

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI**

APPEAL JUDGMENT

Case no: CA 15/2016

In the matter between:

HOSEA ALUGONGO ELUMBA

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Elumba v S* (CA 15/2016) [2018] NAHCNLD 43 (24 April 2018)

Coram: TOMMASI J and JANUARY J

Heard: 08 February 2018

Released: 24 April 2018

Flynote: Criminal Procedure – Appeal – Conviction and sentence – Late filing of notice of appeal – Application for condonation – No reasonable explanation for delay – Prospects of success on appeal – Appeal succeeds.

Summary: The appellant in this matter was erroneously convicted for 1. Possession of stock read with the provisions of The Stock Theft Act 12 of 1990. He was acquitted on count 2. On charges 3, 4, 5, 6 and 7 he was not properly convicted on charges of receiving of stolen stock. The convictions are set aside and substituted with a proper conviction of: Absence of reasonable cause for believing stock or produce properly acquired in

contravention of section 3 of the Act. No reasonable explanation for the delay was provided but there are prospects of success on appeal on charge 1 and the convictions on counts 3, 4, 5, 6, and 7 need to be set aside to reflect a proper conviction. Condonation is granted.

ORDER

1. Condonation is granted; and
2. The conviction and sentence on charge 1 - Possession of stolen stock are set aside and;
3. The convictions for receiving of stolen stock are set aside and substituted;
4. The appellant is convicted for contravening section 3 of the Stock Theft Act, Act 12 of 1990 - Absence of reasonable cause for believing stock or produce properly acquired on counts 3, 4, 5, 6 and 7;
5. The sentences are set aside and; the appellant is sentenced:
 - 5.1 Charge 3 – N\$1000 or 1 year imprisonment;
 - 5.2 Charge 4 – N\$2000 or 2 years' imprisonment:
 - 5.3 Charge 5 – N\$1000 or 1 year imprisonment;
 - 5.4 Charge 6 - N\$1000 1 year imprisonment; and
 - 5.5 Charge 7- to N\$2000 or 2 years' imprisonment.
6. The sentences are antedated to 21 August 2015.

JUDGMENT

JANUARY J (TOMMASI J concurring):

[1] The appellant was charged in the Regional Court, Outapi for:

1. Possession of suspected stolen property in contravention of section 2 read with the provisions of sections 1, 11(1)(a), 15 and 17 of the Stock Theft Act, Act 12 of 1990 to wit: 4 head of cattle valued N\$8000;
2. Stock theft to wit: 1 ox valued N\$2500;
3. Stock theft to wit; 1 heifer valued N\$3000;
4. Stock theft to wit; 2 heifers valued N\$1600;
5. Stock theft to wit; 2 heifers valued N\$1600;
6. Stock theft to wit; 1 cow valued N\$5000;
7. Stock theft to wit: 2 cattle valued N\$5000;

All the stock theft charges are read with sections 11(1) (a), 1, 14 and 17 of the Stock Theft Act, Act 12 of 1990. The appellant was convicted on charge 1- Possession of stolen stock, acquitted on charge 2 and convicted on charges, 3, 4, 5, 6 and 7 for receiving of stolen stock (sic) which are competent verdicts on the charges of stock theft. I do not agree with the phrasing of the convictions and will elaborate *infra* thereto.

[2] The appellant pleaded not guilty to all charges and gave no plea explanations in relation to all charges. The trial proceeded with Mr Tjitere representing the appellant in the court a quo and in this court appellant is represented by Ms Mainga. Mr Gaweseb is representing the respondent in this court of appeal. The appeal is against both convictions and sentences. The appellant was convicted on charge 1, for possession of stolen stock as charged, charge 2 not guilty, on charges 3, 4, 5, 6, and 7, guilty of the competent verdict of having received stock (cattle) knowing the stock have been stolen. The appellant was sentenced on charge 1 to 2 (two) years imprisonment. Charges 3, 4, 5, 6 and 7 were taken together for the purpose of sentence and the appellant was sentenced to 12 years' imprisonment of which 6 years' were suspended for 5 years on condition that

appellant is not convicted of receiving of stolen stock, read with the provisions of Act 12 of 1990 as amended, committed during the period of suspension.

