



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case No: CR 3/2014

In the matter between:

THE STATE

versus

DAVID NAKALE

Neutral citation: *S v Nakale* (CR 3 /2014) [2014] NAHCMD 9 (22 January 2014)

Coram: SHIVUTE, J and PARKER, AJ

Delivered: 22 January 2014

Flynote: Criminal Procedure – Sentence – Accused convicted of theft of stock valued at N\$450 read with the provisions of Act 12 of 1990 as amended by Act 19 of 2004 – Accused fined one thousand Namibia dollars (N\$1000) or five (5) months’ imprisonment – Court imposed incompetent sentence – Mandatory sentence for a first conviction – Not less than two years’ imprisonment without the option of a fine – Sentence set aside.

Summary: Criminal Procedure – Sentence – The accused was convicted of Theft of stock valued at N\$450 read with the provisions of Stock theft Act 12 of 1990, as amended by Act 19 of 2004. The accused was sentenced to a one thousand Namibia dollars (N\$1000) fine or five (5) months’ imprisonment. The sentence imposed by the

magistrate is incompetent. The Act provides for a mandatory sentence for a first conviction of not less than two years' imprisonment without the option of a fine. Accordingly the sentence is set aside.

ORDER

1. The sentence of one thousand Namibia dollars (N\$1000) fine or five (5) months' imprisonment is set aside.
 2. In terms of s 312 of the Criminal Procedure Act 51 of 1977 the matter is remitted to the magistrate to sentence the accused afresh.
 3. Before sentencing, the learned magistrate must explain to the accused the mandatory sentence and the concept regarding substantial and compelling circumstances.
 4. If the accused has paid a fine, the money should be refunded to him.
 5. If the accused is not in custody the presence of the accused before court should be obtained by means of a notice calling him to appear at a stated place, time and date. The provisions of ss 54 (2) and 55 (1) and (2) of the Criminal Procedure Act shall apply mutatis mutandis with reference to a written notice issued under subsection (1).
-

REVIEW JUDGMENT

SHIVUTE J (PARKER, AJ concurring)

[1] The accused was convicted of theft of stock valued at N\$450.00 taking into consideration the provisions of ss 11 (1), 1, 14 and 17 of the Stock Theft Act 12 of 1990 as amended by Act 19 of 2004. He was sentenced as follows:

One thousand Namibia dollars (N\$1000) fine or five (5) months' imprisonment. I queried the magistrate whether the court has the jurisdiction to impose a fine in respect of the subject matter.

[2] The magistrate responded as follows:

“(a) After having carefully gone through a recent reported review matter of S v Benjamin Tjiromongua case no. CR 6/2013 delivered on the 5th of February 2013... I regret to come to the conclusion that the sentence that was imposed in the current matter cannot stand. In Benjamin Tjoromongua (supra) the High Court clearly highlighted or clarified the ambit and effect of the case of David v Attorney General and others 2011 (1) NR 330 (HC). In that case it was held that where in a stock theft case the value is less than N\$500.00, the applicable sentence in such a case is still imprisonment for a period of not less than two (2) years without an option of a fine. The court is still required to consider whether there are any substantial and compelling circumstances which may justify the imposition of a lesser sentence than two years without the option of a fine.”

“(b) In the light of the above position applied in the present case, certainly I concede that the sentence of an option of a fine herein cannot stand and I respectfully recommend that the sentence be substituted by a sentence of twenty four (24) months' imprisonment of which twenty (20) months' are suspended for three years on condition that the accused is not convicted of the crime of stock theft committed during the period of suspension. The sentence to be backdated to 17 July 2013.

[3] The magistrate correctly conceded that the sentence imposed is impermissible. Where the accused person is convicted of theft of stock of which the value is less than N\$500, the mandatory sentence of imprisonment of not less than two years without the option of a fine for a first conviction is still applicable. However, the court may only deviate from imposing the minimum mandatory sentence if it is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence in which case the court should spell out those circumstances on the record of the proceedings and may impose such lesser sentence.

[4] Furthermore, before the accused is sentenced the court must explain to him that there is a mandatory sentence involved as well as to the concept of substantial and compelling circumstances as explained in various decided cases e.g. *S v Gurirab* 2005 NR 510 (HC).

[5] The learned magistrate made a request for the sentence to be set aside and substituted as above. I agree with the learned magistrate that since the sentence imposed is incompetent it cannot be allowed to stand. However, I decline to substitute the sentence as requested by the magistrate because the mandatory sentence was not brought to the attention of the accused and the learned magistrate did not explain to the accused the concept regarding substantial and compelling circumstances.

[6] In view of this the following order is made.

1. The sentence of one thousand Namibia Dollars (N\$1000) fine or five (5) months' imprisonment is set aside.
 2. In terms of s 312 of the Criminal Procedure Act 51 of 1977 the matter is remitted to the magistrate to sentence the accused afresh.
 3. Before sentencing the learned magistrate must explain to the accused the mandatory sentence and the concept regarding substantial and compelling circumstances.
 4. If the accused has paid a fine the money should be refunded to him.
 5. If the accused is not in custody the presence of the accused before court should be obtained by means of a notice calling him to appear at a stated place, time and date. The provisions of ss 54 (2) and 55 (1) and (2) of the Criminal Procedure Act mutatis mutandis with reference to a written notice issued under subsection (1).
-

5
5
5
5
5

N N Shivute
Judge

C Parker
Acting Judge