



**HIGH COURT OF NAMIBIA, MAIN DIVISION  
JUDGMENT**

**CR No: 11/2020**

In the matter between

**THE STATE**

and

**PAULUS ANDREW AND 1 OTHER**

**HIGH COURT MD REVIEW CASE NO 2067/2016**

*Neutral citation: State v Andrew (CR 11/2020) [2020] NAHCMD 52 (17 February 2020)*

**CORAM: SHIVUTE J et LIEBENBERG J**

**DELIVERED: 17 February 2020**

**Flynote:** Criminal Procedure – Review – Wrong accused person reflected on review sheet – Sentence vague - Sentence not corresponding with record of proceedings – Conviction and sentence confirmed but the formulation of sentence amended to read properly.

**Summary:** The Accused persons were convicted of hunting of huntable game in contravention of section 30(1) (a) of Ordinance 4 of 1975 as amended. They were both sentenced to a fine of N\$2 000 or in default of payment 12 months' imprisonment, of

which N\$1 000 or 6 months' imprisonment are suspended for a period of of 3 (Three) years, on certain conditions, committed during the period of suspension. A co-accused whose trial was separated from the matter was wrongly reflected in the review cover sheet. The sentence is vague .There is disparity between the review cover sheet and the record of proceedings. Sentence confirmed but amended to read properly.

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### ORDER

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1. The conviction is confirmed.
2. The sentence imposed is confirmed, but amended to read: as follows Each accused is sentenced to a fine of N\$2 000 or in default of payment, 12 months' imprisonment, of which N\$1 000 or 6 months' are suspended for Three (3) years, on condition that the accused is not convicted of a contravention of Section 30 (1) (a) of Ordinance 4 of 1975, committed during the period of suspension.

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### JUDGMENT

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SHIVUTE J: (Concurring Liebenberg J)

[1] Three accused persons were jointly charged with hunting of huntable game in contravention of section 30(1) (a) read with Section 1, 30(1) (b), 30(1) (c), 85, 89 and 89A of Ordinance 4 of 1975 as amended, further read with sections 90 and 250 of the Criminal Procedure Act 51 of 1977.

[2] Accused 1 pleaded not guilty to the charge whilst Accused 2 and 3 pleaded guilty to the charge. Accused 1 was ordered to stand down so that he can be tried separately. The court invoked the provisions of section 112(1) (b) in respect of accused 2 and 3 where after they were both sentenced to: 'a fine of N\$2 000 or 12 months' imprisonment in default of payment of which N\$1 000 or 6 months' imprisonment are suspended for a

period of 3 years, on condition that the accused are not convicted of hutable game in contravention of Section 30 (1)(A) of Act 51 of 1977, committed during the period of suspension.'

[3] The name of accused 1, Johannes Khoaseb who was initially a co-accused in the matter, appeared on the review cover sheet although his trial was separated after he pleaded not guilty.

[4] When the matter was submitted to me for review following the provisions of section 302 of Act 51 of 1977, I directed the following query to the learned magistrate:

1. The review sheet reads " The State v Johannes Khoaseb" in respect of the accused persons, yet according to the record there was a separation of trial ordered in respect of accused 1. Why is the review sheet reflecting Johannes Khaoseb and 2 others ?
2. Accused 2 and 3 were convicted of hunting of hutable game contravening s 30(1)(a) read with ss1,30 (b) 30 (c), 85 and 89 and 89(A) of Ordinance 4 of 1975 as amended and further read with ss 90 and 250 of Act 51 of 1977.
3. The accused were sentenced as follows: Accused 2 and 3 are both fined N\$ 2000 or 12 months' imprisonment in default of payment of which N\$ 1000 or 6 months are suspended for a period of 3 years on condition that accused are not convicted of hutable game in contravention of section 30(1) (a) of the Act 51 of 1977.
4. The sentence appears to be vague. What did the magistrate mean by the above sentence?
5. Why is the condition of suspension referring to the contravention of s 30(1) (a) of Act 51 of 1977 which is not related to the offence that each accused is convicted of?
6. What does it mean for the magistrate to affix his or her signature to the record of proceedings especially on the review sheet?'

[5] In reply the magistrate stated the following:

1. I concede that I made a mistake to include Johannes Khoaseb in the charge sheet after the matter was separated from him .The charge sheet must have read: "PAULUS ANDREW AND ONE OTHER ". The review sheet has been amended to that effect.
2. The accused were sentenced as follows:  
On count 1, Accused 2 is fined a N\$2 000 or 12 months' imprisonment in default of payment of which 1000 or 6 months are suspended for a period of 3 years on condition that the accused is not convicted of hunting huntable game in contravention of Section 30 (1)(a) read with section 1,30 (1)(b) (c), 85 ,89 and 89(A) of Ordinance 4 of 1977 and further read with section 90 and 250 of Act 51 of 1977, committed during the period of suspension.  
  
Accused 3, is fined N\$2 000 or 12 months imprisonment in default of payment of which 1000 or 6 months are suspended for a period of 3 years on condition that accused is not convicted of hunting huntable game in contravention of Section 30 (1)(a) read with section 1,30 (1)(b) (c), 85 ,89 and 89(A) of Ordinance 4 of 1977 and further read with section 90 and 250 of Act 51 of 1977, committed during the period of suspension.
3. The sentence is competent and proper because it is not shocking and inappropriate .I have considered the personal circumstances of the accused, the crime committed and the interest of society as was held in S v Zinn. The accused is a first time offender and there are surrounding circumstances that I took into consideration.
4. I concede it was an over side on my part and this will not happen again. (sic)
5. The Signature would mean that the magistrate has verified that everything is correct on the review sheets .I apologise.
6. I further pray that the sentence be confirmed.

[6] The magistrate rightly conceded that accused's 1 name ought not to have appeared on the review sheet, instead accused 2 Paulus Andrew and accused 3 Matheus Gamxamub's names were supposed to be reflected.

[7] The conviction is in order. However, the formulation of the sentence is not clear. The matter involved two accused persons and the formulation of the sentence did not indicate as being applicable to both accused persons separately or jointly, which cannot be an appropriate sentence. The sentence should be clear so that the accused persons can know what is expected of them. Furthermore, the condition of suspension should be related to the offence committed. Section 30 (1) of the Criminal Procedure Act has no relation to the offence the accused persons were convicted of and was thus erroneously cited instead of Ordinance 4 of 1975.

[8] The learned magistrate merely payed lip service to the issues raised by the review court because his reply to the review query also contained material errors notwithstanding the fact that his signature is affixed on the document.

[9] A magistrate is a judicial officer who is tasked with not only upholding the dignity of the court but also exercising due diligence when performing their duties, especially when they affix their signatures to court documents. A review sheet should correspond with the record of proceedings so as to reflect what transpired in the court aquo.

[10] There has been no misdirection found in respect of the conviction and sentence. However, the wording of the formulation of the sentence cannot be allowed to stand as is.

In the result the following order is made:

1. The conviction is confirmed.
2. The sentence imposed is confirmed, but amended to read as follows: Each accused is sentenced to a fine of N\$2 000 or in default of payment, 12 months'

imprisonment, of which N\$1 000 or 6 months' are suspended for a period of Three (3) years, on condition that the accused is not convicted of contravention of Section 30 (1) (a) of Ordinance 4 of 1975, committed during the period of suspension.

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NN SHIVUTE  
JUDGE

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J C LIEBENBERG  
JUDGE