

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI**

REVIEW JUDGMENT

Case No.: CR 16/2022

In the matters between:

THE STATE

v

PETRUS MATEUS

ACCUSED

HIGH COURT REF NO: (90/2021)

THE STATE

v

NDAHAMBELELA IIPINGE

ACCUSED

HIGH COURT REF NO: (94/2021)

THE STATE

v

AMUTENYA NUUGWANGA PAULINA

ACCUSED

HIGH COURT REF NO: (89/2021)

THE STATE

v

ZATUNDUMANA INNOCENT TJIPOSA

ACCUSED

HIGH COURT REF NO: (390/2021)

THE STATE

v

JOHANNES SHETWILWA

ACCUSED

HIGH COURT REF NO: (149/2021)

THE STATE

v

FRANS JOHANNES

ACCUSED

HIGH COURT REF NO: (352/2021)

THE STATE

v

PENOMBILI TITUS HAMALWA

ACCUSED

HIGH COURT REF NO: (304/2021)

THE STATE

v

JULIUS SHIIMI MVULA

HIGH COURT REF NO: (327/2021)

ACCUSED

THE STATE

v

NANYENI CONSTASIA NANDJAMBA

HIGH COURT REF NO: (411/2021)

ACCUSED

THE STATE

v

KAMATI PAULINA

HIGH COURT REF NO: (378/2021)

ACCUSED

THE STATE

v

PAULUS PETRUS

HIGH COURT REF NO: (353/2021)

ACCUSED

THE STATE

v

ISMAEL PANDULENI SHIWAONHENI NAUKUSHU

ACCUSED

HIGH COURT REF NO: (423/2021)

THE STATE

v

VILHO SHIPENA

ACCUSED 1

ROGILLIO DIERGARDT

ACCUSED 2

JULIUS SHINAVENE

ACCUSED 3

HIGH COURT REF NO: (328/2021)

Neutral citation: *S v Mateus* (CR 16/2022) [2022] NAHCNLD 39 (19 April 2022).

Coram: SALIONGA J and SMALL AJ

Delivered: **19 April 2022**

Flynote: Constitutional fair trial provisions- straightforward cases in the magistrates' courts- normally no disclosure to an accused of the evidence the State collected- minor offenses with no reasonable prospect of imprisonment- a properly formulated charge sheet is the only facility an accused requires to adequately prepare for his trial- vital that it be properly drawn.

Criminal Procedure- Charges- must contain particulars as to the time on and place at which the offence allegedly was committed- person against whom the crime has been committed- set out each essential element of the relevant offence.

Criminal Procedure- Section 112 of the Criminal Procedure Act, 51 of 1977 as amended- Correct charge- facilitates proper questioning in respect of all the

elements in terms of section 112(1) (b) of the Criminal Procedure Act, 51 of 1977 as amended.

Criminal Procedure- Section 112 of the Criminal Procedure Act, 51 of 1977 as amended- Conviction under section 112(1)(a) after a guilty plea on inadequately drawn up charge- can lead to an irregular conviction- guilty plea not an informed one-accused thus loses the protection afforded by the procedure envisaged in section 112(1)(b).

Summary: The thirteen cases, forwarded to the Northern Local Division of the High Court of Namibia for automatic review in terms of section 302 of the Criminal Procedure Act 51 of 1977 as amended dealt with magistrates' court cases in which the accused pleaded guilty to charges formulated under the Stage 4: State of Emergency - Covid-19 Regulations, published under Proclamation No. 33 of 14 July 2020 and under the Public Health Covid-19 General Regulations issued under the Public and Environmental Health Act, 1 of 2015. Six reviews relate to the selling of liquor, six relate to breaking of curfew regulations, and one related to failing to comply with an order to wear a mask. The accused in ten of the thirteen cases were convicted in terms of section 112(1)(a) of the Criminal Procedure Act 51 of 1977 as amended while three were convicted after questioning in terms of section 112(1)(b) of same Act. After finding that none of the charges preferred against the accused properly set out the charges against them, the Court on review set aside their respective convictions and sentences.

ORDER

In the result, the convictions and sentences imposed in respect of

1. Petrus Mateus (High Court Reference No. 90/2021-Outapi Case 132/2020),
2. Ndahambelela Ipinge (High Court Reference No. 94/2021-Outapi Case 130/2020),
3. Amutenya Nuugwanga Paulina (High Court Reference No. 89/2021-Okahao Case 78/2021),

4. Zatundumana Innocent Tjiposa (High Court Reference No. 390/2021-Opuwa Case OPU-CRM-107/2021),
5. Johannes Shetwilwa (High Court Reference No. 149/2021-Okahao Case 85/2021),
6. Frans Johannes (High Court Reference No. 352/2021-Eenhana Case 246/2021),
7. Penombili Titus Hamalwa (High Court Reference No. 304/2021-Eenhana Case A23/2021),
8. Julius Shiimi Mwula (High Court Reference No. 327/2021-Oshakati Case OSH-CRIM-4147/2021),
9. Nanyeni Constasia Nandjamba (High Court Reference No. 411/2021-Outapi Case 310/2021),
10. Kamati Paulina (High Court Reference No. 378/2021-Okahao Case 365/2021),
11. Paulus Petrus (High Court Reference No. 353/2021-Oshakati Case OSH-CRM-6036/2021)
12. Ismael Panduleni Shiwaonheni Naukushu (High Court Reference No. 423/2021-Oshakati Case OSH-CRM-6730/2021), and
13. Vilho Shipena, Rogillio Diergardt and Julius Shinavene (High Court Reference No. 328/2021-Oshakati case OSH-CRM-5013/2021)

Are all set aside.

JUDGMENT

SMALL AJ (SALIONGA J concurring):

[1] The aforesaid judgement deals with thirteen matters involving convictions of undefended accused for contraventions committed under the regulations issued, either under the Stage 4: State of Emergency- Covid-19 Regulations, published under Proclamation No. 33 of 14 July 2020 and later under the Public Health Covid-19 General Regulations issued under the Public and Environmental Health Act, 1 of 2015 (PEHA). The cases were forwarded to the Northern Local Division of the High

Court of Namibia for automatic review in terms of section 302 of the Criminal Procedure Act 51 of 1977 as amended (CPA).

[2] In all thirteen cases the accused pleaded guilty to the charges as formulated. The accused in ten of the thirteen cases were convicted in terms of section 112(1)(a) of the Criminal Procedure Act 51 of 1977 as amended (CPA) while three were convicted after questioning in terms of section 112(1)(b) of same Act. Sentences differ from fines with alternative imprisonment to fines with alternative imprisonment fully suspended on condition of not being convicted of a similar offence and in four of the matters suspending the sentences on an additional condition that the accused performs community service for periods between 150 and 200 hours.

