

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: CR 20/2013

In the matter between:

THE STATE

And

TEOFILUS STEFANUS

(HIGH COURT MAIN DIVISION REVIEW REF NO. 399/2012)

Case No: CR 21/2013

In the matter between:

THE STATE

and

ANDREAS JOHANNES

(HIGH COURT MAIN DIVISION REVIEW REF NO. 619/2012)

Neutral citation:

S v Stefanus; S v Johannes (CR 20 & 21-2013) [2013] NAHCMD 74 (19 March 2013)

Coram: VAN NIEKERK, J and UEITELE, J

Delivered: 19 March 2013

Flynote: Criminal law – Section 10(6), read with sections 10(7) and (8) of the Arms and Ammunition Act, 1996 (Act 7 of 1996) – Declaring accused unfit to possess firearm – Mandatory that Court should bring provisions of section 10(6) to accused's attention and afford him opportunity to advance reasons and present evidence why he should not be deemed unfit to possess firearm and in regard to the period of such unfitness – *In casu* magistrate failed to afford accused such opportunity – Declaration of unfitness set aside and matter referred back to magistrate to comply with Act.

ORDER

1. In the matter of *S v Stefanus*:

1.1 The conviction is confirmed.

- 1.2 The sentence is altered by deleting the second condition to the effect that the accused is unfit to possess a firearm for a period of two years.
- 1.3 The matter is referred back to the trial court to enable it to summon the accused and to comply with the provisions of section 10(7), read with section 10(6)(a) and 10(8) of the Arms and Ammunition Act, 1996 (Act 7 of 1996).
- 1.4 In the event that the magistrate declares the accused unfit to possess a firearm, the magistrate shall backdate the order to the date on which sentence was passed in this matter.

1. In the matter of *S v Johannes*:

- 2.1 The conviction and sentence are confirmed.
- 2.2 The declaration that the accused is unfit to possess a firearm for five years is set aside.
- 2.3 The matter is referred back to the trial court to enable it to summon the accused and to comply with the provisions of section 10(7), read with section 10(6)(a) and 10(8) of the Arms and Ammunition Act, 1996 (Act 7 of 1996).
- 2.4 In the event that the magistrate declares the accused unfit to possess a firearm, the magistrate shall backdate the order to the date on which sentence was passed in this matter.

VAN NIEKERK, J (UEITELE, J concurring):

[1] These matters are dealt with together as the same issue is to be considered.

[2] In the *Stefanus* matter the accused was convicted in the magistrate's court at Katutura on a charge that he unlawfully discharged a firearm in a public place in contravention of section 38(1)(o) of the Arms and Ammunition Act, 1996 (Act 7 of 1996). The conviction is in order.

[3] The accused was sentenced to a period of twelve months imprisonment suspended for three years on the usual condition of good behaviour. A second condition was added, namely 'that the accused is declared to be unfit to possess a fire arm within the period of (2) two years with effect from today.'

[4] In the matter of *S v Johannes* the accused in this matter was convicted in the magistrate's court at Katutura on a charge of c/sec 38(1)(j) of Act 7 of 1996 in that he failed to lock away an arm in his possession while he was not carrying it on his person or while it was not under his direct control. The conviction is in order.

[5] The sentence imposed is one of N\$2 000 or 12 months imprisonment of which N\$1 000 or 6 months is suspended for 5 years on the usual condition of good behaviour. In addition the magistrate declared the accused unfit to possess a fire-arm for a period of 5 years.

[6] On review the magistrate conceded that he did not follow the provisions of section 10(7) read with section 10(6)(a) of Act 7 of 1996 before sentencing the accused. In other words, the magistrate did not bring to the attention of the accused the

provisions of section 10(6)(a) which state that the accused is deemed to be declared unfit to possess an arm, unless the court determines otherwise. The magistrate also did not afford the accused an opportunity to advance reasons and present evidence why he should not be deemed to be declared unfit to possess an arm or regarding the period for which any deemed declaration should be operative as provided for by section 10(8).

[7] In the *Stefanus* matter the magistrate concedes that the declaration should have been done in terms of 10 and that it should not have been formulated as a condition of suspension.

[8] This Court has repeatedly in the past pointed out that the provisions of sections 10(6), (7) and (8) are mandatory and magistrates must see to it that these provisions are properly carried out. (See for instance, *S v Kashikola Theophilus* (High Court Case No. CR 150/2001); *S v Nahale Paulus* (High Court Case No. 149/2001) – Unrep. 17 August 2001); *S v Colin L Shanika* (High Court Case no. CR 78/2004 - Unrep. 11 October 2004). This must actually be done before sentence is passed, as the outcome of this process might be relevant in determining what sentence would be appropriate sentence to impose. However, as there has been some delay in dealing with these matters, it would not serve any purpose to set aside the sentence at this stage.

[9] In the result the orders set out at the beginning of this judgment are made.

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K van Niekerk

Judge

I agree.

S F I Ueitele

Judge

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