THE STATE VERSUS STEPHANUS VRIES CR 32/96

O'LINN J.; FRANK J.: GIBSON J.

HEARD ON: 1996/03/20 & 1996/04/30
DELIVERED ON: 1996/06/19

Fundamental Human Rights and Freedoms - cruel and inhuman punishment - Stock Theft Act providing for minimum sentence upon second or subsequent conviction - Provision unconstitutional as requires imposition of sentence which in cases that can be foreseen as likely to arise commonly will be such that no reasonable man would have imposed Act thus provides for punishment which is inhuman Section proscribing the minimum\sentence down-read.

Sentence - Minimum mandory sentence - Constitutionality of. Not per se unconstitutional - Test to be applied -If sentence in particular caTse such that no reasonable man would have imposed it is unconstitutional - Where cases that this will happen can be foreseen as likely to arise commonly statory provision subject to attack where not like to arise commonly a constitutional exemption must be applied in respect of the particular case before court. Constitutional law - Stock Theft Act - Minimum proscribed sentence unconstitutional Not referred back to Parliament in terms of Act 25(1)(a) of Constitution - Not done as minimum would sentence remain in place pending referal, as section down-read and not struck out completely essence of section remain intact and no valid societal aim paralysed.

CASE NO. **CR** 32/96

IN THE HIGH COURT OF NAMIBIA

In the matter* between

THE STATE

versus

STEPHANUS VRIES

CORAM: O'LINN, J. et FRANK, J. et GIBSON, J.

Heard on: 1996.03.20 + 1996.04.30

Delivered on: 1996.06.19

JUDGMENT

FRANK, J.: The accused was convicted of the theft of a goat valued at N$280. The accused, a 45 year old male, informed the Court that he was married with six children and employed earning N$250 per month plus rations. The accused had previous convictions namely theft of a sheep valued at N$6 during 1969, use of property without the owner's consent during 1977 and malicious damage to property during 1979. The magistrate sentenced the accused to 18 months imprisonment which he suspended in toto.

When the matter was initially submitted for review my brother Hannah J. queried the sentence as it did not comply with the provisions of the Stock Theft Act, no. 12 of 1990 in that section 14(1)(b) of that Act provides for a minimum sentence of three years imprisonment for a second or subsequent conviction of stock theft which cannot be

suspended partially or wholly (section 14(2)). The matter has now been referred to the full bench to determine whether the prescribed minimum sentence is in conflict with Article 8(2)(b) of the Constitution which reads: "No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment."

In ex parte Attorney-General, Namibia: In Re Corporal Punishment, 1991(3) SA 76 (NmSC) the Supreme Court had the following to say with regard to Article 8:

> "It seems clear that the words . . . . have to be read disjunctively. Thus read, the section seeks to protect citizens from seven different conditions:
>
> (a) Torture;
> (b) cruel treatment;
> (c) cruel punishment;
> (d) inhuman treatment;
> (e) inhuman punishment;
> (f) degrading treatment;
> (g) degrading punishment.
>
> Although the Namibian Constitution expressly directs itself to permissable derogations from the fundamental rights and freedoms entrenched in chapter 3 of the Constitution, no derogation from the rights entrenched by Article 8 is permitted. This is clear from Article 24(3) of the Constitution. The State's obligation is absolute and unqualified. All that is therefore required to establish a violation of Article 8 is a finding that a particular statute or practise authorised or regulated by a State organ falls within one or other of the seven permutations of Act 8(2) (b) . . . . .; 'no questions of justification can ever arise.' (at 86 B - E)
>
> The question as to whether a particular form of punishment authorised by the law can properly be said to be inhuman or degrading involves the exercise of a value judgment by the Court . . . . .
>
> It is however a value judgment which requires objectively to be articulated and identified, regard being had to the contemporary norms, expressed in its national institutions and its Constitution, and further having regard to the

