

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: CC 30/2018

THE STATE

v

ABIGAIL BASHALA

ACCUSED

Neutral citation: *S v Bashala* (CC 30/2018) [2022] NAHCMD 366 (26 July 2022)

Coram: USIKU, J

Heard: 24 May 2022

Delivered: 26 July 2022

Flynote: Criminal Law - Prevention of Organised Crime Act - Smuggling of immigrants - Vulnerable persons exploited for money under pretext they will be relocated to other countries for better living conditions. The counts relate to the accused's conduct committed on different occasions with arrangements made through third parties – Accused found guilty and accordingly convicted on certain counts.

Summary: The accused, a Congolese national and a refugee in Namibia during December 2017 to April 2018 aided in the smuggling of Congolese nationals into Namibia for purposes of obtaining financial or other material benefit.

ORDER

The accused is found guilty on offences charged in respect of counts 13, 14 and 15 respectively, and convicted accordingly.

JUDGMENT

USIKU J:

[1] The accused, Abigail Bashala stood charged with the offence of Migrant Smuggling in contravention of S. 16 read with S. 1 of the Prevention of Organised Crime Act 29 of 2004 as amended. In total, the accused was charged with 15 counts. She denied all the allegations and made no disclosure for the basis of her defence. Thus the state was burdened to prove all the allegations against her.

[2] For purposes of this judgment, I intend to deal with the charge particulars upon which the accused was placed on her defence after an application in terms of S. 174 partially succeeded in respect of some counts.

Those charge particulars relates to counts 1, 2, 3, 13, 14, and 15 respectively.

Count 1

Contravening S. 16 read with S. 1 of the Prevention of Organised Crime Act 29 of 2004 as amended – Migrant smuggling

In that upon or about the 30th October 2013 the accused wrongfully and unlawfully smuggled, participated in and/or aided or abetted the smuggling of a migrant, one Kasongo Ntambala Oscar into Namibia from Zambia or enabling such migrant to unlawfully remain in Namibia for the accused to obtain directly or indirectly a financial or other material benefit.

Count 2

Contravening S. 16 read with S. 1 of the Prevention of Organised Crime Act 29 of 2004 as amended – Migrant smuggling.

In that upon or about the 30th October 2013 the accused wrongfully and unlawfully smuggled, participated in and/or aided or abetted the smuggling of a migrant, one Nzinga Muyuka Kasongo Sylvie into Namibia from Zambia or enabling such migrant to unlawfully remain in Namibia for the accused to obtain directly or indirectly a financial or other material benefit.

Count 3

Contravening S. 16 read with S. 1 of the Prevention of Organised Crime Act 29 of 2004 as amended – Migrant smuggling

In that upon or about the 30th October 2013 the accused wrongfully and unlawfully smuggled, participated in and/or aided or abetted the smuggling of a migrant, one Audrey Nzinga Idjongy into Namibia from Zambia or enabling such migrant to unlawfully remain in Namibia for the accused to obtain directly or indirectly a financial or other material benefit. The complainant is a child of the first and second complainant in counts 1 and 2 respectively.

Count 13

Contravening Section 16 read with Section 1 of the Prevention of Organised Crime Act 29 of 2004 as amended – Migrant smuggling

In that upon or about the month of December 2017, the accused wrongfully and unlawfully smuggled, participated in and/or aided or abetted the smuggling of a migrant, one Gilanda Dina Carine into Namibia from Zambia or enabling such migrant to unlawfully remain in Namibia for the accused to obtain directly or indirectly a financial or other material benefit.

Count 14

Contravening S. 16 read with S. 1 of the Prevention of Organised Crime Act 29 of 2004 as amended – Migrant smuggling

In that upon or about the month of April 2018, the accused wrongfully and unlawfully smuggled, participated in and/or aided or abetted the smuggling of a migrant, one Weaston Disambata into Namibia from Zambia or enabling such migrant to unlawfully remain in Namibia for the accused, to obtain directly or indirectly a financial or other material benefit.

Count 15

Contravening S. 16 read with S. 1 of the Prevention of Organised Crime Act 29 of 2004 as amended – Migrant smuggling

In that upon or about the month of September 2017, the accused wrongfully and unlawfully smuggled, participated in and/or aided or abetted the smuggling of a migrant, one Live Kafutshi Sumudiya into Namibia from Zambia or enabling such migrant to unlawfully remain in Namibia for the accused to obtain directly or indirectly a financial or other material benefit.

[3] Smuggling of immigrants is defined in s 1 of the Prevention of Organised Crime Act as the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person who is not-

(a) a national or permanent resident of Namibia; or

(b) lawfully resident in Namibia;

into Namibia or enabling such a person to remain in Namibia without complying with the law of Namibia.

[4] Section 16 of the Prevention of Organised Crime Act makes it an offence for anyone who participates in or who aids and abets the smuggling of migrants, as contemplated in Annexure 111 of the Convention, by land, air or sea, in order to obtain, directly or indirectly, a financial or other material benefit.

[5] The Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the United Nations Convention against Transnational Organised Crime provides in its Article 2 that the purpose of the Protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among State parties to that end, while protecting the rights of smuggled migrants, Namibia is a State Party to the Protocol. It is clear that the Prevention of Organised Crime Act adopts the United Nations Convention on Smuggling of Migrants which is an offence under Namibian law.

[6] The accused in the matter before court, has not denied to have met the complainants in respect of counts 1, 2, 3, 13, 14 and 15 respectively. Her contention is that she was requested to assist when she encountered the complainant Nzinga Muyuka Kasongo Silvie at the Inter City centre in Zambia who was in the company of her husband and daughter, the complainants in respect of counts 2 and 3. The complainant in count 2 acted as an agent for her family and conceded to have met the complainants in counts 13 and 15 respectively.

[7] It is the State's duty to prove that an offence in terms of s 16 of the Prevention of Organised Crime Act was committed. The elements to be proven are that the accused aided, or abetted in the smuggling of migrants.

[8] It is now common cause that all the complainants were migrants from the Democratic Republic of Congo. All of them confirmed that they travelled from their country due to insecurity.

Evidence on behalf of the State

[9] Mr Oscar Kasongo Ntambala: He testified that he was originally from Democratic Republic of Congo. He left Congo due to tribalism together with his wife and his two children on the 26 October 2013. They left by public transport. They travelled from Congo through Zambia. They stayed in Zambia for about four days and travelled to Namibia using public transport. On the 26 October 2013, before they travelled, he went through torture and as a result, throughout their journey he was very ill and slept throughout their journey.