[3] Six reviews relate to the selling of liquor under the regulations, six related to breaking curfew regulations and one related to failing to comply with an order to wear a mask. The offences relate to dates between 7 August 2020 and 24 September 2021. Therefore, it must be apparent that different regulations applied over this period as the Government regularly amended them in its attempt to minimize the spread of the virus.

[4] These regular amendments brought their challenges to law enforcement as the regulations applicable, say at the beginning of a given month' might be different from those applicable during the last days of the same month. If this was however a challenge to police officers, prosecutors, and courts, one can only imagine how confusing this was for members of the public. Either by not having access to the relevant regulations or simply misunderstanding the essentials of the regulations and contraventions formulated in them.

[5] I must extend my appreciation to the Legal Assistance Centre for its commitment to capturing these proclamations and regulations as an ongoing exercise. The way they updated, uploaded and ordered this on their website was invaluable in considering these reviews and of enormous assistance in identifying the applicable legislation while preparing the judgment.

General applicable principles

[6] Before this Court deals with the alleged contraventions, it is necessary to restate some of the general principles applicable in these matters. An accused is entitled to a fair and public hearing by an independent, impartial, and competent court if charged with any offence.¹ Such an accused has the legal right to be presumed innocent until proven guilty.² An accused must have adequate time and facilities to prepare for his trial and is entitled to be defended by a legal practitioner of his choice.³ No one can be tried or convicted of a crime if the act committed at the time was not a criminal offence. No penalty can be imposed that exceeds the one that was applicable when the offence was committed.⁴

[7] Our Courts recognise that in straightforward cases in the magistrates' courts, there is normally no disclosure to an accused of the evidence the State collected. There are no complexities of fact or law in these minor offenses, and there is no reasonable prospect of imprisonment. Disclosure does not necessarily follow if the accused can easily adduce and challenge the State's evidence. In such instances a properly formulated charge sheet is the only facility he requires to adequately prepare for his trial.

[8] This includes a substantial number of routine prosecutions in the inferior courts where there is little reason for allowing access to police dockets to ensure a fair trial for the accused. Hundreds of routine prosecutions for such minor offences occur every day in the magistrates' courts. In these cases, the accused can ensure his fair trial through an analysis of the charge sheet and proceeding from there. For obvious reasons a properly drafted charge sheet is vital in such cases.⁵

[9] It should go without saying that the so-called minor cases mentioned above include those dealt with under section 112(1) (a) of the Criminal Procedure Act 51 of 1977 as amended (CPA). Perusal of the section ⁶ makes it clear that the question of

¹ Article 12(1)(a) of the Namibian Constitution

² Article 12(1)(d) of the Namibian Constitution

³ Article 12(1)(e) of the Namibian Constitution

⁴ Article 12(3) of the Namibian Constitution

⁵ *S v Nassar* 1994 NR 233 (HC) at 263C-D generally. Principle set out in *S v Angula and Others*; *S v Lucas* 1996 NR 323 (HC) at 328D-E applying *Shabalala and others v Attorney-General of Transvaal and Another* 1995 (2) SACR 761 (CC) in paragraphs 36 and 38

⁶ 112(1) Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea-

whether to implement the aforesaid section is in the discretion of the presiding officer and not in that of the prosecutor.

[10] We regularly in reviews and appeals see presiding officers enquiring from the prosecutor what section should be applied. It is not the prosecutor's decision. Section 112(1) (b) of the CPA empowers a prosecutor to request the court to question the accused under the section after the guilty plea. If he does not make such request, a better approach for a presiding officer would be to indicate to the prosecutor that the court is thinking of convicting the accused on his plea in section 112(1)(a) of the CPA. And enquiring whether that would prejudice the State. This would allow the State to request that the questioning of the accused be done under section 112(1) (b) of the CPA.

[11] This will probably be in instances where the accused has a previous conviction, or the State is contemplating asking the court for a more severe sentence than the maximum mentioned under section 112(1)(a). If it does not use the opportunity, the court is then at large to exercise its duty in favour of section 112(1) (a) procedure.

[12] In deciding the course of action, the presiding officer must consider the offence's nature and seriousness, the possibility of compulsory sentences, and the particulars of the charge. When considering the specifics with the view of disposing of the case expeditiously, the judicial officer must look for indications that the offence is less severe. The amount of N\$6 000 mentioned in the section indicates that a court should not apply it for offences that warrant more severe or circumspect sentences.

[13] The policy behind section 112(1) (a) is clear. The Legislature provided machinery for the speedy and expeditious disposal of minor criminal cases where

- (a) the presiding judge, regional magistrate or magistrate may, if he or she is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding N\$6 000, convict the accused in respect of the offence to which he or she has pleaded guilty on his or her plea of guilty only and-
- (i) impose any competent sentence, other than imprisonment or any other form of detention without the option of a fine or a fine exceeding N\$6 000; or
 - (ii) deal with the accused otherwise in accordance with law;

the accused pleads guilty. The trial court is not obliged to satisfy itself by questioning whether the accused committed an offence but accepts his plea at face value. The accused thus loses the protection afforded by the procedure envisaged in section 112(1) (b), but he is not exposed to any severe form of punishment.⁷

[14] There can be no doubt that a properly drawn charge sheet is part and parcel of a fair trial in criminal matters. Such a charge contains particulars as to the time and place at which the offence allegedly was committed as well as the person against whom the crime has been committed. It furthermore informs the accused of the fundamentals of the charge.⁸ The description of any statutory offence in the words of the law creating the crime, or in similar words, shall be sufficient.⁹

[15] The charge should set out each essential element of the relevant offence.¹⁰ This facilitates proper questioning regarding all the elements in section 112(1) (b) of the CPA. When the court deals with the matter under section 112(1) (a) after a guilty plea, an adequately drawn up charge is vital because the evidence presented cannot cure a defective charge.¹¹ Questioning an accused in terms of section 112(1) (b) will, however, also only fix a defective charge if the questioning in terms of the section covers the actual elements of the offence and not those alleged in a slovenly drafted charge that does not cover all the offence's elements.

⁷ This has been reiterated by our courts repeatedly. See *S v Onesmus*; *S v Amukoto*; *S v Mweshipange* 2011 (2) NR 461 (HC) paragraphs 6 to 10; *S v Boois and Others* 2016 (2) NR 347 (HC) at paragraphs 11 to 12, *S v Aniseb and Another* 1991 NR 203 (HC) at 205I-206A and *S v Buridji (CR 13 I2021)* [2021] NAHCNLD 36 (11 March 2021) paragraphs 3 to 5.

⁸ In *S v Nghixulifwa* 2018 (4) NR 1027 (HC) paragraph 11 it was stated as follows: 'Though the section makes plain what should be contained in the charge, I find the commentary of Hiemstra's *Criminal Procedure* at 14 – 9 illuminating when stating that: "The heart and soul of a charge is that it has to inform the accused of the case the state wants to advance against him or her", while also referring to *S v Hugo* 1976 (4) SA 536 (A) at 340E-F; See also *S v Kapia and Others* 2009 (1) NR 52 (HC) paragraph 15, *S v Nakare* 1992 NR 99 (HC) at 100J-101A and *S v Campbell and Others* 1990 NR 310 (HC) at 313F-H

⁹ See section 84 of the Criminal Procedure Act, 1977 for essentials of a charge.

