



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

Not Reportable

Appeal Case No: CA10/2022

Regional Court Case No: RC4/148/15

In the matter between:

PETRUS MTHUTHUZELI JODO

Appellant

and

THE STATE

Respondent

Coram: Hendricks JP and Petersen ADJP

Heard: On the papers (re-allocated by the Judge President on 26 March 2026; previously allocated to Mfenyana J and Ramolefe AJ on 20 June 2024)

Delivered: This judgment was handed down electronically, circulated to the parties' representatives via email, uploaded to CaseLines, and released to SAFLII. The date and time for the handing down of the judgment are deemed to be 14h00 on 14 April 2026.

Summary: Criminal law – Appeal against sentence – Stock theft – Stock Theft Act 57 of 1959, ss 1 and 11 – Two counts taken together for sentence – Ten years' imprisonment imposed by court *a quo* – Declaration of unfitness to possess a

firearm in terms of Firearms Control Act 60 of 2000, s 103(1) – Whether trial court misdirected itself in sentencing – Recovery of all stolen stock and absence of any financial loss to complainants erroneously disregarded as mitigating factor – Inference that appellant influenced co-accused drawn without evidentiary support and improperly used as aggravating factor – Broad assertions regarding economic consequences of stock theft unsupported by evidence and not competent aggravating considerations – Fourth misdirection: use of unproved conviction as aggravating factor, contrary to s 271 of the Criminal Procedure Act 51 of 1977 and *Khasela v S* [2023] ZAGPJHC 970, *Bekker v S* [2022] ZAGPPHC 374 and *Mochole v S* (CA 03/2019) [2024] ZANWHC 155 – Four misdirections individually and cumulatively entitling court of appeal to interfere – Declaration of unfitness to possess firearm: stock theft an offence involving dishonesty – imprisonment without option of a fine imposed – s 103(1)(g) of Firearms Control Act 60 of 2000 applicable by operation of law – trial court’s finding sustained – Appellant’s testimony regarding sentence being served not formally proved by State in terms of s 271 of Criminal Procedure Act 51 of 1977 but not usable as aggravating factor – testimony considered for proportionality of cumulative custodial period only – Appellant a persistent recidivist with prior convictions for stock theft spanning several years, constituting substantial aggravating factor – Mitigating considerations: full recovery of stolen cattle, no financial loss to complainants, personal circumstances including widowhood, dependent children, and continuous custody since arrest – Proportionality of cumulative sentence requiring careful attention where appellant serving concurrent sentence – Sentence of six years’ imprisonment substituted – proportionality achieved by direct reduction of sentence rather than concurrency order referencing unproved conviction, applying *Khasela v S* [2023] ZAGPJHC 970; *Bekker v S* [2022] ZAGPPHC 374; *Mochole v S* (CA 03/2019) [2024] ZANWHC 155 – Appeal against sentence partially succeeds.

JUDGMENT

PETERSEN ADJP (HENDRICKS JP concurring):

Introduction

[1] This is an appeal against sentence only. The appeal was reallocated by the Judge President following the failure of the previously assigned panel of Judges to deliver a judgment over a protracted period of time. The appellant, Petrus Mthuthuzeli Jodo, was convicted in the Regional Court, Klerksdorp, on two counts of stock theft in contravention of ss 1 and 11 of the Stock Theft Act 57 of 1959. On the first count, he stole two bulls and 28 cows from Mr Willem Jacobus Maree; on the second, three cows from Mr Willem Johannes Jooste. Both counts were taken together for the purposes of sentence, and the court *a quo* imposed a sentence of ten years' imprisonment. The court also declared the appellant unfit to possess a firearm in terms of s 103(1) of the Firearms Control Act 60 of 2000. The appellant was in continuous custody from the date of his arrest; he did not apply for bail, and no bail was granted pending appeal. The appeal is before us with the leave of the court *a quo* granted on 02 December 2019.

Background

[2] The facts are largely common cause. On 27 May 2014, the appellant and a co-accused stole the cattle from two farms in the Klerksdorp district. Two days later, on 29 May 2014, the stock was tracked to a cattle post near Stilfontein, where it was recovered, and the appellant and his co-accused were arrested. All the stolen cattle were identified and returned to their owners; the complainants suffered no financial loss.