[10] Mr Ntambala testified that he met the accused for the first time inside the bus when they left Zambia. He later saw her during a Refugee day celebration at Osire Refugee Camp on the 20th June. He also saw her during the registration of refugees in the camp.

[11] Upon their arrival at the Namibian border a police officer entered the bus and directed everyone to get out of the bus. The bus conductor removed their luggage and a search was conducted. He was approached by a female police officer asking him something but could not understand very well, but thought it was in relation to his passport. He in the meantime saw the accused and called her to come and assist him and his family. The accused informed him that the police officer was asking for their passports. Because the passports were inside his jacket which he left inside the bus, they together entered the bus and took out the four passports and handed them over to the police officer. The passports were thereafter handed over to the immigration officer. It was realised that there were no stamps on their passports from the Zambian side where they had first stopped before they arrived on the Namibian

side. According to Mr. Ntambala, the reason why he did not get his passport stamped was because he was not aware that he was at the Zambian-Namibian border and secondly he heard a voice directing that they should not get out of the bus. He recognised the voice as that of the accused. After the issue of the passport was resolved, they were taken to the police station in Katima Mulilo where they spent 4 to 5 months before they were transported to Osire Refugee Camp.

[12] With regard to the accused indicating that no one should get out from the bus, the witness could not with certainty confirm if the message was directed to him and his family alone or to all the bus passengers at the time.

[13] Ms Nzinga Muyuka Kasongo Sylvie: She testified that she has been residing at the Osire Refugee Camp for the past 9 years. She is married to Kasongo Ntambala Oscar and is a mother of two children. They arrived at Osire Refugee Camp on 30 October 2013. They left the DRC due to insecurity after her two sons were killed on the 26 October 2013. They arrived at Kasumbalesa on the border of Zambia. On the same date they arrived in Lusaka, where they spent three days.

[14] During her stay in Lusaka, she decided to visit a bus terminal and sold her jewellery. She met the accused who spoke in a language she understood. She approached the accused and asked her to assist her in paying her tickets and to exchange the US dollars she had into Zambian currency. She did not know the exchange rate. Accused assisted her to pay their accommodation and also to buy food. The tickets cost them 480 US dollars.

[15] Ms Kasongo and her family boarded a bus in Lusaka and travelled towards the Zambian- Namibian border. Upon arrival at the border she was aware that they needed a visa. She waited to reach an office where their travel documents could be stamped. They sat on the last seat in the bus whereafter the accused made a gesture to them not to get out of the bus. There were passengers who got out of the bus and others remained seated. When accused informed the passengers not to get out of the bus, she understood that it was not the place where their passports were to be stamped by the immigration officers.

[16] Upon arrival at the Namibian border they were again requested to get out of the bus and ordered to open their suitcases. They were also requested to hand over their passports. During the checking of the passports it was discovered by the police officers that there were no stamps from the Zambian side. They were referred back to the Zambian side to get their passports stamped no one could however assist them at the Zambian side and they returned to the Namibian side. They were taken to a Police station where they were kept for about 4 months, after which they were taken to the Osire Refugee Camp. Ms Kasongo vehemently denied that it was the accused who brought her and her family into Namibia or that she facilitated their journey into Namibia.

[17] Ms Audrey Nzinga Idjongy, she is a daughter of Ms Kasongo. She confirmed that she is originally from the Democratic Republic of Congo. She left Congo because of tribal strife between the Chokwe and Tutsi tribes. She further confirmed that after they left Congo they took the bus to Kasumbalesa finally arriving in Lusaka, Zambia. In Zambia they stayed for about 4 to 5 months and on the 30th of October 2013 arrived at the Zambia – Namibia border. They were later taken to the Katima Mulilo Police station where they spent about 5 months before they were driven to the Osire Refugee Camp. Ms Idjongy could not with certainty explain the arrangements made between her mother and the accused except that she merely followed what her mother was arranging. At the time she was a minor aged 17 years old.

[18] Ms Gilanda Dina Carine aged 36 years old at the time testified that she is a Congolese national, she is a mother of two children. One of them being Weaston Disambata Ibumbu. Due to insecurity in Congo, she tried to look for a safe place to stay and it is how she met one Pastor David who at the time worked with the accused at a centre in Lubumbashi. The pastor assured her that the accused could assist her to go to Canada. It was further explained that the accused was working for the Namibian Government. She was first hesitant but later on decided to go along. They started to communicate through WhatsApp whereafter she reconsidered her position. She was requested to pay 500 US dollars but she only had 300 US dollars which she deposited in Pastor David's account. That money was to be transferred into the accused's account.

[19] According to Ms Carine, after the discussions, arrangements were made and the pastor arrived and took them to Lubumbashi. From there they were to leave for Zambia. In Zambia she met with other people and they all stayed in a rented house. Their stay in Zambia lasted from the 2nd of September 2017 and they only left on the 15th of December 2017 arriving in Namibia on 16 December 2017. They were divided into two groups and at the time she had no travel documents.

[20] Upon arrival at the border, at a place called Sesheke, the people who had passports went out of the bus whereafter the bus made a U-turn and they were dropped off at another point nearby. She crossed the Zambezi River by boat, and arrived in Namibia. In Namibia they went to the Red Cross as directed by one Eric. From the Red Cross they were taken to another place for verification. After some days they were transported to Osire Refugee Camp arriving on the 20th of December 2017.

[21] Whilst at Osire Refugee Camp, the witness started to communicate with the accused, she already had her contact number before leaving Zambia. They were in constant communication. During her communication with the accused, the latter requested her to pay 500 US dollars in order to complete forms for the alleged trip to Canada. Arrangements were made for her to travel to Otjiwarongo to meet the accused. However, that could not materialise because she was still new at the camp. She had not yet obtained the relevant documents to leave the camp.

[22] In the meantime Ms Live Katutshi Fumudiya also arrived at the Osire Refugee Camp and informed her that she had already paid the money to the accused for the completion of the travel documents to Canada. The accused continued to demand payment in order for her to complete the processes.

[23] Later on, the witness travelled to Otjiwarongo and met the accused for the first time. She was able to recognise the accused from the photos she had earlier been sent and also from her voice as she spoke.

[24] The accused took her to her house where she got her luggage which had been left by Ms Fumudia. There was money inside her bag which the accused had

not been aware of. She removed the money and offered accused only 300 US dollars. She handed the money to the accused, whereafter, accused escorted her in her car to the bus. This was after they went to exchange the money at Money Gram, into Namibian currency.

[25] During their conversation, the accused warned her not to discuss any issue related to her intended travel with anyone, because the people in the camp were very jealous. She later returned to Osire Refugee Camp.

