

**CASE NO. CR 180/07**

**IN THE HIGH COURT OF NAMIBIA**

**THE STATE**

and

**JOHANNES BABIEB**

**HIGH COURT REF NO. 426/07**

**CORAM:** MANYARARA, AJ *et* HINRICHSEN A.J.

Delivered on: 21 December 2007

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**REVIEW JUDGMENT**

**HINRICHSEN A.J.**

[1] In this matter the Divisional Magistrate of Keetmanshoop requested this Court by way of special review in terms of Section 304 (4) of the Criminal Procedure Act to correct the error committed by the Regional Court Magistrate while presiding in the District Court in the district of Keetmanshoop. The error was the sentence which that Magistrate imposed namely 20 (twenty) years imprisonment of which 18 were suspended for 5 (five) years subject to the usual conditions. In doing

so the Magistrate exceeded the sentencing jurisdiction of the District Court.

[2] The Divisional Magistrate Keetmanshoop A.M SIBOLEKA rightly pointed out in his request to the Registrar of this Court that the section under which the accused was sentenced exceeds the jurisdiction of the District Court. The Section is Section 14(1)(a) (ii) of the Stock Theft Amendment Act 12 of 1990 as amended by Act 19 of 2004.

[3] The Section reads as follows:-

*"14 (i) 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).....(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;"*

[4] The fact that the Presiding Magistrate in this matter exceeded the jurisdiction of the Court is reason enough to set the sentence aside and substitute it with a competent sentence.

[5] However there is another important aspect which this Court has to take into consideration. The recorded proceedings relating to the stage leading to the conviction of the accused on his plea of guilty reveal the

following questions and answers as regards the value of the stock, in this case a goat, which the accused stole.

"Question – Do you know the value of the goat?"

Answer – It is N\$700,00.

Question – Do you dispute that value?"

Answer – No, I do not dispute it."

The Court's verdict is recorded as follows.

"Court satisfied that the accused is guilty of the theft of one goat valued at N\$700,00. Accused found guilty as charged."

[6] The impression one has when reading the record is that the accused heard the prosecutor mentioning the value of the stolen goats when reading out the charge sheet. Therefore, when the accused was asked whether he knew the value of the goat, he simply answered " It is N\$ 700,00 ". It seems that the Magistrate had the same impression because he was not satisfied with the answer. He therefore continued to ask " Do you dispute the value?" to which the accused replied " No, I do not dispute it"

Having received this reply, the Magistrate recorded that he was satisfied that the accused is guilty of the theft of a goat valued at N\$ 700.00.

[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 vs Baadjie* 1991 (1) SACR 677 (0) 679 a:

"an..... indication that an allegation is not disputed is not admission or proof of its 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.

[9] The record p 3 states " Right before Plea explained to the accused in terms of Annexure "B" – Annexure "B" was not included in the record at the time this judgment was first written. Unfortunately it took some time before this omission was rectified. As it now turns out Annexure "B" does not only explain to the accused his constitutional right to be defended by a legal practitioner, it also expressly quotes the wording of the relevant section of the Act.

- [10] However It is all very well to have the highly technical and complicated Stock Theft legislation simply quoted in terms of Annexure "B" to an undefended and uneducated accused . In this case the Court and the prosecution should pertinently have instructed the accused of the importance of the value of the goat in this borderline situation.
- [11] 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) 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.
- [12] Applied to this case the difference of N\$200,00 i.e. between the amount of N\$500,00 and N\$700,00 is 18 (eighteen) years imprisonment. It is not the task of this Court to judge on the merits and demerits of the underlying legislation. The difference in the gravity of sentence between stock valued below N\$500,00 and stock valued at or above N\$500,00 was not sufficiently and pertinently pointed out to the accused at any stage of the proceedings. It seems as though the value of N\$700,00 was casually placed on the stolen stock by the accused and accepted as such by the Court a quo without any expert evidence which would have been essential in this case. A legal practitioner defending the accused in this matter would and should

probably have advised his client to make an issue of the valuation of the stolen stock.

