

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI**

**REVIEW JUDGMENT**

CR No.: 27/2020

In the matter between:

**THE STATE**

v

**TJIUMBUA VESANENUAIJE**

**ACCUSED**

(HIGH COURT NLD REVIEW CASE REF NO: (360/2019))

**Neutral citation:** *S v Vesanenuaije* (CR 27/2020) [2020] NAHCNLD 66 (9 June 2020)

**Coram:** JANUARY J *et* DIERGAARDT AJ

**Delivered:** 9 June 2020

**Flynote:** Review – Failure of magistrate to hold an enquiry and make a forfeiture order – discretionary and peremptory – Duty of public prosecutor restated – Magistrate needs to be proactive to forfeit – Application of section 112(1) (a) of the Criminal Procedure Act, (the CPA) Act 51 of 1977 restated.

**Summary:** In *S v Vesanenuaije* the accused was convicted for hunting of huntable game (an Oryx valued at N\$2000); possession of a firearm without a licence; and in terms of section 112 (1) (a) of possession of ammunition. There was no forfeiture order made which in terms of the Arms and Ammunition Act, Act 7 of 1996 is discretionary and in terms of the Nature Conservation Ordinance 4 of 1975 partly discretionary and otherwise compulsory. The matter is remanded for the magistrate to hold the necessary enquiry.

The magistrate convicted the accused on possession of ammunition after applying section 112(1) (a) of the CPA. This conviction and sentence are set aside. The matter is remitted for the magistrate to comply with the provisions of section 112(1) (b) of the CPA. The convictions and sentences of hunting of huntable game and possession of a fire arm without a license are confirmed.

---

### **ORDER**

---

1. The conviction and sentence of hunting of huntable game in contravention of section 30(1) (a) read with sections 1, 30(1) (b), 30(1) (c), 85, 89 and 89 A of Ordinance 4 of 1975 is confirmed;
2. The conviction and sentence of possession of a firearm in contravention of section 2 read with sections 1, 38(2) and 39 of Act 7 of 1996 as amended is confirmed;
3. The conviction and sentence of possession of ammunition in contravention of section 33 read with sections 1, 38(2) and 39 as amended are set aside and the magistrate is directed to apply section 112(1) (b) of the CPA in relation to the charge of possession of ammunition, question the accused, if satisfied sentence the accused afresh and enter a plea of not guilty if he is not satisfied that the accused is guilty;
4. The matter is remitted to the magistrate to apply section 38(5) (a) of Act 7 of 1996

and section 89 of the Nature Conservation Ordinance in relation to forfeiture and in accordance with the directives in this judgment.

---

## REVIEW JUDGMENT

---

JANUARY J (DIERGAARDT AJ concurring):

[1] The case is before me in terms of section 304 of the Criminal Procedure Act, Act 51 of 1977.

### *Introduction*

[2] The accused in this matter was charged with another co-accused on charges of; 1. Hunting of huntable game in contravention of section 30(1) (a) read with sections 1, 30(1) (b), 30(1) (c), 85 89, and 89 A of the Nature Conservation Ordinance 4 of 1975 as amended; 2. Possession of a firearm without a license in contravention of section 2 read with sections 1, 38(2) and 39 of Act 7 of 1996 as amended and; 3. Possession of ammunition in contravention of section 33 read with sections 1, 38(2) and 39 of Act 7 of 1996.

[3] The accused pleaded guilty to all three charges. The accused in this matter was convicted on all three charges. The magistrate applied section 112(1) (b) of the Criminal Procedure Act, Act 51 of 1977 (the CPA) in respect of charges 1 and 2 and applied section 112(1) (a) in relation to charge 3.

[4] The co-accused also pleaded guilty to all three charges but a plea of not guilty was entered on the charge of possession of a firearm without a license. Eventually the trials were separated. The record defectively reflects: "Accused convicted" and "Accused sentenced" whereas it turned out that there was a separation of trials and the accused in this case under review was accused 2 in the matter. Separation was granted in

relation to accused 1 and his case stood down. The record and review cover sheet reflect as if both accused were convicted and sentenced.

*The query*

[5] I directed a query to the learned magistrate in the following terms:

The Reviewing Judge remarked as follows:

'1. The magistrate must explain the sentencing of both accused 1 and 2 on the charge of possession of a fire arm without hearing evidence after a plea of not guilty was entered in terms of section 113 of Act 51 of 1977 in relation to Accused 2 and no verdict was entered in relation to accused 1.

2. Does the magistrate consider the unlawful possession of ammunition as a trivial offence considering the prescribed penalty clause in section 38(c) of Act 7 of 1996, a fine of N\$12 000 or 3 years imprisonment for a first offender? Why did he slavishly follow the suggestion of the public prosecutor to deal with this charge in terms of section 112(1) (a) of Act 51 of 1977?

