REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case no: CA 76/2010

In the matter between:

ITOMBUA NDEMUHENUKA **1st APPELLANT**

SIMON INGASHIPOLA **2nd APPELLANT**

And

THE STATE **RESPONDENT**

Neutral citation: *Ndemuhenuka v The State* (CA 76/2010) [2013] NAHCNLD 5 (15 February 2013)

Coram: LIEBENBERG J and TOMMASI J

Heard: **08 February 2013**

Delivered: **15 February 2013**

Flynote: Appeal – Evidence – Dock identification – particular care should be taken and premise for reaching a conclusion on identity should be investigated by magistrate – Sentencing –the prescribed minimum sentence was disproportionate to the crime, the offender and the legitimate needs of society – in addition words “or a period not less than twenty years’” struck down from s 14(1)(a)(ii) of Stock Theft Act.

Summary: Second appellant was convicted of stock theft on the strength of the testimony of two State witnesses who identified him as being the person who was in the company of first appellant when he sold 4 heads of cattle which turned out to be stolen cattle. The witnesses initially failed to recognise him during trial but later became certain that it was indeed him whom they saw in the company of first appellant. The witnesses failed to testify what led them to reach this conclusion and no investigation was done by the magistrate to ascertain the premise on which the witnesses based their identification of second appellant. This court concluded that magistrate erred when he concluded that the evidence proved beyond reasonable doubt that second appellant was the person who accompanied first appellant. Appeal accordingly upheld. First appellant's sentence was found to have been disproportionate to the crime, the offender and the legitimate needs of society. In addition hereto this court struck down words "or a period not less than twenty years'" from s 14(1)(a)(ii) of Stock Theft Act and this court thus entitled to interfere with the sentence. The sentence accordingly set aside and substituted with a sentence of 12 years' imprisonment of which four years are suspended.

ORDER

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1. Condonation is granted for the late noting of the appeal by first and second appellants;
2. First appellant's appeal against sentence is upheld and the sentence imposed by the Regional Court sitting at Opuwo is set aside and substituted with the following sentence:

   12 years' imprisonment of which four years' are suspended for a period of five years on condition that the accused is not convicted of theft read with the provisions of the Stock Theft Act, Act 12 of 1990, as amended committed during the period of suspension;
3. The sentence of first appellant is antedated to 31 March 2008;
4. Second appellant's appeal against conviction is upheld and the conviction is accordingly set aside.

APPEAL JUDGMENT

TOMMASI J (LIEBENBERG J concurring):

[1] The appellants appeared in the Magistrate's Court sitting at Opuwo and were convicted of theft read with the provisions of the Stock Theft Act, Act 12 of 1990, as amended. The appellants were thereafter committed for sentence to the Regional Court sitting at Opuwo and were sentenced to 20 years' imprisonment.

[2] First appellant noted an appeal against sentence and applied for condonation for the late noting of the appeal. Second appellant noted an appeal against conviction and sentence and applied for condonation as his appeal was also noted outside the prescribed time limit.

[3] Ms Mugaviri appeared on behalf of the first appellant *amicus curiae* and the court wishes to thank her for her assistance. She also appeared on behalf of second appellant on the instructions of legal aid. Mr Wamambo appeared on behalf of the respondent.

[4] Although Mr Wamambo initially opposed the applications for condonation, he conceded during argument that first appellant has shown that there were reasonable prospects of success in his appeal against sentence, and second appellant in his appeal against conviction.

2nd Appellant's appeal against conviction

[5] The appellants and one other accused (accused 3) were charged with having stolen 12 heads of cattle valued at N$33500. All three accused were unrepresented. The third accused was discharged in terms of section 174 of the Criminal Procedure Act, 51 of 1977. Second appellant pleaded not guilty to the charge and in his plea explanation denied having driven the 12 heads of cattle.

[6] The 12 cattle went missing from the cattle post of the complainant situated at Omakange during February 2007. He recovered one, bearing his earmark, in Ongandjeru during July 2007. The appellants were however convicted of four heads of cattle as the State led evidence that the appellants had sold four heads of cattle in Okuatuthi. It was the State's case that first and second appellant brought the four cattle to this place.

[7] Second appellant's first two grounds may be summarised to read as follow: The magistrate erred by concluding that second appellant was positively identified by two state witnesses (Fannel and Dawid) whose evidence was unreliable in this respect.

