

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

Case Title: <i>The State v Kamaariurika Ngueezeta and Kemuii Kambatiri Herunga</i>	Case No.: CR 56/2022 Opuwo: OPU-CRM-1303/2021
	Division of Court: Northern Local Division
Heard before: Honourable Lady Justice Salionga J et Honourable Mr Justice Kessler AJ	Delivered on: 17 October 2022
Neutral citation: <i>S v Ngueezeta</i> (CR 56/2022) [2022] NAHCNLD 113 (17 October 2022)	
It is hereby ordered that: <ol style="list-style-type: none">1. The convictions in respect of both accused are confirmed.2. The sentence in respect of accused 2 is confirmed.3. The sentence in respect of accused 1 is set aside.4. The matter is remitted to the Magistrate or, if no longer available, any other Magistrate in terms of section 275 of the CPA, to comply with the guidelines in this judgment.5. Upon sentencing accused 1 afresh, the court must take into account the period of imprisonment served by the accused.	

Reasons for the order:

KESSLAU AJ (SALIONGA J concurring):

[1] The matter comes before this court on automatic review in terms of Section 302 of the Criminal Procedure Act 51 of 1977, as amended (the CPA).

[2] The two accused were charged in the Magistrates Court of Opuwo with stock theft read with the provisions of the Stock theft Act 12 of 1990 as amended (The Act). The accused both plead guilty, were questioned in terms of section 112(1) (b) of the CPA and subsequently were convicted on the theft of one goat with a value of N\$ 200. Accused 1 was sentenced to two years imprisonment of which six months were suspended for a period of two years on condition that the accused is not convicted of stock theft read with the provisions of the Stock Theft Act 12 of 1990, committed within the period of suspension. Accused 2, who had a relevant previous conviction, was sentenced to two years imprisonment.

[3] The magistrate was queried *inter alia* as follows:

'The value of the stolen stock is less than N\$ 500. Why did the learned Magistrate not apply Section 14(2) of Act 12 of 1990 regarding substantial and compelling circumstances before sentence was meted out? [See S v Tjiveze 2013 (4) NR 949 (HC)]'

[4] The magistrate in reply stated that:

'The Magistrate did not apply section 14(2) of Act 12 of 1990 as amended because there are no substantial and compelling circumstances from the personal circumstances of accused person. Further the accused is not a first offender has previous convictions record' (sic).

[5] The magistrate correctly pointed out that where a previous conviction is proved it implies that the provision of section 14(2) of the Act governing substantial and compelling circumstances does not apply.¹ However in this case it was only accused 2 who had a

¹ Section 14 was amended by Act 4 of 1991, substituted by Act 19 of 1993 and substituted by Act 19 of 2004 after S v Vries 1998 NR 244 (HC) struck out some portions of the previous version of section 14(1) (b) on constitutional grounds. Portions of the amended section 14 were struck out and read down as a result of *Daniel v Attorney-General & Others; Peter v Attorney-General & Others* 2011 (1)

previous conviction. Accused 1 was a first offender and in that regard the record is silent on explaining the provisions of section 14(2) of the Act to him in order for the accused to address same in mitigation before the magistrate could make a finding regarding substantial and compelling circumstances.

[6] In this regard, Damaseb JP stated in *S v Willem*²:

‘The tenets of natural justice dictates that persons likely to be affected by a decision of a court or tribunal must be afforded an opportunity to make representations before a decision is made.’

[7] In *S v Tjiveze*³ the current sentencing position, when the value is less than N\$ 500, was described in the following terms:

‘To sum up, the position in relation to sentence for first offenders in terms of section 14 of the Stock Theft Act is as follows:

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 (see section 297(1) (b) of the CPA, read with paragraph [7] of the *Tjambiru*⁴ judgment).

2.1 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 (see section 297(4) of the CPA, read with paragraph [3] & [6] of the *Tjambiru* judgment).’

NR 336 (HC) which was confirmed in *Prosecutor-General v Daniel & Others* 2017 (3) NR 837 (SC).

² *S v Willem* (CR 57/2014) [2017] NAHCMD 264 (11 September 2017)

³ *S v Tjiveze* (CR 27-2013) [2013] NAHCMD 110 (24 April 2013) par 13

⁴ *State v Mbahuma Tjambiru and two other cases* (Case No's CR47/2008; CR48/2008 & CR 49/2008) delivered on 21 July 2008

[8] The proceedings, as far as the convictions in respect of both accused, appear to be in accordance with justice and will be confirmed however the magistrate needs to comply with the provisions of section 14(2) of the Act in respect of accused 1 before sentencing him afresh.

[9] In the result the following order is made:

1. The convictions in respect of both accused are confirmed.
2. The sentence in respect of accused 2 is confirmed.
3. The sentence in respect of accused 1 is set aside.
4. The matter is remitted to the Magistrate or, if no longer available, any other Magistrate in terms of section 275 of the CPA, to comply with the guidelines in this judgment.
5. Upon sentencing accused 1 afresh, the court must take into account the period of imprisonment served by the accused.

Judge(s) signature	Comments:
KESSLAU AJ:	None
SALIONGA J:	None