

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case Title: <i>The State v George Malyu</i>	Case No: CR 10/2021
High Court MD Review No: 1408/2020	Division of Court: Main Division
Heard before: Judge Claasen et Judge Usiku	Delivered on: 23 February 2021
Neutral citation: <i>State v Malyu</i> (CR 10/2021) [2021] NAHCMD 63 (23 February 2021)	
The order: The conviction and sentence are set aside.	
Reasons for order:	

Claasen J (concurring Usiku J)

1. In this matter the accused, an Angolan national, was charged and convicted of a contravention of s 10(3) read with s 1, and 7 of the Immigration Control Act 7 of 1993, (the Act) for having been wrongfully and unlawfully found at Kaisosi location, whilst he was not in possession of a valid passport or any document issued to him.
2. After being questioned in terms of s 112(1)(b) of the Criminal Procedure Act as amended, (the CPA) the court convicted him and imposed a fine of N\$ 20 000. or 5 years' imprisonment. The review cover sheet indicates that the fine was not paid.
3. When the matter came before me on review, I addressed a query that comprised of 3 aspects. The first and second issue is related and it pertains to whether the accused was properly charged and whether the conviction of the accused 'as charged' was in order. An additional question was raised as to whether leading questions in the examination in terms of s 112(1)(b) of the CPA are permissible.
4. The matter of *S v Alberto*¹ is instructive to the matter at hand and provides a synopsis of the relevant section as follows:

‘ It is therefore apparent that an offence under section 10(3) of the Act can only come into existence, where such contravention was brought about by a person entering Namibia in contravention of the offences provided for in sections 6, 7 or 8 of the Immigration Control Act or, even after compliance with sections 6, 7 or 8 of the Act and such person failed to satisfy the immigration officer that he or she is not a prohibited immigrant, and the immigration officer refused such person entry into Namibia in terms of section 10(1).’ My emphasis.
5. In considering the answers given by the accused when questioned, he informed the court that when he entered the country he 'came with a permit from the consulate.' It was not clarified what type of permit the accused had at the time of entry into the country. There is also nothing in his answers to suggest that he did not enter at a port of entry or did not present himself to an immigration officer at the time of entry. More importantly, the accused's responses did not suggest that after he complied with s 6, 7 or 8 of the Act that he nevertheless failed to satisfy the immigration officer that he is not a prohibited immigrant and was refused entry into Namibia by an immigration officer.

In fact, the accused was pertinently asked and his answer unequivocally showed the opposite.

¹ *S v Alberto* (CR 57/2019) [2019] NAHCMD 309 (29 August 2019)

' Q: Have you ever been refused entry into Namibia?

A: No.'

6. Moreover, the charge particulars were not phrased along the lines as stipulated in s 10(3) of the Act. In view of the defective charge, the magistrate was led astray. Ultimately, in the circumstances the *court a quo* could not have been satisfied that the accused admitted all the elements of s 10(3) of the Act and should not have convicted the accused 'as charged'. The court a quo conceded to that and asked that the conviction and sentence to be squashed.
7. In respect of the leading questions, the court in her reply alluded that it is appropriate in order to introduce the accused to the charge at hand. However, this is not what transpired in the case at hand. At the outset a general question was put to the accused as to what led to his arrest. He answered that it was because he was found at Kaisosi with a bag of vegetables. Thus, the introduction was done and his answer shows his understanding of the reason for his arrest.
8. Further down the line, the court informed him that the State is alleging that he was found in Namibia particularly Kaisosi here in Rundu in the district of Rundu on the 12/4/2020 without any valid document which permit him to be in Namibia. It brought to the mind of the accused the crux of the charge as formulated by the prosecutor, namely that he was in Namibia without being in possession of a valid document. In looking at the charge sheet, this question irrevocably constitutes a restatement of the material averments of the charge particulars, which is not appropriate.²
9. For these reasons, the following order is made:

The conviction and sentence are set aside.

C M CLAASEN JUDGE	D N USIKU JUDGE

² S v Awa-Eiseb (CR 03/2015)[2015] NAHCMD 12 (30 January 2015), S v Pieters (CR 58/2013) [2013] NAHCMD 272 (04 October 2013)