> emerging consensus of values in the civilised community (of which Namibia is a part) which Namibians share. This is not a static exercise. It is a continually evolving dynamic. What may have been acceptable as a just form of punishment some decades ago, may appear to be manifestly inhuman or degrading today. Yesterday's orthodoxy might appear to be today's heresy."
> (at 86 H - 87 A)

As is apparent from the heading of the above Supreme Court decision the question that had to be resolved was whether the infliction of corporal punishment was in conflict with Article 8(2) (b) of the Constitution and not when will a permissable form of punishment such as imprisonment conflict with Article 8(2)(b), if ever. The value judgment and the way it is to be made must thus be seen in that context. It is not apposite in the present case, e.g. to determine whether India, Canada, Australia, U S A , etc have stock theft Acts and what their penal provisions provide and if they do not have minimum sentences to conclude that therefore the Namibian Stock Theft Act, in so far as it makes provision for minimum sentences, is unconstitutional. The problems, effects and importance of Stock Theft would vary from country to country as would, probably, the way it is dealt with. What however is important and significant is that it is clear that the prohibition against the punishments mentioned in Article 8(2)(b) is absolute and to decide whether Article 8(2) (b) is infringed is a value judgment that could vary from time to time but which is one not arbitrarily arrived at but which must be judicially arrived at by way of an attempt to give content to the value judgment by referral to the prevailing norms which may o: may not coincide with the norms of any particular judge. A;

was pointed out in Cohen v Georgia, 1977 433 US 584 at 592 these judgments "should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent."

The first question to decide is whether the imposition of a minimum sentence by the legislature is per se unconstitutional. The defects of such sentences are succinctly spelt out in S v Thorns; S v Bruce, 1990(2) SA 802 (A) at 806 H - 807 D in the following terms:

> "The first principle is that the infliction of punishment is pre-eminently a matter for the discretion of the trial Court (at R v Mapumulo and Others, 1920 AD 56 at 37). That Courts should, as far as possible, have an unfettered discretion in relation to sentence is a cherished principle which calls for constant recognition. Such a discretion permits of balanced and fair sentencing, which is a hallmark of enlightened criminal justice. The second, and somewhat related principle, is that of the individualisation of punishment, which requires proper consideration of the individual circumstances of each accused person. This principle too is firmly entrenched in our law (S v Rabie. 1975(4) SA 855 (a) at 861 D; S y Scheepers, 1977(2) SA 159 (A) at 158 F - G).
>
> A mandatory sentence runs counter to these principles (I use the term 'mandatory sentence' in the sense of a sentence prescribed by the legislature which leaves the Court with no discretion at all - either in respect of the kind of sentence to be imposed or, in the case of imprisonment, the period thereof). It reduces the Court's normal sentencing function to the level of a rubber stamp. It negates the ideal of individualisation. The morally just and the morally reprehensible are treated alike. Extenuating and aggravating factors both count for nothing. No consideration, no matter how valid or compelling, can affect the question of sentence. As Holmes J.A. pointed out in S v Gibson, 1974(4) SA 478 (A) at 482 A, a mandatory sentence
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> > 'unduly puts all the emphasis on the punitive

> and deterrent factors of sentence, and precludes the traditional consideration of subjective factors relating to the convicted person.'
>
> Harsh and inequitable results inevitably follow from such a situation. Consequently judicial policy is opposed to mandatory sentences (ct S v Mpetha, 1985(3) SA 702 (A) at 710 E), as they are detrimental to the proper administration of justice and the image and standing of the courts."

Despite the mentioned defects the imposition of a mandatory sentence is accepted in both Canada and the United States of America as not being per se contrary to the provisions of their respective Constitutions which prohibits "cruel and unusual" punishment. As will be seen later the factors mentioned in the Thorns case above, are considered when deciding whether such a sentence is unconstitutional or not. This is done out of deference to the legislature which as representative of the populace clearly reflects the norms and values of the electorate and thus of society in general. Thus regard is had to the "contemporary norms, expressed in its national institutions" (see Corporal Punishment case, above). Parliament is empowered by the Constitution to pass legislation and is thus undoubtedly entitled to proscribe conduct as criminal and to determine punishment for conduct so proscribed. I am thus of the view that minimum sentences are not per se unconstitutional. This view is bolstered by the approach set out hereinafter which in my view is the only reasonable one to allow both Parliament and the courts to play their proper role as envisaged by the Constitution. I pause here for a moment to state that if a minimum sentence is unconstitutional then for the reasons set out in the Thorns case a maximum one would also be unconstitutional.

