



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

CASE NO.: CA 58/2013

In the matter between:

ELIASER LAMBERT

APPELLANT

vs

THE STATE

RESPONDENT

Neutral citation: *Lambert v State* (CA 58/2013) [2013] NAHCMD 213 (12 July 2013)

CORAM: UEITELE,J et UNENGU AJ

Heard on: 12 July 2013

Delivered on: 12 July 2013

Flynote: Sentence — Prescribed sentences — Minimum sentences in terms of Stock Theft Act, 1990 — Crucial that value of stock stolen should be determined — Value of stock impacts on sentence — Such value should be determined in magistrates' court in order to decide whether accused should be transferred to regional court for sentence - To inform an unrepresented accused like the accused of section 14 of the Stock Theft Act, 1990 (as amended) is meaningless.

Summary: Criminal sentence – Stock Theft Amendment Act 19 of 2004 – Where an accused has been convicted of stock theft, the value of the stock is crucial to sentencing as it determines whether the prescribed minimum sentence applicable should be one of imprisonment of not less than two or 20 years, as provided in the Stock Theft Act, 1990 (as amended).

There is a substantial difference between the two prescribed sentences and the need to determine the proper value of the stock is almost imperative when it comes to borderline cases where a difference of as little as One Namibia cent in the value of the stock could result in a sentence of 20 years, instead of two years of imprisonment. It is therefore not something that should be considered lightly by the court and it deserves proper consideration.

Held that the appellant's notice of appeal does not set out the grounds on which he attacks the conviction, conviction accordingly confirmed.

Held further that this court has as far back as 2005 stated that the value of the stock is *crucial* to sentencing as it determines whether the prescribed minimum sentence applicable should be one of imprisonment of not less than *two* or *twenty* years. That in this case the District Magistrate should pertinently have instructed the accused of the importance of the value of the sheep and elicited evidence, as contemplated in section 112(3) of the Criminal Procedure Act, 1977 as to the value of the sheep.

Held further that it is meaningless for a magistrate to simply inform an accused person about the penalty clause. The appellant was not legally represented and it was thus the duty of the magistrate to explain to him the provisions and implications of section 14 of the Stock Theft Act, 1990.

Held further that a failure by a magistrate to explain to an unrepresented accused the purport of section 14(2) of the Stock Theft Act, 1990 (as amended) and to afford him an opportunity to place information before him or her constitutes an irregularity.

ORDER

1. The appellant's conviction, is in terms of section 304(2)(c)(iii) read with section 309(3) of the Criminal Procedure Act, 1977 confirmed.
2. The sentence, is set aside and is in terms section 304(2)(c)(iv) read with section 309(3) of the Criminal Procedure Act, 1977 substituted with the following sentence:

'3 years, four months and ten days imprisonment'.
3. The sentence is, in terms of section 282 of the Criminal Procedure Act, 1977 antedated to 02 March 2010.

JUDGMENT

UEITELE J (UNENGU J concurring):

[1] The appellant appeared before the District Magistrates' Court for the district of Outjo on a charge of theft read with the provisions of sections 1, 11(1)(a), 14 and 17 of the Stock Theft Act, 1990¹, as amended² for allegedly having stolen a sheep, valued at N\$ 500.

[2] The appellant was convicted on his plea of guilty and committed for sentence by the Regional Court in terms of s 114(1) of the Criminal Procedure Act, 1977³. In the Regional Court the appellant was still unrepresented and sentenced to twenty (20) years imprisonment.

¹ Act 12 of 1990.

² Stock Theft Amendment Act, 2004 (Act 19 of 2004)

³ Act 51 of 1977.

[3] I have perused the record of the proceedings in the District Magistrates' Court. From the record of proceedings in that court it appears that after the charge was put to the appellant, the appellant indicated that he is pleading guilty to the charge. The learned Magistrate then questioned the appellant as contemplated in section 112(1)(b) of the Criminal Procedure Act, 1977. I am satisfied that the learned Magistrate did elicit sufficient information from the appellant to establish that the appellant admits all the elements of the crime with which the appellant was charged. I, however, have doubt as to whether justice was done with regard to the procedures leading to his sentencing in the Regional Court. I will in due course return to this aspect and explain my doubt.

