



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

CR NO.: 18/2016

In the matter between:

THE STATE

and

MUTAMBO KARUNGURUNGURU

ACCUSED

HIGH COURT NLD REVIEW CASE REF NO: **171/2016**

Neutral citation: *The State v Karungurunguru* (CR 171/2016) [2016] NAHCNLD 106
(14 December 2016)

Coram: CHEDA J

Delivered: 14 December 2016

Flynote: Where a trial court states that it has taken certain factors either in mitigation or aggravation, this should manifest itself in the type of sentence passed. The use of “judicially discretion” should not be used to prevent a probe from the scrutiny Magistrate or reviewing Judge. Factors taken into account should appear on the record.

Summary: Accused was charged with theft of one ox valued at N\$10 000 which was recovered. He was sentence to 18 months imprisonment. I raised a query regarding the leniency of the sentence. The magistrate responded by trying to justify

it by bringing in mitigating factors which were not on the record. This conduct is not proper.

Magistrates must have a positive approach to criticisms as it is through them that we all learn. Proceedings not confirmed and sentence as manifestly lenient. Appropriate sentence should have been 2 years imprisonment.

ORDER

1. The confirmation certificate is withheld and the appropriate sentence in the circumstances should have been two (2) years imprisonment.

JUDGMENT

CHEDA, J

[1] This is a matter referred to me on review. The accused was charged with stock theft as read with the provisions of Stock Theft Act, Act 19/1990. He pleaded guilty and was sentenced to 18 months imprisonment.

[2] I was not happy with the sentence passed and I raised a query with the learned trial magistrate whose response was as follows:

“1. In my *ex tempore* judgment, I have specified what I have considered before passing the sentence of 18 months imprisonment. Although I do not clearly understand the honourable Judge’s query, it appears to me that the query is that the value of the beast (N\$10 000-00), which was recovered should have concerned (sic) the imposition of a sentence in excess of 18 months imprisonment so imposed.

2. although, I did refer to the value involved, only to the extent that a minimum and mandatory sentence of 2 years was not applicable, the value was not the only consideration I had to consider.

3. The sentence of 18 months imprisonment is above the sentence of 1 year imprisonment submitted by the state.

4. In the exercise of my discretion judicially, I have considered what would appear to be a repetition of my *ex tempore*, the following:

- a) that the accused has pleaded guilty to the charge – at the earliest opportunity
- b) The facts of the offence – based squarely on the accused admissions in terms of section 112 (1) (b)
- c) Whether there was any aggravating factor or evidence, premeditation on how the offence was committed
- d) The accused clear criminal record – he is a first offender
- e) The accused character, behaviour and demeanour and clear demonstration of remorse in court
- f) The accused family circumstances, his level of education – accused is an unsophisticated adult who does not even know his age and a family man with two children. The accused is from the marginalised back ground of Ovahimba community
- g) The period the accused already spend in custody as a trial awaiting prisoner
- h) The impact of the offence on the victim – in this case the victim suffered no loss or harm as the beast was recovered as it the very same day, and
- i) Whether the accused had benefited from the offence – which he did not.

5. The sentence imposed may appear lenient, but it is not startlingly inappropriate that it induces a sense of shock

6. The sentence is in line with the guidelines set out in several High Court cases that did away with the mandatory sentence.

7. The sentence is well within the jurisdiction of the trial court. I submit the sentence is in accordance with justice.

The above was the basis on which I have imposed the sentence of 18 months imprisonment.

I stand to be guided

(signed)

IT Velikoshi

Principal Magistrate: Relif

Windhoek

04 July 2016.”

[3] Accused stole one ox valued N\$10 000 which was recovered. He pleaded guilty, was convicted and sentenced to 18 months imprisonment. Accused was asked to address the court in mitigation. He stated that he is a communal pensioner with 20 goats, not employed and married traditionally. He survives by selling goats. He is a first offender.

[4] The mitigating features of the accused are not out of the ordinary and therefore there is nothing spectacular about them. The learned trial magistrate stated that he took into account the factors which are listed in his response. However, there is nothing in the record that shows that this was ever taken into consideration at all. This, therefore, casts doubt on the learned trial magistrate's *bona fides*.

[5] It appears to me, that the learned trial magistrate put on his defensive gear the moment he realised that a query was being raised with regards to the appropriateness of his sentence. He should have accepted the query with the ordinary expected humility of a professional. There was no need for him to have armed himself with the proverbial sword and shied as this was nothing, but, a judicial query with no hidden motives at all.

[6] Magistrates and indeed any judicial officer of the court should appreciate that, there is no judicial officer who has a monopoly of knowledge, for that reason we are all learning and we will continue learning from each other.

[7] It was, therefore wrong for the trial magistrate to view a query as a personal attack. The objective of scrutiny, review or appeals is to ensure that justice is achieved at every stage of our judicial system.

[8] In *casu*, it is clear that the learned trial Magistrate, went out of his way and put in every conceivable mitigating features for and on behalf of the accused, a situation which is worrying and not expected from a judicial officer.

[9] It is further clear that, the learned trial magistrate decided to tailor-make the mitigation in order to justify the sentence imposed. What cannot be taken away from

this case is that the sentence is manifestly lenient in view of the fact that, the act refers to a value of stock of more than N\$500 attracting a 2 year sentence.

[10] The application of logic, therefore, tells us that a sentence of 18 months is on the lenient side. The learned magistrate approach and societal outlook about the value placed on stock by the Oshiwambo people, is indeed in order. It is for that reason that the court's views should have been reflected on its sentence.

[11] What militates against the accused is that he has 20 goats. According to communal standard, he is not a poor man. Instead of selling his own goats he decided to steal. This, in my view, is a clear indication of greed than need. For that reason the court should have sentenced him to an effective 2 years imprisonment.

[12] I am convinced that there was a miscarriage of justice in this matter.

[13] The confirmation certificate is withheld and the appropriate sentence in the circumstances should have been two (2) years imprisonment. I withhold my certificate.

M Cheda
Judge