REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

EX-TEMPORE JUDGMENT

Case no: CA 71/2012

In the matter between:

ABDOOL MAJEED HOORZOOK **FIRST APPELLANT**
RABIA BIBI HOORZOOK **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Hoorzook v State* (CA 71/2012) [2013] NAHCMD 168 (10 June 2013)

Coram: GEIER J and PARKER AJ
Heard: **10 June 2013**
Delivered: **10 June 2013**

Flynote: Criminal procedure – Appeal against conviction – Notice of appeal – Noting of appeal is foundation on which appeal is based – Where grounds are not grounds but conclusions of the draftsperson who drafted the notice court is not entitled to adjudicate the case on such non-grounds – In instant case counsel therefore did not pursue such non-grounds.

Summary: Criminal procedure – Appeal against conviction – Notice of appeal – Noting of appeal is foundation on which appeal is based – Where no grounds but conclusions of facts are put forth by the draftsperson of the notice of appeal court is

not entitled to adjudicate the case based on those conclusions – Court finding that only two of the six grounds of appeal are grounds and so merit adjudication on the merits – Court rejected the two grounds as meritless – Appeal against conviction therefore dismissed – In casu, counsel did not pursue the four non-grounds – The principles in *S v Gey van Pittius* 1990 NR 35 (HC) and *S v Kakololo* 2004 NR 7 (HC) on notice of appeal applied.

ORDER

The appeal is dismissed.

JUDGMENT

PARKER AJ (GEIER J concurring):

[1] The first appellant (accused 1 in the court below) and the second appellant (accused 2 in the court below) were charged before the magistrates' court, Windhoek, with two counts, namely, remaining in Namibia after expiration of employment permit in contravention of s 27(6), read with s 1, of the Immigration Control Act 7 of 1993 (count 1 in respect of the first appellant) and resisting a member of the Police (count 2 in respect of the first appellant); and in respect of the second appellant, resisting a member of the Police (count 2) and remaining in Namibia after expiration of visitor's entry permit (count 3).

[2] The formulation of the counts is inelegant and confusing in relation to the second appellant. The impression is given that she was also charged with the first count. There is no first count charged against the second appellant, and yet the two counts are numbered '2' and '3'.

[3] I find that as respects the first appellant the two counts are clear, and as respects the second appellant the two counts are also clear, save that the numbering is wrong, as I have shown. The wrong numbering of the counts cannot and does not detract from the fact that the counts are clear, and it would seem that both appellants

who were represented by counsel in the trial court pleaded not guilty to the charges. And I do not see anything on the record establishing that they did not understand the charges and so did not plead to the counts. They did plead to the counts, and they did plead not guilty. They were tried, convicted and sentenced accordingly. They now appeal against the conviction.

[4] The appellants filed a notice of appeal in November 2012, dated 20 November 2012. In the notice both appellants put forth what they consider to be six grounds of appeal. The respondent has moved to reject the appeal, and in doing that the respondent raises a preliminary objection on the basis that some of the grounds are not grounds in terms of our law.

[5] I do not think this objection should be characterized as a point *in limine*. In my view it goes to adjudication of the merits of the appeal and I shall consider it as such. In any case, Mr Brandt does not persist with ground 3, ground 4, ground 5 and ground 6. This concession disposes of the respondent's point *in limine*.

[6] I now proceed to deal with the two remaining grounds of appeal. As to ground 1; the appellants say that he 'Learned Magistrate erred by not finding that both accused had no *mens rea* in relation to the statutory offences of section 27(6) and 29(1), respectively, of the Immigration Control Act'.

