

REPUBLIC OF NAMIBIA

REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case no: CR 66/2020

In the matters of:

HIGH COURT REF. NO: 829/2020

MAGISTRATE'S SERIAL NO: 48/2020

CASE NO: OKA-CRM- 2321/2019

THE STATE

v

KANDJE MAX NGUMBI

Accused 1

KUNOUWA SEVEN TJIPOSA TJAMBIRU

Accused 2

LUSABI MUFAYA

Accused 3

AND

HIGH COURT REF. NO: 830/2020

MAGISTRATE'S SERIAL NO: 49/2020

CASE NO: OKA-CRM- 2300/2019

THE STATE

v

DAVE NGUMBI

Accused 1

UPENDUKA NDIOMBE

Accused 2

RIUTORORA NDIOMBE

Accused 3

Neutral citation: *S v Ngumbi* (CR 66/2020) [2020] NAHCMD 414 (15 September 2020)

Coram: LIEBENBERG J *et* SHIVUTE J

Delivered: 15 September 2020

Flynote: Criminal Procedure – s 297(1)(b) of the Criminal Procedure Act – Competence of a suspended sentence – s 297(1)(b) permits a court to impose a sentence which is wholly or partially suspended – But does not empower court in suspending a sentence into two parts, attaching a different condition to each part and suspending each part for different periods of time – Magistrate divided suspended sentence into two parts – Such sentence impermissible and amounts to irregularity – Latter portion of sentence set aside.

Summary: The above cases came before me on automatic review. They were both presided over by the same magistrate, sitting in the same district. The accused persons in both cases, faced a similar conviction in respect of count 1. They were thereafter, each sentenced to - N\$50 000 or in default of payment 48 months' imprisonment of which N\$25 000 or 24 months are suspended for 5 years on condition that they are not convicted of illegal hunting of specially protected game contravening section 26(1) of the Nature Conservation Ordinance 4 of 1975, as amended, committed during the period suspension. Plus a further 24 months' imprisonment wholly suspended for 5 years on condition that they are not convicted of illegal hunting of specially protected game contravening section 26 (1) of the Nature conservation Ordinance 4 of 1975, as amended, committed during the period of suspension – The conviction is in order and confirmed – Sentence imposed is

irregular – s 297 (1) (b) empowers a court to suspend whole or part of a sentence but does not empower a court to suspend a sentence into two parts, attaching a different condition to each part and suspending each part for different periods of time – The latter portion of the sentence that starts with the words ‘plus a further...’ amounts to a second sentence – Sentence set aside and replaced with another.

REVIEW JUDGMENT

SHIVUTE J, (LIEBENBERG J Concurring)

[1] The two matters came before me for review. In respect of High Court Ref. No.: 829/2020. Accused 1 was convicted of 4 counts namely:

Count 1: Hunting of specially protected game – Contravening section 26(1) read with sections 1, 26(2), 26 (3), 85,87, 89 and 89A of the Nature Conservation Ordinance, 4 of 1975 as amended, and further read with sections 90 and 250 of the Criminal Procedure Act 51 of 1977.

Count 2: Possession of a firearm without a license – Contravening section 2 read with sections 1, 38(2) 10(6) (a), 10(7), 10(8) and 39 of the Arms and Ammunition Act 7 of 1996, as amended.

Count 3: Possession of ammunition contravening section 33 read with sections 1, 38(2) and 39 of Act 7 of 1996 as amended.

Count 4: Pointing of a firearm – contravening section 38(1) (i) read with sections 1, 38(1), 38(2) and 39 of Act 7 of 1996, as amended.

[2] However, accused 2 and 3 were only convicted on counts 1 - 3.

[3] In respect of High Court Ref. No. 830/2020, all three accused persons were convicted on count 1, which is hunting of specially protected game in contravention of section 26(1) read with sections 1, 26(2) 26(3), 85, 89A of Ordinance 4 of 1975 as amended and further read with sections 90 and 250 of Act 51 of 1977 as amended.

However, accused 1 was further convicted on counts 2 and 3, namely possession of a firearm without a licence in contravention of section 2 read with sections 1, 38(2) and 39 of Act 7 of 1996 as amended and of possession of ammunition contravening section 33 read with sections 1, 38(2) and 39 of Act 7 of 1996 as amended.

