

**REPUBLIC OF NAMIBIA**

NOT REPORTABLE



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI**

**JUDGMENT**

Case no: CR 11/2013

In the matter between:

**THE STATE**

and

**ALBERTINA VATILIFA HAUWANGA**

**High Court NLD Review Case Ref No.: 66/2013**

**Neutral citation:** *The State v Hauwanga* (CR 11/2013) [2013] NAHCNLD 23  
(22 April 2013)

**Coram:** DAMASEB JP and LIEBENBERG J

**Delivered:** 22 April 2013

**Flynote:** Criminal procedure – Charge - Accused charged and convicted of a contravention of s 50(1)(a) of Children’s Court Act 74 of 1983 (RSA) - Such Act never applied in Namibia - Correct statute being s 18 (1) of Children’s Act 30 of 1960 - Court on review can substitute incorrect statute provided it is in accordance with justice and accused would suffer no prejudice – The particulars of wrong charge to which accused pleaded in essence similar to provisions of substitute charge.

Sentence – Where there are indications that the accused’s minor children in her custody raises concern over their well-being in the court’s mind and the children’s future well-being being unknown (after their mother is given a custodial sentence), the court should exercise its discretion and request a social welfare report before sentencing.

**Summary:** The accused was wrongly charged and convicted of ill-treatment or abandonment of a child or infant in contravention of Act 74 of 1983, which Act is not applicable in Namibia. The accused should have been charged with a contravention of s 18 (1) of the Children’s Act 33 of 1960. On review the court was satisfied that the description of the act alleged to have been committed by the accused (as set out in the charge), in material respects, corresponds with the provisions set out in subsections (1) and (2) of s 18, and that the accused fully realised the case she had to meet. The error made by the prosecution to have charged the accused under the wrong (South African) Act is not fatal to the conviction and it would be in the interest of justice to substitute the charge. The substitution and subsequent conviction of the accused is not prejudicial to the accused’s defence. The circumstances of the case are such that there is reason to believe that the minor children of the accused may either be neglected and left destitute and as such be children in need of care after the imposition of a custodial sentence. A social welfare report in the circumstances of this case was required, which would equally have placed the court in a much better position when sentencing.

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**ORDER**

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1. The charge is corrected and substituted with that of ill-treatment or neglect of a child in contravention of section 18 (1), read with sub-sections (2), and (5) of the Children's Act, 1960.
  2. The accused is convicted of a contravention of section 18 (1) of Act 33 of 1960 – Ill-treatment or neglect of a child.
  3. The sentence imposed is set aside.
  4. The magistrate is directed to request as a matter of urgency a social welfare report on the circumstances of the accused's minor children, prior to sentencing the accused afresh.
  5. In circumstances where the children are found to be children in need of care, the magistrate is directed to immediately bring this to the attention of the Commissioner of Child Welfare.
  6. The accused is to remain in detention pending finalisation of the matter.
  7. The sentence already served by the accused must be taken into account by the court in sentencing.

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## JUDGMENT

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LIEBENBERG J (DAMASEB JP concurring):

[1] The accused was convicted in the magistrate's court, Oshakati of ill-treatment or abandonment of a child/infant in contravention of s 50 (1)(a) and (b), read with s 1 and 50 (3) of the Child Care Act, 1983 (Act 74 of 1983).<sup>1</sup> Not only is this Act no longer in force in South Africa, it is not and has never been of application in Namibia.

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<sup>1</sup>This Act is a South African Act which had been repealed by s 313 of the Children's Act, 2005 (Act 38 of 2005).

[2] When the matter came on review a query was directed to the magistrate enquiring whether the accused was correctly charged and if not, whether this court on review is permitted to substitute the charge. I also enquired whether the court, in the circumstances of this case and before sentence, should not have obtained a social welfare report in respect of the accused person's three minor children whose welfare and safety, undoubtedly, would seriously have been affected if their care giver were to be given a custodial sentence – a factor the sentencing court ought to have considered before sentence.

[3] The magistrate's quick response to the query is appreciated. In her reply the learned magistrate submits that though the legislation under which the accused was charged and convicted is not applicable to this jurisdiction, the Children's Act, 1960 (Act 33 of 1960) has a similar provision in s 18 (1), read with sub-sections 3 and 5 of the Act. In view thereof, and also what has been said in *S v Somses*<sup>2</sup>, she submits that the accused should not be allowed to escape conviction only as a result of the prosecution's attachment of the incorrect "label" to a statutory provision or an erroneous reference to the applicable statutory provision which has allegedly been contravened. The learned magistrate's reasoning is sound in law.

[4] Although the *Somses* case was decided on appeal, the court in that case endorsed the sentiments expressed as *per* Henochsberg J in *R v Ngcobo; R v Sibega*<sup>3</sup> where it was said:

(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 in the charge the statute or statutory regulation alleged to have been contravened, may be regarded as an error not fatal to the charge. Hence, in circumstances such as those, an error of that nature may be corrected on review, if

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<sup>2</sup>1999 NR 296 (HC).

<sup>3</sup>1957 (1) SA 377 (N) at 381B-D.