[3] Mr Gaweseb took issue with appellant's notice of appeal being filed late and he submitted that the appellant does not have any prospects of success on appeal as no reasons for prospects of success are provided. My considered view is that the fact that no reasons for prospects of success are provided is not the criteria. This court must first decide if the explanation for the delay is reasonable and then deal with prospects of success by dealing with the merits of the case. Even if the court is not satisfied with the explanation for the delay and when there are good prospects of success, this court may condone the late filing.¹ The Court will balance the explanation for the late filing with the prospects of success on appeal.

[4] Ms Mainga filed a notice of motion for the late filing of the notice of appeal, grounds of appeal and amended grounds of appeal. The appellant also filed a supporting affidavit. The appellant was sentenced on 21st August 2015. He filed his notice of appeal on 10 September 2015. Subsequently Ms Mainga filed an amended notice of appeal on 28 March 2017. The appellant states that he was initially represented by Dr Weder, Kauta & Hoveka legal practitioners but they have withdrawn in the meantime. The appellant had to apply for legal aid as a result of their withdrawal and Ms Mainga was appointed in August 2015. This is the explanation for the delay.

[5] This court has in the past issued a caveat that in future condonation is only to be granted in exceptional circumstances.² This court has a discretion and the circumstances of each case are to be taken account of.³ The court should show some flexibility in the exercise of such discretion.⁴

[6] The learned magistrate explained at length the right to appeal to the appellant and he signed in acknowledgement of his rights. All the more the appellant was represented

¹ *S v Andima* 2010 (2) NR 639 (HC).

² *S v Malama-Kean* 2002 NR 11 (HC).

³ *S v Nakapela & another* 1997 NR 184 (HC).

⁴ *Pietersen-Diergaardt v Fischer* 2008 (1) NR 307 (HC).

at the time. The explanation for the delay in filing a notice of appeal timely is, in my view, not reasonable. I will however determine if there are prospects of success on appeal.

[7] The amended grounds of appeal are as follows:

1. AD CONVICTION

1.1 The Learned Magistrate erred in law and/or on facts in arriving at a conclusion that the Appellant was unable to give a satisfactory account of possession of the stock at the time when he was questioned by the police.

1.2 The Learned Magistrate erred in law and/or facts in arriving at a conclusion that the State did establish beyond all reasonable doubt that there was a reasonable suspicion that the stock found in possession of the Appellant were stolen.

1.3 The Learned Magistrate erred in holding that the Appellant had a requisite *mens rea* to possess the said stock unlawfully.

1.4 The Learned Magistrate erred in not finding that the version of the Appellant is reasonably possibly true.

1.5 The Learned Magistrate erred in accepting the version of the State more than the version of the Appellant.

2. AD SENTENCE

2.1 The sentence imposed was harsh under the circumstances especially bearing in mind that the stolen stock was recovered and the complainants did not suffer any loss, furthermore, the value of the stolen cattle was not properly established by the state.

2.2 The Learned Magistrate overemphasized the seriousness of the offence at the expense of the Appellant's personal circumstances.'

[8] Ms Mainga submitted in her heads of argument: that the State bears the onus of proof beyond reasonable doubt although not beyond the shadow of a doubt; that from the onset the appellant's case was that he had purchased the stock in question; the burden on the State was to prove that he did not purchase the stock in question and that his explanation was not reasonably possibly true; that none of the witnesses testified or tendered evidence in contradiction of the Appellant's case; that none of the witnesses

said that the stock was actually stolen as none of the owners testified about theft of their stock; that there is further no evidence that the appellant had the required intention to possess stolen stock or that he was aware that the stock was stolen. In conclusion Ms Mainga submitted that the appellant's version was reasonably possibly true.

