CASE NO.: CA 13/2012

IN THE HIGH COURT OF NAMIBIA

In the matter between:

MATHEUS NENGONGO **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: SMUTS, J *et* GEIER, J

Head on: 22 June 2012
Delivered on: 27 June 2012

JUDGMENT

SMUTS, J.: [1] The appellant was charged with and convicted of contravening s 38(1)(j) of the Arms and Ammunition Act, 7 of 1996 (the Act) - of failing to safeguard a fire arm his lawful possession - in the Magistrates' Court in the district of Windhoek on 20 September 2011. The District Magistrate sentenced the appellant to a caution and discharge and found that the appellant should not be deemed to be declared unfit to possess a fire arm under s16 of the Act. Dissatisfied with his conviction, the appellant appealed against it.

[2] The appellant is represented by Mr Nekongo and the State by Mr Marondedze. In Mr Marondedze's heads of argument, the State took issue with the sentence imposed by the Magistrate and submitted that it should be substituted by a more appropriate sentence. When the matter was set down on 28 May 2012, this court also gave notice to the appellant through his legal representative of an intention to increase the sentence if the appeal were not to succeed. The appeal was then postponed to 22 June 2012 to afford the appellant an adequate opportunity to address that aspect.

[3] On 15 June 2012 the appellant sought to withdraw his appeal by way of a notice dated 14 June 2012. In view of the notice given by this court of an intention to increase sentence, this attempt to withdraw the appeal is not competent by reason of the provisions of s309 of the Criminal Procedure Act, 51 of 1977. At the hearing of this appeal Mr Nekongo accepted this.

[4] At issue in this appeal is whether the appellant was correctly convicted and, if so, whether the sentence should be interfered with.

[5] The appellant was legally represented (by Ms A. Angula) at the trial. He pleaded not guilty to the charge. Most of the facts were not in issue.

[6] At the trial, the appellant testified that he is an instructor in the Namibia Defence Force (NDF) with the rank of sergeant. He was at the time based at the Military School

near Okahandja. Whilst off duty over a long weekend, he travelled to Windhoek and went with a friend to a bar in Katutura. Whilst there, his friend (who did not testify) apparently asked the appellant for his car keys to collect some money from the car. The appellant also went to his car whilst at the bar to collect his cell phone charger. It was in his bag in the boot of his car. He testified that he took the bag from the boot and placed it inside the car when gathering his charger, and then returned to the bar.

[7] When the appellant later left the bar, the appellant noticed that his bag had been stolen. There were no signs of a break-in. The appellant testified that his driver's door was locked and speculated that it was possible that keys could be manufactured which could open the doors of his car. Inside his bag was his pistol. He testified that the pistol was in a small safe (inside the bag).

[8] The appellant proceeded to the Wanaheda Police Station to report the theft of the bag which included the theft of the firearm. When doing so, he was charged with contravening s38(1)(j). This subsection provides:

> *"Any person who –*
>
> *Fails to lock away an arm in his or her lawful possession in a strongroom or other place of safety or safe, device, apparatus or instrument for the safe-keeping of an arm referred to in section 3(8) when such arm is not carried on his or her person or is not under his or her direct control."*

[9] This provision refers to 3(8) which is to the following effect:

> *"A licence in terms of subsection (1) and an authorization in terms of subsection (4) shall only be issued to a person if he or she is, or will be, on the date that it is so issued to him or her, in possession of or has access to such strong-room or other place of safety or safe, device, apparatus or instrument for the safe-keeping of an arm as may be prescribed."*

[10] The appellant acknowledged in his testimony that he was acquainted with the law governing possession of firearms. He stated that a firearm must be kept in a safe or properly on his person. He considered that he met this requirement because the firearm was in a safe. The appellant's case at the trial was thus that it was sufficient for him to have the firearm in a portable safe inside his car. He said that the firearm was secure in his car, even though he had provided his car key to his friend. He testified that the safe was roughly A4 size and was not too heavy to be carried around. It was thus portable. The appellant was not cross-examined about why he had not placed the bag back into the boot of his car. Nor was he cross-examined as to why he would carry around his firearm in a safe which was portable in the context of the underlying purpose of safe-keeping. He also testified that his vehicle did not have an alarm. Nor did he state that it had an immobiliser.

