

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

Case Title: <i>The State v Akathingo Stefanus Elago and Dennis Povanted</i>	Case No.: CR 52/2022 Ruacana: 19/2016
	Division of Court: Northern Local Division
Heard before: Honourable Mr. Justice Small AJ, et Honourable Mr. Justice Munsu AJ	Delivered on: 29 September 2022
Neutral citation: <i>S v Elago</i> (CR 52/2022) [2022] NAHCNLD 101 (29 September 2022)	
The order: <ol style="list-style-type: none">1. The conviction and sentence of accused 1 in respect of Count 1 is confirmed.2. The order declaring accused 1 unfit to possess a firearm for a period of 3 years is set aside. The matter is referred to the trial court to enable it to summon the accused and to properly comply with the provisions of section 10(7), read with section 10(6)(a) and 10(8) of the Arms and Ammunition Act, 1996 (Act 7 of 1996).3. If the magistrate declares the accused 1 unfit to possess a firearm, the magistrate shall backdate the order to the date on which sentence was passed in this matter.4. The conviction and sentence of accused 1 in respect of Count 2 is set aside and the matter is referred to the trial court to enable it to summon the accused continue	

questioning the accused in terms of section 112(1)(b) of the Criminal Procedure Act, 1977 or to act in terms of section 113 of the aforesaid Act.

5. If accused 1 paid the fine imposed on count 2 he should be refunded. If he served the alternative imprisonment this should be considered if he is again convicted of count 2 and sentenced.
6. The conviction and sentence of both accused 1 and accused 2 in respect of count 3 is confirmed.

Reasons for the order:

Small AJ (Munsu AJ concurring):

[1] The matter came before this court on automatic review in terms of section 302 of the Criminal Procedure Act 51 of 1977.

[2] Accused 1 was charged with three charges. Count 1 was contravening section 2 of the Arms and Ammunition Act 7 of 1996, -Possession of a fire-arm without a licence, Count 2 contravening section 33 of the Arms and Ammunition Act 7 of 1996-Illegal Possession of Ammunition and a third count of possession of housebreaking implements in contravention of section 9(1) of Proclamation 27 of 1020 (sic). Accused 2 was only charged in respect of Count 3 as set out hereinbefore.

[3] Accused 1 pleaded guilty to all the three charges preferred against him. Accused 2 pleaded guilty to Count 3. The magistrate after questioning accused 1 in terms of section 112(1) (b) of the Criminal Procedure Act 51 of 1977 convicted accused 1 of contravening section 2 of the Arms and Ammunition Act, 7 of 1996- Possession of an unlicensed firearm, Contravening section 33 of the Arms and ammunition Act, 7 of 1996- Illegal possession of ammunition and contravening section 9 of Proclamation 27 of 1920- Possession of Housebreaking Implements.

[4] After questioning accused 3 in terms of section 112(1)(b) of the Criminal Procedure Act 51 of 1977 in respect of Count 3 the learned magistrate convicted him of contravening section 9 of Proclamation 27 of 1920- Possession of Housebreaking Implements.

[5] When the matter came before my brother Munsu AJ, he directed the following queries to the presiding magistrate:

1. Count 2 does not follow the words used in section 33 of the Arms and Ammunition Act 7 of 1996. Is the charge not defective?

2. The accused merely stated that he is guilty because the police found a fire-arm without a licence in his car. The court then began to question him as if he admitted that the fire-arm was in his possession. The fact that the accused says that the firearm was found in his car does not mean that he admits to possession. It could be in his car but under someone else's possession. So, a specific question in that regard is necessary to establish whether it was in the car under his possession or someone else.

3 In respect to count 2 — When regard is had to the questions posed to accused 1 and his replies thereto, I am unable to understand why he was convicted on count 2. May the learned magistrate kindly clarify. No question was put to the accused to establish whether he was in lawful possession of an arm capable of firing such ammunition. How was the court satisfied that he was guilty.

4. It would appear that the court used the “vehicle” to link both accused to count 3. They were each asked the same question as to who was in control of the vehicle and when there was confirmation by each accused, they were each asked a leading question “Do you then agree that you had constructive possession of housebreaking implements” to which each confirmed. How is it possible that they could each have been in control of the vehicle at the same time?

5. No inquiry was conducted before declaring accused 1 unfit to possess a fire-arm. Does the omission not amount to an irregularity?

[6] In her response the magistrate agreed and conceded that the formulation of count two was defective. She did not address the question as to her not asking accused 1 to establish whether he was in lawful possession of an arm capable of firing such ammunition. Similarly, she did not answer the follow up question as to how she was satisfied that he admitted all the elements of the alleged crime.

[7] Regarding whether the vehicle was used to link both accused to count 3, the learned magistrate indicated that accused one admitted during questioning that he was in control of the car. When the bag with housebreaking implements was placed into the vehicle by accused two, he knew what was inside the bag as they were going to commit housebreaking using the bag's contents but were caught before they could pull it off.

[8] The learned Magistrate agrees with the Honourable Judge that an inquiry had to be conducted before declaring the accused unfit to possess a firearm and that failing to do so amounted to an irregularity. This concession was fairly made in view of what was stated in *S v Stefanus; S v Johannes*¹.

[9] It is necessary to also refer to what was stated in *S v Mateus*² about properly drafted charges.

[7] Our Courts recognise that in straightforward cases in the magistrates' courts, there is normally no disclosure to an accused of the evidence the State collected. There are no complexities of fact or law in these minor offenses, and there is no reasonable prospect of imprisonment. Disclosure does not necessarily follow if the accused can easily adduce and challenge the State's evidence. In such instances a properly formulated charge sheet is the only facility he requires to adequately prepare for his trial.