¹⁰ See section 85(1)(b) and 86(1) of the Criminal Procedure Act, 1977

¹¹ Section 88 of the Criminal Procedure Act 1977 provides as follows: 'Where a charge is defective for the want of an averment which is an essential ingredient of the relevant offence, the defect shall, unless brought to the notice of the court before judgment, be cured by evidence at the trial proving the matter which should have been averred.' See: *S v Bruwer* 1993 NR 219 (HC) at 220E-J and at 221I approving and applying *S v Tshivhule and Others* 1985 (4) SA 48 (V)

[16] Where time is of the essence to the offence, the time at which the offence was committed is crucial and must be contained in the charge's allegations. Specifying or refuting any exception, exemption, proviso, excuse, or qualification in the charge is not only expert and clever drafting but, more importantly, fully informs an accused why he is charged with the offence and what is being alleged against him. It assists the State¹² and simultaneously, fairly, and effectively, ensures that the plea of an unrepresented accused is an informed one.

[17] What has been set out is essential when drafting all charges but even more so for charges under the so-called Covid-19 regulations either issued under the Stage 4: State of Emergency - Covid-19 Regulations under Proclamation No. 33 of 14 July 2020 or under the Public and Environmental Health Act 1 of 2015. These regulations changed, in many instances substantially so, almost every fortnight to cater for the different scenarios as they developed. Regulations are also much easier and faster to amend than an Act of Parliament.

[18] Law enforcement officials, prosecutors in the office of the Prosecutor-General and the Courts must ensure that the correct and applicable charges are drafted for adjudication in court. Prosecutors must ensure that charges in terms of section 56 of the CPA drawn up by police officers comply with the Criminal Procedure Act, 51 of 1977 as amended, before they use it in court.

[19] Similarly, presiding officers who convicts and sentences an accused of an offence based on an inadequate charge must understand that they are not dispensing substantial justice to the undefended accused persons. Therefore, it is crucial when faced with an unrepresented accused that the court ensures that the charge, they are facing is formulated in a manner that appropriately and adequately informs them of the offence alleged against them. Especially if the court considers it an appropriate case for possible finalization in terms of section 112(1) (a) of the CPA. The charge might be a minor one, but the duty to dispense substantial justice¹³ should never be considered less important in such cases.

¹² See sections 90, 92(1)(c) and 92(2) of the Criminal Procedure Act, 1977

¹³ Substantial justice according to *S v Van den Berg* 1995 NR 23 (HC) at p 32 to 33 ensures that '... an innocent person is not punished and that a guilty person does not escape punishment.'

[20] The court should not appear to countenance a form of charge which is so lacking in particularity that on being found guilty, there must be considerable confusion as to what exact offence has indeed been committed.¹⁴ This principle was reiterated in *S v Mangqu*¹⁵ which was summarized as follows in the headnote:

‘By making allegations in an indictment which have nothing whatsoever to do with the real issue between the State and the accused, the purpose of the indictment (to inform the accused of the charge against him or her in order to enable the accused to prepare his or her defence) is frustrated. Draftsmen of indictments should not slavishly follow the wording of a statute but should confine the charge to that which is relevant.’

[21] In *R v Preller*¹⁶ Van den Heever JA explained this as follows:

‘That, however, is a rule which should be followed with discretion. The language of a statutory enactment, considered as a general and wide command or prohibition, may be couched in clear and intelligible language. As a description of an offence in the abstract it may be above criticism. Yet it does not necessarily follow that by inserting a few dates, names of places and of persons, like fillings of lard in a haunch of venison, it can be made to charge an accused person with a specific offence. On the contrary situations may arise in which a statutory provision turned into a criminal charge in that manner would be pure gibberish.’ And later: ‘To say that such an indictment discloses an offence is tantamount to saying that if instead of positive averments it contained algebraic symbols, it would not be explicable but only lacking in particularity. As was pointed an accused person's embarrassment in meeting a defective charge is not the sole prejudice arising out of it; there is also the uncertainty after conviction as to the exact offence of which he was found guilty.’

[22] Sections 57 and 112(1)(a) of the Criminal Procedure Act (Act 51 of 1977 as amended) must be considered simultaneously as both target the speedy finalization of the less severe offences. Section 57, dealing with crimes for which an accused can pay an admission of guilt fine instead of appearing in court, had initially limited it to offences for which the fine would not be more than N\$300. Similarly, previously section 112(1) (a) could also only be applied by a court if it was contemplating a fine of less than N\$300. The Criminal Procedure Amendment Act, No. 13 of 2010

¹⁴ *R v De Bruyn and Another* 1957 (4) SA 408 (C) at 410 G-H

¹⁵ 1977 (4) SA 84 (E) at 87H-I; See also *R v Botsoane* 1960 (3) SA 324 (T) 326D-F

¹⁶ 1952 (4) SA 452 (A),

amended sections 57(1) (a) and 112(1) (a) and increased the amounts in both sections to N\$6000. These sections complement each other and also identifies what types of offences the Legislature had intended it for.

[23] As will be seen later, the contravention of any regulation under the Stage 4: COVID-19 Regulations under Proclamation 33 of 2020 prescribed sentences of a fine not exceeding N\$2 000 or imprisonment for a period not exceeding six months or to both such fine and such imprisonment. This meant that section 57 and section 112(1) (a) of the Criminal Procedure Act 1977 as amended could be used for contraventions under these regulations.

[24] The Public and Environmental Health Act 1 of 2015 (PEHA) in this regard came into operation on 17 September 2020. The initial and subsequent sets of Public Health Covid-19 General Regulations issued under that Act increased the penalty provision of the relevant regulations to a fine not exceeding N\$100 000 or to imprisonment for a period not exceeding ten years, or to both such fine and such imprisonment. The increased penalty provision makes it apparent that sections 57 and 112(1)(a) of the Criminal Procedure Act (51 of 1977 as amended) could no longer, except in exceptional cases, be used for contraventions under these regulations. The Legislature indicated that offences under the Act and regulations warranted severe sentences. Accordingly, section 112(1) (b) of the Criminal Procedure Act of the CPA (51 of 1977 as amended) was the appropriate section to apply when an accused elected to plead guilty to such a charge.

Proclamation of the Stage 1 State of Emergency – Covid-19 Regulations

[25] The Declaration of State of Emergency: National Disaster (Covid-19) Proclamation 7 of 2020¹⁷ declared a state of emergency in the whole of Namibia on account of the outbreak of the Coronavirus disease (COVID -19), with effect from 17 March 2020.

