

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: CC 30/2018

THE STATE

v

ABIGAIL BASHALA

ACCUSED

Neutral citation: *S v Bashala* (CC 30/2018) [2022] NAHCMD 465 (8 September 2022)

Coram: D USIKU, J

Heard: 22 August 2022

Delivered: 8 September 2022

Flynote: Sentence – Prevention of Organised Crime Act – Smuggling of immigrants – Vulnerable persons exploited for money under pretext they will be relocated to other countries for better living conditions. All victims running away from the war in their country – Accused a first offender – Remorseful – Accused having testified in mitigation of sentence – Accused also testified about her ill health as a mitigating factor – Gravity of the offences and society's legitimate interests far much

outweigh the accused's interests – A custodial sentence unavoidable under the circumstances.

Summary: The accused, a Congolese national and a refugee in Namibia pleaded not guilty to all the charges preferred against her in terms of the Prevention of Organised Crime Act.

The allegations were that during December 2017 to April 2018, she aided in the smuggling of Congolese nationals into Namibia for purposes of obtaining financial or other material benefit.

After a full-fledged trial, the accused was acquitted on some of the charges in respect of counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 respectively. She was, however, found guilty in respects of counts 13, 14 and 15 respectively and convicted as charged.

ORDER

- (a) Count 13: 3 years imprisonment.
- (b) Count 14: 3 years imprisonment.
- (c) Count 15: 3 years imprisonment.

It is ordered that the sentences in respect of counts 13 and 14 are to run concurrently with the sentence in count 15.

JUDGMENT

D USIKU J:

[1] On 26 July 2022, the accused was convicted of three counts of smuggling of immigrants. It is common cause that the convictions arose from the incidents in which the accused assisted or aided in the smuggling of Congolese nationals into Namibia for the purposes of obtaining financial or other material benefits.

[2] The state in aggravation of sentence led the evidence of Mr. Immanuel Erishi an employee of the Ministry of Home Affairs, Safety and Security. His testimony is that, he is attached to the Immigration Department. Most importantly his duties include the administration and enforcement of immigration laws, whereby he is required to ensure safe entry and exit of persons at all border posts within Namibia. He is also tasked with the issuing of employment and residency permits. He chairs a committee that is responsible to issue certificates of identity for persons married to Namibian citizens. All foreign national falls under his control and he has to ensure that all the relevant immigration laws are complied with.

[3] According to his testimony, the reasons why entry and exit is controlled is to ensure public safety and security within the country. It is also meant to enhance national security and prevent unwanted diseases amongst travellers to and from the country.

[4] With regard to the offences of smuggling of immigrants, these are serious offences as they undermine national security and may expose the country to diseases, thus the importance to have proper control mechanism at exit and entry points at all gazetted border posts around the country.

[5] Mr. Erishi also testified how the country is battling with illegal immigrants at border posts. These persons usually are motivated by economic reasons as well as persons running away from conflicts in order to obtain better living conditions. There are others seeking asylum due to political persecution such as those from the Democratic Republic of Congo. Others could be criminals, who usually make use of ungazetted border posts. He did not have any personal encounter with the accused and his testimony is that he has nothing against her.

[6] Another witness who was called by the state to testify in aggravation is Dr Otilie Kovalova, a medical doctor with a bachelor degree in medicine obtained in 2011 from a University in Moscow, Russia.

[7] She completed her internship at the Katutura and Central hospitals during 2014, whereafter she was employed as a medical officer at Swakopmund state hospital from 2015 to 2016. She worked as a senior medical officer until 2018, whereafter in November 2018, she joined the Namibian Correctional Service as Chief Medical Officer.

[8] Her further testimony is that in total there are 14 correctional facilities country wide and at each facility there is a clinic. Each of these clinics deal with primary health care as the Correctional Health Care services are mandated to provide safe and secure custody to inmates and offenders. They are also responsible for inmates and offenders' rehabilitation and reintegration into the community. The Health care services being provided are equivalent to those provided to the communities at large.

[9] According to Dr. Kovalova, there is a standard procedure that needs to be followed when an inmate cannot be treated at a facility clinic. As such they work in corroboration with the Ministry of Health and Social Services whereby inmates are referred to public facilities at different levels, such as from the district to intermediate hospitals and thereafter to state hospitals. Inmates are referred from one facility to the other and could be directly referred to the State hospitals if need arises.

[10] Further, within the facilities, there are sick bays where sick inmates are kept, especially those with special needs to receive special medical care such as those who are disabled or those in need of renal care. They also provide HIV testing, ARV is provided to the infected as well as giving support and making sure that medication is administered through supporting staff members.

[11] On the other hand, accused also testified in mitigation of sentence and acknowledged her guilt, despite the state having had to lead evidence to show that

accused committed the offences as alleged. Throughout the trial she denied to have smuggled the victims in respect of counts 13, 14 and 15 respectively. Accused pleaded before court for forgiveness.

[12] She testified that she was born in Congo on 18 May 1970. Her parents are both deceased. She is a mother of seven children, 5 of them are deceased. Her two surviving children live in Namibia and both are adults. One of her sons is a student at the International University of Management. She is responsible for his tuition fees. She also have two grandchildren with whom she was residing in Otjiwarongo. These are both minors. She is married and her husband is suffering from cancer since 2018. He is currently on treatment.

