



NOT REPORTABLE

CASE NO: SA 78/2020

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

WILLEM PETER

Appellant

and

THE STATE

Respondent

Coram: SHIVUTE CJ, SMUTS JA and FRANK AJA

Heard: 12 November 2020

Delivered: 16 November 2020

Summary: On 8 December 2009, appellant was sentenced to 30 years imprisonment on a charge of stock theft of a head of cattle (valued at N\$3200) under s 14 of the Stock Theft Act 12 of 1990 (the Act). Having previously been convicted of stock theft and sentenced to three years imprisonment in 1997, the court *a quo* sentenced the appellant to the mandatory 30 years imprisonment in terms of s 14(1) (b) of the Act for a repeat offender who commits theft of stock where the value exceeds N\$500.

Section 14 was declared unconstitutional by the High Court in 2011 (see *Daniel v Attorney-General & others; Peter v Attorney-General & others* 2011 (1) NR 330 (HC)), which finding was confirmed by this court on 28 July 2017 – (see *Prosecutor-General v Daniel & others* 2017 (3) NR 837 (SC)). Appellant was a party to the s 14 constitutional challenge in the High Court).

Counsel for both parties agree that the finding of unconstitutionality of the minimum sentence provisions was that those provisions were expunged from the Act *ex tunc*. There not being any disagreement with the finding of invalidity of the minimum sentence provisions, this court must determine an appropriate sentence.

Appellant's previous convictions are relevant in the determination of an appropriate sentence.

Held, that there are clear aggravating circumstances present and the only factors militating against imposing the maximum sentence within the normal range of sentences for similar cases is the fact that appellant was in detention pre-trial for three years.

Held, appellant is sentenced to 12 years direct imprisonment, backdated to 8 December 2009.

Appeal succeeds.

APPEAL JUDGMENT

FRANK AJA (SHIVUTE CJ and SMUTS JA concurring):

Introduction

[1] On 3 December 2009 the appellant was convicted of stock theft involving one head of cattle valued at N\$3200. As the appellant had a previous conviction of stock theft for which he was sentenced to three years imprisonment in 1997, he was sentenced to 30 years imprisonment on 8 December 2009.

[2] The sentence, which on the face thereof, is startlingly inappropriate, was mandatory as s 14(1)(b) of the Stock Theft Act 12 of 1990 (the Act) at the time made it the compulsory sentence for a repeat offender under the Act where the value of the stock involved exceeds N\$500 unless the court found substantial and compelling circumstances not to impose such sentence. The court *a quo* did not find such circumstances.

[3] Subsequent to the appellant being sentenced, the High Court on 10 March 2011 held that the minimum sentences contained in s 14 of the Act were unconstitutional.¹ This court subsequently confirmed this finding of the High Court on 28 July 2017.²

[4] The appellant who was a party to the High Court challenge to the constitutionality of s 14 of the Act made various attempts to appeal his sentence but encountered many technical and procedural hurdles as he was unrepresented. It is unnecessary to relate all his efforts in detail, save to say that he eventually approached this court on a petition which resulted in him being given leave to appeal against his sentence.

¹ *Daniel v Attorney-General & others; Peter v Attorney-General & others* 2011 (1) NR 330 (HC).

² *Prosecutor-General v Daniel & others* 2017 (3) NR 837 (SC).

[5] Counsel for both the appellant and the respondent accept that the result of the decision of unconstitutionality of the minimum sentence provisions was that those provisions were expunged from the Act *ex tunc* which means these provisions must be taken to not have been in existence when the appellant was sentenced in the court *a quo* on 8 December 2009. This is so because the finding of invalidity operates retroactively.³ It is also clear from the judgment *a quo* that the minimum sentence in place at the time was an important factor that swayed the judge *a quo* in the sentencing of the appellant. Counsel for both the appellant and the respondent also further agreed that this court should impose an appropriate sentence on the appellant.

Appropriate sentence

[6] As far as the accused's personal circumstances are concerned, the following was placed before the court *a quo*. He was single and 38 years old at the time. He worked as a mechanic earning between N\$3000 and N\$4000 per month. He was the sole breadwinner of his family at the time which included two of his six children who, with him, stayed with his mother who operated a shebeen, presumably, from home. Appellant was the eldest of nine siblings, whom he looked after financially. He also supported his grandmother who looked after livestock. From an educational perspective the appellant attended school up to grade 11.

³ *Communications Regulatory Authority of Namibia v Telecom Namibia Ltd & another* 2018 (3) NR 664 (SC) para 94.

[7] As mentioned, the appellant has one previous stock theft conviction that predated the current conviction by about nine years for which he was sentenced to a period of imprisonment of three years. This experience did not prevent him or deter him from taking a leading role in the planning and execution of the crime in the present appeal where a team of five persons used a car and a rifle to go out along a public road at night to look for an animal to kill on any of the farms adjoining the public road.

[8] Stock theft remains a public scourge in this country where the wide open spaces make it impossible to constantly guard livestock. Furthermore, the sparse population renders many country roads virtually empty pathways for thieves to operate from and execute their plans to transfer stolen or slaughtered stock over formidable distances so as to avoid detection.

[9] With the above facts in mind, the question is what punishment would be appropriate and will fit the appellant, the crime and be fair to society.⁴

[10] Counsel for the appellant submits a sentence of ten years, 11 months and four days (which is the time already spent in prison by the appellant) would be an appropriate sentence. Counsel for the State submits a sentence of 15 years imprisonment would be an appropriate sentence.

⁴ *S v Strauss* 1990 NR 71 (HC) at 76A-B.

[11] Whereas the counsel for the appellant focuses on his previous conviction for stock theft, counsel for the respondent submits his other previous convictions are also worthy of consideration. These are a conviction for assault with intent to do grievous bodily harm in 1995 and a conviction for housebreaking with intent to steal and theft in 1996. These convictions are in my view relevant as it shows the appellant's previous brushes with the law did not put him off further criminal conduct and does reflect on his propensity to commit offences and that he is less open to rehabilitation than people without such convictions.

[12] I have already alluded to the leading role appellant played in the committing of the offence under consideration. He persuaded or recruited three of his co-accused to accompany him and another on their criminal venture upon payment. He also drove the vehicle used in the foray which took place at night. These factors clearly amount to aggravating circumstances.

[13] That stock theft is regarded as serious and worthy of a direct term of imprisonment (especially where repeat offenders are involved) is accepted by both counsel. This is also supported by case law referred to by both counsel. From the case law, it is apparent that the range of sentences for similar cases is between ten to 15 years direct imprisonment.

[14] The aggravating circumstances mentioned above are such that they indicate a sentence at the highest end of the range for similar cases. Here however, it must be

borne in mind that the appellant was incarcerated for three years awaiting trial prior to his conviction of the offence relevant to this appeal.

[15] I am of the view, taking into account all the circumstances, that a sentence of direct imprisonment of 12 years would be an appropriate sentence.

[16] Before I make the order, I must express the court's gratitude to both counsel for assisting the court in this matter and especially counsel for the appellant who appeared for the appellant on an *amicus curiae* basis.

[17] In the result, the following order is made:

- (a) The appeal is upheld.
- (b) The order of the court *a quo* of 8 December 2009 sentencing the appellant to 30 years imprisonment is set aside and substituted with the following order:
 - '(i) The accused is sentenced to 12 years imprisonment backdated to 8 December 2009.'

SHIVUTE CJ

SMUTS JA

APPEARANCES

APPELLANT:

N Bassingthwaighte

Amicus Curiae

Of Society of Advocates, Promenaden

Chambers, Windhoek

RESPONDENT:

E Moyo

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