[4] I have no difficulty with convictions, except for the sentence that was imposed on count 1 in respect of both cases which reads as follows:

'Sentence: Count 1 (Each Accused 1, 2 and 3): Fifty thousand (N\$50 000) or in default of payment forty eight (48) months' imprisonment of which twenty five thousand (N\$25 000) or twenty four (24) months are suspended for a period of five (5) years on condition that accused person is not convicted of the offence of illegal hunting of specially protected game contravening section 26(1) of the Nature Conservation Ordinance 4 of 1975, as amended, committed during the period suspension.

Plus a further (for each accused person) twenty four (24) months' imprisonment wholly suspended for a period of five (5) years on condition that the accused person is not convicted of the offence of illegal hunting of specially protected game contravening section 26 (1) of the Nature conservation Ordinance 4 of 1975, as amended, committed during the period of suspension.'

[5] The two cases originated from the same court and they were presided over by the same magistrate. I raised a query with the magistrate whether the latter portion of the sentence that starts with the words 'plus a further...' is permissible and whether it was not a second sentence imposed in respect of each accused.

[6] The learned magistrate responded as follows:

(a) The observation is properly and correctly made by the Honourable reviewing judge and I am indebted, that the use of the words 'plus further...' would sound like a second sentence being imposed on the accused persons, and that will not be in accordance with justice.

(b) I concede that the use of words 'plus a further ...' is an irregularity. I did not intend and had not intended that a second sentence be imposed in respect of count 1 on all the accused persons. The proper wording should have been 'In addition hereto ...' as used in

the matter of *Gideon v S; S v Gideon* (CA 11/2017) [2017] NAHCNLD 122 delivered on 8 December 2019.

(c) Based on the above, I will humbly seek from the Honourable reviewing judge to substitute the words 'plus a further...' with that of 'in addition hereto...' That is so, because in sentencing I intended to impose both such fine and such imprisonment as provided for in the Nature Conservation Amendment Act 3 of 2017, because the Rhinoceros hunting and killing in this district is on the increase. Luckily in this matter, the accused persons did not kill a Rhinoceros but they should be penalised to deter them and other would be offenders not to commit a similar offence. As I am replying to this query, there are still three (3) other matters pending before this court in which 4, 3 and 2 Rhinoceros had been hunted and killed on the same Farm Sny Rivier of which we had so far heard two (2) bail applications and one bail application for a matter that was committed in December 2019 is pending. Based on those facts, I am of the judicious opinion that deterrent sentences be meted out, as I had intended in these two matters.'

[7] The court may impose a sentence which is wholly or partially suspended in terms of section 297 of the Criminal Procedure Act 51 of 1977.

Section 297 reads as follows:

'(1) Where a court convicts a person of an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion-

1(b) pass sentence but order the operation of the whole or any part thereof to be suspended for a period not exceeding five years on any condition referred to in paragraph (a) (i) which the court may specify in the order...'

[8] On a careful reading of s 297 (1) (b) the section empowers the court to suspend the whole or any part of a sentence passed. However, it does not empower a court, in suspending a sentence into two parts, attaching a different condition to each part and suspending each part for different periods of time.

[9] It will be recalled that in his response to the query whether the sentence was permissible and whether it did not amount to a second sentence imposed on each accused in respect of one offence, the magistrate conceded that the use of the

words 'plus a further ...' was irregular as the court did not intend to impose a second sentence. He also suggested that 'plus a further...' should be substituted with the words 'in addition hereto...' It appears to me that the magistrate did not get the gist of the query. The emphasis is not on the word 'plus a further' but on the additional sentence on the latter portion of the sentence that starts with the words 'plus a further...' It does not matter whether the sentence starts with the words 'in addition hereto...' as suggested by the magistrate. Even in that scenario the sentence would still be problematic and impermissible.

[10] The latter portion of the sentence that starts with the words 'plus a further...' amounts to a second sentence. The magistrate suspended a sentence into two parts, attaching a different condition to each part and suspending each part for different periods of time. The tacking on of an additional sentence of 24 months' imprisonment to the substantive sentence wholly suspended is not a competent sentence because s 297 (1) (b) does not permit a sentence to be broken up into different parts. The court only has the option of suspending the whole sentence or suspending a part thereof.

See, for example, *S v Dudela* 1990 (2) SACR 355 (TK) quoted with approval in *S v Witbooi and Others* (CR 119/2007) [2007] NAHC 62 (09 August 2007).

