

REPUBLIC OF NAMIBIA

CASE NO.: CR 72/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

STATE

versus

MASIRBA ISRAEL GOCHERA

CHRISTOPHER KUFARUWENGA

(HIGH COURT REVIEW CASE NO.: 12/08)

CORAM: VAN NIEKERK, J et MULLER, J

Delivered on: 29 October 2010

REVIEW JUDGMENT

VAN NIEKERK, J [1] Both accused in this matter were convicted on a count of contravening section 30(1) of the Immigration Act, 7 of 1993. Accused no 2 was also convicted and sentenced on a second count of contravening section 29(5) of Act 7 of 1993. On review I directed the following query to the trial magistrate:

"1. Does section 30 of Act 7 of 1993 create the offence contended for by the charge as framed in count 1? Should the accused not have been charged with a contravention of section 29(5) of Act 7 of 1993 instead?"

2. If the answer to the second question posed in paragraph 1 is "Yes" should all the allegations against accused no 2 not have been contained in a single charge of contravening section 29(5) of Act 7 of 1993? In other words, was there not, in effect a multiplication of convictions in respect of accused no. 2?"

With respect to the first question the magistrate concedes in her reasons that the accused should have been charged with section 29(5) of Act 7 of 1993, as section 30 of the Act does not create the offence contended for by the charge as drawn in count 1. In respect of the second question she also agrees that all the allegations against accused no 2 should have been contained in a single charge of contravening section 29(5) of Act 7 of 1993.

[2] This case is on all fours with the case of the *State versus Nico Gotosa and Two Others* (Case No CR 99/08 - unreported judgment of this Court delivered on 22 August 2008). A copy of that judgment is attached hereto for the magistrate's convenience. It will serve no purpose to repeat what was stated in that judgment. By way of explanation I merely wish to state that section 30 of Act 7 of 1993 criminalizes the conduct of persons who engage in certain activities with the holders of permits issued under the Act, e.g. a visitors permit permitting a foreigner to, say, enter Namibia and to remain here for a certain number of days on holiday. Section 30 does not criminalize the conduct of the permit holder if he/she does not act in accordance with the permit's conditions. In this case the accused, who held visitor's permits, were alleged to have conducted business while they were on holiday. This does not constitute a contravention of section 30 of the Act (see the *Gotosa* judgment at paras [9] and [10]).

[3] Applying the reasoning as set out in paras [12] - [14] of the *Gotosa* judgment, it

seems to me that the conviction on count 1 in respect of accused no 1 may be substituted with a conviction on a contravention of section 29(5), read with section 29(6) of the Act. However, if this should be done with respect to accused no 2, there would be a multiplication of convictions for the same offence of contravening section 29(5) read with section 29(6) in different ways, namely (i) by staying in Namibia for longer than the visitor's permit allows; and (ii) by conducting himself in a way not allowed by the permit, namely by conducting a business. The allegations in (i) and (ii) should be combined in a single charge.

[4] In the premises the following order is made:

[1] In respect of accused no 1, the conviction on count 1 of a contravention of section 30 of Act 7 of 1993 is substituted with a conviction of a contravention of section 29(5), read with section 29(6), of Act 7 of 1993.

[2] The sentence of accused no 1 on count 1 is confirmed.

3. In respect of accused no 2 the conviction and sentence on count 1 are set aside.

4. In respect of accused no 2 the conviction and sentence on count 2 are confirmed.

VAN NIEKERK, J

I concur.

MULLER, J