[8] It is trite law that the State bears the onus to prove the identity of an accused beyond reasonable doubt. The magistrate in his judgment concluded that the evidence of Fannel and Dawid proved that second appellant was in the company of first appellant at the residence of Fannel when the sale of the cattle was concluded. He noted that these two witnesses were initially unsure about the identity of second appellant but were emphatic that it was indeed second appellant who was in the company of first appellant. The magistrate also noted that the person who accompanied the first appellant introduced himself to Fannel as Simon which also happened to be the name of 2nd appellant. He took into consideration that there are many persons hailing by that name but found it improbable that it would be a coincidence given the positive identification by Fannel.

[9] Ms Mugaviri submitted that the evidence of the two State witnesses was far from satisfactory in respect of their identification and that the magistrate erred in relying on it. I now turn to consider the evidence of these two State witnesses.

[10] Fannel testified that he knew first appellant prior to the sale of the cattle and that first appellant telephonically requested him to look for a buyer for his cattle whilst he was in hospital. When he arrived home from hospital, first appellant and his companion were already at his home with 4 heads of cattle. He could not recall on which date he returned from hospital but during cross-examination by first appellant, he testified the incident occurred in April 2007. The companion, at this stage, only introduced himself as Simon. First appellant again requested him to look for a buyer for the cattle. A reasonable conclusion from this evidence would be that his interaction with the companion of first appellant, on this occasion, was very brief.

[11] The next interaction with the first appellant and his companion was when his uncle, Dawid, came to visit him the same day. According to Dawid this occurred during June 2007. Whilst Dawid and first appellant negotiated the sale of the three heads of cattle, Fannel and the companion were having a conversation some distance away. His testimony in this regard corresponds with that of Dawid who testified that he only dealt with first appellant and that his companion was standing "far away". No evidence was led as to exactly what the distance was or what the duration was of the conversation between Fannel and the companion. Regrettably no clarity was sought by the magistrate in respect hereof.

[12] According to Fannel, he ascertained during this conversation that first appellant's companion resides in Omakange. He showed first appellant and his companion the water point after the sale was concluded. Again no evidence was adduced in respect of the time which Fannel had spent in the company of first appellant's companion on this occasion.

[13] The above constituted the only recorded interactions between the two witnesses and second appellant. Both witnesses had never met this companion prior to the date on which the sale of the cattle was concluded.

[14] The trial commenced just over six months after the appellant's arrest. Given the contradicting testimony of the two witnesses, one would have to speculate as to when exactly the sale took place. It would suffice to conclude that more than six months lapsed after the sale of the cattle. Their identification of the second appellant as being the companion of first appellant took place during their testimony in court. Both witnesses had no difficulty in identifying first appellant. It must be noted that apart from the first appellant, second appellant and accused 3 were in the dock and both witnesses pointed out second appellant. No evidence was led that an identification parade was held and it must under these circumstances be assumed that none was held. The manner in which the witnesses identified the second appellant is commonly referred to as dock identification.

[15] During his evidence in chief, Fannel testified as follow: "In fact I know accused 1 and his colleague, I don't know which colleague". He later testified during his evidence in chief that: "There was also another person who was in the company of accused. I requested for his id but he refused, I cannot identify that person. In fact accused 1 was in the company of one other person whom I cannot recall but as I see accused 2 here today I am sure it's him. He identified himself as Simon".

[16] Dawid testified that he negotiated the sale with first appellant. During his evidence in chief he testified that first appellant was in the company of another person but he was unable to see him clearly as he was very far away. During cross-examination second appellant informed Dawid that it was the first time that he was seeing him. Dawid responded as follow: "I did not talk to you, if it was you who was with accused 1's company, you were very far away. In fact it was you, but I did not talk to you".

[17] .In S v Matwa 2002 (2) SACR 350, Leach J at page 356*j* – 257 *a-b* stated the following:

'It is of course, always necessary for a court to approach the evidence of identification with caution (S v Mthetwa 1972 (3) SA 766 (A) at 768A), especially where faced with a dock identification, with its attendant problems. Moreover, just as the confidence and sincerity of the witness are not sufficient (S v Mehlape 1963 (2) SA 20 (A) at 32F), so neither is the honesty of the witness in identifying a person by itself a guarantee of correctness (S v Ndika and other 2002 (1) SACR 250 250 SCA) at 256f-g). The judicial officer must therefore scrutinise evidence of identification closely in order to be satisfied that the witness in fact has a recollection of the person concerned which goes beyond a mere impression (S v Maradu1994 (2) SACR 410 (W) at 412e)'

[18] This court held that an identification parade has more persuasive value than the so called "dock identification"[1] This however does not mean that the court is precluded from relying on dock identification. In S v Haihambo[2] this court adopted the approach followed in the S v Matwa, supra[3] i.e that:

'. . . the question in issue is not the admissibility of dock identification but the evidential value to be placed thereon. Where a witness identifies an accused in the dock, it forms part of the evidential matter upon which the case must be decided ..."

