REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

Case no: CR 10/2013

In the matter between:

THE STATE

and

CHITANG JOAO RAIVA   **ACCUSED**

High Court NLD review case ref no: 155/2012)

Neutral citation: *The State v Raiva* (CR 10/2013) [2013] NAHCNLD 20 (18 April 2013)

Coram: TOMMASI J and LIEBENBERG J

Delivered: **18 April 2013**

Flynote: Criminal procedure – charge – Accused convicted under s 12 of Immigration Control Act, 7 of 1993 – Change lacking essential elements of the offence created therein – charge does not disclose an offence – conviction and sentence set aside on review

Summary: The magistrate conceded after being referred to two previous decisions of this court that the charge as formulated did not contain the essential elements of the offences created by s12(1) and (4) of the Immigration Control Act 7 of 1993. The conviction and sentence were set aside.

ORDER

The conviction and sentence are set aside

REVIEW JUDGMENT

TOMMASI J (LIEBENBERG J concurring):

[1]   The accused was charged with having contravened s12(4) read with sections 1, 12(1) of the Immigration Control Act, 7 of 1993. He was convicted and sentenced to a fine of N$2000 or 12 months' imprisonment wholly suspended for a period of 3 years on condition that the accused is not convicted of a similar offence of contravening section 12(4) of Act 7 of 1993 i.e being in Namibia without a valid document.

[2]   The charge put to the accused reads as follow:
        "That the accused is guilty of contravening section 12(4) read with section 1 and 12(1) of the Immigration Control Act (Act 7 of 1993)
In that upon or about 12 May 2012 the said accused was found in Namibia to wit Oshakati which is in the district of Oshakati while he was not in possession of a valid passport or any valid documents issued to him"

[3]   The relevant subsections of section 12 reads as follow:
        " (1)   Any person seeking to enter Namibia who fails on demand by an immigration officer to produce to such immigration officer an unexpired passport which bears a valid visa or an endorsement by a person authorized thereto by the Government of Namibia to the effect that authority to proceed to Namibia for the purpose of being examined under this Act has been granted by the Minister or an officer authorized thereto by the Minister, or such person is accompanied by a document containing a statement to that effect together with

particulars of such passport, shall be refused to enter and to be in Namibia, unless such person is proved to be a Namibian citizen or a person domiciled in Namibia.

'(4)   If any person enters or has entered Namibia in contravention of the provisions of subsection (1) or, after having been refused to enter Namibia in terms of that subsection, is found in Namibia, he or she shall be guilty of an offence and on conviction be liable to a fine not exceeding R20 000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment, and may be dealt with under Part VI as a prohibited immigrant."

[5]   The charge contains the allegation that the accused has entered Namibia but fails to allege that he had contravened the provisions of subsection (1) or that he entered Namibia after having been refused entry into Namibia in terms of s12(1).

[6]   I referred the magistrate to S v Ngono 2005 NR 34 (HC) and S v Wellem; S v Nkomo 2009 (1) NR 352 (HC). In both these cases this court held that the charge which was phrased identical to the charge herein, lacked the essential elements contained in the statutory offence. The magistrate, after having perused these decisions conceded that the charge which was put to the accused did not disclose an offence.

[7]   The charge as formulated does not disclose an offence in terms of the provision of s12(4) of the Act in that it lacks essential averments of the offence created therein. The proceedings are therefore not in accordance with justice and should be set aside.

[8]   In the result the conviction and sentence are set aside.

MA Tommasi
Judge

JC Liebenberg

Judge