



CASE NO.: CR 12/2011

**IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI**

In the matter between:

THE STATE

and

FERNANDO KATITI

(HIGH COURT REVIEW CASE NO.: 29/2011)

CORAM: LIEBENBERG, J. *el* TOMMASI, J. Delivered on:

24.03.2011

REVIEW JUDGMENT

LIEBENBERG, J.: [1] The accused appeared in the Magistrate's Court, Outapi on a charge of contravening section 12 (4) of the Immigration Control Act, 1993 (Act 7 of 1993), hereinafter referred to as 'the Act'. The accused was convicted on his mere plea of guilty in terms of s 112 (1)(a) of Act 51 of 1977 and sentenced to a fine of N\$4 000 or 12 months imprisonment, wholly suspended on condition of good behaviour. The sentence imposed is subject to review under s 302 of the Criminal Procedure Act 51 of 1977.

[2] The charge on which the accused was convicted reads as follows:

"FOUND IN NAMIBIA WITHOUT VALID DOCUMENTS

That the accused is guilty of contravening section 12 (4) read with section 1 and 12 (1) of the Immigration Act (Act 7 of 1993).

In that upon or about the 3rd day of December 2010 the said accused was found in Namibia to wit Ruacana which is in the district of Outapi while he was not in possession of valid passport or any valid documents issued to him." (sic)

[3] The charge formulated against the accused in this case is identical to that preferred against the accused in *S v Ngongo*¹ and I find it disconcerting that no heed was given to the judgment delivered in the *Ngongo* case by the prosecution when formulating the charge against the present accused. In this instance the charge equally does not follow the wording of s 12 (4) of the Act as one would have expected it to do, and completely ignores a crucial element of the section i.e. that it does not apply to a person proved to be a Namibian citizen or a person domiciled in Namibia. The relevant portions of section 12 read as follows:

'12 Passports and visas

- 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 authorised thereto by the Government of Namibia to the effect that authority to proceed to Namibia for the purpose of being*

¹ 2005 NR 34 (HC)

examined under this Act has been granted by the Minister or an officer authorised 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.

2) ...

(4) If any person enters or has entered Namibia in contravention of the provisions of ss (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 N\$20 000 or to imprisonment for a period not exceeding five (5) years or to both such fine and such imprisonment, and may be dealt with under Part VI as a prohibited immigrant.' (Emphasis provided)

[4] I can do no better than echo what has already been stated in *Ngono* and *S v Wellem; S v Nkomo* , which judgments are on point.

[5] It was said that the section creates two offences: (a) entering Namibia in contravention of the provisions of subsection (1) of s 12 of the Act; and (b) being found in Namibia after having been refused to enter Namibia in terms of that subsection (see *Ngono* at p 35). In order to be convicted under s 12 (4), the charge must allege that the accused was found in Namibia after having been refused entry

2009 (1) NR 352 (HC).

into Namibia under the provisions of s 12 (1), an essential element of subsection (4). In the absence thereof, the charge formulated against the accused in this instance, did not meet the requirement set out in s 84 (1) of the Criminal Procedure Act, which states:

"Essentials of charge

(1) Subject to the provisions of this Act and of any other law relating to any

particular offence, a charge shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.

(2).....

(3) In criminal proceedings the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient" (Emphasis provided)

[6] Besides the requirement that there should have been a preceding refusal by an immigration officer to allow the person 'to enter Namibia in terms of s 12 (1) of the Act, it should also be borne in mind that a person who has proved that he or she is a Namibian citizen or legally domiciled in Namibia, cannot legally be refused entry under s 12 (1). Where these allegations - essentials of the offence created by s 12 (4) - were not contained in the charge preferred against the accused, the charge did not disclose an offence at all.

[7] Unlike the situation in the aforementioned cases where the accused persons were questioned in terms of s 112 (1)(b) on their pleas of guilty, in this instance, the case was finalised in terms of s 112 (1)(a). This, in my view, underscores the importance for judicial officers to exercise their judicial discretion when they decide to finalise cases in terms of s 112 (1)(a); instead of invoking the provisions of s 112 (1)(b) which requires the process of questioning, thereby protecting the accused from the adverse consequences of an ill-considered plea of guilty.

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

LIEBENBERG, J

I concur.

TOMMASI, J