

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CR 82/2012

In the matter between:

THE STATE

and

TJILOMBO VERIMANGA

ACCUSED

Neutral citation: *The State v Verimanga* (CR 82/2012) [2012] NAHCMD 14 (08 October 2012)

Coram: GEIER J et PARKER AJ

Delivered: 08 October 2012

Flynote: Criminal law – mens rea – State failing to prove mens rea in court a quo – Sentence and conviction set aside on review.

Summary: Accused has been charged, convicted and sentenced of the offence of forgery and uttering related to the admitted alteration/correction of the accused's birth date on a Grade 10 certificate – Accused maintaining that he did not know that such conduct was unlawful – Prosecution not challenging such evidence.

Held: that the accused's version indicating a lack of criminal intent had to be accepted as being reasonably possibly true.

Held: that the State has failed to prove the element of mens rea beyond reasonable doubt.

Held: that it followed that the conviction and sentence imposed by the court a quo on 4 June 2010 had to be set aside and that the accused be acquitted.

ORDER

The conviction and sentence imposed by the court a quo on 4 June 2010 is set aside.

JUDGMENT

GEIER J (PARKER AJ concurring):

[1] The accused in this matter was charged with the crime of forgery and/or uttering forged documents knowing it to be forged in that it was alleged that on an unknown date in 2006, at or near Rundu charge office, in the district of Rundu, the accused unlawfully, falsely and with the intent to defraud and to the prejudice of Shiluwe Elizabeth forged an instrument in writing namely a Junior Secondary Certificate.

[2] When the charge was put to the accused he pleaded guilty. When questioned by the court he explained that he had tried to correct an error on the

certificate as it did not reflect his date of birth correctly. He admitted having changed the date of birth with a pen. He explained further that he had gone to the police station to have his papers certified and that is when the police officer pulled him aside whereafter he was then arrested and charged.

[3] The accused explained further that 'I just changed because the things was wrong and I thought I could correct it'

[4] As the court thus was not satisfied that the accused had admitted all the elements of the charge the plea of guilty was altered to one of not guilty in terms of section 113 of the Criminal Procedure Act 51 of 1977.

[5] The State called one witness only, namely, Siluwe Elizabeth Sinti a police officer who worked at the charge office on the day when the accused came to have his documentation certified. In evidence she stated that:

' ... on the day in question the accused before came to certify his documents and I realised that the document was tampered with, it was scratched and on one of the names and the age. And therefore I told him that he was under arrest and I explained his rights to him.

Question – what explanation did he give you?

Answer – he told me that he did it himself and I must forgive.'

[6] The junior certificate in question was then handed in as evidence.

[7] Although the accused person, when cross-examining the police officer, put it to him that he had just come with 2 certificates, one of which was the handed in grade 10 certificate, nothing further of significance emerged from such cross-examination.

[8] The State then closed its case and the accused testified as follows:

'upon finding myself guilty of forging my grade 10 certificate I did it myself and I did not know of the consequences and I did that to correct where it was mistaken because as I said, I never knew that if I did that it was unlawful and until last year when I took my documents to the police station to be certified and at the same time it is whereby I was arrested by the police officer. And even the time I was arrested I never knew it was wrong and when I was arrested it is when it was explained to me. I am guilty because what I did was wrong and I accept that it was a mistake and also that was not told before that.'

[9] During cross-examination the prosecution did not attack the accused's denial that he did not know what he did was wrong.

[10] It was against this background that the court then nevertheless proceeded to find the accused guilty as charged.

[11] When the matter came up for automatic review the learned reviewing judge, inter alia, also questioned the basis on which the accused person was found to have 'had the criminal intent and was aware that his conduct was unlawful when he corrected the document'.

[12] In response to such query the learned magistrate stated:

'... Furthermore the Grade 10 certificate can be categorized as being both a private document and at the same time state document, therefore accused had no right vested in him to alter the certificate as it still remained the property of the National Examination and Assessment Directorate. Moreover it is clearly endorsed on the Certificate that it was issued without any erasures or alterations and as such any alterations by an unauthorised body or individual rendered the Certificate invalid. In addition accused was literate and surely must have read the conditions of award of the Certificate. It is also general knowledge that national or state documents can only be corrected by the issuing institutions and not the individual holders of such documents themselves.

Therefore accused knew that the grade 10 Certificate was not his and altered it to make it look as if it was his and such had the necessary intention and his conduct was unlawful.'

[13] With the greatest respect to the learned magistrate it does not emerge from the record that it was ever put to the accused person that he must have been aware of the conditions endorsed on the certificate to the effect that any such alterations by an unauthorised body or individual would render the certificate invalid and that the accused therefore must have known that he had no right to effect changes to the document.

[14] Also in regard to the imputed public knowledge relating to the conditions endorsed on the certificate the record reflects that no cross-examination by the State or questions by the court ever focused on this issue on which the conclusion – that the accused knew that his conduct was unlawful – was also based. It is in any event doubtful whether or not a court can take judicial notice of 'general knowledge' to the effect that 'national or state documents can only be corrected by the issuing institutions and not the individual holders of such documents'?

[15] What was clearly placed in issue through the numerous contentions on the part of the accused was that he did not know that it was wrong to correct his incorrectly reflected date of birth on the Grade 10 certificate in question and that he did not know what he did was unlawful. This evidence, in my view, squarely placed

an onus on the State to prove the criminal intent of the accused beyond a reasonable doubt.

[16] This evidence was however never challenged by the State nor questioned by the court.

[17] In such circumstances it emerges that the accused's denials in respect of having had the requisite criminal intent, at the relevant time, must be accepted as being reasonably possibly true.

[18] This, by the same token means that the State has failed to prove this element of the charge beyond reasonable doubt.

[19] It follows that the conviction and sentence imposed by the court a quo on 4 June 2010 is set aside.

H GEIER
Judge

C PARKER
Judge (Acting)