



**CASE NO.: CA 10/2010**

**IN THE HIGH COURT OF NAMIBIA  
HELD AT OSHAKATI**

In the matter between:

**VATATISA TJIUMBIRUA**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

**CORAM:** LIEBENBERG, J *et* TOMMASI, J.

Heard on: 27 February 2012

Delivered on: 02 March 2012

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**APPEAL JUDGMENT**

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**LIEBENBERG, J.:** [1] The appellant and a fellow accused appeared in the Magistrate's Court, Opuwo on two charges of stock theft, read with the

provisions of the Stock Theft Act, 1990<sup>1</sup>, and after evidence was heard the co-accused was acquitted, but appellant convicted. Subsequently the matter was remitted for sentence to the Regional Court where sentences of twenty (20) years' imprisonment were imposed in respect of each count, ordered to be served concurrently. Appellant now appeals against these sentences.

[2] Appellant's notice of appeal was filed out of time by more than three years; hence, in a substantive application he now seeks condonation for non-compliance with the Rules. In view of the respondent not opposing the application and the concession made regarding prospects of success on appeal, the Court condoned the appellant's late filing of both the notice of appeal and his counsel's heads of argument.

[3] When the matter came before us on appeal for the first time on 28 October 2011, the legal representative of the appellant did not attend proceedings and as a result the matter was struck from the roll. The Court directed that the matter should be re-enrolled during the next term, with a further direction that counsel must address us on the possible duplication of convictions. Both counsel addressed the issue in their heads of argument and the industry evinced in this regard is appreciated.

[4] Whereas both counsel submitted that the trial court should not have convicted the appellant on both counts of stock theft, amounting to a duplication of convictions, the point was moot with no need to be argued. The concession is properly made as the evidence clearly does not sustain

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<sup>1</sup> Act No 12 of 1990 (as amended)

convictions of two separate crimes committed by the appellant. It is common cause that five head of cattle were stolen from the two complainants during the same period of time and from the same place, and no evidence was tendered at the trial suggesting that two distinctive acts were committed when the cattle were wrongfully and unlawfully appropriated. These cattle were taken from communal land and in the absence of evidence showing otherwise, the cattle (in all probability) were grazing together when herded along and taken to the place where it was eventually discovered by the police. Counsel, in my view correctly, argued that appellant acted with a single intent i.e. to steal five head of cattle and the fact that these cattle were the property of two individual persons, made no difference. See: *S v Seibeb and Another*; *S v Eixab*<sup>2</sup> which was endorsed by the Supreme Court in *S v Gaseb and Others*.<sup>3</sup>

[5] Consequently, the appellant should only have been convicted of one count of theft of five head of cattle. The convictions are not in order or in accordance with justice and therefore, must be set aside.

[6] I now turn to consider sentence. In what purports to be grounds enumerated in the appellant's notice of appeal, it would appear that he is dissatisfied with his sentence and asks that the sentence of twenty years be reduced. He further submits that he is a first offender; has six children; two wives and his elderly parents turning blind, all dependent on him. He claims to have been in custody for a period of two years pending finalization of the

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<sup>2</sup> 1997 NR 254 (HC) at 256D-H

<sup>3</sup> 2000 NR 139 (SC) at 150 E-F

case, but this is not borne out by the record, which reflects that the appellant paid bail on 27 July 2006, exactly one month after his arrest. Had the appellant been in custody for two years as he claims, then his continued incarceration is unrelated to the matter under consideration.

[7] Ms *Koch*, who appears for the appellant, contends that a sentence of twenty years' imprisonment for theft of stock valued at N\$7 500 was shockingly inappropriate; more so, where the stolen cattle have been recovered. In the circumstances of the case, a sentence of five years' imprisonment was proposed; alternatively, an appropriate sentence determined by this Court.

[8] Mr *Lisulo*, representing the respondent, seemingly in agreement that a sentence of twenty years on one count is inappropriate in the circumstances, argued that regard must be had not only to the personal circumstances of the appellant, but also to the seriousness of the offence committed and the interests of society. In his view a sentence of ten years' imprisonment, partly suspended, would be appropriate; regard being had to those factors traditionally taken into account in sentencing.

[9] I can do no better than what this Court has already said in *Petrus Lwishi*<sup>4</sup> namely: The fact that the Court has struck down the mandatory sentences of not less than twenty and thirty years' imprisonment, respectively, does not imply that stock theft cases are no longer considered by the courts to be serious (para [15]); that there is a need to impose deterrent sentences in

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<sup>4</sup> Unreported Case No CA 92/2009 delivered on 18.11.2011

stock theft cases where the objective of punishment should be deterrence (para [16]); and cattle farming forming the backbone of the economy, at least in this part of the country, emphasises the need for the courts to try and protect farmers against stock thieves (as far as this is reasonably possible), by imposing deterrent sentences (para [17]).

[10] In sentencing the appellant the trial court was guided by the provisions of s 14 (1)(a) (ii) of the Stock Theft Act, 1990<sup>5</sup> which, in the mean time, has been struck down in the case of *Protasius Daniel and Another v Attorney-General and Two Others*<sup>6</sup>; therefore the section no longer finds application. Even in those circumstances prevailing at the time of sentencing, I consider a sentence of twenty years' imprisonment to be shockingly inappropriate; regard being had to the circumstances of the case and the appellant's personal circumstances, which were either ignored or given insufficient weight.

[11] Appellant, at the age of 31 years, is a first offender and has an extended family dependent on him. Although the appellant today cannot escape a custodial sentence, a sentence substantially less than what has been imposed by the sentencing court, would, to a large extent, reduce the hardship brought upon his family by his incarceration. Another factor that deserves consideration is that the stolen stock was recovered and the complainants suffered no pecuniary loss. On the other hand, the offence is considered to be serious and calls for a deterrent sentence. In my view, a

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<sup>5</sup> Act No 12 of 1990 (as amended)

<sup>6</sup> Unreported Case No's A 238/2009 and A 430/2009, delivered on 10.03.2011

balance would be struck between the interests of the appellant and that of society, if a partly suspended sentence is imposed.

[12] In the result, the Court makes the following order:

1. The convictions and sentences imposed on counts 1 and 2 are set aside and substituted with a conviction of the offence of theft (involving five (5) head of cattle), read with the provisions of Act 12 of 1990.
2. Appellant is sentenced to twelve (12) years' imprisonment of which three (3) years' imprisonment is suspended for five (5) years on condition that the accused is not convicted of theft, read with the provisions of the Stock Theft Act (Act No 12 of 1990), committed during the period of suspension.
3. The sentence is antedated to 26 June 2008.

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**LIEBENBERG, J**

I concur.

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**TOMMASI, J**

**ON BEHALF OF THE APPELLANT**

**Ms R Nathaniel-Koch**

**Instructed by:**

**Directorate: Legal Aid**

**ON BEHALF OF THE RESPONDENT**

**Mr D Lisulo**

**Instructed by:**

**Office of the Prosecutor-General**