[4] From the record of the proceedings in the District Magistrates' Court it appears that the appellant was convicted on 21 January 2010 and the matter transferred to the Regional Court for sentencing on 02 March 2010. On that day (i.e. 02 March 2010) the appellant was, as I have already indicted, sentenced to 20 years imprisonment. Dissatisfied with his conviction and sentence the appellant, on 10 March 2010, filed a document titled "*Appeal for conviction & sentence*".

[5] Before us the appellant argued his appeal in person while Mr Khumalo appeared for the respondent. Mr Khumalo filed his heads of arguments way back on 18 October 2011 as the appeal hearing was scheduled to have taken place on 21 October 2011. From the court file I can unfortunately not make out why the appeal was not heard on that day and why it took approximately two years before the appeal was again set down for hearing. On 12 July 2013 Mr Khumalo filed supplementary heads in which he concedes that in view of the fact that this court, in the matter of *Daniel v Attorney-General and Others; Peter v Attorney-General and Others*⁴, found the provisions of section 14(1)(a)(ii) to be unconstitutional and thus invalid, this court may reconsider the sentence imposed. The concession made by Mr Khumalo is in my view correct, but because of some irregularities which have repeatedly been committed by both the trial (District Magistrates' Courts) and sentencing (Regional Courts) I find it appropriate to in

⁴ 2011 (1) NR 330 (HC).

this judgment point out those irregularities with the hope that both district and regional magistrates will pay attention to the guidelines given by this court.

[6] In the original heads of arguments submitted on 18 October 2011 the respondent raised the point that the appellant's notice of appeal does not satisfy the requirements set out in the rules⁵ in that the 'document' on which the appeal is based does not constitute a valid notice of appeal in that no grounds are advanced upon which either the conviction or sentence are attacked. Mr Khumalo also referred us to the decisions in the cases of *S v Horne*⁶ and *S v Kakololo*⁷.

[7] I agree with Mr Khumalo's submission that the courts have on many occasions emphasised the requirements for clear and specific grounds of appeal and the importance of a proper notice of appeal. I, however, also take note of the fact that in each case the Appeal Court must interpret the notice of appeal to assess its compliance or otherwise with the requirements set by the law.

[8] In this case, the letter which launches the appeal was written by a lay person without assistance of a lawyer. I therefore find the comments of Van Niekerk, J⁸, fitting this matter when she said:

'I do not think that an overly fastidious and technical approach should be followed in the circumstances of this case in considering whether it is a notice of appeal. I think justice will be served if the Court rather seeks, if possible, to interpret the letter in a manner upholding its validity as a notice of appeal so that the merits of the matter may be dealt with and the appeal may be disposed of. While the letter is not couched in the form and language that a properly drawn notice of appeal should be, the substance of the letter is clear – the accused appeals against sentence because he feels aggrieved by the fact that a sentence of direct imprisonment was imposed....'

⁵ Rule 67 (1) of the Magistrates' Court Rules.

⁶ 1971(1) SA 630.

⁷ 2004 NR 7.

⁸ In *S v Zemburuka* 2008 (2) NR 737 (HC) at page 738.

[9] I further agree that in the present matter the appellant does not set out the grounds on which he attacks the conviction, but the same cannot be said as regards sentence. I am of the view that the appellant actually sets out the basis of his appeal against sentence. He is stating that the 'sentence imposed is harsh'. What he in essence is saying is that the Regional Magistrate misdirected herself as the sentence imposed induces a sense of shock. I am able to make out what the substance of the complaint is, and in my view the letter in this case should be considered to be a valid notice of appeal in respect of the sentence. I am accordingly of the view that I cannot disturb the conviction of theft as read with the Stock Theft Act, 1990 (as amended).

