

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case no: CA 19/2013

In the matter between:

JOHANNES NANGOMBE

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Nangombe v The State* (CA 19/2013) [2013] NAHCNLD 60 (12 December 2013)

Coram: TOMMASI, J

Heard: 09 December 2013

Delivered: 12 December 2013

Flynote: Criminal Procedure – Sentence – Stock theft – sentence disproportionate to the offence committed, the offender and legitimate expectations of society – matter remitted to regional court to sentence the accused afresh.

Summary: The appellant appealed against the sentence imposed by the regional court. The appellant was sentenced to 20 years' imprisonment of which 10 years were suspended in accordance with the provisions of s14(1)(a)(ii) of the Stock Theft Act,

1990 (Act 12 of 1990) as amended. The record of the sentencing procedure was incomplete but the court was able to consider the appeal on the information recorded. At the time of sentencing the magistrate was required to act in terms of s114 of the Criminal Procedure Act, 1977 (Act 51 of 1977) and if satisfied that the appellant had correctly been convicted of the offence, to sentence the appellant in accordance with the provisions of s14 of the Stock Theft Act, 1990 (Act 12 of 1990) as amended. The appellant was correctly convicted in the district court and the conviction was confirmed. The regional court magistrate evidently did not find substantial and compelling circumstances and imposed the prescribed minimum sentence provided for in terms of s14(1)(a)(ii). The mandatory sentence prescribed has subsequently been struck down as being in conflict with the constitution but this does not *per se* mean that the sentence imposed was inappropriate. The record at hand provides details of the offence and limited personal information of the appellant. On the available facts the court was able to determine that the sentence imposed was disproportionate to the offence, the offender and the legitimate expectations of society. The sentence was accordingly set aside. The court could not determine an appropriate sentence and the matter was remitted to the regional court to sentence the accused afresh.

ORDER

1. The conviction is confirmed;
2. The appeal against sentence is upheld;
3. The sentence imposed by the regional court magistrate is set aside;
4. The matter is remitted to regional court for the district of Opuwo to sentence the accused afresh; and
5. The presiding regional court magistrate is further ordered to take into consideration the period of imprisonment already served, when sentencing the accused.

JUDGMENT

TOMMASI J

[1] The appellant herein was convicted in the district court of stock theft after he pleaded guilty. He was hereafter committed for sentence to the regional court in terms of s114 of the Criminal Procedure Act. The latter court imposed a sentence of 20 years' imprisonment of which 10 years were suspended on condition that the accused not be convicted of stock theft committed during the period of suspension. This sentence was imposed in accordance with the provisions of s14 of the Stock Theft Act, 1990 (Act 12 of 1990) as amended.

[2] The appellant lodged an appeal against his sentence and appeared in person. He requested this court in his notice of appeal to reduce his sentence in view of the following circumstances:

- (a) he pleaded guilty to the charge, was remorseful and he is capable of being reformed;
- (b) he was a first offender
- (c) he was not a threat to society;
- (d) he has a family and was capable of generating an income in order to financially support his family.

[3] The record of the sentencing procedure in the regional court however is not complete. The clerk of court attached an affidavit. The two salient facts gleaned from this document are that the transcribers failed to provide a typed record for almost two years and the magistrate had kept no notes or had destroyed his notes. This is a poor attempt at reconstructing the record. The failure of the transcribers to provide the clerk of the court with a typed record has delayed the hearing of the appeal for almost two years. It is trite that the appellant has the duty to ensure that the court of appeal is provided with a complete record. The appellant herein however is unrepresented and he has limited scope and skill to meaningfully participate in the reconstruction of the record.

[4] The question is whether this court, on the record before it, is in a position to consider the appellant's appeal against sentence. The regional court had to comply with the provisions of s114 of the Criminal Procedure Act. If satisfied that the accused had correctly been found guilty the regional court magistrate had to formally record a finding of guilty and thereafter the magistrate had to determine whether there were substantial and compelling circumstances present which would justify a lesser sentence than the prescribed minimum sentence of 20 years' imprisonment.

[5] The record reflects that the prosecutor handed the record of the district court's to the regional court magistrate. It further reflects that the prosecutor brought it to the magistrate's attention that the ownership and value of the stock was not properly canvassed by the district court magistrate during questioning in terms of s112(1)(b) of the Criminal Procedure Act. What followed hereafter was mechanically recorded and not transcribed for reasons mentioned above. The sentence imposed was recorded. This court may with reasonable certainty infer from the notes recorded by the regional court magistrate that he was satisfied that the appellant had correctly been convicted. The value of the cattle is in any event not an essential element of the offence of theft. The appellant admitted that he stole someone's cattle which did not belong to him. The appellant was correctly convicted and the conviction by the district court may be confirmed.

[6] The regional court evidently did not find substantial and compelling circumstances and therefore imposed the minimum sentence prescribed by s14(1)(a)(ii) for stock theft where the value of the stock exceeds N\$500. The minimum sentence prescribed in terms of s14(1)(a)(ii) has subsequently been struck down as being in conflict with the Constitution by a full bench decision of this court in *Daniel and Another v Attorney-General and Others*.¹ This does not *per se* mean that the sentence ought to be set aside.

[7] The record reflects that the appellant was a 36 year old first offender and that he stole two heads of cattle which the owner had left unattended. Stock theft is a prevalent offence and it severely impacts on subsistence farmers who rely on livestock for their

¹ 2011 (1) NR 330 (HC)

livelihood. It is the legitimate expectation of society that the courts would impose deterrent sentences. The serious nature of the offence and the interest of society invariably outweigh considerations of the personal circumstances of the accused. This however does not mean that a lengthy custodial sentence for stock theft is warranted in all cases. Each case has to be considered on its own facts. In this instance the sentence of 20 years imprisonment of which 10 years are suspended is disproportionate to the offence committed by the appellant i.e the theft of two heads of cattle considering that he was a first offender who pleaded guilty. It is furthermore disproportionate to the legitimate expectations of society. This would explain why the magistrate suspended half of the mandatory minimum sentence. The sentence under these circumstances cannot be allowed to stand.

[8] Counsel for the respondent submitted that the court has sufficient information which may be gleaned from the record of the proceedings in the district court to arrive at an appropriate sentence. This court, in the absence of evidence of all the factors in mitigation and aggravation, cannot do justice by imposing a sentence on the facts before it. It is for this reason that the matter should be remitted to the regional court for that court to sentence the appellant afresh. The appellant already served over 7 years' imprisonment and the sentencing magistrate should take the term already served into consideration when sentencing the appellant.

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

1. The conviction is confirmed;
2. The appeal against sentence is upheld;
3. The sentence imposed by the regional court magistrate is set aside;
4. The matter is remitted to regional court for the district of Opuwo to sentence the accused afresh; and
5. The presiding regional court magistrate is further ordered to take into consideration the period of imprisonment already served, when sentencing the accused.

M A Tommasi
Judge

APPEARANCES

APPELLANT : In Person

RESPONDENT : N Wamambo
Of Office of the Prosecutor- General, Oshakati