

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: CR 27/2013

In the matter between:

**THE STATE**

and

**TJINDURI TJIVEZE**

**(HIGH COURT MAIN DIVISION REVIEW REF NO 2135/2012)**

**Neutral citation:** *S v Tjiveze* (CR 27-2013) [2013] NAHCMD 110 (24 April 2013)

**Coram:** VAN NIEKERK, J and GEIER, J

**Delivered:** 24 April 2013

**Flynote:** **Criminal law** – Section 14 of the Stock Theft Act, 12 of 1990 – current legal position in relation to sentence for first offenders set out.

### **Summary:**

Since delivery of the judgment in *Daniel v Attorney-General and others; Peter v Attorney-General and others* 2011 (1) NR 330 (HC), it is clear that section 14(2) should only be applied in cases where the value of the stock is less than N\$500. The current legal position in relation to sentence for first offenders in terms of section 14 of the Stock Theft Act, 12 of 1990, as amended is:

1. Cases where the value of the stock is less than N\$500, i.e. 'section 14(1) (a)(i) cases' and the accused is a first offender

1.1 The prescribed sentence is any period of imprisonment for a period 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 section 14(2) to the accused and if satisfied that substantial and compelling circumstances exist, enter those circumstances on 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 imposed.

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 it may suspend part of the sentence.

2. Cases where the value of the stock is N\$500 or more, i.e. 'section 14(1)(a) (ii) cases' 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, i.e. the court is not concerned with substantial and compelling circumstances.

2.3 The court may wholly or partly suspend the period of imprisonment.

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**ORDER**

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1. The conviction is confirmed.
2. The sentence of two years imprisonment is confirmed, but one year thereof is suspended for four years on condition that the accused is not convicted of the

theft of stock, read with the provisions of the Stock Theft Act, 1990 (Act 12 of 1990), as amended, committed within the period of suspension.

3. The suspension of the sentence is backdated to 17 September 2012.

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## REVIEW JUDGMENT

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VAN NIEKERK, J (GEIER, J concurring):

[1] In this matter the accused was properly convicted upon a plea of guilty to a charge of theft of stock, to wit one goat valued at N\$600, in contravention of section 11(1)(a) of the Stock Theft Act, 1990 (Act 12 of 1990), as amended. The accused has no previous convictions. At the sentencing stage the magistrate informed the accused that he must place substantial and compelling circumstances before the court and if existent, the court will deviate from the prescribed minimum sentence, which the magistrate earlier explained, is two years imprisonment for stock valued under N\$500. The accused placed some personal information before the court. However, in his judgment on sentence the magistrate found that there were no substantial and compelling circumstances to deviate from the prescribed minimum sentence of two years imprisonment. He thereupon sentenced the accused to 24 months imprisonment.

[2] On automatic review I posed the following query to the magistrate:

'In this case the value of the stolen goat exceeded N\$500. The magistrate is requested to explain why he thought it necessary to apply the provisions of section 14(2) of the Stock Theft Act as amended, bearing in mind the decision of ..... [*Daniel v Attorney-General and others; Peter v Attorney-General and others* 2011 (1) NR 330 (HC)]'.

[3] The magistrate gave detailed reasons in which he refers to several other criminal review case where certain queries were raised or certain remarks made, which it seems, leave him with some uncertainty on how to approach the issue of sentencing in stock theft cases since the judgment in *Daniel v Attorney-General* was delivered. From the magistrate's reply it seems to me that there are certain misconceptions about the ambit and effect of the judgment in *Daniel v Attorney-General*. In this regard I refer to the recent unreported judgment in *S v Tjiromongua* (CR 06-2013) [2013] NAHCMD 31 (5 February 2013) in which this Court provided some clarification. The magistrate says he is aware of this judgment and will apply in future it where necessary. However, judging from the magistrate's reasons, I think it is necessary to explain some matters in more detail in order to provide some assistance.

[4] Before I do so, I think I should point out that the reported version of the judgment in the Namibian Law Reports regrettably contains some printing errors in paragraph [86] in which the order is set out and reads as follows:

'[86] In the result the following order is made:

(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 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) the second respondent is ordered to pay both applicants' costs of two  
instructed and one instructing counsel.'

