

# **SUMMARY**

**CASE NO.: CR 134/2007**

**THE STATE versus ABASI COMBO**

**TIMILAY THOMAS MTOI**

**MULLER, J et SILUNGWE,**

**AJ**

## **CRIMINAL PROCEDURE**

**PLEA** - Plea of guilty - Questioning in terms of section 112(1)(b) of Criminal Procedure Act 51 of 1977 - Object of section 112(1)(b) is to protect accused from consequences of unjustified plea of guilty - Where accused's responses to questions suggest a possible defence or leave room for a reasonable explanation, other than guilt, a plea of not guilty should be entered and the matter raised clarified by evidence at the accused's trial.

**CASE NO.: CR 134/2007**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**THE STATE**

**VS**

**ABASI COMBO  
TIMILAY THOMAS MTOI**

*(HIGH COURT REVIEW CASE NO.: 681/2007)*

**CORAM:** MULLER, J *et* SILUNGWE, AJ

**DELIVERED:** 11/09/2007

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**REVIEW JUDGMENT**

**SILUNGWE, AJ** [1] Both accused - foreign nationals - purportedly pleaded guilty to the crime of departing from Namibia without a valid passport or permit, in contravention of section 2(a) of the Departure from the Union Regulation Act 34 of 1955, as amended by section 2(a) of the Departure from Namibia Regulation Amendment Act 4 of 1993. They were each convicted and sentenced to six (6) months imprisonment, wholly suspended on the usual conditions.

[2] During questioning, pursuant to section 112(1)(b), it came to light

that both accused were citizens of Burundi. The questioning continued as follows:

“*Crt.:* When did you come into Namibia?

*Accd. 1:* *I cannot remember, but I was here approximately three (3) days in the country before we were arrested.*

*Accd. 2:* *Three (3) days before I was arrested.*

*Crt.:* *When did you get out of Namibia?*

*Accd.1:* *On the 11/05/2006 the same day I was arrested.*

*Accd. 2:* *On 11/05/2006.*

*Crt.:* *Which side of the Namibian border were you arrested?*

*Accd.1:* *Across the border on the South African side.*

*Accd. 2:* *Across the Namibian border fence.*

*Crt.:* *Did you use the designated post border to cross?*

*Accd.1:* *No, we used the river.*

*Accd. 2:* *No, I used the river.*

*Crt.:* *Did you use a passport to cross the border?*

*Accd.1:* *No I do not have a passport.*

*Accd. 2:* *No I do not have a passport.*

*Crt.:* *Did you have any special permit or exemption, or border pass to leave Namibia without a passport?*

*Accd.1:* *No*

*Accd.2:* *No*

*Crt.:* *Do you have any lawful excuse to tender to court?*

*Accd.1:* *Yes, there is war in my country. Both my parents died and grandmother.*

*Accd. 2:* *Yes, there is war in my country. Accused 1 is my step-brother so our father died as a result of war.*

*Crt.:* *Accused 2 where is your mother?*

*Accd. 2:* *She died a long time ago.*

*Crt.:* *Is there still war in your country?*

*Accd. 1:* *There can be attacks any time. So yes there is still war.*

*Accd. 2:* *Yes, there is still war that is why I ran away.*

*Crt.:* *Proceedings stopped to inquire on the status of accused persons as they allege to be refugees fleeing from war.*

*Rem.:18/05/2006 (10 am for continuation on 18/05/2006).*

*...*

*Court: The court stopped proceedings in your matter yesterday 17/05/2006 to make an inquiry on how you should be treated in the light of your explanation that you are fleeing war in your country. The inquiry was made with the Department of Immigration and the Ministry of Home Affairs. That part would be dealt with by the Tribunal appointed in terms of the Immigration Act. For now the court will proceed to deal with the criminal charges you are facing and thereafter you can approach the Tribunal and explain your circumstances, wherein you shall be assisted in the manner deemed appropriate by the Tribunal.*

*The proceedings shall accordingly continue.*

*Crt.: Do you have anything more to say besides that you are fleeing war in your country?*

*Accd. 1: Nothing further.*

*Accd. 2: Nothing further.*

*Crt.: From what you have said this far, the court is convinced that you are guilty of the offence you are charged with.*

*VERDIC: Guilty as charged for both accused.*

*..."*

[3] When the learned presiding Magistrate was called upon to give reasons for what was perceived to be irregular convictions in this matter,

he responded that, on the authority of *S v Ncube* 1981 (3) SA 511; and *R v Rashiane* 1941 (2) PH F76 (O), he should have entered pleas of not guilty since, with hindsight, the accused “had a possible defence of necessity”. In his own words, he said:

*“... I am of the humble view that the two had a possible defence of necessity. I however doubt if that defence could have stood trial as the two were arrested at Noordoewer the extreme southerly border of Namibia on their way to South Africa, having shown no sign of seeking refuge anywhere in Namibia.*

*As things stand they did not serve any sentence of this Court. The only prejudice they have been put to is to carry a conviction and the burden of a suspended sentence. More so they have since been released.”*

[4] Notwithstanding the trial Magistrate’s acknowledgment that the accused persons had a possible defence, he nonetheless surprisingly proceeded to express doubt about the prospect of success of such defence. It is well settled that where an accused’s responses to questioning, in terms of section 12(1)(b) (of the Act) suggest a possible defence, or leave room for a reasonable explanation, other than the accused’s guilt, a plea of not guilty should be entered and the possible defence raised, or reasonable explanation given, should thus be clarified by evidence at the accused’s trial. See: *S v Naidoo* 1989 (2) SA 114(A) at

121F; *S v Nagel* 1998 (1) SACR 218i - 219a. It is necessary to appreciate that the primary purpose of section 112(1)(b) of the Act is to protect an undefended accused, (such as the accused *in casu*) against the consequences of an incorrect plea of guilty. Such questioning entails two aspects about which the presiding Magistrate must be convinced, to wit: firstly, that the accused admits all the elements of the charge and, secondly, that he is guilty thereof. Hence, the Court should be satisfied, not only that the accused committed the crime, but also that he committed it unlawfully and with the necessary mens rea.

[5] In the instant case, it is self-evident that the accused were wrongly convicted. Although it is not relevant in the light of my decision, if there are more than one accused that pleads guilty, they should be questioned separately in terms of section 112(1)(b) of the Act.

[6] As the accused have reportedly long left the country (and their whereabouts are apparently unknown), it would serve no useful purpose to order a retrial in the matter. Consequently, the following order is hereby made:

- (1) the convictions and the attendant sentences are set aside.

**I agree**

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**MULLER, J**