[26] On another occasion the witness travelled to Otjiwarongo and met the accused. She was accompanied by another lady who wanted to travel to South Africa and needed travel documents.

[27] At the accused's house, the witness sought assistance in getting her daughter to Namibia. She had earlier on explained her wish to get her daughter into Namibia and was told to approach the Red Cross. The accused explained to her that the Red Cross will take too long and offered to assist her in that regard. She paid an amount of 200US dollars to the accused in order to facilitate the witness' daughter's arrival in Namibia. The daughter arrived two months later in Namibia. She is currently a resident of the Osire Refugee Camp.

[28] Prior to the arrival of the group the head of the group, Pastor David, had shown them photos of the accused, in order to convince them about their travelling abroad. It was claimed that the accused was an advocate and there were photos in which she appeared to be at the airport in Namibia with a group of people boarding an aircraft. It was further claimed that the group of people appearing in the photo were leaving for Australia. Her Namibian passport was also shown in order to convince the group that she was indeed a Namibian. In a photo handed in before court the accused appears wearing a gown usually worn by lawyers surrounded by police officers whom it was claimed were her body guards. All this information was provided through telephonic conversation whilst put on loud speaker in order for the group to listen for themselves. To date, the witness did not travel to Canada as promised, neither did she get back the money she paid the accused.

[29] The witness persisted that when she and her group spoke to the accused, she could see her face through the video call before she eventually travelled to Namibia via Zambia. The witness did not have a passport neither did she make use of a border post but crossed the Zambezi river into Namibia.

[30] Weaston Disambata the 3rd state witness testified that at the time of her testimony she was aged 13 years. She appears to be able to differentiate between what is wrong and right.

[31] Her testimony is that she arrived in Namibia on the 10th of April 2017, accompanied by one Eric who found her in Kasumbalesa, Congo. She was escorted by her uncle who put her in a truck. There were other people in the truck whom she did not know. The truck brought them to Zambia, she slept at the border and the following morning entered into Namibia. She joined another group of people whom she found at the border. After Eric left her, he informed her that if she was asked who she was, she must tell the people that she was a refugee. After the border opened, a police officer approached her and she explained to the officer that she was a refugee. Three days later she was transported to Osire Refugee Camp. At the camp she was registered as a refugee whereafter she was given some necessities. She met her mother Gilanda Dina Carine the next morning at the camp.

[32] Ms Live Kafutshi Fumudiya testified that she was 40 years old and was residing at Osire Refugee Camp having left the Congo during September 2017. She is a Congolese national. She came to know the accused before court very well. The accused invited her to come to Namibia and promised to welcome her upon arrival. The reason she left Congo was because her life was in danger. She had been raped and lost her husband who was killed in 2015 by unknown people, whereafter she left Kinshasa to go and live with her brother. As the insecurity continued, she later met a certain Pastor David to whom she explained her situation. The pastor offered to take her to Zambia where they were to wait for another group of people who were also waiting for the accused person, Abigail, who was allegedly working for the United Nations.

[33] The witness testified that she was given luggages whereafter she was put on a truck after she was given the accused's photo and her telephone contact number by Pastor David, in whose supervision she had been. Ms Fumudiya finally arrived by truck in Otjiwarongo and contacted the accused on the number she had been provided with. The accused responded to her call and assured her that she will be coming to meet her, whereafter they met and she recognised the accused from the photo she had been provided with. Accused arrived in a white sedan vehicle at the service station. They drove to the accused's house with all her baggage, which included Carine's and her children's luggage.

[34] At the house, the accused explained to her that she will rent a shack for her and demanded payment of 100US dollars for rent. The 100US dollars she demanded was given to her. Accused further demanded money for water and electricity. The witness was shown a shack and started renting it. Accused was then paid money for water and electricity in Namibian currency which was about N\$200.

[35] According to the witness, accused left to collect other people who were still in Zambia. Whilst still at the rented shack, thieves broke in and stole most of her properties including her laptop and some money. When she reported the theft to the accused, she again demanded 500US dollars and explained to her that she will no longer wait for the rest of her family but will make arrangements for her to leave the country for Canada. Accused also requested the witness to give her a photo of her and an identification document which she claimed was for her to complete the forms she was to send to Canada. Accused also requested the witness to give her a passport size photo and an identification document which she claimed was to be used to complete the forms she was to send to Canada. Accused also promised her that she was to leave in a week's time. As the process took too long, the witness requested her to rather consider applying locally and referred her to the relevant authorities in Namibia. That is how she ended up at the Osire Refugee camp. She did not get her money back from the accused to date.

[36] Ms Fumudiya also testified that she met the accused again on the 20th June 2018 or 2019 during the refugee day at Osire Refugee Camp and was surprised to meet the group of people she had left in Zambia. The group included the likes of

Carine, Devine whom the accused was also supposed to have assisted to migrate to Canada. Accused warned her not to make any reference about her name or about what she had told her, which made her to become more suspicious.

[37] Having arrived in Otjiwarongo by truck accused informed the witness to leave all her belongings at her house because she will not be staying long. That is how her baggage remained at the accused's house. These luggage was later on collected by Carine from accused's house. She travelled from Zambia to Namibia by truck without travelling documents and did not present herself at the border post.

[38] The witness testified further that when she asked the accused about her money, accused claimed that she had no money and has refused to refund the money to date.

[39] During cross examination the witness persisted that she had communication with the accused whilst enroute to Namibia. The reason why she handed over her 500US dollars was in order for accused to complete forms to facilitate her trip to Canada. She also handed to the accused her two passport size photos and her complete identity document.

[40] Ms Divine Yemba: She testified that she came to know the accused as someone who used to do the business of taking people to Namibia in order to take them abroad to Europe. She is currently residing at the Osire Refugee Camp after leaving the eastern part of DRC at Ngoma. She testified about incidences when they were attacked as a result of which she lost her unborn baby and her sister who were both killed. They experienced insecurities whilst in Ngoma. After a while her husband met a certain pastor David who became his friend. During their meetings the issue of insecurity was discussed with the pastor, and it was decided that they have to sell their house in order to leave Ngoma. They later left Ngoma for Lumbumbashi with their six minor children.