¹⁷ Published in Government Gazette 7148 dated 18 March 2020 and issued by the President under Article 26(1) of the Namibian Constitution, read together with section 30(3) of the Disaster Risk Management Act, 2012 (Act No. 10 of 2012)

[26] The first Stage 1 State of Emergency – Covid-19 Regulations were issued on 23 March 2020 in Proclamation 9 of 2020¹⁸ and amended on 18 April 2020 by Proclamation 13 of 2020.¹⁹ The lockdown period covered by these regulations was initially stated in Proclamation 9 of 2020 to be from 14:00 on 28 March 2020 until 23:59 on 17 April 2020, then amended by Proclamation 13 of 2020 to continue from 23:59 on 17 April 2020 to 23:59 on 4 May 2020.²⁰ The amending Proclamation also made numerous substantive changes. For example, although the regulation under Proclamation 9 of 2020 prohibited the sale of liquor²¹ during the lockdown period, liquor was not defined. By Proclamation 13 of 2020, regulation 11 was amended to prohibit the sale as well as the purchasing of liquor. A definition for liquor²² was also inserted by Proclamation 13 of 2020. This first set of the state of emergency regulations expired at the end of lockdown on 4 May 2020.

[27] It is not necessary to deal with each of the proclamations that amended previous proclamations. Suffice to refer to 28 June 2020, when Stage 4: State of Emergency - Covid-19 Regulations were issued in Proclamation 28 of 2020.²³ These regulations were initially intended to apply to the whole of Namibia for the period from 00:00 on 29 June 2020 to 24:00 on 17 September 2020, with some exceptions pertaining to the Erongo Region. It substituted the previous regulations. Liquor was again re-defined²⁴. The sale and purchase of liquor was specifically regulated but did not apply to the holders of on-consumption liquor licences as defined in the Liquor Act²⁵ and the holders of such licences were subject to conditions relating to the sale of liquor that apply to on-consumption liquor licences.²⁶

¹⁸ Published in Government Gazette 7159 dated 28 March 2020

¹⁹ Published in Government Gazette 7180 dated 17 April 2020

²⁰ See Regulation 3 of Proclamation 9 of 2020 as amended by Proclamation 13 of 2020

²¹ See Regulation 11 of Proclamation 9 of 2020

²² "liquor" means - (a) any spirituous liquor or any wine or beer containing three per cent or more by volume of alcohol, excluding methylated spirit; (b) tombo or any other fermented, distilled, spirituous or malted drink, traditional or non-traditional, which contains three per cent or more by volume of alcohol; or (c) any drink or concoction which the Minister, under section 1 of the Liquor Act, 1998 (Act No. 6 of 1998), has by notice in the Gazette declared to be liquor, excluding any preparation which is intended or manufactured for medical purposes"

²³ See Government Gazette 7255 dated 28 June 2020

²⁴ "liquor" means any spirits, wine, beer, cider or other beverage, including a traditional beverage which contains alcohol, and intended for human consumption but excludes any substance that contains alcohol but used or is intended to be used for medicinal purposes;"

²⁵ Act 6 of 1998

²⁶ See Regulation 7 of the Stage 4: State of Emergency - Covid-19 Regulations published under Proclamation 28 of 2020

[28] These initial Stage 4 regulations were repealed before their anticipated date of expiry, on 14 July 2020, by Proclamation 33 of 2020.²⁷ The proclamation repealed regulations under Proclamation 28 and issued a replacement set of Stage 4: State of Emergency - Covid-19 Regulations. This second set of Stage 4 regulations applied to the whole of Namibia from the time of publication on 14 July 2020 to 24:00 on 17 September 2020, with some exceptions pertaining to the Erongo Region.

[29] This second set of Stage 4 regulations was initially virtually identical to the first set of Stage 4 regulations which it repealed. The definition of alcohol remained the same²⁸ and the sale and purchasing thereof was limited to certain days and times. It however did not apply to the holders of on-consumption liquor licences as defined in the Liquor Act and the holders of such licences were subject to conditions relating to the sale of liquor that apply to their on-consumption liquor licences subject to limitations.

[30] The second set of Stage 4 regulations was amended on 24 July 2020 by Proclamation 40 of 2020.²⁹ This amendment substituted *inter alia* regulation 7

²⁷ See Government Gazette 7270 dated 14 July 2020

²⁸ "liquor" means any spirits, wine, beer, cider or other beverage, including a traditional beverage which contains alcohol, and intended for human consumption but excludes any substance that contains alcohol but used or is intended to be used for medicinal purposes;"

²⁹ See Government Gazette 7284 published on 24 July 2020

restrictions relating to liquor.³⁰ The second set of Stage 4 regulations was further amended on 3 August 2020 by Proclamation 44 of 2020.³¹

Public Health Covid-19 General Regulations issued under the Public and Environmental Health Act 1 of 2015 (PEHA)

[31] The state of emergency expired at midnight on 17 September 2020. The period of the state of emergency was not extended. Covid-19 related matters were afterwards to be dealt with through the PEHA, which was in this regard brought into force on 17 September 2020.³² An initial set of Public Health Covid-19 General Regulations was issued in terms of that Act in Government Notice 233 of 2020³³ as amended by Government Notice 235 of 2020³⁴ from 23 December 2020. These regulations were afterwards either amended fortnightly or monthly.

[32] Both the offences defined under regulation 3 (wearing of masks) and regulation 5 (selling and purchasing of liquor) prescribed sentences which were upon

³⁰ "Restrictions relating to liquor

7. (1) For the purposes of this regulation, a term defined in the Liquor Act, 1998 (Act No. 6 of 1998), except for the word "liquor", bears that meaning.

(2) A person may only sell liquor and a person may only purchase liquor if -

(a) the person who sells the liquor holds a liquor licence authorising the sale of liquor, and the sale of liquor is in accordance with that licence; and

(b) the sale and purchase of liquor is in accordance with sub-regulation (3) or

(4).

(3) During the specified period and despite any contrary condition applicable to any type of liquor licence issued under the Liquor Act, 1998 (Act No. 6 of 1998), the sale of liquor in terms of a liquor licence and the purchase of liquor may -

(a) only take place between 09:00 and 18:00 on a week day;

(b) only take place between 09:00 and 13:00 on a Saturday;

(c) not take place on a Sunday and on a public holiday; and

(d) only take place if the liquor is sold or purchased on an off-sales basis.

(4) Except that sub-regulation (3)(c) applies to paragraph (b), the provisions of sub-regulation (3) do not apply to -

(a) a hotel, restaurant or similar business that lawfully sells food that is intended to be consumed on the premises of the seller and the liquor is sold, for on-consumption, in relation to a meal sold to be consumed on the premises;

or

(b) a night club, casino and gambling house selling liquor for on-consumption, provided that liquor may only be sold between 12:00 and 22:00.

(5) A person who contravenes or fails to comply with sub-regulation (2), (3) or (4) commits an offence and is on conviction liable to a fine not exceeding N\$2 000 or imprisonment for a period not exceeding six months or to both such fine and such imprisonment.