[8] This includes a substantial number of routine prosecutions in the inferior courts where there is little reason for allowing access to police dockets to ensure a fair trial for the accused. Hundreds of routine prosecutions for such minor offences occur every day in the magistrates' courts. In these cases, the accused can ensure his fair trial through an analysis of the charge sheet and proceeding from there. For obvious reasons a properly drafted charge sheet is vital in such cases.³

[10] The following from *S v Mateus*⁴ also requires mention:

[15] The charge should set out each essential element of the relevant offence.⁵ This facilitates proper questioning regarding all the elements in section 112(1) (b) of the CPA. When the court deals with the matter under section 112(1) (a) after a guilty plea, an adequately drawn up charge is vital because the evidence presented cannot cure a defective charge.⁶ Questioning an accused in

¹ (CR 20 & 21-2013) [2013] NAHCMD 74 (19 March 2013) paragraph 6 and the numerous cases, some collected in paragraph 8.

² (CR 16/2022) [2022] NAHCNLD 39 (19 April 2022) in paragraphs 7 and 8.

³ *S v Nassar* 1994 NR 233 (HC) at 263C-D generally. Principle set out in *S v Angula and Others; S v Lucas* 1996 NR 323 (HC) at 328D-E applying *Shabalala and others v Attorney-General of Transvaal and Another* 1995 (2) SACR 761 (CC) in paragraphs 36 and 38.

⁴ (supra) paragraph 15.

⁵ See section 85(1)(b) and 86(1) of the Criminal Procedure Act, 1977.

terms of section 112(1) (b) will, however, also only fix a defective charge if the questioning in terms of the section covers the actual elements of the offence and not those alleged in a slovenly drafted charge that does not cover all the offence's elements.'

[11] In *S v Bruwer*⁷ Strydom JP as he then was, explained it as follows:

'The charge in this instance is unintelligible and did not inform the accused sufficiently of the charge which he had to meet. The question is whether the defective charge was remedied by the provisions of s 88 of Act 51 of 1977 which are to the effect that the evidence given at the trial may amplify and remedy a defect in a charge. Admissions made by an accused in terms of s 112(1)(b), after a plea of guilty, are evidence and can therefore remedy such defect. (See *S v Tshivhule and Others* 1985 (4) SA 48 (V). Mr Smuts, who appeared on behalf of the appellant, conceded, in my opinion correctly, that this is indeed the case. He, however, submitted that the answers given by the appellant during questioning did not have that effect.

.....

The conclusion to which I have reluctantly come is that the admissions by the appellant remedied the defective charge. The answers of the accused also demonstrate that he knew exactly what he was charged with, and it cannot be said that he was prejudiced by the defective charge.'

[12] I agree with the aforesaid general principles insofar as it relates to count 2. Therefore, although the learned magistrate did not ask accused 1 whether he had a firearm capable of firing the aforesaid ammunition, ammunition can only be legally possessed if the accused was in lawful possession of a firearm capable of firing such ammunition.

[13] In this matter, the accused 1, having been in illegal possession of the firearm, could have answered the question posed by the learned magistrate that he was in possession of a firearm capable of firing the ammunition. However, his possession of the ammunition is only legalized if he lawfully possesses a firearm capable of firing that ammunition.

⁶ Section 88 of the Criminal Procedure Act 1977 provides as follows: 'Where a charge is defective for the want of an averment which is an essential ingredient of the relevant offence, the defect shall, unless brought to the notice of the court before judgment, be cured by evidence at the trial proving the matter which should have been averred.' See: *S v Bruwer* 1993 NR 219 (HC) at 220E-J and at 221I approving and applying *S v Tshivhule and Others* 1985 (4) SA 48 (V).

⁷ 1993 NR 219 (HC) at 220I-221A and 221H-I, [Also reported at 1993 (2) SACR 306 (Nm)].

[14] The slovenly drafted charge in count 2, which left out an element of the crime could have been supplemented as was set out before if the learned magistrate asked the question suggested by my bother Munsu AJ in his query.

[15] As this fall under the provisions of section 312 of the Criminal Procedure Act, 1977, the matter must be referred back to the trial court for the leaned magistrate to comply with the provisions of section 112(1)(b) or to act in terms of section 113 of the Act as mentioned earlier.

[16] As a result it is ordered that:

1. The conviction and sentence of accused 1 in respect of Count 1 is confirmed.
2. The order declaring accused 1 unfit to possess a firearm for a period of 3 years is set aside. The matter is referred to the trial court to enable it to summon the accused and to properly comply with the provisions of section 10(7), read with section 10(6)(a) and 10(8) of the Arms and Ammunition Act, 1996 (Act 7 of 1996).
3. If the magistrate declares the accused 1 unfit to possess a firearm, the magistrate shall backdate the order to the date on which sentence was passed in this matter.
4. The conviction and sentence of accused 1 in respect of Count 2 is set aside and the matter is referred to the trial court to enable it to summon the accused continue questioning the accused in terms of section 112(1)(b) of the Criminal Procedure Act, 1977 or to act in terms of section 113 of the aforesaid Act.
5. If accused 1 paid the fine imposed on count 2 he should be refunded. If he served the alternative imprisonment this should be considered if he is again convicted of count 2 and sentenced.
6. The conviction and sentence of both accused 1 and accused 2 in respect of count 3 is confirmed.

Judge(s) signature:	Comments:
Small AJ:	

Munsu AJ:	
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