CASE NO.: CR 17/2010

IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI

In the matter between:

THE STATE

and

ASSER HAUFIKU

(HIGH COURT REVIEW CASE NO.: 239/2009)

CORAM: LIEBENBERG, J. *et* TOMMASI, J.

Delivered on:

REVIEW JUDGMENT

LIEBENBERG, J.: [1] The accused was arraigned in the Magistrate's Court Tsumeb on a charge of theft, read with the provisions of the Stock Theft Act, 1990 (Act 12 of 1990) as amended. He pleaded guilty for having slaughtered one goat

valued at N$350-00 without permission of the owner whereafter was sentenced to two years imprisonment.

[2] On 17 September 2009 the following review query was directed to the magistrate;

> *"1. In view of the judgment delivered in **S v Kambonde** (unreported) Case No. CR 109/2006 delivered on 22 November 2006 the magistrate, before sentencing, should have explained to the accused the meaning of the phrase 'substantial and compelling circumstances' which he failed to do. Please explain.*
> *2. No reasons were given for the sentence imposed; did the magistrate find that there are no substantial and compelling circumstances present?*
> *3. If no substantial and compelling circumstances were found to exist, did the magistrate in view of the accused's personal circumstances consider a partly suspended sentence under section 297 (4) of the Criminal Procedure Act?"*

The magistrate's reply dated 19 July 2010 was received after **ten months** in the following terms:

> *"1. Should the Reviewing Judge not be satisfied that the proceedings were not (sic) in interest of justice, the conviction and sentence may be set aside.*
> *2. The Magistrate did not find that there are no substantial and compelling circumstances were present (sic).*
> *3. The Magistrate did not consider a partly suspended sentence under Section 294 (sic) of the CPA."*

[3] Before I consider the merits of this case it seems necessary to first make some comments on the manner in which the magistrate of Tsumeb handled this, and several other review cases in which queries were directed to him; and where the replies were received between *four* and *ten* months later, without any accompanying explanation for the delay. For example:

> (i) *The State v Liigius Salom* Case No. 67/2008 – The reply to a query dated 21.10.2009 was attended to on 19.07.2010 (nine months later). That was after it took ten months before the matter was sent on review.

(ii) *The State v Andries Nande* Case No. 568/2009 – After the Court was not satisfied with the reply received from the magistrate on a query directed to him, the Court on 23.03.2010 directed that the query should properly be dealt with. The reply dated 19.07.2010 was equally unhelpful and in order to finalise the matter (after five months), the required information relevant to the conviction, was obtained from the Prosecutor-General's Office.

(iii) *The State v Petrus Gamibeb* – Case No. 07/2010 – The first query was directed on 12.03.2010 which was not properly dealt with and the reply to a follow-up letter sent was only attended to on 19.07.2010, four months later.

[4] In the absence of any explanation justifying the inordinate delay in replying to queries directed to the relevant magistrate within a reasonable period of time; and, the superficiality with which this Court's queries are being dealt with, it would appear that the magistrate fails to realise that such conduct not only amounts to a dereliction of duty, but in particular, that it infringes on the Constitutional *right* of an accused to a fair trial which includes *the right to have case reviewed* in terms of s 302 (1) of the Criminal Procedure Act, within one week. The urgency of review proceedings is clear from s 303 which stipulates that: *"The clerk of the court in question shall within one week after the determination of a case ……forward to the registrar ……the record of the proceedings ……"* Although review cases are seldom dispatched to the registrar for review within the stipulated period of one week, it has always been the case that the preparation of review cases were treated as a matter of urgency and where time frames were not met due to reasons beyond the clerk of the court's control (e g for the transcribing of the record), a letter explaining the delay would usually accompany the review case. In the past this Court – despite the time restriction – has always shown a considerable degree of understanding for the difficulties experienced by the clerk of court who submits a review case out of time, but proffers a reasonable excuse explaining the delay.

