

CASE NO.: CR 78/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

KAMBAMBA ELIAS

ACCUSED NO. 1

OTEKE OLONIO

ACCUSED NO. 2

(HIGH COURT REVIEW CASE NO.: 1357/2010)

CORAM: MULLER, J et BOTES, AJ

Delivered on: 27 October 2010

REVIEW JUDGMENT

MULLER, J.: [1] The two accused persons were charged with the offence of fraud. They were undefended and both pleaded guilty. After questioning by the Magistrate in terms of S 112(1)(b) of the Criminal Procedure Act, no. 51 of 1977 (CPA) both were convicted and each was sentenced to six months imprisonment, which sentence was wholly suspended conditionally.

[2] The following question was posed to the Magistrate on 20 September 2010:

*"As prejudice or potential prejudice is an essential element of the charge of fraud,, it does not appear that either of the accused admitted that element.
(See S v Campbell 1990 NR 274 (H.C.).*

Please explain

[3] On 7 October 2010 the Magistrate replied to the aforesaid question as follows:

The Magistrate concede that prejudice or potential prejudice is an essential element of the charge of fraud and during the questioning of both accused it

was not covered. The question which was put to both accused was "after you used someone's report were you then registered at the Senior Secondary School to which both admitted being registered but nothing was put to them on prejudice or potential prejudice. Therefore may the conviction and sentence be set aside"

[4] The charge put to the two accused contained the elements of prejudicial prejudice and/or loss, but, as conceded, the Magistrate failed to address any question in this regard to any to the two accused persons. This essential element was consequently not admitted by any of them. As a result the conviction cannot stand. Although the sentences of both accused were conditionally suspended *in toto*, it will still appear on their records.

[5] In the result the convictions and sentences of both accused person are set aside.

MULLER, J

I agree

BOTES, AJ