[9] She submitted ad sentence that the sentence of all together 8 years imprisonment is shocking especially and in light of the fact that the stock in question were all recovered and the owners suffered no loss. She argued that the Stock Theft Act 12 of 1990 makes provision for a fine or both a fine and imprisonment and that the learned magistrate erred in not imposing a fine or fines. She further argued that the appellant is a first offender and the court a quo should have considered a fine as opposed to direct imprisonment.

[10] Mr Gawaseb, as stated hereinbefore argued that the appellant's explanation for the delay is not reasonable and that he does not have prospects of success on appeal.

[11] The State called 6 (six) witnesses. I will just summarise the evidence not to unnecessarily prolong this judgement. The first witness is a chief at a village named Onamatanga. This witness does not know the appellant. He directs members of the community that if they do wrong that they will be arrested and more in particular wrongdoings with cattle. The witness saw the appellant the first time in court.

[12] The second witness is a police officer who had 11 years' experience. He is the investigating officer in the case. He testified that the accused stole the cattle as he could not produce documentation. The appellant told the investigating officer that he bought 13 cattle but one died in the meantime. The owners of the cattle identified them in the kraal of the accused at a place called Oukwaluudhi. Four (4) cattle could not be identified and were kept in the custody of the police. The witness further stated that the cattle were handed to their owners. The appellant brand marked the cattle as his own and there were earmarks on them. The investigating officer took photos of the cattle and handed a photo plan up in the court a quo. This witness also testified on the value of the cattle of 8 to the value of N\$12000 and 2 to the value of N\$3000 per head. I do not attach much weight to the evidence of the value because the record does not reflect how the witness came to this value. In cross-examination it was put to this witness that the accused will testify that the value is N\$800 and N\$1600. He could not dispute these values.

[13] The third witness from a place Uufitwamalwa testified that the appellant was in possession of 12 (twelve) cattle. The witness and other persons went to the appellant's house. This witness could identify 2 cattle. He described the 2 cattle as female, one is white with red spots and the other one was black but not really black. He mentioned the owners by name and testified which one belonged to whom. One of the owners is deceased. The witness could identify the cattle on brand marks, the colour of the hair, earmarks and tags. The police handed the cattle to this witness and other persons who went to the appellant's house. The witness testified some of the ear marks were not there before. He stated that he knew that the 2 cattle got missing. One in 2007 and the other one he could not tell the date it went missing. The appellant did not claim ownership when the cattle were handed to the witness. The two owners for the beasts were looking for their cattle. The witness stated that the whitish beast's value is N\$5000 and the blackish one N\$1900. He could not tell how the appellant came into possession of it.

[14] The fourth witness testified that two of his cattle got lost in December 2006 at cattle post Olushana. He described that the cattle had earmarks that he cut on the ears. One head of cattle was brownish with no brand marks. The second one is also brownish but black on the leg. One of the cattle used to breast feed and had a stick on the nose probably to prevent it from breastfeeding. The appellant brand marked the cattle with the letters "AME". The witness valued his cattle at N\$2500 each. He recovered the cattle in 2007.

[15] The fifth witness testified that he resides in Epumbu village. He came to testify about two cattle from his house. The one head of cattle is red with white spots and the other one is black with white spots. The witness testified that the cattle were re-cut (probably re-earmarked). The cattle were found at the kraal of the appellant. He (the appellant) apparently bought the cattle that were not his from a place called Onamatanga. The cattle were in the kraal of the appellant. The cattle were in the care of this witness before they were re-cut. The witness valued the cattle at N\$10 000 for each one.

[16] The sixth witness is from Onamatanga and he came to testify about one head of cattle that got lost in 2003. It was recovered in 2007 at Uukwaluudhi at Omahono. The cattle was in this witness's care but another person is the owner. The colour of the beast

is red with white spots. The witness values it at N\$8000. The witness knows the appellant by face. The witness met the appellant at his house at Uukwaluudhi when the cattle were identified and handed to their rightful owners.