³¹ See Government Gazette 7295 dated 3 August 2020

³² By Government Notice 230 of 2020 in Government Gazette 7338

³³ Government Gazette 7342

³⁴ Government Gazette 7346

conviction liable to the penalties specified in section 29(3) of the PEHA. Government Gazette 235 of 2020 also inserted an additional regulation 4A which prohibited persons from leaving their place of residence for certain periods at night. Contravening the latter provision also prescribed sentences specified in section 29(3) of the PEHA.

[33] Before I move to the individual reviews it is necessary to mention another principle in view of the intrusions these proclamations and regulations made in the lives of the public. In the absence of indications to the contrary, the fundamental principle embodied in the *maxim actus non facit reum, nisi mens sit rea* and *nulla poena sine culpa*, is that the legislature is presumed not to have intended violations without guilt to be punishable. The rule that courts must interpret penal statutes in favour of innocence where there is ambiguity, reinforces such an approach. Since *mens rea* is an element of common-law crimes, there is also a presumption that the legislature does not intend to alter the common law without precise language indicating that such change was intended.³⁵

S v Petrus Mateus (High Court Review 90/2021) and S v Ndahambelela lipinge (High Court Review 94/2021)

[34] The first two reviews, that of *S v Petrus Mateus*³⁶ and *S v Ndahambelela lipinge*³⁷ can be dealt with together as they involve apparently similar incidents that took place on 7 August 2020 and the alleged charges were formulated in a similar

³⁵ *S v Paulo and Another (Attorney-General as Amicus Curiae)* 2013 (2) NR 366 (SC) at 171E – G; *S v Hanse* 2020 (2) NR 499 (HC) in paragraph 11 quoting with approval from *S v Majola* 1975 (2) SA 727 (A) at 736C – D. See also *R. v H* 1944 A.D. 121 at p. 126; *R v Langa*, 1936 C.P.D. 158, *R. v Moyage and Others* 1958 (3) S.A. 400 (A.D.) at p. 414G; *S v Paulus* 2011 (2) NR 649 (HC) paragraph 22, *S v Qumbella* 1966 (4) SA 356 (A) at 359, *S v De Blom* 1977 (3) SA 513 (A) at 532; and *S v Naidoo* 1974 (4) SA 574 (N) at 598A.

³⁶ The charge was framed as follows: ‘Contravention of Regulation 7(3) 6 and 5 of Covid 19 Regulation No 40 Government Gazette No 7284 of 24 July 2020 as amended in that upon or about 7 August 2020 at 18:17 the accused wrongfully and unlawfully was supplying alcohol (Tombo) to the customer beyond the stipulated time 18:00 at unnamed shebeen at Eetika Location Okapika Village Ruacana Constituency.’

³⁷ The charge was framed as follows: ‘Contravention of Regulation 7(3)(b) 5 of Covid 19 Regulation No 40 Government Gazette No 7284 of 24 July 2020 as amended in that at 19:03 upon or about 7 August 2020 at 19:03 the accused wrongfully and unlawfully at LA’s cuca-shop-Oshifo Ruacana supplying traditional alcohol (Tombo) to a customer beyond the stipulated was supplying alcohol (Tombo) to the customer beyond the stipulated time 18:00

manner. Both pleaded guilty and were convicted in terms of section 112(1) (a) of the Criminal Procedure Act, 1977 as amended (CPA).

[35] On 7 August 2020 the Stage 4: State of Emergency - Covid-19 Regulations published under Proclamation 33 applied.³⁸ It was amended by Proclamation 40 of 2020³⁹ and Regulation 7, dealing with offences in respect of liquor, was substituted. Liquor was previously defined in the main Proclamation 33.⁴⁰

[36] A properly drafted charge sheet of an incident occurring on 7 August 2020 would have summarized it as a contravention of regulation 7(3) of the Stage 4: State of Emergency - Covid-19 Regulations published under Proclamation 33 of 14 July 2020, as amended by the regulations contained in Proclamation 40. The amending proclamation did not create its own offence, it just inserted an amended version of the regulation into Proclamation 33.

[37] A correctly drafted charge under regulation 7 of an incident occurring on Friday 7 August 2020 would require alleging and, if necessary, proving that the accused sold liquor, not supplied it as was alleged in the charge sheet. The charge sheet also required an allegation that liquor sold was spirits, wine, beer, ciders, or other beverage, including a traditional beverage which contained alcohol intended for human consumption as a substance that contains alcohol intended to be used for medicinal purposes is excluded.⁴¹

[38] It further required alleging and, if necessary, proving that the accused who sold the liquor held a liquor licence authorising the sale of liquor⁴² but that the sale of

³⁸ Government Gazette 7270 of 14 July 2020

³⁹ Government Gazette 7284 of 3 August 2020

⁴⁰ "liquor" means any spirits, wine, beer, cider or other beverage, including a traditional beverage which contains alcohol, and intended for human consumption but excludes any substance that contains alcohol but used or is intended to be used for medicinal purposes;

⁴¹ Liquor was defined as follows in Proclamation No. 33 Stage 4: State of Emergency - Covid-19 Regulations: Namibian Constitution published in Government Gazette 7270 of 14 July 2020 as: "liquor" means any spirits, wine, beer, cider or other beverage, including a traditional beverage which contains alcohol, and intended for human consumption but excludes any substance that contains alcohol but used or is intended to be used for medicinal purposes;'

⁴² The amended regulation 7(2) reads as follows: 'A person may only sell liquor and a person may only purchase liquor if -

the said liquor was prohibited under regulation 7(3) specifying such period as it depended on which day and by what licensee such liquor was sold.⁴³

[39] It further required an allegation and proving that the selling licensee was neither a hotel, restaurant or similar business as those were not limited to specific hours, nor a night club, casino and gambling house as those could sell liquor defined above for on-consumption from 12:00 to 22:00.⁴⁴ Hotels, restaurants or similar businesses night clubs, casinos and gambling houses were thus exceptions to the general rule applicable to holders of other liquor licences under the Liquor Act. Perusal of the relevant provisions makes it clear that someone who was selling liquor as defined without a licence under the Liquor Act 6 of 1998 could not be charged or convicted under these regulations applicable at the time.

[40] As drafted by the police officer and put by the prosecutor, the charges in these two matters are totally inadequate and did not aver vital elements, did not specify, or refute the exceptions, exemptions, provisos, excuses, or qualifications to comply with the essentials of a charge. It failed to fully inform the two undefended accused why they were charged with the offences and what is being alleged against them. The pleas of guilty and subsequent conviction by reason of the plea alone of the unrepresented accused were not informed, resulting in a substantially unfair trial, conviction and sentence warranting the setting aside of their respective convictions and sentences.

