



NOT REPORTABLE

CASE NO: CA 40/2011

IN THE HIGH COURT OF NAMIBIA

MAIN DIVISION

HELD AT WINDHOEK

In the matter between:

JAN SWARTBOOI

APPLICANT

and

THE STATE

RESPONDENT

CORAM: HOFF, J *et* SIBOLEKA, J

Heard on: 13 April 2012

Delivered on: 13 April 2012 (*Ex tempore*)

Reasons on: 30 May 2012

APPEAL JUDGMENT

HOFF, J: [1] This Court, after hearing argument on behalf of the respective parties gave the following orders on 13 April 2012:

1. The appeal against the sentence imposed by the Regional Court Magistrate succeeds.

2. The sentence is set aside and substituted with one of 15 years imprisonment.
3. The sentence is antedated to 10 November 2008.

These are the reasons.

[2] The appellant (a 29 years old Namibian male person), who pleaded guilty on a charge of stock theft in contravention of the provisions of section 11(1)(a) of the Stock Theft Act, (Act 12 of 1990) (the Act) in the Regional Court, was subsequent to questioning in terms of section 112(1)(b) of Act 51 of 1977, convicted and sentenced to 30 years imprisonment. The appellant admitted stealing one ox valued at N\$4 000.00. The appellant also admitted two previous convictions for stock theft committed during 2002 (six head of cattle) and during the year 2007. It is not clear what stock the appellant stole during 2007, but he was sentenced in the Regional Court to 20 years imprisonment of which 17 years imprisonment were suspended for a period of 5 years on certain conditions.

[3] The Regional Court magistrate, in the absence of any compelling and substantial circumstances, had little discretion and was obliged in terms of the provisions of section 14(1)(b) of Act 12 of 1990 impose a mandatory 30 years direct term of imprisonment as the appellant was a repeat offender and over the age of 18 years when the crime was committed.

[4] The appellant was sentenced in the Regional Court on 10 November 2008 and filed his notice of appeal against sentence on 9 September 2011.

[5] The appellant in his application for condonation of the late filing of his notice of appeal stated that he drafted his notice of appeal with the assistance of fellow inmates well within the 14 days period prescribed by the Rules and gave the notice of appeal to

the “postman” whom he had trusted to deliver to the prison authorities. During 2009 he directed a letter to the Registrar of this Court enquiring about his appeal and was informed that such notice of appeal was not received by the Registrar. He further stated that he has good prospects of success on appeal on the merits as section 14(1)(b) of the Act in terms of which he was sentenced has been declared unconstitutional, and that a sentence of 30 years imprisonment is startlingly inappropriate, induces a sense of shock, and that there is a striking disparity between the sentence imposed by the trial court and that which in all likelihood will be imposed by the Court of Appeal.

[6] Although the explanation for the late filing of his notice of appeal is not a reasonable explanation, Mr Moyo, counsel appearing on behalf of the State, conceded in view of recent decisions that the appellant has an “arguable case”. (See *Daniel v Attorney-General and Others*; *Peter v Attorney-General and Others* 2011 (1) NR 330 (HC) and *State v Ismael Huseb*, Case Number CR 95/2011, unreported judgment delivered on 21 October 2011).

[7] This Court in view of the fact that there are reasonable prospects of success on appeal, condones the late filing of the notice of appeal.

[8] The approach of a Court of Appeal regarding a sentence imposed in a lower court is that sentencing is pre-eminently a matter within the discretion of the trial court and that a Court of Appeal will only interfere where the court imposing sentence, misdirected itself materially in respect of the sentence imposed or committed an irregularity. A Court of Appeal will also interfere where the sentence imposed is startlingly or disturbingly inappropriate, or where it induces a sense of shock, or where there is a striking disparity between the sentence imposed by the trial court and the sentence the Court of Appeal would have imposed as court of the first instance. (See *S v Tjiho* 1991 NR 361 (HC) at 361A – B; *Director of Public Prosecutions v Mngoma* 2010 (1) SACR 427 (SCA)).

[9] This Court in Daniel (*supra*) struck the words “for a period of not less than 30 years” from the wording of section 14(1)(b) of the Act and held that the prescribed minimum sentence was inconsistent with the Constitution of Namibia consequently the prescribed minimum sentences no longer apply and are incompetent sentences.

[10] Where the law has changed regarding a sentence to be imposed between the time of the imposition of the sentence by the trial court and the hearing of the appellant’s appeal in the Court of Appeal, the Court of Appeal will regard the appellant to be in the same position as one that has not been sentenced at all. (See *S v Mpendokana* 1987 (3) SA 20 (CPA) at 23C – D approved in *Prokureur-General, Noord-Kaap v Hart* 1990 (1) SA 49 (A) at 57 A).

[11] Mr Jones who appeared on behalf of the appellant in this appeal (*amicus curiae*) submitted that the appellant’s motive for the theft was not commercial gain but due to the needs of the family. Mr Jones with reference to a number of South African *dicta* submitted that an appropriate sentence in the circumstances would be one of 3 years and six months imprisonment.

[12] This Court will consider sentence having regard to the usual sentencing principles and to the aims of punishment.

[13] In the matter of the *State versus Petrus Lwishi* unreported judgment Case No. CA 9/2009 delivered on 18 November 2011 Liebenberg J appropriately stated the fact that the mandatory minimum stated (*in casu* thirty years imprisonment) has been struck down does not imply that the offence of stock theft has become a less serious offence. It remains a serious offence and deterrence as one the aims of punishment should be emphasised in order to give effect to the intention of the Legislature to address the problem of stock theft in Namibia.

[14] The appellant slaughtered an ox and the fact the meat was recovered before the appellant could dispose thereof does not mean that the complainant suffered no financial loss. The appellant previously had the benefit of a suspended sentence but this appears to have no meaningful impact on the behaviour of the appellant. What remains morally reprehensible is the fact that appellant after he had been convicted of stock theft on 17 July 2007 (for the second time) but before he was sentenced (on 23 November 2007) stole this one ox during November 2007.

[15] I am mindful of the fact that the State may in future apply to have the suspended sentence put into operation nevertheless I am in agreement with the submission of Mr Moyo who appeared on behalf of the respondent that an appropriate sentence in the circumstances would be a custodial sentence of not less than fifteen years.

HOFF, J

I agree

SIBOLEKA, J

ON BEHALF OF THE APPELLANT:

MR J P JONES

Instructed by:

**AMICUS CURIAE
(THE CHAMBERS
172 PREMENADEN
ROAD, WINDHOEK**

ON BEHALF OF THE RESPONDENT:

ADV. E MOYO

Instructed by:

OFFICE OF THE PROSECUTOR GENERAL