



**CASE NO. CR 36/2005**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**THE STATE**

versus

**ANDRIES AFRIKANER**

**CORAM:** VAN NIEKERK, J *et* MANYARARA, A.J.

Heard on: 2005.07.22

Delivered on: 2008.07.15

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**REVIEW JUDGMENT**

**MANYARARA, A.J.:** [1] The accused was convicted in the Gobabis magistrate's court on a charge of theft – taking into consideration the provision of the Stock Theft Act 12 of 1990 as amended by Act 19 of 2004. He was sentenced to 20 years imprisonment of which 18 years imprisonment was suspended on conditions.

[2] When the case was forwarded to this court on review, the court directed that the following question of law be argued by the Prosecutor-General and counsel acting *amicus curiae*:

*“Does a magistrate’s court of a district division have jurisdiction to impose sentence in terms of the Stock Theft Act 12 of 1990 as amended by Act 19 of 2004.”*

[3] The question arose because the accused was convicted and sentenced by a magistrate of a district division. At the present hearing Mr Truter represented the Prosecutor-General and Mr Obbes appeared *amicus curiae* for the respondent.

[4] The court wishes to place on record its deep appreciation to both counsel for the comprehensive heads of argument filed, which made it unnecessary for counsel to address the court.

[5] Counsel were *ad idem* in answering the question posed by the court in the negative as amplified by the heads of argument filed. Save for the difference in style and syntax, the choice between Mr Truter’s and Mr Obbes’s heads of argument can be likened to a choice between six of one or half dozen of the other. For the record, it suffices to quote the following self-explanatory submission by Mr Obbes:

*“Section 14 of the original Stock Theft Act, 1990 (Act 12 of 1990), as enacted, stated under the heading “Jurisdiction of magistrate’s courts in respect of penalties” that, notwithstanding anything to the contrary in any other law contained, magistrate’s courts shall have jurisdiction to impose*

*imprisonment for period not exceeding twenty (20) years in the case of a second or subsequent conviction.*

*The Stock Theft Amendment Act, 1993 (Act 19 of 1993) substituted section 14 of Act 12 of 1990 but kept the maximum period to twenty (20) years imprisonment in certain instances. Section 15A under the heading “Jurisdiction of magistrate’s courts in respect of penalties” was now inserted after section 15 of the principal act and read as follows:*

*“15A Notwithstanding anything to the contrary in any other law contained, magistrate’s courts shall have jurisdiction to impose any penalty provided for under sections 14 and 15 of this Act.”*

*Section 14 of Act 12 of 1990, was again substituted by section 2 of the Stock Theft Amendment Act, 2004 (Act 19 of 2004) under the heading “Penalties for certain offences”, raising the maximum period of imprisonment to not less than thirty (30) years imprisonment in certain instances.*

*Section 15A of Act 12 of 1990, was substituted by section 3 of the Stock Theft Amendment Act, 2004 (Act 19 of 2004) under the heading “Jurisdiction of magistrate’s courts” as follows:*

*“15A Notwithstanding anything to the contrary contained in any other law-*

*(a) a magistrate’s court of a regional division shall have jurisdiction to impose any penalty or additional penalty provided for in this Act, even though the penalty may, either alone or together with any additional penalty imposed by the court, exceed the punitive jurisdiction of the court; and*

*[b] a magistrate’s court of a district or a regional division shall have jurisdiction to make any order under section 17 irrespective of the amount payable under that order.”*

*It is respectfully submitted that the Legislator acknowledged the difference between a magistrate's court of a district and a magistrate's court of a regional division in section 15A (a) and (b) when comparing the wording of the two sub-sections. Accordingly different powers were given to the two different courts.* (Emphasis added)

[6] Both Mr Obbes and Mr Truter point out that the limits of punitive jurisdiction applicable to a magistrate's court are detailed in section 92(1) of the Magistrate's Courts Act 32 of 1944, in terms of which the power of punishment of a magistrate's court of a district in Criminal matters was not cancelled, removed or derogated from by section 15A(a) of Act 19 of 2004. Section 15A(a) refers to the powers regarding punishment while section 15A(b) refers to the powers regarding section 17 of Act 19 of 2004, i.e compensation for damage to, or loss of stock.

[7] Mr Truter elaborated the point as follows:

*"S 17(1) contemplates that any sentence following a conviction under the provisions of ss 11(1)(a), (b), (c) or (d) may be accompanied by an 'order' (essentially compensatory in nature) in terms of s 17(1)(a);*

*An 'order' is seen as being ancillary to a 'sentence', the former being subject to the imposition of the latter; and*

*the 'additional penalty' provided for in s 17(1)(b) is punitive (and not compensatory), and follows where the convicted person defaults in payment of an order made under s 17(1)(a)."*

[8] Accordingly both counsel are agreed that, in this matter, the magistrate did not have the general punitive jurisdiction to impose the sentence she imposed but should have referred the case for sentencing to the magistrate's court of a regional division in terms of section 114 of the Criminal Procedure Act 51 of 1977. The submissions made by counsel are accurate and do not require comment or elaboration.

[9] The appropriate order would be to set aside the sentence and refer the matter back to the magistrate's court to be dealt with as submitted by counsel.

[10] The accused was sentenced on 25 January 2005. I have ascertained by enquiry that he was reprieved on 24 October 2006.

[11] In the circumstances no further action by this court is required.

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**MANYARARA, AJ**

I agree

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**VAN NIEKERK, J**

**ON BEHALF OF THE APPELLANT**

**ADV. D OBBES**

**Instructed by:**

***Amicus Curiae***

**ON BEHALF OF THE RESPONDENT**

**MR J.A TRUTER**

**Instructed by:**

**Office of the Prosecutor-General**