

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 an 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 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 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 stating thus:

¹ Act 34 of 1955.

² (Unreported) Case No CA 51/98 delivered on 02.08.1998.

³ 1957(1) SA 377 (N) at 381B-D.

'(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.

J C LIEBENBERG

JUDGE

N N SHIVUTE

JUDGE