

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI**

APPEAL JUDGMENT

Case No: CA 49/2016

In the matter between:

KAPA JOHANNES

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Johannes v S* (CA 49/2016) [2018] NAHCNLD 8 (25 January 2018)

Coram: TOMMASI J and JANUARY J

Heard: 05 December 2017

Delivered: 25 January 2018

Flynote: Criminal Procedure – Appeal – Stock theft in terms of the Stock Theft Act 12 of 1990 – Appellant convicted in District court – Transferred to Regional court for sentence – Sentenced to 8 (eight) years imprisonment – Appeal against sentence – Not

necessary to enquire about substantial and compelling circumstances – No misdirection or error.

Summary: The appellant in this matter was convicted for Stock theft in the District court of Eenhana. The matter was referred to the Regional court for sentence. He was sentenced to 8 (eight) years imprisonment. This appeal is against sentence only. The appellant appeared in person and addressed the court in mitigation. He placed sufficient facts before the magistrate after being duly informed about his mitigating rights. The value of the Stock is N\$16 000 and section 14(2) of the Stock Theft Act, Act 12 of 1990 is not applicable in relation to substantial and compelling circumstances. The sentencing discretion was appropriately exercised. The appeal is dismissed.

ORDER

The appeal is dismissed

JUDGMENT

JANUARY, J (TOMMASI J concurring):

[1] The appellant in this matter was convicted in the magistrate's court Eenhana for theft of stock read with the provisions of sections 11(1)(a), 1, 14 and 17 of the Stock Theft Act, Act 12 of 1990. The accused stole 3 (three) cattle valued at N\$16 000. The matter was thereafter transferred to the Regional Court for sentence. The appellant was convicted of theft of 3 cattle valued at N\$16 000. He was sentenced to 8 years' imprisonment. He is appealing against this sentence.

[2] The notice of appeal was filed about 4 months late. Ms Mugaviri is representing the appellant in this appeal and Mr Gaweseb is for the respondent. The appellant filed an application for condonation with a supporting affidavit. Mr Gaweseb did however not oppose the application for condonation and he submitted that the applicant has

prospects of success as the Regional court magistrate who sentenced the appellant erred during the sentencing process.

[3] Ms Mugaviri filed substantial heads of argument on 4 grounds of appeal which are:

1. The learned magistrate failed to take into account or take into account inadequately that:
 - 1.1 the appellant was a first offender;
 - 1.2 the appellant was 27 years old at the time the offence was committed and he could be rehabilitated;
 - 1.3 the appellant was the sole provider for his five children;
 - 1.4 the appellant had been diagnosed with breast cancer;
 - 1.5 the stolen live stock was all recovered.
2. The learned Magistrate erred failing to render assistance to an unrepresented appellant to elicit information that could lessen his sentence.
3. The learned Magistrate overemphasised the seriousness of the offence and interest of society over the personal circumstances of the appellant.
4. The sentence induces a sense of shock and is so unreasonable that no reasonable court would have imposed it.'

[4] Ms Mugaviri amplified the grounds of appeal in her heads of argument. She referred this court to *Daniel v Attorney-General & Others; Peter v Attorney-General & others* where the constitutional invalidity of sections 14(1)(a)(ii) and (b) of the Stock Theft Act were cured by 'striking out the periods of the minimum sentences they prescribe while keeping intact their prescription of imprisonment without the option of a fine, as such approach would leave intact the underlying principle, that the perpetrators of stock theft should be incarcerated.'¹

[5] Ms Mugaviri also referred the court to *S v Tjiveze*² where the current position of sentencing on Stock Theft cases is set out crystal clear as follows:

'Since delivery of the judgement 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

¹ 2011(1) NR 330 HC at 356 paragraph 83.

² (CR 27-2013) [2013] NAHCMD 110 (24 April 2013).

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.' (my emphasis)

[6] The appellant's case falls in the second category as the value of the stock is N\$16 000. Section 14(2) therefore does not apply.

[7] Mr Gaweseb in his heads of argument submitted that the learned magistrate did not explain substantial and compelling circumstances to the appellant. The magistrate therefore committed an irregularity according to Mr Gaweseb. I disagree with the submissions. It is clear from the *S v Tjiveze* judgement, referred to above, that where the value of stock is N\$500 or more that section 14(2) does not apply.