[13] Furthermore the Magistrate erred in not finding that there are obvious substantial and compelling circumstances in this case as envisaged in Section 14(2) of the Stock Theft Amendment Act No 19 of 2004 which justify the imposition of a lesser sentence than the sentence prescribed in sub-section 1(a) or (b) of Section 14.

[14] Instead the Magistrate took into account the Prosecutor's plea in aggravation treating the offence as very serious yet paradoxically considering that the accused was a first offender who did not waste the Court's time and who offered to compensate the complainant. The record states that the Magistrate considered that the accused had "shown contribution" whatever that may mean presumably indicating that the accused showed remorse.

[15] Speaking of the record it reveals an alarming scarcity of information relating to the accused's circumstances and illustrates the shortcomings of the proper presentation of mitigating circumstances of an accused appearing undefended.

There are further substantial and compelling circumstances:-

[16] The complainant received back the meat of the goat slaughtered and stated that he was in serious financial difficulty not being able to cope with expenditures mainly because he was at that stage unemployed.

[17] Being aware of the illegality of his deed he approached his mother with a request that the complainant be compensated although this was linked to a condition that the case be withdrawn against him. He stated that he had one child and was in arrears with that child's school fees.

[18] This Court is supported in its decision to consider and accept that substantial compelling circumstances exist by reference to the unreported case of The State vs Victor Mbishi Mishe, case no. CR 101/2006 decided in this Court. (The Mishe case). Similar circumstances existed in the Mishe case wherein the accused was never informed that he was facing a prescribed minimum sentence. The circumstances were that the accused in that case also pleaded guilty to a charge of theft in terms of the Stock Theft Act No 12 of 1990 having stolen a goat valued at N\$250,00. He was unemployed.

[19] In the Mishe case Liebenberg AJ also criticized the scarcity of facts on record. He states in paragraph [12]

“This clearly illustrates the duty of presiding officers to assist an undefended accused to place on record as many facts as possible

which will in turn assist the sentencing officer to impose a well balanced sentence that complies with all the well-known criteria set out in *S v Tjiho* 1991 NR 361 (HC) at 364I-365B."

While Liebenberg AJ in the Mishe case found that the offence was undoubtedly serious because "...the community in that area depend on their livestock as means of income, are all factors to be taken into account in sentencing" in the Mishe case the difference is that the accused was in no position to compensate the complainant in contradistinction to the present case where the accused agreed and was in the position to compensate. A further distinguishing factor in this case is that the complainant received back the carcass of the goat slaughtered.

This Court finds itself in agreement with the dictum of Liebenberg AJ pronounced in paragraph [15]:

"[15.] It is trite that specified sentences are not to be departed from lightly or for flimsy reasons and the lesser sentence to be imposed must according to the circumstances, still be an appropriate one. See: *S v Malgas* 2001 (1) SACR 469 (SCA)."

Considering all the circumstances of this case, this Court applies the following *dictum* in the Malgas case at p 482:

"If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence."

Effectively for sentencing purposes the complainant's loss may have been reduced to nil. Since the carcas was recovered and handed to the complainant its meat may have been still usable.

Finally a very basic consideration was overlooked by the magistrate which must count in mitigation of sentence:

In his plea explanation the accused's plea of guilty seems to hinge on his proposed settlement of the matter with the complainant. In return for accused compensating the complainant with two goats:-

" the complainant is prepared to withdraw the matter. He is here in Court." (Record p. 3)

The complainant was not called to give evidence.

And again in his plea for mitigation the accused repeats the proposed deal with the complainant on the latter's initiative ( record p 7)

The question here arises whether the accused pleaded guilty on the assumption rightly or wrongly that he would be treated leniently. He may even have assumed that the case against him would be a mere formality in the light of his agreement with the complainant.

Accordingly having found that Section 14 (2) applies in this case the Court hereby finds that substantial and compelling circumstances exist and imposes a lesser sentence in substitution as follows:-

1 (one) year imprisonment wholly suspended for 3 years on condition that the accused is not convicted of theft of Stock, committed within the period of suspension.

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**HINRICHSEN A.J**

**I agree**

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**MANYARARA, AJ**