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.’ (My underlining)

[5] From the above cases it is clear that the charge will not be fatal where the ‘body of the charge is clear and unambiguous in its description of the act alleged against the accused, ... and the offence is clearly described in the actual terms of the statute’ and ‘that the accused realised fully the case to meet’. Where the court is satisfied that the conviction is in accordance with justice, it may correct the error on review.

[6] The charge to which the accused pleaded reads as follows:

‘In that upon or about [an] unknown date during April 2012 and at or near Endola village in the district of OSHAKATI the accused being the lawful guardian or custodian of a(n) infant/child known as (N) (3 years old) did wrongfully ill-treat and/or abandon the said infant/child by assaulting (N) and neglecting to take the child for medical care.’

[7] Section 18 of the Children’s Act of 1960 provides for the ill-treatment or neglect of children and reads:

‘(1) Any parent or guardian of a child or any person having the custody of a child who ill-treats, neglects (otherwise than by such failure as is mentioned in subsection (2)) or abandons that child or allows it to be ill-treated, shall be guilty of an offence if as a result of the ill-treatment, neglect or abandonment the child is likely to suffer unnecessarily or any part or function of its mind or body is likely to be injured or detrimentally affected, even though no such suffering, injury or detriment has in fact been caused or even though the likelihood of such suffering, injury or detriment has been averted by the action of another person.

(2) Any person legally liable to maintain a child who, while able to do so, fails to provide that child with adequate food, clothing, lodging and medical aid, shall be guilty of an offence.

(3) ....

(4) ....

(5) Any person convicted of an offence under this section shall be liable to a fine not exceeding two hundred pounds or in default of payment of such fine to imprisonment for a period not exceeding two years or to such imprisonment without the option of a fine or to both such fine and such imprisonment; or ...'

[8] It appears to me that when the charge to which the accused has pleaded is compared with the provisions of s 18 of the Children's Act, the description of the act alleged to have been committed by the accused, in all respects, corresponds with the provisions of subsections (1) and (2) of s 18 and 'that the accused realised fully the case (she) had to meet' (*Someses supra*). I therefore deem the error made by the prosecution to have charged the accused under the wrong (South African) Act, not to be fatal and that it would be in the interest of justice to amend the charge by substituting the erroneous reference to s 50 of the defunct Act with s 18, read with sub-sections (2) and (5) of Act 33 of 1960. I am further of the view that the substitution and subsequent conviction of the accused was not prejudicial to her defence, or that this would result in a failure of justice. The conviction otherwise is in order and will be confirmed.

[9] Regarding the second leg of the query pertaining to the social well-being of the accused's minor children, the learned magistrate took the view that, from what the accused has said in mitigation, it appears that the accused was more concerned over the well-being of her elderly blind grandfather than her own children. Unfortunately the magistrate failed to specifically enquire into the circumstances of these children and what would become of them if the accused was given a custodial sentence. The accused's neglect and failure to satisfactorily take care of the victim, towards whom she had a duty of care, seems to have brought doubt in the mind of the magistrate regarding the accused's ability to provide in the needs of her own children. In view of the evidence presented one is inclined to come to the conclusion that the circumstances under which the victim as well as the accused's own children in her custody had been living, were not conducive to their well-being and ought to be investigated. In these circumstances the court materially misdirected itself in failing to exercise its discretion to request a social welfare report in

respect of the circumstances of the accused's minor children under her care; more so, as the court came to the conclusion that the imposition of a custodial sentence was inevitable while the children's well-being was not known to the court and was a relevant factor to have regard to in arriving at an appropriate sentence.

[10] Although the circumstances are such that a custodial sentence in principle is justified, it cannot be ruled out that the court might have come to a different conclusion, and even might have imposed a different sentence, if it had the benefit of such report. The report would have informed the court whether or not the accused's minor children are properly taken care of – an important factor at the stage of sentencing. It does not mean to say that a parent of minor children may not be sentenced to imprisonment; only that it is incumbent upon the sentencing court to ensure that any children are not left abandoned or destitute and without care. If that were to be the case the court must decide whether there is any need to start children's court proceedings in respect of these children.

[11] The court's failure to investigate the circumstances of the accused's minor children at the stage of sentencing and without considering what impact a custodial sentence might have on their future well-being, in my view, constitutes a misdirection and justifies interference by this court.

[12] Consequently, the following order is made:

1. The charge is corrected and substituted with that of ill-treatment or neglect of a child in contravention of section 18 (1), read with sub-sections (2) and (5) of the Children's Act, 1960.
2. The accused is convicted of a contravention of section 18 (1) of Act 33 of 1960.

3. The sentence imposed is set aside and the case referred back to the magistrate who convicted and sentenced the accused, to deal with the matter according to law.
4. The magistrate is directed to request, as a matter of urgency, a social welfare report on the circumstances of the accused's minor children, prior to sentencing the accused afresh.
5. In circumstances where the children are found to be children in need of care, the magistrate is directed to immediately bring this to the attention of the Commissioner of Child Welfare.
6. The accused is to remain in detention pending finalisation of the matter.
7. The sentence already served by the accused must be taken into account by the court in sentencing.

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JC LIEBENBERG  
JUDGE

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PT DAMASEB  
JUDGE-PRESIDENT