

1REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

PRACTICE DIRECTIVE 61

<b>Case Title:</b> <i>S v Gavin Kneale</i>	<b>Case No:</b> CR 127/2023
	<b>Division of Court:</b> Main Division
<b>Coram:</b> January J et Christiaan AJ	<b>Delivered on:</b> 16 November 2023
<b>Neutral citation:</b> <i>S v Kneale</i> (CR 127/2023) [2023] NAHCMD 744 (16 November 2023)	
<b>ORDER:</b> 1. The conviction and sentence are set aside.	
<b>Reasons for the above order:</b>	
CHRISTIAAN AJ (JANUARY J concurring):  [1] The accused appeared in the Keetmanshoop Magistrate's Court on a contravention of the Immigrations Control Act 7 of 1993 (the Act). The accused pleaded guilty and was convicted of a contravention of s 12(1) read with s 1, 2, 4 and 12(4) of the Immigration	

Control Act 7 of 1993. The State alleged that the accused not being a Namibian citizen or person domiciled in Namibia, entered Namibia without an unexpired passport bearing a valid visa or authority.

[2] When the matter came before me on review I queried the learned magistrate why the charge sheet failed to address the pertinent elements of the offence enjoined in s 12(1) and 12(4), namely; the refusal of entry and the failure of the accused to on demand by an immigration official produce an unexpired passport bearing a valid endorsement were not addressed in the charged sheet and s112(1)(b) questioning of the accused. Further, how the magistrate could have been satisfied that the accused admitted all the elements and whether the accused was correctly charged with contravening s12(1).

[3] The learned magistrate in his response conceded that he realised that the accused was not correctly charged and questioned with contravening s 12(1) the Act.

[4] While s 12(1) read with 12(4) of the Act stipulates:

‘(1) Any person seeking to enter Namibia who fails on demand by an immigration officer to produce to such immigration officer an unexpired passport which bears a valid visa or an endorsement by a person authorized thereto by the Government of Namibia to the effect that authority to proceed to Namibia for the purpose of being examined under this Act has been granted by the Minister or an officer authorized thereto by the Minister, or such person is accompanied by a document containing a statement to that effect together with particulars of such passport, shall be refused to enter and to be in Namibia, unless such person is proved to be a Namibian citizen or a person domiciled in Namibia.

(2)...

(3) ...

(4) If any person enters or has entered Namibia in contravention of the provisions of subsection (1) or, after having been refused to enter Namibia in terms of that subsection, is found in Namibia, he or she shall be guilty of an offence and on conviction be liable to a fine not exceeding R20 000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment, and

may be dealt with under Part VI as a prohibited immigrant.'

[5] With regard to count one, the charge did not contain the necessary averments to sustain the offence. The magistrate's inquiry under s 112(1)(b) of the Criminal Procedure Act, 1977 did not cover or follow the allegations made in the charge sheet. No questions were directed to the accused on whether or not they had previously been refused entry in Namibia by an Immigration Officer under s12 (1). Nor were admissions made to that effect and on a proper construction of ss (1) the magistrate could not have convicted the accused as charged. The exclusion of these pertinent elements enjoined in s12 (1) renders the charges defective.

[6] Ndauendapo J, with Siboleka J concurring in the *State v Okuani*<sup>1</sup> set aside the conviction and sentence and directed magistrates and prosecutors to make sure that the pro-forma charge sheets are corrected to have regard to the contents of these two sections. I see no reason why I should deviate from the corrective matter suggested in the *Okuani* matter.

[7] In the result:

The conviction and sentence are set aside.

P CHRISTIAAN ACTING JUDGE	HC JANUARY JUDGE

<sup>1</sup> *State v Okuani* (CR 07 /2013) [2013] NAHCMD 32 (5 February 2013)