

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA

“ANNEXURE 11”

Practice Direction

Case Title: THE STATE vs MARTIN KAZUVA ACCUSED	Case No: CR 46/2022
	Division of Court: High Court, Main Division
Heard before: Honourable Lady Justice Usiku et Claasen, J	Date of hearing: 18 May 2022
	Delivered on: 24 May 2022
Neutral citation: <i>S v Kazuva</i> (CR 46/2022) [2022] NAHCMD 262 (24 May 2022)	
COURT ORDER	
<ol style="list-style-type: none">1. The convictions and sentences in respect of accused 2 are in accordance with justice and are hereby confirmed.2. The proceedings in terms of s 112(1) in respect of accused 1 on the first count is set aside.3. The matter is remitted back to the presiding officer M.E. Kwizi in order to question	

accused 1 in respect of the 1st count accordingly and to bring the matter to its conclusion.

REASONS FOR ORDERS:

USIKU J, (CLAASEN, J concurring)

[1] This matter has been referred to me by way of special review in terms of section 304 of the Criminal Procedure Act (Act 51 of 1977) (CPA). The accused persons were jointly charged under the Immigration Control Act 7 of 1993 whereby accused 1 faced charges of failure to present himself to an immigration officer upon entry into Namibia.

[2] Both accused pleaded guilty and the court invoked the provisions of s 112(1) (b) of the Criminal Procedure Act, whereafter each accused was convicted and sentenced to pay a fine of N\$ 5 000.00 or in default of payment to serve 10 months imprisonment.

[3] The matter was sent on special review after the presiding magistrate realised that when questioning accused 1, in respect of the first count he did not question accused 1 on the elements of wrongfulness and unlawfulness.

[4] In the letter attached to the case review the presiding magistrate state as follows:

“On 06 May 2022 I dealt with the above mentioned case involving two accused persons (accused 1 and 2). Both accused persons were found guilty and convicted by myself on charges as charged on the same date, each accused was sentenced to a fine of five thousand (N\$5000) or in default of payment thereof to ten (10) months imprisonment. When proof reading the record, I noticed that I erroneously omitted to question accused no. 1 on count 1 on the elements of wrongfulness and unlawfulness. Based on the aforesaid, I have opted to send matter for special review in terms of section 304 of the Criminal Procedure Act, Act no. 51 of 1977 as amended for the honourable judge to give direction or that matter be remitted back to this court for the accused 1 to be questioned on the aforesaid elements of the offence in respect of count 1. As far as I am concerned the questioning in respect of accused 2 on count 2 are in accordance with justice.’

[5] I respectfully accept that the questioning in respect of accused 1 cannot be said to

be in accordance of justice.

[6] The basic principle is simple and trite. The presiding officer must see to it that justice is done. Plea proceedings constitute the formal joining of issues where the points in issue between the parties are determined. For that reason it is important that any unrepresented accused be guided as far as necessary. It is common cause that the court in terms of s 112 is to a large extent dependent upon the information given by an accused in order to come up with a conviction, without the leading of evidence. The main aim of the plea process is after all to determine whether an accused admits every element of the offence charged, freely, cautiously and reliably after the charge has been conveyed to him.

[7] It must also be emphasised that questioning is an important part of the legal process and another court has to be able to access whether it was done correctly and whether a conviction was justified. The accused's answers are the essence of the questioning. In *casu* the accused was not asked whether he was aware of the unlawfulness and wrongfulness of his conduct which constitutes the elements of the offence charged and as a result the court *a quo* could not have been satisfied in order to return a verdict of guilty as charged.

[8] In the result the following orders are made:

1. The convictions and sentences in respect of accused 2 are in accordance with justice and are hereby confirmed.
2. The proceedings in terms of s 112(1) in respect of accused 1 on the first count is set aside.
3. The matter is remitted back to the presiding officer M.E. Kwizi in order to question accused 1 in respect of the 1st count accordingly and bring the matter to its conclusion.

D USIKU JUDGE	C CLAASEN JUDGE