

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

PRACTICE DIRECTION 61

<b>Case Title:</b> <i>The State v Murangi Tjimbua Paulaus Haindongo Uapukakata Tjiharuka</i>	<b>Case No:</b> CR 79/2023
<b>High Court MD Review No:</b> 1171/2023	<b>Division of Court:</b> High court Main Division
<b>Heard before:</b> Honourable Justice Christiaan AJ et Honourable Justice Shivute	<b>Delivered on:</b> 20 July 2023
<b>Neutral citation:</b> <i>S v Tjimbua &amp; Others</i> (CR 79/2023) [2023] NAHCMD 417 (20 July 2023)	
<b>The order:</b>  <ol style="list-style-type: none"><li>1. The conviction and sentence in respect of each accused are set aside.</li><li>2. If the accused persons are still being held in custody they must be released forthwith.</li></ol>	
<b>Reasons for order:</b>	

CHRISTIAAN AJ (SHIVUTE J concurring)

[1] This is a review matter which came before me in terms of s 302 (1) and s 303 of the Criminal Procedure Act 51 of 1977 (the CPA).

[2] This is an instance where the provisions of s 304(2) (a) of the CPA are dispensed with, as the accused persons will be prejudiced if the matter is not expeditiously dealt with on review.

[3] The accused persons appeared in the magistrate's court in the district of Karasburg on a charge of contravening s 2 (c) read with s 8 of the Departure from Namibia Regulation Act 34 of 1955 (the Act). The charge reads as follows:

'In that upon or about the 04<sup>th</sup> day of June 2023 and at or near Noordoewer in the district of Karasburg the accused did wrongfully and unlawfully left Namibia for the purposes of proceeding to another country without using the port where such person shall appear before an Immigration Officer as defined in section 1 of the Immigration Control,1993 and such person's or permit didn't bear an endorsement, or he or she was not in possession of a document issued to him or her by a person authorized thereto by the Minister or such an Immigration Officer, to leave Namibia at a place other than a port and for such purposes and during such period as may be set forth in that endorsement or document.

PENALTY: In the case of Contravention of section 2, to a fine not exceeding N\$10 000 or imprisonment for a period not exceeding 5 years or to both.'

[4] The accused persons pleaded guilty and the court *a quo* invoked s 112(1) (b) of the (the CPA.) Thereafter, the court convicted the accused persons and sentenced them each to a fine of N\$2 000 or 6 months' imprisonment.

[5] S 2 (c) of the Act reads as follows:

**'2. Prohibition of departure from Namibia without passport or permit at a place other than a port**

No person shall leave Namibia for the purpose of proceeding to another country

(c) except at a port where such person shall appear before an immigration officer as defined in section 1 of the Immigration Control Act, 1993, unless such person's passport or permit bears an endorsement, or he or she is in possession of a document issued to him or her by a person authorized thereto by the Minister or such an immigration officer, to leave Namibia at a place other than a port and for Republic of Namibia 4 Annotated Statutes Departure from Namibia Regulation Act 34 of 1955 (SA) such purposes and during such period as may be set forth in that endorsement or document.;

[6] Upon reviewing the charge and considering the Act under which the accused were charged, it became apparent that the Act has undergone a number of amendments. Most recently and more particularly, s 2 of the latter Act has been amended by Government Notice No. 7<sup>1</sup> published in Government Gazette No. 7099 of 21 January 2020, which came into effect on 26 November 2019.

[7] The amendment in the latter Government Gazette reads as follows:

**'Substitution of regulation 2 and 3 of Regulations**

3. The Regulations are amended by the substitution for regulations 2 and 3 of the following regulations:

**'Departure from Namibia**

2. A person wishing to depart from Namibia, excluding a person referred to in paragraph (b) of section 2 of the Act shall at a port listed in Annexure "B", present himself or herself to an immigration officer on duty at that port . . . .'

[8] This is clearly not an instance where an incorrect label was attached to the charge, but where the state relied on a section which has been substituted and no longer encompasses the elements of the offence the State intended to charge the accused persons with.

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<sup>1</sup> Amendment of Regulations under the Departure from Namibia Regulation Act: Departure from Namibia Regulation Act, 1955.

[9] Although the amended regulation is still aimed at regulating persons departing from Namibia, the provisions under the substituting section differs significantly from that of the substituted section, in that it imposes a duty on a person who wishes to depart from Namibia, excluding those persons referred to in s 3, to present him/herself at an immigration officer on duty at that port, and no longer requires of such person to be in possession of a valid passport or permit.

[10] Whereas the accused persons were not charged for contravening the provisions of s 2 of the amended Act (but the repealed section), the charge to which the accused persons pleaded and was convicted of is no longer binding in law, hence it is defective. This culminated in the accused persons being wrongly convicted and sentenced. As a result the conviction is not in accordance with justice and therefore cannot be allowed to stand.

[11] In the result, it is ordered that:

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

<b>P Christiaan ACTING JUDGE</b>	<b>NN Shivute JUDGE</b>