

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case Title: <i>The State v Billbonga Kawajo</i>	High Court Ref Case No: CR 104/2019
	Division of Court: Main Division
Heard before: Honourable Justice Shivute <i>et</i> Honourable Justice Sibeya Acting	Delivered on: 12 December 2019
Neutral citation: <i>S v Kawajo</i> (104/2019) [2019] NAHCMD 546 (12 December 2019)	
The order: <ol style="list-style-type: none">1. The conviction on count 1 is confirmed.2. The conviction on count 2 is set aside.3. The sentence imposed is set aside and the matter is referred back to the trial magistrate for sentencing the accused on count 1 afresh.	

SIBEYA, AJ and SHIVUTE, J (concurring)

[1] This is a review in terms of s 302(1) of the Criminal Procedure Act 51 of 1977 (the CPA).

[2] The accused appeared in the magistrate's court for the district of Otjiwarongo charged with the following offences:

'Count 1 – contravening section 30(1)(a) read with sections 1, 30(1)(b), 30(1)(c), 85, 89 and 89A 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 06th September 2019 at or near Farm Hebron in the district of Otjiwarongo the said accused did wrongfully and unlawfully hunt huntable game, to wit 1 x oryx valued at N\$3000.00 without a permit or written authority to do so.

Count 2 – contravening section 1(1) of the Trespass Ordinance, 1962 (Ordinance 3 of 1962) as amended by Act 20 of 1985.

In that upon or about the 06th September 2019 and at or near Farm Hebron in the district of Otjiwarongo the accused did unlawfully enter and was upon land situated at Farm Hebron without the permission of the lawful occupier of such land or building or part of a building, or of a person authorized by or on behalf of such lawful occupier to give such permission, or of the owner or person in charge of land or a building or part of a building that is not lawfully occupied by any person.'

[3] The accused pleaded guilty to the above charges where after the court questioned

him in terms of section 112(1)(b) of the CPA on count 1 whilst invoking section 112(1)(a) in respect of count 2. The accused was subsequently convicted as charged on both counts and while taking the two counts together, the court sentenced him to a fine of N\$4,000 or 12 months' imprisonment.

[4] A query was addressed to the magistrate as to why count one and count two were taken together for purposes of sentencing while the two are distinct statutory offences.

[5] The magistrate in her response stated that:

'Herewith the author concedes that each count should have been sentenced separately. I trust the Honourable Reviewing Judge will deal with the matter accordingly.'

[6] It should be noted that the CPA does not particularly provide for the process of taking charges together for purposes of sentence, but over the years our courts have set out guidelines through judicial precedents within which sentences on different counts may be taken together for sentencing.

[7] Hoff J (as he then was) in *S v Tjikotoke*¹ referred to the said guidelines and stated the following:

'[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 April 2001), *S v Eric Mbala*

¹ 2014 (1) NR 38 (HC) at 39G to 40B. see: also: *S v Akanda* 2009 (1) NR 17 (HC).

(unreported Namibian High Court review judgment delivered on 5 November 2001), *S v Mostert*; *S v De Koker* 1995 NR 131, *S v Haingura Alexander* (unreported Namibian High Court review judgment delivered on 8 February 2002), *S v Saltiel Shikongo*, (unreported Namibian High Court review judgment, case No CR 144/2003 delivered on 3 October 2003), *S v Ananias Katjire* (unreported Namibian High Court review judgment case No CR 84/2005 delivered on 20 July 2005), *S v Mekondja Helao* (unreported Namibian High Court review judgment CR 10/2012 delivered on 15 February 2012), *S v Visagie* 2010 (1) NR 271 (HC). See also *S v Hayman* 1988 (1) SA 831 (NC), *B 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).'

[8] Our judicial precedents have thus evolved that it is permissible to take charges together for purposes of sentencing but only if there are exceptional circumstances present to warrant such an approach. In some cases where exceptional circumstances may be found to be present may include cases where charges directly flow from the other or are closely connected as to time, place or circumstance.

[9] One of the reasons why taking charges together for purposes of sentencing should only be applied when there are exceptional circumstances present is the difficulty which the appeal or review court may have in the event of setting aside the conviction of only one of the concerned charges.

[10] Hoff J in *S v Tjikotoke (supra)*² discouraged taking charges together for sentencing purposes particularly regarding statutory offences and stated as follows:

'The facts of this case provide an excellent example of 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

² Para 19.

statutory contraventions.’

[11] I associate myself with the above remarks and emphasise that an offender should be sentenced individually for each offence which bears a corresponding penalty clause, lest society thinks that some of the offences are not worthy of prescribed penalties unless there are exceptional circumstances which warrant that charges be taken together for sentencing. It is thus advisable to impose separate sentences for individual offences especially for statutory offences.

[12] Whilst being mindful of the provisions of section 83 of the CPA, which provides that an accused may be charged of all or any such offences or alternatives, where there is uncertainty or doubt on the facts as to which offences may be proven, it remains the duty of the court to guard against duplication of convictions. The court should therefore be vigilant in its analysis of the facts and evidence presented to avoid duplication of convictions.

[13] The Supreme Court in *S v Gaseb and Others*³ endorsed the test used to determine whether there is a duplication of convictions or not which was discussed in *S v Seibeb and Another*; *S v Eixab*⁴ where it was stated that:

‘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,

³ 2000 NR 139 (SC).

⁴ 1997 NR 254 (HC) 256E-I.

should be used the Court must apply common sense and its sense of fair play. See Lansdown and Campbell (supra) at 228.'

[14] The accused admitted that he went to Farm Hebron on 06th September 2019 in the district of Otjiwarongo, he admitted to entering the said farm without a permit, hunting and killing an oryx. The accused further pleaded guilty to trespassing at Farm Hebron. The accused therefore committed two separate statutory offences, namely: unlawful hunting huntable game and trespassing. What needs to be considered is whether or not the accused had the necessary intention to commit any or both such offences.

[15] From the plea it is apparent that when the accused entered Farm Hebron, his intention was to unlawfully hunt on the farm. Trespassing flows consequentially as in order to hunt on the farm, the accused had to enter that farm. The accused therefore had a single intent which is to hunt and therefore convictions of both unlawful hunting and trespassing cannot be sustained as he had a single intent while performing a single transaction. A conviction of trespassing and unlawful hunting, *in casu*, amounts to a duplication of convictions. In the premises the conviction of the accused on trespassing falls to be set aside.

[16] In the result, it is ordered:

1. The conviction on count 1 is confirmed.
2. The conviction on count 2 is set aside.
3. The sentence imposed is set aside and the matter is referred back to the trial magistrate for sentencing the accused on count 1 afresh.

O S SIBEYA ACTING JUDGE	N N SHIVUTE JUDGE