

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

<b>Case Title:</b> <i>The State v Rehabeam Natangwe Kapelema</i>	<b>Case No:</b> CR 61/2022
<b>High Court NLD Review No:</b> 356/2022	<b>Division of Court:</b> Northern Local Division
<b>Heard before:</b> The Honourable Lady Justice Salionga J et The Honourable Mr Justice Kessler AJ	<b>Delivered on:</b> 03 November 2022
<b>Neutral citation:</b> <i>S v Kapelema</i> (CR 61/2022) [2022] NAHCNLD 119 (03 November 2022)	
<b>It is hereby ordered that:</b> <ol style="list-style-type: none"><li>1. The conviction and sentence are confirmed.</li><li>2. The order declaring accused unfit to possess a firearm is set aside.</li><li>3. The matter is remitted to the trial Magistrate to properly apply section 10 of Act 7 of 1996.</li></ol>	

**Reasons for the order:**

SALIONGA J (KESSLAU AJ concurring):

[1] This matter came before me on review in terms of section 302 (1) of the Criminal Procedure Act 51 of 1977 (CPA). The unrepresented accused appeared in the magistrate's court for the district of Outapi, held at Ruacana, on a charge of contravening section 2 read with section 1, 38(2) and 39 of Act 7 of 1996 as amended- possession of a firearm without a licence where he pleaded guilty and was convicted in terms of section 112 (1) (b) of the Criminal Procedure Act 51 of 1977 (the CPA). He was then sentenced and the matter finalised. The conviction and sentence are proper and will be confirmed.

[2] Upon receiving this matter I observed that two issues needed clarity. Firstly I noticed that not only did the annexure allege the unlawful possession of a firearm, it further alleged that the accused also possessed 3 lives round of ammunition. The possession of ammunition is an offence of its own genre and should always be individually charged in terms of section 33 of Act 7 of 1996- Arms and Ammunitions Act. I however did not take this issue up with the Magistrate because I was satisfied with his/her questioning on the offence of unlawful possession of a firearm. I highlight this issue here for the benefit of the Prosecutors and Magistrates to make it clear that these two offences cannot be compounded into a single charge.

[3] The second issue in this matter was addressed in the following query directed to the Magistrate:

'Explain whether the provisions of both section 10 (6) and 10 (7) of the Arms and Ammunitions Act 7 of 1996 were brought to the attention of the accused and whether he was afforded an opportunity to advance reasons and present evidence why he should not be declared or deemed to be declared unfit to possess an arm after conviction.'

[4] To the above query the Magistrate responded that: '... regarding the application of Section 10(6) and 10 (7) of the Act 7 of 1966, such query was done in court, the issue is that the Magistrate failed to reflect such on record.' (SIC) With this reply I also acknowledge the

Magistrates apology for the late reply to the query.

[5] Apart from the Prosecutor's application that the accused should be declared unfit to possess a firearm there is no indication on the case record that such inquiry was conducted by the Magistrate. Both the provisions of Section 10(6) and 10(7) of the Arms of Ammunitions Act, 7 of 1996 provides as follows:

- (6) Subject to subsection (7), a person who is convicted by a court of -
- (a) a contravention of a provision of this Act relating to the unlawful possession of an arm without the required licence, permit or other authorization, or of section 38(1)(i), (j), (k), (l) or (m), or of any other offence in the commission of which an arm was used (excluding any such conviction following upon the payment of an admission of guilt fine in terms of section 57 of the said Criminal Procedure Act, 1977), is deemed to be declared unfit to possess an arm, unless the court determines otherwise;
- (b) an offence referred to in Schedule 1 of this Act in the commission of which an arm was not used, may except in the case where such a conviction follows upon the payment of an admission of a guilt fine referred to in paragraph (a), be declared unfit to possess an arm in the discretion of the court concerned.
- (7) The court shall upon convicting any person referred to in paragraph (a) of subsection (6) of where the court exercises a discretion as referred to in paragraph (b) of that subsection, bring the provisions of the paragraph concerned to the notice of such person and afford him or her an opportunity to advance reasons and present evidence why he or she should not be declared or deemed to be declared unfit to possess an arm.' (Emphasis added)

[6] The above provisions and specifically 10(7) is peremptory and places a duty on the Magistrate to hold an inquiry before an accused is deemed or declared unfit to possess a firearm in terms of section 10(6) above. These two provisions not only place a duty on the Magistrate but create rights and choices for the accused that has been convicted to either just advance reasons or give evidence why he/she should not be declared or deemed as aforesaid. Evidence maybe adduced in different ways. Where an

accused person has a right that he has to exercise, it is very important that such right is brought to his/her attention and the manner in which such a right is to be exercised should equally be explained and reflected *ex facie* on the record.

[7] It is trite that Magistrate's courts are courts of record.<sup>1</sup> It cannot be emphasized enough that it is incumbent on Magistrates to keep proper records of proceedings. As Shivute J and January J when addressing the need for proper record keeping in Magistrates Court put it in *S v Hanse*<sup>2</sup> that: 'It serves in review matters to properly inform the reviewing judges of the facts and principles to determine if the matter was disposed of in accordance with justice.' Inquiries such as that envisaged in section 10 above are conducted to determine issues of substance that borders on individuals rights and have to be conducted in terms of specific procedures to minimise any prejudice that may result from any resultant order thereof. No explanation was recorded of the accused's rights in terms of this section despite the allegation that this was made. His response to the explanation or choice is also not recorded. Strangely there is no single trace of the whole inquiry on the case record apart from the application by the Prosecutor and the declaratory order.

[8] In relation to the duty of a Magistrate to ensure a proper and comprehensive record of the court proceedings as they transpired, I refer to *S v Frederick*<sup>3</sup> where it was held that a Magistrate has a duty to keep an unrepresented accused informed of procedural rights and to keep record thereof.<sup>4</sup> In that case, the magistrate failed to record the explanations of the procedural rights, but merely recorded that rights in cross-examination, mitigation rights, and review and appeal rights were explained to the accused, without recording or stating the exact and detailed explanation given to the accused. In that case it was held that the details of the explanations should appear *ex facie* the record,<sup>5</sup> which was not properly done in that matter and the court found that it amounted to an irregularity.

<sup>1</sup> Section 4(1) of Magistrates Court Act No 32 of 1944 as amended

<sup>2</sup> (CR 105/2021) [2021] NAHCMD 521 (09 November 2021)

<sup>3</sup> *S v Frederick* (CR 76/2020) [2020] NAHCMD 459 (6 October 2020).

<sup>4</sup> See footnote 1 supra providing that every Magistrates Court shall be a court of record

<sup>5</sup> *S v Daniels* 1983 (3) SA 275 A.

[9] The above principles are sound in both law and logic. Although not specifically dealing with the issues of procedural rights as above, it cannot equally be assumed by this court that an explanation was properly given and in what terms in this specific matter. This court cannot assume facts which are not part of the record and consequently I will have to lean more towards a finding that the provisions of section 10 were not properly applied. For the aforesaid reasons the matter has to be remitted for the Magistrate to properly apply and conduct the said enquiry.

[10] In the result,

1. The conviction and sentence are confirmed.
2. The order declaring accused unfit to possess a firearm is set aside.
3. The matter is remitted to the trial Magistrate to properly apply section 10 of Act 7 of 1996.

<b>J. T. SALIONGA</b> <b>JUDGE</b>	<b>E. E. KESSLAU</b> <b>ACTING JUDGE</b>