

“ANNEXURE 11”
REVIEW JUDGMENT

Case Title: <i>S v Sanda David & 5 others</i>	CR NO: 33/2020 Case No. OSH-CRM -5647/20187
	Division of Court: Northern Local Division
Heard before: Honourable Mr. Justice January J et Honourable Ms. Justice Salionga J	Delivered on: 19 June 2020
Neutral citation: <i>S v David</i> (CR 33/2020) [2020] NAHCNLD 70 (19 June 2020)	
IT IS ORDERED THAT: 1. The conviction and sentence are set aside;	
Reasons for the above order:	
SALIONGA J (JANAURY J concurring): [1] Six accused appeared in the Oshakati Magistrate’s Court on contraventions of the Immigrations Control Act, No 7 of 1993 (the Act). Accused one, two, three and six pleaded guilty and were convicted of a contravening section 29 (5) (1) read with section 26 and section 12 (1) read with section 1, 2, 4 and 12 (4) of the Immigration Control Act, Act 7 of 1993. On count one it is alleged that the accused remained in Namibia for purposes of business or employment without a business permit while on count two the State alleged that the accused not being Namibian citizens or persons domiciled in Namibia failed to produce an unexpired passport to an immigration officer on demand respectively. Accused 4 and 5 were charged and convicted of count 2 only.	

[2] When the matter came before me on review I queried the learned magistrate how could she have satisfied that the accused admitted all the elements of entering or remaining in Namibia for purposes of doing business or employment without a business permit from the enquiry she conducted. Secondly whether the accused were correctly charged with contravening section 12 (1) on count two.

[3] The learned magistrate in a one paragraph response conceded that she realised that the accused persons were not questioned about their entry into Namibia to come and conduct such business. On the second query she responded that the accused were correctly charged with contravening section 12(1) of the Immigration Control Act.

[4] Section 29 (5) (1) of the Act reads:

'Any person to whom a visitor's entry permit was issued under subsection (1) and who remains in Namibia after the expiration of the period or extended period for which, or acts in conflict with the purpose for which, that permit was issued, or contravenes or fails to comply with any condition subject to which it was issued, shall be guilty of an offence and on conviction be liable to a fine not exceeding R12 000 or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment, and may be dealt with under Part VI as a prohibited immigrant.'

[5] Section 29 deals with any person to whom a visitor's permit was issued and he remains in Namibia after the expiration of the period or extended period or such a person who acts in conflict with the purpose for which that permit was issued. These allegations should be contained in the charge sheet and accused's answer thereto would decisively influence the determination of his guilt.

[6] While section 12 (1) read with 12(4) of the Act stipulates:

'(1) Any person seeking to enter Namibia who fails on demand by an immigration officer to produce to such immigration officer an unexpired passport which bears a valid visa or an endorsement by a person authorized thereto by the Government of Namibia to the effect that authority to proceed to Namibia for the purpose of being examined under this Act has been granted by the Minister or an officer authorized thereto by the Minister, or such person is accompanied by a document containing a statement to that effect together with particulars of such passport, shall be refused to enter and to

be in Namibia, unless such person is proved to be a Namibian citizen or a person domiciled in Namibia.

(2)...

(3) ...

(4) If any person enters or has entered Namibia in contravention of the provisions of subsection (1) or, after having been refused to enter Namibia in terms of that subsection, is found in Namibia, he or she shall be guilty of an offence and on conviction be liable to a fine not exceeding R20 000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment, and may be dealt with under Part VI as a prohibited immigrant.'

[7] On count one the accused were charged and convicted with remaining in Namibia for purposes of business or employment. The charges did not allege that the accused were issued with the visitors' permit. During questioning the accused were not questioned on any visitor's permit issued to them authorising their stay in Namibia for that specified period or he remained in Namibia after the expiration of that period. Some accused admitted that they were conducting business without permits and others admitted to not having passports. The problem is that the magistrate failed to address a question in respect of an essential elements of a charge in terms of section 29(5) and (1). This occurred because the charge was not correctly drawn to cover all the elements of the offence. It has been stated by this court on several occasions that one would have expected the charge to follow the word of the statute which creates the offences. See *S v Alfred Ngono* 2005 NR 34 (HC).

[8] With regard to count two, the charge contained necessary averments to sustain the offence. Section 12 (4) creates two offences, that of entering Namibia in contravention of the provisions of subsection (1) of s12 of the Act and being found in Namibia after having been refused to enter Namibia in terms of subsection (4) of s 12 of the Immigration Control Act 1993. However the magistrate's inquiry under section 112 (1) (b) of the Criminal Procedure Act, 1977 did not cover or follow the allegations made in the charge sheet. No questions were directed to the accused on whether or not they had previously been refused entry in Namibia by an immigration Officer under section 12 (1). Nor were admission made to that effect and on a proper construction of subsection (4) the magistrate could not have convicted the accused as charged. The exclusion of these pertinent elements enjoined in

sections 12 (1) and 12 (4) renders the charges defective.

[9] Ndauendapo J, with Siboleka J concurring in the *State v Okuani* (CR 07 /2013 [2013] NAHCMD 32 (5 February 2013) set aside conviction and sentence and directed magistrates and prosecutors to make sure that the pro-forma charge sheets are corrected to have regard to the contents of these two sections. Despite these clear directives given, this court is still clouded with voluminous uncorrected pro-forma charge sheets.

[10] In the result:

The convictions and sentences on both counts are set aside.

J T SALIONGA JUDGE	H C JANUARY JUDGE