



CASE NO.: CR 16/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

MARCEL OLIVIER

ANDRIETTE NORMAN

(HIGH COURT REVIEW CASE NO.: 01/2011)

CORAM: DAMASEB JP *et* HOFF, J

Delivered on: **23 February 2011**

JUDGMENT

DAMASEB, JP: [1] The Control Magistrate, Windhoek sent this case to this Court for 'special review' in terms of sec. 304(4) of the Criminal Procedure Act, 51 of 1977 (CPA) which states:

'(4) If in any criminal case in which a magistrate's court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the High Court or any judge thereof that the proceedings in which the sentence was

imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section.'

[2] The two accused-visitors to our shores - were, upon their guilty pleas, convicted by the Magistrate, Windhoek, of 'contravening section 34 of Act 7 of 1993 read with section 1, 2 and 56(g)' of the Immigration Control Act, No. 7 of 1993 (ICA), ostensibly for a 'failure to present' themselves 'to an immigration officer or to an officer of the Ministry.' The two accused were intercepted at the Windhoek/Okahandja police road block where it was discovered that they had entered Namibia and failed to present themselves to an immigration officer or an officer of the Ministry while not in possession of a permanent residence, employment, student or visitors entry permit.

[3] Each accused was fined N\$15 000 or 4 years imprisonment of which N\$5000 or 12 months imprisonment are suspended for a period of 5 years on condition that each accused is not convicted of the offence of failure to present himself/herself to an Immigration Officer or contravening section 34 of Act 7 of 1993 read with sections 1, 2 and 56(g) of the said Act committed within the period of suspension.' They were also ordered to depart from Namibia with immediate effect.

[4] The Control Magistrate Windhoek, is troubled by the sentences imposed and the formulation of the charge upon which the convictions rested. She states:

"I am of the humble opinion that the learned presiding magistrate erred in sentencing the accused persons as reflected on the case record, because the maximum sentence for contravening Section 34(3) of the Immigration Control Act, Act 7 of 1993, is: **N\$4 000-00 (Four Thousand Namibian Dollar) or 12 (Twelve) months imprisonment or both such fine and such imprisonment.**

I am also of the humble opinion the charge against the accused persons is being wrongly formulated and should have read: Contravening Section 34(3) read with Sections 34(1) and 34(2) of the Immigration Control Act, Act 7 of 1993."

[5] It is clear from the record that the two accused were legally represented. Under s. 302 of the CPA, a proceeding in the Magistrate's Court is not reviewable if the accused was legally represented. With this circumstance in mind, I caused the record to be forwarded to the Prosecutor-General for comment. The Prosecutor-General's Office has now furnished the Court with its comments. It readily accepts that this Court has jurisdiction under s. 304(4) to entertain the review as presented by the Control magistrate, although the accused were legally represented. The concession is properly made.¹ Mr Small of the PG's Office has provided very helpful comments on the matter. He argues that the two accused admitted all the elements of the offence and were properly convicted and asks this Court to confirm the convictions. He correctly submits that the Court, prosecutor and counsel acting for the accused all wrongly assumed that the applicable penalty provision in the ICA was s. 56(g)² which, Mr Small correctly submits, is applicable only to contraventions of s. 56(a), 56(b), 56(c), 56(d) and 56(e). Mr Small states that the sentences are not in accordance with justice and must be set aside and substituted with 'appropriate and competent sentences'. As I understand his submissions, should this Court impose a sentence of a fine, the difference between that fine and what the court *a quo* imposed should be paid back to the accused. Mr Small also accepts in so many words that the Control Magistrate is correct in her view that the charges were wrongly formulated and should have been made under s. 34(3) read with s. 34(1) of the ICA.

¹ *S v Eli* 1978 (1) SA 451

² Which in respect of other offences provides for a penalty of N\$20,000 or 5 years imprisonment or both such fine and imprisonment.

[6] Section 34(3) of the ICA states:

"(1) 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.

(2) Any person who has under section 35 been exempted from the provisions of section 24(b) for a specific period, shall before the date on which such period expires present himself or herself to an immigration officer or to an officer of the Ministry.

(3) Any person referred to in subsection (1) who fails to comply with the provisions of that subsection 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, then and there to furnish to such immigration officer the particulars determined by the Chief 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, shall be guilty of an offence and on conviction be liable to a fine not exceeding R4000 or to imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment, and may be dealt with under Part VI as a prohibited immigrant."

[7] It is clear on the face of the record that the trial Magistrate misdirected herself. She had no competence to impose a sentence in excess of the statutory maximum prescribed by the ICA; as the penalty provision of 56(g) of the ICA which prescribes the sentence of N\$20 000 or 5 years imprisonment is not applicable to an offence created by s. 34(3) read with s. 34(1). The sentence imposed was therefore a nullity.

[8] The two accused admitted that they had entered Namibia and failed to present themselves to an immigration official or to an official of the Ministry. That conduct constitutes a criminal offence under s. 34(3) of the ICA: The section under which they were convicted was the wrong one and considering that their admitted conduct is a crime under the ICA, this Court has the power to amend the charge and to confirm the conviction as there would be no prejudice to the accused.³ Considering that the sentence imposed is a nullity, this Court is at large as to sentence.

[9] The two accused did not testify in mitigation of sentence and failed to take the Court in their confidence and to more fully explain when and how they entered Namibia. Their counsel made submissions from the Bar in mitigation that they were both first offenders who pleaded guilty and expressed regret for what they did. They had, as their counsel submitted from the Bar in mitigation, entered Namibia in a vehicle. Exactly how they achieved that without being noticed is not apparent from the record but it demonstrates how daring and audacious their conduct was. It certainly calls for the maximum fine permissible under s. 34(3) of the ICA, as a deterrent to those who might be minded to take a similar risk. It is appropriate to also impose a wholly suspended term of imprisonment as a disincentive for the accused to engage in the kind of criminal conduct they made themselves guilty of.

[10] Accordingly the following order is made:

1. The conviction of each accused for contravention of 'section 34 read with sections 1, 2 and 56(g) of the Immigration Control Act, No. 7 of 1993' is set aside.

³ See *S v Babiep* 1999 NR 1970 at 172H-I

2. The resulting sentence against each accused of a fine of N\$15 000 or in default 4 years imprisonment, partly suspended on conditions, are set aside.

3. The above convictions are substituted as follows:

 '3.1 Each accused is convicted of contravening s. 34(3) read with s. 34(1) of the Immigration Control Act, Act No. 7 of 1993.

 3.2 Each accused is sentenced to a fine of N\$4 000 or in default 6 months imprisonment. In addition, each accused is sentenced to 6 months imprisonment wholly suspended for a period of 3 years on condition the accused person is not convicted of contravening the provisions of s. 34(3) (read with s.34(1)) of the Immigration Control Act, Act No. 7 of 1993 committed during the period of suspension. Each accused person is ordered to depart from Namibia with immediate effect.'

4. Each accused is entitled to a refund of moneys paid, representing the difference between the fine of N\$4 000 and the amount of N\$10 000 paid in compliance with the fine imposed by the court *a quo*.

DAMASEB, JP

I agree.

HOFF, J