(a) the person who sells the liquor holds a liquor licence authorising the sale of liquor, and the sale of liquor is in accordance with that licence; and

⁴³ (3) During the specified period and despite any contrary condition applicable to any type of liquor licence issued under the Liquor Act, 1998 (Act No. 6 of 1998), the sale of liquor in terms of a liquor licence and the purchase of liquor may -

- (a) only take place between 09:00 and 18:00 on a week day;
- (b) only take place between 09:00 and 13:00 on a Saturday;
- (c) not take place on a Sunday and on a public holiday; and
- (d) only take place if the liquor is sold or purchased on an off-sales basis.

⁴⁴ (4) Except that subregulation (3)(c) applies to paragraph (b), the provisions of subregulation (3) do not apply to -

(a) a hotel, restaurant or similar business that lawfully sells food that is intended to be consumed on the premises of the seller and the liquor is sold, for onconsumption, in relation to a meal sold to be consumed on the premises;

or

(b) a night club, casino and gambling house selling liquor for on-consumption, provided that liquor may only be sold between 12:00 and 22:00.

S v Amutenya Nuugwanga Paulina (High Court Review 89/2021); S v Johannes Shetwiilwa (High Court Review number 149/2021); S v Nanyeni Constasia Nandjamba (High Court Review Number 411/2021) and S v Kamati Paulina (High Court Review Number 388/2021)

[41] The reviews of *S v Amutenya Nuugwanga Paulina*; *S v Johannes Shetwiilwa*; *S v Nanyeni Constasia Nandjamba* and *S v Kamati Paulina* all further alleged contraventions of the regulations dealing with the selling of liquor.

[42] Before I deal with the four cases individually it is important to consider that the relevant Public Health Covid-19 General Regulations did not define liquor and therefore liquor wherever it was used in the regulations means liquor as it is defined in the Liquor Act 6 of 1998 as follows:

“liquor” means-

- (a) any spirituous liquor or any wine or beer containing three percent or more by volume of alcohol, excluding methylated spirit;
- (b) toambo or any other fermented, distilled, spirituous or malted drink, traditional or non-traditional, which contains three percent or more by volume of alcohol;
- (c) any drink or concoction which the Minister by notice in the Gazette declares to be liquor;’

[43] The alleged offence in *S v Amutenya Nuugwanga Paulina*⁴⁵ took place on 12 January 2021 and the applicable regulations that applied at the time is contained in the 5th set of post-state of emergency Covid- 19 regulations.⁴⁶ She pleaded guilty and was convicted under section 112(1) (a) of the CPA.

⁴⁵ Charge formulated as: ‘Contravening regulation 53(B) of the Public Health Covid 19 Public and Environmental Health Act 2015-Selling liquor beyond prescribed hours.

In that upon or about 12 day of January 2021 and at or near Omushapi Location in the district of Outapi the said accused did wrongfully and unlawfully sold liquor at 22:08 beyond stipulated time of 20h00 and the seller was a holder of an on-consumption licence

⁴⁶ Government Notice 233 of 2020 as published in Government Gazette 7342 as amended by GN 326/2020 in GG7429

[44] The alleged offence in *S v Johannes Shetwiilwa*⁴⁷ took place on 17 February 2021 and the 7th set of post-state emergency Covid-19 regulations⁴⁸ were applicable at that time. She pleaded guilty and was convicted after questioning under section 112(1) (b) of the CPA.

[45] The alleged offence in *S v Nanyeni Constasia Nandjamba*⁴⁹ took place on 24 June 2021 and the applicable regulations that applied at the time is contained the 12th set of post-state of emergency Covid- 19 regulations.⁵⁰

[46] The alleged offence in *S v Kamati Paulina*⁵¹ took place on 5 August 2021 and the applicable regulations that applied at the time is contained in 15th set of post-state of emergency Covid-19 regulations⁵². She pleaded guilty and was convicted after questioning in terms of section 112(1) (b) of the CPA.

[47] The different regulations applicable at the time indicate that the offence is committed by an on-consumption licensee, selling liquor beyond the daily hours of 09:00 until 20:00, or at one stage beyond 09:00 until 18:00. Liquor is as defined meaning spirituous liquor, wine, beer, tombo or any other fermented, distilled,

⁴⁷ The charge was framed as follows: 'Contravening of regulation 5(3)(b) of public health covid 19 regulations, public and environmental health act 2015

In that upon or about 17th day of February 2021 and at or near Ombongodhiya location in the district District of Outapi the said accused did wrongfully and unlawfully supplied liquor at 23h30 beyond the stipulated time of 20h00 in terms of GG notice no 326 amended'

⁴⁸ Contained in Government Notice 233 of 2020 in Government Gazette 7342 as amended by GN 9/2021 in Government Gazette 7451 dated 3 February 2021

⁴⁹ The charge was framed as follows: Selling of alcohol on a take-away basis Covid 19 Regulation 7(3)(b) (l) of GG no 128 of Public and Environmental Health Act 1 of 2015, Covid 19 Regulation

In that upon or about the 24th day of June 2021 at or near Onaanda location in the district of Outapi the said accused did wrongfully and unlawfully sell alcohol to wit Tombo to customers and they drank inside the shebeen and not on a take-away basis as stipulated by the Covid 19 Regulations.

⁵⁰ Published under Government Notice 91 of 2021 and published in Government Gazette 7522 as amended by GN 128/2021 published in Government Gazette 7554

⁵¹ The charge was framed as follows: Selling/supplying Liquor beyond the stipulated time-C/Reg 7((3) (b)(ii) of GG NO. 7593 as amended of Act 1 of 2015, Covid 19 Regulations
In that upon or about the 5th day of August and at or near Onakuheke location in the district of Outapi, the said accused did wrongfully and unlawfully sell or supply liquor to wit: Castle wine & Savannah Cidor liquor to wit: Castle wine and Savannah Cider to customers at 21h30 which is beyond the stipulated time of 18h00 as per Covid 19 regulations.

⁵² As per GN 91 of 2021 (GG 7522) as extended by Government Notice 160 of 2021 (GG 7593) came into force on 1 August 2021

spirituous or malted drink, traditional or non-traditional, containing three percent or more by volume of alcohol.

[48] The charges in all four of these matters failed to comply with the essentials of a charge as they did not aver all vital elements that would constitute a crime. Furthermore, it failed to fully inform the undefended accused why they were charged with the offence and what is alleged against them. For example, there are no allegations that the accused had an on-consumption liquor licence, what liquor they sold and that the liquor sold contained three per cent or more by volume of alcohol. Their guilty plea was thus not informed.

[49] Consequently, the questioning of the accused by the court in terms of section 112(1) (b) of the CPA, was based on the faulty charge sheet and did not cover the actual elements of the offence. The subsequent convictions of the unrepresented accused resulted in an improper conviction warranting the setting aside of the convictions and sentences.

