REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CR: 86/2012

In the matter between:

THE STATE

and

ERASTUS TJIKOTOKE **ACCUSED**

(HIGH COURT MAIN DIVISION REVIEW REF NO. 1380/2012)

Neutral citation*:* *The State v Tjikotoke* (CR 86/2012) [2012] NAHCMD 41 (29 October 2012)

Coram: DAMASEB JP and HOFF J

Delivered: **29 October 2012**

Flynote: Sentence – practice of taking counts together for purpose of sentence - undesirable

Summary: The accused was convicted of two counts of contravening the provisions of the Road Traffic and Transportation Act 22 of 1999 and one count of contravening a regulation of the Regulations published in terms of the Act.

The three counts were taken together for purpose of sentence and one comprehensive sentence was imposed - Although the practice of taking counts together for purpose of sentence is not prohibited by the Criminal Procedure Act 51 of 1977 such practice is undesirable for two reasons - Firstly, the imposition of a comprehensive sentence in respect of dissimilar offences of disparate gravity may create the difficulty on appeal or review if the convictions on some but not all counts are set aside - The problem that may confront the court of appeal or of review is to determine how the trial court assessed the seriousness of each offence and what moved it to impose the sentence which it did.

Secondly, why it is undesirable to take detergent counts (especially divergent statutory provisions) together for purpose of sentence, is the tendency of losing sight of the legal principle that the imposition of a comprehensive sentence should be a competent sentence in respect of each of the individual counts so taken together - A comprehensive sentence imposed in respect of two or more charges essentially means that the single sentence is regarded as the punishment for each of the separate offences and for that reason it is not competent to impose such a sentence when its severity exceeds the jurisdiction of the court in regard to one or more of the charges - Where the single sentence imposed exceeds the maximum prescribed sentence in respect of one of the charges such sentence is irregular and de jure a nullity

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ORDER

(a) The convictions in respect of counts 1, 2 and 3 are confirmed.

(b) The sentence imposed is set aside.

(c) The matter is referred back to the presiding magistrate who is ordered to sentence the accused afresh in respect of each of the three counts.

(d) The Chief Magistrate is instructed to see to it that each and every magistrate in Namibia is provided with a hard copy of this judgment.

JUDGMENT

HOFF J (DAMASEB JP concurring):

[1] This matter came before me by way of an automatic review. The accused person was correctly convicted subsequent to pleas of guilty in respect of the following statutory offences:

Count 1: Driving a motorvehicle with no driver's licence in contravention of the provisions of section 31(1)(a) of the Road Traffic and Transport Act, 22 of 1999;

Count 2: Furnishing false information (a false name) to an officer in contravention of the provisions of section 84(b) of the Road Traffic and Transportation Act, 22 of 1999; and

Count 3: Failing to wear a safety belt in contravention of Regulation 232(4) of the Road Traffic and Transport Regulations published in Government Gazette no. 2503 of 30 March 2001 and read with sections 1, 86 and 89 of Act 22 of 1999.

[2] The three counts were taken together for purpose of sentence and a fine of N$3000 or 12 months imprisonment was imposed.

[3] I directed the following query to the presiding magistrate:

'Could you please provide me with your reasons why the convictions in respect of three distinct statutory contraventions had been taken together for purpose of sentence ? Why was a separate sentence not imposed in respect of each of the convictions ?'

[4] The presiding magistrate replied inter alia as follows:

'I am further of the opinion that even though the accused pleaded to three distinct statutory contraventions, that it came about through a single action of the accused person. Thus I deemed it fit to take all three counts together for the purpose of sentencing.'

[5] The magistrate did not explain which single action she had in mind. It is nevertheless debatable, having regard to the particular circumstances of this case, whether the three statutory contraventions came about through a single action of the accused person. In my view the furnishing of false information to an officer and the failure to wear a seatbelt are two distinct ways of conduct by the accused person.

[6] This court on a number of occasions in the past held that although it is permissible for a presiding magistrate to take counts together for the purpose of sentence this must be done with circumspection and in line with the guidelines of this court as well as judgments of other jurisdictions, and that special care should be taken when dealing with statutory offences. (See *S v Bisengeto Kitungano* (unreported Namibian High Court review judgment delivered on 27.4.2001), *S v Eric Mbala* (unreported Namibian High Court review judgment delivered on 5.11.2001), *S v Mostert* 1995 NR 131, *S v Haingura Alexander* (unreported Namibian High Court review judgment delivered on 8.2.2002), *S v Saltiel Shikongo*, (unreported Namibian High Court review judgment, case number CR 144/2003 delivered on 3.10.2003), *S v Ananias Katjire* (unreported Namibian High Court review judgment case number CR 84/2005 delivered on 20.07.2005*), S v Mekondja Helao* (unreported Namibian High Court review judgment CR 10/2012 delivered on 15.02.2012), *S v Visagie* 2010 (1) NR 271. See also *S v Hayman* 1988 (1) SA 831 (NC), *S v Viljoen* 1989 (3) SA 965 (T), *S v Young* 1977 (1) SA 602 (A), *S v Setnoboko* 1981 (3) SA 553 (O), *S v Mofokeng* 1977 (2) SA 447 (O), *S v Swart* 2000 (2) SACR 566 (SCA).