[5] The correct version of paragraph [86] as it appears in the original typed  
judgment reads as follows:

'[86] In the result the following order is made:

- a) the words "*for a period not less than twenty years*" are struck from  
section 14(1)(a)(ii) of the Stock Theft Act 12 of 1990, as amended;
- b) the words "*for a period not less than thirty years*" are struck from  
section 14(1)(b) of the Stock Theft Act 12 of 1990, as amended;
- c) the reference to "*subsections (1)(a) and (b)* " in section 14(2) of the  
Stock Theft Act 12 of 1990, is consequentially read down to mean  
"*subsection (1)(a)(i)*";

- d) the second respondent is ordered to pay both applicants costs of two instructed and one instructing counsel.'

[6] The magistrate states that, in his view, the courts are still required to apply section 14(2) of the Stock Theft Act whether the value of the stock is more or less than N\$500. He gives two reasons for this view. The first is that section 14(2) has not been declared unconstitutional. The second reason entails a faulty interpretation of the *Tjiromongua* case which calls for clarification of that judgment as well.

[7] Returning to the first reason given by the magistrate, it is indeed so that section 14(2) was not declared unconstitutional. However, it was ordered in subparagraph c) of paragraph [86] in *Daniel v Attorney-General* that -

' the reference to "subsections (1)(a) and (b) " in section 14(2) of the Stock Theft Act 12 of 1990, is consequentially read down to mean "subsection (1)(a)(i)".'

[8] The motivation for this order was set out in paragraph [85] of the judgment:

'[85] As the logical consequence of only striking out the periods of the minimum sentences referred to in ss 14(1)(a)(ii) and 14(1)(b), while leaving the cross-reference to s 14(1)(a) and 14(1)(b) as contained in s 14(2) unqualified, would cause an obvious and irreconcilable discrepancy to the entire structure of s 14, it has become necessary to also effect, at the same time, a consequential qualification of the affected provisions of s 14(2). This power is exercised in terms of art 25(3) of the Constitution.'

[9] When section 14(2) is read in its current state, it is clear that section 14(2) should only be applied in cases where the value of the stock is less than N\$500, i.e. in 'section 14(1)(a)(i) cases'. It therefore means that, after the judgment in *Daniel v Attorney-General*, the statement in paragraph [12] of the unreported Full Bench judgment of *State v Mbahuma Tjambiru and two other cases* (Case Nos CR47/2008; CR48/2008 & CR 49/2008) delivered on 21 July 2008, that it is an irregularity if an accused is not 'informed of the fact that "substantial and compelling circumstances" might lead to the imposition of a lesser sentence and asked to address this aspect', only applies to cases where the value of the stock is less than N\$500, i.e. in 'section 14(1)(a)(i) cases'.

[10] Turning to the magistrate's second reason, he seems to be saying that, because imprisonment is the only sentence that may be imposed in cases where the value of the stock is N\$500 or more, the court must still establish whether there are substantial and compelling circumstances before it can determine whether any part of the imprisonment should be suspended and if so, what portion. In this regard the magistrate relies on the passage in the *Tjiromongua* case where this court said in paragraph [9]:

'Furthermore, the only sentence that may be imposed for stock theft, irrespective of whether the value is more or less than N\$500, is still only imprisonment without the option of a fine. It is therefore not correct to state that the courts may impose 'any' appropriate sentence for stock theft.

[11] As can be seen when this passage is read in context, the Court was concerned with the misconception held by the particular magistrate in that case that 'any' sentence may now be imposed since the judgment in *Daniel v*



*Attorney-General*. The Court did not intend to convey that the imprisonment may not be partly suspended in cases where the value of the stock is N\$500 or more. It has always been the position that the prescribed minimum sentence provided for in section 14(1)(a)(i) and (ii) may be suspended in part. This is so because section 297(4) of the Criminal Procedure Act, 1977 (Act 51 of 1977), ('the CPA') provides, *inter alia*, that where a law prescribes a minimum punishment, the court may pass sentence, but order the operation of a part thereof to be suspended. The decision to do so was in the court's discretion and not dependent on a finding that there were substantial and compelling circumstances justifying such suspension (see *Tjambiru's* case at paragraphs [3], [6] & [7]).