Whereas Parliament may generally enact legislation including legislation with penal provisions Parliament cannot enact penalties which will fall foul of Art 8(2) (b) . Whether a prescribed punishment infringes Art 8(2) (b) is for the courts to decide and not for Parliament (Art 25 of the Constitution). This is also the approach in Canada and the U S A . (See Smith v The Queen. 1987(34) CCC (3d) 97 and the Georgetown Law Journal (Vol. 79 no. 4 April 1991). In Smith v The Queen the following appears at 137:

> "It is not for the court to pass on the wisdom of Parliament with respect to the gravity of various offences and the range of penalties which may be imposed upon those found guilty of committing the offences. Parliament has broad discretion in proscribing conduct as criminal and in determining proper punishment. While the final judgment as to whether a punishment exceeds constitutional limits set by the Chapter is properly a judicial function
>
> "....., the courts are empowered, indeed required, to measure the content of legislation against the guarantees of the Constitution."

The next question that arises is when will courts hold that a minimum mandatory sentence amounts to cruel, inhuman or degrading punishment. In both the USA and Canada the courts have evolved a test based on proportionality. Thus a sentence is "in violation of the eighth amendment if it is grossly disproportionate to the severity of the offence" in the USA (Georgetown Law Journal, above at 1118 - 1121) and "Section 12 is violated where the sentence prescribed is grossly or excessively disproportionate to the wrongdoing" in Canada (R v Goltz. 1991(6) CCC (3d) 481 at 482 b). The mentioned eighth amendment reads "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and

unusual punishments inflicted" and section 12 reads "Everyone has a right not to be subjected to any cruel and unusual treatment or punishment."

To determine whether a sentence is "grossly disproportionate" use is made of expressions like; "- a severe punishment must not be unacceptable to contemporary society", "the infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering", it is excessive and serves no valid legislative purpose", "..... invalid if popular sentiment abhors it" (Furman v Georgia, (1971) 408 US 238 at 277, 279) and "outrage standards of decency", ".... no one, not the offender and not the public, could possibly have thought that that particular accused's offence would attract such penalty. It was unexpected and unanticipated in its severity either by him or by them." (Smith v The Queen, supra at 139 and 147).

The fact that the sentence is excessive in the view of the Court hearing the matter is not sufficient to declare it unconstitutional. This point is made in both the majority and minority judgments in Smith v The Queen. Lamer J. makes the point as follows in the majority judgment:

> "The test for review under section 12 of the Charter is one of gross disproportionality, because it is aimed at punishments that are more than merely excessive. We should be careful not to stigmatise every disproportionate or excessive sentence as being a constitutional violation, and should leave to the usual sentencing appeal process the task of reviewing the fitness of a sentence. Section 12 will only be infringed where the sentence is so unfit having regard to the

> offence and the offender as to be grossly-disproportionate."
> (at 139)

Mclntyre J. makes the same point in his minority judgment as follows:

> "Not every departure by a court or legislature from what might be called a truly appropriate degree of punishment will constitute cruel an unusual punishment. Sentencing, at the best of times, is an imprecise and imperfect procedure and there will always be a substantial range of appropriate sentences. Further, there will be a range of sentences which may be considered excessive, but not so excessive or so disproportionate as to 'outrage standards of decency' and thereby justify judicial interference under section 12 of the Charter. In other words, there is a vast grey area between the truly appropriate sentence and a cruel and unusual sentence under the Charter."
> (at 109 - 110)

