

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: CR 11/2013

In the matter between:

THE STATE

and

ANTONIO MFUKA

(HIGH COURT MAIN DIVISION REVIEW REF NO 1623/2010)

Neutral citation: *S v Mfuka* (CR 11-2013) [2013] NAHCMD 82 (2 April 2013)

Coram: VAN NIEKERK, J and UEITELE, J

Delivered: 2 April 2013

Flynote: **Criminal procedure** – Charge – C/Regulation 3(1) of Exchange Control Regulations, 1961 – Essential element that the foreign

currency was taken out of Namibia without the permission of the Treasury or a person authorised by the Treasury – Failure to include this allegation in charge – Accused not questioned on this element in terms of section 112(1)(b) of Criminal Procedure Act, 1977 – Conviction and sentence set aside

ORDER

The conviction and sentence are set aside.

REVIEW JUDGMENT

VAN NIEKERK, J (UEITELE, J concurring):

[1] The accused was convicted by the magistrate of Karasburg on a charge of a contravention of Regulation 3(1) of the Exchange Control Regulations, 1961 and sentenced to a fine of N\$2 000 or 20 months imprisonment.

[2] The relevant part of the charge alleges that the accused ‘unlawfully and intentionally departed from Namibia with in his possession foreign currency, to wit US\$8 430-00 without declaring to any Customs officer.’

[3] The relevant part of Regulation 3(1) of the Exchange Control Regulations reads as follows:

'3.(1) Subject to any exemption which may be granted by the Treasury or a person authorised by the Treasury, no person shall, without permission granted by the Treasury or a person authorised by the Treasury and in accordance with such conditions as the Treasury or such authorised person may impose:-

(a) take or send out of the Republic any bank notes, gold, securities or foreign currency, or transfer any securities from the Republic elsewhere;'

[4] The relevant part of Regulation 3(3) of the Exchange Control Regulations provides as follows:

'3(3) Every person who is about to leave the Republic and every person in any port or other place recognised as a place of departure from the Republic, who is requested to do so by the appropriate officer shall –

- (a) declare whether or not he has with him any bank notes, gold, securities or foreign currency; and
- (b) produce any bank notes, gold, securities or foreign currency which he has with him;.'

[5] Regulation 22 provides, *inter alia*, that any person who contravenes or fails to comply with any provision of the regulations shall be guilty of an offence.

[6] Having considered the wording of Regulation 3 when the matter came before me on automatic review, it seemed to me that the particulars in the charge fitted better to the wording of Regulation 3(3) than to the wording of Regulation 3(1). Yet the answers given by the accused when the magistrate questioned him and also during mitigation suggested that the offence committed resorted better under Regulation 3(1). I therefore directed the following query to the trial magistrate:

- '1. Do the allegations in the charge relate to a contravention of Regulation 3(1) or 3(3) of the Exchange Control Regulations, 1961?
2. If the charge relates to a contravention of Regulation 3(3), should it not have contained the essential allegation that the accused was requested by an "appropriate officer", e.g. an officer of customs and excise, to declare whether or not he had foreign currency with him?'

[7] The learned magistrate responded that the allegations do relate to a contravention of Regulation 3(3); conceded that the essential element was missing; and that, as a result, the accused was not asked whether he admitted this element. He suggested that the conviction and sentence should be set aside.

[8] As the matter concerns the correct formulation of the charge and the evidence on which it is based, I requested the Prosecutor-General to comment on the query raised and to suggest what the outcome of the review should be. I am informed that this request was mislaid for a considerable period, but Mr Small, Deputy Prosecutor-General, has now furnished an opinion, for which the Court expresses its gratitude. The accused appears to have paid part of the fine which means there was no real prejudice caused by the delay.

[9] In considering the opinion I shall only mention foreign currency, as this matter concerns US Dollars. Mr Small agrees that Regulations 3(1) and 3(3) create two different offences which are committed under different circumstances. He submits that Regulation 3(1) is contravened when a person takes or sends out foreign currency without permission of the Treasury or a person authorised by the Treasury to do so. On the other hand, Regulation 3(3) is contravened when a person, who is requested to do so by an appropriate officer, fails to declare whether or not he has foreign currency and to produce any foreign currency that he has with him. Regulation 3(1) can be contravened without the offender being requested to declare the foreign currency. I agree with this exposition.

[10] Mr Small concedes that the charge mistakenly alleges that the accused departed from Namibia without declaring it to a customs officer. He further points out that the magistrate, when questioning the accused in terms of section 112(1)(b) of the Criminal Procedure Act, 1977 (Act 51 of 1977), did not establish whether the accused admitted that the foreign currency was taken out of Namibia without the permission of the Treasury or a person authorised by the Treasury. This probably happened because the prosecutor failed to include this element in the charge.

[11] Mr Small's further view amounts thereto that the questioning was incomplete and that the conviction and sentence must, strictly speaking, be set aside and the matter referred back to the magistrate in terms of section 312 of the Act. However, as the accused is a foreigner who left Namibia, he suggests that it would serve no purpose and agrees with the magistrate that the conviction and sentence merely be set aside as they do not accord with justice. I agree with these views.

[12] The result is, then, that the conviction and sentence are set aside.

K van Niekerk

Judge

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S F I Ueitele

Judge

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