



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case no: CR 38/2019

In the matter between:

**THE STATE**

v

**MALVERN TYAURIPO**

**ACCUSED**

(HIGH COURT MAIN DIVISION REVIEW REF NO. 890/2019)

**Neutral citation:** *S v Tyauripo* (CR 38/2019) [2019] NAHCMD 147 (15 May 2019)

**Coram:** NDAUENDAPO, J and UNENGU, AJ

**Delivered:** 15 May 2019

**Flynote:** Criminal Procedure – Automatic review in terms of s 302 of the Criminal Procedure Act 51 of 1977 – Conviction and sentence of counts 1 and 2 confirmed. Immigration Control Act 7 of 1993 – Declaration of an accused a prohibited immigrant and his deportation from Namibia – Order set aside.

**Summary:** The accused who was charged with and convicted of offences under the Immigration Control Act 7 of 1993 was sentenced to twenty four months imprisonment and twelve months imprisonment on counts 1 and 2 respectively. The sentences were ordered to run concurrently. In addition, the magistrate declared the accused a prohibited immigrant and ordered him to be deported from Namibia after serving his sentence. On review, the court confirmed the conviction and sentence of both counts but set aside the order to declare the accused a prohibited immigrant and the order to deport him, and *held* that the procedure to declare a person a prohibited immigrant, how to arrest and detain such a person as well as how to remove him or her from Namibia, is provided for in the Act.

*Held* further that the magistrate should have acquainted himself with the provisions of sections 39, 43, 44, 49, 51 and 52 before making the order he made.

*Held* further that the order was made *ex abundanti cautela* therefore, set aside.

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### ORDER

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- (i) The conviction and sentence on both counts are in accordance with justice and confirmed.
- (ii) The order by the learned magistrate to declare the accused a prohibited immigrant and the order to deport him after he had served his sentence are hereby set aside.

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### REVIEW JUDGMENT

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UNENGU, AJ (NDAUENDAPO, J concurring):

[1] This matter was submitted for automatic review following the provisions of s 302 of the Criminal Procedure Act<sup>1</sup> (herein referred to as the CPA), by the magistrate sitting at the magistrate's court for the district of Keetmanshoop.

[2] The accused who is a Zimbabwean national was charged with two counts of offences under the Immigration Control Act<sup>2</sup> by remaining in Namibia after the expiration of visitor's entry permit – which is a contravention of s 29 (5) read with sections 1 and 8 as count 1; and making a false representation or committing a fraudulent act for the purpose of entering or remaining in Namibian contravening s 56 (d) read with s 1 and s 56 (aa) as count 2.

[3] After he was convicted of the offences charged with, the accused was sentenced as follows:

Count 1: Twenty four (24) months imprisonment. Count 2: Twelve months imprisonment. Sentence to run concurrently.'

[4] In addition to the sentence the learned magistrate ostensibly acting in terms of the provisions of Part VI of the Act, also declared the accused a prohibited immigrant and ordered him to be deported after serving his sentence.

[5] The conviction and sentences imposed in respect of counts 1 and 2 are in order therefore, will be confirmed. However, in his covering letter dated 31 January 2019 to the Registrar of this Court, the learned magistrate was not sure as to whether the law in respect of the order made to declare the accused person a prohibited immigrant in terms of Part VI of the Act, was correctly applied and asked for guidance from this court.

[6] It is foolish and a tardy utterance from a magistrate who is required to apply the law correctly in order to do justice to all the parties involved.

[7] Who a prohibited immigrant is, the procedure how he or she is arrested, detained and removed from Namibia is provided in s 39 of the Act. Had the learned magistrate made time to acquaint himself with the provisions of sections 39, 43, 44, 49, 51 and 52, he would have discovered that it was not required from him to make

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<sup>1</sup> Act 51 of 1977 as amended.

<sup>2</sup> Act 7 of 1993 as amended.

the order to declare the accused a prohibited immigrant and his deportation from Namibia.

[8] Therefore, and with the aforesaid reasons in mind, I conclude that the order by the learned magistrate to declare the accused person a prohibited immigrant and his deportation from Namibia after serving his sentence was done *ex abundanti cautela* and as such should not be allowed to stand

[9] In the result, the following order is made:

- (i) The conviction and sentence on both counts are in accordance with justice and confirmed.
- (ii) The order by the learned magistrate to declare the accused a prohibited immigrant and the order to deport him after he had served his sentence are hereby set aside.

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E P UNENGU  
Acting Judge

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G N NDAUENDAPO  
Judge