

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case Title: <i>The State v Mashura Dambudzo</i>	Case No: CR 40/2021
High Court MD Review No: 407/2021	Division of Court: Main Division
Heard before: Judge January et Judge Claasen	Delivered on: 18 May 2021
Neutral citation: <i>S v Dambudzo</i> (CR 40/2021) [2021] NAHCMD 240 (18 May 2021)	
The order: <ol style="list-style-type: none">1. The conviction and sentence are set aside.2. The matter is referred back to the Office of the Prosecutor General to institute a charge afresh, if so inclined.	
Reasons for order:	

Claasen J (concurring January J)

1. In this matter the accused was charged and convicted of a contravention of s 56(g) read with s 1, 2 and 12(4) of the Immigration Control Act 7 of 1993, (the Act) for having remained in Namibia without documents be it an unexpired passport with a visa or other authority. After being questioned he was convicted in terms of s 112(1)(b) of the Criminal Procedure Act as amended, (the CPA) and sentenced to pay a fine of N\$ 4000 or 12 months' imprisonment.
2. The record was forwarded on automatic review. The review court noticed an anomaly in the formulation of the charge, and directed a query on that. The questions to the court a quo were whether the accused was correctly charged, if not, what is the correct charge and whether the conviction can stand in view of the charge as it was phrased.
3. In his reply the Magistrate concedes that it was a wrong charge. He proposes the correct charge to be that of a contravention of section 12(4) of the Act. According to him the conviction can stand in view of the answers given by the accused, which show that she was caught in Namibia without any documents or passport. He stated that she will not be prejudiced if the charge is amended.
4. The charge against the accused was formulated as follows:

'Immigration Control Act– Remaining into Namibia without documentation be it an unexpired passport bearing a valid visa or authority

Count 1 (in respect of accused 1)

That the accused is/are guilty of contravening section 56(g) read with sections 1, 2 and 12(4) of the Immigration Control Act, Act 7 of 1993

Accused

In that upon or about the 21st day of November 2020 at or near Total Service Station in the district of Okahandja the accused, not being a Namibian citizen or a person domiciled in Namibia, did wrongfully and unlawfully remained in Namibia without any documentation to wit an unexpired passport

(a) bearing a valid visa, or

(b) an endorsement by a person authorised thereto by the Government of Namibia indicating that the Minister or authorised officer granted authority to such person to remain in Namibia,
or without a document containing

(a) a statement to the effect that the Minister or authorised officer granted authority to such person to remain in Namibia, and

(b) the particulars of such passport. ' (sic)

5. What triggered the review court was that section 56(g) of the Act refers to general offenses, i.e. it criminalises any act that:

'contravenes or fails to comply with any provision of this Act, if such contravention or failure is not elsewhere in this Act declared an offence, ...' My emphasis.

It is thus apparent that a contravention of s 56(g) of the Act cannot be correct as the charge particulars contain fragments from s 12(1) of the Act.

6. I turn my focus to the argument that the conviction can be validated if the statutory label is amended to that the offence was in contravention of s 12(4) of the Act. The objective of s 12 of the Act was considered in *S v Ngono*¹, and it was explained that the section creates two offences namely:

(a) entering Namibia in contravention of the provisions of ss(1) of s 12 of the Act; and

(b) being found in Namibia after having been refused entry into Namibia in terms of that subsection.

The charge herein does not refer to entry into Namibia and failing to produce to an immigration officer a valid passport with a visa or any other authorisation. It is safe to conclude that s 12(1) of the Act is not applicable.

7. That takes me to s 12(4) of the Act, which is the argument that the Magistrate made, that the accused was found in Namibia without the required immigration documents. I can do no better than to refer to *S v Wellem; S v Nkomo*² which gave a concise explanation about the defect in the charge at hand:

'It is, however, an essential element of the latter offense that, prior to him being found in Namibia, he should have been refused entry into the country under the provisions of s 12(1) of the Act. In the absence of such an allegation, the charge did not comply with the provisions of s 12(4) relating to the essentials of the charge and was as such objectionable within the meaning of s 85(1)(a) of the Criminal Procedure Act 1977.'

8. Furthermore a rather confusing picture emerged from some of the answers given by the accused. She admitted to being a national of Zimbabwe. The aspect of her entry into the country was canvassed during the questioning by the court a quo. In particular, it was asked whether she was issued with a visitor's permit or any other authority at the time? She replied in the negative. That was followed up with how did she enter into the country without obtaining a permit? Her reply was that she entered to visit, that she entered 'via' the border using her passport, but that she had no visitor's permit. How the accused managed to do this is not clear. In any event, her answers do not depict that she was 'refused entry into Namibia', in fact it shows the contrary.

¹ *S v Ngono* 2005 NR 34 (HC)

² *S v Wellem; S v Nkomo* 2009 (1) 352 (HC)

9. Lately, this has been one of several defective charge sheets in respect of offences under this particular legislation. As regards to shoddily drawn charge sheets, J Van Niekerk stated in *S v Aukumb*³ at para 6 E-F:

‘While it is advisable for the magistrate to have checked, especially in the case of an undefended accused, the wording of the charge sheet, particularly in the case of more obscure statutory offences, the prosecutor is primarily to blame for framing the charge sheet in this way. Although it is not compulsory and not always necessary, it is, generally speaking, advisable to follow the wording of the statutory provision when framing a charge. This will usually lead to a proper and accurate charge being drawn.’

Had the court officials followed this advice, there would have been no need for the matter to be set aside and for the court a quo to redo the same case, should the Office of the Prosecutor General decide to charge the accused afresh. The matter illustrates that one cannot assume that because this particular district does not have border posts, immigration offences are off limits. It is better to remain vigilant especially when it is an unfamiliar offence.

10. In light of the above the charge is fatally defective, in that it lacks an essential averment of the offense created therein. It is not a situation of an incorrect citation of the statutory provision which can merely be amended with the correct provision. Therefore the proceedings are not in accordance with justice and should be set aside.

11. In the result, I make the following order:

1. The conviction and sentence are set aside.
2. The matter is referred back to the Office of the Prosecutor General to institute a charge afresh if so inclined.

C M CLAASEN JUDGE	H C JANUARY JUDGE

³ *S v Aukumb* 2009 (1) NR 21 Para 6 E-F