

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case No: CR 16/2013

In the matter between:

**THE STATE**

and

**RIGEN MAWAWA**

**(HIGH COURT MAIN DIVISION REVIEW REF NO 1624/2010)**

**Neutral citation:** *S v Mawawa* (CR 16-2013) [2013] NAHCMD 61 (7 March 2013)

**Coram:** VAN NIEKERK, J and UEITELE, J

**Delivered:** 7 March 2013

**Flynote:** **Criminal procedure** –Review – Accused charged with c/sec 6 of Immigration Control Act, 7 of 1993 – Answers given during questioning in terms of

section 112(1)(b) of Criminal Procedure Act, 51 of 1977, revealed that accused did not commit this offence – Accused may have committed offence of c/sec 7 of Act 7 of 1993 – Conviction and sentence set aside

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### **ORDER**

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The conviction and sentence are set aside.

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### **REVIEW JUDGMENT**

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VAN NIEKERK, J (UEITELE, J concurring):

[1] In this matter the accused was convicted after a plea of guilty to a charge of contravening section 6(1) of the Immigration Control Act, 1993 (Act 7 of 1993), in that he allegedly wrongfully and unlawfully entered Namibia at a place other than a port of entry without a passport bearing an endorsement by the Minister of Home Affairs to the effect that permission has been granted to him by the Minister to enter Namibia at that place and to be in Namibia for such purposes and during such period and subject to such conditions as may be stated in that

endorsement. The accused was sentenced to a wholly suspended sentence of 8 months imprisonment.

[2] During the questioning in terms of section 112(1)(b) of the Criminal Procedure Act, 1977 (Act 51 of 1977), the accused's answers revealed that he is a Congolese citizen, that his passport was stolen in South Africa and that he entered Namibia at Ariamsvlei without a passport while hiding on a truck.

[3] From these answers it is clear, and the trial magistrate agrees, that, as Ariamsvlei is a port of entry, the accused did not commit the offence charged, but should rather have been charged with the offence of contravening section 7 of the Immigration Control Act, which provides as follows:

**'7. Persons to present themselves to immigration officer before entering Namibia**

A person seeking to enter Namibia shall before entering Namibia present himself or herself to an immigration officer at a port of entry and satisfy such officer that he or she is not a prohibited immigrant in respect of Namibia and is entitled to enter and to be in Namibia.'

[4] As this case concerns the offence with which the accused was charged, I requested the Prosecutor-General to provide me with her views on the matter. I am informed that this request was mislaid for a considerable period, but Mr Small, Deputy Prosecutor-General, has furnished an opinion, for which the Court expresses its gratitude.

[5] Mr Small points out that the offence under section 6 is committed if a person enters Namibia at a place other than a port of entry. In this case the accused did enter at a port of entry, but it seems that he did not present himself to an immigration officer. Mr Small agrees that the accused should have been charged with a contravention of section 7 of the Immigration Control Act. He suggests that the conviction and sentence be set aside. I agree.

[6] The result is that the conviction and sentence are set aside.

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K van Niekerk

Judge

I agree.

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S F I Ueitele

Judge