PRACTICE DIRECTION 61

REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
REVIEW JUDGMENT

Case Title: *The State v Sila Delfina Mauhawa*	**Case No:** CR 11/2022
High Court MD Review No: 41/2022	**Division of Court: High court** Main Division
Heard before: Honourable Mr. Justice Liebenberg *et* Honourable Lady Justice Claasen	**Delivered on:** 17 March 2022
Neutral citation: *S v Mauhawa* (CR 11/2022) [2022] NAHCMD 117 (17 March 2022)	
The order: The conviction and sentence are set aside.	

Liebenberg, J (Claasen, J concurring)

[1] The accused appeared in the magistrate's court in the district of Rundu on a charge of contravening s 12 (4) of the Immigration Control Act, 7 of 1993 – Entry into Namibia without valid documents. She was convicted on her plea of guilty and sentenced to a fine of N$ 7 000 or 24 months' imprisonment. The cover sheet indicates that the fine was not paid.

[2] When this matter came before me on automatic review a query was directed to the magistrate in the following terms:

'The provisions of section 12(4) of the Immigration Control Act 7 of 1993 makes plain that this section must be read with section 12(1). The latter section regulates the requirements a person **seeking to enter Namibia** must satisfy, failing which, entry shall be refused to such person.
In order to satisfy these requirements when the accused has pleaded guilty, the court must question the accused as to the provisions set out in section 12(1) of the Act at the time of entry.

1. Did the court during its questioning in terms of s 112(1)(b) of the CPA establish where the accused **entered** Namibia?
2. On what authority did the court assume jurisdiction over the matter?
3. Without questioning the accused on the provisions of section 12(1), could the court have been satisfied that the accused was guilty of an offence under section 12(4)?'

[3] I will address the first and third questions in the query simultaneously, as it turns on the applicability of s 12(1) and ss (4) in relation to the court *a quo's* questioning. In response to the first query and after regurgitating the provisions of s 12(1) and (4) of the Act, the magistrate explained that the reason why no question regarding the place where the accused entered Namibia was posed, is because, according to her, entry into Namibia is regulated by s 6 of the Act. Thus, she 'applied her mind to the relevant section regulating particular conduct of being found in the country inconsistent to the said section.' (*sic*)

[4] Upon inspecting the table of contents of the Act, it is evident that both s 6 and s 12 appear under the heading 'Ports of entry'. Therefore, s 12 regulates the requirements a person seeking to enter Namibia must satisfy and the heading directs that this must happen at the port of entry. In that regard, when an accused is charged with contravening s 12(4) read with s 12(1) the court must establish where the accused entered Namibia.

[5] Furthermore, in *S v Ngono*[1] it was held that s 12(4) of the Act creates two offences; (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 the subsections. Therefore, in order to be convicted of a contravention of s 12(4) it must be

[1] *S v Ngono* 2005 NR 34 (HC).

proved that prior to being found in Namibia, the accused should have been refused entry into the country in terms of the provisions of ss (1). Thus, the place where the accused entered Namibia is an essential element of the offence and failure by the court *a quo* to establish this, amounts to a material irregularity.

[6] As regards the query on the court *a quo's* omission to question the accused on the elements of s 12(1) and how the court *a quo* could have been satisfied that the accused was guilty of the offence under s 12 (4), the magistrate's reply was as follows. Due to the fact that the immigration officers searched the accused's bag for her travel documents and because her answers to the court was that she was not in possession of the prescribed documentation to be in Namibia, 'the court was satisfied that accused who has no valid travel documents could not have sought permission from immigration officers to enter into Namibia.' This is a clear indication that the court *a quo* drew an inference during the s 112(1)(*b*) questioning.

[7] It is trite that the primary purpose of questioning the accused in terms of s 112(1)*(b)* is to safeguard the accused against the result of an unjustified plea of guilty and, furthermore, questioning cannot assume the nature of a trial. In *State v Simeon Nghishinawa*[2], this court held that:

> 'It is trite law that s 112(1)(b) of Act 51 of 1977 requires the presiding officer in peremptory terms to question the accused with reference to those facts alleged in the charge in order to ascertain whether the accused admits the allegations in the charge to which he or she pleaded guilty. Further, the answers the accused person gives when questioned by the Court do not constitute evidence given on oath from which the Court may draw inferences; thus, regard must be had to what the accused says and not what the Court thinks of it.'

[8] Furthermore, in *S v Thomas*[3] the court stated that '. . . the answers given by an accused in the course of a s 112(1)(b) inquiry do not constitute ''evidence'' on oath from which [an] inference can be drawn. (See *S v Naidoo* 1989 (2) SA 114 (A); and *S v Nagel* 1998 (1) SACR 218 (O).)'

