

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

versus

**A K
M G
J H**

**FIRST ACCUSED
SECOND ACCUSED
THIRD ACCUSED**

HIGH COURT REVIEW CASE NO. 130/2010

CORAM: HOFF,J *et* SWANEPOEL,J

Delivered on: 05 October 2010

REVIEW JUDGMENT

SWANEPOEL,J.: [1] The three accused aged 16, 15 and 16 years respectively pleaded guilty to the crime of theft taking into consideration the provisions of section 11(1)(a), 14 and 17 of the Stock Theft Act (Act 12 of 1990) as amended. The accused were duly convicted after questioning in terms of section 112(1)(b) of the Criminal

Procedure Act, Act 51 of 1977 (hereinafter “CPA”) and each sentenced to:

“Two (2) years imprisonment which are suspended for five (5) years on

condition accused individual is not convicted of stock theft committed within the period of suspension.”

[2] All three accused were first offenders.

[3] I directed the following query to the learned magistrate:

“Is the suspension of the WHOLE of the sentence of imprisonment (where no compelling circumstances were found) permissible in terms of Section 297(4) of the Criminal Procedure Act, Act 51 of 1977?”

[4] In reply the learned magistrate concedes that the “*current sentence does not comply with the abovementioned section*”. The concession is well made.

Compare: The State v Mbahuma Tjambiru & two others

CR 47/2008, 48/2008 and 49/2008 unreported judgment by Frank AJ with whom Damaseb JP *et* Parker J agreed, dated 21 July 2008-

[5] One way of dealing with the review is to re-mit same to the magistrate to pass sentence afresh. However, upon perusing the case record again it appears to me that compelling circumstances should have been found, particularly in view of the following facts and submissions made by the public prosecutor before sentence: (unedited)

“Yes, your worship I can see that all these accused persons are very, very young. Actually at their tender age, your worship. I mean we can see from

the question in terms of section 112(1)(b) that they were forced by hunger and even the State had the opportunity to see their parents, your worship. These are people who are really, really struggling. So I really think that the circumstances has forced them to commit this offence and on top of everything they surrendered their option for legal aid in order to finalise this case because they can no longer afford travelling up and down with their parents down to the court, your worship and I am of the opinion that a wholly suspended sentence in the circumstances would do much good, your worship.

Court: No compelling circumstances but the (incomplete)

Prosecutor: Your worship the circumstances, their living standards the way in which they are finding themselves must have compelled them, your worship to commit this offence. The compelling circumstances are definitely there. These people are really suffering from hunger, your worship and even the employment they are talking about is not the employment, as it is known to be employment. It is only that they are used at the farm to be sent around to help here and there that is what they think is employment. They do not earn anything for that, your worship.

Court: I am stuck. Are you saying there are compelling circumstances?

Prosecutor: Yes, your worship.

Court: So the court must give a lesser sentence?

Prosecutor: Yes, yes your worship.

Court: So it means they are going to jail but for a short time?

Prosecutor: I would appreciate even if the whole sentence can be suspended.

Court: That does not mean compelling circumstances. I am struggling to recognize the purpose of that provision.”

[6] I am in respectful agreement with the submissions made by the prosecutor and the facts placed before the court that compelling circumstances were present and which should have been found by the learned magistrate. Such a finding in turn would have allowed her to pass a wholly suspended sentence in terms of section 297(1)(b) of the CPA. The finding negated the applicability of section 297(4) of the CPA.

Compare paragraph 8 of the Tjamburu case *supra*.

[7] In the result the conviction of all three accused are confirmed and the original sentence in respect of each of the accused is hereby substituted with the following: 6 (six) months imprisonment wholly suspended for five (5) years on condition that the respective accused are not convicted of stock theft committed within the period of suspension.

SWANEPOEL, J

I agree

HOFF, J

