REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

Case Title: *The State v Benjamin Tobias Naikutu*	**Case No.:** CR 49/2022 Ruacana: 164/2020
	Division of Court: Northern Local Division
Heard before: Honourable Mr. Justice Small AJ *et* Honourable Mr. Justice Munsu AJ	**Delivered on**: 27 September 2022
Neutral citation: *S v Naikutu* (CR 49/2022) [2022] NAHCNLD 98 (27 September 2022)	
The order: 1. The conviction and sentence are confirmed.	
Reasons for the order	
Small AJ (Munsu AJ concurring): [1] The matter came before this court on automatic review in terms of section 302 of The Criminal Procedure Act 51 of 1977.	

[2] Accused in this matter was charged with Theft of Stock in contravention of section 11(1) of the Stock Theft Act 12 of 1990 as amended by Act 19 of 2004 and an alternative count of contravening section 2 of the Stock Theft Act 12 of 1990. The accused pleaded guilty to both counts and was after questioning in terms of section 112(1)(b) of the Criminal Procedure Act 51 of 1977 convicted of contravening section 11 of Act 12 of 1990 as amended by Act 19 of 2004-Stock Theft after the plea was accepted by the State.

[3] The leaned magistrate sentenced the accused to 24 months direct imprisonment.

[4] When the matter was initially placed before my bother Munsu AJ, he was either not satisfied that the proceedings were in accordance with justice or had doubt whether the proceedings are in accordance with justice. He therefore addressed several queries to the learned magistrate who presided at the trial for a statement setting forth his reasons for sentence.[1] Simultaneously my brother penned specific general comments to the learned magistrate for comment. I believe a summation of those mentioned above will suffice.

[5] He firstly enquired whether the sentence of twenty-four months was not inadequately lenient given the value of the two stolen oxen being N$20 000.

[6] Secondly my bother Judge Munsu in the general comment pointed out that the sentence judgement bears the following sentence: *"The court is in agreement with the state that accused person had planned the commission of the offence and executes (sic) it, and this is aggravating".* My brother further pointed out that the record does not contain such

[1] 304(2)(a) of the Criminal Procedure Act 51 of 1977: 'If, upon considering the said proceedings, it appears to the judge that the proceedings are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice, he shall obtain from the judicial officer who presided at the trial a statement setting forth his reasons for convicting the accused and for the sentence imposed, and shall thereupon lay the record of the proceedings and the said statement before the court of the provincial division having jurisdiction for consideration by that court as a court of appeal: Provided that where the judge concerned is of the opinion that the conviction or sentence imposed is clearly not in accordance with justice and that the person convicted may be prejudiced if the record of the proceedings is not forthwith placed before the provincial division having jurisdiction, the judge may lay the record of the proceedings before that court without obtaining the statement of the judicial officer who presided at the trial.'

submission by the state. He advised the leaned magistrate to ensure that remarks made by the court have a basis and are borne out by the record.

[7] He further reminded the leaned magistrate that the absence of a basis borne out by the record might create the impression that:

(a) The learned magistrate does not keep a proper record.
(b) The learned magistrate confuses matters brought before her, that she considers facts and circumstances applicable in a different case to those in a particular case.
(c) In sentencing, the learned magistrate introduces and relies on material not placed before her, which has the effect of vitiating proceedings.
(d) The learned magistrate uses an already prepared proforma / standard on reasons for sentences and fails to adjust accordingly in each case to ensure that the remarks are suited to the circumstances of the case.

[[8] My brother Munsu AJ thirdly pointed out that the last sentence of paragraph 4 on the reasons for sentence reads: *"The complainant worked hard for his good deeds and the mind likes of the accused person destroyed all the efforts of hard work, therefore this is aggravating"* and enquired whether the remark is relevant since both oxen were recovered.

[9] Lastly my bother Munsu AJ pointed out that the learned magistrate referred to a decision 'S *v Soela (sic)* 1996 (2) SACR 616 (0)' and that as he did not manage to locate the authority if the learned magistrate, could note the relevance of this authority and either provide the correct reference or attach a copy of the referred case.

[10] The learned magistrate replied that she did not consider the sentence startlingly lenient and considered the sentence of 24 months imprisonment appropriate. She pointed out that although the cattle were valued at N$20 000, both were recovered and returned to the lawful owner. She considered this a mitigating factor.

[11] The learned Magistrate agreed that the remarks made regarding state's submission in her judgment were not submitted by the State and indicated that she had probably confused this matter with another matter as she dealt with too many cases.

[12] The magistrate responded in respect of the third query listed hereinbefore that she intended to indicate that the accused intended reaping where he did not sow. This according to the learned magistrate is applicable as the 'offense is theft and not recovery of the cattle'.

[13] In respect of the query related to the cited case of *S v Soela* 1996 (2) SACR 616 (O) the learned magistrate said she obtained the citation of the case from other rulings such as *S v Van Wyk* 1997 (1) SACR 345 (T) at 366 h and *S v Randall* 1995 (1) SACR 559 (C) at 565 c. According to her all these cases deal with accused being a first offender to be regarded as a mitigating factor. Where they referred to *S v Soela* 1996 (2) SACR 616 (0) at 629 d-c, that "the subsequent principle is that a first offender should not be imprisoned if this can be prevented".