It seems to me that the disproportionality test is the same test that was originally used to determine whether a sentence was shocking before the "shocking" test became virtually synonymous with the "startlingly" or "disturbingly inappropriate" test. Thus in R v Taliaard, 1924 TPD 581 Curlewis J. held in this regard that a court could not interfere with a sentence unless "it is so clearly excessive that no reasonable man would have imposed it." It is with this test that Shreiner J. took issue in R v Recce, 1939 TPD 242 and which eventually led to the "shocking" test to become synonymous with the "disturbingly or startlingly inappropriate" test. Shreiner J. states the following at p. 243 - 244:

> "In that case Curlewis, J. said: 'Unless

> the Court is clearly of opinion that no reasonable man ought to have imposed such a sentence, ... the Court cannot interfere.' It would, on principle, seem regrettable that the Court should not be entitled to alter a sentence which seemed to it to be grossly excessive, because it could conceive of reasonable people holding a different view. In matters of sentence opinions must necessarily vary greatly. Different people will inevitably take different views with regard to the appropriate punishment in any particular case and, consequently, the Court would have to hesitate long indeed before it could come to the conclusion that a particular sentence is such that no reasonable person ought not to have awarded it. But the position is different when the Court has to express its own view as to whether the sentence is excessive or not; on such a question the Court is able to give a clear and definite opinion ..... It is clear, at least that the Court will not interfere simply because it disagrees with the sentence that was imposed ....; but at some stage more disagreement may be left behind and the superior court may feel a sense of shock or outrage at the sentence."

In considering what "no reasonable man would have imposed" all the factors taken into account in the "disproportionality" test would have to be considered and I doubt whether in effect the "shocking" test as proposed in the Tali aard case differs from the "disproportionally" test. This "shocking" test also gives sufficient recognition to the legislature because as pointed out by -Shre-iner J. only punishments which are "more than merely excessive" will be subject to attack and will leave other sentences to be normal appeal procedures which would include appeals on the basis of shock in its normal sense intact but distinct from the basis of "shock" in constitutional challenges to sentences. In this way not every excessive or even startlingly or disturbingly inappropriate sentence will be dealt with as constitutional violations but will be dealt with under the normal principles applicable to appeals

concerning sentences.

Where I hereafter use the work "shock" in a constitutional sense I refer to shock as defined in the Taliaard case as being a sentence "so excessive that no reasonable man would have imposed it" and not to the concept as used in its ordinary meaning as developed for appeals in the ordinary course of Criminal Procedure.

It follows thus that this Court must look at the facts of the present case and determine what a proper sentence would have been taking all the facts and circumstances into account which must be taken into account when sentencing an accused. Once this is done and an appropriate sentence has been determined this sentence must then be measured against the statutory mandatory one. If this is done and the mandatory sentence induces a sense of shock then Act 8(2)(b) has been infringed.

What must be determined next is whether the statutory section must be set aside or whether only the sentence imposed on the individual accused must be set aside.

Both counsel approached the matter on the basis that the statutory injunction must be set aside and there was no basis on which a sentence on an individual basis could be set aside without setting the statutory injunction aside. I am not convinced that this proposition is sound as in Canada both these possibilities exist (R v Kumar, Vol. 20 Canadian Rights Reporter 114) and it seems to me that the

ratio of our Supreme Court in S v Tcoeib, 1996(1) SACR 390 (NmS) is to the same effect. In the Tcoeib case the Supreme Court dealt with the constitutionality of life imprisonment under two distinct headings namely as set out at 391 h - i:

> "1. Is the imposition of a sentence of life imprisonment per se unconstitutional in Namibia?
>
> 2. If it is not per se unconstitutional, is such sentence nevertheless unconstitutional in the circumstances of the present case?"

The approach clearly indicates that whereas a sentence may in general terms not be unconstitutional per se it may be such on the facts of a particular case. How must one then determine whether a minimum sentence is per se unconstitutional or whether it is unconstitutional only in a specific case (i.e. when does one apply the so-called "constitutional exemption" to a particular accused and not nullify the empowering statute).

