

**REPUBLIC OF NAMIBIA**

REPORTABLE



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: CR 84/2013

In the matter between:

**THE STATE**

and

**MBAMBI TUHANDI**

**ACCUSED 1**

**NDORA PETRUS**

**ACCUSED 2**

**Neutral citation:** *S v Tuhandi* (CR84/2013)[2013]NAHCMD367(02 December 2013)

**Coram:** SIBOLEKA J and CHEDA J

**Delivered:** 02 December 2013

**Flynote:** Criminal law: If an accused is facing two separate counts and the same evidence is used to sustain a conviction on both of them, there is a splitting of charges, and only one of the counts should be preferred against him.

**Summary:** The two accused were charged and convicted on two counts: hunting a warthog at Farm Ouparakane without a permit on the first count and theft of the

same warthog at the same farm on the second count. The matter was disposed of in terms of section 112(1)(b) of Act 51 of 1977 and were sentenced accordingly on each count.

Held: It is a duplication of charges to convict and punish an accused twice on one and the same offence he had committed at the same time and place.

Held: In the result both conviction and sentence on the second count are set aside.

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### **ORDER**

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The conviction and sentence on the second count are set aside.

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### **REVIEW JUDGMENT**

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SIBOLEKA J (CHEDA J concurring):

[1] The two accused appeared before the Magistrate's Court at Okahandja on the following charges: Count 1: Nature Conservation Ordinance – Hunting huntable game in contravention of section 30 (1)(a), read with section 1, 30(1)(b) + (c), 85 89, and 89 A of Ordinance 4 of 1975 as amended, and further read with sections 90 and 250 of Act 51 of 1977.

In that upon or about the 6<sup>th</sup> day of November 2010 at or near Farm Ouparakane in the district of Okahandja the said accused did wrongfully and unlawfully hunt huntable game, to wit: 1 x warthog valued at N\$600 without a permit or written authority to do so.

Count 2: Theft:

That the accused is/are guilty of the crime of Theft. In that upon or about the 6<sup>th</sup> day of November 2010 and at or near Farm Ouparakane in the district of Okahandja the said accused did wrongfully, unlawfully and intentionally steal 1 x warthog valued at N\$600 the property or in the lawful possession of Martin Harms.

[2] Both accused pleaded guilty and after questioning in terms of section 112 (1)(b) of Act 51 of 1977, were convicted and sentenced accordingly.

[3] In *S v Benjamin en Ander* 1980 (1) SA 950 (A): Two appellant brothers were charged firstly with attempted murder in that they had attempted to kill S by shooting him with a firearm and secondly, robbery with aggravated circumstances in that they had used violence on S and had threatened him and had led him to believe that force would be used in that they had shot him with a firearm and had threatened him with such firearm with intent to steal the money in his possession. They were convicted and separate sentences on each count were imposed. On appeal an analysis of the evidence revealed that both charges had included a conviction of an act of assault, the shooting of S with a firearm. It was held that the charges of attempted murder and robbery resulted in the appellants being convicted twice on the same act of assault, that is, shooting of S with a firearm.

[4] In the two counts both accused admitted that on 6 November 2010 they stabbed and killed a warthog with spears at Farm Ouparakane. It is therefore my considered view that on this matter both counts included a conviction of killing the same warthog with spears on the same day at the same farm. Consequently there is a splitting of charges.

[5] In view of the above, the conviction and sentence on the second count of theft cannot be allowed to stand.

[6] In the result I make the following order:

The conviction and sentence on the first count are confirmed.

The conviction and sentence on the second count are set aside.

It is ordered that any payment, if any, the accused may have made on the second count be refunded back to him immediately.

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**A M SIBOLEKA**  
**Judge**

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**M CHEDA**  
**Judge**