[41] In Lumbumbashi the witness was given the accused's account number in order to deposit money so that accused could fetch them. The witness's husband finally deposited 14 000 US dollars plus agent's fees which went up to 15 000 US

dollars. This money was deposited in instalments. They stayed in Lumbumbashi for 2 months whilst Pastor David and another male person left for Zambia in order to prepare for their accommodation. The pastor returned to fetch them. They travelled to Zambia without any travel documents. They spent another two months and half in Zambia. Whilst in Zambia, the accused would communicate with them through the phone placed on loud speaker. The group would listen to what was going to happen next. During the communication accused promised them that she will come to Zambia but did not show up. In the meantime the witness's husband decided to leave her and the children in Zambia. It was only after a while that they were collected by one Eric during the month of December 2017. They left Lusaka on the 25th of December 2017 arriving in Katima Mulilo on the same date. They travelled by bus until the Zambezi River, Eric arranged someone with a canoe. They were put on the canoe which took them across the Zambezi River into the Namibian side. Eric again arranged for the transport that took them to the Red Cross. Whilst at the Red Cross offices, police officers approached them and took them to the Ministry of Home Affairs. At the Ministry they were offered food, whereafter about five days in Katima Mulilo they were transported to Osire Refugee Camp.

[42] Ms Yemba testified that she did not know the accused physically prior to their meeting in Otjiwarongo in March 2018, at that time accused accommodated her husband.

[43] In Otjiwarongo, accused drove her with Carine in her car and took them to a hotel for a meeting. She realised that accused misled them about the trip to travel abroad, when she ended up at the Osire Refugee Camp. Accused had earlier promised them a trip to Canada which never materialised to date.

[44] The main aim of the meeting at Otjiwarongo was for her husband to get a refund from the accused, whilst Pastor David wanted them to meet the accused in person and to whom the money was deposited. Accused acknowledged to owe them money and signed a document to that effect.

[45] Accused acknowledged the money she owed the witness and her husband, which was a sum of 20 000 US dollars. In a letter dated 19 March 2018, the accused

acknowledged receiving money from a certain David from the period of December 2016, January 2017 as well as in August 2017. In total she acknowledged having received 20 900 US dollars after expenses. She further made reference to a deduction of 300 US dollars and another deduction of 200 US dollars paid to Eric. Ms Yemba persisted in her testimony that when she paid the money to the accused through her husband, it was specifically for her to be assisted to travel to Canada. She had been convinced that the accused was employed by the High Commissioner for refugees and that she would arrange everything for their travel, including their accommodation for a month. They had also been convinced that the accused was responsible for all their travel arrangements.

[46] Ms Muliangala Akwak Geogine: She testified that she is a resident of Osire Refugee Camp since April 2014. She came from Democratic Republic of Congo with her family of 11 people. They left Democratic Republic of Congo on the 25 October 2013 because of the war. She did not know where they were going and later on arrived in Zambia. Whilst in Zambia, their elder brother, now deceased decided about their way forward. Her deceased brother decided that they had to move and he sought transport for them and they followed suit. The transport took them to the border of Namibia. In Namibia they presented themselves as Refugees whereafter they handed their travel documents to the authorities. It was discovered that the travel documents did not bear the Zambian border stamps. They had not presented their travel documents upon their arrival at the Zambian side of the border. They had not travelled before.

[47] Ms Muliangala testified that she has never left her country before and did not know what to do. They were taken back to the Zambian side of the border because of the lack of stamp from the Zambian side but found the border closed. They returned to the Namibian side whereafter they were taken to the Katima Mulilo police station. They remained at the police station for 5 to 6 months whereafter they were taken to Osire Refugee Camp.

[48] Earlier, she met the accused in the bus as they travelled but she was not interested in what the accused was doing.

[49] Ms Yakasa Mawe Rachel; She testified that she is a resident of the Osire Refugee Camp but at times travels to Okahandja and Windhoek where she works as a hairdresser. After leaving DRC they arrived in Zambia. She travelled together with her family. In Zambia they did not have any family but their brother would go out in order to seek assistance.

[50] From Zambia they all travelled to Namibia by bus and were kept at Katima Mulilo Police station whereafter they were taken to Osire Refugee Camp.

[51] Ms Annety Kabuba Nchindo a former member of the Namibian Police Force testified that, she has been a police officer for 16 years. During October 2013 she was stationed at Wenela Border post and served as the Station Commander. Wenela border post is between Zambia and Namibia. Her duties were to maintain law and order and to ensure that all persons entering Namibia were complying with the right procedures. Further, that entrants present their travel documents upon entry into Namibia.

[52] The set up at the Wenela border post is that there are offices which are occupied by Immigration and Customs officers. No one is allowed to leave Namibia without travelling documents. Such documents must indicate where you are travelling to. Likewise, a person entering from elsewhere must present a valid passport. In between the Namibian and Zambian border posts, is a place called no man's land.

[53] On the 31st October 2013 she was on duty at the Namibian border post. After allocating duties to the members, she stationed herself at the main gate in order to see and search all the people who were entering from the Zambian side as well as those going to Zambia. She specifically searched a bus that arrived from Zambia.

[54] According to her, after the bus stopped, the accused was the first passenger to disembark. Accused entered the immigration office as other passengers started to disembark as well. She assumed that all the passengers had disembarked from the bus, and was waiting to see the bus driver. A while later the bus driver came and she

approached him in order to alert him about her intention to do a search inside the bus.

[55] Permission was granted to do a search and the witness immediately entered the bus. After she entered the bus, accused also entered the bus, she was surprised when she discovered that there were some passengers sitting on the chairs inside the bus. These passengers were nine in number. She questioned the passengers about what was going on and the reason why they did not disembark from the bus and have their passports stamped. She did not get any response as they could not understand one another. The witness approached one lady and a young boy whereafter the accused retorted that the boy was her child. She did not pay much attention to the accused, but went on to inquire about the passengers' passports. The passengers that were not able to communicate started pointing at the accused. At that moment one of the passengers whom she came to identify as Nzinga Muyuka Sylvie informed her that their passports were in the accused's possession.

[56] Due to the miscommunication, the witness decided to call one of the officers who could communicate in the Swahili language. The officer arrived and questioned the accused about the passengers' passports which the accused produced by throwing them before the officer. At that stage the witness stood next to the door of the bus and could clearly see what was happening.

[57] The accused had taken the passport from her black bag. After the passports were thrown on the ground, the officer picked them up as another officer also got on the bus. They started to check the passports in order to determine if they belong to the nine passengers who remained on the bus. They checked the photos on the passports as well as the names, whereafter the witness retained the passengers' passports.

[58] It was discovered that the passports did not bear the Zambian departure stamp or the Namibian arrival stamp. Again, the nine passengers were requested to disembark from the bus. The accused was also requested to submit her passport to the witness. Her passport showed an entry as well as a departure stamp from Zambia. The accused was again questioned about the boy she claimed was her son,

whereafter she produced a certain document from Zambia bearing her names, Abigail Bashala and family. The nine passengers were later driven to the Katima Mulilo police station.

