



NOT REPORTABLE

CASE NO. CA 207/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between

KAENDAPEKE MUHENJE

1ST APPELLANT

ANDREAS VERIRANSA TJIHENGE

2ND APPELLANT

versus

THE STATE

RESPONDENT

CORAM: HOFF, J. *et* PARKER, J

Heard on: 2009.02.13

Delivered on: 2009.02.13 (*Ex tempore*)

APPEAL JUDGMENT:

HOFF, J: [1] The Appellants are appealing against their sentence. In the Magistrate Court they pleaded guilty to the commission of the offence of theft of stock.

[2] In terms of the Stock Theft Act, where the value of the stock is in excess of five hundred Namibian dollars (N\$500.00), the magistrate who convicts an accused person must sentence him to a minimum sentence. That is the case where a Magistrate finds that there are no compelling and substantial circumstances. Where those circumstances exist, the magistrate has a discretion to impose a sentence lesser than the minimum prescribed sentence.

[3] Now, in order for the magistrate to come to the conclusion whether or not there exist, compelling and substantial circumstances, he must have some information before him, from the accused person's personal circumstances and other factors which he should then consider in order to make such a finding.

[4] Mr Matota who appears on behalf of the Respondent, concedes that the Magistrate should have questioned the accused persons at that stage, in order to get sufficient information before he could have come to the conclusion that there were no substantial circumstances. His failure to do so, amounts to a misdirection. This Court, sitting as a Court of Appeal has certain powers one of which is that a matter may be referred back to the Magistrate's Court with appropriate instructions.

[5] This Court cannot at this stage determine an appropriate sentence, since this Court is in the same position having just the record in front of it, as the Magistrate did, and this Court can also not at this stage question the two appellants in order to elicit the necessary information to determine whether or not there were compelling and substantial circumstances. That is why this Court now refers this matter back to the Regional Court Magistrate to sentence them afresh. The Regional Court Magistrate is ordered to question the

two appellants sufficiently and to get useful information and to consider afresh whether or not there were compelling and substantial circumstances.

[6] In order for the Magistrate to consider afresh the sentence, after questioning the Appellants before this Court, this Court must of necessity at this stage, set the sentence aside, which was imposed by the Magistrate.

[7] The Court also directs the Magistrate in this regard when he considers a new sentence, to take into account the period that they have been in custody. This Court confirms the conviction in respect of each of the Accused persons. They will remain in custody until such time as they will be dealt with by the Regional Court Magistrate. This Court will also take the opportunity to thank Mr Kaumbi as well as Mr Mutota for their assistance and submissions made in this regard, in order for the Court to finalise this matter.

HOFF, J

I agree

PARKER, J

ON BEHALF OF THE 1ST APPELLANT:

MR KAUMBI

Instructed by:

VAN DER MERWE-GREEFF INC.

ON BEHALF OF THE STATE

MR MUTOTA

Instructed by:

OFFICE OF THE PROSECUTOR-GENERAL