



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CR 82/2013

In the matter between:

THE STATE

APPLICANT

and

NANGAKU EDWARD

FIRST RESPONDENT

NANGAKU VICTOR TUTALENI

SECOND RESPONDENT

Neutral citation: *S v Edward* (CR82/2013) [2013] NAHCMD 368 (3 December 2013)**Coram:** PARKER AJ *et* UNENGU AJ**Delivered:** 3 December 2013

Flynote: Criminal procedure – Sentence – In terms of s 9 of Police Offences Proclamation 27 of 1920 – Court held that in imposing an additional second sentence not permitted by s 9 of the Proclamation the lower court acted ultra vires and therefore sentence 2 is a nullity.

Summary: Criminal procedure – Sentence – In terms of s 9 of Police Offences Proclamation 27 of 1920 – Two accused persons were found guilty of being found in their possession, without lawful excuse, housebreaking implements in contravention of s 9(1) of the Proclamation – The court found the proceedings were in accordance with justice and accordingly confirmed the conviction – The court found further that the first sentence to a fine or imprisonment wholly suspended on conditions was in accordance with s 9 of the Proclamation, read with s 297(1)(a) and (b) of the Criminal Procedure Act 51 of 1977, but in imposing the additional second sentence

of community service the lower court acted ultra vires s 9 of the Proclamation – Accordingly court set aside the sentence and replaced it with another sentence.

ORDER

(a) The conviction of both accused 1 and accused 2 is confirmed.

(b) The sentence is set aside and the following sentence is put in its place:

Each accused person is sentenced to a fine of N\$300,00 or three months' imprisonment, wholly suspended for five years on condition that he is not convicted of being found in his custody or possession, without lawful excuse, any pick-lock, key, crow or other implement of housebreaking in contravention of s 9 of Proclamation 27 of 1920.

JUDGMENT

PARKER AJ (UNENGU AJ concurring):

[1] The accused persons were charged with possession of housebreaking implements in terms of s 9(1) of Police Offences Proclamation 27 of 1920 and appeared before the district magistrates' court, Rundu. The accused persons pleaded not guilty. They were tried and found guilty, and sentenced as follows:

- '1. Each fined N\$1 500,00 or 7 (seven) months imprisonment wholly suspended for five (5) years on condition each is not convicted being found in possession of housebreaking implements, or and housebreaking with intent to steal and theft.

2. Each does community service of 700 hours at Dr Romanus Kampungu Secondary School under the supervision of the school principal from Monday-Friday, 14h00-17h00 of community service.'

[2] I am satisfied that the proceedings are in accordance with justice and, therefore, the conviction should be confirmed. However, the sentence is outwit s 9 of the Proclamation, if regard is had to the penalty provision attached to the offence in the chapeau of s 9, that is:

- '9. Any person guilty of any of the following acts or offences shall upon conviction in respect of each act or offence be liable to a penalty not exceeding twenty pounds, or in default of payment to be imprisoned with or without hard labour for a period not exceeding six months, unless such penalty be sooner paid: or either to such penalty or such imprisonment,'

[3] As the sentence stands, sentence 1 is permissible in terms of the Proclamation, read with s 297(1)(a) and (b) of the Criminal Procedure Act 51 of 1977. Sentence 2 stands on its own as a separate punishment; and since it is not a condition upon the suspension of sentence 1, sentence 2 is outwit s 9 of the Proclamation. In sum, the learned magistrate acted ultra vires in imposing an additional second sentence not provided in s 9 of the Proclamation. For that reason, I find that sentence 2 is a nullity and it cannot be allowed to stand.

[4] In the result, I make the following order:

- (a) The conviction of both accused 1 and accused 2 is confirmed.
- (b) The sentence is set aside and the following sentence is put in its place:

Each accused person is sentenced to a fine of N\$300,00 or three months' imprisonment, wholly suspended for five years on condition that he is not convicted of being found in his custody or possession, without lawful excuse, any pick-lock, key, crow or other implement of housebreaking in contravention of s 9 of Proclamation 27 of 1920.

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C Parker
Acting Judge

E P Unengu
Acting Judge