



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI
JUDGMENT**

Case no: CR 6/2017

THE STATE

and

MEIKO HAMUKWAYA

ACCUSED

(High Court Case no. 112/2017)

Neutral citation: *S v Hamukwaya* (CR 6 /2017) [2017] NAHCNLD 61 (4 July 2017)

Coram: TOMMASI, J *et* JANUARY, J

Delivered: 4 July 2017

Flynote: Criminal Procedure – Sentence – Stock theft – Value of stock crucial for sentence as it impacts on sentence – Fine not permissible – Sentence set aside and remitted.

ORDER

1. The conviction is confirmed; and
2. The sentence imposed is set aside and the fine, if paid ought to be refunded;
3. The matter is remitted to the district court sitting at Eenhana to sentence the appellant in accordance with the guidelines set out herein.

4. The sentencing court must have regard to the period already served by the appellant.

JUDGMENT

TOMMASI, J (JANUARY, J CONCURRING)

[1] This is a review matter. The accused pleaded guilty to stock theft read with the provisions of the Stock Theft Act, 12 of 1990, as amended, and was questioned in terms of s 112(1)(b). He was convicted on his plea of guilty and sentenced to a fine of N\$3000 or seven months' imprisonment.

[2] The conviction is in order but the sentence is clearly not in accordance with justice, and a further delay of this matter would be prejudicial to the accused. The sentence was imposed on 12 December 2012. The matter was sent on review and received by this court on 18 April 2017. For these reasons the matter is disposed of without obtaining the statement of the judicial officer who presided at the trial.

[3] The charge sheet does not reflect the value of the cow. It is merely described as: 'a cow, a heifer, black in colour'. During questioning the accused indicated that he did not know the value and the learned magistrate found him guilty of theft of "unknown value".

[4] The value of the stock is not an element of theft therefore it is not required to prove the value in order to convict an accused of stock theft.¹ The value however is crucial for sentence as it impacts on sentence.²

[5] In terms of s 14(1) of The Stock Theft Act, 1990 (12 of 1990) as amended by the Stock Amendment Act, 19 of 2004 reads as follow:

'(1) Any person who is convicted of an offence referred to in section 11(1)(a), (b), (c) or (d) that relates to stock other than poultry-

¹ See *S v Kauleefelwa* 2006 (1) NR 102 (HC).

² See *S v Undari* 2010 (2) NR 695 (HC) and *S v Guim & another* 2008 (1) NR 305 (HC).

- (a) of which the value-
- (i) is less than N\$500, shall be liable in the case of a first conviction, to imprisonment for a period not less than two years without the option of a fine;
 - (ii) is N\$500 or more, shall be liable in the case of a first conviction, to imprisonment for a period not less than twenty years without the option of a fine.'

[6] In *Daniel v Attorney-General & others; Peter v Attorney-General & others* 2011 (1) NR 330 (HC) the court made the following order:

- '(i) the words 'or a period not less than twenty years' are struck from s 14(1)(a)(ii) of the Stock Theft Act 12 of 1990, as amended;
- (ii) the words 'for a period not less than thirty years' are struck from G s 14(1)(b) of the Stock Theft Act 12 of 1990, as amended; the reference to 'ss (1)(a) and (b)' in s 14(2) of the Stock Theft Act 12 of 1990, is consequentially read down to mean 'ss (1)(a)(i)';
- (iii) ...'

Section 14 (1) (a) (ii) now reads as follow:

- (ii) 'is N\$500 or more, shall be liable in the case of a first conviction, to imprisonment without the option of a fine;

[7] In *S v Tjiveze*³ this court set out the following general guidelines with regard to sentencing in stock theft cases in light of the decision in *Daniel v Attorney-General & others; Peter v Attorney-General & others, supra*:

- '1. Cases where the value of the stock is less than N\$500, (s 14(1)(a)(i)) and the accused is a first offender
 - 1.1 The prescribed sentence is any period of imprisonment of not less than two years without the option of a fine, but not exceeding the normal sentence jurisdiction of the magistrate.
 - 1.2 The court must explain s 14(2) to the accused and if satisfied that substantial and compelling circumstances exist, enter those circumstances on

³ 2013 (4) NR 949 (HC), see also *S v Lwishi* 2012 (1) NR 325(HC).

the record and may impose a lesser sentence than two years' imprisonment, which must still be a period of imprisonment.

- 1.3 If the court finds that there are substantial and compelling circumstances it may impose a shorter period of imprisonment. The court may in its discretion also wholly or partly suspend any period of imprisonment.
 - 1.4 If the court is not satisfied that there are substantial and compelling circumstances, it must impose a sentence of at least two years' imprisonment without the option of a fine, but part of the sentence may be suspended.
2. Cases where the value of the stock is N\$500 or more, (s 14(1)(a)(ii)) and the accused is a first offender
- 2.1 The prescribed sentence is any period of imprisonment without the option of a fine, but not exceeding the normal sentence jurisdiction of the magistrate.
 - 2.2 Section 14(2) does not apply, ie the court is not concerned with substantial and compelling circumstances.
 - 2.3 The court may wholly or partly suspend the period of imprisonment.'

[8] The matter cannot be made any simpler or clearer than that. The court may not impose a sentence of a fine and if the prescribed minimum for stock valued at **less** than N\$500 is two years' imprisonment, it stands to reason that the court cannot impose a sentence of less than two years' imprisonment for stock worth **more** than N\$ 500 despite the fact that there are no prescribed minimum sentence at present, the latter having been struck down.

[9] *S v Undari* 2010 (2) NR 695 (HC) Liebenberg J at page paragraph 18 – 19 stated as follow:

'Whereas it is the prosecution who relies on the value of the stock in question, the State obviously carries the onus to prove such value to the satisfaction of the court. In circumstances where the value of the livestock had not been determined prior to the

matter being received in the regional court; or the latter court is not satisfied that the accused unequivocally admitted the value, it may, to ensure that the court has sufficient information for determining a suitable sentence, inform the prosecution accordingly and invite evidence under s 112(3) of the Act. G See S v Sikhindi 1978 (1) SA 1072 (N); S v Phakati 1978 (4) SA 477 (T); S v Bromkamp 1978 (2) PH H205 (NC); and S v Serumala 1978 (4) SA 811 (NC).

Should the prosecution for some reason or another fail to establish the value of the stock in question, the regional court is constrained to apply the provisions of s 14(1)(a)(i) and to sentence the accused, if he is a first offender, to imprisonment of not less than two years, because it was not proved that the value of the stock was N\$500 or more.

[10] In this case the State Prosecutor made no effort to prove the value of the cow and in fact misled the court by proposing that a fine may be imposed.

[11] The sentencing proceedings are not in accordance with justice and it stands to be set aside. This court however deems it in the interest of justice to remit this matter to magistrate to consider sentence afresh following the guidelines and the authorities referred to herein.

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

1. The conviction is confirmed; and
2. The sentence imposed is set aside and the fine, if paid ought to be refunded;
3. The matter is remitted to the district court sitting at Eenhana to sentence the appellant in accordance with the guidelines set out herein.
4. The sentencing court must have regard to the period already served by the appellant.

MA TOMMASI
Judge

HC JANUARY

Judge