The Canadians have evolved a set of principles which in my view is the only sensible approach once it is accepted that a sentence may in general be acceptable and constitutional but in a particular case be unacceptable and unconstitutional. From a reading of the Canadian cases of Smith v The Queen. R v Goltz and R v Kumar mentioned above, the following may be said to be their approach: (Here it must be kept in mind that even if a sentence is held to be grossly disproportionate it may still be upheld because of section 1 of the Canadian Charter which creates derogations under certain circumstances. This is however not the case

in Namibia where the rights created in Art 8(2)(b) are absolute as already pointed out).

1. A statutory minimum sentence of imprisonment is not per se unconstitutional.

2. It will be unconstitutional however if it prescribes imprisonment as a punishment which is "grossly disproportionate" to the circumstances of the offender and the offence.

3. The section 12 test for "gross disproportionality" is to be applied first with respect to the offence and offender before court, and then with respect to hypothetical cases which,. . . . ., can be foreseen as likely to arise commonly." (R v Kumar, at 130. See also Smith and Goltz cases).

4. Where a statutory minimum sentence is found to be "grossly disproportionate" there are three possible avenues open to the court namely:

   (a) to declare the provision of no force or effect for all purposes;

   (b) to declare the provision to be of force and effect only in a particular class of cases i.e. to read it down; and

   (c) to declare the provision to be of no force or

effect in respect to the particular case before the court i.e. apply a constitutional exemption.

5. Although not totally clear it seems that the options mentioned above in 4 (a) and (b) are followed when "cases. . . . can be foreseen as likely to arise commonly" and option 4 (c) is followed when what was described in the Goltz case at 497 as "far-fetched and marginally imaginable cases" suddenly becomes reality which can happen as every experienced lawyer can testify.

If the test with regard to legislation is not to be based on "reasonable hypothetical circumstances as opposed to far-fetched or marginally imaginable cases" then no statutory minimum sentence will survive scrutiny. In this manner a proper balance is in my view struck between the role of the legislature and the courts. Thus if the sentence legislated is not shocking in reasonable hypothetical cases it will not be impugned. If in an individual case it then turns out to be shocking that individual's right in terms of Art 8(2)(b) will be protected by applying a constitutional exemption. On this basis Parliament can legislate generally and the constitutional rights of the subjects are protected.

Maybe an example from Canada where the constitutional exemption option was followed will clarify the matter further. Thus in R v Chief (see Kumar case at 124 - 125) a native Indian Trapper from the Yukon area who was reliant on game for the support of his family and dependent on income

from the sale of furs faced a mandatory prohibition against the possession of firearms after having been convicted of an assault. Esson J. justified the reliance on the constitutional exemption as "the remedy which will do justice in the instant case without changing the general good. Section 98(1), in its application to the great majority of Canadians, cannot possibly be considered to offend the Charter." (Section 98 was the section providing for the mandatory prohibition).

In my view the position in Namibia can be summarised as follows or be divided into the following steps:

1. A statutory minimum sentence is not <u>per se</u> unconstitutional.

2. It will be unconstitutional if it provides for a punishment which will be shocking in the circumstances of the specific case before court.

3. Where a statutory minimum sentence results in a shocking sentence there are four options available to the court, namely;

   (a) to declare the provision of no force or affect for all purposes,

   (b) to declare the provision to be of no force and effect only in a particular class of cases i.e. to down-read it,

(c) to declare the provision to be of no force or effect in respect to the particular case before court i.e. apply a constitutional exemption,

(d) to allow the legislature to cure the defects in the impugned legislation pursuant to the provisions of Art 25(1)(a) of the Constitution.