[12] However, since the prescribed minimum sentence in section 14(1)(a)(ii) cases has been struck down, section 297(4) no longer acts as a limitation on a court's discretion. Section 297(1)(b) of the CPA now applies. It provides that where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion pass sentence, but order the operation of the whole or any part of the sentence to be suspended. A court may now suspend the whole of the sentence passed in a section 14(1)(a)(ii) case without enquiring whether there are any substantial and compelling circumstances. It should be noted, however, that in section 14(1)(a)(i) cases, the court may only do so if there are substantial and compelling circumstances which lead the court to impose a lesser sentence than the prescribed minimum sentence of two years imprisonment.

[13] To sum up, the position in relation to sentence for first offenders in terms of section 14 of the Stock Theft Act is as follows:

1. Cases where the value of the stock is less than N\$500, i.e. 'section 14(1)(a)(i) cases' and the accused is a first offender

1.1 The prescribed sentence is any period of imprisonment for a period 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 section 14(2) to the accused and if satisfied that substantial and compelling circumstances exist, enter those circumstances on 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 imposed (see section 297(1)(b) of the CPA, read with paragraph [7] of the *Tjambiru* judgment).

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 it may suspend part of the sentence (see section 297(4) of the CPA, read with paragraph [3] & [6] of the *Tjambiru* judgment).

2. Cases where the value of the stock is N\$500 or more, i.e. 'section 14(1)(a)(ii) cases' 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, i.e. the court is not concerned with substantial and compelling circumstances.

2.3 The court may wholly or partly suspend the period of imprisonment (see section 297(1)(b) of the CPA).

[14] Having set out the current legal position, I now turn to a consideration of the particular facts of this case. As the goat stolen in this case was valued at N\$600, the magistrate erred when he applied the provisions of section 14(2). He also misdirected himself when he required of the accused to satisfy him that there was reason to deviate from what he called 'the prescribed minimum sentence of two years imprisonment' because this is not the applicable sentence. The magistrate erred because he clearly thought that he was obliged to impose at least two years imprisonment. He also did not give any consideration to a suspended sentence.

[15] The accused is a 25 year old first offender who killed his uncle's goat by strangling it. The uncle caught him in the act and recovered the carcass. The accused has two children, aged 4 and 3 years, with his girlfriend, who is pregnant with their third child. Before he was arrested he derived an income of N\$3 000 per month from chopping and selling wooden droppers and poles. His girlfriend also made an income from making and selling traditional necklaces. This income

was sufficient to maintain herself and the children while he is in custody. The accused spent four months in custody awaiting trial. The accused also had to assist his invalid mother and grandmother. The accused said he killed the goat to eat the meat because he was hungry. However, I agree with the magistrate that this excuse should be rejected in light of the family's income.

[16] Even though the magistrate misdirected himself on the applicable sentence, I think that a sentence of two years imprisonment is nevertheless appropriate in the circumstances of this case. However, bearing in mind that the accused is a first offender who pleaded guilty, who is still relatively young and has a young family and who sought to improve his life by being gainfully self-employed, it seems to me that the accused should be given the opportunity afforded by a partly suspended sentence hanging over his head to stay clear from committing further crimes. In my view such a sentence will balance the competing interests of the State, the accused and the community and will also take account of the fact that the crime is serious and prevalent in the district of Outjo.

[17] The result is as follows:

1. The conviction is confirmed.
2. The sentence of two years imprisonment is confirmed, but one year thereof is suspended for four years on condition that the accused is not convicted of the theft of stock, read with the provisions of the Stock Theft Act, 1990 (Act 12 of 1990), as amended, committed within the period of suspension.

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3. The suspension of the sentence is backdated to 17 September 2012.

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K van Niekerk

Judge

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H Geier

Judge