[10] I now return to the proceedings before the Regional Magistrate, but before I do so, I find it appropriate to quote part of the questioning in terms of section 112(1)(b) of the Criminal Procedure Act, 1977 because the doubt that I expressed above (i.e. in paragraph 3) stems from the application of that section. The questioning in terms of section 112(1)(b) amongst others went as follows:

- 'Q: While you were there what wrong did you do that lead to your arrest?
 A: I slaughtered a sheep.
 Q: Who's sheep did you slaughter?
 A: I slaughtered my uncle's sheep.
 Q: Will you dispute it if it is said that Emma Lambert was the lawful owner of the sheep?
 A: No, I will not dispute, she is my uncle's daughter.
 Q: Will you dispute if it is said the value of the sheep is N\$ 500-00?
 A: No I will not dispute because I do not know.
 Q: Is this sheep stock?
 A: Yes it is stock.
 Q: Did the owner or the complainant give you the right to slaughter the sheep?
 A: No I did not have the right to slaughter.
 Q: What happened with the meat?
 A: I ate the meat.
 Q: Why did you slaughter the sheep?
 A: I slaughtered the sheep because I did not have anything to eat...'

The District Magistrates Court's verdict is recorded as follows:

'The court satisfied that the accused admits all the allegations in the charge and the accused is found guilty as charged (Stock Theft).'

⁹

[11] I find it appropriate to pause here to make some general comments as regards the transfer of the proceedings to the Regional Court for sentence. With the substitution of section 14 of the Stock Theft Act, 1990, by the Stock Theft Amendment Act, 2004¹⁰, the Legislature enacted prescribed minimum sentences which, depending on the *value* of the stock in question, must be imposed unless there are substantial and compelling circumstances present, justifying a lesser sentence of imprisonment. Section 14(1) of the Stock Theft Act, 1990 (as amended) in peremptory terms states:

- '14(1) Any person who is convicted of an offence referred to in section 11 (1)(a), (b), (c) or (d) that relates to stock other than poultry –
- (a) of which the value –
 - (i) is less than N\$500, shall be liable in the case of a first conviction, to imprisonment for a period not less than two years without the option of a fine;
 - (ii) is N\$500 or more, shall be liable in the case of a first conviction, to imprisonment for a period not less than twenty years without the option of a fine;
 - (b) shall be liable in the case of a second or subsequent conviction...'

⁹ It may be appropriate to remind oneself that the Charge against the appellant reads as follows:

"That the accused is/are guilty of the crime of theft –read with the provisions of section 11(1)(a), 1,14 and 17 of the Stock Theft Act, 1990 (Act No. 12 of 1990) as amended.

In that upon or about the 11/12th day of December 2009 and at or near Farm Skaap Pos Namatanga area in the District of Outjo the accused did unlawfully and intentionally steal stock to wit one sheep to the value of N\$ 500-00 the property of or in the lawful possession of Emma Lambert."

¹⁰ Act No. 19 of 2004.

[12] Because the prescribed minimum sentence of twenty years exceeds the sentencing jurisdiction of the magistrate's court (N\$20 000-00 or five years imprisonment or both), the accused is committed for sentence by the Regional Court in terms of section 114 (1) and section 116 (1) of the Criminal Procedure Act, 1977. It is therefore only in cases involving stock valued less than N\$500-00 that the magistrate's court has sentencing jurisdiction of up to five years.

[13] From the above quoted penalty clause it is evident that the referral of the accused to the Regional Court for sentence, depends *solely* on the value of the stock for which the accused stands convicted. It thus follows that the value of the stolen stock must be unequivocally admitted by the accused it is not sufficient if he simply does not dispute it. In this regard see the matters of *Erastus Munongo v The State*¹¹ and *S v Babieb*¹². In the *Erastus Munongo* case the court held that:

'...where an accused as in this case during section 112(1)(b) questioning states that he does not dispute the alleged value of the stock mentioned in the charge, it cannot be interpreted to mean that the value is admitted. It is nothing more than an estimated value given to the by the State and which generally is the value attributed to the owner thereof. On a plea of guilty, the State, for the purposes of sentence has to prove the value of the stock by leading evidence in terms of section 112(3)..."

