

# SUMMARY

CASE NO.: CR 31/2008

THE STATE

and

MWEDENI GOTLIEB FIKAMENI

MAINGA, J et SILUNGWE, AJ

**CRIMINAL PROCEDURE** - Sentence – Consistency – Same crime – Same presiding magistrate – Failure to observe principle of consistence may, in a suitable case, amount to a misdirection in law.



CASE NO.: CR 31/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

**THE STATE**

**vs**

**MWEDENI GOTLIEB FIKAMENI**

*(HIGH COURT REVIEW CASE NO.: 1372/2007)*

**CORAM: MAINGA, J et SILUNGWE, AJ**

Delivered on: 2008.04.23

---

**REVIEW JUDGMENT**

**SILUNGWE, AJ** [1] In this review matter, the accused, then aged 26 years, appeared before the Tsumeb Magistrate's Court on September 03, 2007, charged with possession of a firearm without a licence, in contravention of section 2, read with sections 1, 32(2) and 39, as amended, of the Arms and Ammunition Act, Act 7 of 1996. He tendered a plea of guilty upon which he was convicted and sentenced to 18 months' imprisonment, without the option of a fine.

[2] Thereafter, the accused approached a legal practitioner and the matter was sent for review. In his representations, the accused alleged that the provisions of section 112(1)(b) of the Criminal Procedure Act, Act 51 of 1977, had not been complied with in that all the elements of the offence had not been admitted with the result that the conviction was irregular.

[3] In his response to the accused's allegation, the presiding magistrate maintains that he duly complied with the provisions of section 112(1)(b) aforesaid and that all the elements of the crime charged were admitted by the accused.

[4] A careful perusal of the record of proceedings clearly shows that the presiding magistrate's reasons for the accused's conviction are impeccable. Accordingly, the accused's allegation in this regard is untenable.

[5] A further allegation by the accused is that, before the commencement of the hearing, he "was given the impression by the Public Prosecutor that it would be in (sic) his best interest if (sic) he pleaded guilty and if the case was finalized on that day". The presiding magistrate's comment, however, is that whatever might have transpired between the accused and the Public Prosecutor is unknown to him. He adds that when the accused was asked (during the section 112(1)(b) questioning) whether he had been forced to plead guilty, his categorical response was "No.". In this connection, there is nothing on record from the Public Prosecutor or anything to suggest that the accused was in anyway influenced by anyone to plead guilty. Indeed, the fact that the State Prosecutor urged the court *a quo* to impose a deterrent sentence counters the accused's allegation. It would appear that this allegation by the accused is not only an afterthought, but also false. It follows that the allegation cannot reasonably possibly be sustained.

[6] Finally, the accused urges that, in the event that the Court does not interfere with his conviction, the sentence imposed be substituted with a sentence that includes the option of a fine. He draws the Court's attention to the case of *The State v Sakaria Willem*, Case No. 230/2007 in which the accused who had been convicted of a similar offence was fined N\$2 000-00 or alternatively ordered to serve one year's imprisonment; and to the case of *The State v Steven Shipanga*, Case No. 79/2007 in which the accused was fined N\$1000-00 or

alternatively ordered to serve one year's imprisonment. In both cases, the sentences were wholly suspended. I pose here to mention that in the latter case, the accused was a juvenile aged 17 years; that the crime committed in all three cases was the same; and that the presiding magistrate too was the same.

[7] It is trite law that sentencing is a matter for the discretion of the trial court and that an appellate Court, and might I add, a reviewing Court, will only interfere with such discretion on certain judicially recognised grounds, for instance, where a trial Court misdirects itself on the law and/or on the facts; fails to exercise its discretion judiciously, *et cetera*.

[8] In the final analysis, the real issue that emerges in this matter is one of consistence in sentencing (or the lack thereof). The principle of consistency in sentencing has gained wide judicial recognition. This principle is important because it strives to avert any wide divergence in sentences imposed in similar cases and, as such, it fosters fairness and justice. See: *S v Skrywer* 2005 NR 288 at 289H-I; *S v Cambinda*; *S v Agosotino*; *S v Carvalho* 2006 (2) NR 550 at 551C-E. It follows that, in a suitable case, failure to observe the principle may amount to a misdirection in law.

[9] In casu, as in the two other similar cases previously referred in paragraph 6, the accused persons were first offenders and, apart from the case of *Steven Shipanga* – the juvenile – the personal circumstances of the remainder are such that they do not justify a wide divergence in the sentences that were passed, with particular reference the current case where the accused was not given an option of a fine. In the circumstances, the sentencer's lack of consistence was a misdirection that warrants an interference with the sentence imposed. As the accused has been serving his sentence since September, 2007 (having been arrested on August 31, 2007) it is unnecessary to impose a fine.

[10] In conclusion, the following order is made:

1. the conviction is confirmed; and
2. the sentence of 18 months' imprisonment is set aside and, in substitution therefor, a sentence of 9 months' is imposed effective from the date of the initial sentence, namely, September 03, 2007.

---

**SILUNGWE, AJ**

**I agree**

---

**MAINGA, J**