

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

CR No.: 28/2020

In the matter between:

**THE STATE**

**v**

**RUTENI MUHARUKUA**

**ACCUSED**

(HIGH COURT NLD REVIEW CASE REF NO: (358/2019))

**Neutral citation:** *S v Muharukua* (CR 28/2020) [2020] NAHCNLD 65 (8 June 2020)

**Coram:** JANUARY J *et* DIERGAARDT AJ

**Delivered:** 8 June 2020

**Flynote:** Review – Failure of the magistrate to question the accused in term of section 112(1) (b) Criminal Procedure Act 51 of 1977.

Failure of magistrate to hold an enquiry and make a forfeiture order – discretionary and peremptory – Duty of public prosecutor restated – Magistrate needs to be proactive to forfeit.

**Summary:** In *casu the* accused was convicted and sentenced on: 1. hunting of specially protected game (a rhinoceros); 2. Possession of a firearm without a license; 3. Possession of ammunition; 4. Entering a game park or nature reserve without permission; 5. Conveying a firearm into a nature reserve/game park.

4. The accused pleaded guilty to all counts. The magistrate applied section 112(1) (b) of the CPA in relation to charges 1, 2, 3 and section 112(1) (b) of the CPA in relation to charges 4 and 5 without questioning the accused. The accused was convicted and sentenced on all charges.

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### ORDER

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1. The conviction and sentence of Hunting of specially protected game (a rhinoceros) contravention of section 26(1) (a) read with sections 1, 26(2) , 26(3) (c), 85, 87 and 89 A of Ordinance 4 of 1975 as amended and further read with sections 90 and 250 of Criminal Procedure Act 51 of 1977 is confirmed;
2. The conviction and sentence of possession of a firearm in contravention of section 2 read with sections 1, 38(2) and 39 of Act 7 of 1996 as amended is confirmed;
3. The conviction and sentence of possession of ammunition in contravention of section 33 read with sections 1, 38(2) and 39 as amended is confirmed;
4. The conviction and sentence in respect of counts 4 and 5 are set aside. The matter is remitted for the magistrate to comply with the provisions of section 112(1) (b) of the Criminal Procedure Act and question the accused properly, if satisfied sentence the accused afresh and enter a plea of not guilty if he is not satisfied that the accused admits to all the elements of the offence;
5. The prosecutor applied for the forfeiture of 3 rifles, 9 rounds of 303 ammunition and knives. The magistrate in his reasons is silent on the application.

6. The matter is remitted to the magistrate to consider the application for forfeiture in compliance of section 89 of the Nature Conservation Ordinance 4 of 1975 and in accordance with the directives of the judgment.

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## REVIEW JUDGMENT

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DIERGAARDT AJ (JANUARY J concurring):

[1] The case came before me in terms of section 304 of the Criminal Procedure Act, Act 51 of 1977

### *Introduction*

[2] The accused was charged, convicted and sentenced for: 1. Hunting of protected game ( a rhinoceros) in contravention of section 26(1) read with sections 1, 26(2), 26(3), 85, 87, 89 and 89 A of Ordinance 4 of 1975 as amended; 2. Possession of a fire arm without a licence in contravention of section 2 read with sections 1, 38(2) and 39 of Ordinance 4 of 1975, as amended; 3. Possession of ammunition in contravention of section 33 read with sections 1, 38(2) and 39 of Act 7 of 1996, as amended; 4. Entering or residing within a game park or nature reserve without permission in contravention of section 18(1) (a) read with sections 1, 18(3), 19, 21, 81 A, 87, 89, and 89 A as amended; 5. Conveying a firearm into a nature reserve/game park in contravention of section 18(1) (b) read with sections 1, 18(3), 85, 81 A, and 87 of Ordinance 4 of 1975 as amended.

[3] The accused pleaded guilty on all five charges. The magistrate applied section 112(1) (b) of the CPA in respect of charges 1, 2, and 3. He applied section 112(1) (a) in respect of counts 4 and 5.

[4] The facts of the matter are rather tragic. The accused illegally went into Etosha National Park at Otjovazando with a friend. They possessed unlicensed firearms and ammunition. They wanted to hunt a rhinoceros, were searching, pursuing, laying and waiting for it with the intention to kill it for the horn. The hunted

became the hunter. The rhino charged the accused and his friend, stabbed the friend with its horn, lifted him and threw him on the ground and trampled him to death on the spot.

[5] The accused was sentenced as follows:

'1. Hunting of protected game: N\$25 000 or in default of payment 5 years imprisonment, in addition two years imprisonment wholly suspended for a period of 5 years on condition that accused is not convicted of hunting of specially protected game in contravention of section 26(1) read with sections 1, 26(2), 26(3), 85, 87, 89 and 89 A of the Nature Conservation Ordinance 4 of 1975 as amended committed within the period of suspension;

2. Possession of a firearm without a license: N\$8 000 or in default of payment 2 years imprisonment;

3. Possession of ammunition: N\$4 000 or in default of payment to 1 year imprisonment wholly suspended for a period of 5 years on condition that accused is not convicted of either possession of a firearm without a license or possession of ammunition without an arm capable of firing those ammunition committed during the period of suspension.

