

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CRI-APP-CAL-2022/00087

In the matter between:

JOHANNES KATUKUNDU

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Katukundu v State* (HC-MD-CRI-APP-CAL-2022/00087) [2023]
NAHCMD 164 (3 April 2023)

Coram: LIEBENBERG J *et* USIKU J

Heard: 17 March 2023

Delivered: 3 April 2023

Flynote: Stock theft – What constitutes a startling and shocking sentence – Principles of uniformity of sentences in comparable cases and the principle of individualization of sentences considered.

Summary: This is an appeal by the appellant against the sentence imposed by the Magistrate's Court for the district of Otjiwarongo where he was convicted on one count of stock theft and sentenced to five (5) years' imprisonment of which one (1) year is suspended for a period of four (4) years on condition that the accused is not convicted of the same offence, committed during the period of suspension. It is against that sentence that he appeals. The appellant alleges that the sentence imposed induces a sense of shock when compared to similar or comparable cases.

Held: The sentence imposed falls within the norm of punishment meted out in cases of this nature, and although weighty, falls within the parameters of what would be reasonable in the circumstances of the case.

Held further that: The test is not whether the court sitting as the trial court would have imposed a different sentence, but rather whether the court *a quo* committed a misdirection by imposing the sentence as it did.

Held that: The seriousness of the offence and the interest of society having outweighed the personal circumstances significantly, required the imposition of a deterrent sentence.

ORDER

1. The application for condonation is refused.
 2. The matter is struck from the roll and deemed finalised.
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JUDGMENT

LIEBENBERG J (concurring USIKU J):

[1] The appellant was arraigned in the Magistrate's Court for the district of Otjiwarongo on one count of theft, read with the provisions of sections 11(1)(a), 1, 14 and 17 of the Stock Theft Act 12 of 1990. He was convicted on his plea of guilty and sentenced to five (5) years' imprisonment of which one (1) year is suspended for a period of four (4) years on condition that the accused is not convicted of the same offence, committed during the period of suspension.

[2] Displeased with the outcome of the trial, the appellant lodged an appeal within the prescribed time limit against his conviction and sentence. Subsequent thereto, the appellant abandoned his appeal against conviction and, through his legal representative, filed an amended notice of appeal on 3 February 2023, accompanied by an application for condonation. The respondent opposes the application for reason that the applicant in his founding affidavit failed to provide reasonable and acceptable reasons for the delay in filing the amended notice of appeal.

[3] During oral argument the court intimated to counsel that the court reserves judgment on the condonation application and invited counsel to argue the appeal on the merits.

[4] Appellant explained that from the outset he intended appealing the matter and also applied to the Directorate of Legal Aid for legal representation. Mr Andreas was appointed to represent the appellant and only received the instruction letter on 7 December 2022. The first consultation took place the next day and it was agreed that the notice of appeal had to be amended for reason that it was agreed that the appellant

wanted to appeal only against the sentence. Due to court recess until 15 January 2023, the amended notice of appeal was only drafted on 31 January and filed on 3 February 2023 with the Clerk of the Court, as required. It is further the appellant's contention that, based on the grounds of appeal set out in the amended notice, there are prospects of success on appeal.

[5] It is now settled law that an applicant seeking condonation for the non-compliance with the rules of court bears the onus to satisfy the court that there is sufficient cause to warrant the granting of condonation and that such application should be launched without delay.¹ When applying the principles stated in the *Petrus* matter (infra), I am satisfied that this is not an instance where no explanation was offered for the delay and that the reasons stated by the appellant, in the circumstances, are reasonable and acceptable. In deciding the prospects of success, I turn to consider the grounds of appeal.

[6] The three grounds of appeal against sentence raised are: The sentence induces a sense of shock or is startlingly inappropriate; mere lip-service was paid to the appellant's personal circumstances; and that the seriousness of the offence was overemphasised at the expense of the appellant's personal circumstances. The gist of these grounds boil down to one issue namely, whether the sentence imposed is proper and just.

