

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

Case Title: <i>The State v Kalambu Fucangi</i>	Case No.: CR 34/2022
	Division of Court: Northern Local Division
Heard before: Honourable Ms. Justice Salionga J et Honourable Mr. Justice Kessler AJ	Delivered on: 28 July 2022
Neutral citation: <i>S v Fucangi</i> (CR 34/2022) [2022] NAHCNLD 73 (28 July 2022)	
The order: <ol style="list-style-type: none">1. The conviction and sentence on count 1 of contravening section 90(a) of the Customs and Excise Act 20 of 1998- possession of illicit goods are set aside;2. The matter is remitted to the magistrate to enter a plea of not guilty in terms of section 113 of Act 51 of 1977 and proceed with the trial. It follows that if the accused is convicted the period already served must be considered.3. The conviction and sentence on count 2 are confirmed.	
Reasons for the order:	

Salionga J (Kesslau AJ concurring):

[1] The matter came before this court on automatic review in terms of section 302 of Act no 51 of 1977.

[2] Accused in this matter was charged with two counts, namely, the first count of contravening section 14 read with section 90(a) of the Customs and Excise Act, Act 20 of 1998-Possession of illicit goods to wit 1x 20 l of petrol and a second count of contravening section 6 (1) read with 1, 2, and 10 (3) of Act 7 of 1993-Entry into Namibia at any place other than a port of entry. He pleaded guilty, was questioned in terms of section 112(1) (b) of Act 51 of 1977. The court was satisfied that accused admitted to all the essential elements of the offences and convicted him as charged.

[3] I have no qualm with the conviction and sentence of the accused on count two and it will be confirmed. It is count one I have a problem with. In the first instance the charge annexure reads that section 14 was to be read with section 90 of Act 20 of 1993. The allegations are that accused possessed illicit goods, however he admitted that he was conducting business in Namibia with the products that are prohibited because he was selling petrol (fuel). He did not even know what illicit goods were nor did he know that he had to declare the 20 litres of petrol at the Custom and Exercise Office. Generally, I have some difficulty to understand which contravention the accused was questioned on for the magistrate to satisfy that accused admitted all the elements of the offence/s charged.

[4] The reviewing judge in a query to the magistrate remarked that there were major differences between the original, typed record as well as the review cover sheets in respect of count 1 resulting in the questioning in terms of section 112(1) (b) of the Criminal Procedure Act 51 of 1977 to be chaotic or disordered. The original charge sheet (J15) indicates a charge of possession of illicit goods in contravening section 14 read with section 90 (c) of Act 20 of 1998, while the typed record talks of a contravention of section 90 (a) of Act 20 of 1998 and the original charge sheet annexure reads contravening section 14 read with section 90(a) of the Act. Seeing that section 14 of Act 20 of 1998 creates separate offences from those listed in section 90 with a completely different penalty clause, the reviewing judge wanted to know

which of the sections the accused was questioned on and convicted of. In addition the judge wanted to know why the charge annexure indicates a quantity of 20 litres but accused was questioned about 25 litres of fuel.

[5] In her response the magistrate conceded that in respect of count one the correct section accused contravened is the one indicated in the original charge sheet that of contravening section 14 read with section 90 (a) of Act 20 of 1993. According to the magistrate it was the section applied when she questioned the accused. She went further to state that it was only after she got a proper sight of section 14 of Act 20 of 1993, she realised that section 14 deals with a person leaving or entering Namibia and failed to declare goods. She conceded that it is wrong to have the above section read with section 90 (a) of the same Act in that the contents of section 14 are not part of the charge annexure. She agrees that section 14 of the Act was wrongly inserted in the charge sheet and it renders the charge vague. Such an error could only be amended if the matter is set aside and the matter be remitted for the correct section to be applied. She further conceded that it was also a typing error for the magistrate to question the accused on 25 litres of fuel instead of 20 litres depicted in the charge annexure.

