REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

Case Title: *The State v Immanuel Silungwe*	**Case no:** CR 27/2022
	Division of Court: Northern Local Division
Heard before: Honourable Lady Justice Salionga J *et* Honourable Mr Justice Kesslau AJ	**Delivered on:** 4 July 2022
Neutral citation: *S v Silungwe* (CR 27/2022) [2022] NAHCNLD 68 (4 July 2022)	
It is hereby ordered that: 1. The conviction and sentence are set aside.	
Reasons for the order:	

KESSLAU AJ (SALIONGA J concurring):

[1] The matter comes before this court as special review in terms of section 304(4) of the Criminal Procedure Act 51 of 1977 as amended, (the CPA).

[2] The accused person appeared in the Okongo Periodical Court in the district of Eenhana charged, according to the charge sheet, with the contravention of Section 34(1)

of the Immigration Control Act 7 of 1993: Found in Namibia without a valid permit, however according to the charge annexure the accused plead to the offence of contravening section 6(1) of the Immigration Control Act 7 of 1993: Entry into Namibia at any place other than a port of entry. The charge sheet, which is a public document, leaves much to be desired as many parts thereof were left incomplete. It is also worthwhile to note that, despite numerous rulings by this court determining that Section 34(1) of Act 7 of 1993 does not constitute an offense, it still appears on the charge sheet[1].

[3] The accused pleaded guilty to the charge, was questioned in terms of Section 112(1) (b) of the CPA and the magistrate, not convinced of his guilt, entered a plea of not guilty in terms of Section 113 of the CPA. The matter was thereafter remanded for trial.

[4] The record reflects that, when the case appeared ten months later, the State indicated that the matter is for trial upon which the magistrate started to re-question the accused on the elements of the offense in a manner resembling questioning in terms of Section 112 (1) (b) of the CPA. Thereafter he was convicted and sentenced to a fine of N$ 1 000 or five months imprisonment.

[5] Approximately six months have passed since sentence was imposed thus the accused has served the term of imprisonment. The learned magistrate in a cover letter indicated that, on the date of trial, she omitted to record that, prior to her subsequent questioning, the State submitted that the accused wished to 'change his plea' to one of guilty. The magistrate realised the omission when revisiting the record and is requesting this court to make an appropriate order.

[6] The Criminal Procedure Act 51 of 1977 does not make provision for changing a plea of not guilty, including such a plea noted in terms of Section 113 of the CPA, to one of guilty. The correct approach can be found in *S v Cachimbembo*[2] wherein it was found that once a plea of not guilty was entered in terms of Section 113 of the CPA the court is obliged to follow the procedure provided for in Section 115 of the CPA when there is a

[1] *S v Alex* (CR 14/2020) [2020] NAHCNLD 23 (10 February 2020); *S v Nukoneka* (CR 59/2020) [2020] NAHCNLD 155 (11 November 2020); *S v Buridji (CR 13 I*2021) [2021] NAHCNLD 36 (11 March 2021); *S v Haufiku* (CR 11/2022) [2022] NAHCNLD 30 (30 March 2022); *S v Maimbolwa; S v Petrina* (CR 7/2022) [2022] NAHCNLD 20 (15 March 2022).

[2] *S v Cachimbembo* 1990 NR 290 at page 292 par A-E

need for additional questioning.

[7] The magistrate might under the provisions of Section 115 of the CPA invite the accused to make a statement indicating the basis of his defence upon which the magistrate may ask questions to determine which allegations are in dispute. This can however only be done once an accused is informed of his right that he is not obliged to make any statement or answer any of the questions from the magistrate. At this stage it should also be explained to an accused that the effect of any admissions made, will be that it relieves the State from the burden of proving facts that have been admitted. Should an accused then decide to volunteer any admissions they can be deemed to be formal admissions in terms of Section 220. However these can only be recorded as such with the consent of an accused. It is furthermore paramount that the record of proceedings reflects the details of the said explanations and warnings.

[8] In *casu* the accused plead and some ten months passed after which the State apparently indicated that the accused wished to 'change his plea'. The correct procedure would have been for the magistrate to enquire from the accused what his intention is and furthermore properly inform him of the consequences and effects of any admissions in terms of Section 220 of the CPA. The initiative to volunteer admissions should be from an accused or his legal practitioner.

[9] In similar circumstances the following was stated in *S v Poppas,*[3] 'With regard to the questioning of the magistrate in order to assist the unrepresented accused as stated, the ideal process should have been to allow evidence to be led. Where the accused elects to make admissions during the trial, courts should not lead the nature or content of such admissions nor ask leading questions. Questions like whether the accused disputes certain averments or not are not desirable at this stage. The accused should be afforded an opportunity to state his admissions in his own words and have same recorded verbatim'.

[10] The same approach was followed in *S v Manyuwa*[4] wherein the court ruled that 'during criminal proceedings an accused or his legal representative may formally admit a relevant fact that forms part of the dispute between the accused and the State and once recorded as such

[3] *S v Poppas* (CR 48/2020) [2020] NAHCMD 287 (16 July 2020)
[4] *S v Manyuwa* (CR 91/2020) [2020] NAHCMD 513 (11 November 2020)

becomes conclusive proof'. The court furthermore stated that 'once evidence has been led and an accused wish to make additional admissions the court needs to explain to an unrepresented accused the drastic effect of formal admissions and an accused should also be made aware of the fact that he is not compelled to assist the State in proving the allegations against him'.[5]

[11] Returning to the matter in hand, the record does not reflect that the accused voluntarily indicated his change of heart and there is furthermore no indication that the accused was warned that he is not obliged to provide further admissions. It was also not explained to the accused that once admissions are noted as formal admission in terms of Section 220 of the CPA it becomes conclusive proof of the allegations. The record on face value reflects a gross irregularity in that the accused was questioned in what appears to be an extension of his guilty plea and convicted without volunteering the information.

[12] Remitting the proceedings will serve no purpose as the accused completed his sentence. Considering the irregularities committed it cannot be said that the proceedings were in accordance with justice and will be set aside.

[13] In the result, the following order is made:

1. The conviction and sentence are set aside.

Judge(s) signature	**Comments:**
KESSLAU AJ:	none
SALIONGA J:	none

[5] *S v Daniels* 1983 (3) 275 (A).