

REPUBLIC OF NAMIBIA

NOT REPORTABLE



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI
SPECIAL REVIEW JUDGMENT**

Case No: CR 17/2017

In the matter between:

THE STATE

and

SHILONGO ELIASER

1ST ACCUSED

LAMEK JESAYA

2ND ACCUSED

HIGH COURT NLD REVIEW CASE REF NO: **239/2017**

Neutral citation: *S v Eliaser* (CR 17/2017) [2017] NAHCNLD 92 (12 September 2017)

Coram: TOMMASI J and JANUARY J

Delivered: 12 September 2017

Flynote: Special Review – Plea of guilty – Stock theft Act – Sentence to a fine – Misled by penalty clause put by public prosecutor – Accused has a defence – Magistrate retired – proceedings set aside.

Summary: Two accused were charged with Stock theft of one goat valued N\$950. They were sentenced to a fine or imprisonment. The Stock theft Act makes no provision for a fine. One of the accused raised a defence. The presiding magistrate is now retired.

ORDER

1. The conviction of accused 1 is confirmed;
 2. The conviction of accused 2 is set aside;
 3. The sentences of both accused are set aside;
 4. The matter is remitted to the Divisional Magistrate, Oshakati, with a direction that another magistrate may sentence accused 1 afresh in accordance with the provisions of section 275 of the Criminal Procedure Act, Act 51 of 1977.
 5. The proceedings of accused 2 is remitted with a direction that a plea of not guilty in terms of section 113 of the Criminal Procedure Act, Act 51 of 1977 is entered and that a trial is held.
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JUDGMENT

JANUARY J (TOMMASI J concurring)

[1] This matter is sent to me by the Divisional Magistrate, Oshakati for special review. The former presiding magistrate has in the meantime retired.

[2] The two accused were charged with Stock Theft read with the provisions of sections 11(1)(a), 1, 14 and 17 of the Stock Theft Act, Act 12 of 1990 as amended. The

case involved 1 goat valued at N\$950. The case was finalized on 30 January 2017. It was received on 04 August 2017 by the Office of the Deputy Registrar.

[3] Both accused pleaded guilty and were sentenced to a fine of N\$1000 or 6 months imprisonment. Section 14 of the Stock Theft Act of 1990 *inter alia* as amended reads as follows;

'14 Penalties for certain offences

(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; . . . '

[4] It is clear that the accused could not have been sentenced to pay a fine after conviction and it is a misdirection by the former magistrate. I need to mention that in the record, the annexure to the charge sheet in relation to the charge, reflects with reference to the penalty clause *inter alia* as follows;

'PENALTY CLAUSE

(see sec 14). . . Magistrates Courts shall have jurisdiction to impose-

- (a) In the case of a first conviction for any offence referred to in paragraph (a), ... (b),(c), or (d) of subsection (1) of section 11-
 - (i) Imprisonment for a period not exceeding ten years; or
 - (ii) a fine not exceeding N\$ 20 000 or
 - (iii) both such fine and imprisonment;

(b) ...in the case of a second or subsequent conviction for any such offence ...

[Sec 14 amended by sec 6 of Act 4 of 1991 and substituted by sec 3 of Act 19 of 1993 and by sec 2 of Act 19 of 2004.]'

The above quoted penalty clause reflects the provision of the Stock Theft Act before it was amended and I refer to it to again emphasize the point that magistrates should not always rely on everything submitted by prosecutors and/or legal representatives that could be misleading on occasions. Presiding Officers should keep themselves abreast of the law.

[5] With reference to this case, accused 2 raised a possible defence in that he informed the learned magistrate that he bought the goat from accused 1. Accused 1 allegedly promised him to bring proof of ownership the following day. Accused 2 subsequently slaughtered the goat. I agree with the Divisional Magistrate that the presiding magistrate could not have been satisfied that accused 2 is guilty and should have entered a plea of not guilty in terms of s 113 of the Criminal Procedure Act, Act 51 of 1977. The former magistrate is no longer active as a magistrate.

[6] The conviction of accused 1 is in accordance with justice but not the sentence. Accordingly the matter is remitted to the Divisional Magistrate with a direction that another magistrate may sentence accused 1 afresh in accordance with the provisions of s 275 of the Criminal Procedure Act 51 of 1977.

[7] The proceedings of accused 2 are remitted with a direction that a plea of not guilty in terms of s 113 of the Criminal Procedure Act, Act 51 of 1977 is entered and that a trial is held.¹

[8] The proceedings are not in accordance with justice for the aforementioned reasons and stand to be set aside.

[9] In the result:

Hiemstra's Criminal Procedure, A Kruger, (2009) see Section 118, Commentary at p18-12.

1. The conviction of accused 1 is confirmed;
2. The conviction of accused 2 is set aside;
3. The sentences of both accused are set aside;
4. The matter is remitted to the Divisional Magistrate, Oshakati, with a direction that another magistrate may sentence accused 1 afresh in accordance with the provisions of s 275 of the Criminal Procedure Act, Act 51 of 1977.
5. The proceedings of accused 2 is remitted with a direction that a plea of not guilty in terms of section 113 of the Criminal Procedure Act, Act 51 of 1977 is entered and that a trial is held.

**H C JANUARY
JUDGE**

I agree,

**M A TOMMASI
JUDGE**