CASE NO.: CR 15/2012

IN THE HIGH COURT OF NAMIBIA
NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

In the matter between:

THE STATE

versus

GORDON MUVANGUA

PAULUS TJIRUNGU

(HIGH COURT REVIEW CASE NO.:152/2010)

CORAM: Liebenberg J *et* Tommasi, J

DELIVERED ON: 18 April 2012

REVIEW JUDGMENT

TOMMASI J [1] This matter was sent for review from the district court of Opuwo. The two accused were charged with having contravened section **26(1)** of Ordinance 4 of 1975 (hunting of **specially protected game**).

[2] The particulars of the charge were that the two accused had wrongfully and unlawfully hunted **protected game** (which is an offence in terms of section **27** of Ordinance 4 of 1975), to wit an oryx (which falls under the category of **huntable game**), without a permit on 17 February 2010 at or near Palmfontein.

[3] Both accused pleaded guilty but pleas of not guilty were entered in respect of both accused who denied that they had hunted the oryx. During questioning by the magistrate in terms of section 112(1)(b) accused 1 admitted that they were found skinning an oryx. Accused 2 admitted that he was found in possession of oryx meat. Both accused denied having killed the oryx. The accused thus disputed that they hunted the oryx and the State bore the burden of proving same.

[4] The State called Ferdinand Tourob, an employee of the Ministry of Environment and Tourism. He testified that he received a report that two persons had hunted an oryx. He found the accused in a vehicle with other persons. He took the accused and the carcass to the police station. He testified that he asked the accused why they had killed the oryx and they informed him that they were hungry. He further testified that the accused pointed out where the oryx was killed and told him that they had used a dog to hunt. He found a dog killed by an oryx at the scene. He estimated the

value of the oryx to be N$1500.00. He asked the two accused if they had "*a permit allowing them to hunt without a permit (sic).*" He did not say how the accused responded to this question.

[5] All indications are that this witness was employed as a nature conservator appointed in terms of section 79 of the Nature Conservation Ordinance, 4 of 1975 although it was not expressly stated by the witness. Nature conservators are given wide powers[1] to *inter alia*, investigate, search and seize game without a warrant and have all the powers of a peace officer to arrest any person without warrant.[2] They are peace officers [3] albeit limited in respect of the area of jurisdiction, offences and powers. There is no reason why these officers should not as a rule show their appointment certificates when arresting a suspect, warn the suspect in accordance with the Judge's Rules and inform him/her of his/her constitutional right not to incriminate him/herself and of his/her right to legal representation.

[6] In this instance it however appears that the accused was questioned by Sgt Shigweda who interpreted what the accused were saying. When cross-examined by accused 2 he testified as follow:

[1] Section 81 of the Ordinance
[2] Section 81 (2) referring to powers granted under section 22 of the Criminal Procedure Ordinance 1963 (Ordinance 34 of 1963) – See Section 40 read with section 344 of the CPA, 51 of 1977.
[3] In terms of Regulation R159 of 2 February 1979.

"When we were talking with you I have Sgt Shigwedha who was talking Otjiherero and Oshiwambo and he is the one who accompanied as he knows the two languages."

Accused 2 pertinently put it to this witness that they never spoke to him. These admissions, if made to this witness, would be inadmissible for the same reasons set out hereunder.

[7] Sgt Shighweda testified that the employees of the Ministry of Environment and Tourism brought two suspects who were found with a carcass. He asked them their names which they gave. He then asked them if they had knowledge of the carcass and the accused admitted that they were found in possession of the carcass and that they killed "*it*". The accused informed them that a dog was killed and they were asked to direct the police to the place where the dog was killed. The next day Sgt Shigweda, the two accused and the employees from the Ministry of Environment and Tourism drove to the place where they found a head, skin, intestines and a dog which was killed by an Oryx. He asked the accused who the dog belonged to and the accused informed him that it belonged to a person who resides with accused 2.

[8] The accused did not testify and were convicted as charged i.e. of having contravened section 26(1) and sentenced to pay a fine of "*N$1600.00 of which N$1000.00 or 10 months were suspended for a period*

of three years on condition that the accused is not convicted of contravening section 26(1) of Ordinance 4 of 1976 as amended committed during the period of suspension".

[9] This matter would not have been reviewable in the ordinary cause in terms of section 302[4] as no imprisonment was imposed by the magistrate due to an oversight. The magistrate submitted the matter for review with a letter attached thereto pointing out errors made in the charge, the conviction and sentence.

