



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

CR No: 60/2017

In the matter between:

THE STATE

and

TJANGANO INGRID NANGALI

HIGH COURT MD REVIEW CASE NO 1248/2017

Neutral citation: *S v Nangali* (CR 60/2017) [2017] NAHCMD 286 (10 October 2017)

CORAM: LIEBENBERG J et SHIVUTE J

DELIVERED: 10 October 2017

Flynote: Criminal Procedure – Sentence – Accused convicted on four counts of ill-treatment and/or neglect of her biological children in contravention of s 18(1) of the Children’s Act 33 of 1960 – Whether the sentence imposed did not exceed the maximum penalty provided for in s 18(5) of the Act – The maximum fine under s 18(5)

of the Act is 200 pounds – Conversion of - Section 2 of the Decimal Coinage Act of 1959 find application – Legal conversion to Rand/Namibian dollar – Two hundred pounds equivalent to N\$400.

Criminal Procedure – Charge – Duplication of convictions – Charged on four counts of ill-treatment and/or neglect of children in contravention of s 18(1) of the Children’s Act 33 of 1960 (the Act) – Convicted on four counts – Accused acted with single intent to abandon her four children simultaneously during the same period.

Summary: The accused was convicted on four counts of ill-treatment or neglect of her biological children in contravention of s 18(1) the Act and sentenced to a fine of N\$2 000 or 12 months’ imprisonment, wholly suspended on condition of good conduct and the accused to perform 1500 hours community service at a designated clinic. The issue for determination was whether the sentence imposed did not exceed the maximum penalty as provided in s 18(5) of the Act. The Court, having regard to s 2 of the Decimal Coinage Act of 1959, found that the maximum fine that may be imposed under s 18(5) of the Act is one not exceeding the amount of N\$400.

The accused was convicted on four counts. The counts covered the same period during which she abandoned her children. The Court found that the accused acted with the single intent to abandon her four children simultaneously during the same period and should therefore have been convicted on one count.

ORDER

1. The charge in count 1 is amended to include the names of the victims in counts 2, 3 and 4.

2. The conviction on count 1 is confirmed.
3. The convictions on counts 2, 3 and 4 are set aside.
4. The sentence imposed is set aside and substituted with the following: Count 1 – N\$400 or 6 months' imprisonment, wholly suspended for a period of 5 years on the following conditions:
 - a) Accused is not convicted of a contravention of s 18(1) of Act 33 of 1960, committed during the period of suspension;
 - b) Accused performs a total of 1500 hours of community service at Sambyu Clinic, to be supervised by Mr Karei Paulus, three (3) hours on a daily basis from 14:00 – 17:00, Mondays to Fridays, excluding public holidays, starting on 26 May 2017.
5. The sentence is antedated to 24 May 2017.

JUDGMENT

LIEBENBERG J: (Concurring SHIVUTE J)

[1] The accused was convicted on four counts of ill-treatment or neglect of her biological children in contravention of s 18(1) of the Children's Act 33 of 1960 (the Act) and sentenced to a fine of N\$2 000 or 12 months' imprisonment, wholly suspended on condition of good conduct and the accused to perform 1500 hours community service at a designated clinic.

[2] When the matter came before me on review, a query was directed to the magistrate enquiring as to whether the sentence imposed i.e. the fine, did not exceed the maximum penalty provided for in s 18(5) of the Act. In the magistrate's replying statement it is conceded that the maximum penalty was indeed exceeded. The concession is proper.

[3] Section 18(5) of the Act reads:

'(5) Any person convicted of an offence under this section shall be liable to a fine not exceeding two hundred pounds or in default of payment of such fine to imprisonment for a period not exceeding two years or to such imprisonment without the option of a fine or to both such fine and such imprisonment; or if it was proved that the said person would, to his knowledge, directly or indirectly acquire any property or an interest in any property or indirectly derive any benefit from any such acquisition by any other person in the event of the death of the child in respect of whom that offence was committed, he shall be liable to a fine not exceeding five hundred pounds or in default of payment of such fine to imprisonment for a period not exceeding five years or to such imprisonment without the option of a fine or to both such fine and such imprisonment.'

