



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI**

**REVIEW JUDGMENT**

Case no: CR 09/2013

In the matter between:

**THE STATE**

and

**SHIKUMA NDAPWIYONYA**

**ACCUSED 1**

**NDJOLONIMU MATHEUS**

**ACCUSED 2**

**LINUS JEREMIA**

**ACCUSED 3**

**KALWISHI TULINAYE**

**ACCUSED 4**

**High Court NLD review case ref no: (186/2012)**

**Neutral citation:** *The State v Ndapwiyonya* (CR 09/2013) [2013] NAHCNLD 19 (18 April 2013)

**Coram:** TOMMASI J and LIEBENBERG J

**Delivered:** 18 April 2013

**Flynote:** Criminal Procedure – Review - Four accused charged with having contravening section 6 of Immigration Control Act, 7 of 1993 – inappropriate joinder of accused of separate offences entirely unrelated – Failure by State to inform accused of place where offence was committed – the place an indispensable element of the offence – failure renders charge fatally defective – no evidence adduced that accused entered at a place other than a port of entry - Accused should have been charged with having contravened s7 of the Immigration Control Act.

**Summary:** Four accused were charged with contravention of s6 of the Immigration Control Act, 7 of 1993 having entered Namibia at an unknown place which was not a port of entry. No evidence was adduced that the accused entered Namibia at the same time and neither did the prosecutor inform the court that evidence admissible at the trial of one of the accused will in his opinion also be admissible as evidence at the trial of the other accused. The accused during questioning in terms of s112(1)(1) (b) informed the court that they had entered Namibia at Oshikango border post. A plea of not guilty was recorded. Evidence was led that the accused were found at Oshakati Police Station and that they were unable to produce documents which indicate that they in fact passed through Oshikango border post.

*Held* that the joinder of accused who committed separate and completely unrelated offences is not appropriate;

*Held* that the charge is fatally defective where it does not inform the accused of the place where the offence was committed when the place is an essential element of the offence;

*Held* that no onus rests on the accused to prove that they entered Namibia at a port of entry; the State bears the onus to prove that the accused entered at a place other than a port of entry and in casu failed to do so;

*Held* that the defects resulted in a failure of justice and the conviction and sentence must be set aside.

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## ORDER

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1. The conviction and sentence of all the accused are set aside.
2. Where a fine has been paid the accused must be refunded.

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## REVIEW JUDGMENT

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TOMMASI J (LIEBENBERG J concurring):

[1] All the accused appeared in the magistrate's court for the district of Oshakati on a charge of having contravened section 6(1) read with section 1, 2 and 10(3) of the Immigration Control Act, Act 7 of 1993 in that they, on 22 June 2010, at or near Nampol Oshakati wrongfully and unlawfully entered Namibia at an unknown place which was a place other than a port of entry without their passport bearing an endorsement by the Minister or being in possession of a document issued to them by an immigration officer granting them permission 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 have been stated in that endorsement or such document. The accused were convicted and sentenced to pay a fine of N\$2000 or 6 months imprisonment.

[2] All the accused pleaded guilty to the charge. When questioned in terms of section 112(1)(b) of the Criminal Procedure Act, 51 of 1977, all four accused admitted that they were at Nampol in Oshakati and that they entered Namibia at Oshikango border post. The magistrate was not satisfied that the accused admitted all the elements of the offence and entered a plea of not guilty. The matter was then postponed for trial.

[3] The State called the immigration officer who arrested the accused. He testified that he requested the accused to produce their documents which permitted them entry into Namibia but they were unable to produce any such documents. The

accused informed him that they entered Namibia through Oshikango border post. The State prosecutor asked him why he was of the view that they had entered Namibia at a place other than a port of entry and he responded as follow: "... they did not provide anything, they do not have any document." All the accused put it to the witness that they had entered at the border post. His standard response was that they were supposed to have obtained a border pass from an immigration officer.