[8] Ms Mugaviri also submitted that it was a misdirection by the magistrate: 'not to highlight the provisions of section 14 of the Stock Theft Act, Act 12 of 1990 to the appellant with reference to the prescribed minimum sentence which read with section 297(4) requires the court in its discretion to pass sentence, but order the operation of a part to be suspended. The court's failure in this regard, I submit amounts to a misdirection.' She furthermore elaborated that the Learned Magistrate 'considered the value of the stock as a substantial factor and the prevalence of the offence in the district without consideration (sic) the fact there were compelling and substantial circumstances which included that the appellant was expecting a child and had five children who were all minors and under his care.' (my underlining)

[9] The record indeed does not reflect that the magistrate assisted the unrepresented appellant in mitigation of sentence. In my view, however, it is a notorious fact that not all accused need assistance in mitigation. In this case the appellant placed sufficient facts before the Learned Magistrate to pass a competent sentence. The record reflects as follows:

'MR MWAALA: PROVES NO PREVIOUS CONVICTIONS

COURT: Yes mitigation rights.

ACCUSED ADRESSES COURT IN MITIGATION OF SENTENCE: I am twenty-eight years old Namibian male. I am not married and am a father of five children. The eldest child is seven years old and five years the second, third 4 and the last two are my twins. They are one year old. I am unemployed and I never went to school and yesterday I was detected that I am suffering from breast cancer. It was detected yesterday at Oshakati State Hospital and I do not have any saving at the bank and I would like Your Worship to consider Sentence coupled with a fine where Your Worship to pay a fine and return back outside and commence off work. It is

correct. It is just there is no one to assist my children outside. When I am given a fine I will be able to go outside and work and assist my children. That will be all.'

[10] The above extract is the mechanical recording of the record. If one only considers that it seems that the Learned Magistrate displayed non-apathy towards the appellant. The magistrate however, appropriately explained the mitigating rights to the appellant as per an annexure as follows:

'MITIGATION

The court found you guilty. The court may, before passing sentence, receive evidence as it think fit in order to inform itself as to the proper sentence to be passed.

You are further informed that before the court passes the sentence; you have now a right to address the court on the matter of sentence. You may now bring to the attention of the court Mitigating factors. Mitigating factors which if brought to the knowledge of the court could have passed in the absence thereof. You can do so by either testifying under oath or calling witnesses to testify under oath. You may also address the court without taking an oath or call witnesses to testify under oath or make an affirmation, then either the court or the prosecution is entitled to ask you or your witness questions.

Q; Do you understand?

A: Yes

Q: Do you wish to testify under oath or call witness to testify under oath in mitigation or do you wish to address the court without taking an oath or making an affirmation?

A: No.'

[11] Considering the address in mitigation, it is clear that the answer 'No' only refers to the first part of the question that the appellant did not want to testify under oath or call a witness to testify under oath.

[12] The public prosecutor in the court *a quo* in his address referred the court to the case of *Daniel v Attorney-General & Others; Peter v Attorney-General & Others (supra)*. The prosecutor suggested a sentence of 10 years' imprisonment of which 2 years' are suspended on conditions. The learned magistrate does not state in his reasons whether

or not he considered to suspend part of the sentence. It is however a fact that judgements are never all embracing. The fact that something is not mentioned in a judgement does not mean that it was not considered. The magistrate did not give additional reasons on the Notice of this appeal. In my view, he was however alerted to the fact that part of the sentence could be suspended shortly before imposing the sentence. It seems he exercised his discretion not to suspend part of the sentence.

[13] The *ex tempore* reasons reflect that the learned magistrate indeed considered the personal circumstances of the appellant, mitigating and aggravating circumstances. In my view it was considered appropriately. The magistrate also considered the fact that Stock Theft is prevalent in the court's jurisdiction and that the value thereof in this case was high.

[14] The record of the district court reflect that the appellant pleaded not guilty and showed no signs of remorse. It appears that bail was granted at his first appearance and that he paid the bail. The evidence revealed that the cattle were recovered about a year after they were stolen in the Kavango Region about 300 km from where they were stolen. The appellant sold the cattle to one of his relatives. The complainant recovered the cattle but the appellant gained financially from the proceeds thereof. These are all factors that the learned magistrate in my view, duly considered.

[15] This court's powers to interfere with the sentence is limited. It is trite that it can only interfere in circumstances where the trial court has not exercised its discretion judicially. That will be the case where the sentence is vitiated by irregularity or misdirection or where the sentence is disturbingly inappropriate and induces a sense of shock. I am convinced that *in casu* the discretion was exercised judicially.³

[16] In the result:

The appeal is dismissed.

³ *Natangwe Martin Muahafa v The State* (CA 119/2010) [2011] NAHC 69 (11 March 2011) at para 20.

HC JANUARY
Judge

I agree

MA TOMMASI
Judge

Appearances:**For the Appellant:**

Ms. Mugaviri

Of Mugaviri Attorneys, Oshakati

For the Respondent:

Mr. Gaweseb

Of Office of the Prosecutor-General, Oshakati