

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: CR 06/2014

In the matter between:

THE STATE

and

MATHEUS KAMBONDE

High Court NLD Review Case Ref No.: 425/2013

Neutral citation: *S v Kambonde* (CR 06/2014) [2014] NAHCNLD 15 (5 March 2014)

Coram: HOFF J and LIEBENBERG J

Delivered: 05 March 2014

Flynote: Criminal procedure – Sentence – Stock theft (c/s 11 (1)(a) of Act 12 of 1990) – Fine imposed – Section 14 (1)(a) of the Stock Theft Act not providing for fines for stock theft – Sentence not proper – Fine set aside and substituted with custodial sentence.

ORDER

1. The conviction is confirmed.
2. The sentence is set aside and substituted with a sentence of 12 months' imprisonment, wholly suspended for 5 years on condition that the accused is not convicted of contravening s 11 (1)(a) of Act 12 of 1990, committed during the period of suspension.
3. The sentence is antedated to 30 October 2013.

JUDGMENT

LIEBENBERG J (HOFF J concurring):

[1] The accused appeared as accused no 2, together with two other accused on a charge of theft, read together with the provisions of s 11 (1)(a) of the Stock Theft Act, 12 of 1990 (as amended) in the magistrate's court Ohangwena. After evidence was heard accused no's 1 and 3 were discharged while accused no 2 was convicted of theft of one goat. The conviction is in order and will be confirmed. The sentence however is not a proper and for reasons to follow falls to be set aside.

[2] The court also found the alleged value of the goat (N\$1 500), as per the charge, not duly proven and proceeded to sentencing. The accused was sentenced to a fine of N\$2 000 or 12 months' imprisonment in default of payment, wholly suspended for 5 years on condition of good conduct.

[3] On review I directed a query to the magistrate enquiring on what authority the court acted when imposing a fine. The learned magistrate in his reply conceded that he had erred and should not have imposed a fine. He further proposed that the sentence should be substituted with a term of imprisonment, wholly suspended.

[4] It is settled law – as the magistrate correctly concedes – that any person convicted of theft of stock in contravention of s 11 (1) of the Stock Theft Act, 12 of 1990 (as amended), is liable to a sentence of imprisonment (*S v Lwishi*¹). The fine imposed in this instance is therefore not competent and cannot be permitted to stand.

[5] The magistrate invites the court to substitute the sentence with a wholly suspended sentence of imprisonment. Whereas the value of the stock involved had not been properly proved before the court below, the correct approach to sentence, in such instance, is stated in *S v Kauleefelwa*² where it is said:

'In the absence of such proof [the value of the stock], the magistrate will be constrained to apply the provisions of s 14(1)(a)(i) and to sentence the accused, if he is a first offender, to imprisonment for a period of not less than two years without the option of a fine.' (at 105B-C)

[6] In view of the court's finding that the value of the stock was unknown the provisions of s 14 (1)(a)(i) find application ie the mandatory sentence of imprisonment for a period of not less than two years without the option of a

¹ 2012 (1) NR 325 (HC).

² 2006 (1) NR 102 (HC).

fine. The court is entitled to suspend part of the sentence but not the whole sentence (s 297 (4) of CPA). However, if the court is satisfied that substantial and compelling circumstances exist, justifying the imposition of a sentence less than the prescribed two years' imprisonment, it may suspended the entire sentence (of imprisonment).

[7] In the present case the court's *ex tempore* judgement reflects that it found substantial and compelling circumstances to exist; furthermore, that because of the accused's poor health a custodial sentence was not an option. Having found substantial and compelling circumstances the court was thus entitled to impose a wholly suspended sentence. It appears to me in the circumstances of the present case justified and proper to substitute the sentence with a wholly suspended custodial sentence.

[8] In the result, it is ordered:

1. The conviction is confirmed.
2. The sentence is set aside and substituted with a sentence of 12 months' imprisonment, wholly suspended for 5 years on condition that the accused is not convicted of contravening s 11 (1)(a) of Act 12 of 1990, committed during the period of suspension.
3. The sentence is antedated to 30 October 2013.

JC LIEBENBERG
JUDGE

EPB HOFF
JUDGE