[17] The appellant testified in his defence. He stated that during 2007 he got an idea to start a business. He approached Nedloan for a loan. He got the loan of N\$15 000 and he had N\$10 000 of his own money. He started buying cattle. He got the idea to buy cattle when he was at an auction kraal at a place called Onhimbu in 2007. He bought 4 cattle, 3 female and 1 male. At another time he bought 2 female and 1 female. He bought the cattle from two men at the kraal. He was given documentation but it got lost in the meantime. He also bought other cattle at Onamatanga. He also bought cattle from a certain Mr Shilongo and a Mr Ekandjo.

[18] He further testified that the headman was also around when he bought the cattle. With the assistance of the headman he received documents. He stated that he had the documents on the day he was arrested and he gave them to the police. The appellant testified that a certain Stefanus Malakia also brought cattle to him that that person bought. Stefanus Malakia had no place to keep the cattle. The appellant also took care of Malakia's cattle. He further stated that he did not know that the cattle were stolen when he bought them. Mr Tjiteere handed up into court the appellant's warning statement as an exhibit.

[19] The accused stated in the warning statement that he understood his rights; that he wanted a legal representative in future; that he at the time wanted to give a statement at the time; that it was his choice to make a statement at the time; that he was not influenced to make the statement; that that he made the statement of his own free will; that he was at the time not under the influence of alcohol, drugs or medication; that he fully understood the consequences of the proceedings (of giving the warning statement). The officer who took down the statement observed that the accused was in his sound and sober senses. The statement reflects as follows:

'On unknown date and time but it was between June – July 2007 I went to Onamwatanga Vilage 3 times in the week-end. On my arrival there I asked from the public if there is anyone who wants to sell his livestock. I then talked to the traditional headman whom I can cannot his name. Then

cattle's (sic) were brought there at Onamatanga cuca shops at an open area. Then all the people were gathered there to see whether the cattle's (sic) are stolen or not. I then started to buy one by one and boarded them in the bakkie and dropped (sic) them at my house. The headman authorized me to drive the cattle home. The total number which I bought is thirteen (13) cattle among thirteen one had died and now they are 12 twelve in total in number. Seven cattle were recognized by their owner (sic) whom they are saying were stolen. Then the seven which were identified were given back to their rightful owner (sic) in the presence of police office (sic) then 5 cattle remained in the kraal home.'

[20] In cross-examination the appellant admitted that he was a police officer for 16 years but now he is suspended. He held the rank of constable in the Reserve Force. He stated that he had no knowledge as to how to buy cattle. He was not aware of the Stock Theft Unit in the Police Force. Appellant was confronted with the fact that he did not mention to the police that Stefanus Malakia also bought cattle that he left in the appellant's care and custody. Appellant admitted that he bought 13 cattle but one died in the meantime. He was confronted with the headman/chief's evidence that he (the headman) does not know the appellant. Appellant claimed that the headman knows him but the headman stated that it was the first time to see the appellant in court and yet there was no cross-examination on this aspect. He claimed again that he lost the document(s) reflecting that he bought the cattle. He confirmed that the cattle had a brand mark with the letters "AME". The brand mark belongs to him. He agreed to the fact that he bought cattle that were stolen. He did not find out that the person from he bought the cattle were genuine owners. In re-examination he stated that he did not know that the cattle were stolen and did not suspect that they were stolen.

[21] I agree with the learned magistrate that there is a duty on a person buying stock to be in lawful possession of such stock. Likewise in my view, there is a duty a person who receives stock to ensure that he is not unlawfully receiving stock. I further agree that when documentation got lost, new documents can easily be acquired. The appellant did not testify that he at least attempted to obtain new documents. Furthermore the headman whom the accused claimed to have assisted him with document(s) denies such fact and testified that it was the first time in court to see the appellant.

