



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case no: CA 36/2011

In the matter between:

JESAYA HIHEPA

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Hihepa v The State* (CA 36/2011) [2013] NAHCNLD 31 (24 May 2013)

Coram: LIEBENBERG J and TOMMASI J

Heard: 17 May 2013

Delivered: 24 May 2013

Flynote: Appeal – Sentence – Sentence imposed disproportionate to the crime and legitimate expectations of society –penalty provisions of Stock theft Act, 12 of 1990, as amended, being struck down as being unconstitutional – court’s discretion no longer limited – sight should not be lost of the reasoning behind legislature prescribing stiff mandatory sentences for stock theft – stock theft is a serious offence and prevalent in region where subsistence farmers rely on cattle for their livelihood.

Summary: This is an appeal against the sentence of 20 (twenty) years’ imprisonment imposed by the regional court having found no substantial and

compelling circumstances. The appellant was convicted of stock theft in that he stole two head of cattle from a neighboring farm. The sentence of 20 years' imprisonment which was imposed was found to be disproportionate to the crime and legitimate expectations of society. The court of appeal is entitled under these circumstances to interfere. The sentence is set aside and substituted with a sentence of 7 (seven) years' imprisonment of which three years' imprisonment is suspended for five years on the usual conditions. The sentence is ante-dated.

ORDER

1. Condonation is granted for the late noting of the appeal.
2. The appeal against sentence is upheld; the sentence imposed by the regional court sitting in Opuwo is set aside and substituted with the following sentence:
The accused is sentenced to 7 (seven) years' imprisonment of which 3 (three) years' imprisonment is suspended for five years on condition that the accused is not convicted of stock theft committed during the period of suspension
3. The sentence is ante-dated to 29 September 2008

JUDGMENT

TOMMASI J (LIEBENBERG J concurring):

[1] The appellant was convicted of stock theft, read with the provisions of the Stock Theft Act, 12 of 1990 as amended in the regional court sitting at Opuwo on 29 September 2008 to 20 years' imprisonment. It is against this sentence that the appellant now appeals.

[2] The appellant noted his appeal out of time and applied for condonation for the late noting of the appeal. The appellant made out a case by providing an acceptable explanation for the delay and showed that there are reasonable prospects of

success. The application for condonation was not opposed by the respondent. Condonation is therefore granted.

[3] The appellant relied on the following grounds of appeal:

1. The learned magistrate erred in law and/or on the facts in not finding substantial and compelling circumstances;
2. The sentence imposed was harsh under the circumstances and induces a sense of shock especially bearing in mind that the stolen stock was recovered and the complainant did not suffer any loss.
3. The learned magistrate overemphasized the seriousness of the offence at the expense of the appellant's personal circumstances.
4. The learned magistrate erred in law and on the facts in not having regarded the appellant as a youthful offender.

[4] The accused stole two head of cattle from a neighboring farm. He sold it for a box of wine and a promise of a further N\$1000 in cash. His father instructed him to return the cattle which he did. Appellant was a 29 years old bachelor with no children. He was a cattle herder for his grandfather. He is a first offender. The value of the cattle was estimated at N\$2000 each by the complainant and N\$1000 each by the grandfather of the appellant. The court a quo found the grandfather to be an honest witness, despite the fact that he was related to the appellant. The complainant exaggerated his loss and a more realistic value of the cattle was that of the grandfather.

[5] The magistrate found no substantial and compelling circumstances existing which justified the imposition of a lesser sentence and he consequently sentenced the appellant to 20 (twenty) years' imprisonment, the minimum sentence prescribed by the Act.

[6] Much has already been said in other judgments in respect of the magistrate's duties when it comes to sentencing and there is no need to repeat same here¹. I however wish to comment on the manner in which the grounds of appeal are phrased. It is evident that the court imposed the mandatory minimum sentence prescribed by the Act. Subsequent to this sentence being handed down, this court struck the penalty provisions of the Act which prescribed a mandatory minimum

¹ S v LIMBARE 2006 (2) NR 505 (HC), page 510, para [11] & 13; S v GURIRAB 2005 NR 510 (HC)

sentence of twenty years' imprisonment, as being unconstitutional.² The effect of this judgment has been discussed in various judgments of this court.³ One would have expected the grounds to have reflected the new development in respect of sentences which were imposed in terms of the penalty provisions, prior to it being struck and read down, particularly when one considers the fact that these grounds were formulated by a legal practitioner. In its current form, although it cannot be said to be non-compliant with the rules, do not reflect the current legal position.

[7] The sentence of 20 years' imprisonment is shockingly inappropriate. It is disproportionate to the crime and legitimate expectations of society. For this reason alone this court is allowed to interfere with the sentence imposed. The respondent conceded this. In view of the afore-mentioned decisions the court's discretion is no longer limited. This does not mean that the courts should lose sight of the initial reasons behind the legislator prescribing stiff minimum custodial sentences for the offence of stock theft. In this region farmers consider cattle to be valuable assets. For subsistence farmers stock theft often means the loss of their livelihood. Deterrent sentences which fit the crime, the offender and satisfy the legitimate expectations of society should still be imposed.

[8] If one weighs the appellant's personal circumstances, that he is a first offender and that the cattle were recovered, against those factors in aggravation, the latter outweighs his personal circumstances and a custodial sentence would be inevitable. The appellant to date has already served a term of imprisonment of just over 4 years and 7 months. An appropriate sentence would be a custodial sentence which is consistent with other sentences imposed by this court for similar offences. A part thereof would be suspended to serve as a personal deterrent.

[9] In the result the following order is made:

1. Condonation is granted for the late noting of the appeal.
2. The appeal against sentence is upheld; the sentence imposed by the regional court sitting in Opuwo is set aside and substituted with the following sentence:

² See *Daniel v Attorney-General and Others*; *Peter v Attorney-General and Others* 2011 (1) NR 330 (HC)

³ *The State v Ismael Huseb*, unreported case no CR 95/2011 delivered on 21 October 2011; *Petrus Lwisi v The State*, unreported case; No CA92/2009 delivered on 18 November 2011

The accused is sentenced to 7 (seven) years' imprisonment of which 3 (three) years' imprisonment is suspended for five years on condition that the accused is not convicted of stock theft committed during the period of suspension

3. The sentence is ante-dated to 29 September 2008

MA Tommasi
Judge

JC Liebenberg
Judge

APPEARANCES

FIRST APPELLANT : R Nathaniel Koch
Of The Directorate of Legal Aid, Oshakati

RESPONDENT : R Shileka
Of Office of the Prosecutor- General, Oshakati