumstances of this case; hence, condonation will be granted.

[3] The grounds of appeal are threefold in that (a) the sentencing court failed to take into account certain factors relating to the personal circumstances of the appellant and the offence he stands convicted of; (b) that the sentence induces a sense of shock and is unreasonable in the circumstances; and (c) the magistrate failed to explain to the unrepresented appellant 'what compelling and substantial circumstances are and failed to assist [him] to ascertain whether any existed'.

[4] I shall start with the last ground first. In my view there is no merit in this ground as the court, before mitigation of sentence (as per the two proforma annexures attached to the record), duly explained to the appellant his rights;

the penalty clause applicable and whether or not substantial and compelling circumstances exist, will be determined by considering both the mitigating and aggravating factors present. In any event, since s 14 (1)(a)(ii) and (b) of the Stock Theft Act 12 of 1990 (as amended) were struck down in *Protasius Daniel and Another v Attorney-General and Two Others*¹ and found to be unconstitutional, it has become unnecessary for the sentencing court to first determine whether or not substantial and compelling circumstances exist (in cases where the value of the stock is N\$500 and more). The courts would thus approach sentence as usual. (See *Petrus Lwishi v The State*, (unreported) Case No CA 92/2009 delivered on 02 March 2012). That settles the last ground of the appeal.

[5] The appellant testified in mitigation and placed the following evidence before the court: He is single at the age of 22 years and the father of one minor child; he is unemployed and was doing part-time work. He also made mention about him 'studying to do mechanical work' (unfortunately the nature of his studies was not enquired into). He has a disabled mother and it further seems that he takes care of his siblings. Before sentencing, all that the court said was that there were no substantial and compelling circumstances present, but that a partly suspended sentence would be imposed. It must be said that the approach adopted by the sentencing court in this instance falls short from the duty a presiding officer has when sentencing an unrepresented accused.

[6] It requires of the sentencing officer by asking exploratory questions, to assist the accused and enable him or her to place before the court as much as possible information favourable to the accused that in turn, would also assist the court to get in the best position to decide what sentence in the circumstances of the case would be appropriate. See *Mukwakwa Tjihove v The State*² and the cases cited, where it was said at par 14:

¹ Unreported Case No's A 238/2009 and A 430/2009, delivered on 10.03.2011

²Case No CA 15/2010 HCNLD (unreported) delivered on 21.04.2011.

'Counsel for the respondent conceded that the record does not reflect that the court *a quo* assisted the appellant, but stated that the possibility that he did, cannot be ruled out. The fact of the matter is that this was not recorded and neither did the magistrate in his reasons indicate that he did so. There are several reported cases where the duty of the court to render assistance to the accused during sentencing was spelt out. (See *S v Limbare*;³ *S v Van den Berg*⁴ and *The State v Victor Mbishi Mishi*⁵). It is disappointing to observe from the record, the apathy displayed by the concerned judicial officer during (the) mitigation, given the seriousness of the case. Not even the most obvious questions were posed In *S v Limbare (supra)* the court referred and agreed with the opinion expressed in *S v Dlamini*⁶ that there is an obligation on the magistrate, even if the appellant is represented at the trial, to ask questions himself to investigate, and to call witnesses to determine those compelling circumstances, if at all possible.'

[6] The magistrate in his additional reasons states that he took into consideration 'all the circumstances; the offence committed, the personal circumstances of the offender and the interest of society'; that the offence is considered to be serious and prevalent in the region; and that the accused stole out of greed. Unfortunately this is not borne out by the record. Neither was any mention made of the accused's age of 22 years, being relatively young and a first offender. Although the value of the stolen stock was taken into consideration, the fact that the stolen cattle were recovered was clearly ignored. The court furthermore had no regard to the period of one year which the appellant spent in custody pending the finalisation of his case. This is a factor usually taken into account and normally leads to a reduction in sentence. (See *S v Kauzuu*⁷ at 232F-H).

[7] Where the magistrate, as in this instance, did not give any reasons at the time of sentencing, he should have done so when afforded the opportunity in terms of Rule 67 (3) of the Magistrate's Court Rules. His attention was specifically drawn to those factors that ought to have been taken into consideration for sentence and the learned magistrate should have dealt with

³ 2006 (2) NR 505 (HC).

⁴ 1995 NR 23 (HC).

⁵ Case No CR 101/2006 (unreported) delivered on 14.11.2006.

⁶ 2000 (2) SACR 266 (T).

⁷ 2006 (1) NR 225 (HC).

these factors specifically, instead of making general statements, namely that all factors were indeed taken into consideration. It should not be left to the appeal court to speculate what factors were indeed taken into consideration and which ones received no consideration from the court. Of equal importance for the appeal court is to see the weight the court *a quo* had given to each such factor taken into account and specifically, in the present case, what led to the decision to suspend half the sentence. In the absence of any explanation to these important questions, it must be inferred that these principles received no consideration or very little by the sentencing court. This constitutes a serious misdirection on the part of the court *a quo* and justifies interference by this court (*S v Tjiho*⁸)

[8] Mr *Lisulo* for the respondent conceded that the sentence of 20 years' imprisonment imposed was shockingly inappropriate. I agree, and the sentence cannot be permitted to stand. It further seems to me that whereas the appellant had already served three years of his sentence, that it would be best for this court to sentence him afresh – albeit on the scanty information available.

[9] We were referred to other sentences imposed by this court in similar cases of which due notice is taken. Counsel are in agreement that a custodial sentence is justified but differ on the term of imprisonment to be imposed. Ms *Mugaviri* submitted that regard should not only be had to the period the appellant had been in custody pending finalisation of the trial, but also the time already served. Regarding the latter, I am of the view that, whereas this court is entitled in terms of s 282 of Act 51 of 1977 to antedate the sentence, an appropriate order to that effect will sufficiently mitigate the sentence the court now intends imposing.

[10] After due consideration of the main principles applicable to sentence, as well as the main purposes of punishment as referred to in *S v Khumalo and Others*⁹ and endorsed in *S v Van Wyk*¹⁰, and having applied same to the

⁸ 1991 NR 361 (HC).

⁹ 1984 (3) SA 327 (A).

¹⁰ 1993 NR 426 (HC) at 448.

present facts, I am respectful of the view that a custodial sentence, partly suspended, would satisfy the requirement that 'Punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances'¹¹

[11] Resultantly, the court makes the following order:

1. The appellant's late noting of the appeal is condoned.
2. The appeal against sentence succeeds and the sentence imposed by the court *a quo* is set aside but substituted with the following sentence: 11 years' imprisonment of which 4 years' imprisonment is suspended for 5 years on condition that the accused is not convicted of theft in contravention of the Stock Theft Act 12 of 1990 (as amended), committed during the period of suspension.
3. The sentence is antedated to 11.05.2009.

JC LIEBENBERG
JUDGE

MA TOMMASI
JUDGE

¹¹S v *Rabie*, 1975 (4) SA 855 (A) at 861A-862F.

APPEARANCES

APPELLANT

G Mugaviri

Of Mugaviri Attorneys, Oshakati: instructed by the

Directorate: Legal Aid

RESPONDENT

D Lisulo

Of the Office of the Prosecutor-General,

Oshakati