[14] In the *Babieb* case it was held that:

'[7] It is not sufficient to inquire whether the accused "disputes" an allegation i.e. the charge sheet or not. Section 112 (1)(b) of the Criminal Procedure Act No. 51 of 1977 requires that the Magistrate "shall.... question the accused with reference to the alleged facts of the case in order to ascertain whether he admits the allegations in the charge to which he has pleaded guilty." Not disputing an allegation does not necessarily mean admitting the allegation. As was stated in *S v Baadjie* 1991 (1) SACR 677 (0) 679A "an..... indication that an allegation is not disputed is not admission or proof of its

¹¹ Case no CA 104/2010 an unreported case delivered on 9/12/2010 (reasons released on 17/01/2011), at paragraph [6].

¹² CR 180/2007 (an unreported judgment of delivered on 21 December 2007).

contents. There is a material difference between failure to dispute an allegation and failure to dispute evidence."

[8] I bear in mind that the value is not an element of the crime itself but it is a material jurisdictional fact when it comes to sentence, because it could mean the difference between a sentence of two years imprisonment and a sentence of twenty years imprisonment.'

[15] Where the value of the stock has not been determined, on which facts does the District Magistrates' Court rely in forming the opinion that the offence is of such gravity that it merits punishment in excess of the jurisdiction of that court in cases involving livestock? The answer to that question obviously lies in the penalty clause (s 14). It seems to me that the a District Magistrates' Court would only be entitled to commit an accused for sentence by the Regional Court *after* the value of the stock had been *determined*, either by means of an unequivocal admission by the accused or by presenting evidence to that effect. This court has as far back as 2005¹³ stated that the value of the stock is *crucial* to sentencing as it determines whether the prescribed minimum sentence applicable should be one of imprisonment of not less than *two* or *twenty* years. I am therefore of the view that in this case the District Magistrate should pertinently have instructed the accused of the importance of the value of the sheep and elicited evidence, as contemplated in section 112(3)¹⁴ of the Criminal Procedure Act, 1977 as to the value of the sheep.

[16] I echo the words of Heinrichsen, AJ¹⁵ when he said that there is an enormous difference between the compulsory sentence provided for in Section 14 (1)(a)(ii) quoted above which imposes a sentence of not less than 20 years and Section 14(1)(a)(i)

¹³ In the matter of S v Kauleefelwa 2006 (1) NR 102 (HC).

¹⁴ That section reads as follows:

'(3) Nothing in this section shall prevent the prosecutor from presenting evidence on any aspect of the charge, or the court from hearing evidence, including evidence or a statement by or on behalf of the accused, with regard to sentence, or from questioning the accused on any aspect of the case for the purposes of determining an appropriate sentence.'

¹⁵ In the Babieb matter *supra* footnote 5 at paragraphs [11] to [12].

which provides that if the value of the stock stolen is less than N\$500,00 the person concerned shall be liable in the case of a first conviction, to imprisonment for a period not less than two years without the option of a fine. Applied to this case the difference of One Namibia cent i.e. between the amount of N\$ 499-99 (less than N\$500-00) and N\$500,00 (N\$ 500-00 or more) is 18 (eighteen) years imprisonment.

[17] I therefore share the opinion of Liebenberg, J¹⁶ that the need to determine the proper value of the stock is imperative when it comes to borderline cases where a difference of as little as one Namibia cent in the value of the stock could result in a sentence of 20 years', instead of two years', imprisonment. It is therefore not something that should lightly be considered by a court and, in my view, it deserves proper consideration. The court went on and said¹⁷:

'I can see no reason why such value cannot already be determined in the magistrate's court before the accused is committed for sentence; in fact, in my view, it should already be determined in the magistrate's court because that court would only be entitled to come to the conclusion that the prescribed sentence exceeds its sentencing jurisdiction if the facts prove the value to be N\$500 and more.'

[18] In this matter the Regional Court simply accepted that the value of the sheep was N\$ 500. I say so because from the record of proceedings in the Regional Court the Regional Magistrate when sentencing the appellant said:

'Accused person I refer you to section 14(1) of the Stock Theft Amendment Act and once again I would like to inform you of the penalty clause as stipulated in the Act. If the amount is less than five hundred Namibian (*sic*) Dollars (N\$ 500), in the case of a first conviction to imprisonment for a period not less 2 years without the option of a fine. Is five hundred Namibian (*sic*) Dollars (N\$ 500) or more shall be liable in the case of a first conviction, to imprisonment for a period not less than twenty years without the option of

¹⁶ In S v Undari 2010 (2) NR 695 (HC).