[7] The guidelines when the court of appeal would be entitled to interfere with a sentence are set out in *S v Tjiho*² and need not be rehashed as the ground of appeal are clearly based on these guidelines. With regards to the trial court's discretion on sentence, the following appears at 364G-I:

'This discretion is a judicial discretion and must be exercised in accordance with judicial principles. Should the trial court fail to do so, the appeal Court is entitled to, not obliged to, interfere with the sentence. Where justice requires it, appeal Courts will interfere, but short of this, Courts of appeal are careful not to erode the discretion accorded to the trial court as such

¹ *Petrus v Roman Catholic Archdiocese* 2011 (2) NR 637 (SC).

² *S v Tjiho* 1991 NR 361 (HC) at 366.

erosion could undermine the administration of justice. Conscious of the duty to respect the trial court's discretion, appeal Courts have over the years laid down guide-lines which will justify such interference.'

[8] In order to make out a case, counsel on both sides, in their respective heads of argument, focused primarily on sentences imposed in other cases involving stock theft, while relying on the established principle of uniformity of sentences where the same or similar offences were committed. Ms Jacobs, counsel for the respondent, in response to the assertion that the sentence induces a sense of shock and is startlingly inappropriate, cited cases where individualisation and uniformity of sentences are discussed and which should be adopted in this instance (*S v Moloji*³; *S v Strauss*⁴). In *Strauss* as per O'Linn (as he was then) the following appears at 76D-G:

'[The principle of individualisation] ... is the principle that in imposing sentence all the relevant facts and the personal circumstances of the accused which may distinguish the crime and the criminal from other cases must be taken into account. This is the principle of individualisation, but at the same time there is the principle of uniformity and equality in imposing sentence. In other words, the principle that if the crime is similar and the circumstances of the criminal are more or less similar to another case, the High Court should as far as possible try to impose sentence in such a way that the public can have confidence therein, in the sense that it cannot be said that yesterday there was a man convicted of dealing in diamonds and there was so much involved and that he received a suspended sentence; today there was another man before the Court in a similar case and so many years' imprisonment were imposed. It is therefore necessary that the Courts apply more or less the same guidelines regarding the imposition of sentence and that these be balanced against the principle of individualisation of the particular accused and offence. It is only when the Courts genuinely attempt to reconcile and balance the principle of individualisation with the principle of uniformity that the public will have confidence in the performance of these functions by the Courts as the public will then be able to see that, on the face of it, justice is done where possible.'

³ *S v Moloji* 1987 (1) SA 196 (A) at 219I-220B.

⁴ *S v Strauss* 1990 NR 71 (HC).

[9] In addition, counsel for the respondent pointed out that the trial magistrate, as per the judgment on sentence, followed the same approach stated above and was alive to the fact that each case should, amongst others, be individualised. This much is borne out by the judgment.

[10] Mr Andreas, counsel for the appellant, referred us to the unreported cases of *The State v Gift Sililo Ilukena*⁵ and *Naobeb v S*.⁶ It seems necessary to mention that both appeals were decided by the same constituted bench. We were not referred to any other cases on the point.

[11] The *Ilukena* matter was sent on review in terms of s 302 of the Criminal Procedure Act 51 of 1977 where the accused was convicted on a charge of theft of one ox valued at N\$5000 and was sentenced to a term of four (4) years' imprisonment. From a reading of the judgment it appears that the review court took issue with the value reflected in the charge and that the trial court did not sufficiently apply its mind to the accused person's personal circumstances, mitigating factors and the element of mercy. It concluded that the learned magistrate overemphasised the seriousness and prevalence of the crime and that the sentence imposed was too harsh and induced a sense of shock. The sentence was accordingly set aside and substituted with one of three (3) years' imprisonment of which one (1) year suspended on condition of good conduct. In reaching its conclusion there is nothing in the judgment showing that the court was guided by sentences imposed in the past in similar cases of stock theft.