3. Section 38(5) (a) of Act 7 of 1996 provides that:

'(5) The court convicting any person of an offence under this Act may, in addition to any punishment imposed for such offence-

(a) declare the convicted person's rights to any article in respect of which the offence has been committed, to be forfeited to the State.'

(b) And section 89(1)(c) of Ordinance 4 of 1975, the Nature Conservation Ordinance, provides that:

'89 Forfeiture and other orders

(1) Whenever any person is convicted of an offence in terms of this Ordinance-

(a) the court convicting such person shall, subject to the provisions of this Ordinance, declare any game or wild animal or game meat or the skin, horn, tooth or tusk, egg, shell, ears, feet or head of any game or wild animal or any fish or indigenous plant which is found in the possession of such person and which was used for the purpose of or in connection with the commission of such offence or in respect of which such offence has been committed, to be forfeited to the State;

[Para (a) substituted by sec 32(a) of Act 27 of 1986 (wef 27 November 1986).]

(b) .....

(c) the court convicting such person may, subject to the provisions of this Ordinance, declare any weapon or ammunition, lamp, battery, fishing tackle, device or article referred to in section 42, animal or any other article or object which was used for the purpose of or in connection with the commission of such offence to be forfeited to the State;'

4. Did the magistrate consider the abovementioned provisions and what happened to the rifles and ammunition afterwards?

5. The magistrate must please clarify and explain."

### *The response*

[6] The magistrate responded in a 4 page document to each of the queries. I will just try and paraphrase as I do not find it necessary to verbatim deal with the responses. Ad query 1 he responded that accused 1 was not sentenced as there was a separation of trials. He apologized for a typing error on the review charge sheet and for having omitted to enter a verdict concerning the charge for possession of a fire arm.

[7] Ad query 2 he conceded that possession of ammunition is not a trivial offence. He tried to justify the proceedings in terms of section 112(1) (a) of the CPA by responding that he wanted to curtail proceedings and expedite the finalization of the cases as there are a lot of cases enrolled on a daily basis. The magistrate further stated that considering that section 112(1) (b) was applied in relation to the charge of Possession of a firearm without a license to which the accused admitted all the elements and the fact that only two live ammunitions were found, he applied section 112(1) (a). Further that he was of the opinion that the sentence would not exceed N\$6000 and no direct imprisonment.

[8] Ad query 3 and 4, he responded that he indeed took into consideration the stated provisions but that the exhibits were not before court despite postponements to have it before court.

[9] The magistrate convicted the co-accused of 1. Hunting of huntable game, one oryx valued at N\$2000; 2. Recorded a plea of not guilty in terms of section 113 of the CPA as the accused denied wrongfulness and unlawfulness for possession of a firearm without a license; and 3. Convicted accused 1 in terms of section 112(1) (a) of the CPA as amended.

[10] I am of the view that it is not necessary for the exhibits to be necessarily before court to declare it forfeited. In general forfeiture of property after conviction is ordered in terms of section 35 of the Criminal Procedure Act, Act 51 of 1977. SS Terblanche; Guide to Sentencing in South Africa at pages 397 and 398 paragraph 2.2 (Second edition 2007) states that the prerequisites to be satisfied before forfeiture can be ordered are:

'(1) The accused must have been convicted of the commission of some offence, which in the case of paragraph (b) has to be one of those mentioned in paragraph 1 of the schedule to the Act. (2) The article declared forfeited has to be one seized (ordinarily by the police) in terms of the Act. (3) The article (which may include a weapon or instrument) must be the means through which the offence was committed or had to be used in the commission of the offence.'

No mention is made that it is a prerequisite that the exhibits should be before court nor could I find any authority for that proposition.

[11] The Nature Conservation Ordinance 4 of 1975 and the Arms and Ammunition Act, Act 7 of 1996 specifically provides for forfeiture. It is therefore, in my view, not necessary to apply section 35 of the CPA for forfeiture. The prerequisites in both laws and the CPA are the same in that an accused must be convicted of some offence; the article declared forfeited has to be one seized (ordinarily by the police); The article (which may include a weapon or instrument) must be the means through which the offence was committed or had to be used in the commission of the offence.

[12] In this matter the public-prosecutor did not bring an application for forfeiture. It was incumbent upon the prosecution to make out a case for forfeiture and that an accused should then be afforded a proper opportunity to address the application for forfeiture (upon

an application of the principle of audi alteram partem). I agree that a case would need to be made out and that an accused should be accorded a proper opportunity to address it.<sup>1</sup> In my view, the magistrate should also be more proactive. Where no application is made the magistrate should invite the public-prosecutor and the accused to address him/her on the issue and to present evidence where necessary. I hold this view more specifically because the magistrate has a wide discretion to forfeit where forfeiture is discretionary. Where forfeiture is peremptory the forfeiture is a 'shall'.