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[2] An Unreported judgment of this Court, Case No. CR 20/2012, delivered on 21 September 2012.

[3] *State v Simeon Nghishinawa* 2006(1) NR 83 (HC).

[9] Therefore, in applying the above stated principles to the present facts, it is clear that the court *a quo*, inferred, without posing any question to that effect that, because the accused did not have valid travel documents, therefore she could not have sought permission from the immigration officer to enter into Namibia. The *court quo*, could thus not have been satisfied that the accused admitted to all the elements of the offence without putting such questions to her.

[10] Regarding the query about jurisdiction, the magistrate explained that the court *a quo* derived its jurisdiction from s 89, 90 and 92 of the Magistrate Court Act 32 of 1944, read with s 12 (4) of the Immigration Control Act. She relied more particularly s 90 of the latter Act which provides:

'**90 Local limits of jurisdiction**

(1) Subject to the provisions of section eighty-nine, any person charged with any offence committed within any district or regional division may be tried by the court of that district or of that regional division, as the case may be.'

[11] This is so because according to the magistrate the offence 'was committed at Wimpy service station in the district of Rundu' where the accused was found in Namibia without the prescribed documentation; whereby s 110(1) finds application only when the jurisdiction of the court is brought in dispute.

[12] Firstly, the accused disputed that she was found at Wimpy, but at Safari location. Thus, the magistrate is wrong in stating the offence was committed at Wimpy. Though the accused was found in the district of Rundu, s 110(1) of the CPA specifically provides for cases of this kind. Section 110 reads as follows:

'Accused brought before court which has no jurisdiction

(1) Where an accused does not plead that the court has no jurisdiction and it at any stage-

(a) after the accused has pleaded a plea of guilty or of not guilty; or

(b) where the accused has pleaded any other plea and the court has determined such plea against the accused, appears that the court in question does not have jurisdiction, the court shall for

the purposes of this Act be deemed to have jurisdiction in respect of the offence in question.

(2) Where an accused pleads that the court in question has no jurisdiction and the plea is upheld, the court shall adjourn the case to the court having jurisdiction.' (Emphasis provided)

[13] This section gives jurisdiction to a court which otherwise would not have jurisdiction and is based on the accused tacitly accepting the court's jurisdiction and without raising it during his/her first appearance. This means the court *a quo* had a duty to explain to an unrepresented accused his/her right to object to the court's jurisdiction over the matter.[4] This much the magistrate clearly did not do and in the absence thereof, the court *a quo's* acceptance of jurisdiction over the matter based on s 110 of the CPA, was not permitted in these circumstances and thus irregular. However, the query turns on the question whether the accused was correctly charged.

[14] It is evident from the facts of the present matter that s 34 (3), read with s 34 (1) of Act 7 of 1993, would have been the correct charge preferred against the accused person, which reads as follows:

'**Duties of certain persons not in possession of permit**

34. (1) Any person who at any time entered Namibia and, irrespective of the circumstances of his or her entry, is not or is not deemed to be in possession of a permanent residence permit issued to him or her under section 26 or an employment permit issued to him or her under section 27 or a student's permit issued to him or her under section 28 or a visitor's entry permit issued to him or her under section 29, or has not under section 35 been exempted from the provisions of section 24, as the case may be, shall present himself or herself to an immigration officer or to an officer of the Ministry.

(2) Any person who has under section 35 been exempted from the provisions of section 24(b) for a specified period, shall before the date on which such period expires present himself or herself to an immigration officer or to an officer of the Ministry.

(3) Any person referred to in subsection (1) who fails to comply with the provisions of that subsection or any person referred to in subsection (2) who fails to comply with the provisions of the last-mentioned subsection or any person, so referred to, who fails, on being called upon to do so by an immigration officer, then and there to furnish to such immigration officer the particulars

[4] *S v Mutandwa* (CR 04/2015) [2015] NAHCMD 13 (05 February 2015).

determined by the Chief of Immigration to enable the board, the Chief of Immigration or such immigration officer, as the case may be, to consider the issuing to the said person of a permit concerned, shall be guilty of an offence and on conviction be liable to a fine not exceeding R4 000 or to imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment, and may be dealt with under Part VI as a prohibited immigrant.'

[15] In terms of the above quoted sections, an offence is committed on the mere basis that an accused is found in the country without valid documents irrespective of how he had entered the country. This means that the magistrate's court of the district where the accused is found, has jurisdiction of the matter.

[16] Whereas the accused was charged under the wrong section of the Act, the conviction is not in accordance with justice and falls to be set aside.

[17] In the result, it is ordered that:

The conviction and sentence are set aside.

J C Liebenberg **JUDGE**	**CM Claasen** **JUDGE**