I respectfully agree.

[19] The key question is whether the magistrate approached the evidence of these two witnesses with sufficient caution. The magistrate concluded that although the witnesses were initially unsure they later positively identified 2nd appellant. The fact that they at first failed to recognise second appellant and only thereafter became certain should have been cause for concern.

[20] In S v Ndikwetepo and Others, *supra*, MULLER A J, as he then was, at page 250 D-E, cited the following from extract from *Lansdown and Campbell South African Criminal Law and Procedure vol V at 935:*

`It is well recognized that the identification of an accused person as the criminal is a matter notoriously fraught with error, and in recent years the Appellate Division has frequently directed trial courts to exercise caution in testing identity evidence. To this end, matters such as the identifying witnesses' previous acquaintance with the accused, the

[1]S v Ndikwetepo and Others 1992 NR 232 (HC)
[2]2009 (1) NR 176 (HC)
[3]at 355i - 356j

distinctiveness of the alleged criminal's appearance or clothing, the opportunities for observation or recognition, and the time lapse between the occurrence and the trial, should be investigated in detail, since without such careful investigation a reasonable doubt as to the identity of the accused must persist.'

[21] The magistrate, in view of the initial failure to recognise second appellant, should have investigated the grounds on which the witnesses premised their conclusion that it was indeed second appellant who accompanied first appellant. At least some investigation was required to ascertain why they were unable from the outset to recognise second appellant and what had triggered their recognition afterwards. This would have enabled the magistrate to determine the weight which should have been accorded to their dock identification of second appellant. There was no indication whether they had sufficient opportunity to observe the companion of first appellant given the fact that he was a stranger to them. No enquiry was made whether the person whom they saw had any distinctive characteristics in respect of his appearance or clothing which they could recall. It was further not determined whether the time lapse between the event and the trial had any impact on their ability to remember, particularly given the fact that Fannel was unable to recall the date on which the incident took place. These factors considerably reduced the value of their identification of the second appellant from amongst the two accused.

[22] Mr Wamambo argued that the appellant placed himself at the scene during cross-examination of Fannel. He however conceded that it was not the only inference which could be drawn from his questions. It may also be construed as an attempt by second appellant to get the witness to repeat his evidence in chief in the hope that he would contradict himself or offer more information. It must further be borne in mind that second appellant was not represented at the time.

[23] Second appellant was employed by the complainant and bears the same name as the person who identified himself to Fannel. He confirmed that he knew first appellant and that they reside in the same village. Whilst these facts would be consistent with an inference that second appellant was the person who accompanied first appellant, such an inference would however not be the only reasonable

inference to be drawn from those facts. First appellant denied the allegations and did not implicate second appellant during his testimony.

[24] This court, considering the totality of the evidence in respect of identity, is of the view that the magistrate erred when he found that the identity of the second appellant was proven beyond reasonable doubt. The court further is of the view that failure of the magistrate to investigate the evidence of the witnesses is indicative of the fact that he did not approach their evidence with the requisite caution. The recorded evidence does not prove beyond reasonable doubt that it was in fact second appellant who accompanied first appellant when he negotiated the sale of the cattle. The second appellant's appeal against conviction thus succeeds on this ground and it is therefore not necessary to deal with the other grounds of appeal.

First Appellant's appeal against sentence

[25] First appellant's grounds of appeal against sentence are that the magistrate erred in the following respects:

(a). By not taking into consideration (i) that first appellant was a first offender; (ii) his personal circumstances such as the fact that he was the sole breadwinner and maintained his unemployed wife and children; and that he had his own business of buying and selling cattle which earned him a monthly salary of N$5400; (iii) that he has been held in custody whilst awaiting his trial for just over 8 months.

(b) By imposing a sentence which induces a sense of shock and which is not reasonable in the circumstances.

