

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case Title: <i>John Claasen v The State</i>	Case No.: HC-MD-CRI-APP-CAL-2020/00110
	Division of Court: High Court Main Division
HEARD BEFORE: Honourable Ms Justice Shivute et Honourable Mr Justice January	Date of Hearing: 30 April 2021 Reasons released on: 7 June 2021
Neutral citation: <i>Claasen v State</i> (HC-MD-CRI-APP-CAL-2020/00110) [2021] NAHCMD 279 (7 June 2021)	
THE ORDER: (a) The convictions in respect of counts 2 and 3 are set aside. (b) The sentence in respect of counts 1,2 and 3 are set aside and the appellant is sentenced afresh on count 1 as follows: Thirteen (13) months' imprisonment back dated to 11 March 2020.	
REASONS FOR ORDER.	
1. The appellant was convicted of corruptly using his office or position for gratification contravening section 43(1) read with sections 32, 43(2), 43 (3), 46,49 and 51 of the Anti-Corruption Act, 8 of 2003. One count of money laundering contravening section 6 (a) read with sections 1, 7,8,10 and 11 of the Prevention of Organised Crime Act, 29 of 2004 and another count of money laundering contravening s 6 (b) of the same Act.	

2. The appellant was sentenced to 2 years' imprisonment. Count 1 – 3 were taken together for purpose of sentence.
3. The appellant was aggrieved by the conviction in respect of counts 2 and 3 and sentence hence this appeal. The convictions in counts 2 and 3 were set aside as well as the sentence and the following are our reasons for the order.

4. Grounds of appeal in respect of convictions counts 2 and 3.

(1) The learned magistrate erred in law in convicting the appellant on his own plea of guilty in respect of both sections 6 (a) and 6 (b) of Act 29 of 2004 whilst the admitted facts could not in law sustain a conviction.

(2) The learned magistrate erred in law in convicting the appellant of both the predicate offence and also under section 6(a) and 6(b) of the Act. Therefore, constituting an impermissible duplication of charges.

With regard to sentence, the grounds are that:

(3) The learned magistrate erred in law when he took the three convictions together for purposes of sentence, whilst the appellant was erroneously convicted on counts 2 and 3.

(4) The learned magistrate erred in law in imposing a sentence that is disturbingly inappropriate when regard is had to the only remaining conviction in terms of section 43(1) of the Anti-Corruption Act.

5. Although the appeal was filed out of time, the application for condonation for the late filing of an appeal was granted because the appellant had a prospect of success on appeal.
6. Counsel for the appellant argued that the learned magistrate erred in law for convicting the appellant under section 6 (a) and 6(b) of Act 27 of 2004 if one has

regard to the Full Bench judgment of this court in *State v Henock* (Cr 86/2019) [2019] NAHCMD 466 (11 November 2019). The convictions in respect of counts 2 and 3 cannot be allowed to stand. The reason being that the accused who committed the predicate offence in this matter on count 1, corruptly using an office or position for gratification in terms of the Anti-corruption Act cannot be convicted again under sections 6 (a) and (b) of the Prevention of Organised Crime Act as this would amount to duplication of convictions.

7. With regard to sentence, counsel argued that the learned magistrate erred in law by taking the three counts together for purpose of sentence since the appellant was erroneously convicted on counts 2 and 3. This resulted in a disturbingly inappropriate sentence when regard's had to the only remaining conviction in terms of section 43(1) of Act 8 of 2003. Therefore, counsel urged the court to set aside the convictions in count 2 and 3 as well as the sentence.
8. Counsel for the respondent conceded that the appellant was improperly convicted in respect of counts 2 and 3 in light of the decision of the Full Bench of this court between the *State v Henock* and 8 others (supra). He further conceded that since the three counts were taken together for purpose of sentence, the appeal against sentence should succeed and the appellant should be given an appropriate sentence of which a custodial sentence is unavoidable. Respondent further did not oppose the application for condonation for the late filing.
9. Both counsel rightly argued that the appellant was erroneously convicted in respect of counts 2 and 3. He was also erroneously sentenced when the court a quo took the three counts together for purpose of sentence.
10. The appellant in this matter committed corruption, by asking the complainant in the robbery case to pay him in order for the appellant to return the complainant's phone that he had recovered. The appellant committed a predicate offence of corruptly using his office or position for gratification. The appellant was also charged under POCA for contravening section 6(a) and 6 (b) of having acquired, possessed or used the proceeds of unlawful activities.

11. In terms of section 6 the appellant being the author of the predicate offence of corruption and the money – launderer, he cannot be the same person. Although the offence of money laundering is created under section 6, it only applies to a person other than the one who committed the predicate offence. This is in line with the decision of the Full Bench of this court of *S v Henock* and 8 others supra.

12. The court a quo's conviction of the appellant on the predicate offence of corruption and money laundering under section 6(a) and 6(b) amounts to duplication of convictions. Therefore, the convictions in respect of counts 2 and 3 cannot stand and the appeal should succeed in this regard. It also follows that since the three counts were taken together for purpose of sentence, the sentence must also be set aside and the appellant should be sentenced afresh.

13. In the premise, the following order is made:

(a) The convictions in respect of counts 2 and 3 are set aside.

(b) The sentence in respect of counts 1, 2 and 3 are set aside and the appellant is sentenced afresh on count 1 as follows.

Thirteen (13) months imprisonment backdated to 11 March 2020.

Judge's signature:	Note to the parties:
N.N. SHIVUTE Judge H. C. JANUARY Judge	
Counsel:	
Mr Isaacks (For the appellant)	Mr Lisulo (For the respondent)