REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CR: 34/2013

In the matter between:

THE STATE

and

VINCENT JAZPERSON **ACCUSED**

(HIGH COURT MAIN DIVISION REVIEW REF NO. 903/2012)

Neutral citation*:* *State v Jazperson* (CR 34/2013) [2013] NAHCMD 155 (07 June 2013)

Coram: HOFF J and VAN NIEKERK J

Delivered: **07 June 2013**

Summary: State may in terms of section 83 of Act 51 of 1977 charge an accused with more than one offence on the strength of the evidence the State has at its disposal – However, what should be avoided is an improper duplication of convictions by the presiding legal officer.

Two tests, the single intent test and the same evidence test are used to determine whether or not there was a duplication of conviction – In applying one or the other test the court should also be guided by common sense and fairness.

Accused convicted of theft and trespassing – In order for accused to gain access to bag on premises from which he stole certain articles he of necessity had to trespass. Single intent test applicable – conviction of both theft and trespassing a duplication of convictions - Conviction in respect of trespassing set aside.

ORDER

(a) The conviction and sentence in respect of the charge of theft (count 1) are confirmed.

(b) The conviction and sentence in respect of the charge of trespassing (count 2) are set aside.

JUDGMENT

HOFF J (VAN NIEKERK J concurring):

[1] The accused was convicted of the crime of theft and the crime of trespassing in contravention of the provisions of s 1(1) of Ordinance 3 of 1963 as amended. In respect of the charge of theft he was sentenced to 18 months imprisonment of which half was suspended on certain conditions and in respect of trespassing he was sentenced to 6 months imprisonment which was wholly suspended.

[2] I directed the following query to the magistrate:

'Does the conviction in respect of count 2 not amount to a duplication of convictions in the circumstances?
How could the accused (on his version) have appropriated the bags in the tea garden without trespassing?'

[3] The magistrate in her reply referred to the tests applied by the courts to determine 'whether or not there has been an improper splitting of charges' and then in conclusion stated the following:

'If one applies the single intent test I would have to agree with the Honourable Reviewing Judge. However if the evidence test is applied the opposite result would be arrived at. On the first count the evidence must proof (sic) the unlawful *contrectatio* of the bag of curios with the intent to steal same and on count two, the entry of the premises without the permission of the owner/occupier of said premises as well as *mens rea*. I submit that the accused duly admitted the elements of both offences. I therefore submit that this is a matter of interpretation and that the evidence test show there was no improper duplication of convictions.'

[4] The accused pleaded guilty to both charges and was questioned in terms of section 112(1)*(b)* of Act 51 of 1977. The answers given by the accused person revealed the following sequence of events: On the night in question he was at a gambling house which was situated on top of a building in Swakopmund. At one stage he looked down and saw a bag on the ground in a place he referred to as a tea garden at the back of the building. He went down and entered an alley which led to the tea garden. Here he opened the bag and discovered that it contained different types of curios. He put some of the curios in two plastic bags and was arrested as he was about to leave the premises.

[5] After I have received the reply of the magistrate I forwarded the matter to the Prosecutor-General for her opinion. In due course I received an opinion from Advocate Nyoni who is attached to the Office of the Prosecutor-General and I am grateful for her views expressed in a memorandum. Advocate Nyoni referred to the provisions of section 83 of Act 51 of 1977 which provide that if by reason of uncertainty as to the facts which of several offences can be proved, the accused may be charged with the commission of all or any of such offences or may be charged in the alternative with the commission of any number of such offences. (See *S v Grobler* 1966 (1) SA 507 (A) cited with approval in *S v Gaseb and Others* 2000 NR 139 (SC)).

[6] In *Gaseb* O'Linn AJA found that the State may charge an accused with more than one offence on the strength of the evidence the State has at its disposal, but *what should be avoided is an improper duplication of convictions*. (Emphasis

provided). The Supreme Court in *Gaseb* (supra) thoroughly discussed this issue and referred with approval to what was said by Hannah J in the Full Bench decision in *S v Seibeb* and *S v Eixab* 1997 NR 254 (HC) at 256 D-E, namely:

'There is no single test. This is so because there are a large variety of offences and each has its own peculiar set of facts which might give rise to borderline cases and therefore to difficulties. The tests which have been developed are mere practical guidelines in the nature of questions which may be asked by the Court in order to establish whether duplication has occurred or not. These questions are not necessarily decisive.'

[7] The High Court (in *Seibeb*) then referred to and explained the two tests, namely the single intent test and the same evidence test.

[8] The Supreme Court in *Gaseb* also approved the guideline quoted in *Seibeb* (supra) from Landsdown and Campbell: *South African Criminal Law and Procedure* (Vol. V) at 228, namely:

'Both tests or one or other of them may be applied in determining which, or whether both, should be used the Court must apply common sense and its sense of fair play.'

[9] In the present matter it is clear from the record that the bag from which the accused intended to steal and from which he eventually stole was situated in the tea garden and in order to gain access to the bag the accused of necessity had to enter the tea garden ie he had to trespass.

[10] I agree with Ms Nyoni, that the magistrate should have been guided by the single intent test since the two acts of which each, standing alone, would constitute criminal conduct, were committed by the accused with a single intent, namely, to steal from the bag in the tea garden. The act of entering the tea garden was necessary for him in order to carry out that intention.

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[11] In my view, therefore when the magistrate convicted the accused of both theft and trespassing there was a duplication of convictions. The accused should only have been convicted of the charge of theft.

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

(a) The conviction and sentence in respect of the charge of theft (count 1) are confirmed.

(b) The conviction and sentence in respect of the charge of tresspassing (count 2) are set aside.

E P B HOFF

Judge

K Van Niekerk

Judge