



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 63/2013

In the matter between:

NANDE MOSHANA

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Moshana v State* (CA 63/2013) [2014] NAHCMD 87 (14 March 2014)

Coram: HOFF J and SIBOLEKA J

Heard: 31 January 2014

Delivered: 14 March 2014

ORDER

- (a) The point *in limine* is upheld.
- (b) The conviction and sentence in respect of count 1 are confirmed.
- (c) The convictions in respect of count 2 and 3 are confirmed.
- (d) The sentence imposed in respect of count 2 and 3 are set aside and substituted with the following sentences:
- In respect of count 2: three years imprisonment.
In respect of count 3: one year imprisonment.
- (e) It is ordered that the sentences imposed in respect of count 2 and 3 should run concurrently with the sentence imposed in respect of count 1.

JUDGMENT

HOFF J (SIBOLEKA J concurring):

[1] The appellant was convicted at Eenhana Regional Court on 22 May 2007 on three counts namely: count 1 – robbery with aggravating circumstances, (liquor and cigarettes valued at N\$591) count 2 – unlawful possession of a fire-arm (an PM rifle) in contravention of the provisions of s 2 of Act 7 of 1996, and count 3 – the unlawful possession of ammunition (2 cartridges for PM rifle) in contravention of the provisions of s 33 of Act 7 of 1996

[2] In respect of count 1 the appellant was sentenced to 12 years imprisonment. Count 2 and 3 were taken together for sentence and a sentence of five years imprisonment was imposed.

[3] This appeal lies against both the conviction and the sentence.

to the effect that the appellant did not set out his grounds of appeal clearly and specifically as required by Rule 67(1) of the Magistrate's Court Rules. This Court was referred to relevant case law relating to the purpose grounds of appeal serve in an appeal hearing. I do not deem it necessary at this stage to revisit those authorities since it is trite law.

[5] A perusal of the record confirms that the appellant filed no grounds of appeal in respect of both the convictions and sentences imposed, but instead filed an application to lead further evidence.

[6] Mr Ipumbu, who appeared *amicus curiae*, conceded that the appellant had correctly been convicted, but attacked the sentences imposed on the basis that the cumulative effect of the sentences imposed was not taken into account by the magistrate and that the magistrate should have ordered the sentence imposed in respect of count 2 and 3 to run concurrently with the sentence imposed in respect of count 1.

[7] In view of the fact that there are no grounds of appeal in respect of the sentences imposed together with the fact that the appellant has acknowledged previous convictions of which one involved the crime of robbery with aggravating circumstances, this court cannot interfere with the sentence imposed by the magistrate.

[8] In respect of the single sentence imposed in respect of counts 2 and 3, a maximum penalty of a fine not exceeding N\$12 000 or imprisonment for a period not exceeding three years is applicable for a contravention described in count 3. The magistrate by taking the counts together for purpose of sentence and by imposing a

five years imprisonment term exceeded the maximum prescribed penalty in respect of count 3. The sentence imposed by the magistrate is thus an incompetent sentence and a nullity which may be set aside by this court in spite of the fact that there are no grounds of appeal against sentence.

[9] This court has in the past on more than one occasion emphasised the undesirability of taking convictions in respect of statutory offences together for purpose of sentence and the sentence imposed by the magistrate once again demonstrates the undesirability of such a practice.

[10] This court on appeal may in terms of the provisions of s 309(3) read with s 304(2)(c) of Act 51 of 1977 impose any competent sentence which the magistrate ought to have given.

[11] In the result the following orders are made:

(a) The point *in limine* is upheld

(b) The conviction and sentence in respect of count 1 are confirmed.

(c) The convictions in respect of count 2 and 3 are confirmed.

(d) The sentence imposed in respect of count 2 and 3 are set aside and substituted with the following sentences:

In respect of count 2: three years imprisonment.

In respect of count 3: one year imprisonment.

(e) It is ordered that the sentences imposed in respect of count 2 and 3 should run concurrently with the sentence imposed in respect of count 1.

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E P B HOFF
Judge

A M SIBOLEKA
Judge

APPEARANCES

APPELLANT:

T Ipumbu
Amicus curiae, Titus Ipumbu Legal Practitioners,
Windhoek

RESPONDENT:

S R Nyambe
Office of the Prosecutor-General, Windhoek