[22] It is common course that the appellant was found in possession of stock not belonging to him; that cattle that were found in his possession did not belong to him; that cattle found in his possession were returned to the lawful owners or their representatives; the accused did not claim ownership of the cattle in question and it is not known if the appellant made attempts to recover his money that he allegedly bought the cattle for.

[23] In addition, it is improbable that a police officer with 16 years' experience in the Police service would not know of a Stock Theft Unit and a very strict Stock Theft Act. He also stated that he is a deputy headman in his village. In my view he should be able to advise the community on stock theft issues like the headman who testified as the first witness in this trial.

[24] The appellant was charged with Possession of suspected stolen stock in contravening section 2 read with section 1, 11 (1)(a), 15 and 17 of the Stock Theft Act, Act 12 of 1990 as amended. The other charges i.e. charges 3, 4, 5, 6 and 7 are theft taking into consideration the provisions of sections 11(1) (a), 1, 14, and 17 of the Act.

[25] I have stated above (paragraph [1]) that I do not agree with the phrasing of charges on which the appellant was convicted. Sections 2, 3 and 11 of the Stock Theft Act read as follows:

'Failure to give satisfactory account of possession of stock or produce

2. Any person who is found in possession of stock or produce in regard to which there is reasonable suspicion that it has been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence.

Absence of reasonable cause for believing stock or produce properly acquired

3. Any person who in any manner, otherwise than at a public sale, acquires or receives into his possession from any other person stolen stock or stolen produce without having reasonable cause for believing, at the time of such acquisition or receipt, that such stock or produce is the property of the person from whom he acquires or receives it or that such person has been duly authorized by the owner thereof to deal with it or dispose of it, shall be guilty of an offence.

Verdicts on a charge of theft of stock or produce

11 (1) Any person who is charged with the theft of stock or produce may be found guilty of-

- (a) the theft of or an attempt to commit the theft of such stock or produce; or
 - (b) receiving such stock or produce knowing the same to have been stolen; or
 - (c) inciting, instigating, commanding or conspiring with or procuring another person-
 - (i) to steal such stock or produce; or
 - (ii) to receive such stock or produce; or
 - (d) knowingly disposing of, or knowingly assisting in the disposal of, stock or produce 'which has been stolen or which has been received with knowledge of it having been stolen; or
 - (e) contravening section 2 or 3.
- (2) Any person charged with the theft of stock or produce belonging to a particular person may be found guilty of any of the offences mentioned in subsection (1), notwithstanding the fact that the prosecution has failed to prove that such stock or produce actually did belong to such particular person.'

[26] In my view, sections 2 and 3 are separate offences with elements to be proven beyond reasonable doubt. Further there is a strong resemblance to sections 36 and 37 of the General Law Amendment Ordinance 12 of 1956 providing for possession of stolen goods and receiving of goods suspected to be stolen respectively. Section 11 provides for competent verdicts when the elements on charges of stock theft are not proven beyond reasonable doubt but the elements of any of the competent verdict are proved.

[27] I am of the considered view that firstly, the convictions of possession of stolen stock and receiving of stolen stock implies that the State needed to prove that the stock were stolen. Although one may in the evaluation of the evidence find that it was stolen it is not an element to be proven in any of sections 2 and 3 of the Act. It must only be proved that there was a reasonable suspicion that the stock have been stolen and that the accused did not give a reasonable explanation for his possession thereof. Secondly, there is uncertainty if the appellant stands convicted of the competent verdict of receiving

such stock or produce knowing the same to have been stolen in terms of section 11(b) or section 3 of the Act. (My emphasis)

[28] I agree with C R Snyman *Criminal law* 5 ed p 525 to 529 where he discusses sections 36 and 37 of the General Law Amendment Act, Act 62 of 1955. In Namibia, the General Law Amendment Ordinance 12 of 1956. Snyman states that the elements of section 36 for possession of suspected stolen goods as follows: **3 Elements of the crime** If one ignores the reference in section 36 to the Stock Theft Act, the elements of the crime created in the section can be described as follows: (a) *the “goods”*; (b) *X must be found in possession*; (c) *there must be a reasonable suspicion that the goods have been stolen*, and (d) *X must be unable to give a satisfactory explanation of the possession.* No mention is made that the goods must have been stolen.