(Emphasis provided)

[4] Courts faced with legislation promulgated in the Union (of South Africa) under British reign before 1961, are guided by s 2 of the Decimal Coinage Act of 1959 which reads:

'Any reference in any law, deed, instrument, security for money or other document or in any contract or agreement, manner whatsoever, to an amount determined on the basis of the coins specified in the Schedule to the principal Act, shall be construed as including a reference to an equivalent amount determined on the basis of the coins specified in sub-section (2) of section *one* and in accordance with the respective values of such last mentioned coins in comparison with the coins specified in that Schedule as set out in the said sub-section ...'

Section 1 (1) and (2) further states that the coinage units would be the rand (R) of which the comparative value to the pound is two rand to the pound.

[5] The Namibian Constitution came into existence with the independence of Namibia in 1990 and Article 140 thereof reads:

'The Law in Force at the Date of Independence

(1) Subject to the provisions of this Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent court.'

[6] The legal conversion of the maximum fine that may be imposed under s 18(5) of the Act is therefore not to exceed the amount of N\$400.

[7] For a period of 57 years there has been no amendment made to the penalty provisions set in s 18(5) of the Act which created the untenable situation where presiding officers, when sentencing offenders under the Act, are compelled to impose fines which are shockingly inadequate and inconsistent with principles of fair justice. It is not in the interest of the administration of justice where the court's sentencing jurisdiction is inhibited by outdated legislation. It is therefore imperative that the Legislature expeditiously set in motion the process of having the penalty provisions provided for in the Act adjusted to be more realistic and in step with the present dictates of criminal justice.

[8] The frustration of magistrates regarding the inadequate maximum sentence applicable to crimes committed in contravention of s 18 is quite understandable,

because the prescribed maximum fine is disproportionate to the maximum alternative sentence that may be imposed i.e. two years imprisonment. This notwithstanding, the prescribed sentence is still applicable until such time that it is amended by legislation.

[9] There is one further issue arising from the record of the proceedings that requires consideration and that is a possible duplication of convictions.

[10] The accused was charged and convicted on four identical counts of ill-treatment or neglect of children in contravention of s 18(1) of the Act, the only difference in the charges being the names of the children and their respective ages differing. The counts cover the same period during which she abandoned the children i.e. December 2015 – October 2016. Though it had been proved during the trial that the accused made herself guilty of a contravention of s 18(1) when abandoning her children whilst legally liable and able to maintain her children, she had clearly acted with single intent.

[11] 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 trial court in the end to decide on the facts whether or not conviction of the offences charged will constitute a duplication of convictions.

[12] 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)

[13] When applying these tests to the present facts, it is evident that the accused had acted with the single intent to abandon her four children simultaneously during the same period and should therefore only have been convicted on one count in respect of all four children and not on four different counts. This constituted a duplication of convictions and the remaining counts fall to be set aside.

[14] In the result, it is ordered:

1. The charge in count 1 is amended to include the names of the victims in counts 2, 3 and 4.
2. The conviction on count 1 is confirmed.
3. The convictions on counts 2, 3 and 4 are set aside.
4. The sentence imposed is set aside and substituted with the following: Count 1 – N\$400 or 6 months' imprisonment, wholly suspended for a period of 5 years on the following conditions:
 - a) Accused is not convicted of a contravention of s 18(1) of Act 33 of 1960, committed during the period of suspension;
 - b) Accused performs a total of 1500 hours of community service at Sambyu Clinic, to be supervised by Mr Karei Paulus, three (3) hours on a daily basis from 14:00 – 17:00, Mondays to Fridays, excluding public holidays, starting on 26 May 2017.
5. The sentence is antedated to 24 May 2017.

J C LIEBENBERG

JUDGE

**N N SHIVUTE
JUDGE**