



CASE NO.: CR 4/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

JULIUS MBELE

(HIGH COURT REVIEW CASE NO.: 1985/2010)

CORAM: HOFF, J et MULLER, J

Delivered on: 1 February 2011

REVIEW JUDGMENT

MULLER, J.: [1] The accused was charged on two offences of which only the second charge is relevant to this review. He was discharged at the end of the States case in terms of S 174 of the Criminal Procedure Act, no. 51 of 1977 (CPA) in respect of the first charge.

[2] The second charge of which he was convicted as charged, is one of contravening S 29(1)(a) of the Immigration and Control Act, no. 7 of 1993(the Act). This subsection provides as follows:

"An immigration officer may, on the application of any person who has complied with all the relevant requirements of this Act, issue to such person a visitor's entry permit.

(a) To enter Namibia or any particular part of Namibia and to sojourn temporarily therein."

[3] I addressed the following query to the Magistrate:

"The accused was charged and convicted for contravening S 29(1)(a) of the Immigration and Control Act, no. 7 of 1993. That Act only applies to a person who is not a Namibian citizen and such categories as set out in S 2(1) of the Act. It is consequently necessary for the State to prove or for the accused to admit that he is not a person described in S 2(1) of the Act. No such proof were provided and the accused did not admit that he is not a person described in S 2(1) of the Act when questioned in terms of S 112(1)(b) of Act 51 of 1977, yet he was convicted."

[4] In reply to my query the Magistrate responded as follows:

"I concede I erred by convicting accused without establishing whether or not accused is lawfully in Namibia as envisaged by Section 2(1) of Act of 1993. This is an oversight on my part and is sincerely regretted. It follows therefore that the conviction in terms of S 112(1)(b) of Act 51 of 1977 is not proper. May the proper remedial measures be taken in the instant case."

[5] It is evident that the Act pertains to non-Namibians or persons not lawfully in Namibia. In fact S 2(1) of the Act excludes Namibian citizens in particular, as well as other categories of persons lawfully in Namibia. It follows that only non-Namibians, or other persons not lawfully in Namibia or other persons not lawfully in Namibia, can contravene Section 29(1)(a) of the Act. Therefore, in order to convict a person charged with contravening that section, it must either be proved or admitted by the accused that he is not a Namibian citizen or not lawfully in Namibia.

[6] In this matter the Magistrate questioned the accused in terms of S 112(1) (b) of the CPA after he pleaded guilty. The Magistrate could only convict him if he admitted all the elements of the charge. It is inherent in a charge in terms of a contravention of S 29(1)(a) of the Act that the accused was a foreigner and not a Namibian citizen or falling within the other categories listed in S 2(1) of the Act. Without an admission in that regard he could not have been convicted. That pertinent question was simply not asked.

[7] The Magistrate correctly conceded that he made a mistake in this regard and in the circumstances the conviction cannot stand.

[8] The correct procedure ought to be to set the conviction and sentence aside to refer that the matter back to the Magistrate to obtain the required admission or to refer the matter to trial in terms of S 113 of the CPA. That is, however, not so easy with this type of matter and in particular because I am not aware whether the accused paid the fine and perhaps left the country or whether he served his sentence in gaol. If the latter is true, he may already

be out of prison.

[9] In all the circumstances, which I have duly considered, the only plausible solution is that this court has to set the conviction and sentence aside. If the accused did pay the fine of N\$1 000, he is entitled to have it refunded (if he can be found). If he did not pay the fine and served the prison sentence, the former is irrelevant and he should be released immediately, if he is still in prison.

[10] In the result the following order is made:

1. The conviction and sentence of the accused is set aside.
2. If the accused paid the fine imposed, it should be refunded to him.

MULLER, J

I agree

HOFF, J