¹⁷ *Supra* at 700H-I.

a fine. In your case the Accused person the amount involved is exactly five hundred Namibian (*sic*) Dollars (N\$ 500) which makes you to fall within(2).

[19] As I have indicated above the appellant stated that he does not dispute the value of the sheep because he does not know what the value is. The acceptance of that value without any evidence is undoubtedly an irregularity, tainting the sentencing procedure. Furthermore the Regional Magistrate states that she once again ‘informs the appellant of the penalty clause stipulated in the Act.’ I have perused the record and could not find anywhere where the Regional Magistrate informed the appellant about the penalty clause. I furthermore add that it is meaningless for a magistrate to simply inform an accused person about the penalty clause. The appellant was not legally represented and it was thus the duty of the magistrate to explain to him the provisions and implications of section 14 of the Stock Theft Act, 1990.

[20] The record of proceeding in the Regional Court reveals the following exchange between the Regional Magistrate and the appellant:

Court you pleaded guilty to the charge is that correct?

Accused Yes Your Worship guilty with a reason.

Court No it is a plea of guilty that was recorded by the Magistrate Mr. Swartz is it correct. Can you just answer the question did you plead guilty before Magistrate Swartz in Outjo?

Accused That is correct your worship.

Court Okay, Accused person according to the record of proceedings that was taken by the Magistrate Mr Swartz in Outjo, the Court went through the record of proceedings and the court is satisfied according to the record, that the plea was taken in accordance with the law and that you admitted to all the of the offence.

Accused yes

Court Is it correct, so you admitted to all the elements of the offence ?

Accused That is correct

Court Thank you. It is now the time the case has been transferred to the Regional Court. So it is now for your mitigation before Court and then for the Court to pass sentence.

Accused Okay.

Court You have the opportunity to address the court in mitigation...’

[21] Section 114 (3)(a) of the Criminal Procedure Act, 1977 in peremptory terms states that *“the court shall make a formal finding of guilty and sentence the accused.”* Liebenberg, J opined that “the intention of the Legislature why the Regional Court has to make a formal finding of guilty is because in terms of subsection (2) the accused could still cast doubt in that court’s (i.e. in the Regional Court’s mind) as to his guilt. Section 114 (2) reads:

“(2) Where an accused is committed under subsection (1) for sentence by a regional court, the record of the proceedings in the magistrate’s court shall upon proof thereof in the regional court be received by the regional court and form part of the record of that court, and the plea of guilty and any admission by the accused shall stand unless the accused satisfies the court that such plea or such admission was incorrectly recorded.”

{My emphasis}

[22] In this matter the appellant was unrepresented, I am of the opinion that when the appellant was asked by the Regional Magistrate whether he pleaded guilty in the magistrate court and his reply was that he pleaded guilty with a reason , that answer should have triggered the Regional Magistrate to inform and explain the purport of section 114 (2) of the Criminal Procedure Act, 1977 to the appellant and also explain to him that he could (on a balance of probability) satisfy the court that his plea or admissions or both the plea and admissions were incorrectly recorded. And if, after such an explanation, the court thereafter was of the opinion that the plea of guilty and admissions made by the appellant were indeed correctly recorded, it then had to formally convict the appellant and only thereafter proceed with sentence. If it was not satisfied, then a plea of not guilty had to be entered and the State requested to lead evidence. In the present matter the Regional Court did not do that and that court’s omission to act accordingly amounts to an irregularity and in these circumstances it cannot, in my view, be said that the appellant was given a fair trial as far as it concerns the proceedings on sentence.

[23] Section 14(2) of the Stock Theft Act, 1990 (as amended)¹⁸ provides that if a court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence. It has been held where an accused was not legally represented it was thus the duty of the magistrate to explain to him the provisions and implications of section 14 of the Act¹⁹. The Court said²⁰:

'In particular...the accused must further be afforded the opportunity to adduce proof of the existence of substantial and compelling circumstances. Where the accused person is a lay person and unlikely to fully understand this concept the court must explain to him that the court will take into consideration all facts and factors the accused wishes to advance, in order for the court to come to a just decision regarding the existence or otherwise of substantial and compelling circumstances.'

