REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CR 83/2012

In the matter between:

THE STATE

and

VAINO HAIPINGE **ACCUSED**

Neutral citation: *The State v Haipinge* (HC 1771/2012) [2012] NAHCMD 16 (October 2012)

Coram: GEIER J et SMUTS J

Delivered: **09 October 2012**

Flynote: Criminal procedure –duplication of convictions – test of single evidence and intent applied – court concluding on facts that impermissible duplication of convictions occurred – accordingly conviction on lesser offence set aside – other conviction confirmed –

Criminal procedure - Arms & Ammunition Act 7 of 1996 – failure to conduct inquiry prescribed by section 10(7) of the act upon conviction on an offence listed in sub-section 10 (6)(a) and (b) –duties of court listed – matter referred back to court a quo to conduct enquiry

Summary: Magistrate referring matter for review in terms of section 304(4) of the Criminal procedure Act 51 of 1977 – accused had been found guilty of contravening Sections 38(1)(i) and (l) of the Arms and Ammunition Act consequent to a statement made in terms of 112(2)

of the Act – on factual basis disclosed in such statement Court finding – on the application of the single intent and evidence test – that an impermissible duplication of convictions had occurred – conviction in respect of contravention of section 38(1)(i) set aside – conviction in respect of Section 38(1)(l) confirmed – sentence in respect thereof confirmed –

Court a quo failing to conduct an enquiry consequent to the conviction of the accused of an offence listed in section 10(6) of the Arms & Ammunition Act –

Held: a conviction of one or more of the listed offences in sub-section 10 (6) (a) and (b) brings with it a rebuttable 'deemed declaration of unfitness to possess a firearm';

Held – that it was obligatory for the court in terms of sub-section 10 (7), upon convicting any person referred to in paragraph (a) of subsection (6) or where the court exercises a discretion as referred to in paragraph (b) of that subsection, to 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 –

Held - that it was further incumbent upon a court, when convicting a person under s38, to make the appropriate enquiry and duly apply the mind to s10. This should appear from the judgment of the court.

Held: case had to be referred back to the court a quo to follow prescribed procedure -

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ORDER

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1. The conviction in respect of the contravention of section 38 (1) (i) of Act 7 of 1996 relating to the pointing of a firearm is hereby set aside.

2. The conviction in respect of the contravention of section 38 (1) (l) of Act 7 of 1996 relating to the negligent discharge of a firearm is hereby confirmed.

3. The sentence imposed in respect of the accused's conviction in terms of section 38 (1) (l) of Act 7 of 1996 is hereby once again imposed.

4. The matter is referred back to the court a quo for purposes of conducting the enquiry prescribed by section 10(7) of the Arms and Ammunition Act 7 of 1996.

JUDGMENT

GEIER J (SMUTS J concurring):

[1] The accused - consequent to plea of guilty - based on the statement handed into court in terms of section 112(2) of the Criminal Procedure Act - was convicted of the negligent discharge of a firearm and the unlawful pointing thereof. The court thereupon sentenced the accused to a fine of N$2000.00 or 12 months imprisonment in lieu of payment of such fine.

[2] For purposes of sentence both convictions were taken together.

[3] Subsequently the magistrate of Otjiwarongo had doubts about the correctness of the conviction and the resultant sentence and requested a review thereof in terms of section 304(4) in which request he raised the following issues:

'Kindly be informed that after the accused was convicted in this matter for negligent discharge of a firearm, the Court omitted to apply the provisions of Sec 10 of Act 7 of 1996 to enquire into why the accused's fire-arm licence should not be suspended.

The accused was convicted of negligent discharge of a fire-arm and pointing of fire-arm, which result from one act and pertaining to the same complainant, thus this is a duplication of charges and resultant duplication of convictions which is in law, not allowed.

Further, after the accused was convicted, the charges were taken together for purposes of sentence. However, this was also done in error as the charges are statutory offences.

Owing to the abovementioned errors and omissions, I humbly request you to place the matter before a judge to review the proceedings in terms of Sec 304(4) of the Criminal Procedure Act as amended.'

AD THE DUPLICATION OF CONVICTIONS

[4] The said plea of guilty was tendered on the following basis:

> '(a) I admit that on 10 July 2005 I was at or near Otjiwarongo in the district of Otjiwarongo.
>
> (b) I admit that I am the lawful owner, and licence holder of a firearm to wit, 7.65 Calibre Browning Pistol Serial No. 79465920.
>
> (c) I admit that on the said date, I got into an argument with Johny Katjire, and because I was so mad, did wrongfully and unlawfully discharge the above mentioned firearm.
>
> (d) I admit that by discharging the said firearm, I endangered the limb of Johny Katjire and handled my firearm in a negligent manner.
>
> (e) I admit that I wrongfully, unlawfully and intentionally pointed the said firearm at John Katjire.
>
> (f) I admit that I knew at the time of my actions that such actions were wrongful and unlawful and punishable by law.'

