



HIGH COURT OF NAMIBIA, MAIN DIVISION

JUDGMENT

CR No: 14/2017

In the matter between:

THE STATE

and

JACKSON EIXAB

HIGH COURT MD REVIEW CASE NO 1653/2016

Neutral citation: *S v Eixab* (CR 14/2017) [2017] NAHCMD 39 (17 February 2017)

CORAM: LIEBENBERG J et SHIVUTE J

DELIVERED: 17 February 2017

ORDER

1. The conviction is confirmed.
2. The sentence is amended to read: 24 months' imprisonment of which 18 months' is suspended for a period of 5 years on condition that the accused is not

convicted of theft of stock, committed during the period of suspension, furthermore, the accused to compensate the complainant, Abraham Sihetite Aibeb, on or before 21.05.2016 in the amount of N\$2 500.

JUDGMENT

LIEBENBERG J: (Concurring SHIVUTE J)

[1] The accused was convicted on his plea of guilty of the offence of stock theft in contravention of s 11(1)(a) of the Stock Theft Act 12 of 1990 and sentenced to imprisonment, partly suspended. The conviction is in order and will be confirmed on review.

[2] When the matter came on review, I directed a query to the presiding magistrate in the following terms:

“Is the payment of compensation in addition to the sentence of 24 months’ imprisonment, or an alternative to the sentence?”

As the sentence reads, it would appear that if compensation is made, the sentence falls away. What is the meaning of the word ‘or’ between the sentence and the order for compensation?”

[3] In the magistrate’s replying statement is stated that the order for compensation is not an alternative to the sentence imposed and that the word ‘or’ should read ‘and’, and the sentence to be amended to reflect the court’s actual intention.

[4] As the sentence currently reads, it creates the impression that the accused can avoid serving the sentence by paying compensation to the complainant, the ambiguity brought about by the insertion of the word 'or' between the sentence and what appears to be a compensation order. From the magistrate's reasons I am now satisfied that this is not what the court intended and that payment of compensation payable to the complainant was intended a further condition of the suspended sentence imposed. The proposal made is proper and the sentence ought to be amended to reflect the court's intentions.

[5] What prompted the trial court to incorporate compensation as part of the sentence was likely brought about by the accused's proposition to be afforded the opportunity to compensate the complainant in the amount of N\$1 500, or paying monthly instalments of N\$1 000. The prosecutor in aggravation of sentence submitted that the court should order the accused to compensate the complainant by either giving him a calf or N\$2 500. In sentencing, the court latched on to the State's proposal and accordingly ordered compensation to be made to the complainant. Firstly, there is nothing on record showing that the accused was having cattle of his own from which he could draw one calf to compensate the complainant. Secondly, the amount of N\$3 000 ordered as compensation towards the complainant exceeds the actual value of the stolen calf, to wit N\$2 500. On the facts there is accordingly no justification to compensate the complainant in excess of the actual loss suffered, and the amount ordered by the trial court therefore has to be corrected. Furthermore, to afford the accused the opportunity of replacing the stolen calf with another and making this part of the sentence, would unnecessarily complicate matters as the size and value of the replacement calf could become contentious. At no stage did the accused say that he was able to find a calf. In view thereof the prosecutor's proposal was without substance and should not have been relied upon by the court in sentencing.

[6] In the result, it is ordered:

1. The conviction is confirmed.
2. The sentence is amended to read: 24 months' imprisonment of which 18 months' is suspended for a period of 5 years on condition that the accused is not convicted of theft of stock, committed during the period of suspension, furthermore, the accused to compensate the complainant, Abraham Sihetite Aibeb, on or before 21.05.2016 in the amount of N\$2 500.

J C LIEBENBERG

JUDGE

N N SHIVUTE

JUDGE

