

REPUBLIC OF NAMIBIA

HIGH COURT OF  
WINDHOEK  
REVIEW JUDGMENT



NAMIBIA MAIN DIVISION,

<b>Case Title:</b> The State versus Simonda Conrad Wamunyima Kasuka	<b>e No: 114/2022</b>
<b>Heard before:</b> Hon. Judge Liebenberg <i>et</i> Hon. Judge Shivute	<b>Division of Court:</b> Main Division
<b>Delivered on:</b> 21 October 2022	
<b>Neutral citation:</b> <i>S v Conrad &amp; Another</i> (CR 114 /2022) [2022] NAHCMD 574 (21 October 2022)	
<b>The order:</b>  a) The conviction and sentence in respect of accused 1 are confirmed. b) The conviction and sentence in respect of accused 2 are set aside. c) If accused 2 is in custody, he must be released forthwith. d) If accused 2 paid a fine, he must be refunded.	
<b>Reasons for order:</b>	
SHIVUTE J ( LIEBENBERG J concurring):  [1] In this matter accused 2, Kasuka Wamunyima, was charged alone in respect of count 1; entry into Namibia at any place other than a port of entry in the district of Katima Mulilo namely, Stone City on the 23 <sup>rd</sup> day of October 2021, contravening section 6(1) read with sections 1, 2 and 10(3) of the Immigration Control Act 7 of 1993.  [2] Accused 1 and 2 were charged with count 2 namely; entry into Namibia at any place other than a port of entry that is alleged to have taken place in the district of Katima	

Mulilo on 15 September 2021 at Chantuhu, contravening section 6(1) read with sections 1, 2 and 10(3) of the Immigration Control Act 7 of 1993.

[3] Count 1 was withdrawn against both accused, however, the annexure indicates that count 1 was only in respect of accused 2. The accused persons pleaded guilty to count 2 and the court applied section 112(1)(b) of the Criminal Procedure Act 51 of 1977 (CPA). Accused 1 was convicted accordingly, however, accused 2 was convicted of count 1, the charge that was withdrawn against both accused persons. The accused persons were sentenced to a fine of N\$2000 or in default of payment eight months' imprisonment.

[4] I directed a query to enquire why accused 2 was convicted of count 1 which was withdrawn.

[5] The magistrate responded that it was an error from the court's side in granting the application for withdrawal. Further, that both accused were charged with one count each of contravening section 6(1) read with sections 1, 2 and 10(3) of Act 7 of 1993 and that the offences were committed on different dates by each individual accused person. The magistrate goes further and state that the record should have clearly reflected that accused 1 was charged with count 1 and accused 2 charged with count 2. The magistrate makes a worrisome statement in him/her response that the accused persons are not prejudiced as they were convicted of one count each despite the wrong indication.

[6] Section 156 of the Criminal Procedure Act 51 of 1977 makes a provision for persons committing separate offences at the same time and place who may be tried together under the following circumstances:

'Any number of persons charged in respect of separate offences committed at the same place and at the same time or at about the same time, may be charged and tried together in respect of such offences if the prosecutor informs the court that evidence admissible at the trial of one of such persons will, in his opinion, also be admissible as evidence at the trial of any other such person or such persons.'

[7] The accused persons in the present matter committed offences on different dates and at different places. Therefore, it was wrong for them to be jointly charged.

[8] Accused 2 being convicted of a charge that has been withdrawn against him is prejudicial for him as he was wrongly convicted. It is apparent that the presiding magistrate did not exercise his/her discretion judiciously and failed to apply his/her mind when questioning the accused in terms of section 112 (1)(b) of the CPA. Therefore, the conviction and sentence cannot be allowed to stand and must be set aside.

[9] In the result, it is hereby ordered that:

- a) The conviction and sentence in respect of accused 1 are confirmed.
- b) The conviction and sentence in respect of accused 2 are set aside.
- c) If accused 2 is in custody, he must be released forthwith.
- d) If accused 2 paid a fine, he must be refunded.

<b>N N SHIVUTE</b> Judge	<b>J C LIEBENBERG</b> Judge