

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

TORO TJAHERANI

(HIGH COURT REVIEW CASE NO.:682/2008)

CORAM: VAN NIEKERK, J et MULLER, J

Delivered on: 09 June 2008

REVIEW JUDGMENT

MULLER, J.:

[1] The accused was charged with the theft of one goat. The accused pleaded guilty to the charge and was convicted. He was the sentenced to 2 years imprisonment.

[2] The magistrate cleared up certain aspects that were queried by me in respect of the conviction. I accept the magistrate's answers in that regard.

[3] The record makes it clear that the magistrate's explanation of the onus to prove substantial and compelling circumstances, what that concept entails and the effect thereof was not only superficial, but it was ambiguous and not understood by the accused. All that

the magistrate said in this regard was: “I you prove that there are substantial circumstances justifying a lesser than the presented sentenced, but that those circumstances should also be compelling.”

How a 19 years old unrepresented accused could make any sense of this, boggles the mind. He received not further assistance.

[4] From what he said, he magistrate was apparently alive to the provision that if substantial and compelling circumstances are proved a lesser sentence than the mandatory sentence may be imposed. The accused clearly did not understand this and only mentioned that he is unable to sleep, because he was apparently cursed by his uncle. No questions were put to the accused who was young and unrepresented at the trial. The accused was not assisted by the magistrate at all. In several judgments by this Court it was emphasised that a magistrate has a duty to assist an unrepresented accused in this regard. (*S v Victor Mbishi Mishe*, Case No CR 101/2006, an unreported judgment, delivered on 14 November 2006 by Liebenberg AJ and Damaseb, JP; *S v George Johannes Kambonde*, Case No CR 109/2006, an unreported judgment delivered on 22 November 2006 by van Niekerk, J and Liebenberg, AJ)

[5] Although it is evident that the magistrate committed an irregularity in respect of the provisions contained in the Act which allows the trial court to impose a lesser sentence than the

mandatory one applicable in the circumstances and the sentence imposed should consequently be set aside and remitted to the magistrate to conduct the proceedings properly, I have decided not to waste any more time and to impose an applicable sentence myself.

[6] I do not agree that the sentence imposed in the circumstances is in accordance with justice. The accused was very young when the offence was committed. He was a first offender and stole only one goat valued at N\$450. He is unemployed and apparently stole the goat for its meat. The magistrate listed these mitigating factors in his judgment on sentence. The accused also pleaded for a suspended sentence.

[7] In the light of all the mitigating factors, I am of the opinion that it would be in accordance with justice to suspend $\frac{3}{4}$ of the mandatory sentence.

[8] In the result the following orders are made:

- a) **The conviction of the accused is confirmed;**
- b) **The sentence imposed by the magistrate is set aside and is substituted by the following sentence:**

“The accused is sentenced to a period of imprisonment of 2 years, of which 18 months are suspended for 5 years on condition that the accused is not convicted of theft of stock in contravention of the Stock Theft Act, No 12 of 1990, as amended, committed within

the period suspension.”

- c) The sentence is backdated to 15 March 2008.

MULLER, J

I concur

VAN NIEKERK, J