REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

REVIEW JUDGMENT

CR.: 13/2021

In the matter between:

THE STATE

and

JONES BURIDJI	**ACCUSED**
CLAUDIO TOCO	**ACCUSED**
ROSA RAIMUND	**ACCUSED**
FRANCISCO JACINTO	**ACCUSED**

Neutral citation*: S v Buridji (CR 13 I*2021) [2021] NAHCNLD 36 (11 March 2021)

Coram: SALIONGA J and MUNSU AJ

Delivered: 11 March 2021

Flynote: Criminal Procedure — Plea — Plea of guilty in terms of s 112(1) (a) of the Criminal Procedure Act 51 of 1977 as amended by the Criminal Procedure Amendment Act 13 of 2010 — Procedure intended for “minor” or “trivial” offenses —A contravention of section 34(1) read with section 34(3) — disposed of in terms of section 112(1) (a) of

the CPA —not in accordance with justice — not a minor offence—Criminal law— S 34 (1) does not create an offence but duties —instead accused should have been charged with contravening S 34 (3) read with S 34 (1) — No substitution feasible — Conviction and sentence set aside.

Summary: The 4 (four) accused in this case were convicted in the magistrates court Eenhana for Contravening of section 34(1) read with section 34(3) of the Immigration Control Act 7 of 1993 – Found in Namibia without valid permit and failing to report to Immigration. All the accused pleaded guilty and the magistrate applied section 112(1) (a) of the (the CPA). The crime cannot be regarded as minor or trivial offences. The magistrate misdirected herself by disposing of the case in terms of section 112(1) (a) of the CPA. The conviction and sentence of N$ 1000 or 2 months direct imprisonment is set aside. The magistrate is directed to deal with the case from the plea stage.

ORDER

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1. The conviction and sentence for contravening section 34(1) read with section 34(3) of Act 7 of 1993 are set aside with a direction that it is dealt with from the plea stage;
2. In the event of a conviction the sentencing court must have regard to the sentence already served or the fine paid.

JUDGMENT

SALIONGA J and MUNSU AJ (Concurring):

[1] This is a review matter in terms of s 304 of the Criminal Procedure Act 51 of 1977 as amended. Four accused persons were charged with contravening section 34 (1) read with section 34(3) of Act 7 of 1993-Found in Namibia without a valid permit and failing to report to Immigration officer.

[2] The accused pleaded guilty to the charge and all four accused were convicted in terms of section 112(1) (a) of the Criminal Procedure Act 51 of 1977 (the CPA). They were each sentenced to a fine of N$1000.00 or Two (2) months imprisonment.

[3] Once again this court reiterates what was stated in numerous review matters that section 112(1) (a) of the CPA should only be applied where the crimes are “trivial”, “minor” or not “serious[1]”. Notwithstanding the above, some magistrates in the lower courts are still disposed serious cases by applying section 112(1) (a) of the CPA.

[4] In *S v Onesmus; S v Amukoto; S v Mweshipange* 2011 (2) NR 461 (HC) Liebenberg J, has this to say on page 463 paragraph 5:

‘From the wording of s (1) of s 112 it is clear that the presiding officer is authorised to convict an accused on his bare plea of guilty where he or she is of the opinion that the offence in question does not merit certain kinds of punishment; or a fine exceeding N$6000. The presiding officer therefore has a discretion which must be exercised judiciously. This discretion will mainly be influenced and determined by the circumstances of any particular case and the information available to the presiding officer, allowing him or her to form an opinion. It seems to me that in order to make a judicial discretion at all possible, there has to be sufficient information before the court to rely on, which would enable it to reach a decision as to the procedure to be followed.’

[5] It follows that although the amount of a fine provided for contravening section 34 falls within the ambit of section 112 (a) of CPA, it is my conviction that the failure to pay a fine results in the accused serving a period of 12 months which sentence is in excess of the sentence permitted if the section is applied. When regard is had to an imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment and the purpose of section 112(1) (a) it cannot be said a contravention of

[1] *S v Onesmus; S v Amukoto; S v Mweshipange* 2011 (2) NR 461 (HC); S v Mostert 1994 NR 83 (HC); *S v Aniseb and Another* 1991 NR 203 (HC); *S v Paulus Vilho*, CR09/2016 unreported, delivered, 08 august 2016; *S v Paulus Silas*, CR06/2016 delivered 11 August 2016; *The State v Kago* (156/2015); *The State v Johannes and Basson* (109/2015)[2015] NAHCNLD

section 34 (3) of the Immigration Control Act 7 of 1993 is a minor offence to be disposed of in terms of section 112(1) (a).

