

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**THE STATE**

and

**DANIEL HAMUKOTO**

(HIGH COURT REVIEW REF. 361/04)

**CORAM: VAN NIEKERK, J et PARKER, J**

Delivered: 06 June 2007

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**JUDGMENT**

**VAN NIEKERK, J:**

[1] In this case the accused was convicted of two charges in the Oshakati magistrate's court. The first is that he unlawfully possessed a machine gun, an AK 47, in contravention of section 29(1)(a) of the Arms and Ammunition Act, 1996 (Act 7 of 1996) ("the Act"). The second is that he contravened section 33 of the Act by being in possession of ammunition, to wit 18 live rounds, while he was not lawfully in possession of an arm capable of firing that ammunition.

[2] On the first count the accused was sentenced to three years imprisonment of which one year is suspended for five years on condition that the accused is not convicted of the same offence again. On the 2 second count the sentence was one of N\$2000 or 2 years

imprisonment of which N\$1000 or 1 year was conditionally suspended for five years.

[3] On review I asked the magistrate whether he was in law permitted to suspend part of the sentence in relation to count 1. He replied that, as the Act is silent on the issue, he used his discretion. However, the Act is not silent on the matter, but provides in section 38(2)(a):

“Subject to the provisions of this section, any person convicted of an offence under this Act shall be liable in the case of a contravention of section 29(1)(a), (b) or (c), to imprisonment for a period ..... not exceeding 25 years”;

and in 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 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.”

[4] The accused in this matter was older than 18 years at the time of the commission of the offence and it is therefore clear that the trial magistrate could not have suspended part of the sentence. As the accused has already served his sentence on count 1 I think it would be just to sentence him to a period of imprisonment equal to the effective part of the sentence imposed by the magistrate.

[5] The magistrate agrees that he did not comply with the peremptory provisions of section 10(7) relating to the declaration of the accused to be unfit or deemed to be unfit to possess an arm.

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

1. The conviction on count 1 is confirmed.

2. The sentence on count 1 is set aside and replaced with a sentence of 2 (two) years imprisonment. This sentence is backdated to 1 October 2003.
3. The conviction and sentence on count 2 are confirmed.
4. The matter is referred back to the trial court to enable it to summon the accused and to comply with the provisions of section 10(7), read with section 10(6)(a) and 10(8) of the Arms and Ammunition Act, 1996 (Act 7 of 1996).

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**VAN NIEKERK, J**

I concur.

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**PARKER, J**