

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

SPECIAL REVIEW JUDGMENT

Case Title: <i>The State v Gideon Ibenere Chimoso</i>	Case No: CRM 1314/2020
High Court MD Review No: 01/2021	Division of Court: Main Division
Special review: Lady Justice Dinah Usiku	Delivered on: 11 February 2021
Neutral citation: <i>S v Chimoso</i> (CRM 1314/2020) [2021] NAHCMD 37 (11 February 2021)	
The order: <ol style="list-style-type: none">1. The conviction and sentence are set aside.2. The matter is referred back to the Office of the Prosecutor General to institute a charge afresh if so inclined.	
Reasons for order: 	

USIKU J (concurring Claasen J)

[1] This matter has been sent on review in terms of the provisions of s 304(4) of the Criminal Procedure Act¹, herein referred to as the CPA.

[2] The accused was charged with contravening section 56(e) of the Immigration Control Act 7 of 1993, possession and or use of fabricated, forged or falsified documents. The accused pleaded guilty and after being questioned in terms of section 112(1)(a) of the CPA he was convicted and sentenced to a fine of N\$ 5 000.00 or 15 months imprisonment.

[3] During his first appearance at court the right to legal representation was explained and he elected to obtain the services of a legal representative. The accused even stated the name of the legal practitioner of his choice. The matter was then remanded to a further date for that purpose as well as for investigations to continue.

[4] On a subsequent court appearance on 9 December 2020 the court proceeded with plea proceedings. That was done without canvassing the issue of legal representation. The court record does not indicate that the accused waived his right to legal representation. In the absence of it being expressly stated in the recordkeeping of the magistrate, it cannot be assumed that the accused changed his mind about his earlier preference to exercise his right to legal representation.

[5] Article 12(1)(e) of the Constitution provides:

'All persons should be afforded adequate time and facilities for the preparation of their defence, before the commencement of and during their trial, and shall be entitled to be defended by a legal practitioner of their choice.'

¹ Act 51 of 1977.

[6] I agree with Shivute, J where she states in *S v Kambatuka 2014 (4) NR 1142 (HC) at 1145 E-F*:

[12] The rights provided by the Constitution in the above article are there to ensure that all offenders charged with criminal charges and appearing before a criminal court are afforded a fair trial. The right to be represented is a fundamental right. Whether the failure of the accused to be afforded the opportunity to be represented results in a failure of justice is a question of fact which depends on the circumstances of each case.

[7] The act of the magistrate of recording a plea in the absence of a legal representative, as per the accused's election, offends against the Constitutional right to a fair trial. It constitutes an unfortunate miscarriage of justice which should not have resulted.

[8] The matter revealed other problematic issues as to the charge particulars and questioning by the magistrate in terms of section 112(1) (b) of the Act.

[9] I venture into the concerns as regards to the charge particulars. The charge annexure reads as follows:

'Immigration Control Act – Possession and/or use of fabricated, forged or falsified documents

Count 1 (in respect of accused 1)

That the accused is guilty of Contravening Section 56(e), read with sections 1 and 56(aa) of the Immigration Control Act 7 of 1993'

In that upon or about the 16th day of May 2019 and at or near Grootfontein in the in the district of Grootfontein, the accused person did intentionally and unlawfully have in his possession a fabricated, forged or falsified document, to wit one marriage certificate which was issued by lawful authority and had been obtained in a fraudulent and malice manner

and with mala fide intent.’

[10] Strangely the case had two charge annexures. One of them is duplicated in the preceding paragraph. The second annexure reads the same, but has additional words of ‘to remain in Namibia’ at the end of the charge particulars. It is not clear which of the charges was actually put to the accused.

[11] Moreover, the formulation of the charge annexure leave much to be desired. The reason for saying that will become clear in view of the charge as stipulated in the relevant legislation. Section 56 (e) of the Immigration Control Act 7 of 1993 provides as follows:

‘for the purpose of entering Namibia, or of remaining therein in contravention of the provisions of this Act or any other law, or of assisting any other person so to enter or so to remain, fabricates, forges or falsifies any permit, certificate or other document, or utters, uses, or attempts to use any permit, certificate, or other document which has not been issued by lawful authority, or which though issued by lawful authority, such person is not entitled to use, or uses any fabricated, forged or falsified permit, certificate or other document, knowing it to have been fabricated, forged or falsified’

[12] The charge is phrased vaguely as to the element that the accused, whilst being in possession of this questionable document knew that it had been forged, fabricated or falsified. This element was omitted in the charge particulars. It is a material aspect, especially since the averment in the charge was that the document was issued by a ‘lawful authority.’

[13] In *S v Omar*² Liebenberg J held that it is trite that a charge sheet require certain minimum requirements. These requirements are stipulated in section 84 of the CPA which reads as follows:

² *S v Omar* (CR 50/2020) [2020] NAHCMD 297 (17 July 2020).

'84 Essentials of charge

- (1) Subject to the provisions of this Act and of any other law relating to any particular offence, a charge shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.
- (2) Where any of the particulars referred to in subsection (1) are unknown to the prosecutor it shall be sufficient to state that fact in the charge.
- (3) In criminal proceedings the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient.'

[14] This means that the charge must contain such particulars as is reasonable to inform an accused of the nature of the charge.³ The charge annexure in this case, does not comply with the standard as required by the law.

[15] When charges are phrased in such defective manner, it may also mislead the magistrate along a flawed path when questioning an accused. All elements might not be canvassed or the elements may construed incorrectly. This problem manifested in the case at hand, in the magistrate's questioning. According to the charge particulars the accused was found in possession of a forged document. Notwithstanding that, the magistrate construed the situation as that the accused was the person who forged the document. That much was clear from the following question as posed by magistrate:

³ *S v Katari* 2006 (1) NR 205 (HC) 206J – 207A.

‘ Why did you forge a Marriage Certificate?.’

[16] This imputation by the magistrate that the accused was the person who forged the document, does not correlate with the charge particulars that the document was issued by a ‘lawful authority.’

[17] Again, it comes back to the principle that charges must be phrased properly and with sufficient particularity. Magistrates should also apply their minds when conducting questioning in terms of section 112(1)(b) of the Act to ensure that the questions they posed are coherent with the essential averments of the charge particulars and that the charge particulars are sensible and in accordance with the statute if applicable.

[18] In the result, the following order is made:

1. The conviction and sentence are set aside.
2. The matter is referred back to the Office of the Prosecutor General to institute a charge afresh, if so inclined.

D USIKU JUDGE	C CLAASEN JUDGE