

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

REVIEW JUDGEMENT

<b>Case Title:</b> The State v Watyipopo Tyali	<b>CR No.:</b> 28/2022 Case No.: Outapi 392/2021
	<b>Division of Court:</b> Northern Local Division
<b>Heard before:</b> MUNSU AJ <i>et</i> KESSLAU AJ	<b>Delivered on:</b> 16 June 2022
<b>Neutral citation:</b> <i>S v Tyali</i> (CR 28/2022) [2022] NAHCNLD 62 (16 June 2022)	
<b>The order:</b> <ol style="list-style-type: none"><li>1. The conviction is confirmed.</li><li>2. The sentence is amended to read as follows: A fine of N\$ 4000 or 12 (twelve) months imprisonment wholly suspended for a period of 5 (five) years on condition that the accused is not convicted of contravening section 6 of the Immigration Control Act 7 of 1993: Entry into Namibia at any place other than a port of entry, committed during the period of suspension.</li></ol>	
<b>Reasons for the order:</b> MUNSU, AJ (KESSLAU, AJ concurring):	
[1] This is a review matter in terms of section 302 of the Criminal Procedure Act 51 of 1977 (CPA).	

[2] The accused was arraigned on a charge of contravening section 6 (1) read with sections 1, 2 and 10(3) of the Immigration Control Act, 1993 (Act 7 of 1993) (the Act) – entry into Namibia at a place other than a port of entry.

[3] He pleaded guilty to the charge and was questioned in terms of section 112 (1) (b) of the CPA. I am satisfied that the accused admitted all the allegations contained in the charge and was correctly convicted.

[4] The learned Magistrate proceeded to impose the following sentence:

‘A fine of N\$ 4000.00 or 12 months wholly suspended for a period of five years on condition that accused is not convicted of any immigration related offence in terms of the Immigration Control Act, Act 7 of 1993 during the period of suspension.’

[5] The first issue about the sentence imposed is that it omits the words ‘committed’. In *S v Maimbolwa and Another*,<sup>1</sup> a review matter that emanated from the same court, this court held that the period of suspension must relate to the commission of the crime,<sup>2</sup> hence the word ‘committed’...during the period of suspension should form part of the sentence.

[6] The second issue relates to the condition of suspension. The condition is that the accused should not be convicted of any immigration related offence. In *S v Maimbolwa and Another*,<sup>3</sup> the court had the following to say:

‘In both matters, the conditions of suspension were that the accused should not be convicted of “any immigration related offence”. In *S v Radebe*<sup>4</sup> it was held that a condition of suspension should only refer to an offence which has a *material connection to the nature and circumstances of the offence of which the accused had been convicted of* i.e. it must not be so wide that it has no nexus with the offence the accused had been convicted of. The Act creates numerous offences some of which have no connection with the offences the accused were convicted of.’

[7] It follows that the sentence imposed in the instant matter should be amended.

<sup>1</sup> (CR 7/2022) [2022] NAHCNLD 20 (15 March 2022).

<sup>2</sup> See Terblanche SS, 2007 *Guide to Sentencing in South Africa*, 2<sup>nd</sup> ed Lexis Nexis, Durban, p 362.

<sup>3</sup> *Supra*

<sup>4</sup> *S v Radebe* 1973 (3) SA 940 (O).

[8] In the result, it is ordered as follows:

1. The conviction is confirmed.
2. The sentence is amended to read as follows:

A fine of N\$ 4000.00 or 12 (twelve) months imprisonment wholly suspended for a period of 5 (five) years on condition that the accused is not convicted of contravening section 6 of the Immigration Control Act 7 of 1993: Entry into Namibia at any place other than a port of entry, committed during the period of suspension.

<b>Judge(s) signature</b>	<b>Comments:</b>
MUNSU AJ	NONE
KESSLAU AJ	NONE