[12] In the *Naobeb* matter the court of appeal set aside the conviction on four (4) counts of theft of stock and substituted it with convictions on only two (2) counts, involving two head of cattle. The court proceeded to sentence the accused afresh and, having taken both counts together, sentenced the accused to two (2) years' imprisonment of which six (6) months' imprisonment suspended. No reasons are to be found in the judgment elucidating the sentence imposed. I pause to observe that the

⁵ *The State v Gift Sililo Ilukena* (CR 76/2019) [2019] NAHCMC 415 (16 October 2019).

⁶ *Naobeb v S* (HC-MD-CRI-APP-CAL-2019/00024) [2020] NAHCMD 226 (15 June 2020).

sentence imposed in this instance compares with sentences that would ordinarily be imposed in instances where stock valued at less than N\$500 is involved.

[13] The court *a quo* in deciding what sentence in the circumstances of the case would be suitable, cited several High Court appeal judgments which, as far as the stock involved is concerned, are more or less similar to what the court faced in this instance. There is no need to repeat what is reflected in the judgment, suffice it to say that the sentences imposed in these cases surpass the sentence imposed on the appellant in this instance. Where it involved one head of cattle, sentences of five (5) and eight (8) years imprisonment were imposed. Some of the cases cited involve different or more stock but of approximately similar value, in which instances weightier sentences were imposed.

[14] In the unreported matter of *Sagarias Ramseb v The State*⁷ which involved theft of one head of cattle, the court was referred to the matter of *S v Lwishi*⁸ which makes plain that the bench mark sentence for stock valued below N\$500 is the prescribed minimum of two (2) years' imprisonment and where it involves stock of greater value, as in this instance (N\$10 000), then '...the court's approach should be to commensurate the sentence with the value of the stock involved'. Also, that courts in the past have always considered stock theft to be a serious offence.

[15] Bearing in mind that the above stated cases had already been decided before the *Ilukena* and *Naobeb* judgments were delivered and, in the absence of any reasons advanced in the judgments which could possibly justify the courts' divergent approach to sentence in cases of stock theft, I am respectfully of the view that these judgments should not be followed as authority for sentence in stock theft matters.

[16] Returning to the grounds of appeal, appellant's contention that the sentence imposed induces a sense of shock and startlingly inappropriate, in my view, loses sight of the seriousness of the offence committed and that the sentence imposed falls within the norm of punishment meted out in cases of this nature. The sentencing court's

⁷ *Ramseb v The State* (CA 05/2013) [2014] NAHCNLD 40 (11 July 2014).

⁸ *S v Lwishi* 2012 (1) NR 325 (HC).

objective was to impose a deterrent sentence which, in the circumstances, was called for. Though the sentence could be seen to be on the weighty side, it still falls within the parameters of what would be reasonable in the circumstances of the case. The test is not whether this court, sitting as the trial court, would have imposed a different sentence, but rather whether the court *a quo* committed a misdirection by imposing the sentence as it did.

[17] As for the ground that mere lip service was paid to the personal circumstances of the appellant, this amounts to nothing more than a bold assertion and conclusion reached by the drafter of the amended notice of appeal. Personal circumstances such as the appellant being a first offender; his family and him being unemployed and the fact that he pleaded guilty, were stated in the judgment and considered to be mitigating. However, the seriousness of the offence and the interest of society having outweighed the personal circumstances significantly, required the imposition of a deterrent sentence.

[18] When applying the principles stated above to the present facts, we are not persuaded that the appellant, on the grounds raised on appeal, was able to show any misdirection on the part of the court *a quo*. Having come to this conclusion, we are further satisfied that there are no prospects of success on appeal.

[19] In the result, it is ordered:

1. The application for condonation is refused.
2. The matter is struck from the roll and deemed finalised.

J C LIEBENBERG
JUDGE

D USIKU
JUDGE

APPEARANCES

APPELLANT

J Andreas

Of Andreas-Hamunyela Legal Practitioners (Instructed by
Legal Aid), Windhoek.

RESPONDENT

S L Jacobs

Of the Office of the Prosecutor-General, Windhoek.