



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CR: 62/2013

In the matter between:

THE STATE

and

MUYENGA GOTFRIED KATEMA**ACCUSED**

(HIGH COURT MAIN DIVISION REVIEW REF NO. 815/2013)

Neutral citation: *State v Katema* (CR 62/2013) [2013] NAHCMD 293 (18 October 2013)

Coram: HOFF J and MILLER AJ

Delivered: 18 October 2013

Summary: A sentence of ten years imprisonment was imposed in respect of an accused who had been convicted of the unlawful possession of a machine gun in contravention of the provisions of s 29(1)(a) of the Arms and Ammunition Act 7 of 1996.

This court had in the case of *S v Likuwa* 1999 NR held that the minimum sentence of ten years imprisonment prescribed by the unlawful possession of a machine gun was an inhuman or cruel punishment and in conflict with Article 8(2)(b) of the Namibian Constitution and this minimum sentence was struck out.

The minimum sentence of ten years imprisonment appears on the charge sheet used by the prosecutor more than 14 years after it had been struck out – The Prosecutor-General should take remedial measures in this regard.

Sentence of ten years imprisonment set aside and substituted with appropriate sentence.

ORDER

- (a) The conviction is confirmed.
- (b) The sentence of ten years imprisonment is set aside and substituted with the following sentence:

three years imprisonment of which one year imprisonment is suspended for a period of five years on condition the accused is not convicted of contravening s 29(1)(a) of Act 7 of 1996, committed during the period of suspension.

- (c) The Prosecutor-General is requested to ascertain whether the charge sheet referred to in this case was used only in this case or whether charge sheets of this format are being used generally by prosecutors and if necessary, to take remedial measures.

JUDGMENT

HOFF J (MILLER AJ concurring):

[1] The accused was convicted in the Rundu magistrate's court for the possession of a machine gun (AK 47) in contravention of the provisions of s 29(1)(a)

of the Arms and Ammunition Act 7 of 1996 as amended, and sentenced to ten years imprisonment.

[2] I directed a query to the magistrate regarding the sentence imposed and whether suspending part of the sentence had not been considered in view of the fact that the accused was a first offender.

[3] The magistrate in her reply *inter alia* stated that the accused cannot be permitted to escape the minimum sentence since the accused 'could not prove extenuating circumstances arising out of the commission of the offence'. I was further referred to the judgment of this court in *S v Likuwa* 1999 NR 151 where this court held that a minimum sentence of ten years imprisonment is grossly disproportionate in view of the very wide net cast by s 29(1)(a) of Act 7 of 1996.

[4] The magistrate further admitted that the sentence she had imposed was 'inhuman or cruel punishment' and suggested that a period of seven years imprisonment be suspended in which event the accused would be required to serve three years imprisonment.

[5] I must at stage state that the following appears at the bottom of the charge sheet:

'Penalty clause (see sec. 38(2)(a): . . . to imprisonment for a period not less than 10, but not exceeding 25 years.'

[6] Hannah J in dealing with a similar case in *Likuwa* found that the minimum sentence prescribed by s 38(2)(a) of the Arms and Ammunition Act 7 of 1996 for the possession of a machine gun in contravention of s 29(1)(a) was (for the reasons mentioned) an inhuman or cruel punishment in conflict with Article 8(2)(b) of the Namibian Constitution resulting in striking the words 'of not less than 10 years, but' from s 38(2)(a).

[7] The AK 47 found in possession of the accused person in the present matter was wrapped in plastic and hidden in pillowcase in his bedroom. The explanation

given to the police by the accused person was that he had received the weapon from his brother who lived in Tsumeb. The accused was however unable to provide the name or contact details of his brother to the police. Eleven rounds of ammunition were also found in the pillowcase. When he was questioned by the magistrate what he was doing with the fire-arm the accused replied: 'Nothing'.

[8] The accused in mitigation of sentence stated that he is uneducated and unemployed, unmarried and that he is eking out an existence by repairing 'phones'. The accused is a first offender.

[9] I cannot accede to the request of the magistrate to suspend part of the sentence that she had imposed because that minimum sentence had been struck down in *Likuwa* during March 1999.

[10] It must be stated that it is quite disturbing to see that the prosecutor in this case used a charge sheet in which the minimum sentence of ten years imprisonment appears on the charge sheet in spite of the fact that this minimum sentence had been struck down by this court more than 14 years ago. I cannot exclude the possibility that charge sheets of similar format are in existence and are being used by other prosecutors across the width and breadth of Namibia. If this is the case the correct penalty clause needs to be inserted on these charge sheets. The magistrate in all likelihood relied on the penalty clause which appears on the charge sheet which was misleading.

[11] In terms of the provisions of s 304(2)(c)(iv) of Act 51 of 1977 this court may generally give such judgment or impose such sentence as the magistrate's court ought to have given.

[12] The accused had been convicted of a serious offence. He was not frank with the magistrate on how he came into possession of the fire-arm and for what purpose he was in possession thereof. The accused was sentenced on 17 April 2013 and I shall take this fact into account.

[13] The AK 47 was discovered by police officers during the course of their investigation of a case of housebreaking allegedly committed by the accused person.

[14] It must also be stated for reasons unknown to this court that the accused had not been charged of being in unlawful possession of ammunition in contravention of the provisions of s 33 of Act 7 of 1996.

[15] In view of the reasons afore-mentioned the sentence of ten years imprisonment imposed by the magistrate needs to be set aside.

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

- (a) The conviction is confirmed.
- (b) The sentence of ten years imprisonment is set aside and substituted with the following sentence:

three years imprisonment of which one year imprisonment is suspended for a period of five years on condition the accused is not convicted of contravening s 29(1)(a) of Act 7 of 1996, committed during the period of suspension.

- (c) The Prosecutor-General is requested to ascertain whether the charge sheet referred to in this case was used only in this case or whether charge sheets of this format are being used generally by prosecutors and if necessary, to take remedial measures.

E P B Hoff
Judge

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P J Miller
Acting Judge