**REPUBLIC OF NAMIBIA**

REPORTABLE



**HIGH COURT OF NAMIBIA, MAIN DIVISION**

**JUDGMENT**

**CR No: 24/2017**

In the matter between

**THE STATE**

and

**RUBEN JOSOP ACCUSED NO 1**

**LORENTIUS FRANCISKUS DREYER ACCUSED NO 2**

**ESMARELDA EMILY JOSSOB ACCUSED NO 3**

**HIGH COURT MD REVIEW CASE NO 403/2017**

**THE STATE**

and

**JACUES CYRIL BASSON ACCUSED NO 1**

**GABRIEL KAPOLO ACCUSED NO 2**

**MATHIAS SIYEPO HAINDERE ACCUSED NO 3**

**ANDREAS AFRIKANER ACCUSED NO 4**

**PETRUS GERTZE ACCUSED NO 5**

**THOMAS KASANGA ACCUSED NO 6**

**JOSEF SWARTBOOI ACCUSED NO 7**

**RUBEN MICHAEL MARTINS ACCUSED NO 8**

**HIGH COURT MD REVIEW CASE NO 404/2017**

*Neutral citation:* *S v Josop* (CR 24-2017) [2017] NAHCMD 87 (16 March 2017)

**CORAM: LIEBENBERG J *et* SHIVUTE J**

**DELIVERED: 16 March 2017**

**Flynote**: Criminal procedure – Review – Accused charged and convicted under the Amendment Act and not principal Act – Substitution of conviction with reference to applicable law – Accused duly informed in charge of case to meet – ‘Label’ given to charge incorrect – Prejudice to accused – Amendment will not prejudice accused.

**Summary**: The accused were wrongly charged and convicted under the Departure from Namibia Regulation Amendment Act of 1993 and not the principal Act, the Departure from the Union Regulation Act 34 of 1955. The body of the charge preferred against the accused was clear and unambiguous despite the erroneous reference to the applicable statutory provision which has been contravened. Court satisfied that no prejudice to the accused would result from and amendment of the charge.

**ORDER**

1. In *The State v Ruben Josop and 2 Others* and *The State v Mathias Siyepo Haindere* the charge is amended and the convictions in respect of each accused substituted with a contravention of s 2(a) and (c) of the Departure from the Union Regulation Act 34 of 1955, as amended.
2. The sentences imposed in respect of both cases are confirmed.

**JUDGMENT**

LIEBENBERG J: (Concurring SHIVUTE J)

[1] In both the above cited cases the accused were charged and convicted under s 2 of the Departure from Namibia Regulation Amendment Act of 1993, which section merely regulates the amendment of the principal Act namely, the Departure from the Union Regulation Act, 1955.[[1]](#footnote-1) The offence for which the accused persons should have been charged under s 2(a) and (c) of Act 34 of 1955 prohibits departure from Namibia without a passport or permit, or at a place other than a port of entry.

[2] When the matter came on review it was pointed out to the presiding magistrate that the accused persons were wrongly charged under the amendment Act and not the principal Act, and enquired whether the convictions, in view thereof, were proper.

[3] The magistrate in her replying statement concedes that the accused persons were wrongly charged and convicted as they should have been charged under s 2(a) and (c) of the principal Act as amended. Relying on what this court had said in the matter of *The State v Bettie Somses[[2]](#footnote-2)* the magistrate implores the court to amend the charge and substitute the conviction in both cases with a contravention of s 2(a) and (c) of the Departure from the Union Regulation Act 34 of 1955, as there would be no prejudice to the accused persons. The relevant part of the *Somses* case reads:

‘As a general rule, an accused should not be allowed to escape conviction only as a result of the prosecution’s attachment of an incorrect ‘label’ to a statutory offence or an erroneous reference to the applicable statutory provision which has allegedly been contravened.’

The court further endorsed the remarks made as per Henochsberg J in *R v Ngcobo; R v Sibega[[3]](#footnote-3)* stating thus:

‘(The) principle is that, if the body of the charge is clear and unambiguous in its description of the act alleged against the accused, e.g. where the offence is a statutory and not a common law offence and the offence is correctly described in the actual terms of the statute, the attaching of a wrong label to the offence or an error made in quoting the charge, the statute or statutory regulation alleged to have been contravened, may be corrected on review if the court is satisfied that the conviction is in accordance with justice, or, on appeal, if it is satisfied that no failure of justice has, in fact, resulted therefrom.’

[4] In the present instance the body of the charge preferred against the accused is clear and unambiguous in its description of the act alleged against the accused persons and they were duly informed of the charge they were to meet. The problem lies with the ‘label’ given thereto which makes reference of a contravention of a section under the Amendment Act, and not the principal Act under which the accused ought to have been charged. I am satisfied that the accused have not been or will not be prejudiced by an amendment of the ‘label’ or that it will result in a failure of justice.

[5] In the result, it is ordered:

1. In the matters of *The State v Ruben Josop and 2 Others* and *The State v Mathias Siyepo Haindere* the charge is amended and the convictions in respect of each accused substituted with a contravention of s 2(a) and (c) of the Departure from the Union Regulation Act 34 of 1955, as amended.
2. The sentences imposed in respect of both cases are confirmed.

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**J C LIEBENBERG**

**JUDGE**

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**N N SHIVUTE**

**JUDGE**

1. Act 34 of 1955. [↑](#footnote-ref-1)
2. (Unreported) Case No CA 51/98 delivered on 02.08.1998. [↑](#footnote-ref-2)
3. 1957(1) SA 377 (N) at 381B-D. [↑](#footnote-ref-3)