[26] The magistrate at the time of sentencing was required in terms of the provisions of the Stock Theft Act 12 of 1990, as amended, to impose a term of imprisonment of not less than 20 years where the value of the stock exceeded N$500. The magistrate however had a discretion to impose a lesser sentence if he was satisfied that substantial and compelling circumstances existed. The fist appellant was convicted of having stolen four cattle. The value of the stock was

taken by the sentencing magistrate as being N$11000 and same was not placed in dispute by the legal representative who represented first appellant during the sentencing procedure.

[27] First appellant's legal representative placed mitigating factors identical to those mentioned in the grounds of appeal before the sentencing court. The State prosecutor submitted that the offence was serious, prevalent in the district and premeditated in that first appellant produced a false permit to facilitate the movement of the cattle. He remarked that the cattle were recovered as a result of routine investigation and that the period of incarceration was not unduly long. The magistrate found no substantial and compelling circumstances present and sentenced first appellant to twenty years' imprisonment.

[28] In response to the notice of appeal the magistrate further stated that the value of the stock was considerable, and that first appellant was motivated by greed given the fact that he owned livestock. He emphasised that the offence is rife in the region. He was of the view that the aggravating factors outweigh the personal circumstances of the offender.

[29] Although the sentencing court was entitled to conclude that the interest of society and the nature of the offence outweighed the personal circumstances of the first appellant, the court still had to determine whether a sentence of 20 years imprisonment was the appropriate sentence under the circumstances of this case. The minimum sentence of 20 years prescribed by the Stock Theft Act, 12 of 1990, in the circumstances of this particular case, was disproportionate to the crime, the offender and to the legitimate needs of the society. This in itself was a substantial and compelling circumstance which should have compelled the sentencing court to have imposed a lesser sentence.[4] In this regard the sentencing court erred by imposing the prescribed minimum sentence.

[4] See S v Malgas 2001 (1) SACR 429 (SCA) and Erastus Munongo v The State an unreported case No CA 104/2010)

[30] In addition to the above, the landscape in respect to the prescribed minimum sentences for stock theft valued more than N$500 has subsequently been altered by the striking down of the words: 'or a period not less than twenty years' from s 14(1)(a)(ii) of the Stock Theft Act.[5]; The import and consequences of this decision as well as a subsequent decision[6] have been fully dealt with in Petrus Lwisi v The State [7].

[31] In considering what an appropriate sentence would be, this court is guided by principles set out in Petrus Lwisi v the State, supra. Ms Mugaviri submitted that a period of nine years' imprisonment, of which a portion is suspended, would be an appropriate sentence. Mr Wamambo argued that such a sentence would not be appropriate. He referred to previous decisions of this court where a sentence of eleven years' imprisonment, of which four years were suspended, was imposed. He submitted that this would be a more appropriate sentence

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[32] The magistrate correctly concluded that in this matter the interest of society and the nature of the offence outweigh considerations of the personal circumstances of first appellant and a lengthy custodial sentence is called for. In addition to those factors which were considered by the sentencing court, this court was reminded of the fact that, although the cattle were recovered, the purchaser suffered a loss of N$6300. The fact that first appellant is a first offender is however a factor which would persuade this court to suspend a portion of the custodial sentence.

[33] A sentence of 12 years' imprisonment of which four years' are suspended for a period of five years on the usual conditions, would: fit the crime; be fair to the offender; and would satisfy the legitimate expectations of society.

[34] In the result the following order is made:

1. Condonation is granted for the late noting of the appeal by first and second appellant;

[5] See Daniel v Attorney-General and Others; Peter v Attorney-General and Others 2011 (1) NR 330 (HC)
[6]The State v Ismael Huseb, unreported case no CR 95/2011 delivered on 21 October 2011
[7]unreported case, Case no CA92/2009 delivered on 18 November 2011

2. First appellant's appeal against sentence is upheld and the sentence imposed by the Regional Court sitting at Opuwo is set aside and substituted with the following sentence:

12 years' imprisonment of which four years' are suspended for a period of five years on condition that the accused is not convicted of theft read with the provisions of the Stock Theft Act, Act 12 of 1990, as amended, committed during the period of suspension;

3. The sentence of first appellant is antedated to 31 March 2008;

4. Second appellant's appeal against conviction is upheld and the conviction is accordingly set aside.

MA Tommasi

Judge

JC Liebenberg

Judge

APPEARANCES

1ST & 2ND APPELLANTS:	G Mugaviri Of Mugaviri Attorneys, Oshakati
RESPONDENT:	N Wamambo Of the Office of the Prosecutor-General Oshakati