[7] The principle guideline discernable from afore-mentioned judgments is that although the procedure is neither sanctioned nor prohibited by the Criminal Procedure Act 51 of 1977, the practise is undesirable and should only be adopted by lower courts in exceptional circumstances.

[8] ‘Exceptional circumstances’, may for instance be present where the charges are closely connected eg. in a case where unlawful possession of a fire-arm and unlawful possession of matching ammunition was obtained at the same time or where the charges flow from one and the same act, (*Ananias Katjire* (supra)), or where the charges are closely connected or similar in point of time, place or circumstance, (See *S v Akanda* 2009 (1) NR 17 (HC)).

[9] The first reason for frowning upon the practice is the difficulty it might create on appeal or review especially if the convictions on some but not all counts are set aside. (*S v Young* (supra)).

[10] In *S v Immelman* 1978 (3) SA 726 (AD) at 728 H – 729 A. Corbett JA explained the ‘difficulty’ of taking counts together for the purposes of sentence in the following way:

> ‘In my view, the difficulty can also be caused on appeal by the imposition of a globular sentence in respect of dissimilar offences of disparate gravity. The problem that may then confront the court of appeal is to determine how the trial court assessed the seriousness of each offence and what moved it to impose the sentence which it did. The globular sentence tends to obscure this.’

[11] In the same vein Trollip JA in *Young* supra stated that it induces to clearer thinking in determining the appropriate sentences to treat each offence separately.

[12] The second reason why it is undesirable to take divergent counts (especially divergent statutory provisions) together for the purpose of sentence is the tendency of losing sight of the legal principle that the imposition of a comprehensive sentence should be a competent sentence in respect of each of the individual counts so taken together. Where the comprehensive sentence imposed is an incompetent sentence in respect of any one of the individual counts which had been taken together for the purpose of sentence, such a comprehensive sentence is irregular and de jure a nullity and should be corrected. (*S v Hayman* 1988 (1) SA 831 (NC), *S v S* 1981 (3) SA 3771).

[13] It has been stated on this score that when one comprehensive sentence is imposed in respect of two or more charges, it essentially means that the single sentence is to be regarded as the punishment for each of the separate offences and for that reason it is not competent to impose such a sentence when its severity exceeds the jurisdiction of the court in regard to one or more of the charges (*Hiemstra's Criminal Procedure* 4th Issue par 28 – 41).

[14] In *S v Van Zyl* 1974 (1) SA 113 (TPD) it was held (with reference to the circumstances of that case) that although offences are created by one and the same Ordinance and, broadly speaking, belong to the same genus, it is preferable to impose separate sentences. It was further held that even if it would be permissible to take counts together for the purpose of sentence, no court is competent to impose a sentence which is higher than the sentence prescribed for a single offence.

[15] This practice of taking counts together for purpose of sentence has been described by Chetty J in S v *Ngabase* 2011 (1) SACR 456 (ECG) at 467 (d), as a lamentable practice, and correctly so.

[16] I shall now turn to the prescribed penalties in respect of each of the convictions in this review case and shall consider whether the magistrate was justified in imposing the comprehensive sentence of N$3000 or 12 months imprisonment having regard to the afore-mentioned guidelines.

[17] The penalty prescribed by section 106(7) of Act 22 of 1999 in respect of count 1 is a fine not exceeding N$2000 or to imprisonment not exceeding 6 months or to both such fine and imprisonment. The prescribed penalty in respect of count 2 is the same, and in respect of count 3 it is a fine not exceeding N$4000 or imprisonment not exceeding 12 months.

[18] It should now be apparent that the comprehensive sentence imposed exceeds the maximum prescribed penalties in respect of counts 1 and 2. The comprehensive

sentence imposed not only exceeds the maximum fine which may be imposed but also exceeds the prescribed maximum term of imprisonment in respect of each of these two counts. The comprehensive sentence imposed is therefore an incompetent sentence and a nullity.

[19] The facts of this case is an excellent example why the emphasis should not be that the practice of taking counts together for purpose of sentence, is not prohibited, but the emphasis should be that such a practice is *undesirable* and magistrates should (save in exceptional circumstances) as a general point of departure refrain from taking counts together for purpose of sentence but in particular to refrain from doing so in respect of statutory contraventions.

[20] This court has fairly comprehensively dealt with the undesirability of afore-mentioned practice in *S v Mekondja Helao* (supra) delivered on 15 February 2012. I am aware of the fact that review judgments of this court are being distributed to magistrates by way of email. I was also informed that not all the magistrates are in a position to access email due to the unavailability of computers especially in rural areas.

[21] It cannot, in my view, be over-emphasised that it is essential that all the magistrates in this jurisdiction should read review judgments as well as appeal judgments of this court in order to avoid the pitfalls which are exposed in these judgments.

[22] In the result the following orders are made:

(a) The convictions in respect of counts 1, 2 and 3 are confirmed.

(b) The sentence imposed is set aside.

(c) The matter is referred back to the presiding magistrate who is ordered to sentence the accused afresh in respect of each of the three counts.

(d) The Chief Magistrate is instructed to see to it that each and every magistrate in Namibia is provided with a hard copy of this judgment.

E P B Hoff

Judge

P T Damaseb

Judge President