

REPUBLIC OF NAMIBIA

REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case no: CR 51/2016

THE STATE

versus

KASHIKUKU FILLEMON

ACCUSED

(HIGH COURT MAIN DIVISION REVIEW REF NO'S 1561/2012 & 1838/2012)

Neutral citation: S v Fillemon (CR 51-2016) [2016] NAHCMD 270 (15 September 2016)

Coram: SHIVUTE J and (PARKER AJ CONCURRING)

Delivered: 15 September 2016

FLYNOTE: Criminal Procedure – Review – Judge's certificate – On review Judge confirming matter that proceedings in accordance with justice – Magistrate failing to apply provisions of s10 (7) of Arms and Ammunition Act 7 of 1996 – Court on further reviewing competent to set aside certificate and consider matter afresh – Conviction

and sentence confirmed – Matter remitted to Magistrate to act in terms of s10 (7) Act 7 of 1996.

SUMMARY: Criminal Procedure- Review – The judge on review issued a certificate erroneously that proceedings were in accordance with justice. Although the conviction and sentence were in order, the magistrate failed to apply s 10 (7) of the Arms and Ammunition Act 7 of 1996. The reviewing Judge is competent to withdraw the Judge’s certificate and consider the matter afresh. The matter is remitted to the magistrate to invoke the provision of s 10 (7) Act 7 of 1996.

ORDER

- (a) The conviction and sentence are confirmed.
- (b) The certificate granted that proceeding were in accordance with justice is withdrawn forthwith.
- (c) The matter is remitted to the magistrate who convicted and sentenced the accused to hold an inquiry in terms of s 10 (7) Act 7 of 1996.
- (d) The accused should be brought to court by way of a notice or summons.

REVIEW JUDGMENT

SHIVUTE J, (PARKER AJ CONCURRING)

[1] The matter came on automatic review and the reviewing judge erroneously granted a certificate that the proceedings were in accordance with justice.

[2] When the matter was send back to Rundu, the Divisional Magistrate, returned it for review because the accused was convicted of attempted murder whereby a firearm was used and the learned magistrate did not apply the provisions of s 10 (7) of the Arms and Ammunition Act 7 of 1996. This resulted in the case having two review numbers. The accused now wants the firearm to be returned to him.

[3] Although the conviction and sentence were in order, the reviewing judge was not supposed to issue the certificate because s 10 (7) of the Arms and Ammunition Act 7 of 1996 made it obligatory for the court to explain to the accused that he may advance reasons and lead evidence as to why he or she should not be declared unfit to possess a firearm. After that the court must exercise its judicial discretion whether or not to declare the accused unfit to possess such arm.

[4] In these circumstances it is in the interest of justice that the certificate issued be withdrawn in order for the court a quo to apply the provisions of s 10 (7) of the Act. This approach was followed in *S v Linyando* 1999 NR 300 where it was held that the court on further review is competent to set aside the certificate it had issued.

[5] In the premise the following order is made:

- (a) The conviction and sentence are confirmed.
- (b) The certificate granted that proceedings were in accordance with justice is withdrawn forthwith.
- (c) The matter is remitted to the magistrate who convicted and sentenced the accused to hold an inquiry in terms of s 10 (7) Act 7 of 1996.
- (d) The accused should be brought to court by way of a notice or summons.

NN SHIVUTE
Judge

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C PARKER
Acting Judge