

“REPORTABLE”

CASE NO.: CR 54/06

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

versus

- 1. MANUEL PAULO DA COSTA**
- 2. FRANCISCO ANTONIO DOMINGOS**

(HIGH COURT REVIEW CASE NO. 391/06)

Coram: VAN NIEKERK *et* MULLER, JJ

Delivered: 8 June 2006

REVIEW

VAN NIEKERK, J:

[1] The two accused pleaded guilty to and were convicted on a charge of contravening section 2(c) of the Departure from Namibia Regulation Act, 1955 (Act 34 of 1955). The details of the offence are that they were dropped off at the Noordoewer border post and tried to leave Namibia for South Africa by sneaking around the back of the buildings instead of reporting themselves to the immigration officer at the border post. I am satisfied that they were correctly convicted.

[2] When they were to be sentenced the learned magistrate noted on the record that the statutory penalty clause mandates imprisonment without the option of a fine, thereby indicating how seriously the offence is regarded. She then proceeded to sentence each accused to a period of six months imprisonment. The magistrate referred to Act 34 of 1955 as well as to the Departure from Namibia Regulation Amendment Act, 1993 (Act 4 of 1993).

[3] When I ascertained what the correct penalty is for this offence I also consulted the Office of the Prosecutor-General and wish to thank Adv Lategan for the research she did. It seems that the books which the learned magistrate had at her disposal have not been properly annotated. Originally Act 34 of 1955 provided for the penalty relied upon by the magistrate. Section 8(1)(a) of the Act originally read as follows:

“8. Penalties

- (1) Any person who contravenes any provision of this Act or who fails to comply with a notice under sub-section (5) of section *five*, shall be guilty of an offence and liable on conviction –
 - (a) in the case of a contravention of section *two*, to imprisonment without the option of a fine, for a period of not less than three months and not exceeding two years;”.

[4] Section 10 of that Act provided that the Act and any amendment thereof shall apply to the territory of South West Africa, including that portion thereof known as the Eastern Caprivi Zipfel. The administration of the Act was not transferred to South West Africa prior to Independence (see section 3(1)(6) of the Executive Powers (Interior) Transfer Proclamation (Proc. AG 17 of 1978). This meant that any legislative amendment by the South African Parliament to Act 34 of 1955 prior to Independence would be applicable in South West Africa. The penalty clause of Act 34 of 1955 was indeed amended by the (South African) Aliens and Immigration Laws Amendment Act, 1984 (Act 49 of 1984), which amended section 8(1)(a) to the following penalty:

“8(1)(a) in the case of a contravention of section 2, to a fine not exceeding R10 000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment;”.

[5] This is still the penalty, as Act 4 of 1993 amended paragraph (c), and not paragraph (a), of section 8(1) of Act 34 of 1955.

[6] The learned magistrate therefore mistakenly restricted herself when considering an appropriate sentence. As the accused have already served nearly four months of their sentence, it does not seem

just to now impose a fine. I think it would be appropriate to suspend the remainder of the period of imprisonment.

[7] I therefore make the following order:

1. The convictions of both accused are confirmed.
2. The sentence of six months imprisonment is set aside.
3. The accused are each sentenced to six (6) months imprisonment of which two (2) months imprisonment are suspended for three (3) years on condition that the accused is not convicted of a contravention of section 2(c) of the Departure from Namibia Regulation Act, 1955 (Act 34 of 1955) (Departing from Namibia except at a port without appearing before an immigration officer), committed within the period of suspension.
4. The sentence is backdated to 10 February 2006.

VAN NIEKERK, J

I agree,

MULLER, J