

REPUBLIC OF NAMIBIA

NOT REPORTABLE



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

CR No: 40/2017

In the matter between:

THE STATE

and

SHIKUSHO JOSEPH

HIGH COURT MD REVIEW CASE NO 1213/2015

Neutral citation: S v Joseph (CR 40/2017) [2017] NAHCMD 176 (27 June 2017)

CORAM: LIEBENBERG J et SHIVUTE J

DELIVERED: 27 June 2017

Flynote: Criminal procedure – Charge – Duplication of convictions – Charged with trespassing (c/s 1(1) of Ordinance 3 of 1962) and theft – Convicted both counts – Accused acted with single intent to steal – Constituted one criminal transaction.

ORDER

1. The conviction and sentence on count 1 are set aside.
2. The conviction and sentence on count 2 are confirmed.

JUDGMENT

LIEBENBERG J: (Concurring SHIVUTE J)

[1] The accused appeared in the Rundu Magistrate's Court and in count 1 charged with the offence of trespassing (c/s 1(1) of Ordinance 3 of 1962), and in count 2, with theft of a pair of glasses. Having pleaded guilty to both counts the accused was convicted and given a fine on each count.

[2] On the charge of trespassing the court questioned the accused pursuant to the provisions of s 112(1)(b) of the Criminal Procedure Act, 51 of 1977, while on count 2 he was convicted on his mere plea of guilty as provided for in s 112(1)(a) of the Act.

[3] Both counts result from the same incident when the accused entered the premises of the complainant and took the pair of glasses through an open window of his home. In response to the court's questioning the accused said the purpose of him going onto the premises was to take the pair of glasses.

[4] When the matter came on review a query was directed to the presiding magistrate enquiring from her whether a conviction on both counts did not constitute a duplication of convictions. In her cryptic statement and without even attempting to defend the convictions, the magistrate concedes that there was a duplication of convictions and requests the conviction on count 1 to be quashed.

[5] From the accused's answers it is evident that he entered the complainant's premises solely with the intention of taking the pair of glasses. This should have alerted the court that he lacked the required intent to commit the offence of trespassing as he, in order to take the glasses, had to enter the premises.

[6] Section 83 of the Criminal Procedure Act, 51 of 1977, provides that the accused may be charged in the main, or the alternative, with the commission of several offences of which there exist uncertainty as to the facts that can be proved, or where there is doubt which of several offences is constituted by the facts and can be proved. The prosecution is thus permitted to bring in as many charges as can be justified by the facts to be proved. It ultimately lies with the court in the end to decide on the facts whether or not conviction on the offences charged will constitute a duplication of convictions.

[7] The Supreme Court in *S v Gaseb and Others* 2000 NR 139 (SC) approved two tests that should be applied by the court in determining whether or not there is a duplication of convictions and cited with approval these tests as summarised in the Full Bench decision of *S v Seibeb and Another; S v Eixab* 1997 NR 254 (HC) where the following appears at 256E-I:

'The two most commonly used tests are the single evidence test and the same evidence test. Where a person commits two acts of which each, standing alone, would be criminal, but does so with a single intent, and both acts are necessary to carry out that intent, then he ought only to be indicted for, or convicted of, one offence because the two acts constitute one criminal transaction. See *R v Sabuyi* 1905 TS 170 at 171. This is the single intent test. If the evidence requisite to prove one criminal act necessarily involves proof of another criminal act, both acts are to be considered as one transaction for the purpose of a criminal transaction. But if the evidence necessary to prove one criminal act is complete without the other criminal act being brought into the matter, the two acts are separate criminal offences. See Lansdown and Campbell South African Criminal Law and Procedure vol V at 229, 230 and the cases cited. This is the same evidence test.

Both tests or one or other of them may be applied and in determining which, or whether both, should be used the Court must apply common sense and its sense of fair play. See: Lansdown and Campbell ((supra)) at 228.'

(Emphasis added)

[8] When applying these tests to the present facts it is evident that, although the accused committed two acts, each standing alone would be criminal, he had acted with the single intent to steal the pair of glasses. In order to get to them he had to enter the complainant's premises and as the two acts constitute one criminal transaction, he ought to have been convicted of only one offence i.e. theft. Consequently, the conviction on count 1 falls to be set aside.

[9] There is however one further issue that needs to be addressed. The query was directed to the magistrate as far back as 27 August 2015, to which she only responded **16 months** later! Except for stating that the 'record was not found on time for the magistrate to provide reasons' no reasons for the delay has been given. The remissness on the part of the Clerk of the Court to bring the query to the presiding magistrate's attention as a matter of urgency, in this instance, undoubtedly resulted in an injustice caused to the accused in that he already served the sentence imposed on count 1 in full which now falls to be set aside. It boggles the mind why the magistrate, who is responsible for checking the Review Register on daily basis, did not observe the outstanding review case sooner and made the necessary enquiries into the matter. Such carelessness must be discouraged in the strongest of terms.

[10] In the result, it is ordered:

1. The conviction and sentence on count 1 are set aside.
 2. The conviction and sentence on count 2 are confirmed.
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J C LIEBENBERG

JUDGE

N N SHIVUTE

JUDGE