[11] The appellant's legal representative at the trial argued that it was not contested that the pistol was in a safe and that s38 was thus not contravened. That argument was initially persisted with on appeal in the appellant's heads but underwent a change in oral argument before us, as I set out below. The presiding magistrate rejected that approach

and found that the appellant's car was not a place of safety for a firearm and convicted the accused. Despite being referred to the prescribed sentences for a contravention of s38(1)(j) – being a fine not exceeding N$12 000 of 3 years imprisonment or both for a first time offender, the magistrate sentenced the appellant to a caution and discharge. The magistrate was also alerted to s10. As I have said, the magistrate proceeded to find that the deeming provision contained in that section should not apply. Neither the prosecutor nor the appellant's representative in the court below referred the magistrate to the provisions of regulation 26 of the regulations promulgated pursuant to the Act, it provides:

> *"(1) For the purposes of section 3(8) of the Act the safe which shall be used for the storage of an arm shall comply with the requirements of regulation 5(2) (d) (i).*
>
> *(2) The safe which is referred to in sub regulation (1) shall –*
>
> *(a) be affixed to the immovable part of the building where the arm is to be kept; or*
>
> *(b) if the safe is to be installed in a vehicle, it shall be fitted in such a manner that it is not conspicuous from outside the vehicle and the applicant must produce a written document from the person who installed the safe and the document must contain –*
>
> *(i) the date of installation;*
>
> *(ii) the name and address of the installer;*

(iii) the registration number, engine and chassis number and make of the vehicle; and

(iv) a statement that the vehicle is fitted with an immobiliser."

[12] This regulation prescribes the requirements a safe must meet in order to satisfy the requirement of safe keeping a firearm posited by s3(8) for those possessing firearms.

[13] In his oral argument, Mr Nekongo correctly accepted that the appellant's safe did not meet the requirements of the Act, read with the regulations. He however submitted that the appellant's motor vehicle was a "place of safety" as contemplated by the Act and that his conviction could not stand.

[14] In examining this question, the term "place of safety" found in s38 and s3 (8) is to be construed within the context of the Act considered as a whole.

[15] At the very outset of the Act, and after the definitions section, is s2. It creates an offence to possess a firearm unless in possession of a licence to do so. This is the cornerstone of the Act as reflected in the statutory intention as stated in its long title:

"to provide for control over the possession of arms and ammunition, to regulate the dealing in, importation, exportation and manufacture of arms and ammunition..."

[16] The licencing regime brought about by the Act is central to furthering this statutory purpose. A key condition and pre-requisite for a licence, as stated in s3(8), is to have access to "a strong room or other place of safety or a safe, device or apparatus or instrument for the safe keeping of an arm as may be prescribed." The Act establishes a fundamental duty upon those seeking to lawfully possess a firearm (by means of a licence) to keep that firearm in a safe and secure place when not being carried on his or her person.

[17] In furtherance of the Act and its statutory intention, the Act creates a range of offences in s38. Subsection 38(1)(j) makes it clear that when a firearm is not properly carried on a person or is not under a person's direct control, an offence is committed if such a person fails to lock it away in a strong-room or other place of safety or safe, device or apparatus or instrument for the safekeeping of an arm referred to in s3(8). The purpose of thus locking it away is for the safekeeping of a firearm to avoid the obvious harm of it coming into the wrong hands, as I further stress below.

[18] Despite being alerted to the fact that this requisite may be prescribed and the reference to s3(8) in s38(1)(j), the prosecutor and defence counsel did not at the trial

refer to the way in which this has been prescribed under the power to regulate under s42 of the Act

[19] The duty upon licencees to properly lock away or seure their firearms for the purpose of safekeeping is further demonstrated by s38(1)(k) which makes if an offence for a licencee to lose a firearm or from whom one is stolen if either event is owing to the licencee's failure to lock away the firearm as required by s38(1)(j) or to take reasonable steps to prevent the loss or theft. In a prosecution under s38(1)(k), s 39(2) provides for a presumption that, upon proof of the loss or theft of a firearm:

> *"...(I)t shall be prima facie evidence that –*
>
> (a) *such arm has been lost, stolen, if it is proved taht the accused failed to produce the arm at the request of a member of the Police and that he or she was unable to furnish such member with a reasonable explanation as to such failure*
>
> (b) *the loss or theft is due to –*
>
> (i) *the accused's neglect to lock the arm away as contemplated in paragraph (j) of section 38(1); or*
>
> (ii) *his her neglect, while the arm was on his or her person or under his or her direct control, to take reasonable steps to prevent the loss or theft thereof.*

[20] Whilst the appellant was not charged under this subsection, it serves to demonstrate the importance of the duty of safekeeping of firearms and the centrality of that duty to the overall purpose of the Act to control firearms.

[21] It is clear that the keeping of the firearm in a portable safe did not meet the requirements of s38(1)(j) re3ad with s3(8), as amplified by the regulations. Mr Nekongo in argument correctly conceded this. The defence based upon the firearm being in a safe thus does not avail the appellant. Mr Nekongo however contended that its presence in the appellant's car was place of safekeeping contemplated by the Act and thus constituted a defence to the charge. The vehicle did not have an alarm. It may also not have been properly locked and, as stated by the appellant, it may have been accessible by others with similar keys.