[3] The appellant is a recidivist. At the time of sentencing, his record disclosed two relevant previous convictions. In 2008 he was sentenced to six years' imprisonment for stock theft committed in November 2007; and in 2015 to 30 months for failing to give a satisfactory account of possession of stock in respect of an offence committed in December 2014. He also testified that on 01 August 2018, before sentence was passed in the present matter, he had been convicted and sentenced to ten years' imprisonment for a further stock theft, and that he was serving that sentence at the time of sentencing in the present

proceedings. The State did not formally prove this previous conviction emanating from the evidence of the appellant, as required by s 271 of the Criminal Procedure Act, and neither did the appellant formally admit this previous conviction he testified about. The appellant volunteered it during his evidence in mitigation. I deal with the effect of this omission by the State later in the judgment.

[4] In mitigation, the appellant testified that he was 46 years old at the time of sentencing, married, with two children aged 25 and 17. His wife had died, and his children were in the care of his unemployed mother in the Eastern Cape, who subsisted on social grants. He was self-employed as a builder, earning approximately R2 000 to R2 200 per month.

The sentencing approach of the trial court

[5] In its sentencing remarks, the trial court acknowledged the prevalence and gravity of stock theft and its impact on farming communities. However, it found that the “sole mitigating circumstance” was the approximately 3 years spent in custody awaiting trial. It did not treat the recovery of all the stolen stock and the absence of any financial loss to the complainants as a mitigating factor. It further remarked that the appellant “*might possibly have influenced accused 1 to do what they have done*”, a finding unsupported by any evidence on the record. It also made broad statements to the effect that farmers are forced into bankruptcy and the country’s economy is adversely affected by stock theft, again without any evidential basis. When it subsequently granted leave to appeal, it acknowledged that it could not exclude the possibility that another court might order some measure of concurrency.

The applicable legal principles

[6] The applicable principles are settled. A court of appeal will not disturb a sentence unless the trial court misdirected itself in a material respect, or the sentence is so manifestly inappropriate that it induces a sense of shock.¹ A misdirection includes a failure to give proper weight to any of the legs of the sentencing triad, the personal circumstances of the offender, the nature of the offence, and the interests of society.² Where a misdirection is established, the appellate court is at large to impose the sentence it considers appropriate.³

¹*S v Malgas* 2001 (1) SACR 469 (SCA) para 12; *S v Rabie* 1975 (4) SA 855 (A) at 857D–E.

²*S v Zinn* 1969 (2) SA 537 (A) at 540G.

³*S v Malgas* supra para 12.

Discussion

[7] I am satisfied that the trial court misdirected itself in several respects. The first and most obvious misdirection is the finding that the “sole mitigating circumstance” was the time spent awaiting trial. The recovery of all the stolen stock, with no consequential loss to the complainants, is a well-recognised mitigating consideration. To disregard it entirely is an error.

[8] The second misdirection is the inference that the appellant may have influenced his co-accused. That inference was drawn without any evidential support and was then used as an aggravating factor. It cannot stand.

[9] Third, the court’s broad assertions about the economic and financial consequences of stock theft were unsupported by evidence. While judicial notice may properly be taken of the prevalence and seriousness of the offence, specific factual consequences, such as farmers being driven into insolvency, require an evidentiary basis. To treat unsubstantiated generalisations as aggravating factors risks distorting the balance that sentencing requires.⁴

[10] Fourth, the trial court committed an error regarding the sentence the appellant was already serving. It is doubtful whether the magistrate was entitled to treat the appellant’s mitigation testimony about the 2018 conviction as an aggravating factor bearing on recidivism, given that the State had not proved that conviction in terms of s 271 of the Criminal Procedure Act,⁵. The two prior convictions already established a pattern of persistent stock theft. The ‘unproven’ 2018 sentence should not have been superimposed on that analysis as though it were a proved aggravating factor.

[11] The trial court also declared the appellant unfit to possess a firearm in terms of s 103(1) of the Firearms Control Act 60 of 2000. Although the correct procedure under s 103(1) is not for the court to make a positive declaration of unfitness, unfitness arising automatically by operation of law unless the court determines otherwise, the substance of the trial court’s finding is unimpeachable. Stock theft is an offence involving dishonesty. The appellant was sentenced to ten years’ imprisonment without the option of a fine. The requirements of s 103(1)(g) are accordingly satisfied. The *ex lege* unfitness to possess a firearm stands. There is no merit in the challenge to the trial court’s finding in this regard.

⁴*S v Malgas* supra; see also *S v PB* 2013 (2) SACR 533 (SCA).

