

**CASE NO.: CR 19/2011**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**THE STATE**

and

**MAPWAYA ALSON**

(HIGH COURT REVIEW CASE NO.: 54/2011)

**CORAM:                   HOFF, J et MULLER, J**

Delivered on:           4 March 2011

**REVIEW JUDGMENT**

**MULLER, J.:** [1] Although the accused pleaded guilty to the statutory offence of contravening S 56(d) of the Immigration Control Act, no 7 of 1995 the Magistrate failed to establish the citizenship of the accused. Despite that failure he was convicted and sentenced.

[2]       I addressed the following query to the Magistrate:

*"Is S 56(d) applicable in respect of Namibian citizens? No question was asked, or admission made by the accused, to the effect that he is a citizen of another country. Has all the elements of the charge been proved?"*

[3] In reply the Magistrate responded as follows:

*"I concede, I erred by failing to canvass the element as to the citizenship of the accused. This is an oversight on my part which is sincerely regretted. This means that an important essential element was not proved. I therefore place the record before the learned judge for the necessary remedial action be*

*taken."*

[4] An essential element of the offence had neither been proved nor admitted by the accused. A similar failure occurred in *S v Julius Mbele*, case no. 4/2011 delivered on 1 February 2011.

[5] The conviction has to be set aside. However, because it is not practical to refer the matter back to the Magistrate to properly question the accused in terms of S 112(1)(b) of the Criminal Procedure Act no. 51 of 1977, the same order is made as in that case.

[6] In the result the following order is made:

1. The conviction and sentence of the accused is set aside.  
If the accused paid the fine imposed, it should be refunded to him.

**MULLER, J**

I agree

**HOFF, J**