

Rex

v

**Senzo Welcome Nxumalo
Joseph Jabulani Fakudze**

Cri. Case No. 43/1998

CORAM

S.W. Sapire, CJ

For Prosecution
For Accused

Mr. Maseko
Mr. Ntiwane

Judgment
(02/02/99)

The order I therefore make is that on Counts 1 to 6 both accused are discharged and they are found not guilty. Accused No. 1 is accordingly found guilty on counts 7 and 8.

SENTENCE

You have been found guilty of 2 contraventions of the Arms and Ammunition Act. The 1st contravention relates your possession of a magazine containing rounds of ammunition. For the purpose of this count the ammunition is not relevant and you have been found guilty on the 2nd count of possession of ammunition.

This conviction takes place at the conclusion of a trial in which you were charged with serious offences, which have not been proven against you. I am very aware that this fact can play no part in determining the correct sentence, which has to be imposed on you. In other words there is no question of you getting a heavier sentence than you otherwise should have got because you have successfully defended other charges against you. In determining your sentence I have disregarded any suggestion that you were involved in those other

offences and your contraventions of the Arms and Ammunition Act are to be treated entirely separately.

Mr. Ntiwane who has appealed on your behalf has urged me that you are entitled to some credit for having changed your plea to one of guilty to two of these counts at the end of the crown case. I am not sure to what extent any credit is due to you for this and the fact remains that you pleaded not guilty originally and waited until the last moment to admit your guilt. I am not sure that any serious consideration of leniency arises out of those circumstances.

What is important is that you have a criminal record. You were found guilty apparently of a serious fraud many years ago in 1988 and you were sentenced on two counts to 4 years and 1 year respectively. The amounts involved were considerable for those days. It marks you as a person of proven criminality.

So does your convictions also in 1988 for contravention of the very act for which you have now been found guilty. These convictions do not correspond with the present conviction and do not qualify as another conviction in respect of the charge relating to the magazine making obligatory the sentence to be passed in cases where the accused person is found guilty on a *second contravention of the same section*. This is because the view I take of the matter the conviction has to be under the same sub-section of the act to qualify as another conviction in this sense. I therefore in that respect treat you as a first offender in respect of that crime.

The act contemplates that either a sentence of 5 years or E5 000.00 may be imposed. The choice seems to be exclusive and it does not seem correct to impose both a fine and a jail sentence. It seems to be that there should be a decision whether circumstances warrant a jail sentence or a fine. It is possible of course to suspend the whole or portion of the sentence.

In the case of the possession of ammunition the sentence can be somewhat less and I have in mind that I cannot treat the two counts as one for the purpose of sentence. I do intend to make the sentences, which I will impose in respect of both crimes run concurrently.

No evidence has been led to explain your possession of the magazine or the ammunition. A different approach may be taken where persons of clear record and no criminal tendencies come before the Court. It may be possible in such a case to lead evidence to show that the possession of the magazine or part of the firearm and the ammunition would have an innocent explanation in this sense that they were not possessed for any criminal purpose. No such explanation, apart from what you told the police has been forthcoming from you. It is open to one convicted of an offence under the act, to offer evidence in mitigation, and to explain the possession in terms which exclude the intended use of the firearm or part thereof for other than innocuous purposes.

In the absence of such mitigating evidence I must treat the manner as one where a person with proven criminal tendencies has been found in possession. The previous convictions proved date back ten years or more, but nonetheless indicate previous criminality on your part. Such a record of previous criminality, even dating back for such a long period, is relevant to assessing the character of one found in possession of a part of a firearm more especially in regard to the reason for such possession. In such a case of proven criminality, combined with the absence of mitigating evidence of the nature I have described, a fine is not apposite.

On the first count there is a prescribed minimum of five years imprisonment. On the second count there is a maximum sentence provided for.

I therefore impose the minimum sentence of 5 years in the case of the possession of the magazine and 1 year imprisonment in the case of the possession of the ammunition. These sentences will run concurrently.

I also order that for the period during which you were in prison awaiting trial you are to be deemed to have been serving your sentence. That means that the sentences will have been deemed to have been served by you to the extent of 10 months. The effective sentence is therefore one of 5 years of which 10 months are deemed to have been served already making it the effective sentence 4 years and 2 months.

S.W. Sapire,

Chief Justice

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