[7] *S v Kramash* 1998 NR 186, referred to the court by Mr Brandt, tells us that in deciding whether an accused had *mens rea* when he or she committed a statutory offence like the offences committed by the appellants in the instant proceeding the onus to prove the absence of *mens rea* on a balance of probabilities rests on the appellants. See also *S v Paulus* 2011 (2) NR 649 (HC) at [65] to [66]. On the discharge of the onus, Mr Brandt submits on behalf of the appellants that both appellants testified that they had no intention to commit these offences. And why does counsel say so? It is only this. The appellants were advised by their immigration agent (Seter) that they could remain in the country and be employed pending the outcome of the renewal application for employment permit and that they had no intention to commit these offences.

[8] First, it is important to note that Seter has no colour of authority or power to administer the Immigration Control Act. Indeed, he does not administer that Act. And

so, what Seter said or did not say is of no moment in this proceeding as far as the administration of the Immigration Control Act is concerned. Second, *Tobias Nandago v State* Case No. SA 3/2001 (SC) (Unreported), referred to the court by Mr Eixab, tells us that '*mens rea*, this mental element, is not always capable of proof through evidence. It is usually inferred from proved facts relating to a person's conduct'. See also *S v Kramash* at 193. In the instant matter, the proved facts in the trial court for which I have no good reason to fault the learned magistrate are these: as respects the first appellant; the first appellant knew that his employment permit had expired and yet he remained in the country and worked without the requisite permit, which he knew, was required. That is his conduct. And as respects the second appellant; the second appellant knew her visitor's permit had expired and that she requested a new permit, and yet she continued to remain in the country knowing that this was required. That is also her conduct. It can be inferred from the proved facts relating to the conduct of the appellants that they had the requisite intention to commit the separate offences they were charged individually with under the Immigration Control Act. What Seter said or did not say to them is merely an excuse; it does dissipate their intention to commit the offences. For these two considerations, the case of the appellants fails with regard to ground 1.

[9] I now proceed to consider ground 2. As to ground 2; the appellants contend that the 'Learned Magistrate erred by not finding that both accused were erroneously charged under the Police Act 19 of 1990 instead of under the Immigration Control Act 7 of 1993 (police officers are deemed to be Immigration Officers)'.

[10] The evidence is that when the immigration officials failed to get the appellants to open the door to their flat so that the immigration officials could talk to them, the immigration officials called for assistance from police officials 'to come to help as to see how we can get the key for the flat or may be how we can also enable to see who is here on the flat'. I, therefore, accept the evidence that there were police officials on the scene and they requested the appellants to open the door so that they could speak to them. And it is not in dispute that they resisted the police from carrying out their functions by refusing to open the door. Such conduct is an offence under s 54 of the Immigration Control Act and so the appellants could be charged under the Immigration Control Act. But, as I have found previously, there were police officials also on the scene in order to carry functions under the Police Act. They were called by the immigration officials to assist them. The police officials were also

resisted. And so the appellants' conduct is also an offence under s 35 of the Police Act 19 of 1990, as amended by the Police Amendment Act 3 of 1999. The State elected to charge the appellants under the Police Amendment Act and not under the Immigration Control Act; and so, I see no merit in Mr Brandt's argument that they were erroneously charged under the Police Act No. 19 of 1990. The conduct of the appellants, as I have said, is on the facts and in the circumstances offensive of the two Acts. The State was at liberty to decide under which statute they would charge the appellants. The State elected to charge them under the Police Act. Accordingly, I do not see anything 'erroneous' about that election. It follows inevitably that ground 2 also fails. It, too, has no merit.

[11] For the aforegoing reasoning and conclusions, I decide that the appeal against conviction fails.

[12] The chapeu of the notice of appeals indicates that the appeal is against conviction and sentence, but no grounds are put forth in the notice regarding sentence; nor were any arguments addressed on the question of sentence by counsel. Accordingly, the court makes no finding on sentence.

[13] For all these reasons the appeal is dismissed.

C Parker

Acting Judge

H Geier

Judge

APPEARANCES:

FIRST AND SECOND APPELLANTS:	C Brandt Of Chris Brandt Attorneys, Windhoek
RESPONDENT:	J E Eixab Of Office of the Prosecutor-General, Windhoek.