

REPORTABLE

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: CR 6/2013

In the matter between:

THE STATE

and

BENJAMIN TJIROMONGUA

(HIGH COURT MAIN DIVISION REVIEW REF NO 1946/2012)

Neutral citation:

S v Tjiromongua (CR 06-2013) [2013] NAHCMD 31 (5 February 2013)

Coram: VAN NIEKERK, J and SHIVUTE, J

Delivered: 05 February 2013

Flynote: Criminal law – Contravention of section 11(1)(a) of Stock Theft Act, 1990 (Act 12 of 1990) – Ambit and effect of decision in *Daniel v Attorney-general and others; Peter v Attorney-general and others* 2011 (1) NR 330 (HC) clarified.

Summary: The Court clarified the ambit and effect of *Daniel v Attorney-general and others; Peter v Attorney-general and others* 2011 (1) NR 330 (HC). In that case the High Court did not strike down any provision of the Stock Theft Act, 1990 (Act 12 of 1990) relating to an offence where the value of the stock is less than N\$500, i.e. in relation to section 14(1)(a)(i). The applicable sentence in such a case is still imprisonment for a period of not less than two years without the option of a fine. Furthermore, the only sentence that may be imposed for stock theft, irrespective of whether the value is more or less than N\$500, is still only imprisonment without the option of a fine. It is therefore not correct to state that the courts may impose ‘any’ appropriate sentence for stock theft.

The reading down of section 14(2) should also be noted. The effect is that in cases where the offence is one of a contravention where section 14(1)(a)(i) is applicable, i.e. where the value is less than N\$500, the court is still required to consider whether there are any substantial and compelling circumstances which justify the imposition of a lesser offence than two years without the option of a fine.

ORDER

1. The conviction is confirmed.

2. The sentence is set aside and substituted with the following sentence:

20 (twenty) months imprisonment of which 10 (ten) months are suspended for 4 (four) years on condition that the accused is not convicted of an offence of a contravention of section 11(1)(a) of the Stock Theft Act, 1990 (Act 12 of 1990), committed within the period of suspension.

REVIEW JUDGMENT

VAN NIEKERK, J (SHIVUTE, J concurring):

[1] The accused in this matter appeared in the magistrate's court of Okakarara on a charge of contravening section 11(1)(a) of the Stock Theft Act, 1990 (Act 12 of 1990), in that he stole a sheep valued at N\$750. The offence occurred on 15 September 2012 and the accused appeared before the magistrate on 18 September 2012. By then the judgment of this Court in *Daniel v Attorney-general and others; Peter v Attorney-general and others* 2011 (1) NR 330 (HC) had already been delivered 18 months before. In that judgment the Court held (at 356A) that sections 14(1)(a)(ii) and 14(1)(b) of the Stock Theft Act were unconstitutional and invalid. As a result the Court *inter alia* ordered (at 356F-G) that (i) the words '[f]or a period not less than twenty years' are struck from s 14(1)(a)(ii); (ii) the words 'for a period not less than thirty years' are struck from s 14(1)(b); and (iii) the reference to 'ss (1)(a) and (b)' in s 14(2) of the Stock Theft Act, is consequentially read down to mean 'ss (1)(a)(i)'.

[2] Despite its reverberating effect, this judgment evidently did not come to the knowledge of the magistrate, as he took the trouble before plea to explain to the

unrepresented accused the contents of sections 14(1)(a)(ii) and 14(1)(b) as they existed before they were declared invalid.

[3] The accused pleaded guilty to the charge and after he was questioned in terms of section 112(1)(b) of the Criminal Procedure Act, 1977 (Act 51 of 1977), the magistrate convicted him. The State proved no previous convictions.

[4] In mitigation of sentence the accused stated:

‘I am 50 years old, I am single. I have nine children, I stay with six children, and they are all minors. I am unemployed and I can’t pay any fine at all. I am paralyzed. I am HIV positive. I want the court to consider that in sentencing me. That is all I want to say.’

[5] The magistrate then invited the accused to provide any substantial and compelling circumstances ‘that may persuade this court to deviate from the[prescribed] sentence in terms of the [S]tock [T]heft [A]ct.’ To this the accused replied, ‘All I can say is that I stole out of hunger.’

[6] The magistrate recorded the following before he sentenced the accused:

‘In considering an appropriate sentence the court is alive to the fact that the accused is a first offender. The accused has nine children. Accused is unemployed and he is ill. The accused cannot pay a fine.