[24] In the present matter the Regional Magistrate state that "*The court finds in your case there are no compelling circumstances that can render a lesser sentence*". From the portion of the exchange between the Regional Magistrate and the appellant that I have quoted above in paragraph 20 it is clear that the magistrate did not explain to the appellant the he could place before her information, facts and factors which would enable her to consider substantial and compelling circumstances exist in this matter. How would the magistrate then have established the existence or non-existence of substantial and compelling circumstances? A failure by a magistrate to explain to an

¹⁸ That subsection actually reads as follows:

'(2) If a court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in subsection (1)(a) or (b), it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.'

¹⁹ In the matter of *Matheus Nakathingo v The State* Case No.: CA 200/2007 (An unreported judgment of the High Court of Namibia delivered on 24 February 2011. Also see the cases of *S v Victor Mbishi Mishe* Review Case No. 1425/2006 (An unreported judgment of the High Court of Namibia delivered on 14 November 2006); *S v George Johannes Kambonde* Review Case No. 1480/2006; Appeal judgment of *Levi Gurirab v The State* Case No. CA 190/2004 (An unreported judgment of the High Court of Namibia delivered on 12 July 2005).

²⁰ At paragraph [11].

unrepresented accused the purport of section 14(2) of the Stock Theft Act, 1990 (as amended) and to afford him an opportunity to place information before him or her constitutes an irregularity. All the above irregularities entitle this court to interfere with the sentencing discretion of the trial court. The sentence of twenty years is accordingly set aside.

[25] I digress here and state that it is totally unacceptable that this court time and again sets out guidelines to the District Magistrates' Courts and Regional Courts and those courts simply do not bother to read and study the judgments of this court and continue to commit the same errors that have been pointed out by this court in a string of judgments.²¹ I therefore hope that the Magistrates Commission will devise mechanisms to encourage magistrates to read and study both appeal and review judgments of this court.

[26] I now return to the sentencing of the appellant. Mr Khumalo (I pause here and express this court's appreciation of the industry of Mr Khumalo) who appeared before us submitted that the appellant was sentenced on the 2nd of March 2010, some 3 years ago and that the sentence provided for in terms of section 14(1)(a)(i) has already been satisfied and exceeded. He further submitted that this court may act in terms of section 304(2)(c)(iii) of the Criminal Procedure Act, 1977; and section 304(2)(c)(iv) of the Criminal Procedure Act, 1977. I agree with the submissions by Mr Khumalo.

²¹ The errors committed by the Regional Magistrate in this case were pointed out in a number of both review and appeal judgments of this court, to mention but a few of them I refer to the cases of *S v Victor Mbishi Mishe* Review Case No. 1425/2006 (An unreported judgment of the High Court of Namibia delivered on 14 November 2006) *S v Kauleefelwa* (*supra* footnote 13); *Erastus Munongo v The State* (*supra* footnote 11) and *S v Babieb* (*supra* footnote 12), *S v Augustus Justus Theodore* Case No.: CA 110/2009 (An unreported judgment of the High Court of Namibia delivered on 24 September 2009. *Matheus Nakathingo v The State* Case No.: CA 200/2007 (An unreported judgment of the High Court of Namibia delivered on 24 February 2011.

[27] In the result the following orders are made:

1. The appellant's conviction is, in terms of section 304(2)(c)(iii) read with section 309(3) of the Criminal Procedure Act, 1977 confirmed.
2. The sentence is set aside and is, in terms section 304(2)(c)(iv) read with section 309(3) of the Criminal Procedure Act, 1977 substituted with the following sentence:

'3 years, four months and ten days imprisonment'.

3. The sentence is, in terms of section 282 of the Criminal Procedure Act, 1977 antedated to 02 March 2010.

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APPEARANCES

APPELLANT:

In Person

RESPONDENT:

P S Kumalo

Instructed by the Prosecutor-General