CASE NO. CR 137/07

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

versus

FRANS DANIEL JACKSON

(HIGH COURT REVIEW CASE NO.: 957/2007)

CORAM: MULLER, J. *et* SILUNGWE, A.J.

Delivered on: 2007.09.11

REVIEW JUDGMENT

MULLER, J.: [1] The accused was charged in terms of Section 4 (1) of Ordinance 12 of 1956, namely possession of a dangerous weapon, to wit a knife. He pleaded guilty and was questioned by the magistrate in terms of Section 112 (1)(b) of the Criminal Procedure Act, no. 51 of 1977 (CPA). He was convicted and sentenced on 26 April 2007 to 6 months imprisonment after no previous conviction was proved.

[2] The questions in terms of Section 112 (1)(b) of the Criminal Procedure Act and the answers thereto are the following:

> *"Q: Why do you plea guilty to the charge?*
> *A: Because I was found in possession of a knife.*
> *Q: And it was at Ondangwa police cells on 11/04/2007?*
> *A: Yes.*
> *Q: Why did you possess a knife?*
> *A: I was just using to cut my things.*
> *Q: What type of a knife?*
> *A: And it was silver.*
> *Q: You were aware that you are not suppose to possess a knife while?*
> *A: Yes.*
> *Q: How did you get hold of the knife?*
> *A: I came with it in from outside and at Ondangwa."*

[3] I directed the following question to the presiding magistrate on 6 July 2007:

> *"On what basis was the court satisfied that all the elements of the offence were admitted?"*

[4] My clerk established from the magistrates office, Ondangwa, that the accused was in custody until his release on 24 August 2007.

[5] In the light of this situation justice demands review although the accused had already served a sentence which was not in accordance with justice, as will more clearly appear from the rest of this judgment.

[6] It is certainly not an offence to possess a knife. The offence created by Section 4 (1) of the said Ordinance contains certain elements which should be proved. One of these is that he must have had the intent to use it for an unlawful purpose. This element was never admitted by the accused during the Section 112 (1)(b) questioning. The reason that he provided was that he used it to "cut my things". The fact that he had the knife at the Ondangwa police cells does not assist, but could have been used in a follow-up question, but was not done.

[7] It is consequently clear that the accused could not have been convicted on this charge on the basis of his answers in response to the Section 112 (1)(b) questioning. The conviction has to be set aside and so has the sentence. It is unfortunate that the accused already served a custodial sentence for a wrong conviction, but in the circumstances this Court cannot do anything else than setting it aside so that this conviction and sentence are deleted from his record.

[8] The following orders are made:

(a) The conviction on the charge of unlawful possession of a dangerous weapon in contravention of Section 4 (1) of Proclamation 12 of 1956 is set aside.

(b) The sentence imposed by the Magistrates Court Ondangwa on 26 April 2007 of 6 months imprisonment is set aside; and

(c) No conviction or sentence as imposed by the Magistrate Ondangwa, on 26 April 2007 should appear on any criminal record of the accused.

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MULLER, J.

I agree

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SILUNGWE, A.J.