[59] According to the witness, the accused told the nine passengers not to disembark from the bus whenever they got to a border post. The witness collected all the passports and kept them. The accused was later on charged with the offence of smuggling of immigrants on the basis that after she was questioned, she could not explain how the nine passengers came about to be on the bus, and she was hiding their travelling documents at the time. It was further explained to the witness that the accused was well known at the borders before she took possession of the passengers' passports, which were never stamped upon entry into Namibia.

[60] Mr. Percy Lubasi Limbo: He testified that he has been a member of the Namibian police for the past 18 years. He was stationed at Katima Mulilo during October 2013 at the Wenela border post. His duties involve the protection of the people moving in and out of Namibia. He was also required to protect government properties as well as institutions around the border post.

[61] On the 13 October 2013 whilst on duty, he saw the accused at the Wenela border post. He had been tasked to search people and the vehicles arriving at the border post. During the search he discovered some passengers inside a bus. These passengers had not presented themselves to the immigration officers. He further discovered that the passengers had no passports in their possession. Their passports were in the accused's possession. At that moment the accused dropped the passports on the ground, whereafter the witness picked them up in order to examine them. It was discovered that none of the passports bore the departure stamp from Zambia. The accused was thereafter charged.

[62] Mr. Rafael Simasiku: He is also a member of the Namibian police and stationed at the Katima Mulilo police station. His testimony is that during October 2013 he was attached to the Prevention of Organised Crime Unit. His duties entails the prevention of money laundering and smuggling of migrants across borders.

[63] He came to know the accused on the 30th of October 2013 after he received a call from Ms Nchindo who at the time was stationed at the Wenela border post.

[64] Ms Nchindo arrested some persons whom she thought were victims of smuggling from another country into Namibia. It was further explained to him that the victims had not reported themselves to the Immigration officials, and had no passports in their possession at the time. Upon further inquiries it was explained that the accused had directed the victims not to report themselves to immigration officials whenever they arrive at any border post because the accused will be responsible to do all the paperwork for them.

[65] Ms Celestine Shotete Alwendo testified that she is employed by the Ministry of Home Affairs, Immigration, Safety and Security under the Namibian Police Directorate. She is attached to the Criminal Investigation Directorate in the High Profile Crime Investigation Division. In the unit they are mandated to investigate matters related to the smuggling of immigrants, trafficking in persons as well as high profile cases.

[66] She is the investigating officer in this case which was formally investigated by the former head of the subdivision Directorate Chief Inspector Van Wyk. She holds a rank of a Detective Inspector. During her investigations she found out that one of the state witnesses has since died and three of the witnesses were given 90 days to leave the country after their applications for refugee status were declined by the Ministry of Home Affairs. The witness who died is Muliangala Bual-A-Kwil. The ones that were declined refugee status are Mimunu Ngende Ariston, Fega Roy and Mumbala Feli Kimona. These witnesses' whereabouts are unknown. Attempts to trace them had been made however they could not be found as such they could not testify before court.

[67] Other investigations Ms Alweendo carried out were the analysing of Bank statements that she received and also obtained few statements from some of the witnesses that testified before court.

[68] Ms Otilie Kariko; She was previously employed by Standard Bank Namibia, Otjiwarongo branch as a branch manager. She completed her grade 12 then at the Augustinium Secondary School in 1983. In 1984 she completed her certificate in Private Secretary at the Academy for Tertiary education by that time which is currently Namibia University of Science and Technology or NUST. She continued her studies and obtained a Diploma in National Public Administration in 2002. She attended the Credit Evaluation program in the United States and obtained a Certificate in Credit Evaluation process in banking. Currently she is pursuing a bachelor's degree in Business Administration, she has 34 years' experience in the banking industry.

[69] Ms Kariko testified that she knows the accused as her previous client. They had a good relationship because of the accused's friendliness. Accused had been a frequent client.

[70] With regard to the case before court, Ms Kariko was approached by the previous investigating officer Inspector van Wyk. The Inspector requested a bank statement of the accused for a specified period of time to which she complied.

[71] Having been requested to provide information from the bank, she found out that the accused was receiving numerous amounts of money through Money Gram.

[72] These monies that came through her statements and other monies were cash withdrawals. She specifically concentrated on the period of the month of January 2017 up to December 2017.

[73] The witness explained how Money Gram works. That it is a system introduced to the bank usually dealing in foreign currency. The system uses only US dollars. When one is abroad and wishes to send money to any country which is assigned to do the transaction on the other side, the person must identify him/herself positively with a valid identification in the form of a passport before he/she sends the money to the person in another country. After the transaction has been processed abroad, it pops up a pin number to the client who is going to receive the money. The client who receives the pin number on the other side will approach the bank with the pin

number, which must be provided to the bank. By the time the client comes to the bank the system has already received the money of the client into the bank's account and into their system. The pin number received by client is compared by the bank to the monies, the pin number on the system and the money received. The client is asked to verify who the sender of the money is and when correctly verified the bank proceeds to process the transaction. The money will usually either be paid out cash or it is paid into the client's account upon request.

[74] Ms Kariko testified that during January 2017 as per the bank records there were transactions done through the accused's account as well as cash taken. The total cash received during January 2017 by the accused was N\$14 913,62. This transaction was reflected on the form received from the accused when she collected the cash amount. This form was handed to the police.

[75] In the month of February 2017 the total amount received by the bank was N\$47 453,72. From that amount N\$2 624,40 was deposited into the accused's account whilst N\$5 736,51 was also deposited into her account, the rest was cash taken. Another amount of N\$5 244,36 was also deposited. Some amounts were deposited from the amounts she withdrew, others were done through her instructions to deposit the amounts into her account.

[76] During March 2017 the accused received a total of N\$31 657,09 which amount was taken in cash. No deposit was made into the accused's account. The amount of money was received on different dates during the month of March 2017.

[77] In the month of April 2017 the accused received an amount of N\$30 202,20 all in cash. She made no deposit into her account in the month of April. A cash deposit was made into her account as reflected on her bank statement at the time she withdrew the money.

[78] In the month of May 2017 the accused received a total amount of N\$6 931,03 all in cash. Whilst in June 2017 she received a total amount of N\$83 866, 94. Amounts of N\$3 139,33, N\$9 457,28 and N\$5 043,88 were directly deposited into the accused's account. These deposits were made by the bank.

[79] During the month of July 2017, there were six transactions all in cash totalling N\$9 372,46 which were taken in cash.

[80] In August 2017, the accused received N\$65 805,60 from which N\$5 809,23 was deposited directly into her account. Whilst in September 2017 there were only two transactions deposited into the accused's account. Accused's account totalled N\$5 313 and it was taken cash.