[10] She pointed out that the accused were erroneously charged and consequently convicted of having contravened section 26(1) (hunting of specially protected game) of Ordinance 4 of 1975 whereas they should have been charged and convicted of having contravened section 30(1)(hunting of huntable game) of the same ordinance. An oryx, as correctly pointed out by the magistrate, is defined in Ordinance 4 of 1975 as huntable game and not specially protected game. This however is not the only error as the particulars reflect that the accused had hunted protected game.

[11] In *S v KARENGA 2007 (1) NR 135 (HC*) Parker J at page 136 para [6] concluded that Courts of appeal and review are competent to amend charge-sheets if the accused person could not possibly be prejudiced by it. It was not disputed by the accused that they were found with the carcass of an oryx

[4] of the CPA Act, 51 of 1977

and they would not have conducted their defense any differently had they been charged with having contravened section 30(1). However a further vitiating irregularity occurred which is dealt with hereunder.

[12] The magistrate further indicated that she intended imposing an alternative sentence of 16 months imprisonment which she omitted to record and requested this Court to correct the sentence of the accused. I assume that she intended for this matter to be reviewed in terms of the provisions of section 304(4).[5]

[13] The evidence against the accused consists of admissions made to the employee of the Ministry of Environment and Tourism, Ferdinand Tourob and/or to Sgt Shigweda, the pointing out of the place and the admissions they made when questioned in terms of section 112(1)(b). The magistrate accepted evidence of Ferdinand Tourob and Sgt Shigweda to prove that the accused had hunted the oryx.

[14 At the time the accused was brought to Sgt Shigwheda, they were considered suspects. He failed to warn the accused in terms of the Judge's Rules before questioning the accused. The accused furthermore were not informed of their constitutional rights i.e. not to incriminate themselves and their right to legal representation. The accused were hereafter held in custody and requested to do a pointing out without being informed of their

[5] of the CPA Act, 51 of 1977

rights enshrined in the Constitution. The admissions and the evidence of pointing out were therefore inadmissible and the magistrate erred by admitting same into evidence.[6]

[15] Non compliance *per s*e does not vitiate the proceedings and the Court will only set aside a conviction if a failure of justice has occurred. In *S V SHIKUNGA* 1997 NR 156 (SC) (1997 (2) SACR 470) at 171B - D (NR) and 484 d - f) (SACR) the following was stated:

> *"Essentially the question that one is asking in respect of constitutional and non-constitutional irregularities is whether the verdict has been tainted by such irregularity. Where this question is answered in the negative the verdict should stand. What one is doing is attempting to balance two equally compelling claims - the claim that society has that a guilty person should be convicted, and the claim that the integrity of the judicial process should be upheld. Where the irregularity is of a fundamental nature and where the irregularity, though less fundamental, taints the conviction the latter interest prevails. Where however the irregularity is such that it is not of a fundamental nature and it does not taint the verdict the former interest prevails. This does not detract from the caution which a court of appeal would ordinarily adopt in accepting the submission that a clearly established constitutional irregularity did not prejudice the accused in any way or taint the conviction which followed thereupon."*

[16] The accused were unrepresented and from the record it is apparent that they lacked the necessary knowledge to challenge the admissibility of the admissions and pointing out. The magistrate failed in this regard to assist the accused.

[17] The evidence *aliunde* the inadmissible admissions and pointing out does not support a conviction on the charge of which hunting is an element.

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[6] See S v MALUMO AND OTHERS 2007 (1) NR 72 (HC)

It would however support a conviction of having contravened section 50(1) of Ordinance 4 of 1975 which reads as follow:

> *"Subject to the provisions of subsection (2) no person other than the owner or lessee of land on which any game is found dead shall remove such game or any part thereof from the place where it is found dead, unless it was killed in accordance with the provisions of this Ordinance by the person removing it."*

[18] In terms of section 304(2)(iv) the Court is authorized to generally give such judgment as the magistrate's court ought to have given. The two accused were not charged with this offence as an alternative and the only option is to consider whether the magistrate would ought to have convicted the accused of having contravened s50(1)[7] by invoking the provisions of section 270[8]. The latter section authorises the conviction of an accused of an offence which by reason of the essential elements thereof is included in the offence with which he is charged if the evidence adduced in support of such charge does not prove the commission of the offence so charged.[9] The elements of these two offences differ materially and this Court therefore cannot convict the accused of the offence which has been proven herein.

[19] Given the above, the conviction herein cannot be allowed to stand

[20] In the result the following order is made:

1. The conviction and sentence are set aside.

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[7] Of Ordinance 4 of 1975)
[8] Of the CPA, 51 of 1977
[9] S v BABIEP 1999 NR 170 (HC)

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Tommasi J

I concur

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Liebenberg J