[14] The last-mentioned explanation by the learned magistrate unfortunately contradicts as she quoted the case queried in her judgement stating that the decision held that the brutality and callousness of the accused's actions shows that the accused has no regard for other people. Furthermore, the South African Criminal Reports carries no decision of an accused named Soela. *S v Seoela* [2] however ends at page 623 and does not contain the referenced 629d-c of for that matter 629c-d and deals with dealing in dagga in contravention of s 5(b) of Drugs and Drug Trafficking Act 140 of 1992. *S v Randall* [3] was a case of dealing in cocaine in contravention of s 5(b) of the Drugs and Drug Trafficking Act 140 of 1992 and does not refer *S v Seoela* [4] at all, but the latter decision refers to *S v Randall* [5]. *S v Van Wyk* 1997 (1) SACR 345 (T) deals with murder and a sentence of life imprisonment and does not refer to *S v Seoela* [6] on 366h or elsewhere.

[15] The learned magistrate, in her judgement, mainly referred to South African cases. When quoting decisions from another jurisdiction, it is essential to consider the Namibian context and establish whether there are not Namibian Supreme Court or High Court cases

[2] *S v Seoela* 1996 (2) SACR 616 (O).
[3] *S v Randall* 1995 (1) SACR 559 (C).
[4] 1 *S v Seoela* 996 (2) SACR 616 (O).
[5] *S v Randall* 1995 (1) SASV 559 (C) at 621b-c.
[6] *S v Seoela* 1996 (2) SACR 616 (O).

either stating the same legal principle. Or perhaps approved and applied the principles of a South African decision.

[16] In *S v Redondo*[7] the Supreme Court of Namibia on 11 June 11, 1992, and thus more than 30 years ago declared:

'The common law continues to apply in Namibia, with the important qualification, however, that it is for the Courts of Namibia to interpret and pronounce on the content and development of such common law in Namibia, which Courts are no longer bound by the decisions of the Appellate Division of the Supreme Court of South Africa.' [8]

[17] *S v Kandovazu* [9] the Supreme Court of Namibia reiterated referring to *S v Heidenreich*[10] that at present, a magistrate's court is a creature of statute and is limited in the exercise of its jurisdiction, either civil or criminal, to what is spelt out in its enabling statute, namely the Magistrates' Courts Act, 32 of 1944. A magistrate, therefore, cannot develop the common law. It can, at most, enforce the common law set by the Supreme and High Courts of Namibia.

[18] The Rules of the Supreme Court of Namibia: Supreme Court Act, 1990[1112] and the

[7] *S v Redondo* 1992 NR 133 (SC) at 145G-J.
[8] See also *S v Hangue* 2016 (1) NR 258 (SC) paragraph 25.

[9] *S v Kandovazu* 1998 NR 1 (SC) at 5G-h.
[10] *S v Heidenreich* 1998 NR 229 (HC); 1996 (2) SACR 171 (Nm).
[11] Published in Government Notice 248 of 2017 Rule 19.

[12] The Rules of the Supreme Court of Namibia: Supreme Court Act, 1990 published in Government Notice 248 of 2017 in Rule19 states:

'(1) Where, in his or her heads of argument or any other written submissions or oral submissions, an appellant or respondent or his or her legal practitioner relies on foreign authority in support of a proposition of law, he or she must –
(a) certify that he or she is unable, after diligent search, to find Namibian authority on the proposition of law under consideration;
(b) whether or not Namibian authority is available on the point, certify that he or she has satisfied himself or herself that there is no Namibian law, including the Namibian Constitution, that precludes the acceptance by the court of the proposition of law that the foreign authority is said to establish;
(c) indicate that he or she has considered the statutory context of the foreign judgment and is satisfied that it is comparable to Namibia's statutory context and the reason for his or her satisfaction; and
(d) state that the foreign authority represents the law on the point under consideration and why the foreign authority is relevant.
(2) The court may grant a costs order against a legal practitioner if any information given in terms of subrule (1) is not correct in material respects.'

Consolidated Practice Directives issued by the Judge-President of the High Court of Namibia[13] require using Namibian case authority and only allow foreign case law after specific prerequisites are satisfied. This practice is commended to our lower courts.

[19] I agree with my brother that the sentence imposed by the learned magistrate is exceptionally lenient. One can even say shockingly lenient. However, this Court, unfortunately, cannot, on review, increase the sentence. This is due to the wording of section 304 (2) of the Criminal Procedure Act, 1977.[14] The interpretation described above has the absurd consequence that it requires a judge sitting on review to certify that a sentence is in accordance with justice, notwithstanding his considered opinion that it is shockingly too lenient or due to a serious misdirection by the magistrate. Such reviewing judge is, for example, left with no option to decline to certify such a shockingly lenient sentence in accordance with justice.

[20] As a result, it is ordered that:

1. The conviction and sentence are confirmed.

Judge(s) signature:	**Comments:**
Small AJ:	
Munsu AJ:	

[13] The Consolidated Practice Directives issued by the Judge-President of the High Court of Namibia under Citation of foreign case law requires counsel who in his or her heads of argument relies on foreign authority in support of a proposition of law must certify that he or she is unable, after diligent search, to find Namibian authority on the proposition of law under consideration and must certify that he or she has satisfied himself or herself that there is no Namibian law, including the Namibian Constitution, that precludes the acceptance by the Court of the proposition of law that the foreign authority is said to establish.

[14] See also *S v Arebeb* 1997 NR 1 (HC) at 6I-7G and *S v Puleni and Another* 2021 (3) NR 611 (SC).