[6] Section 14 of Act 20 of 1998 -persons entering or leaving Namibia, and smugglers states that:

‘(1) Any person entering or leaving Namibia shall, to such officer and in such form and in accordance with the procedures prescribed by the Permanent Secretary, unreservedly declare-

(a) at the time of such entering, all goods (including goods of or belonging to any other person) upon his or her person or in his or her possession and which he or she brought with him or her into Namibia, and which-

(i) were purchased or otherwise acquired outside Namibia or on any ship or vehicle, or in any shop selling goods on which duty has not been paid;

(ii) were remodelled, processed or repaired outside Namibia; or

(iii) are prohibited, restricted or controlled under any law; and

(b) before so leaving, all goods which he or she proposes taking with him or her beyond the borders of Namibia,

and shall furnish such officer with full particulars of such goods, answer fully and truthfully all questions put to him or her by such officer and, if required by such officer to do so, produce and open the

container or package containing such goods for inspection by such officer, and shall pay to the Controller the duty, if any, assessed by such officer.

(2) Any declaration made in terms of subsection (1) shall, for the purposes of this Act, be deemed to be an entry for home consumption or export, as the case may be.

(3) The Controller may, if any person is suspected by the Controller of an attempt to illegally import, export, land, ship or remove goods, or to evade the payment of duties on any goods, arrange for such person to, as soon as practicable, be brought before a Magistrate's Court, or to have such person placed in custody in or at a police station or other suitable place, until he or she can be brought before such court.'

[7] While section 90 provides that;

'Any person who-

(a) has upon his or her premises or in his or her custody or under his or her control, or purchases or otherwise obtains, or sells or otherwise disposes of, any illicit goods, knowing such goods to be illicit goods; or

(b) to (o).....

shall be guilty of an offence and on conviction be liable to a fine not exceeding N\$20 000

or to an amount equal to three times the value of the goods in respect of which such offence was committed, whichever is the greater, or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.'

[8] It is apparent from the reading of the aforesaid sections that two distinct offences were created with different penalty clauses. In the instant case the charge sheet included two distinct offences that of contravening section 14 and 90 which contravention could have been separately charged. For that reason one section cannot be read with another.

[9] In demonstrating the chaotic questioning, the following are some of the extracts from the record:

'Q...

A...

Q: What did you do to be guilty to the charge?

A: I am guilty because I was conducting business in Namibia with products that are prohibited.

Q: What products were you selling?

A: I was selling petrol fuel.

Q: How did you know that the fuel was prohibited to be sold in Namibia?

A: I just realised that I did something legal when I did business.

Q: The state is alleging that you were found in possession of illicit goods, do you know what illicit goods are?

A: No

Q: The illicit goods are goods that are imported from one country into Namibia and they are not declared at the borders at the custom and exercise office for one to pay a tax levy, do you agree?

A: Yes I agree.

Q: Where did you come from with the petrol fuel?

A: I came from Angola.

Q: What nationality are you?

A: I am Angolan.

Q: When you came into Namibia with the 25 litres of petrol did you declare it at the Custom and Exercise Office?

A: No

Q: Why did you fail to do so?

A: I never thought of it.

Q: Did you know that one must declare the goods in his or her possession before entering the country?

A: I was not aware

Q: The state is alleging that you were found in possession of illicit goods to wit 20 liter of petrol, do you dispute it?

A: I do not dispute it

Q: Did you know that such goods the petrol 20 liter was an illicit good upon coming into Namibia?

A: Yes I knew

Q: What was your intention of being possession of illicit goods, the petrol?

A: I wanted to assist myself because I was hungry at home.

Q...

A...'

[10] Accused admitted during questioning that he was conducting business in Namibia with products that are prohibited because he was selling fuel. When confronted with the allegation by the state, he conceded to have possessed illicit goods which he did not know. The accused was not even aware that he has to declare the goods in his possession before entering the

country. The questioning by the magistrate was chaotic and confusing because it included all the elements of both offences. Again from the answers given it cannot be said accused admitted all the elements of either offences charged. In my view it is irregular for the magistrate to simultaneously question the accused on two different contraventions in a single charge and as such the magistrate's concession was properly made.

[11] As a result it is ordered that:

1. The conviction and sentence on count 1 of contravening section 90(a) of the Customs and Excise Act 20 of 1998- possession of illicit goods are set aside;
2. The matter is remitted to the magistrate to enter a plea of not guilty in terms of section 113 of Act 51 of 1977 and proceed with the trial. It follows that if the accused is convicted the period already served must be considered.
3. The conviction and sentence on count 2 are confirmed.

Judge(s) signature	Comments:
Salionga J:	
Kesslau AJ:	