[13] I respectfully agree with Smuts J (as he then was) where he states: 'Given the seriousness of the crime and the fundamental public policy consideration that those convicted of serious offences should be deprived of the instrumentalities of crime (and its gains), there would in my view seem to be a duty on a court when an application is made for forfeiture under the ordinance after conviction to duly and properly consider such an application.'<sup>2</sup>

[14] There is a difference in the forfeiture of an article used in contravention of the Arms and ammunition Act, Act 7 of 1996 and forfeiture in terms of the Nature Conservation Ordinance 4 of 1975. Forfeiture in the Arms and Ammunition Act is discretionary because the word 'may' is used whereas in the Nature Conservation Ordinance forfeiture is peremptory in terms section 89(1) (a) of the Ordinance 'as the court 'shall' forfeit any game or wild animal or game meat or the skin, horn, tooth or tusk, egg shell, ears feet or head of any game or wild animal or any fish or indigenous plant which is found in the possession of such person and which was used for the purpose of or in connection with the commission of such offence or in respect of which such offence has been committed.'

[15] The remainder of section 89 is also clear. Where 'shall' is used it is peremptory and where 'may' is used it is discretionary.

'b) the Court convicting such person shall issue an order directing any licence or permit issued in terms of this Ordinance to the person so convicted to be withdrawn and cancelled;

(c) the Court convicting such person may, subject to the provisions of this Ordinance, declare any weapon or ammunition, lamp, battery, fishing tackle, device or article referred to in section 42,

---

<sup>1</sup> S v Nel 2015 (4) NR 1057 (HC) at 1060 F-G.

<sup>2</sup> S v Nel (supra) at 1063 H-I and 1064 A

animal or any other article or object which was used for the purpose of or in connection with the commission of such offence to be forfeited to the State;

(d) 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.

(2) Any forfeiture in terms of the provisions of subsection (1) (c) or (d) shall, notwithstanding anything to the contrary contained in any law, be ordered by the court irrespective of any rights which any person other than the convicted person has in respect of the forfeited weapon, ammunition, lamp, battery, fishing tackle, device or article referred to in section 42, animal or any other article or object, vehicle, vessel, raft or aircraft.

(3) A forfeiture or an order in terms of the provisions of subsection (1) shall be made or given in addition to any penalty, forfeiture or order that shall or may be imposed, made or given by the Court in terms of this Ordinance.

(4) Anything forfeited in terms of the provisions of this section may be disposed of by the Minister and the proceeds obtained therefrom shall be paid into the Territory Revenue Fund.' (Underlined for my own emphasis).

[16] The matter therefore stands to be remitted for the magistrate to hold the necessary forfeiture enquiry in accordance with the guidelines in this judgement.

### *The Review*

[17] The magistrate responded that he has now rectified the mistakes in pen on the typing record of proceedings. This is an irregularity and amounts to tampering with the record. I reiterate that magistrates and clerks of court have a duty to proofread records of proceedings before they are sent for review. I echo and agree what Salionga J stated in *Kauhanda and 2 Others* in NLD Review cases 57/2019 and 58/19 that presiding officers should not regard queries as an irritation but add that queries are directed to train/and or give guidance.

### *Section 112(1) (a) of the CPA*

[18] This court has on numerous occasions directed that section 112(1) (a) is intended for trivial offences. Despite the numerous judgments, magistrates continue to finalize



serious cases in terms of section 112(1) (a) of the CPA. The magistrate conceded that possession of ammunition in contravention of section 33 of the Arms and Ammunition Act, Act 7 of 1996 is not a trivial offence.

[19] The conviction and sentence of this charge therefore stand to be set aside. The magistrate is directed to apply section 112(1) (b) of the CPA in relation to this charge. This conviction is not in accordance with justice.<sup>3</sup>

[20] In the result:

1. The conviction and sentence of hunting of huntable game in contravention of section 30(1) (a) read with sections 1, 30(1) (b), 30(1) (c), 85, 89 and 89 A of Ordinance 4 of 1975 are confirmed;
2. The conviction and sentence of possession of a firearm in contravention of section 2 read with sections 1, 38(2) and 39 of Act 7 of 1996 as amended are confirmed;
3. The conviction and sentence of possession of ammunition in contravention of section 33 read with sections 1, 38(2) and 39 as amended are set aside and the magistrate is directed to apply section 112(1) (b) of the CPA in relation to the charge of possession of ammunition, question the accused, if satisfied sentence the accused afresh and enter a plea of not guilty if he is not satisfied that the accused is guilty;
4. The matter is remitted to the magistrate to apply section 38(5) (a) of Act 7 of 1996 and section 89 of the Nature Conservation Ordinance in relation to forfeiture and in accordance with the directives in this judgment;

---

<sup>3</sup> *S v Onesmus*; *S v Amukoto*; *S v Mweshipange* 2011 (2) NR 461 (HC); *S v Mostert* 1994 NR 83 (HC); *S v Aniseb and Another* 1991 NR 203 (HC); (supra) Headnote at 204 B-C

---

H C JANUARY  
JUDGE

I agree

---

A DIERGAARDT  
ACTING JUDGE