

PRACTICE DIRECTION 61

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK  
REVIEW JUDGMENT

<b>Case Title:</b> <i>The State v Martha Mandaha Johannes</i>	<b>Case No:</b> CR 14/2022
<b>High Court MD Review No:</b> 43/2022	<b>Division of Court:</b> High court Main Division
<b>Heard before:</b> Honourable Mr. Justice Liebenberg <i>et</i> Honourable Lady Justice Claasen	<b>Delivered on:</b> 24 March 2022
<b>Neutral citation:</b> <i>S v Johannes</i> (CR 14/2022) [2022] NAHCMD 133 (24 March 2022)	
<b>The order:</b> <ol style="list-style-type: none"><li>1. The conviction and sentence are set aside.</li><li>2. This judgment to be brought to the attention of the Prosecutor-General.</li></ol>	
Liebenberg, J (Claasen, J concurring)	
[1] This is a review matter which came before me in terms of section 302 (1) and section 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 will be prejudiced if the matter is not expeditiously dealt with on	

review.

[3] The accused appeared in the magistrate's court in the district of Rundu on a charge of contravening s 2 (a) read with s 8 (1)(a) of the Departure from Namibia Regulations Act, 34 of 1955 (the Act). The charge reads as follows:

'In that upon or about the 24<sup>th</sup> day of December 2021 at or near Dam Dam – Sauyemo Location in the district of Rundu the accused did wrongfully and unlawfully leave Namibia to Angola without [a] passport [or] permit authorising her to proceed to another country – Angola and back to Namibia without a passport [or] permit authorising her/him to proceed to another country – Angola Penalty Clause (see Sec. 8(1) a): "...to a fine not exceeding N\$ 10 000,00 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.'

[4] The accused pleaded guilty and the court *a quo* invoked s 112(1)(b) of the Criminal Procedure Act 51 of 1977 (the CPA.) Thereafter the court convicted the accused and sentenced her to a fine of N\$ 5 000 or 2 years' imprisonment.

[5] Section 2 (a) 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

(a) unless such person is, at the time when he or she leaves Namibia, in possession of a valid passport or a permit;'

[6] Upon inspecting the charge and the Act under which the accused was 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:

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

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

2. 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 with.

[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 was not charged for contravening the provisions of s 2 of the amended Act (but the repealed section), the charge to which the accused pleaded and was convicted of was no longer binding in law, is defective. This culminated in the accused 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 are set aside.
2. This judgment to be brought to the attention of the Prosecutor-General.

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<b>J C Liebenberg</b> <b>JUDGE</b>	<b>C M Claasen</b> <b>JUDGE</b>
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