[29] This court dealt with the charge of Possession of stock in contravention of s 2 of Stock Theft Act 12 of 1990 in *S v Silas* 2013 (3) 760 (HC). The accused in that case pleaded guilty to the charge. The learned Van Niekerk J commented as follows, a comment that I respectfully endorse:

‘[4] The second and more important aspect that requires comment is the fact that the charge alleges that ‘there is reasonable suspicion that’ the cattle have been stolen (the emphasis is mine). In this sense it literally follows the wording of s 2, which reads as follows:

“Any person who is found in possession of stock or produce in regard to which there is reasonable suspicion that it has been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence.”

[5] It has been held time and again in matters dealing with similarly worded statutory provisions in other laws dealing with goods or stock (I shall just use the term ‘stock’) that the reasonable suspicion that the stock has been stolen must exist at the time, or virtually at the time, that the accused was found in possession thereof (*R v Mokoena* 1957 (1) SA 398 (T); *R v Hunt* 1957 (2) SA 465 (N) at 468; *R v Ismail and Another* 1958 (1) SA 206 (A) at 209G – H read with 211F – G; *R v Ndou* 1959 (1) SA 504 (T); *S v Reddy* 1962 (2) SA 343 (N); *S v Khumalo* 1964 (1) SA 498 (N) at 499; *S v Zuma* 1992 (2) SACR 488 (N) at 491e). It is therefore incorrect to allege that the reasonable suspicion ‘is’ in existence in the present tense, i.e. at the trial. As charge-sheets usually refer to past conduct, the allegation under discussion, read in context, should have stated that the accused was found in possession of stock in regard to which there was a reasonable

suspicion that it had been stolen. (See *Ismail supra* at 213A.) The use of the correct tense is not just a question of grammar. It conveys what the actual allegation is which constitutes an element of the offence. In fact, before the courts were granted statutory power under s 86 of the CPA to order amendment of a charge, the use of the wrong tense has led in some cases to a quashing of convictions on appeal as the charge was held not to disclose any offence (see e.g. *Ismail supra* at 213A – B). In the instant case the magistrate should have noticed that the charge did not disclose an offence and invited, alternatively ordered, the prosecutor to amend the charge to read that there was a reasonable suspicion.’⁵

[30] The charge (charge 1) in this appeal is like in aforementioned case also phrased in the present tense and is likewise defective. The learned magistrate did not alert the prosecutor thereto. It accordingly did not disclose an offence. This conviction and sentence for that reason stands to be set aside.

[31] In my view the learned magistrate was not correct to convict the appellant for receiving of stolen property. The verdicts in my view should be set aside to properly reflect that the convictions were on section 3 of the Act- Absence of reasonable cause for believing stock or produce properly acquired in contravention of section 3 of the Act. For reasons mentioned in paragraph 19 to 22 above I find the rejection of the appellant’s evidence justified.

[32] The appellant was a first offender. He was 33 years old, married for 15 years and has 2 children respectively 14 and 9 years old. He was the one taking care of his family. He was taking care of 5 other children. The appellant attended school up to standard 4. He is a deputy headman. He was arrested on 18th October 2007 but was in custody for only a week.

[33] I have considered the sentences meted out. This court cannot merely interfere because it would have passed a different sentence. There are crystalized principles when a court of appeal can interfere with the sentencing discretion of a magistrate in a court a quo. In my view there was a misdirection in relation to the sentences and I find the sentences inappropriate.

⁵ At p 762 A-G.