[81] Accused did not receive any money through Money Gram during the month of October 2017.

[82] During the month of November 2017 there was only one transaction totalling N\$4 658, 67, which accused took in cash. There were no transactions in the preceding month of December 2017. Ms Kariko could however not testify about the source of the money, neither dispute the claim that it was proceeds from rent of the accused's properties in the Democratic Republic of Congo.

[83] Mr. Jacobus Gert van Wyk: He is a retired Chief Inspector in the Namibian Police and formerly attached to High Profile Subdivision testified that his mandate was to deal with cases of smuggling and trafficking in persons involving high profile persons as complainants and accused persons. He served in the Namibian Police for 34 years. He came to know the accused after he arrested her in November 2018. He arrested her on several cases of smuggling of immigrants. He had done the primary investigations until the arrest.

[84] During the cause of his investigations, one of the complainants, Gilanda Dina Carine, the forth state witness submitted a statement in which she explained that she deposited money through a certain pastor David into the accused's account. The deposit slip was provided to him and is marked as Exhibit "C" a Trust Merchant bank SA deposit slip. The deposit slip indicates an amount of 3 000 US dollars deposited on the 23rd of August 2017. That amount was allegedly deposited in Lumbumbashi and bears the complainant's particulars and signature. Exhibit "C2" also indicates an amount of 3 000 US dollars deposited by the complainant Gilanda Dina Carine. The

complainant also relayed to him that they were transported to the border of Namibia and they entered Namibia through an ungazetted point on foot and used a canoe to cross the Zambezi River. Upon arrival in Namibia they approached the Red Cross offices whereafter they were transported to Osire Refugee Camp.

[85] It was also during the cause of the investigations that a document marked Exhibit "D" dated 19 March 2018 was handed over to him by one of the complainants indicating payments received by the accused addressed to a certain Pastor David Eliko. The said document does not explain what the payments were made for and bears the stamp of the office of the Judiciary, the Magistrate Otjiwarongo and is signed by the accused. It was also established that the accused worked as an interpreter at the Magistrate's court, Otjiwarongo during that time.

[86] The complainant Gilanda Dina Carine also relayed to him that accused facilitated the smuggling in of her daughter whereby she was asked to pay 200 US dollars. Her daughter arrived 2 months after the payment was made. It was also during the cause of the investigations that photos of the accused were shown to him by the complainant on her cell phone which were later printed out. These photos were shown to the complainants in order to convince them that the accused was a genuine agent for the United Nations High Commissioner for Refugees who will be responsible to facilitate their exit from Namibia. These photos were admitted into evidence as Exhibit "E". The photos indicates the accused person. In one of the photos, accused is wearing a lawyer's gown standing in the middle of two uniformed police officers, as well as the accused's Namibian copy of identification document. It was further indicated by the complainant Carine that accused had been engaged with them through telephonic conversation whilst they were still in Congo and when they were travelling through Zambia to Namibia.

[87] Another complainant, Live Kafutshi Fumudiya also relayed to him that she made a deposit through the same Pastor David Eliko and handed in her deposit slip. The deposit was made on the 23rd of August 2017 in the amount of 2 600 US dollars marked Exhibit "F" and "F2" respectively. The deposit slip bears the complainant's name and signature. That complainant relayed to him that she travelled in a truck until Otjiwarongo from Zambia. She was in constant communication with the accused

until she reached Otjiwarongo and accused picked her up at the Otjiwarongo service station. She was taken by the accused to her house, a shack was offered to her and she had to pay rent for it. Later on, the accused advised her to report herself at the police station as a refugee, she complied, after which she was transported to Osire Refugee Camp. Apart from the deposits made, there were also claims that the accused received cash payments but no documents could be provided that such payments were made. This resulted in the witness filing a notice in terms of section 179(1) (b) of the Criminal Procedure Act 51 of 1977 as amended, it reads as follows:

'(b) If any police official has reasonable grounds for believing that the attendance of any person is or will be necessary to give evidence or to produce any book, paper or document in criminal proceedings in a lower court, and hands to such person a written notice calling upon him to attend such criminal proceedings on the date and at the time and place specified in the notice, to give evidence or to produce any book, paper or document, likewise specified, such person shall, for the purposes of this Act, be deemed to have been subpoenaed so to attend such criminal proceedings'

This notice was handed to the bank manager of Standard Bank Otjiwarongo branch on the 16 November 2018. The notice was received in evidence as Exhibit "G". A request for the accused's bank statements from 1st of January 2017 to 16 November 2018 was made which led to the investigations regarding information surrounding the smuggling of persons from the Democratic Republic of Congo to the Osire Refugee Camp that had reached the police. This information was communicated to the Inspector General of the Namibian Police and a letter was compiled and sent to the Otjiwarongo Regional Office. However, the investigations were not done by the Regional office.

[88] During the year 2018 there were many foreign immigrants that arrived in Otjiwarongo and the accused was receiving more money from Money Gram which suggested that she was involved in the incidences of immigrant smuggling. It was also established that there was more money being received from the complainants, which suggested further that there might be more persons involved. It also emerged through investigations that there were still other suspected smuggled persons who did not want their names to be revealed for fear of their lives. Those complainants

who entered Namibia at ungazetted entry points were able to point out their entry point into Namibia after crossing the Zambezi River. They also pointed out a place where they had a meeting with the accused in Otjiwarongo whereafter a photo plan was compiled.

[89] With regard to the explanation given by the accused, during the investigations she informed the Investigating Officer that the money she was receiving through Money Gram was proceeds from the house she was renting out, making reference only to a single house. The Investigating officer denied that the accused had told her about several houses and a farm being rented out. He concluded that the accused had not proffered a reasonable explanation considering the amount of money she was receiving, because the amounts have not been consistent.

Evidence on behalf of the accused

[90] The accused met Mr. Kasongo Tambala in Zambia at the Inter City Bus Station during October 2013. He was in the company of his wife and two children. She had earlier on met Ms Kasongo Silvie, Mr. Kasongo's wife. Ms Kasongo approached her and told her that she was speaking her language and asked her whether she was a Congolese national which she confirmed.