[13] She is receiving money from Congo from the property she rents out. This is how she has been sustaining herself and her family.

[14] She is a first offender and the sole care taker of her two children, paying for their rent as they have no other means of income. She also have to pay for their transport expenses. Her husband is unemployed. After her conviction and her bail cancellation, her husband and the two grandchildren are being cared for by friends who made a contribution of N\$500 for their upkeep.

[15] According to her, since 2008, she has been suffering from diabetes, hypertension as well as from gastric. She has a pacemaker. She also suffers from kidney failure and experience renal failure. She had cardiac failure during 2022 and depends on insulin injection on a daily basis.

[16] With regard to her conviction on the 3 charges, she asks for forgiveness and requested the court to give her a second chance, claiming that if the victims had been at court, she would have personally asked them for forgiveness. She was kept in custody after her arrest on 7 November 2018, and was only released on bail during January 2019.

[17] When confronted about the money she received from Congo, accused maintained that it was from the rent of her properties and that it is only she who can claim that money but is not able to do so, due to her incarceration. She is aware about the seriousness of the offences she has been convicted of. Accused complained that she had not been offered an opportunity by the court to apologise to her victims.

[18] As rightly pointed out by both counsels that in order to consider an appropriate sentence, the court has the duty to weigh up the accused's personal circumstances, the crime committed and the interests of society. It is against that background that the United Nations Convention against Transnational Organised Crime and the Protocol was established with the main purpose to prevent and combat the smuggling of migrants as well as to promote cooperation among state parties to that end, while protecting the rights of smuggled migrants. Namibia is a party to that Protocol.

[19] It is now common cause that all the victims were running away from their country as a result of the war. They were vulnerable and desperate to find safety and security. That to my mind is a factor which aggravates and contributes towards the seriousness of the crimes and the consequent punished thereof.

[20] It has been accepted by this court that accused suffers from ill health and is in need of medical care. However, ill health cannot be allowed to become a licence to commit crime, nor can offenders generally expect to escape punishment because of the condition of their health. The Chief Medical Officer at the Windhoek Correctional Facility testified in aggravation of sentence, informing the court that inmates are provided with health care services through corroboration with the Ministry of Health and Social Services. It is their mandate to provide care and treatment to sick prisoners.

[21] It is generally accepted that ill health will be a factor tending to mitigate punishment, however, that only happens when imprisonment will be a greater burden on the offender by reason of the state of health, or where there is a serious risk of imprisonment having a gravely adverse effect on the offender's health.

[22] Society expect that a person who has committed a crime be punished. We live in an orderly society which is governed by moral values and obligations with respect for one another. It is therefore, expected of all members of society to uphold and respect these values. It therefore follows that it is not in the interest of society when persons like the accused trample on the values and rights of others to go unpunished.

[23] The victims were exposed to danger when they had to travel by canoe across the Zambezi River in order to reach Namibia. The whole process was planned by the accused through her associates who to date has not been traced as their whereabouts are unknown. This was a clear syndicate involving different persons amongst different countries.

[24] Accused herself having been a refugee, took advantage of her victims who were desperate to find peace after leaving their war stricken country.

[25] Whereas it is trite that a sentencing court must strive to balance an accused person's personal circumstances, the crime committed and the interest of society, it does not necessarily mean that equal weight must be given to those competing interest. In *S v van Wyk*¹ it was held:

'As in many cases of sentencing, the difficulty arises, not so much from the general principles applicable, but from the complicated task of trying to harmonise and balance these principles and to apply them to the facts. The duty to harmonise and balance does not imply that equal weight or value must be given to the different factors. Situations can arise where it is necessary (indeed it is often unavoidable) to emphasise one at the expense of the other.'

[26] All along accused knew about her ill health but she went on and engaged herself in these criminal activities, not only once but on different occasions as a result her victims suffered financial loss due to accused's conduct and to date she has made no effort whatsoever to compensate them for their losses.

¹ *S v van Wyk* 1993 NR 426 (SC) at 448 D – E.

[27] The defence argued that accused be given a suspended sentence, however, in my view though indeed a suspended sentence has a deterrent effect on the offender, it cannot be an appropriate sentence under the circumstances of this particular case.

[28] It is desirable that justice must be seen to be done through sentences imposed on perpetrators of serious crimes such as the present one.

[29] Therefore, the court having carefully considered all factors relevant to sentencing, I am of the view that a custodial sentence will be unavoidable, as a result, the accused is sentenced as follows:

- (a) Count 13: 3 years imprisonment.
- (b) Count 14: 3 years imprisonment.
- (c) Count 15: 3 years imprisonment.

It is ordered that the sentences in respect of counts 13 and 14 are to run concurrently with the sentence in count 15.

D N USIKU
Judge

APPEARANCES

STATE: Ms Felistus Shikerete
Of Office of the Prosecutor-General
Windhoek

ACCUSED: Mr. Kalundu Kamwi
Of Kamwi Legal Practitioners
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