4. Entering or residing within a game park or nature reserve without permission: N\$ 500 or in default of payment 6 months imprisonment;

5. Conveying a firearm into a nature reserve/game park: N\$500 or in default of payment 6 months imprisonment;

6. It was further ordered that the accused is unfit to possess a firearm for a period of 2 years.'

[6] SS Terblanche, *Guide to Sentencing in South Africa* at pages 397 and 398 paragraph 2.2 (Second edition 2007) states that the prerequisites to be satisfied before forfeiture can be ordered are:

'(1) The accused must have been convicted of the commission of some offence, which in the case of paragraph (b) has to be one of those mentioned in paragraph 1 of the schedule to the Act. (2) The article declared forfeited has to be one seized (ordinarily by the police) in terms of the Act. (3) The article (which may include a weapon or instrument) must be the means

through which the offence was committed or had to be used in the commission of the offence.’ No mention is made that it is a prerequisite that the exhibits should be before court nor could I find authority for that proposition.

[7] The Nature Conservation Ordinance 4 of 1975 and the Arms and Ammunition Act, Act 7 of 1996 specifically provides for forfeiture. It is therefore, in my view, not necessary to apply section 35 of the CPA for forfeiture. The prerequisites in both laws and the CPA are the same in that an accused must be convicted of some offence; the article declared forfeited has to be one seized (ordinarily by the police); The article (which may include a weapon or instrument) must be the means through which the offence was committed or had to be used in the commission of the offence.

[8] In this matter the public-prosecutor did not bring an application for forfeiture. He indicated that the exhibits were not before court and further applications will be made once the exhibits are back. It was incumbent upon the prosecution to make out a case for forfeiture and that an accused should then be afforded a proper opportunity to address the application for forfeiture (subject to the application of the principle of audi alteram partem). I agree that a case would need to be made out and that an accused should be accorded a proper opportunity to address it.<sup>1</sup> In my view, the magistrate ought to have been more proactive. Where no application is made the magistrate should invite the public-prosecutor and the accused to address him/her on the issue and to present evidence where necessary. I hold this view more specifically because the magistrate has a wide discretion to forfeit where forfeiture is discretionary. Where forfeiture is peremptory the forfeiture is a ‘must’.

[9] I respectfully agree with Smuts J (as he then was) where he states: ‘Given the seriousness of the crime and the fundamental public policy consideration that those convicted of serious offences should be deprived of the instrumentalities of crime (and its gains), there would in my view seem to be a duty on a court when an application is made for forfeiture under the ordinance after conviction to duly and properly consider such an application.’<sup>2</sup>

[10] There is a difference in the forfeiture of an article used in contravention of the Arms and ammunition Act, Act 7 of 1996 and forfeiture in terms of the Nature

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<sup>1</sup> S v Nel 2015 (4) NR 1057 (HC) at 1060 F-G.

<sup>2</sup> S v Nel (supra) at 1063 H-I and 1064 A.

Conservation Ordinance 4 of 1975. Forfeiture in the Arms and Ammunition Act is discretionary because the word 'may' is used whereas in the Nature Conservation Ordinance forfeiture is peremptory in terms section 89(1) (a) of the Ordinance 'as the court 'shall' forfeit any game or wild animal or game meat or the skin, horn, tooth or tusk, egg shell, ears feet or head of any game or wild animal or any fish or indigenous plant which is found in the possession of such person and which was used for the purpose of or in connection with the commission of such offence or in respect of which such offence has been committed.'

[11] The remainder of section 89 is also clear. Where 'shall' is used it is peremptory and where 'may' is used it is discretionary.

'b) the Court convicting such person shall issue an order directing any licence or permit issued in terms of this Ordinance to the person so convicted to be withdrawn and cancelled;

(c) the Court convicting such person may, subject to the provisions of this Ordinance, declare any weapon or ammunition, lamp, battery, fishing tackle, device or article referred to in section 42, animal or any other article or object which was used for the purpose of or in connection with the commission of such offence to be forfeited to the State;

(d) the Court convicting such person may, subject to the provisions of this Ordinance, declare any vehicle, vessel, raft, or aircraft used for the purpose of or in connection with the commission of such offence or for the purpose of conveying or removing any game or wild animal hunted or captured contrary to the provisions of this Ordinance, to be forfeited to the State.

(2) Any forfeiture in terms of the provisions of subsection (1) (c) or (d) shall, notwithstanding anything to the contrary contained in any law, be ordered by the court irrespective of any rights which any person other than the convicted person has in respect of the forfeited weapon, ammunition, lamp, battery, fishing tackle, device or article referred to in section 42, animal or any other article or object, vehicle, vessel, raft or aircraft.

(3) A forfeiture or an order in terms of the provisions of subsection (1) shall be made or given in addition to any penalty, forfeiture or order that shall or may be imposed, made or given by the Court in terms of this Ordinance.

(4) Anything forfeited in terms of the provisions of this section may be disposed of by the Minister and the proceeds obtained therefrom shall be paid into the Territory Revenue Fund.'  
(Underlined for own emphasis).

[12] Consequently the case is remitted to the magistrate to apply the guidelines in relation to forfeiture in terms of section 38 of the Arms and Ammunition Act, Act 7 of 1996 and section 89 of the Nature Conservation Ordinance 4 of 1975.

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A DIERGAARDT  
ACTING JUDGE

I agree

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HC JANUARY  
JUDGE