[91] Ms Kasongo Silvie informed her that since their arrival in Zambia, they could not get assistance from anyone, in order to buy themselves food and also to pay for their accommodation due to the challenge in communication. Ms Kasongo related to her further that she was travelling to Namibia but did not know where she could buy their tickets. She also did not know how she could exchange the money in order for her to buy food and pay for their accommodation. She requested her to exchange the money from US dollars into the local currency. As it was not her first time to travel to Zambia, she offered to assist. They went together and approached the boys who were offering money for exchange on the streets. She managed to exchange the 500 US dollars which Ms Kasongo had at the time into Zambian kwachas. The money was handed over to Ms Kasongo after which she informed her that they had to buy tickets for herself, her husband and their two children. The tickets were bought for the two adults at an amount of 120 US dollars each and for the two minor

children at half price of 60 US dollars each. In total 360 US dollars was used on the tickets.

[92] According to the accused the balance was used by Ms Kasongo to pay for their accommodation. She did not accompany her to their hotel.

[93] The following morning accused met the husband of Ms Kasongo and their children. Ms Kasongo again requested her to exchange 500 US dollars before the bus departed. They went to the same place and exchanged the US dollars into Namibian currency after she had advised Ms Kasongo to instead use South African rands which is also used in Namibia. 100 US dollars was exchanged for 950 rands and in total accused received 4 750 Rands. Ms Kasongo asked her to keep the money during the journey after they counted it together.

[94] During the journey, Ms Kasongo would ask accused to buy them food and to pay for the toilets used at any town when the bus had to stop. They finally arrived at the Zambian-Namibian border where the accused disembarked from the bus and had her passport stamped.

[95] After accused returned to the bus she found Ms Kasongo being questioned by the police and asked her to translate for her as she did not understand the English language the officer spoke at the time. It was also decided that the bus be searched. Each passenger was required to take their luggage from the bus. After the searches were conducted, police officers requested for the passengers' passports and it was when Ms Kasongo referred the police to her husband. Her husband removed four passports from his jacket whilst still inside the bus. After the passports were checked by immigration officers, it was noted that there were no visas on their passports. It was then decided that the passengers should return to the Zambian side from where they came from.

[96] Accused in the meantime handed over the balance of 4 500 rands to Ms Kasongo before she left. Other passengers were arrested. Again, the accused was requested to translate for those passengers that remained.

[97] According to the accused's explanation with regard to Ms Kasongo, her husband and their minor children not having visas, Ms Kasongo was under the impression that she will obtain visas at the Namibian border. In the meantime accused was arrested and detained on allegations of migrant smuggling in respect of the 1st 2nd and 3rd counts. She denied the allegations.

[98] In respect of counts 13, 14 and 15, accused recalls meeting Ms Carine in Otjiwarongo after receiving a call from an unsaved number about 10am in the morning of the 16th of December 2017. The caller informed her that she was given her number by one David and introduced herself as Carine. Accused claimed that the caller was at Osire Refugee Camp at the time. Carine requested to see her the following Monday at work at the Otjiwarongo magistrate's court where she was employed as an interpreter.

[99] With regard to the person Carine claimed to have obtained accused's contact number from, she testified that David was the man taking care of her properties in DRC. He was the one responsible to rent out properties and she would pay him a salary which was deducted from the rent received, because she could not send money from Namibia.

[100] Accused maintained that Carine informed her by a text message that she will come by bus from Osire Refugee Camp to Otjiwarongo but did not explain why she wanted to see her, promising to tell her later when they meet. She then offered to pick her up after she arrived. Carine informed her that she had money which she wanted to exchange because she wanted to buy materials to build a house at Osire Refugee Camp. Carine explained further to her that she had 400 US dollars but did not have a passport which could help her to identify herself when exchanging the money. She only had the Arrival form used by refugees for exiting the camp or when seeking medical attention. It was on that basis that accused offered to assist Carine and requested her to go to her house. At the accused's house, Carine removed 400 US dollars from her body. She offered her shoes and pieces of clothing before they left for the bank.

[101] At the bank, accused completed the relevant forms and presented them on her behalf, whereafter she was given N\$5000 at an exchange rate at the time. After the exchange, accused handed over the money to Carine whereafter they parted ways.

[102] On another date she could not recall, Carine related to her that she was married and she and her husband had two children. She also informed her that her husband was in Angola. They met again during the Refugee day celebrations about June 2018, or 2019 at Osire Refugee Camp before she was arrested.

[103] During the celebration of the Refugee day, accused met Carine in the company of Live, the complainant in respect of count 15. They had a discussion. It was during that discussion when Carine revealed that she met David who informed her that the accused will give them money and also help them to migrate to Canada. Carine also claimed that the money was deposited in the account of David, who in turn was to transfer the money into her account. Carine showed her a document. Accused denied to have received any money from David. After they had spoken, she was not interested but instead offered to make a follow-up with David whereafter she left Osire Refugee Camp.

[104] Accused met Carine on another occasion after the Refugee celebration but had no further communication with her.

[105] In respect of the charges on count 13, that accused brought Carine's daughter Weaston Disambata into Namibia, she testified that she only became aware of such allegations after her arrest. She denied having assisted in the transportation of Carine's daughter from Congo to Namibia. She also denied to have received payment for such travelling from Carine. She saw Carine's daughter for the first time at court.

[106] Accused further testified that she was contacted by Live who also claimed to have gotten her contact number from David. At the time Live was already in Namibia. Live informed her that she wanted to see her. They met and she related to her that she was in trouble because she only had a visa for 14 days which had already

expired. Live sought her assistance for an extension or alternatively to return to Congo. Accused advised Live to present herself to the police and explain her situation in order to seek refugee status and be taken to Osire Refugee Camp.

[107] She met Live again on the 20th of June 2018 for the second time at the Osire Refugee Camp.

[108] According to Accused, she used to receive money from David through Money Gram. David was a former body guard of her late husband. He was the person who assisted her to escape from Congo whereafter she came to Namibia, after her husband was killed. Accused has since lost contact with David. She denied to have received any money from Live for her to make arrangements to travel to Canada.

State's submissions

[109] After accused had testified in her defence, the state submitted that the accused be convicted on the first, second and third counts respectively as well as on counts 13, 14 and 15.

[110] It was submitted that in respect of the 3rd count, Ms Kasongo narrated how they left Congo with her husband and her two children after an attack on them. They arrived in Zambia where she met the accused. Accused assisted her to buy their tickets after she had requested her to exchange the 500US\$ into the local currency. Accused finally bought the bus tickets whereafter they boarded a bus which took them to the Zambia-Namibia border. Upon arrival, accused instructed the people in the bus not to disembark which led them to be interrogated by the police.

[111] It was further submitted that at the time, accused was the one in possession of the couple's money which she retained throughout the journey. That money was

only returned to the couple upon demand by the police. Mr. Kasongo corroborated his wife's evidence that they were instructed to remain seated in the bus and henceforth did not present their passports to immigration officers.

