

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

<b>Case Title:</b> <i>The State v Tjaritye Matine</i>	<b>Case No:</b> CR 26/2019
	<b>Division of Court:</b> Northern Local Division
<b>Heard before:</b> Honourable Mr. Justice January J <i>et</i> Honourable Ms. Justice Salionga J	<b>Delivered on:</b> 2 August 2019
<b>Neutral citation:</b> <i>S v Matine</i> (CR 26/2019) [2019] NAHCNLD 75 (2 August 2019)	
<b>The order:</b>  <ol style="list-style-type: none"><li>1. The conviction is confirmed.</li><li>2. The sentence of 18 months imprisonment for contravening section 11(1)(a) of the Stock Theft Act, Act 12 of 1990 – Stock Theft of three goats to the value of N\$2400 is set aside.</li><li>3. The magistrate is directed to inform the accused that the sentence will have to be increased considering his personal circumstances, the seriousness of the offences, the</li></ol>	

prevalence thereof and that it was clearly well premeditated.

4. The matter is remitted to the magistrate to sentence the accused afresh in accordance with the directions of this court.

**Reasons for order:**

JANUARY J (SALIONGA J concurring):

[1] The headnote in *S v Tjiveze*<sup>1</sup> explained the sentences in Stock Theft cases as follows:

'In the present case, the court provided an explanation regarding sentencing in stock theft cases, in the light of the decision in *Daniel v Attorney-General and others; Peter v Attorney-General and Others* 2011 (1) NR 330 (HC).

The following principles apply in such cases:

1. Cases where the value of the stock is less than N\$500, (s 14(1)(a)(i)) and the accused is a first offender.
  - 1.1 The prescribed sentence is any period of imprisonment 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 s 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.
  - 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 part of the sentence may be suspended.
2. Cases where the value of the stock is N\$500 or more, (s 14(1)(a)(ii)) and the accused is a first offender
  - 2.1 The prescribed sentence is any period of imprisonment without the option of

<sup>1</sup> 2013 (4) NR 949 (HC) B-F

a fine, but not exceeding the normal sentence jurisdiction of the magistrate.

2.2 Section 14(2) does not apply, ie the court is not concerned with substantial and compelling circumstances.

2.3 The court may wholly or partly suspend the period of imprisonment.

[2] The effect of the full bench judgment in *Daniel and Another v Attorney-General and Another* 2011 (1) NR 330 (HC), is that ss 14(1)(a)(ii) and (b) of the Stock Theft Act 12 of 1990 have been found unconstitutional and therefore, are without force and effect. Accordingly, the mandatory minimum sentence of not less than 20 years' imprisonment is no longer applicable. However, the court is not permitted to impose any sentence, for example, a fine, because ss 14(1)(a)(ii) and (b) remains unaffected by the judgment and limits the sentencing options to that of imprisonment. The effect of the striking down is that, as far as it concerns stock valued at N\$500 and more, the court is now permitted to impose any custodial sentence within its sentencing jurisdiction without first having to determine the existence or not of substantial and compelling circumstances. It further brings about that the magistrate's court is under no obligation to remit to the regional/divisional court for sentence, those cases in which the value of the stock is N\$500 or above; and that court would be permitted to pass sentence itself: Provided that it is a custodial sentence and falls within the court's sentencing jurisdiction, namely 5 years.

[3] My understanding of the *Daniel* judgment is that only the minimum sentence of not less than 20 years was struck down to be unconstitutional. Sections 14(1)(a)(ii) and (b) remains unaffected and limits the court to impose only imprisonment. In my view the explanation that a court may impose any sentence within its jurisdiction, read in isolation may still cause a misunderstanding and cause magistrates to impose sentences as in the present matter.

[4] It was, in my view, the intention of the legislator to impose harsher sentences for stock theft considering the value and considering if it is less or it exceeds the threshold of

N\$500 in imposing only imprisonment without the option of a fine.

- [5] Common sense dictates that an accused having committed stock theft with a value of less than N\$500 should not be worse off than one who committed the offence where the value is more than N\$500.
- [6] The sentence of 18 months imprisonment for stock theft with a value of N\$2400, about nearly five times more than N\$500, has the effect that the accused in this matter is better off than an accused who committed theft of stock valued less than N\$500. This is unfair and is not reflecting the intention of the legislators.
- [7] In addition, the explanatory headnote specifically states 'the court is not permitted to impose 'any' sentence, for example, a fine, because ss 14(1)(a)(ii) and (b) remains unaffected by the judgment and limits the sentencing options to that of imprisonment.' The mentioning of a fine is by example and not exclusive to only fines. Such sentence should, in my view, not be lesser than the minimum sentence of not less than 2 years to be imposed for stock theft cases where the value is less than N\$500.
- [8] Another case in point is the case of *S v Lwishi*.<sup>2</sup> I endorse where Liebenberg J states: 'There is nothing in the Daniel case from which it can be inferred that the court did not consider stock theft to be a serious offence; neither does the striking down imply that. The current position is that the sentence prescribed by the Legislature for stock, valued below N\$500, is (still) 2 years' imprisonment, which the court did not consider to be in conflict with the Constitution. This remains the bench mark for stock theft cases falling in that category, and where it involves stock valued above N\$500, the court's approach should be to commensurate the sentence with the value of the stock involved. The offence of stock theft has always been considered by the courts to be a serious offence, and from this court's perspective, the position has not changed at all'.
- [9] ' Although the courts now have an unfettered discretion when it comes to sentencing in cases where the value of the stock is N\$500 and more, the approach of the sentencing court, in my view, should be to consider the usual factors applicable to sentence, whilst mindful of the

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<sup>2</sup> 2012 (1) NR 325 (HC) at p 329

need to impose deterrent sentences. Where appropriate, lengthy custodial sentences should be imposed to serve as deterrence in a particular case, as well as generally. Ultimately, that would give effect to the Legislature's intention to address the problem of stock theft (which is rampant in this country), by the imposition of deterrent sentences. Hence, deterrence, as an objective of punishment, in cases of this nature, and where appropriate, should be emphasised.<sup>3</sup>

H C JANUARY JUDGE	J T SALIONGA JUDGE

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<sup>3</sup> At p 329 G to p 330 A-D *supra*