[5] In view of the absence of *any explanation* from the magistrate explaining the inordinate delay in replying to the queries directed to him; and the superficial and most unsatisfactory response received from the magistrate in the abovementioned

cases, it is obvious that such conduct is not conducive and in the interest of justice, as it infringes on the Constitutional rights of the unrepresented accused. As a court official, a magistrate has a *duty* to administer justice; and failure to do so, amounts to a dereliction of duty – which appears to have been the case in the abovementioned cases. Such conduct tarnishes the image of the magistracy as a whole and should be addressed by the relevant authority.

[6] I now turn to consider the merits of the matter under review. *Ex facie* the record of the proceedings it is clear that on their first appearance in court on 30 March 2010, the accused persons were informed of the sentencing provisions as set out in s 14 (1) of the Stock Theft Act of 1990 (as amended) ("the Act") as well as their right to legal representation whereafter both opted to conduct their own defence. Accused no. 1 pleaded guilty and after his co-accused pleaded not guilty, the court ordered a separation of trials and the latter stood down. After questioning accused no. 1 in terms of s 112 (1) (b) of the Criminal Procedure Act, he was convicted and the court proceeded with sentence. When questioned on the value of the stolen goat the record reflects:

> *"Q; It is alleged that the stolen goat belongs to Mr. Dawid Horetsub and the value is N$350-00. Do you dispute it?*
> *A: I am not disputing."*

[7] Although the value of the stock on a charge of theft is not an element of the offence as such, the value of the stolen stock however, is *crucial* to sentencing in that the court is bound by the prescribed minimum sentences set out in s 14 of the Act, where the accused is a first offender and where there are no substantial and compelling circumstances present, justifying the imposition of a lesser sentence of imprisonment. The facts of the present case are similar to what transpired in *S v Baadjie en 'n Ander* 1991 (1) SACR 677 (O) where the accused persons, during the s 112 (1)(b) questioning, said that they did not know the value of the sheep they had stolen, but would not dispute that it was R170-00. On review the Court held *"that the accuseds' indication that they did not dispute the allegation did not amount to an admission as to the value of the sheep."* I respectfully agree, and in the instant matter

the court should not simply have accepted the value of the goat to have been *admitted* by the accused, as he did not admit it – he simply did not *dispute* it.

[8] For the purpose of sentence the value of the goat had to be *established* and in the circumstances the court should have informed the prosecution that the value of the goat had not been determined and therefore it had to present evidence in terms of s 112 (3) to prove the value of N$350-00 as alleged in the charge, before sentencing. Section 112 (1)(b) provides that:

> *"(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."* (my emphasis)

As stated, the value of the stolen stock is crucial to sentencing and in the present circumstances the value of the goat could be determined by presenting reliable evidence before the court and once satisfied, the court would be able to know which prescribed minimum sentence (two or twenty years) finds application. The court should not take judicial notice of the value of stock because the value of one goat or sheep might reasonably be assumed to be under N$500-00; however, it might be a stud animal of higher value, justifying the imposition of a sentence of not less than twenty years.

[9] This underscores the importance for the court to have the value of the stolen stock in question properly determined, without having to extract such information from an unrepresented and unsophisticated accused who, in the majority of cases coming before this Court, is hardly in any position to make an admission as to the value of livestock, due to his or her lack of knowledge on the subject. It will serve all prosecutors well to realise that it is the State who relies on the value of the stock in cases of stock theft and therefore, the State has the burden of *proving* the value to the extent that the sentencing court is satisfied that it has properly been established. By so doing there would be no doubt as to the sentence the court is obliged to impose

under the Stock Theft Act. (See: *Naurasana Undari v The State* (unreported) Case no. CA 113/2009 delivered on […..])

[10] As stated in *Undari* (supra), there is also another reason why it is important that the value of stolen stock is *properly* proved before the court and that is that the court may under s 17 of the Stock Theft Act make an order for compensation in favour of the complainant; which may not exceed the sum of the *actual loss or damage suffered* as a result of the offence committed. In the *Baadjie* matter (supra) the court held that it was a misdirection where the trial court made a compensatory order based on the accuseds' statement that they did not know the value of the sheep and that they did not dispute the State's allegation regarding the value (679b-c). I fully endorse this view.