S v Frans Johannes (High Court Review Number 352/2021)

[50] In the matter of Frans Johannes⁵³ the offence took place on 26 May 2021. The applicable regulations at the time were the 10th set of post-state of emergency Covid-19 regulations.⁵⁴ The accused pleaded guilty and was convicted under section 112(1)(a) of the CPA.

[51] These regulations replaced the Public Health Covid-19 General Regulations in Government Notice 233 of 2020⁵⁵ as amended, which expired at 24:00 on 30 April 2021. The charge in this matter thus refers to regulations that no longer applied on the date of the offence.

⁵³ The charge was framed as follows: Contravening regulation 3(4) read with 1, 2, 3, 3(1) 3(2) and 3(3) and section 29(3) of Act 1 of 2015 of GG 7342 Public Health Covid 19 General Regulation of 23 September 2020 as amended

In that upon or about 10:00 on 26 May 2021 at Okongo Special Store the accused wrongfully and unlawfully refuse to wear a face mask when he was instructed by a police office it (face mask) was in his car and he ran away, he was in a public place at Okongo Special Store

⁵⁴ Issued under Government Notice 91 of 2021 and published in Government Gazette 7522

⁵⁵ Published in Government Gazette 7342 dated 23 September 2020

[52] What is clear is that the offence as to mask wearing under regulation 3 is not committed by not wearing a mask at or in a public place. Although regulation 3(1) states every person must wear a mask whenever he or she is at or in a public place the punishable offence under the regulation is only committed after a police officer instructed a person who is not wearing a mask to wear a mask or to leave the public place. The instruction to such a person should thus be to wear a mask or to leave the public place. If the person puts on the mask or leaves the public place, no offence under the regulations is committed.⁵⁶

[53] The charge in this matter failed to comply with the essentials of a charge as it failed to fully inform the undefended accused why she was charged with the offence and what is alleged against her. Two options were open to a person receiving the instruction. Those are putting on a mask, or leaving the public place if one does not want to put on a mask. The guilty plea was thus not informed. The subsequent conviction on the guilty plea alone of the unrepresented accused resulted in an improper conviction following an unfair trial warranting the setting aside of both the conviction and sentence.

S v Zatundumana Innocent Tjiposa (High Court Review Number 390/21); S v Penombili Titus Hamalwa (High Court Review Number 304/2021); S v Julius Shiimi Mvula (High Court Review Case 327/2021); S v Paulus Petrus & Another (High Court Review Case 353/2021) and S v Ismael Panduleni Shiwaonheni Naukushu (High Court Review number 432/2021)

[54] These five matters all relate to breaking the curfew applicable at given times and criminalized in the regulations.

⁵⁶ 3.(1) Every person must wear a mask whenever he or she is at or in a public place.

(2) Despite subregulation (1), a child under the age of five years is not required to wear a mask.

(3) A person may wear a see-through face shield, provided that the person wears a mask together with the face shield.

(4) A police officer may instruct a person who is not wearing a mask as contemplated in subregulation (1) or (3) to wear a mask or to leave the public place.

(5) A person who fails or refuses to comply with an instruction given under subregulation (3) commits an offence and is on conviction liable to the penalties specified in section 29(3) of the Act. The reference to subregulation (3) is clearly a mistake and it should have referred to an instruction under subregulation (4).

[55] In the matter of S v Zatundumana Innocent Tjiposa the two offences took place on 27 January 2021.⁵⁷ The applicable regulations at the time were the 6th set of post-state of emergency Covid-19 regulations.⁵⁸ Two charges were preferred against the accused. It is not clear whether the accused pleaded guilty to Count 1 or Count 2 or both. He was convicted after a plea of guilty in terms of section 112(1) (a) of the CPA. Again, it is not clear of which count or counts he was convicted of.

[56] The matter of S v Penombili Titus Hamalwa⁵⁹ took place on 6 June 2021 and that of S v Julius Shiimi Mvula⁶⁰ took place on 7 June 2021. In both instances the 11th set of post-state of emergency Covid- 19 regulations, as amended applied,⁶¹ and the accused were convicted in terms of section 112(1)(a) of the CPA.

⁵⁷ The charge was framed as follows: Count 1: Contravening curfew regulations 4(A)(2) of the Environmental Health Act 1 of 2015

In that upon or about 27 January 2021 at or near Okanguati in the district of Opuwo the accused unlawfully and intentionally violated curfew regulations by sitting at a bar between the hours of 21h00 and 04:00 hours

Count 2: Contravening curfew regulations 4(a)(2) of the Environmental Health Act 1 of 2015

In that upon or about 27 January 2021 at or near Okanguati in the district of Opuwo the accused wrongfully and unlawfully found outside his residence drinking alcohol at a bar after 21h00 contrary to curfew regulations.

⁵⁸ Issued in terms of Government Notice 233 of 2020 published in Government Gazette 7342 dated 23 September 2020 and amended by GN 1/2021 published in Government Gazette dated 13 January 2021.

⁵⁹ The charge was framed as follows: Contravening Regulation 5(2) read with regulations 1, 2, 5 (1), 5(20), 5(3), 5(5) of GN7552 of 2020 further read with section 1, 2 29(1) and 29(2) of the Public and Environmental Health Act 1 of 2015

In that upon or about the 6th June 2021 on the road of Eenhana Onhuno road in the district of Eenhana the accused unlawfully leave his/her place of residence between 21h00 and 04h00 in that the accused was found outside his place of residence at 23h25

⁶⁰ Contravening of Regulation 4(A)(2) of the amendment of Public and Environmental Health Act 1 of 2015 as amendment-leaving his or her place of residence between 22h00 and 4h00 without lawful excuses

In that upon 7th day of June 2021 and at or Oneshila location in the district of Oshakati accused did wrongfully, unlawfully and intentionally leave his or her place of residence between 22h00 and 04h00 to wit accused was found driving on the said location without lawful excuses listed in section 4A(3) of the said Act.

⁶¹ As set out in Government Notice 91 of 2021 published in Government Gazette 7522 dated 30 April 2021 and amended by GN 108/21 published in Government Gazette 7544 dated 31 May 2021

[57] In the case of *S v Paulus Petrus & Another*⁶² the offence was committed on 18 August 2021. The regulations that applied at the time were the 16th set of post-state of emergency Covid- 19 regulations as amended.⁶³ The accused was convicted in terms of section 112(1) (a) of the CPA.

[58] In the matter of *S v Ismael Panduleni Shiwaonheni Naukushu* ⁶⁴ the offence was committed on 24 September 2021. The regulations that applied at the time were the 17th set of post-emergency Covid regulations as amended.⁶⁵ The accused was convicted in terms of section 112(1) (a) of the CPA. The applicable regulations had no sub regulation 4A (2) as referred to in the charge summation.

[59] The offence under the curfew regulations was committed if a person leaves his place of residence between 21:00 and 04:00 on each day. At certain stages the period was changed to between 22:00 and 04:00. A person however did not commit the offence if that person left his or her place of residence for purposes of providing a critical service, and the person is in possession of a document issued under subregulation 4A (7) and later subregulation 5 (7), was seeking medical assistance, was seeking assistance from law enforcement agencies or was attending to any other emergency situation that could not be reasonably avoided.