4. Where the statutory minimum sentence is found to be shocking in the case before the Court the Court must then enquire whether it will be shocking "with respect to hypothetical cases which,. . . . ., can be foreseen as likely to arise commonly." If the answer to the second enquiry is in the affirmative then the Court must act in one of the respects set out in 3 (a) , (b) or (d) above. If the answer to the second enquiry is in the negative the court must act as set out in 3(c) above.

Before I deal with the facts of the present case it is necessary to briefly deal with minimum sentences imposed for second or subsequent offenders in general. To decide whether such a sentence is in conflict with Article 8(2) of the Constitution the same general principles should apply (R v Kumar above, see also R v Parsons quoted in the Canadian Charter of Rights; Vol. 3 at 12: 90080 where a minimum penalty of 90 days for a third or subsequent conviction for drunken driving was upheld). However as is apparent from the Kumar case other considerations may apply based on the fact that it is at the discretion of the prosecution to prove or not to prove previous convictions. Thus although

such sentences may not be grossly disproportionate the Kumar case dealt also with the factor of the arbitrariness in the proof of previous convictions and the effect thereof on the "principles of fundamental justice." I make no decision with regard to these aspects as the matter was referred to this court to establish whether the mandatory sentence provided for in the Stock Theft Act infringed on Art 8(2) (b) and on no other basis and both counsel also directed their submissions on this basis only.

As already stated the Stock Theft Act makes provision for a minimum sentence of 3 years imprisonment for a second or subsequent conviction. It is apposite to quote the section at this juncture in *toto*:

> "14(1) Any person who is convicted of an offence referred to in paragraph (a), (b), (c) or (d) of subsection (1) of section 11 shall be liable -
>
> (a) in the case of a first conviction
>
> (i) to imprisonment for a period not exceeding 10 years; or
>
> (ii) to a fine not exceeding R40 000; or
>
> (iii) to both such fine and such imprisonment; or
>
> (b) in the case of a second or subsequent conviction, to imprisonment for a period not exceeding 20 years: Provided that where such second or subsequent conviction relates to stock, other than poultry or the carcase or portion of the carcase of any such stock, such person shall be liable to imprisonment for a period of not less than three years, but not exceeding 20 years."

As also already mentioned section 14(2) expressly excludes a court from suspending any portion of the minimum mandatory sentence for second or subsequent offenders where such offenders were 18 years or older when the second or subsequent offence was committed.

The first factor to notice is that there is no limit on the number of years which may elapse between the date of the last previous conviction and the offence in respect of which the minimum penalty is to be applied. Thus in the present case the accused's previous conviction for stock theft in 1969 triggered the minimum sentence upon his second conviction in May 1995, a period of approximately 26 years. Here it must be borne in mind that in general, as was pointed out by Taylor J.A. in R v Kumar at 131, that:

> "It is, of course, recognised in the sentencing process that the significance of a previous conviction, especially if it is the sole previous conviction, reduces with the passage of time. There comes a point at which, in the case of all but the most serious of offences, a sole conviction registered many years ago no longer has any significance at all."

The present accused has more than one previous conviction but even then his last conviction prior to this case was in 1977 and thus approximately 18 years ago. I may just point out that the fact that previous convictions may lose their significance due to the affluxion of time seems to be an important consideration where minimum sentences are scrutinised in the USA (R v Kumar at 131) and has also been recognised in a country such as South Africa where it is

expressly provided for that certain previous convictions fall away after 10 years (section 271 A of the Criminal Procedure Act-, Act 51 of 1977) .

The second factor to note is that although the section does limit itself by excluding poultry and the carcase of stock from its ambit it does not distinguish between the different kinds of stock at all. Thus, e.g. whether sheep or cattle are involved makes no difference, and this where it is common knowledge that the value of cattle are five to six times that of sheep. The only other exemption is made for second or subsequent offenders under 18 years of age.

In my view the circumstances of the present case does not warrant a sentence in excess of 9 months imprisonment whereas I personally would have imposed one of 6 months. From this it follows that one of three years can only be described as shocking. In fact, the sentence imposed by the magistrate is also startlingly inappropriate. The fact that he suspended it in _toto_ does soften its effect but the point is he had to start off from the basis that 18 months was appropriate before he had to decide whether to suspend it _in toto_ or only a portion thereof. (_S v Olyn en Andere_, 1990 (2) SA 73 (NC)) .

