



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
REVIEW JUDGMENT**

<p><b>Case Title:</b> THE STATE // LORENCE HARASEB, STEFANIS KAWAXAB &amp; AUGUST WITBOOI</p>	<p><b>Case No:</b> CR 70/2020 HIGH COURT REF. NO.: 133012 MAGISTRATE'S SERIAL NO.: 116/2020</p> <p><b>Division of Court:</b> HIGH COURT, MAIN DIVISION</p>
<p><b>Heard before:</b> HONOURABLE MR JUSTICE MILLER AJ <i>et</i> HONOURABLE MR JUSTICE UNENGU AJ</p>	<p><b>Delivered on:</b> <b>22 SEPTEMBER 2020</b></p>
<p><b>Neutral citation:</b> <i>S v Haraseb</i> (CR 70/2020) [2020] NAHCMD 430 (22 September 2020)</p>	
<p><b>The order:</b></p> <p><i>In absentia</i> of the parties and/or their legal practitioners and having read other documents filed of record:</p> <p><b>IT IS HEREBY ORDERED THAT:</b></p> <ol style="list-style-type: none"> <li>1. The conviction and sentence of each accused in count one is found to be in accordance with justice.</li> <li>2. In count two, the conviction of each accused of contravening section 26(1) read with sections 1, 26(2), 26(3), 85, 87, 89 and 89A of the Nature Conservation Ordinance 4 of 1975, as amended, and further read with sections 90 and 250 of Act 51 of 1977 is set aside and substituted with conviction of contravening section 34(2) read with section 34(4) of the Nature Conservation Ordinance 4 of 1975 as amended.</li> </ol>	

3. The sentence imposed upon each accused on count two is found to be competent and is confirmed.

**Following below are the reasons for the above order:**

MILLER AJ (UNENGU AJ concurring):

[1] The matter was placed before me in terms of section 302(1) and section 303 of the Criminal Procedure Act 51 of 1977 (sentences subject to review in the ordinary course and transmission of record).

[2] After the court invoked section 112(1)(b) of the Criminal Procedure Act 51 of 1977 in the Gobabis Magistrate's Court, each of the three accused persons were convicted on two counts, namely:

Count 1: Hunting of huntable game in contravention of section 30(1)(a) read with sections 1, 30(1)(b), 30(1)(c), 85, 89 and 89 A of the Nature Conservation Ordinance 4 of 1975, as amended, and further read with sections 90 and 250 of Act 51 of 1977. In that, upon or about the 24<sup>th</sup> day of July 2020 at or near Farm Kalk Pan in the district of Gobabis, the said accused did wrongfully and unlawfully hunt game, to wit: 1 warthog, valued at N\$3 000 without a permit or written authority to do so.

Count 2: Hunting of specially protected game in contravention of section 26(1) read with sections 1, 26(2), 26(3), 85, 87, 89 and 89A of the Nature Conservation Ordinance 4 of 1975, as amended, and further read with sections 90 and 250 of Act 51 of 1977. In that, upon or about 24<sup>th</sup> day of July 2020 at or near Farm Kalk Pan in the district of Gobabis, the said accused did wrongfully and unlawfully hunt specially protected game, to wit: 1 porcupine, valued at N\$5 000 without a permit.

[3] The learned magistrate wrote a covering letter in which she brought to the attention of the reviewing Judge an explanation that she convicted the three accused persons on count two as charged, but before sentencing them she realized that a porcupine is not specially protected game as alleged in the charge sheet, and that it is not classified as such in the Nature Conservation Ordinance 4 of 1975 as amended, but would be classified as a wild animal in terms of section 34(2) read with section 34(4) of the Nature Conservation Ordinance 4 of 1975 as amended.

[4] The learned magistrate further explained that after such a realization, she proceeded to sentence the three accused persons as if they contravened section 34(2) read with section 34(4) of the Nature Conservation Ordinance 4 of 1975 as amended, which is hunting of wild animals.

[5] The learned magistrate is correct in her conclusion as explained in the covering letter that a porcupine is not specially protected game in terms of section 26 of the Nature Conservation Ordinance 4 of 1975, but a wild animal in terms of section 34 of the Nature Conservation Ordinance 4 of 1975, therefore the sections under which the accused persons were charged and convicted in count two are clearly wrong as the magistrate explained in her covering letter. In count two the accused persons should have been charged with hunting of a wild animal without a written permission of the owner or lessee of such land in contravention of section 34(2) read with section 34(4) of the Nature Conservation Ordinance 4 of 1975 as amended.<sup>1</sup>

[6] Because the accused persons were charged and convicted of contravening wrong sections of the applicable statute in count two, those convictions are not in order and cannot be allowed to stand, but the sentences imposed are found to be competent because the magistrate explained that she proceeded to sentence the accused persons in terms of the correct sections of the applicable statute, which is section 34(2) read with section 34(4) of the Nature Conservation Ordinance 4 of 1975 as amended. Section 34(4) provides that any person who contravenes or fails to comply with any provision of subsection 34(1) or 34(2) shall be guilty of an offence and liable on conviction to a fine not less than N\$750 (seven hundred and fifty rand) and not exceeding N\$1 500 (one thousand five hundred rand) or to imprisonment for a period of not less than twelve months and not exceeding three years or to both such fine and such imprisonment. The learned magistrate complied with section 34(4) by sentencing each accused person as follows: 'Each accused is fined N\$750-00 or in default of payment 12 months imprisonment.'

[7] As said afore, the conviction of the three accused person on count two was done under the wrong sections and will not be allowed to stand. In the result, I make the following order taking into consideration the fact that the accused persons in terms of section 112(1)(b) of the Criminal Procedure Act 51 of 1977 admitted all the elements of the offence under section 34(2), and that they will suffer no prejudice:

- (a) In count two, the conviction of each accused of contravening section 26(1) read with sections 1, 26(2), 26(3), 85, 87, 89 and 89A of the Nature Conservation Ordinance 4 of 1975, as amended, and further read with sections 90 and 250 of Act 51 of 1977 is set aside and substituted with the conviction of contravening section 34(2) read with

<sup>1</sup> Section 34(2) of the Nature Conservation Ordinance 4 of 1974 provides that 'Save as is otherwise provided in this Ordinance, no person shall hunt any wild animal which is not game as defined in section 1 on any land, unless he has the written permission of the owner or lessee of such land.'

section 34(4) of the Nature Conservation Ordinance 4 of 1975 as amended.

- (b) The sentence imposed upon each accused on count two is found to be competent and is confirmed.

**Judge's signature:**

K MILLER, AJ

**Judge's signature:**

E P UNENGU, AJ