

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION,  
HELD AT OSHAKATI

REVIEW JUDGMENT

<b>Case Title:</b> <i>The State v Kapeloko John and Fransisco Talapila</i>	<b>Case no:</b> CR 35/2022
<b>Heard before:</b> Honourable Ms. Justice Salionga J <i>et</i> Honourable Mr. Justice Kessler AJ	<b>Division of Court:</b> Northern Local Division  <b>Delivered on:</b> 02 August 2022
<b>Neutral citation:</b> <i>S v John</i> (CR 35/2022) [2022] NAHCNLD 75 (02 August 2022)	
<b>IT IS ORDERED THAT:</b> 1. The conviction and sentence on count 1 and count 2 in respect of both accused are set aside.	
<b>Reasons for the above order:</b>	
SALIONGA J (KESSLER AJ concurring):  [1] Both accused were charged with two counts, the first count in respect of both accused was said to have committed with common purpose. Both accused pleaded guilty to all the counts, namely count 1- contravening section 14 read with section 1 and 90 of the Customs and Excise Act 20 of 1998: possession of illicit goods and count 2- contravening section 34 (3) read with sections 1 and 34(1) of the Immigration Control Act of 1993: failure to represent himself to the immigration officer or officer of the ministry. They were convicted and sentenced after they were questioned in terms of section 112(1) (b) of the Criminal Procedure Act 51 of 1977 as amended (CPA).	

[2] It is the questioning and the framing of the charge on the first count that the reviewing judge has a problem with. It appears from the record that accused one was questioned on both counts but accused two was only questioned on count one. Furthermore although both accused admitted to have possessed illicit goods, failed to present themselves to an immigration officer and knew their conduct was wrong, unlawful and punishable by law, no further questions were asked.

[3] The reviewing Judge queried the presiding officer whether it could be said that both accused persons had admitted all the elements of the offences charged if no question was asked as to why they possessed illicit goods and why they failed to present themselves to an immigration officer. To the above queries the magistrate responded as follows:

‘1. Both accused persons in my view admitted to every aspect or element of the charges as is on record, and consequently I was satisfied. There is no aspect that was not admitted by the accused persons.

2. I however remain to be guided by acting reviewing judge.’

[4] Section 112 (1) (b) was designed to protect accused and especially the less complicated, undefended and uneducated accused from an ill-considered plea of guilty. When convicting an accused based on a guilty plea and questioning in terms of section 112(1) (b) of the Criminal Procedure Act 51 of 1977 as amended (CPA) the questions and answers must at least cover all the essential elements of the offence and nothing should be left to inferences or speculations to be drawn on either the legal or factual basis.

[5] The mere admission of an act does not by itself indicate that accused had a guilty mind. In this regard the magistrate was under a duty to ensure that all possible conceivable defences are eliminated before convicting the accused. In any event accused two in casu was not questioned on count two and as such did not admit any elements of that offence charged. The omissions of the magistrate in failing to canvas aspects surrounding all the legal requirements for the commission of the offence and his decision to convict accused two on count two without questioning him were fatal in this regard.

[6] Another problem in this matter is the framing of the charge on the first count. Both section 14 and section 90 of the Custom and Excise Act 20 of 1998 creates two distinct offences and when they are compounded on one annexure to form one charge it becomes difficult and confusing to determine which of the offences has been charged, admitted or convicted. Section 14 above places a duty on any person that leaves the country or that

enters the country to unreservedly declare goods, that they own or those that belongs to another person but in their custody or possession- it has nothing to do with possessing illicit goods. While on the other hand section 90 prohibits the possession by any person upon his or her premises or in his or her custody or under his or her control, or purchase or otherwise obtains, or sells or otherwise disposes of, any illicit goods, knowing such goods to be illicit goods.

[7] The confusion with which the charge and annexure were drafted creates a lot of uncertainty with regards to which prohibited conduct accused were convicted of. In light of the above highlighted irregularities, the convictions of both accused in both counts ought to be set aside.

[8] In the result the following orders are made:

1. The conviction and sentence on count 1 and count 2 in respect of both accused are set aside.

<b>Judge(s) signature</b>	<b>Comments:</b>
SALIONGA J:	None
KESSLAU AJ:	None