⁶² The charge was framed as follows: Contravening Regulation 4A(2) of Amendment Public Health Covid 19 General regulations: Public and Environmental Health Act 2015-Leaving place of residence between 22h00 and 04h00am (Curfew)

In that upon or about 18th August 2021 and at or near Epaya location in the district Oshakati accused did wrongfully and unlawfully and intentionally leave their place of residence between 22h00 and 04h00am without any lawful excuse listed in section 4A(3) of the said Act, to wit accused were found at the said location around 00h15 am without any lawful excuse.

⁶³ . Issued in Government Notice 91 of 2021 and published in Government Gazette 7522 dated 30 April 2021 as amended by GN 175/2021 published in Government Gazette 7604 dated 14 August 2021.

⁶⁴ The charge was framed as follows: Contravening Regulation 5(1)(2)(3) the covid 19 regulation as amended read with section 29 of the Public Environmental Health Act 1 of 2015-Curfew

In that upon or about the 24th day of September 2021 and at or near Mandume Ndemefayo main road in the district of Oshakati the said accused did wrongfully and unlawfully leave his place of residence between 23h00 and 04h00 without any lawful excuse as listed in the said regulation, to wit accused was found at the above mention place at 1h00.

⁶⁵ Issued under GN 91/21 and publised in Government Gazette 755 dated 30 April 2021 as amended by GN 205/2021 published in Government Gazette 7637 dated 15 September 2021.

[60] All the charges in these five cases failed to comply with the essentials of a charge as it did not aver all vital elements that would constitute a crime under the regulations. Furthermore, it failed to fully inform the undefended accused why he was charged with the offence and what is alleged against her. For example, the charges were framed as there were no valid reason for leaving one's place of residence outside the time frame without averring the absence of any of the exceptions or valid reasons for which one was allowed to leave without committing an offence. The guilty pleas were thus not informed. Consequently, the subsequent convictions on the guilty plea of the unrepresented accused on an improper charge resulted in an inappropriate conviction following an unfair trial warranting the setting aside of both the conviction and sentence.

S v Vilho Shipena, Rogillio Diergardt and Julius Shinavene (High Court review 328/2021)

[61] The last matter is S v Vilho Shipena, Rogillio Diergardt and Julius Shinavene. The charge against the three accused is a summation of a charge without any information as to locality, date, or time.⁶⁶ To these all three accused pleaded guilty on 10 August 2021 and convicted in terms of section 112(1) (a) of the CPA. Their first appearance was on 12 July 2021 and the Criminal Register of their case is Oshakati 82/07/2021 indicating that it was registered in July 2021.

[62] In July 2021 the regulations that applied were the 13th set of post- state of emergency Covid- 19 regulations as amended⁶⁷ and the 14th set of post-state of emergency Covid- 19 regulations as amended.⁶⁸

⁶⁶ The charge was framed as follows: Contravening regulation 4A(2) of Amendment of Public Health Covid 19 Regulations: Public and Environmental Health Ac 2015-Leaving place of residence between 22h00 and 4400 (Curfew)

⁶⁷ Issued in terms of GN 91/2021 and published in Government Gazette 7522 dated 30 April 2021 as amended by GN 138/2021 published in Government Gazette dated 30 June 2021.

⁶⁸ Issued in terms of GN 91/2021 and published in Government Gazette 7522 dated 30 April 2021 as amended by GN151/2021 published in Government Gazette 7581 dated 15 July 2021,

[63] The charge in this matter failed to comply with the essentials of a charge as it did not aver all vital elements that would constitute a crime under the regulations. Not only did it not contain any date, locality, or time when it was allegedly committed, it failed to fully inform the undefended accused as to what was required as set out earlier in this judgement. Their guilty pleas were thus not informed. Consequently, the subsequent conviction on the guilty plea alone of the unrepresented accused resulted in a miscarriage of justice and an improper conviction following an unfair trial warranting the setting aside of both the convictions and sentences.

[64] In view of the orders we will issue and due to sections 313⁶⁹ and 324⁷⁰ of the Criminal Procedure Act (CPA) the Prosecutor-General will have to decide whether any *de novo* proceedings will be instituted against the accused. If any of the accused are charged again the sentences served under these cases must be considered when sentencing such accused anew.

[65] In the result the convictions and sentences imposed in respect of

1. Petrus Mateus (High Court Reference No. 90/2021-Outapi Case 132/2020),
2. Ndahambelela Ipinge (High Court Reference No. 94/2021-Outapi Case 130/2020),
3. Amutenya Nuugwanga Paulina (High Court Reference No. 89/2021-Okahao Case 78/2021),

⁶⁹ 313 The provisions of section 324 shall *mutatis mutandis* apply with reference to any conviction and sentence of a lower court that are set aside on appeal or review on any ground referred to in that section.

⁷⁰ 324 Whenever a conviction and sentence are set aside by the court of appeal on the ground-

- (a) that the court which convicted the accused was not competent to do so or
- (b) that the indictment on which the accused was convicted was invalid or defective in any respect; or
- (c) that there has been any other technical irregularity or defect in the procedure,

proceedings in respect of the same offence to which the conviction and sentence referred may again be instituted either on the original charge, suitably amended where necessary, or upon any other charge as if the accused had not previously been arraigned, tried and convicted: Provided that no judge or assessor before whom the original trial took place shall take part in such proceedings.

4. Zatundumana Innocent Tjiposa (High Court Reference No. 390/2021-Opuwa Case OPU-CRM-107/2021),
5. Johannes Shetwilwa (High Court Reference No. 149/2021-Okahao Case 85/2021),
6. Frans Johannes (High Court Reference No. 352/2021-Eenhana Case 246/2021),
7. Penombili Titus Hamalwa (High Court Reference No. 304/2021-Eenhana Case A23/2021),
8. Julius Shiimi Mwula (High Court Reference No. 327/2021-Oshakati Case OSH-CRIM-4147/2021),
9. Nanyeni Constasia Nandjamba (High Court Reference No. 411/2021-Outapi Case 310/2021),
10. Kamati Paulina (High Court Reference No. 378/2021-Okahao Case 365/2021),
11. Paulus Petrus (High Court Reference No. 353/2021-Oshakati Case OSH-CRM-6036/2021)
12. Ismael Panduleni Shiwaonheni Naukushu (High Court Reference No. 423/2021-Oshakati Case OSH-CRM-6730/2021), and
13. Vilho Shipena, Rogillio Diergardt and Julius Shinavene (High Court Reference No. 328/2021-Oshakati case OSH-CRM-5013/2021)

Are all set aside.

D. F. SMALL
ACTING JUDGE

I agree,

J. T. SALIONGA
JUDGE