[22] The regulations promulgated further prescribe the type of safekeeping contemplated by s3(8) when it comes to fitting a safe in a vehicle. Had the regulations intended that the mere placement of a firearm in a vehicle would meet the requirement of a place of safe keeping, the further regulations prescribing the nature and manner of fitting of safes in motor vehicles would not have been necessary. The statutory intention to be evinced from the Act and regulations is in my view that when a firearm is in a vehicle without being carried on a person or under his or her direct control, then it is to be in a safe fitted to the vehicle as prescribed. It is common cause that this was not the case in this matter. But even if I were to be mistaken in this regard, it is also clear to me that the mere placing of his firearm in his car in a bag in the circumstances of this

matter, does not meet the requirement of safe keeping contemplated by that subsection construed in the context of the Act.

[23] The appellant had after all removed the bag in which the firearm was contained from the boot and placed it inside the vehicle where the bag would have been visible. He also provided access to the vehicle to a friend and testified that he was aware that keys could be manufactured or obtained which could have access to his car. Furthermore, he had parked the vehicle in a public place – and not a secure place – at a public bar at night. This Court can also take judicial notice of the high incidence of theft from parked vehicles in public places, as frequently occur in the number of matters of that nature which serve before this court in automatic reviews. Most tellingly, there were no signs of any break-in on the appellant's motor vehicle. Plainly the mere presence of the firearm in the appellants motor vehicle in these circumstances does not meet the statutory requirement of a place of safety for the safekeeping of the firearm.

[24] It follows that the appellant was correctly convicted of contravening s 38(1)(j), and that the appeal against conviction must fail. What remains is the appellant's sentence.

[25] I have already referred to the statutory intention in having a licencing system to control the possession of firearms. There is plainly a compelling public interest to ensure that those who are granted a licence to possess a firearm must meet the stringent requirements regarding its safekeeping, lest it fall in the wrong hands. The

deleterious consequences of laxity in the possession of firearms which then are obtained by criminals or, for that matter, even children, are self evident. This is demonstrated by the facts of this case. The appellant's contravention has resulted in a criminal or criminals possessing that firearm, given that it was stolen. This in turn has the real risk of exacerbating the incidence of crime, and especially serious crime involving the use of firearm. That in turn has the obvious potential of grave and possibly even fatal consequences.

[26] The legislature, appreciative of the potentially serious consequences of contraventions of s 38, provided for appropriately severe penal provisions, with a maximum fine of N$12 000 or 3 years imprisonment or both for a first offender. Furthermore the legislature also visited a contravention with a further potential consequence by empowering the court upon a conviction to declare an accused unfit to possess a firearm in the future. These provisions thus amply demonstrate the seriousness of this offence. Yet the magistrate, with little motivation, merely sentenced the appellant to a caution and discharge. The single factor she referred to in passing this extraordinary sentence was the fact that the firearm was stolen. But that is precisely the evil which the Act and s38 seeks to prevent, namely firearms being stolen and thus falling into the hands of criminals because of the failure to properly safeguard firearms by persons in the position of the appellant. It is clear to me that the magistrate comprehensively misdirected herself in doing so, by failing to appreciate the seriousness of the offence and its potential consequences. It follows that the sentence must be set aside and substituted by a more appropriate sentence.

[26] The magistrate's enquiry under s10 would also seem to me to have been inadequate. But it would appear that she had applied her mind to the section, having been alerted to it by, taking into account the appellant's employment as an instructor in the NDF. As this is a relevant factor, it would indicate that her discretion was exercised in deciding not to make a declaration under the section. I would however have expected the magistrate to have dealt more fully with this important provision in her judgment. In my view it is 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. Even though this was not fully dealt with by the magistrate, it would appear, as I have indicated, that the magistrate did apply her mind to s10 even if perfunctorily in her judgment. Having considered relevant matter, being the appellant's employment, I am not inclined to substitute the finding made by the magistrate to invoke s10 against the appellant.

[27] In the result, the appeal against conviction is dismissed and the sentence imposed upon the appellant is set aside and substituted with a fine of N$3000.00 or three months imprisonment.

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SMUTS, J

I concur

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GEIER, J

ON BEHALF OF THE APPELLANT: **MR. NEKONGO**

Instructed by: **SISA NAMANDJE & CO. INC.**

ON BEHALF OF THE RESPONDENT: **MR. MARONDEDZE**

Instructed by: **OFFICE OF THE PROSECUTOR-GENERAL**