

PRACTICE DIRECTION 61

“ANNEXURE 11”

Case Title: <i>The State v Arrie Bock and Martin Lukoro</i>	Case No: CR 46/2020
High Court MD Review No: 2161/2019	Division of Court: Main Division
Heard before: Judge Claasen <i>et</i> Acting Judge Sibeya	Delivered on: 13 July 2020
Neutral citation: <i>S v Bock</i> (CR 44/2020) [2020] NAHCMD 282 (13 July 2020)	
The order: <ol style="list-style-type: none">1. The conviction and sentence of both accused in respect of count 1 are confirmed2. The conviction and sentence of both accused in respect of count 2 are set aside.	
Reasons for order:	
Claasen J (concurring Sibeya AJ) <ol style="list-style-type: none">1. This is a review in terms of section 302(1) of the Criminal Procedure Act 51 of 1977 as amended, (hereinafter referred to as the CPA).2. The accused persons were charged on count 1 with the predicate offence of stock theft and on count 2 with money-laundering namely the acquisition, possession or use of proceeds of unlawful activities.3. Both accused pleaded guilty in terms of section 112(1)(b) of the CPA. They were convicted as charged and sentenced to 36 months imprisonment on count 1 and to 6 months imprisonment on	

count 2.

4. The reviewing court addressed a twofold query that pertains to the charge and conviction of the second count. Firstly it was pointed out that the charge does not contain any reference to a contravention of any section of the Prevention of Organized Crime Act 29 of 2004 (hereinafter referred to as POCA). Secondly it was pointed out that the body of the charge was phrased along the lines of section 6 of POCA. The magistrate was asked whether a charge and conviction in terms of section 6 of POCA was appropriate in view of the full bench decision of *S v Henock and others*¹
5. In her reply the magistrate conceded that section 6 of POCA was not appropriate and that it amounts to duplication of convictions. She requested the court to set aside the conviction and sentence.
6. No issue arises in respect of the conviction and sentence on the first count herein and I turn to the germane issue. For that, it is necessary to set out the charge of count two. It reads as follows:

‘ Count 2 (in respect of accused 1 and 2)

Money laundering – Acquisition, possession or use of proceeds of unlawful activities.

In that upon or about 19 April 2019, and at or near farm Auheib, in the district of Gobabis, the said accused, acting in concert, did wrongfully, unlawfully and intentionally acquire, possess or use proceeds of unlawful activities to wit money in the amount of N\$ 600.00 which they knew or ought to reasonably have known that it is or form part of the proceeds of unlawful activities to wit: they obtained money from selling a stolen sheep, the property of or in the possession of Bohitile Gerhard.’

7. In looking at the charge, it is clear that the accused persons were not charged with a contravention of any statute at all, which according to *S v Mariu*² constitutes a defect. In this matter which involved drugs the charge was held to be defective because dealing in dagga is not a crime under the common law but it was an offence created in terms of a statute. In a similar vein in the matter at hand the offence that appears to have been contemplated is that of section 6 of POCA as the charge particulars take after section 6 of POCA, but there was no reference to POCA or a contravention of any section of POCA.

¹ CR 86/2019 [2019] NAHCMD 466 (11 November 2019).

² 1991 NR 149 HC.

8. I move to the second issue namely whether a charge and conviction in respect of count 2 herein was feasible in the circumstances?
9. Again it is prudent to return to the record. In respect of this count the magistrate questioned the accused persons as to what led to their arrest. Accused 1's reply was that: ' Me and accused 2 sold the sheep we stole for N\$ 600 and used up the proceeds' (sic). Accused 2 answered in similar terms referring back to the other accused.
10. The issue that arises is whether the accused persons who were involved in the predicate offence which in this case was stocktheft, could also be charged and convicted under section 6 of POCA?
11. The full bench decision of *S v Henock Others* supra succinctly crystalized the applicable principles at para 47:
'However as regards section 6, the author of the predicate offence and the money-launderer cannot be the same person. Though an offence of money laundering is equally created under section 6, it only applies to a person other than the one who committed the predicate offence. Where the state prosecutes a person under the predicate offence and the money laundering offense, this is likely to constitute a duplication of convictions.'
12. In applying this to the matter at hand, it is apparent that the accused persons, being the same persons who committed the predicate offence were wrongly charged. Furthermore, the act of being in possession of N\$ 600-00 as proceeds is a consequence of their unlawful act of stealing the sheep which is not sustainable as it amounts to a duplication of convictions.
13. Therefore the conviction and sentence in respect of count two stands to be set aside.
14. In conclusion an aspect that needs to be addressed is the careless manner in which the clerk of court mistakenly filed the magistrate's reply dated 19 February 2020 instead of forwarding it to the High Court. It appears that at some point after the matter was sent on review during November 2019, the magistrate was transferred to another station and forwarded her reply to the District Court of Gobabis from where the matter emanated. Suffice it to say, had the reviewing judge's chamber not followed on the query, the matter may have slipped through the cracks resulting in the accused

remaining in prison for the term imposed on count 2. The Director of Lower Courts is directed to address anomalies such this, which may result in grave consequence for the affected accused.

15. In the result the order is as follows:

- a) The conviction and sentence of both accused in respect of count 1 are confirmed
- b) The conviction and sentence of both accused in respect of count 2 are set aside.

C CLAASEN JUDGE	O S SIBEYA ACTING JUDGE