[11] Although the penalty clause relating to stock theft (s 14 (1) and (b)) was brought to the attention of the accused before sentencing, the import of the phrase "substantial and compelling" was not explained to the unrepresented accused; and more so, that he could put before the court facts which in the circumstances would not only be substantial, but also compelling; justifying the imposition of a lesser sentence of imprisonment. In *S v Gurirab* 2005 NR (HC) Heathcote, AJ stated the following at 517E-G:

> *"In casu, the magistrate should have, at the latest, after the accused was convicted, informed him that it was the duty of the court to imprison the accused for a minimum specified period unless substantial and compelling reasons exist. That in itself would not have sufficed. Lawyers grapple with the concept 'substantial and compelling reasons'. What would the position of an unrepresented accused be, who has just been found guilty, but does not really understand or appreciate the fact that he might be going to prison for 15 years 'unless substantial and compelling reasons' are advanced and found to be in existence."*

Although these remarks were made in the context of a conviction under the Combating of Rape Act, 2000, this Court has found the guidelines laid down in the *Gurirab* case to be equally applicable to cases of stock theft, read with provisions of

the Stock Theft Act (*The State v Victor Mbishi Mishe* (unreported) Case No. CR 101/2006 delivered 14.11.2006).

[12] In the aforementioned cases it has been said that it is *imperative* that the unrepresented accused be assisted by the court and where the court fails to do so, that it amounts to an irregularity. It cannot be expected from the unrepresented, unsophisticated accused to appreciate the import of the concept of "substantial and compelling circumstances"; hence the need for the court to explain it to the accused so that he or she exactly understands the importance of being afforded the opportunity of placing facts or evidence before the court that could assist the court in its finding of whether the circumstances present, are substantial and compelling. It is thus insufficient to only explain to the unrepresented accused, as was done in the present case, that he has the right to give evidence; call witnesses, or address the court in mitigation.

[13] Furthermore, where the facts placed before the court by the accused are scanty, then the court should assist the accused by posing exploratory questions to the accused to elicit information from him which could be helpful in determining what a suitable sentence would be. None of this was done in the present case, which omission amounts to an irregularity; because, had the accused received the necessary assistance, the court reasonably might have come to a different conclusion as far as it concerns the existence of substantial and compelling circumstances. In the process the court ought to have obtained clarity of the accused's age and what his exact age was at the stage he committed the crime. The importance thereof lies in the fact that, where the accused was *under* the age of eighteen years, then the court was entitled to consider imposing a partly suspended sentence as provided for in s 14 (4) of the Stock Theft Act, 1990. The relevant section reads:

> *"(4) The operation of a sentence, imposed in terms of this section in respect of a second or subsequent conviction of an offence referred to in section 11(1)(a), (b), (c) or (d), shall not be suspended as contemplated in section 297(4) of the Criminal Procedure Act, if such person was at the time of the commission of any such offence eighteen years of age or older."* (my emphasis)

In the light of the accused stating his age as eighteen years at the time of sentencing, it might be possible that he was still seventeen when he committed the crime; something the court was bound to determine *before* sentencing the accused. The magistrate in his reasons said that he did not consider that possibility which, clearly, constitutes a misdirection.

[14] In the circumstances, the sentence cannot be permitted to stand and although the conviction is in order, the sentence has to be set aside.

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

1. The conviction is confirmed.
2. The sentence is set aside and the matter is remitted to the magistrate to sentence the accused afresh with full regard of the views expressed by the Court in this judgment.
3. The sentencing court must have regard to that period of the sentence already served by the accused.
4. The Registrar is directed to bring the remarks made by the Court in this judgment to the attention of the Magistrates' Commission.

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LIEBENBERG, J

I concur.

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TOMMASI, J