[6] Another issue raised in my query is whether section 34 (1) of the Immigration Control Act 7 of 1993 creates an offence. That section from the reading of the Act doesn't create an offence but places a duty on certain persons not in possession of a permit. (See S v Olivier and Another [2011] NAHC 53).

[7] Section 34(1) of the Immigration Control Act provides;

'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.'

[8] Whilst ssection 34 (3) provides that;

'(3) Any person referred to in subsection (1) or who fails to comply with the provisions of that section 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, them and there to furnish to such immigration officer the particulars determined by the Chief of Immigration to enable the board the Chief of 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 N$4000 or to imprisonment for a period not exceeding 12.'

[9] The duties and offences created in both sections 34(1) and 34(3) of the ICA come in more than two ways. An offence is committed on the mere basis that an accused is found in the country without valid documents irrespective of how he/she had entered the country. An offence is also created where a person that has been issued with a permit or has not under section 35 been exempted from the provisions of section

24, as the case may be in terms of Part VI of ICA fails to present himself or herself to an immigration officer or to an officer of the Ministry. A person also contravenes section 34 (3) where he/she fails after being called upon by an immigration officer then and there to furnish to such immigration officer the particulars 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.

[10] It must also be pointed out that section 34(1) of ICA makes reference to different types of permits that are provided for in terms of Part V of the Act being a permanent residence or a 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.

[11] In view of the multiple duties and offences created by the two sections discussed above it is very difficult to conclude which facts and part of the offences the accused wanted to admit. The application of section 112(1) (a) requires the presiding officer to properly apply judicial discretion. In a case such as the present it is not only requires a series of admissions but also that the facts upon which those admissions are based. See B 1991 (1) SACR 405 (N).

[12] It is apparent from the reading of the sections that the accused persons should have been charged with contravening section 34(3) read with section 34 (1) of the Act instead.[2]

[13] Another implication of a section 34(3)'s conviction is that it can be used when the convicted person is to be dealt with under Part VI of ICA as a prohibited immigrant. If this conviction were the main basis upon which an immigration officer or the tribunal were to make an assessment whether the accused is to be declared as a prohibited immigrant, it would be unfair if admission does not contain sufficient particulars which I

[2] *S v Nukoneka* (CR 59/2020) [2020] NAHCNLD 155 (11 November 2020)

believe could most certainly have been obtained through the application of section 112(1) (b) of the CPA.

[14] The primary purpose of section 112(1) (b) is mostly to protect an accused against the consequence of an incorrect plea of guilt and the provisions of section 112(1) (a) is intended not only for minor offences but also for less complicated offences. It therefore suffice to say that section 112 (a) must be used sparingly and only where it is certain that no injustice will result from its application.

[15] As it stands it is very difficult to conclude what all the four accused admitted too; whether they admitted to have entered Namibia without a permit or whether they had permits that expired or were merely found without documents and/or failed to present themselves to an immigration official or to an official of the Ministry. Despite that all such conducts constitute criminal offences under s. 34(3) of the ICA, the magistrate wrongly applied section 112(1) (a) of the CPA in convicting the accused. The fact that the accused suffered no prejudice in this matter is not a lee way to substitute the conviction as the substitution of the section is no longer feasible.

[16] In my view the offence of contravening section 34(3) read with section 34(1) is not a minor offence or less complicated and the disposal of the case in terms of section 112(1) (a) of the CPA stands to be set aside. On finding the conviction not in accordance with justice, the sentence imposed is a nullity and should be set aside.

[17] Consequently:

1. The conviction and sentence on contravening section 34(1) read with section 34(3) of Act 7 of 1993 are set aside with a direction that the matter is dealt with from the plea stage;
2. In the event of a conviction the sentencing court must have regard to the sentence already served or the fine paid.

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J T SALIONGA

JUDGE

I agree

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D C MUNSU

ACTING JUDGE