

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

PRACTICE DIRECTIVE 61

Case Title: The State v Pius Enghali Lukas	Case No: CR 86 /2023
High Court MD Review No: 978/2023	Division of Court: High Court, Main Division
Coram: Liebenberg J <i>et</i> Shivute J	Delivered: 4 August 2023
Neutral citation: <i>S v Lukas</i> (CR 86/2023) [2023] NAHCMD 472 (4 August 2023)	
ORDER: <ol style="list-style-type: none">1. The conviction and sentence are confirmed.2. The forfeiture order made in terms of s 89(1)(d) of Ordinance 4 of 1975 is set aside.3. The matter is remitted to the trial court to afford the State the opportunity to lead	

evidence in aggravation of sentence pertaining to the vehicle, alternatively, to hold an inquiry to establish the circumstances under which the offence was committed.

REASONS:

LIEBENBERG J (SHIVUTE J concurring):

[1] This is a review from the Magistrate's court for the district court of Otjiwarongo. The accused, who was arraigned with one other accused, was convicted on his guilty plea in terms of s 112(1)(a) of the Criminal Procedure Act 51 of 1977 ('the CPA') for contravening s 48(1) read with sections 1,48,85,86,87,89 and 89A of Ordinance 4 of 1975 as amended, read with sections 90 and 250 of the CPA – illegally transporting game and game meat. Following his conviction, he was sentenced to One Thousand Namibia Dollars (N\$1000) or one (1) month imprisonment. An order was also made for the vehicle used in transporting the game and game meat to be forfeited to the State.

[2] This court, on review, queried the circumstances which the trial court took into account when making the forfeiture order especially when regard is had to the fact that the accused was convicted in terms of s 112(1)(a) and no enquiry was held in order to ascertain whether and in what manner the vehicle was used in the commission of the offence for which the accused was convicted.

[3] The magistrate concedes that on account of the conviction under s 112(1)(a), he did not get the opportunity to establish the circumstances under which the vehicle was used in the commission of the offence and implores this court to set aside the forfeiture order. The concession is proper.

[4] Section 89(1)(d) of Ordinance 4 of 1975 provides as follows:

'the court convicting such person may, subject to the provisions of this Ordinance, declare any vehicle, vessel, raft, or aircraft used for the purpose of or in connection with the commission of such offence or for the purpose of conveying or removing any game or wild animal hunted or

captured contrary to the provisions of this Ordinance, to be forfeited to the State.' My emphasis

[5] It is evident from the section quoted that for the vehicle to have been forfeited, it must have been used in the commission of the offence, alternatively, used to convey game hunted contrary to the provisions of the Ordinance. However, on account of the accused not having been questioned about the circumstances under which the vehicle was used in the commission of the offence, the trial court could not have ascertained that it indeed was used. Without knowing the circumstances under which the vehicle was used, the court had no basis to act from when making the forfeiture order. It goes without saying that accused was convicted on his mere guilty plea in terms of s 112(1)(a) which does not place an obligation on the trial court to question an accused in order to ascertain the circumstances under which the offence charged was committed. What the trial court did in this instance was to draw an inference about the circumstances surrounding the purported use of the vehicle in question as far as it related to the commission of the offence. What it should have done, was to question the accused during sentencing about the role the vehicle played in the commission of the offence charged before making the forfeiture order.¹

[6] On account of there being no evidence before court that the vehicle was used in the commission of the offence, the forfeiture order stands to be set aside.

[7] In the result, the following order is made:

1. The conviction and sentence are confirmed.
2. The forfeiture order made in terms of s 89(1)(d) of Ordinance 4 of 1975 is set aside.
3. The matter is remitted to the trial court to afford the State the opportunity to lead evidence in aggravation of sentence pertaining to the vehicle, alternatively, to hold an inquiry to establish the circumstances under which the offence was committed.

¹ *S v Muharukua* (CR 28/2020) [2020] NAHCNLD 65 (8 June 2020) para 7.

J C LIEBENBERG JUDGE	NN SHIVUTE JUDGE