

CASE NO.: CR 123/2006

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

versus

HEITA BONIFATIUS

[HIGH COURT REVIEW CASE NO.: 1724/06]

CORAM: VAN NIEKERK, J *et* PARKER J

Delivered on:

2006.12.27

REVIEW JUDGMENT

PARKER, A.J.:

[1] The accused pleaded guilty to the offence of failure to appear before an immigration officer on his entry into Namibia in contravention of s. 2 of the Immigration Control Act (Act 7 of 1993). Although the accused pleaded guilty to the offence, after having heard the accused's plea explanation, the learned magistrate applied s. 113 of the Criminal Procedure Act (Act 51 of 1977) and entered a plea of not

guilty and requested the prosecutor to proceed with the prosecution.

[2] However, in the course of the trial, after the first prosecution witness (a senior immigration officer) had given evidence, the accused informed the court that he wished to plead guilty because what the witness had said was true. Having now been satisfied that the accused had admitted all the allegations in the charge, the learned magistrate convicted the accused and sentenced him to five months' imprisonment, three months of which were "suspended on condition accused does not within 5 years commit an offence of contravening the Immigration Act."

[3] The formulation of the condition is wrong because the suspension is subjected to the condition that both the commission of the offence and the accused's conviction should be within the suspended period of five years. A condition of suspension should not be formulated in such a way as to include both the commission of the offence and the conviction of the accused in the period of suspension because, for all manner of reasons, it can happen that the conviction only follows after the period of suspension has expired. If that happens, the suspended fine or imprisonment cannot be put into operation because the accused has not been convicted within the period of suspension.

[4] In the result, the following orders are made:

- (1) The conviction and sentence are confirmed.
- (2) The condition of suspension is deleted and the following condition is substituted therefor:

Five months' imprisonment, three months of which are suspended for five years on condition that the accused is not found guilty of contravening Act 7 of 1993, committed during the period of suspension.

Parker,J

I agree.

Van Niekerk, J