[112] It was further the state's submissions that Carine was assisted by pastor David in Lusaka, Zambia after she had deposited money into accused's account. That payment was meant to facilitate her smuggling into Namibia. Accused had been communicating with her and others through telephonic conversation whereby the phone is put on loud speaker. They had been shown the accused's photo which convinced them that accused was an influential person in Namibia. There had been an agreement with the accused whilst Carine was still in Lusaka, that she will facilitate her travel to Canada. Therefore upon her arrival in Namibia she paid 300US dollars for her trip to Canada to the accused. Another 200US\$ was paid to the accused in order to facilitate the daughter of Carine's arrival in Namibia from Congo. The daughter arrived after two months with one Eric by truck. That evidence was corroborated by Devine Yemba who also testified that she arrived in Namibia by canoe through the Zambezi River. She had also been promised documents to travel to Canada after her husband had made payments to the accused.

[113] The state further submitted that Ms Fumudiya corroborated Carine's evidence with regard to prior communication with the accused before her arrival in Namibia. She travelled and met the accused in Otjiwarongo whereby she contacted the accused. She was earlier on provided with a photo depicting the accused which enabled her to recognise the accused. That photo was provided by Pastor David and at the time of her arrival in Otjiwarongo, her luggage was already at the accused's place having been left there by Carine. Accused accommodated her for a while and she paid her 500US\$ in person to facilitate her trip to Canada as earlier on agreed.

Defence's submissions

[114] Mr. Kamwi submitted that indeed counts 1, 2 and 3 are connected in that the complainant in count 1 is a husband of the complainant in respect of count 2 and further that the complainant in count 3 is their daughter. It was further submitted that Mr. Kasongo and his daughter have had no communication with the accused

whatsoever throughout their journey from Zambia. The accused dealt mostly with Ms Kasongo who acted as an agent on behalf of her family.

[115] It was further submitted that accused only assisted Ms Kasongo to purchase tickets and to exchange the US dollars Ms Kasongo had at the time. That was done in order to facilitate the buying of the couple's tickets to travel to Namibia. The reasons advanced were that Ms Kasongo had a challenge to communicate in English. It was her testimony that she did not pay the accused for the assistance rendered.

Analysis of the evidence

[116] There appear to be no dispute that accused met the complainant in respect of counts 1, 2 and 3 respectively. Accused on her part does not dispute the fact that she assisted these complainants whom she met in Zambia at the bus terminal. She has denied to have received any payment for having rendered her assistance in buying them bus tickets they used to travel to Namibia. These complainants also testified that they were not requested by the accused to offer her payment whatsoever. In order to sustain a conviction on charges of smuggling of immigrants the state has a duty to prove all the elements of the offence charged.

[117] The elements of the offence of smuggling of immigrants consists of the following:

- (a) Procuring the illegal entry of another person;
- (b) into another country or state;
- (c) for the purposes of financial or material benefit or gain.

[118] In respect of complainants in counts 1, 2 and 3 Ms Kasongo, the complainant in count 2. Her testimony is that they sought peace after they run away from their country Congo, due to the war that resulted in insecurity for them. They arrived in Zambia whereafter they proceeded to Namibia. Their sole purpose was to seek peace. Though they had been in possession of their passports, they did not present the passports to the immigration officials upon arrival at the borders of Namibia.

Indeed that would constitute an illegal entry. There is evidence which has also been confirmed by the accused that due to the lack of communication, assistance was rendered by the accused in order to exchange the US dollars they had at the time, in order to buy their bus tickets before they travelled to Namibia. Ms Kasongo however maintained that she did not pay the accused for the assistance rendered to them. It might be the case that the accused upon arrival had indicated through gesture that the passengers should not disembark from the bus, as alleged, however, the other elements of the offence has also not been proven, which is for the purposes of a financial or material benefit or gain. It is trite law that no onus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if that explanation be improbable, the court is not entitled to convict unless satisfied, not only that the explanation is improbable, but also that beyond any reasonable doubt, it is false¹.

[119] Ms Kasongo's explanation is that she approached the accused because she heard her speak her language. She requested the accused to assist her to exchange the money she had in US dollars into local currency to enable them to buy bus tickets. Whereafter accused assisted them and did not demand any payment which suggest there was no financial or material benefit or gain derived by the accused. As a result the accused is entitled to the benefit of doubt in respect of the first, second and third counts respectively.

[120] Moving on to counts 13, 14 and 15. Evidence led by the state is that accused demanded payments from Carine and Fumudiya after an agreement was reached between them that accused was to facilitate their travel to Canada. Though accused had denied to have received money from the two complainants, it was established that accused constantly received money through Money Gram at Standard Bank Otjiwarongo. These monies were in US dollars, and were not always consistent. The amounts received clearly could not have been proceeds from accused's houses which she claimed to have been renting.

[121] When dealing with circumstantial evidence it is the court's duty to consider every fragment of evidence individually to determine how much weight it had to be

¹ S v Shaanika NR 247 at 252 – G.

accorded. It is therefore the cumulative impression, with all the fragments made collectively that had to be considered in order to determine whether the accused's guilt had been established beyond reasonable doubt. It is in the above context that when the evidence of Carine and Fumudiya is being considered, one should not lose sight of the fact that crimes of immigrant smuggling involve syndicates whereby at times, people are not easily traceable. It is therefore usually very difficult to detect.

[122] Ms Devine Yemba's evidence corroborates the two state witnesses' versions as far as payments were made to the accused and the promises to relocate them to Canada is concerned. Both Ms Carine, her daughter and Ms Yemba entered Namibia by Canoe through the Zambezi River and not through the border post. It was her evidence that accused contacted them through third parties to whom deposits were made for the accused's benefit. Hence, in order to protect the vulnerable members of our society the law does not demand that one should act upon certainties alone, but, the courts ought to act upon just and reasonable grounds.

[123] Therefore, having regard to the totality of the evidence adduced and bearing in mind the authority in the celebrated case of *Miller v Minister of Prisons*² where Lord Denning put it as follows:

'It need not reach certainty, but it must carry a high degree of probability, beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice.'

[124]The accused's defence is a mere denial and it cannot be reasonably true and hence, it stands to be rejected.

[125] This court is satisfied that accused committed the offences charged in respect of counts 13, 14 and 15 respectively, and she is found guilty as charged and convicted accordingly.

² *Miller v Minister of Prisons* 1947 2 AU ER 372 at 373

D N USIKU

Judge

APPEARANCES

STATE: Ms Felistus Shikerete
Of Office of the Prosecutor-General

ACCUSED: Mr. Kalundu Kamwi
Of Kamwi Legal Practitioners