[4] Accused 1 testified that he passed at Oshikango border post and he informed "them" (not clear from the record who it was) that he wanted to buy goods in Namibia. He however spent all his money and had to remain in Namibia. He wanted to find employment to raise money for his return. He testified that he did not intend to remain in Namibia for long. During cross-examination he admitted that he was found in Namibia without any document indicating that he had passed through the border post. He however insisted that he entered Namibia at Oshikango border post.

[5] Accused 2 testified that he accompanied his mother who was ill. During cross-examination he testified that he passed through the gate at Oshikango border but admitted that he had no document which indicates that he entered Namibia at Oshikango border post.

[6] Accused 3 and 4 opted to remain silent.

[7] I directed a query to the magistrate to determine whether she was satisfied that the State had proven all the elements of the statutory offence which they were charged with.

[8] The magistrate responded as follow:

"The evidence of the State is that all accused persons were found in Namibia and none of the accused possesses a document indicating that they entered this country at the port of entry; and all accused persons admitted that they had no documents indicating as such. Thus all were convicted as charged."

[9] The above response creates the impression that the accused were burdened with the onus to prove that they had entered at Oshikango border post. The onus to prove the elements of the offence beyond reasonable doubt rests with the State. The State therefore had to prove that the accused had entered Namibia at a place other than a port of entry.

[10] All four accused persons were charged together on the same charge. From the available evidence it is not apparent that all the accused have entered Namibia at the same time. The only common factor was the fact that they were arrested on the same day by the same immigration officer. The State, in terms of the provisions of s56 of the Criminal Procedure Act, was entitled to join any number of accused charged in respect of separate offences committed at the same place and at the same time or at about the same time, provided that the prosecutor informs the court that evidence admissible at the trial of one of such persons will, in his opinion, also be admissible as evidence at the trial of any other such person or such persons. The prosecutor at no stage informed the court of the latter and it is evident that the joinder of the accused in this instance was improper. Magistrates and prosecutors alike are reminded to refrain from the practice of joining accused in matters that are entirely unrelated.<sup>1</sup>

[11] The charge preferred against the accused was that they had entered Namibia at an *unknown* place. Whilst the State may be entitled to allege that the particulars of time and place at which the offences were committed is unknown, it does not apply in instances where these particulars form an indispensable element of the offence. In this instance the place formed an essential element of the offence. A person contravenes s6 of the Immigration Control Act when he/she enters Namibia at a *place* other than a port of entry. It was thus essential to inform the accused of the place of entry in order for them to understand the nature of the case they had to meet. The failure to inform the accused of the place under these circumstances renders the charge fatally defective.<sup>2</sup>

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<sup>1</sup> See *The State v Zombo Musoki Christo and one other*, an unreported judgment, Case No. CR22/2012 delivered on 19 March 2012

<sup>2</sup> See *Rex v Mapikitla* 1950 (1) SA 336 (GW)

[12] The State furthermore failed to adduce either direct or circumstantial evidence from which the court was entitled to infer that the accused had entered at a place other than Oshikango border post, which is a port of entry.

[13] The mere fact that they had no documents and that they were found at the police station in Oshakati do not conclusively prove that they had entered Namibia at a place other than a port of entry. The accused should have been charged with having contravened s7 of the Immigration Control Act, having failed to present themselves to an immigration officer before entering Namibia<sup>3</sup>.

[14] The defective charge and the subsequent conviction on evidence which does not cure the defect resulted in a failure of justice and the conviction and sentence under these circumstances cannot be permitted to stand.

[15] In the result the following order is made:

1. The conviction and sentence of all the accused are set aside.
2. Where a fine has been paid the accused must be refunded.

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MA Tommasi  
Judge

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JC Liebenberg  
Judge

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<sup>3</sup>See The State v Rigen Mawawa, an unreported judgment, Case No. CR 16/2013 delivered on 7 March 2013

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