

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case Title: <i>The State v Kalyungu Nyama Tection</i>	Case No: CR 35 /2021
High Court MD Review No: 259 / 2021	Division of Court: Main Division
Heard before: Mr Justice Liebenberg <i>et</i> Lady Justice Claasen	Delivered on: 10 May 2021
Neutral citation: <i>S v Tection</i> (CR 35 /2021) [2021] NAHCMD 218 (10 May 2021)	
It is hereby ordered that: a) The conviction and sentence imposed are set aside. b) The matter is remitted to the trial court in terms of section 312 of the Criminal Procedure Act 51 of 1977 for a plea of not guilty to be entered in terms of section 113 of the same Act and the matter to be brought to its natural conclusion.	

Reasons for the order:

[1] This is a review matter which came before me in terms of section 302 (1) and section 303 of the Criminal Procedure Act 51 of 1977 (the CPA).

[2] The accused person in this matter appeared in the magistrate's court for the district of Katima Mulilo on a charge of contravening section 32 (1)(a) read with section 1, 38 (2) and 39 of the Arms and Ammunition Act 7 of 1996, as amended.

[3] It was alleged that on or about 29 October 2020 at Salukwaba village in the district of Katima Mulilo, the accused did wrongfully and unlawfully supply an arm, frame receiver, magazine or an arm or cylinder of a revolver to wit a rifle with serial number 16058 to Kapano Makwele George, not being a licensed dealer, without him producing to the accused a license to possess such arm.

[4] The accused pleaded guilty to the charge and the court continued to question him in terms of section 112 (1)(b) of the Criminal Procedure Act 51 of 1977 as amended. The accused was asked why he gave the fire-arm to the said George Makwele Kutelo, and he responded that he gave it to him so that he guards his fields and return it the same day.

[5] In the end, the learned magistrate found that all the allegations contained in the charge have been admitted and convicted the accused as charged. After submissions in aggravation and mitigation, the accused was sentenced to a fine of N\$ 2000 or 6 months' imprisonment.

[6] In a query directed to the magistrate, the attention of the magistrate was drawn to the fact that section 32 (1) of the Arms and Ammunition Act 7 of 1996 is subject to sections 8 and 45 of the same Act. In light of that, an observation was noted that the accused answered that he gave the rifle to the said Kapano Makwele George to guard the fields and return the rifle the same day when asked why he committed the alleged

offence by giving the rifle to the said person who does not have a license to possess a fire-arm. The learned magistrate was asked if that answer from the accused does not amount to an exception or defence in term of section 8 (1)(b) of the Arms and Ammunition Act 7 of 1996.

[7] Section 8 (1)(b) of the Arms and Ammunition Act 7 of 1996 permits possession of arms with consent of the license holder in certain circumstances. Section 8 (1)(b) specifically states that 'any person other than a person under the age of 18 years or a disqualified person may, with the prior consent of the holder of a licence to possess an arm, whether or not such consent was granted in pursuance of an agreement of lease, and for such period as such holder may permit, have such arm in his or her possession for his or her lawful personal protection or benefit, including the hunting of game or for the purpose of keeping custody of the arm, without holding any licence, provided- such person has the arm in his or her possession in the immediate vicinity of the licence holder or while on any land belonging to or lawfully occupied by the licence holder.'

[8] In response to the query the learned magistrate conceded that he erred in law by disregarding section 8 (1)(b) of the Arms and Ammunition Act 7 of 1996, and added that the guilty plea ought to have been altered to the plea of not guilty in terms of section 113 of the Criminal Procedure Act 51 of 1977, and asked that the matter be remitted for further handling.

[9] The concession by the learned magistrate is properly made because the response by the accused when he was asked why he gave the rifle to the said person who is not a licensed person to possess a fire arm appears to fall within the ambit of section 8 (1)(b) of the Arms and Ammunition Act 7 of 1996, which permits possession of arms with consent of license holder in certain circumstances. In such circumstances, it cannot be said that the accused admitted the allegations in the charge and that the magistrate could have been satisfied that the accused is guilty of the offence to which he pleaded as required in terms of section 112 (1)(b) of the CPA. The conviction of the accused is therefore improper. The accused's response called for the noting of a plea of

not guilty. In the circumstances the conviction and sentence consequently fall to be set aside.

[10] In the result, it is hereby ordered that:

- a) The conviction and sentence imposed are set aside.
- b) The matter is remitted to the trial court in terms of section 312 of the Criminal Procedure Act 51 of 1977 for a plea of not guilty to be entered in terms of section 113 of the same Act and the matter to be brought to its natural conclusion.

J C LIEBENBERG JUDGE	C CLAASEN JUDGE