

CASE NO.: CR 79, 80, 81, 82/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

**THE STATE versus MUTINDA BRIAN
[HIGH COURT REVIEW CASE NO.: 769/2010] - [CR 79/2010]**

**THE STATE versus MANDUKU GERALD
[HIGH COURT REVIEW CASE NO.: 739/2010] - [CR 80/2010]**

**THE STATE versus CHIPODZE TOM
[HIGH COURT REVIEW CASE NO.: 1000/2010] - [CR 81/2010]**

THE STATE versus DAVID NDATANUFA & 1 OTHER

[HIGH COURT REVIEW CASE NO.: 737/2010] - [CR 82/2010] CORAM:

PARKER, J et SIBOLEKA, J

Delivered on: 2010 OCTOBER 26

REVIEW JUDGMENTS

SIBOLEKA, J.:

[1] The above accused persons in the four cases were charged in contravention of sections 12(1) and 12(4) of the Immigration Control Act, Act no. 7 of 1993.

Section 12(1) reads:

"12 Passports and Visas

1. Any person seeking to enter Namibia who fails on demand by an immigration officer to produce to such an immigration officer an unexpired passport which bears a valid visa or an endorsement by a person authorized thereto by the Government of Namibia to the effect that authority to proceed to Namibia for purposes of being examined

under this Act has been granted by the Minister or an officer authorized thereto by the Minister or such person is accompanied by a document containing a statement to that effect together with particulars of such passport, shall be refused to enter and to be in Namibia unless such a person is proved to be a Namibian citizen or a person domiciled in Namibia, my own underlining.

2....

3...."

[2] In the Mutinda Brian matter the accused was charged as follows:

"Entry into Namibia without an unexpired passport bearing a valid visa or authority. That the accused is/are guilty of contravening section 12(1) read with sections 1, 2 and 12(4) of the Immigration Control Act, Act 7 of 1993. In that upon or about the 31st day of January 2010 at or near Windhoek in the district of Windhoek the accused, not being a Namibian citizen or a person domiciled in Namibia, failed to produce to an immigration officer an unexpired passport;

(a) Bearing a valid visa, or

(b) An endorsement by a person authorized thereto by the Government of Namibia indicating that the Minister or authorized officer granted authority to such person to proceed to Namibia, or without a document containing

(c) A statement to the effect that the Minister or authorized officer granted authority to such person to proceed to Namibia, and

(d) The particulars of such passport.

After being requested to do so and therefore did wrongfully and unlawfully enter/remain in Namibia, without valid permit."

[3] In this matter the allegation contained in section 12(1) of Act 7 of 1993 namely, that the accused failed, on demand by an Immigration officer, to produce an unexpired passport bearing a valid visa or endorsement is correctly reflected in the charge sheet. However, the learned Magistrate did not ask the accused to explain whether it was demanded of him by the

Immigration officer to produce an unexpired passport bearing a valid visa or endorsement. The answer that would have been elicited by this question would have determined accurately whether the accused was guilty or not. The failure to ask a question on this important allegation of the charge sheet affects the conviction of the accused. It is therefore my considered view that the conviction of the accused on this matter cannot be allowed to stand.

[4] In the Manduku Gerald matter the accused was charged as follows:

"Remaining in Namibia without a valid document

The accused is guilty of Contravening Section 12(1) of Act 7 of 1993 (Immigration Act).

In that upon or about 31st January 2010 at or near Soweto in Katutura in the district of Windhoek, the accused did wrongfully and unlawfully remaining in Namibia without a valid document."

In this matter the charge sheet is defective because it omitted the integral part creating the offence contained in section 12(1) namely, the failure by an accused on demand by an Immigration officer, to produce an unexpired passport bearing a valid visa or endorsement. It could be the reason why the learned Magistrate did not cover this aspect in his questioning in terms of section 12(1)(b) of Act 51/77.

[5] In the Chipodze Tom matter the accused was charged as follows:

"Remaining or entry into Namibia without an unexpired passport bearing a valid visa or authority. "

That the accused is/are guilty of contravening section 12(1) read with

sections 1, 2 and 12(4) of the Immigration Control Act 7 of 1993.

In that upon or about the 31st day of January 2010 at or near Windhoek in the district of Windhoek the accuse, not being a Namibian citizen or a person domiciled in Namibia, failed to produce to an immigration officer an unexpired passport;

(a) Bearing a valid visa, or

(b) An endorsement by a person authorized thereto by the Government of Namibia indicating that the Minister or authorized officer granted authority to such person to proceed to Namibia, or without a document containing

(a) A statement to the effect that the Minister or authorized officer granted authority to such person to proceed to Namibia, and

(b) The particulars of such passport.

After being requested to do so and therefore did wrongfully and unlawfully enter/remain in Namibia."

[6] In this matter, the charge sheet correctly reflects the integral allegation that creates an offence in section 12(1) of Act 7 of 1993, namely a failure by the accused on demand by an Immigration officer, to produce an unexpired passport bearing a valid visa or endorsement. However, the learned Magistrate did not ask the accused whether there was a demand made to him by the Immigration officer to produce an unexpired passport bearing a valid visa or endorsement. This failure is fatal and it goes to the core of the conviction. In the light thereof the conviction in this matter cannot be allowed to stand.

[7] In the David Ndatanufa matter the two accused were charged as follows:

"Charge: Being in Namibia without a valid passport or permit. That the accused is guilty of C/S 12(4) of the Immigration Control Act 7/1993.

In that upon or about the 21st day of June 2009 at or near Noordoewer Border Post in the district of Karasburg the said accused did wrongfully and intentionally remained or being in Namibia without a valid

passport or permit."

In this matter the charge is defective because it does not allege that the accused was refused entry into Namibia prior to his arrest for being found in Namibia. Section 12(4) of Act 7/1993 reads:

"12(4) If any such person enters or has entered Namibia in contravention of the provisions of subsection (1) or after having been refused to enter Namibia in terms of that subsection, is found in Namibia he or she shall be guilty of an offence and on conviction be liable to a fine not exceeding N\$20.000,00 or to imprisonment for a period not exceeding five years or to both such five and such imprisonment, and may be dealt with under Part VI as a prohibited immigrant," my own underlining.

The omission in the charge lead to the accused persons not being asked whether they were refused entry in this country before their arrest.

[8] If an accused is charged for contravening a statutory provision like it is in these four cases, it is advisable that when formulating a charge the actual wording of the provision creating the offence should be used, and sections 12(1) and 12(4) are not an exception. (See *S v Antonio Wellen* Case No. CR 138/2008, and *S v Levy Nkomo* Case No. CR 139/2008 both unreported).

[9] In the result the convictions and sentences in all four cases are set aside.

SIBOLEKA, J

I agree.

PARKER, J