[5] Given the underlying factual premise it does not take much to conclude that on the application of the single intent and evidence test,[1] for instance, the conviction on the unlawful pointing and discharge of the firearm in question constituted an impermissible duplication of convictions in respect of which the evidence in respect of one of the charges at the same time also established the other.

[1] See for instance : *S v SEIBEB AND ANOTHER; S v EIXAB* 1997 NR 254 (HC) at p256 -257 - *S v GASEB AND OTHERS* 2000 NR 139 (SC) at 150

[6] I come to this conclusion as it is unlikely that a person, having got into an argument with another, leading to the unlawful use of a firearm, would not in the same sequence of events point and discharge the firearm in question in respect of the person with whom he got into such argument in the first place. There is also no suggestion in the plea explanation that that the pointing occurred before or after the discharge of the firearm. Such disjointed conduct would not fit the picture, in my view.

[7] The actions by the accused were, ex facie the plea explanation, also perpetrated for one reason only and thus with single intent ie, ' … *because I was so mad, (I) did wrongfully and unlawfully discharge the above mentioned firearm … '.*[2] There is no suggestion that the pointing did not go hand in hand with the discharge, prior to which the firearm must have been pointed in some direction. Such pointing and discharge surely must have been in the direction of Johnny Katjire who had become the focal point of the accused's anger this must be the only reasonable inference that can be drawn from the plea explanation given the self-declared intent of the accused. If this inference is correct it must also be concluded that both offences were established by the same evidence.

AD THE SENTENCE

[8] In this regard the learned magistrate was of the view that it was impermissible to take the charges - relating to statutory offences - together for purposes of sentence.

[9] In *S v AKONDA* 2009 (1) NR 17 (HC)[3] however held that where accused persons have been convicted for crimes divergent in nature, time and place, the

[2] The accused also stated : I admit that by discharging the said firearm, I endangered the limb of Johny Katjire and handled my firearm in a negligent manner. I admit that I wrongfully, unlawfully and intentionally pointed the said firearm at John Katjire.

[3] See also *S v MWEBO* 1990 NR 27 (HC)

courts discourage the practice of taking such counts together for the purposes of sentence. It appears from the case law that there is no absolute prohibition in this regard[4] and that the harshness of sentence can, for instance, be ameliorated by ordering the running together of sentences.[5]

[10] In view of the above finding however that there was an impermissible duplication of convictions in this instance as a result of which I intend in any event to set aside the conviction relating to the pointing of the firearm, the question whether or not the court a quo erred in taking the charges – for purposes of sentence - together – becomes obsolete.

[11] At the same time of course the question arises what the appropriate sentence for the remaining conviction of the accused on the negligent discharge of the firearm should be?

[12] With reference to what has been stated herein above in respect of the impermissible duplication of convictions – demonstrating that the complained of acts occurred in one and the same sequence of events I consider it appropriate to confer the same sentence that was imposed on the accused in the first instance.

AD THE FAILURE TO APPLY THE PROVISIONS OF SECTION 10 OF ACT 7 OF 1996.

[13] The provisions of this section were not applied, so much emerges from the record and the learned magistrates' abovementioned letter requesting this review.

[14] Sections 10(6) and 10(7) of the Arms and Ammunition Act 7 of 1996 state:

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[4] *S v MOSTERT;S v DE KOKER* 1995 NR 131 (HC)
[5] *S v VISAGIE* 2010 (1) NR 271 (HC)

'(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.'

[15] The provisions of the act are clear :

a) a conviction of one or more of the listed offences in sub-section 10 (6) (a) and (b) brings with it a rebuttable 'deemed declaration of unfitness to possess a firearm';

b) The court is then obliged in terms of sub-section 10 (7), upon convicting any person referred to in paragraph (a) of subsection (6) or 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.

[16] This court, in *S v Nengongo* (CR 13/2012) [2012] NRHC 167 (27 June 2012), has already found that it is further incumbent upon a court, when convicting a person under s38, to make the appropriate enquiry and duly apply the mind to s10. This should appear from the judgment of the court.[6]

[17] Given that these requirements were not followed in this instance, it does not take much to conclude that this matter needs to be referred back to the court a quo to ensure compliance with the said provisions of the Arms and Ammunition Act.

[18] In the result the following orders are made:

5. The conviction in respect of the contravention of section 38 (1) (i) of Act 7 of 1996 relating to the pointing of a firearm is hereby set aside.

6. The conviction in respect of the contravention of section 38 (1) (l) of Act 7 of 1996 relating to the negligent discharge of a firearm is hereby confirmed.

7. The sentence imposed in respect of the accused's conviction in terms of section 38 (1) (l) of Act 7 of 1996 is hereby confirmed.

8. The matter is referred back to the court a quo for purposes of conducting the enquiry prescribed by section 10(7) of the Arms and Ammunition Act 7 of 1996.

H GEIER

Judge

[6] http://www.saflii.org/na/cases/NAHC/2012/167.html at para [26]

DF SMUTS

Judge