On one hand the accused is convicted of a very serious crime. A crime that is very prevalent in this district. The court concurs with the State that people in this area[solely] rely on livestock farming hence the need for this court to protect them. The court is not satisfied that hunger particularly in this case amounts to a compelling and substantial circumstance...’.

The court then imposed a sentence of two years direct imprisonment.

[7] I directed the following query to the magistrate when the matter was submitted for automatic review:

‘1. What is the “prescribed” sentence for an offence of this kind?’

2. Why did the trial magistrate think it necessary to ask the accused to provide substantial and compelling circumstances that may persuade the magistrate to deviate from the “prescribed” sentence?
3. In light of the age of the offender and his personal circumstances, as well as the fact that he is a first offender, would it not have been appropriate to suspend at least part of the sentence?”

[8] Regarding the first two questions posed the magistrate’s response is that section 14 of the Stock Theft Act prescribes the sentence, but that in view of the declaration of unconstitutionality the courts ‘are now having discretion to impose any appropriate sentences’ for stock theft. The magistrate concedes that there is no need for the court to enquire whether there are any substantial and compelling circumstances and that he will avoid doing so in the future.

[9] With respect, it would appear as if the learned magistrate is under some misapprehension as to the ambit and effect of the decision in the *Daniel* and *Peter* case. In light hereof I think it should be clarified that the High Court did not strike down any provision of the Stock Theft Act relating to an offence where the value of the stock is less than N\$500, i.e. in relation to section 14(1)(a)(i). The applicable sentence in such a case is still imprisonment for a period of not less than two years without the option of a fine. Furthermore, the only sentence that may be imposed for stock theft, irrespective of whether the value is more or less than N\$500, is still only imprisonment without the option of a fine. It is therefore not correct to state that the courts may impose ‘any’ appropriate sentence for stock theft.

[10] The reading down of section 14(2) should also be noted. The effect is that in cases where the offence is one of a contravention where section 14(1)(a)(i) is applicable, i.e. where the value is less than N\$500, the court is still required to consider whether there are any substantial and compelling circumstances which justify the imposition of a lesser offence than two years without the option of a fine. It may seem anomalous that the courts now have a wider discretion on sentence in more serious cases than in less serious cases, but this is the result of

the particular parameters within which the constitutional challenge on the Stock Theft Act was launched and adjudicated.

[11] To return to the facts of this case, it was indeed not necessary for the magistrate to determine whether there were substantial and compelling circumstances justifying a lesser sentence, as the stock in question was valued at more than N\$500. The magistrate clearly laboured under the misconception that the applicable prescribed sentence was one of two years imprisonment, which is a misdirection.

[12] I now consider the third question posed to the magistrate. In response he states that this sentence was imposed as stock theft is a serious crime which is prevalent in Okakarara. He further says that, although the accused is fairly old, he failed to satisfy the magistrate as to why he committed the crime, except that he did so out of greed. The magistrate nevertheless has no objection to the sentence being reduced.

[13] The magistrate gives no reason why he was not satisfied that the accused was motivated by hunger to commit the offence. Even if he was not prepared to attach much weight to the reasons advanced by the accused, I do not think he was entitled to reject it outright as he appears to do in his reply. He did not state in his judgment that he rejected this reason. He only stated that hunger was not a substantial and compelling circumstance. In my view this is debatable, but it is not necessary to decide the issue in this case. However, there is no justification on the facts for the magistrate's conclusion that the accused stole because of greed. Here, too, he misdirected himself.

[14] The accused's personal circumstances, which were apparently accepted by the magistrate, are dire indeed. Although stock theft is a serious crime and prevalent throughout Namibia, the fact that the accused at the age of 50 is a first offender is an indication that he is not in need of a two year sentence of imprisonment to deter him from committing crimes. In my view a shorter and partly suspended sentence would meet the demands of this case.

[15] In the result I make the following order:

1. The conviction is confirmed.
2. The sentence is set aside and substituted with the following sentence:

20 (twenty) months imprisonment of which 10 (ten) months are suspended for 4 (four) years on condition that the accused is not convicted of an offence of a contravention of section 11(1)(a) of the Stock Theft Act, 1990 (Act 12 of 1990), committed within the period of suspension.

K van Niekerk

Judge

N N Shivute

Judge