



CASE NO. CA 50/2008

NOT REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:

FRANS NAKANGOMBE

APPELLANT

and

THE STATE

RESPONDENT

CORAM: HOFF, J. et SWANEPOEL, A.J.

Heard on: 2009.11.13

Delivered on: 2009.11.13 (*Ex tempore*)

APPEAL JUDGMENT

HOFF, J: [1] The appellant was convicted in the Magistrate Court on three counts, namely, firstly the unlawful possession of a machine gun (AK 47), in contravention of the provisions of section 29(1)(a) of Act 7 of 1996, the Arms and Ammunition Act, secondly, in possession of a firearm(Tokarev pistol) without a licence, in contravention of section 2 of Act 7 of 1996, thirdly, the unlawful possession of

ammunition, (60 AK 47 cartridges and 6 Tokarev cartridges) in contravention of the provisions of section 39 of Act 7 of 1996.

[2] He was sentenced as follows: count 1, ten years imprisonment, count 2, three years imprisonment and count 3, one year imprisonment. The magistrate ordered that the sentences imposed in counts 2 and 3 run concurrently with the sentences imposed in count 1.

[3] In terms of the provisions of section 10(6), 10(7) and 10(8) of the Arms and Ammunition Act 7 of 1996, the magistrate declared the appellant unfit for a period of 5 years to possess a firearm.

[4] On the 30th of August 2005, the appellant filed a notice of appeal in which he set out his grounds of appeal. He appealed against sentence only. The appellant was unrepresented in the magistrate's court and the matter went on an automatic review. The Judge President caused the matter to be enrolled directing the Society of Advocates to assign an *amicus curiae* to argue the matter on behalf of the accused, in open Court. The Court requested counsel to address three questions. Firstly, whether the learned magistrate was correct in holding that section 38(2) of Act 7 of 1996 places an obligation on the courts to impose direct imprisonment sentences for contravention of Section 29(1)(a). Secondly, considering that he took judicial notice of the increase in that type of offence in his district, was the learned magistrate not required to inform the accused of what he sought to do and afford him the opportunity to address the court thereon ? Thirdly, does the sentence imposed not induce a sense of shock?

[5] This Court, (Damaseb, JP and Van Niekerk J), found in the affirmative in respect of all three questions posed. The sentences imposed by the magistrate were set aside and substituted with the following sentences: count 1, five years imprisonment, count 2, two years imprisonment, count 3, six months imprisonment. The sentences imposed in respects of counts 2 and 3 were ordered to run concurrently. (See case No. 109/2005 delivered on 15th September 2006).

[6] I suspect that when the matter was argued on review, the court was oblivious of the pending appeal against sentence by the appellant. The appellant has informed the Court this morning that he had not been aware of the review court's ruling. My understanding of what was conveyed to this Court by the appellant was that had he known of that review judgment, he would not have prosecuted this appeal. The appellant has now informed the court that he abandons the appeal.

[7] I must just add that the review court confirmed the magistrate's order in the Court *a quo*, in terms of the provisions of the Arms and Ammunition Act, specifically section 10(6), (7) and (8) declaring the appellant unfit to possess a firearm.

[8] The consequences of abandoning the appeal means that the appellant before court today, has to serve the sentences pronounced by the review court. In practice, it means that he has from today to serve a five year term of imprisonment. Since the appellant has abandoned the appeal, this court need not comment on any ground of appeal in this regard.

[9] The State is ordered to complete the necessary warrant of committal to facilitate the detention of the appellant.

[10] The appeal is accordingly struck from the roll.

HOFF, J:

I agree

SWANEPOEL, AJ

ON BEHALF OF THE APPELLANT: **IN PERSON**

Instructed by:

ON BEHALF OF THE RESPONDENT: **ADV. EIXAB**

Instructed by **OFFICE OF THE PROSECUTOR-GENERAL**