⁵ *Khasela v S* [2023] ZAGPJHC 970; *Bekker v S* [2022] ZAGPPHC 374; and the decision of this Division in *Mochole v S* (CA 03/2019) [2024] ZANWHC 155 (Petersen ADJP et Maree AJ).

[12] The four misdirections identified above, individually and cumulatively, entitle this Court to reconsider the appropriate sentence.

The appropriate sentence

[13] The appellant is a persistent offender. His record discloses two previous convictions for stock theft, in 2008, he was sentenced to six years' imprisonment, and in 2015, to 30 months. This pattern of recidivism, spanning nearly a decade, is a substantial aggravating factor. Against that must be weighed, in his favour, the recovery of all the stolen cattle and the absence of any financial loss. His personal circumstances, including his age, the death of his wife, and his dependent children. The fact that he has been in custody continuously since his arrest and throughout the pendency of this appeal; and, as more fully addressed in para [16] below, the disproportionate cumulative effect that a purely consecutive further term of imprisonment would produce.

[14] By way of comparison, this Division, in similar circumstances involving the recovery of stock and multiple sentences, has reduced a ten-year sentence to an effective four years. Comparative cases of this nature are useful as a guide, though the appropriate sentence must ultimately be determined on its own facts. Having regard to all these considerations, I conclude that a sentence of six years' imprisonment is appropriate. As more fully explained in para [16] below, the correct mechanism for achieving proportionality is a direct reduction of the sentence itself, rather than a concurrent order referencing an unproven conviction. A sentence of six years appropriately reflects the seriousness of the appellant's conduct and his persistent recidivism as established by the two previous convictions, while avoiding a disproportionate cumulative custodial period.

[15] A word is necessary about the mechanism through which proportionality is achieved in this matter. In terms of s 271 of the Criminal Procedure Act 51 of 1977, previous convictions must be proved by production of a certificate or by the fingerprint procedure. The State did not avail itself of either mechanism in respect of the conviction on 01 August 2018. That conviction is accordingly not a proved previous conviction for these proceedings, and the recidivism finding in para [13] above rests exclusively on the two convictions properly proved. The principle is well established that an accused cannot substitute self-reported testimony for the State's obligation to prove previous convictions.⁶

⁶ *Khasela v S* [2023] ZAGPJHC 970; *Bekker v S* [2022] ZAGPPHC 374; *Mochole v S* (CA 03/2019) [2024] ZANWHC 155 *supra*.

Notwithstanding that the 2018 conviction is unproven, the appellant himself placed before the sentencing court, in his mitigation evidence, the fact that he was serving a ten year sentence. That evidence is relevant to the one purpose for which this Court may legitimately use it, assessing whether a consecutive sentence would produce a disproportionate cumulative custodial period. A court cannot impose a further term of imprisonment in a vacuum, without having regard to the appellant's existing custodial circumstances. However, since the 2018 conviction cannot be treated as proved, the court cannot make a formal order directing that any portion of the new sentence run concurrently with it. To do so would be to give judicial effect in a court order to an unproven conviction, which is precisely what *Khasela*, *Bekker*, and *Mochole* prohibit. The correct approach, which achieves the same proportionate outcome without reference to the unproven conviction in the order of this Court, is to reduce the sentence itself. An effective additional period of six years' imprisonment properly reflects the seriousness of the offence, the appellant's recidivism as established by the proved convictions, and the mitigating considerations. The sentence imposed is accordingly six years' imprisonment, running, as a direct sentence, independently of any existing sentence, antedated to 10 October 2019.

Order

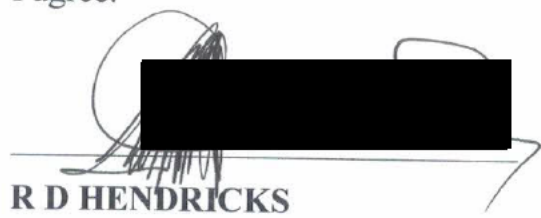
[16] In the result, the following order is made:

1. The appeal against sentence succeeds in part.
2. The sentence imposed by the Regional Court is set aside and substituted with the following:
'The accused is sentenced to six (6) years' imprisonment.'
3. The sentence is antedated to 10 October 2019.



A H PETERSEN
ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

I agree.



R D HENDRICKS

**JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

Appearances

For the Appellant:	K Naidoo (pro deo)
Instructed by:	Legal Aid South Africa, Mahikeng Justice Centre
For the Respondent:	FJ Munyai
Instructed by:	Director of Public Prosecutions, North West