

*"SPECIAL INTEREST"*

**CASE NO.: CR 109/05**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**THE STATE**

versus

**FRANS NAKANGOMBE**

**HIGH COURT REVIEW CASE NO. 1347/2005**

**CORAM:** DAMASEB, JP *et* VAN NIEKERK, J

Heard on: **2005/11/05**

Delivered on: **2006/09/15**

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**REVIEW JUDGMENT**

[1] **DAMASEB, JP:** This case comes to this Court on automatic review. The accused who held the rank of corporal in the Military Police, was 31 years old at the time of his conviction and sentence on 11<sup>th</sup> August 2005. He was convicted on three counts as follows:

- “1.1 Possession of a machine gun (AK 47), in contravention of section 29(1) (a) read with sections 1, 38(2) and 39 of Act 7 of 1996 (the Arms and Ammunition Act) (“the Act”);
- 1.2 Possession of a fire-arm (Tokarev pistol) without a licence, in contravention of section 2 read with sections 1, 3 (6), 4, 8, 24, 34(2), 38 and 44; and further contrary to section 33 read with sections 1 and 38(2) of the Act; and
- 1.3 Possession of ammunition in contravention of section 39 of the Act, (i.e. 2 magazines for the AK 47 with 60 live bullets and one Tokarev magazine with 6 live bullets).

[2] He was correctly found guilty on the three charges and sentenced as follows:

- “Count 1: 10 years imprisonment  
Count 2: 3 years imprisonment  
Count 3: 1 year imprisonment  
Counts 2 & 3: to run concurrently with count 1”.

The accused therefore got an effective term of imprisonment of 10 years.

[3] The accused was also declared unfit to possess a fire-arm for a period of 5 years in terms of s10(6)(7) of the Act. The order of declaration of unfitness is also proper.

[4] When the matter was placed before me on review, I caused the matter to be enrolled for argument, directing the Society of Advocates to assign *amicus curiae* to argue the matter in open Court on behalf of the accused. The Court is indebted to Mr Heathcote both for agreeing to act *amicus curiae*, and for the helpful heads of argument. Mr Sibeya, for the State, also submitted helpful heads of argument. The Court is indebted to both Counsel for their industry.

[5] The Court requested Counsel to address the following questions:

- (a) Was the learned magistrate correct in holding that s38(2) of Act 7 of 1996 places "*an obligation on the courts to impose direct imprisonment sentences*"?
- (b) Considering that he took judicial notice of the increase in the type of offence in his district, was the learned magistrate not required to inform the accused of what he sought to do and afford him the opportunity to address the Court thereon?
- (c) Does the sentence imposed not induce a sense of shock?

I will now deal with each of the questions.

### **Does s38(2) oblige the Court to impose direct imprisonment?**

[6] The section provides as follows:

“38 Offences and penalties

**(1)** ...

**(2)** Subject to the provisions of this section, any person convicted of an offence under this Act shall be liable -

(a) in the case of a contravention of section 29(1)(a), (b) or (c), to imprisonment for a period not exceeding 25 years;

**(b)** in case of -

**(i)** the possession of an arm in contravention of section 2;

**(ii)** a contravention of section 29(1)(d) or (e);

**(iii)** a contravention of section 33, on account of being in possession of more than one hundred rounds of ammunition intended for firing an arm contemplated in subparagraph (i);

to a fine not exceeding N\$40 000 or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment;

**(c)** in the case of -

- (i)** a contravention of or failure to comply with any provision of section 14, 22, 25, 26, 32 or 33 (not being a contravention referred to in paragraph (b)(iii) of this subsection);
- (ii)** a contravention or failure to comply with any provision, direction or requirement of a notice issued under section 30;
- (iii)** an offence referred to in subsection (1)(a), (b), (e), (f), (j) or (k);

to a fine not exceeding N\$12 000 or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment, or in the case of a second or subsequent conviction for an offence referred to in this paragraph, to imprisonment for a period not exceeding five years;

**(d)** in the case of a contravention of any other provision of this Act, to a fine not exceeding N\$4 000 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.”

[7] Section 38(4) provides:

“Notwithstanding anything to the contrary in any law contained, no person shall on a conviction in terms of subsection (2)(a) be dealt with in accordance with section 297<sup>1</sup> of the Criminal Procedure Act, 1977 (Act 51 of 1977), if such person was at the time of commission of the offence in question 18 years of age or older.” (My emphasis)

The accused was 31 years old at the time.

[8] Mr Sibeya submits, based on the interaction of ss38(2) with 38(4), that s38(4) excludes the postponement or suspension of a sentence of caution and reprimand of an accused who is 18 years or older, and that the Court was obliged in the circumstances to impose a term of direct imprisonment. He also relies on *S v Likuwa* 1999 NR 151 (HC) at 152; *S v Vries* 1998 NR 244 (HC) at 254-A. I agree.

[9] The first question is therefore answered in the affirmative.

**Was the learned magistrate not required to inform the accused that he intended to rely on the increase of the offences charged in his district, and afford the accused the opportunity to address the Court thereon?**

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<sup>1</sup> Which provides for conditional or unconditional postponement or suspension of sentence, and caution or reprimand.

[10] Both counsel are in agreement, correctly, that the failure of the Magistrate to afford the prisoner the opportunity to state his position on what the Magistrate perceived to be an increase in the type of offence in the district, was a misdirection. (See *S v H* 1977 (2) SA 1954 (A) 960 G-H, and *S v Mkhwanazi* 1989 (2) SA 802 (T).)

**Does the sentence imposed not induce a sense of shock?**

[11] Again, both counsel correctly take the view that the sentence imposed, being effectively 10 years, induces a sense of shock, in circumstances where the fire-arms were not used in furtherance of another crime. I only need add that the magistrate placed excessive weight on the seriousness of the offences at the expense of the personal circumstances of the accused.

[12] The upshot of it all is that in view of the misdirections, this Court is at large as to sentence. It now becomes our duty to consider a condign sentence for the prisoner.

[13] The mitigating factors are that the accused was 31 years old at the time he committed the offence. He got married in 2004 and has 2 minor children. He was employed by the Ministry of Defence at the time of the commission of the offence and earned N\$2 000 per month.

He was suspended upon being charged and it must be assumed he lost his job as a result of the conviction.

[14] In aggravation of sentence it must be said that the fire-arms the prisoner was found in possession of were illegally taken from his employer. He therefore breached the confidence of his employer. The evidence also shows that the accused decided to arm himself in this unlawful way in order to meet a threat he perceived to face from some social misfits (botsotsos). The risk that he would have put the ill-gotten fire-arms to use against another human being was therefore intended and probable.

[15] Having regard to the totality of evidence in aggravation and mitigation of sentence, I propose to impose a sentence of 5 years imprisonment in respect of count 1; 2 years in respect of count 2 and 6 months in respect of count 3. The sentences on counts 2 and 3 to run concurrently with the sentence on count 1.

[15] In the result it is ordered as follows:

- (i)** The convictions on counts 1 - 3 are confirmed and the declaration of unfitness in terms of s10(6)(7) of the Act is also confirmed.



- (ii) The sentences imposed in respect of all 3 counts are hereby set aside and to be replaced by sentences of 5 years (count 1), 2 years (count 2) and 6 months (count 3).
  
- (iii) The sentences in respect of counts 2 and 3 to run concurrently with the sentence on count 1.

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**DAMASEB, JP**

I agree.

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**VAN NIEKERK, J**