

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

Case Title: <i>The State v Semba Takatadza</i>	Case No: CR 37/2022
	Division of Court: Northern Local Division
Heard before: Ms Justice Salionga J et Mr Justice Kessler AJ	Delivered on: 07 September 2022
Neutral citation: <i>S v Takatadza</i> (CR 37/2022) [2022] NAHCNLD 84 (07 September 2022)	
The order: The conviction and the sentence imposed are set aside.	
Reasons for the order:	
SALIONGA J (KESSLAU AJ concurring):	

[1] The matter came before this court on automatic review in terms of section 302(1) of the Criminal Procedure Act 51 of 1977 (CPA).

[2] Accused was charged in the Magistrate's Court for Outapi district with a contravention of section 34(1) read with sections 34 (3) of the Immigration Control Act 7 of 1993 (ICA) – Failure to present himself to an immigration officer upon entry into Namibia. Yet, the particulars of the annexure relates to the offence of entering the country without a permit.

[3] In addition, although the record does not show that the accused pleaded to the charge, the review cover sheets record a conviction of contravening section 7 of the Immigration control Act 7 of 1993. In his judgment on sentence the magistrate remarked that accused came to Namibia as a visitor after his days expired and that the correct charge would have been that of overstaying but the state preferred the charge of failure to present himself to the immigration officer. Despite the aforesaid the accused was sentenced to 'three thousand Namibian dollars (N\$3000) or twelve (12) months imprisonment, wholly suspended for a period of 5 years, on condition that the accused is not convicted of failure to present himself during the period of suspension.'

[4] In a query to the presiding officer I requested an explanation why accused who was charged with contravening section 34(1), was convicted of contravening section 7 of the Immigration Control Act, 7 of 1993 and whether section 7 and 34(1) create offences. Similarly I requested explanation whether the record was complete in the absence of a plea and verdict recorded. Finally the reviewing judge demanded an explanation for submitting the record on review six months late.

[5] In his response, the learned magistrate responded that the accused was charged with contravening section 7 of the Act and not section 34 (1) of the same Act; of failure to present oneself to an immigration officer as indicated on the J15. He explained that although the charge annexure indicated section 34 (1) it was an oversight on the side of the court and such omission was supposed to be detected

during the plea.

[6] On whether the record submitted on review was complete, the magistrate responded that indeed the charge was put to the accused as there was no way the court could have arrived at the sentencing stage without the charge being put to the accused in terms of section 105 of the CPA. He however only learnt that the record is incomplete when he received it back from the clerk of the court to attend to the queries. He concluded that the missing proceedings could have been misplaced by the typist as this is not the first time that they experienced something to this end.

[7] The magistrate conceded that the issue of the typist typing records late or misplacing some proceedings is known by the Director of Court Services at the head office. They have time and again complained about that and last month they were told the head office was busy transferring the said typist to another station and he stands to be guided by this court.

[8] It is trite that a magistrate's court is a court of record¹. From the proceedings submitted on review there is nothing to show that the charge was put to the accused and he pleaded guilty. In the same vein no verdict was recorded. The record indicates that the matter (without indicating why) was remanded numerous times between 18 October 2021 and 4 November 2021 for plea. Surprisingly it was further postponed to 5 November, 8 November, 10 November, and 11 November, 19 November and 23 November 2021 for mitigation and sentencing respectively. Thereafter the accused was sentenced to 'three thousand Namibian dollars (N\$3000) or twelve (12) months imprisonment, wholly suspended for a period of 5 years, on condition that the accused is not convicted of failure to present himself during the period of suspension.'

[9] The state alleges that the accused persons failed to present himself to the immigration officer or officer of the Ministry. No such allegations were indicated in the charge annexure and no plea proceedings attached to the record. It is apparent that the record submitted on review was incomplete and it does not literally follow that

¹ Section 4 of the Magistrate Court Act of 1944

because accused was sentenced, the charge was put to him.

[10] Section 34 (1) of the ICA creates a duty to any person entering Namibia irrespective of the circumstances of his or her entry to present himself or herself. It is section 34(3) that creates an offence for any person referred to in subsection (1) if he or she fails to comply with the provisions of subsection (3). Section 7 of the Act deals with persons before entering Namibia to present themselves to immigration officer and again the offence is created by section 10 (3). There are a number of distinct sections of the Act under which a person who failed to report to an immigration officer can be charged with depending on the circumstances of one's entry. In the present matter the description of the offence does not correspond with the words as they appear in section 10 read with section 7 of the Act. In the absence of plea proceedings I am satisfied that accused person did not plea to the charge despite the magistrate's contention. It is therefore difficult to determine which section of the Act accused was charged with and sentenced on.

[11] The issue of typing records late or misplacing some proceedings does not address the query why the record was not timeously submitted on review and why the record is not complete. It is however a serious transgressions that need serious action being taken by an appropriate authority and transferring such typist per se is not a solution. It is futile exercise to send an incomplete record on review knowing the same to be such. It follows that there was a substantial delay that defeats the whole purpose of review and fair trial had it not for a suspended sentence imposed in the present matter. I direct that this judgment be brought to the attention of the Executive Director of Office of Judiciary, the Prosecutor-General as well as the Chairperson of the Magistrate Commission.

[12] The Magistrate in sentencing the accused without a charge being put to him to plead thereto committed a serious irregularity resulting in setting it aside. This irregularity is further conflated by the confusion with regard to what was the relevant charge preferred against the accused.

[13] In the result, it is ordered that:

The conviction and sentence imposed are set aside.

J T SALIONGA JUDGE	E E KESSLAU ACTING JUDGE