[11] In *S v Nvula* and *S v Olivier*, Case No. CR 162/2001 and Case No: CR 143/2001 NAHC delivered on 14.12.2001, the Full Bench of this Court quoted with approval Mullins J's views in *S v Labuschagne and 19 others*, 1990(1) SACR 313 E at 315f-g where it was stated as follows:

'To revert to the provisions of s 297(1)(b) of the Criminal Procedure Act, there is also judicial authority for the aforementioned view that the suspended portion of a sentence is not an additional sentence tacked on to a substantive sentence, but that it must be part of such substantive sentence. In other words, the sentence passed for a particular offence consists of both the unsuspended portions thereof and such total sentence must not only be a competent sentence, but must be appropriate for the offence for which the offender is being punished.'

The Full Bench also agreed with the approach to sentencing proposed by Mullins J when a court contemplates a suspension of a sentence under section 297(1) (b). At 316d-j, Mullins J observed:

‘The proper approach of a judicial officer faced with the determination of an appropriate sentence is firstly to consider the nature of the punishment imposed. In casu, he must decide whether the offence calls for a fine alone (with the alternative imprisonment), or imprisonment alone, or both fine and imprisonment. *S v Juta*, 1988 (4) SA 926 (T) at 927 H. Having decided on the form of punishment, the magnitude of the fine or the length of imprisonment, or both must be decided. I agree with the view of Van Reenen CJ in *Juta’s* case *supra* that the alternative period of imprisonment is the sanction which the court regards as appropriate in the event of non-payment of the fine. Having determined both appropriate form of sentence and the magnitude thereof the magistrate may decide to suspend part of the sentence. It would in my view, however, be improper to increase the appropriate sentence and to suspend such increase merely in order to deter the offender from repeating his offence.’

[12] Applying the principles as set out above, in imposing a sentence in terms of s 297(1) (b), the learned magistrate failed to exercise his discretion judiciously by not following the correct approach as set out in the above mentioned case. He acted irregularly by dividing the sentence into two different parts. It follows that the last portion of the sentence in count 1 in respect of each accused in both cases cannot be allowed to stand.

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

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- (a) The convictions on count 1 in respect of each accused are confirmed.
- (b) The sentence on count 1 in respect of each accused is set aside and substituted for the following sentence:

Count 1: Accused 1, 2 and 3 each is sentenced to fifty thousand Namibia Dollar (N\$50 000) or in default of payment forty eight (48) months’ imprisonment of which twenty five thousand Namibia Dollar (N\$25 000) or

twenty four (24) months are suspended for a period of five (5) years on condition that the accused is not convicted of the offence of illegal hunting of specially protected game, contravening section 26(1) of the Nature Conservation Ordinance 4 of 1975, as amended, committed during the period of suspension. The sentence is antedated to 14 May 2020.

- (c) The convictions and sentence on counts 2, 3 and 4 in respect of each accused are confirmed.

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- (d) The convictions on count 1 in respect of each accused are confirmed.

- (e) The sentence on count 1 in respect of each accused is set aside and substituted for the following sentence:

Count 1: Accused 1, 2 and 3 each is sentenced to fifty thousand Namibia Dollar (N\$50 000) or in default of payment, forty eight (48) months' imprisonment of which twenty five thousand Namibia Dollar (N\$25 000) or twenty four (24) months are suspended for a period of five (5) years on condition that the accused is not convicted of the offence of illegal hunting of specially protected game, contravening section 26 (1) of the Nature Conservation Ordinance 4 of 1975, as amended, committed during the period of suspension. The sentence is antedated to 27 May 2020.

- (f) The convictions and sentence on counts 2 and 3 in respect of each accused are confirmed.

- (g) The order made in terms of s 10(6) (7) and (8) of the Arms and Ammunition Act in High Court Ref. No.829/2020 declaring accused 1, 2 and 3 each to be unfit to possess a firearm as well the forfeiture of a firearm is confirmed.

- (h) The order made in terms of s10 (6) (7) and 8 of the Arms and Ammunition in High court Ref. No. 830/2020 in respect of accused 1 declaring him to be unfit to possess a firearm and the order of forfeiture of a firearm and rounds of live ammunition is confirmed.

NN SHIVUTE
Judge

C J LIEBENBERG
Judge