



CASE NO.: CR 04/2009

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

In the matter between:

ANTONIO JOSE LUCAS

and

THE STATE

(Magistrate Review no 24/09)

CORAM: LIEBENBERG, AJ et SHIVUTE, AJ

Delivered on: 11 March 2009

SPECIAL REVIEW: SECTION 304(4) ACT 51 OF 1977

LIEBENBERG, AJ: [1] This is an application for special review made in terms of section 304(4) of the Criminal Procedure Act, Act No 51 of 1977 (the Act) which was filed with the Registrar on 5 March 2009.

[2] This application relates to the accused's conviction following his plea of guilty on a charge of contravening section 29(1) of the Immigration Control Act, Act No 7 of 1993 for which he was sentenced to direct imprisonment of 6 months in the magistrate's court, Ohangwena.

[3] The accused is an Angolan national, 19 years of age and from the record, a second year student at an "institution" in Windhoek. There are prospects of him being enrolled with the University of Namibia this year and he has already applied for a study permit for that purpose.

[4] The application is based on several "points of law and/or facts" which can be summarised as follows:

- Applicant appreciates the seriousness of the crime committed;
- Applicant is in Namibia for a good cause i.e. to further his studies;
- Applicant considers himself partly Namibian having completed his primary and secondary education in Windhoek;
- Applicant admits having committed the offence for which he was charged;
- Applicant was unrepresented at the hearing and might have failed to properly enlighten the court on his personal circumstances before sentence;
- Applicant was advised by fellow inmates, the prosecutor and other court officials to plead guilty as only a fine would be imposed;
- That the presiding officer "recommends" to the Reviewing Judge to, upon reconsideration of sentence, "release (applicant) on warning, alternatively that the sentence be altered to that of a fine";
- That in the light of the cases cited, the matter is reviewable under section 304 of the Act;
- That a grave injustice might result "because there are no other means where justice might be attained in this matter. The only option the accused has is to appeal but it is common cause that by

the time his appeal might be heard, the accused will have served 80% of his time in custody render the appeal ineffective.”
(sic)

[5] The magistrate’s response to the application served on him was in the following terms:

- “1. Section 304(4) of the Criminal Procedure Act 51/77 is only applicable if an erroneous or defective sentence is imposed, i.e. its about the correction of an error or defect in a sentence that has been imposed.*
- 2. The sentence at hand is neither erroneous nor defective and needs not to be corrected, i.e. the sentence imposed is proper, correct and competent.*
- 3. Thus the only option open to the applicant is to challenge this sentence by way of appeal if they are not satisfied with it and not by resorting to Section 304(4) of the Criminal Procedure Act.”*

[6] I was referred to three judgments as authority for this Court to interfere with the sentence imposed, but these cases have no relevance to the application at hand as they deal with *undetermined proceedings*. In *S v Immanuel* 2007(1) NR 327 (HC) the following appears in the head note:

“Where a conviction has not been entered (or where a conviction had been entered but is not followed by sentence) the provisions of s. 304(4) of the CPA 51 of 1977 (dealing with special reviews) are not applicable. Although this Court has inherent power to curb irregularities in magistrates’ courts by referring (through review) with undetermined proceedings emanating there from, such as the present proceedings, it will only exercise that power in rare instances of material irregularities where grave injustice might otherwise result, or where justice might not be attained by other means.” (emphasis added)

The two other cases cited, although from a different jurisdiction, also deal with undetermined proceedings and what approach the court should follow. (*S v*

Burns and Another 1988(3) SA 366 (C); *Ismail and Others v Additional Magistrate, Wynberg and Another* 1963 (1) SA (A). What has been made clear in these cases is that the court would only interfere with undetermined proceedings in a magistrate's court in rare instances where grave injustice might otherwise result or where justice might not be attained by other means.

[7] In the present application the proceedings in the magistrate's court has been finalised and are not subject to automatic review because the magistrate has held that rank for a period of seven years and longer. (Section 302 of the Act). Applicant now seeks to have the sentence imposed by the magistrate reviewed and therefore relies on the provisions of section 304(4) which states:

“(4) If in any criminal case in which a magistrate's court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the court thereof had been laid before such court or judge in terms of section 303 or this section.”

The provisions of section 304(4) are clear and can only be relied upon “where the proceedings in which the sentence was imposed were not in accordance with justice.”

[8] Applicant does not aver in his application that the proceedings relating to the sentence imposed are not in accordance with justice, and neither is there anything on record suggestive thereof. On the contrary, in par 1.4 of his application he states:

“1.4 The Applicant certainly overstayed his stay in Namibia which in an offence.”

Applicant pleaded guilty and after admitting the elements of the offence, he was convicted accordingly. The sole purpose of this application is an attempt to have the sentence imposed by the magistrate overturned and substituted with a sentence other than a custodial sentence. The learned magistrate in his reasons, correctly points out that the sentence imposed is neither erroneous nor defective and need not be corrected and should the sentence be challenged, then that should be done by way of appeal and not section 304 of the Act.

[9] The reason advanced by the applicant why he relies on section 304 for relief, is that by the time an appeal is heard, he almost would have served the sentence in full. I respectfully find applicant's view disturbing and there is no justification for bringing an application on such basis. It remains an essential element that the court's interference is justified (only) because of the interest of justice, which clearly is not the position with the present application. The Court cannot allow that section 304(4) be used for so-called "cheap appeals" as this would be nothing other than an abuse of criminal procedure.

Whereas applicant is dissatisfied with the sentence imposed, he should appeal the matter and has the right to approach the magistrate's court with an application to consider bail pending finalisation of the appeal.

[10] In the result, the application is dismissed.

LIEBENBERG, AJ

I Concur

SHIVUTE, AJ



CASE NO.: 24/09

SUMMARY

ANTONIO JOSE LUCAS

APPLICANT

and

THE STATE

RESPONDENT

LIEBENGERG, A.J et SHIVUTE, A.J

11/03/2009

CRIMINAL PROCEDURE-Special review in terms of section 304 (4) act 51 of 1977 accused dissatisfied with custodial sentence imposed – Proceedings in which sentence was imposed are in accordance with justice – Section 304 (4) does not substitute appeal process – Constitutes abuse of criminal procedure.