

**“SPECIAL INTEREST”**

**CASE NO.: CR 135/07**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**THE STATE**

versus

**ISMAEL NOMOZONDJIE KAKE**

**[HIGH COURT REVIEW CASE NO. 1320/2007]**

**CORAM:** DAMASEB, JP *et* MULLER, J

Delivered on: 2007.09.07

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**REVIEW JUDGMENT**

**DAMASEB, JP:**

[1] This matter comes to this Court on automatic review. The accused was convicted of unlicensed possession of a pistol with a caliber of 7,65, contrary to section 2 read with sections 1, 38(2) and 39 of Act 7 of 1996, as amended (the Act), and of unlawful possession of sixteen live ammunition, contrary to section 33 of the Act. He pleaded guilty and he was properly convicted. He was sentenced in respect of count 1, i.e. the possession of the fire-arm, to N\$10 000 or five years imprisonment, and on count 2 being in possession of ammunition as aforesaid, to N\$4 000 or two years imprisonment. All told he received a fine of N\$14 000 or seven years imprisonment. No order was made that he is unfit to possess a firearm in terms of section 10 (6) (7) of the Act. That is an irregularity. When the matter came up for review I consulted with

my colleague Mr Justice Hoff in view of what I thought was a disturbingly severe penalty. He agreed with me that the sentence imposed induces a sense of shock and it was for that reason that I felt no productive purpose would be served by first sending an enquiry to the learned Magistrate before further steps are taken in the matter as I also, through my clerk, confirmed that the accused - not having paid his fine - remains incarcerated.

[2] It is trite that sentencing remains pre-eminently a matter for the trier of fact. It is only on very limited bases that this Court is permitted to interfere with a sentence on review. It is equally trite that an appellate/reviewing Court will not lightly set aside a sentence simply because it would, had it sat as a Court of first instance, have imposed a different sentence than the one imposed by the trial court. It is only if there is a brutal imbalance between the sentence imposed by the trial court and that which the reviewing or appellate court would have imposed, that interference is permissible. It is equally trite that consistency is an important objective of sentencing: Courts must impose sentences that are roughly of the same severity for the same type of offence and circumstances.

[3] As part of the same bunch of reviews allocated to me while on duty, was one from Ohangwena in Case No. 491/05, i.e. *The State v Teodor Wilbard* involving possession of a fire-arm without a licence and unlawful possession of ammunition. In that case a 19 year old male who was found in possession of a pistol without a licence, and in unlawful possession of 4 live rounds of ammunition was, upon his own guilty plea, found guilty and sentenced, in respect of the possession of a fire-arm offence to N\$1 500 or twelve months imprisonment wholly suspended for five years on conditions, and in respect of the unlawful possession of the ammunition to N\$500 or five months

imprisonment wholly suspended for five years on conditions. I confirmed those sentences. In the matter at hand the accused is 27 years old. If one looks at the sentence imposed *in casu* and the one imposed in the Eehana matter the public would be thoroughly confused by what the Courts are seeking to do. The differences are too striking while the facts are not very dissimilar. This sort of thing can bring the administration of justice in disrepute.

[4] It is in order to achieve a measure of consistency in sentencing and, because as I previously observed, there is a brutal imbalance between the sentences imposed by the trial court and that which I would have imposed had I sat at first instance, that I feel that the sentences imposed in this matter should be interfered with. I think that on each count an appropriate sentence would be a fine of considerably less value than the one imposed a quo and a term of imprisonment in the alternative.

[5] In the premises I order as follows:

The convictions in respect of count 1 and count 2 are confirmed. The sentences imposed by the learned Magistrate are set aside and are to be replaced by the following: The accused is sentenced to N\$1 500 in respect of count 1 or eighteen months imprisonment. In respect of count 2 the accused is sentenced to N\$500 or five months imprisonment. The case is remitted to the magistrate who heard the case to comply with section 10 (6)(7) of Act 7 of 1996.

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**DAMASEB, JP**

I agree

**MULLER, J**