

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

PRACTICE DIRECTION 61

<b>Case Title:</b> The State v Rudolf Nyumba	<b>Case No:</b> CR 36/2024
<b>High Court MD Review No:</b> 381/2024	<b>Division of Court:</b> High Court, Main Division
<b>Coram:</b> Shivute J <i>et</i> Christiaan J	<b>Delivered on:</b> 7 May 2024
<b>Neutral citation:</b> <i>S v Nyumba</i> (CR 36/2024) [2024] NAHCMD 215 ( 7 May 2024)	
<b>ORDER:</b> <ol style="list-style-type: none"><li>1. The conviction and sentence on the alternative to count 1 are set aside.</li><li>2. The conviction on count 2 is confirmed. However, the sentence is set aside and replaced as follows:  Count 2: Accused is sentenced to a fine of N\$1500 or 3 months' imprisonment, which is wholly suspended for a period of 3 years on condition that the accused is not convicted of contravening section 47(1) of Ordinance 4</li></ol>	

of 1975, namely selling game meat without a permit, committed during the period of suspension.

3. This matter to be referred to the Chief Magistrate to investigate

### **REASONS FOR ORDERS:**

SHIVUTE J (CHRISTIAAN J concurring):

[1] The accused in this case was charged with contravening sections 47 and 51 of the Nature Conservation Ordinance 4 of 1975, as amended (the Ordinance) in the Magistrate's Court for the district of Grootfontein. He pleaded guilty to the charges and was convicted of 2 charges namely, an alternative to count 1: contravening section 51 read with sections 85, 87 and 89 of the Ordinance- possession of game meat; and count 2: contravening section 47(1) read with section 1 and 47(6) of the Ordinance – sale of game meat.

[2] The accused was sentenced on the first alternative to count 1 to a fine of N\$6000 or to 2 years' imprisonment and on count 2 to a fine of N\$2000 or to 3 months' imprisonment, wholly suspended with conditions.

[3] When the matter came before me on review, I queried the magistrate on whether the accused was afforded an opportunity to explain or give satisfactory account, as required by the Ordinance, how he came to possess game meat, considering that the court applied section 112(1)(a) of the Criminal Procedure Act 51 of 1977, as amended (the CPA).

[4] To this, the magistrate replied that section 112(1)(a) was not applied in the proceedings and that section 112(1)(b) was applied for both the first alternative to count 1 and to count 2 and that only after questioning the accused in terms of section 112(1)(b),

the court satisfied itself that based on the accused's answers, he could not give a satisfactory account for such possession.

[5] I must pause here to mention that, initially, the record reflected that the accused was convicted on the first alternative to count 1 after section 112(1)(a) was applied by the court, hence the query. The magistrate replied that section 112(1)(a) was not applied in the proceedings and the record, after being returned with the reply, seems to have been tampered with. I say so because, the court record of 15 February 2024 which contains section 112(1)(b) proceedings which was supposed to start with page 1 of 10 to 7 of 10 are specifically not numbered. Strange enough, only pages 8 of 10 to 10 of 10 are numbered, although these proceedings took place on the same date, which is 15 February 2024. When magistrates are queried regarding the record, they must answer to the query without changing the record in the absence of an explanation. Magistrates must desist from tampering with the record, and even if it is not an issue of tampering, they must pay due diligence so as to not remove anything from the record, ensuring that the record remains the same. Considering that this issue persists with magistrates, we will in future, make copies of the records for which we send queries, before sending it back to the magistrate.

[6] I further queried the magistrate whether the custodial sentence of two (2) years in respect of the first alternative to count 1 is permissible. The magistrate responded that section 87(1)(a) of the Ordinance finds application, and it provides for convictions where the Ordinance does not expressly provide for a penalty. Section 87(1)(a) provides for sentences of a fine not exceeding N\$6000 or to 6 months' imprisonment. Hence, the magistrate conceded that the sentence of two (2) years exceeds the maximum prescribed sentence of six (6) months, and is therefore impermissible.

[7] Lastly, I queried the magistrate whether on count 2, the fine of N\$2000 imposed is permissible. The magistrate conceded that it was not permissible as section 47 contains a penalty clause, providing for a sentence of a fine of not less than N\$100 and not exceeding N\$1500.

[8] These concessions are correctly made.

[9] However, as a consequence of the tampering of the record, I am convinced that the magistrate applied section 112(1)(a) instead of section 112(1)(b) in regard to the first alternative to count 1. Thus, the accused had not been given the opportunity to explain or give satisfactory account for the possession of the game meat.

[10] As a result, I make the following order:

1. The conviction and sentence on the alternative to count 1 are set aside.
2. The conviction on count 2 is confirmed. However the sentence is set aside and replaced with the following:

Count 2: Accused is sentenced to a fine of N\$1500 or 3 months' imprisonment, which is wholly suspended for a period of 3 years on condition that the accused is not convicted of contravening section 47(1) of Ordinance 4 of 1975 namely, selling game meat without a permit, committed during the period of suspension.

3. This matter to be referred to the Chief Magistrate to investigate.

**N N SHIVUTE**  
**JUDGE**

**P CHRISTIAAN**  
**JUDGE**