[34] Section 14 of the Act stipulates the penalties as follows:

'14 Penalties for certain offences

(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-

(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;

(b) shall be liable in the case of a second or subsequent conviction, to imprisonment for a period not less than thirty years without the option of a fine.

(2) If a court is satisfied that substantial and compelling circumstances exist which justify the imposition of a less sentence than the sentence prescribed in subsection (1)(a) or (b), it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.

(3) A sentence of imprisonment imposed in respect of an offence referred to in section 11(1)(a), (b), (c) or (d), or an additional sentence of imprisonment imposed under section 17(1)(b) in respect of non-compliance with an order of compensation, shall, notwithstanding anything to the contrary in any law contained, not run concurrently with any other sentence of imprisonment imposed on the convicted person.

(4) The operation of a sentence, imposed in terms of this section in respect of a second or subsequent conviction of an offence referred to in section 11(1)(a), (b), (c) or (d), shall not be suspended as contemplated in section 297(4) of the Criminal Procedure Act, if such person was at the time of the commission of any such offence eighteen years of age or older.

[Sec 14 amended by sec 6 of Act 4 of 1991 and substituted by sec 3 of Act 19 of 1993 and by sec 2 of Act 19 of 2004.]

[35] Section 15 provides:

'15 Penalty where not otherwise provided for

Any person who is convicted of an offence under this Act for which no penalty is otherwise provided shall be liable to a fine not exceeding R4 000 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.' (my emphasis)

It is clear on this court's conviction on a contravention of section 3 of the Act that the sentences are not in accordance with justice and need to be set aside and substituted. The accused is convicted on contraventions of section 3 of the Act which section is a competent verdict on stock theft in terms of section 11(1) (e) not included in the penalty clause in section 14(3) of the Act. Section 15 applies which section provides for a penalty, alternative imprisonment. The sentence of 12 years' imprisonment of which 6 years' are suspended on conditions on all charges taken together are extra-jurisdictional the court a quo's jurisdiction when the prescribed sentences are considered. The appellant has been convicted on 5 charges of receiving of property i.e. Absence of reasonable cause for believing stock or produce properly acquired in contravention of section 3 of the Act.

[36] The maximum sentence on each charge is: 'a fine not exceeding R4 000 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.' Even if the maximum period of imprisonment of 2 years' imprisonment is imposed on each charge it will calculate to 10 years' imprisonment which is less than 12 years' imprisonment, the imprisonment imposed. This is contrary to the provision in section 15 of the Act.

[37] The magistrate considered the cumulative effect of the sentences. I find that there are errors or misdirection's as mentioned in relation to the phrasing of the verdicts in relation to charges 3, 4, 5, 6 and 7. Charge 1 does not disclose an offence as alluded to above and there be an error thereto. The convictions and sentences on that charge stand to be set aside. Condonation therefore should be granted.

[38] In the result:

1. Condonation is granted; and
2. The conviction and sentence on charge 1 - Possession of stolen stock are set aside and;
3. The convictions for receiving of stolen stock are set aside and substituted;

4. The appellant is convicted for contravening section 3 of the Stock Theft Act, Act 12 of 1990 - Absence of reasonable cause for believing stock or produce properly acquired on counts 3, 4, 5, 6 and 7;

5. The sentences are set aside and; the appellant is sentenced:

5.1 Charge 3 – N\$1000 or 1 year imprisonment;

5.2 Charge 4 – N\$2000 or 2 years' imprisonment:

5.3 Charge 5 – N\$1000 or 1 year imprisonment;

5.4 Charge 6 - N\$1000 1 year imprisonment; and

5.5 Charge 7- to N\$2000 or 2 years' imprisonment.

6. The sentences are antedated to 21 August 2015.

H C January

Judge

I agree

M A Tommasi

Judge

APPEARANCES:

APPELLANT:

Ms Mainga
Of Mainga Attorneys, Ongwediva
Instructed by Legal Aid

RESPONDENT:

Mr Gawaseb
Office of the Prosecutor – General, Oshakati