Due to the factors already mentioned relating to the non-limitation of previous convictions, the failure to distinguish between different kinds of stock and also due to the prevalence of stock theft I am of the view that hypothetically cases where the minimum sentence will

probably be shocking "is likely to arise commonly."

In order to attempt to counter the prevalence of stock theft and the effects thereof especially in the rural areas where people barely eke out a living with the small number of livestock they possess Parliament thought it necessary to introduce a minimum sentence. This followed a public outcry especially from farmers and the rural community. This can easily be understood. To steal even one sheep or goat from a person trying to make a living out of say a herd of ten is catastrophic for such a person. Furthermore with transport and vast distances that can be covered in one night as well as the fact that extensive farming is mostly practised in this country it is not easy to counter stock theft. Parliament had every right to attempt to do everything within its powers to curb these pernicious activities.

The factors mentioned is clearly such that cognisance can be taken thereof and are thus part of the "objective factors" mentioned earlier which would and must influence the value judgment as to whether a specific sentence will be constitutional or not. They are clearly factors which the reasonable man would contemplate and which a court must also take cognisance of to determine whether a reasonable man ought not to have imposed such a sentence.

The next question which arises is whether the whole section 14 must be declared unconstitutional, whether it should be read down or whether it should be referred back to Parliament to correct the defects.

If the matter is referred back to Parliament the section will remain valid until the conditions of the referral has been met (Article 25(1) (a)). This would mean that in the meantime persons will receive the minimum mandatory-sentence. This is not only a hypothetical possibility but will happen on a daily basis. Furthermore, in my view, as I intend to down-read the sections for reasons I will set out later, the essence of the section will remain intact giving some effect to the intention of Parliament while also immediately recognising the rights of ordinary citizens. Parliament will in any event be entitled to amend the section should it so wish. As already pointed out the passing of the Stock Theft Act had a valid social aim as its object and the order I intend making will not render the whole Act inoperative as it does not strike at the heart thereof and no valid societal aim will be paralysed if the Act is not referred to Parliament for corrective action.

As it is not the imprisonment per se which is unconstitutional but only the minimum prescribed period of imprisonment I am not inclined to declare the whole of section 14(1) (b) unconstitutional. I intend to read the section down in such a way that upon a second or subsequent conviction an offender will have to undergo a period of imprisonment which will be in the discretion of the Court but which the Court will not be able to suspend because of section 14(2) unless of course such second or subsequent offender was under the age of 18 when he/she committed such second or subsequent offence. Because of the provisions of section 284 of the Criminal Procedure Act, no. 51 of 1977

this will in effect mean that there will remain a minimum sentence of four days imprisonment.

Before I conclude I need to say something about the practical effects of this judgment. Magistrates are not entitled to declare any mandatory punishment unconstitutional or to grant a constitutional exemption in any particular case. They must apply the law as it stands. Should they be of the view that a mandatory sentence would be unconstitutional they must impose it nevertheless and thereafter refer the matter for review or even special review to the High Court.

In the result:

(a) The words "of not less than three years, but" is struck out from section 14(1)(b) of the Stock Theft Act, Act no. 12 of 1990 as being in conflict with Act 8(2) (b) of the Constitution; and

(b) the sentence imposed by the magistrate is set aside and substituted with one of six (6) months imprisonment.

FRANK, JUDGE

m his judgment.

GIBSON, JUDGE

1 agrSe With the order proposed by Frank, fl .
-sons fOr judgment to the ^ FrankJ — — **.
Judgment.

O'LINN, JUDGE

ON BEHALF OF THE STATE: ADV H F JACOBS

ON BEHALF OF THE ACCUSED: ADV D F SMUTq

Instructed by: Amicus Curiae