

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK  
REVIEW JUDGMENT

<b>Case Title:</b> <i>The State v Cecil Kanguatjivi</i>	<b>Case No:</b> CR 16/2023
<b>High Court MD Review No:</b> 121/2022	<b>Division of Court:</b> Main Division
<b>Heard before:</b> Judge January and Acting Judge Christiaan	<b>Delivered on:</b> 13 June 2023
<b>Neutral citation:</b> <i>S v Kanguatjivi</i> (CR 16/2023) [2023] NAHCMD 317 (13 June 2023)	
<b>The order:</b> <ol style="list-style-type: none"><li>1. The conviction and sentence on count one, fraud, are confirmed.</li><li>2. The conviction and sentence of fraud on count two are set aside;</li></ol>	
<b>Reasons for order:</b>	
JANUARY, J (CHRISTIAAN AJ concurring)	
[1] This review matter stems from the Gobabis Magistrates Court and is submitted in terms of s 302(1) of the Criminal Procedure Act 51 of 1977, as amended (the CPA).	

[2] The accused was charged on two counts of fraud. The allegations are that; 1. The accused wrongfully, unlawfully, falsely and with intent to defraud did give out and pretend to Omaheke-Mega Save or Batseba Kaheuva that he was authorised to buy goods (alcohol) in the amount of N\$1131.44 on the account of Milka Ndjavera when in truth and fact the accused was not so authorised, and; 2. That the accused wrongfully, unlawfully, falsely and with intent to defraud did give out and pretend to Standard Bank, Gobabis that he was authorised to withdraw cash in the amount of N\$3000 from the account number 041343743 belonging to Milka Ndjavera when in truth and fact the accused was not so authorised.

[3] The accused pleaded guilty on count one and not guilty on count two. He was questioned pursuant to the provisions of s 112(1)(b) of the CPA and duly convicted on count one. The magistrate applied section 115 of the CPA in relation to count two. The accused gave a plea explanation stating that he was sent by his mother firstly to withdraw N\$5000, which he did. He, thereafter, was then sent with a second instruction by his mother to withdraw N\$3000. In addition, he stated that his mother might have forgotten the second occasion.

[4] The complainant testified in the proceedings. She is the mother of the accused. She testified that the accused stole her ATM card from her wallet and withdrew N\$3000 without her consent. She agreed that she sent the accused to withdraw N\$5000. She usually sent him to withdraw money and therefore he knows the pin-code of the complainant. The accused phoned her after his arrest, apologised and promised to refund the complainant.

[5] The accused did not have any questions in cross-examination and admitted that the witness was telling the truth. He closed his case without testifying.

[6] The magistrate convicted the accused on count 2 for fraud and sentenced him to N\$3000 or 9 months' imprisonment.

[7] I directed a query to the magistrate for him to explain how he was satisfied that the accused made a misrepresentation on the second charge of fraud considering the

evidence of the complainant that the accused stole her ATM card and without her authorisation went to withdraw money. I alerted the magistrate that there is no evidence of the manner in which the money was withdrawn and thus, no evidence of any misrepresentation.

[8] The magistrate concedes that no misrepresentation was made to anyone and that the evidence only proves theft. He thus, requests that the conviction be altered to theft. The concession is well founded but theft is not a competent verdict in Chapter 26 of the CPA, providing for competent verdicts.

[9] The evidence indeed proves no misrepresentation. The accused can therefore not be guilty of fraud. The CPA does not specifically provide for a competent verdict on a charge of fraud. However, s 270 of the CPA provides as follows:

**'270 Offences not specified in this Chapter**

If the evidence on a charge for any offence not referred to in the preceding sections of this Chapter does not prove the commission of the offence so charged but proves the commission of an offence which by reason of the essential elements of that offence is included in the offence so charged, the accused may be found guilty of the offence so proved.'

[10] In my view, it needs to be determined if the essential elements of theft are included in the charge of fraud. I could not find any Namibian case dealing with the question. In the Republic of South Africa the issue was dealt with in the case of *S v Kok*<sup>1</sup>. In that case, the accused was charged with fraud; in that he fraudulently obtained payment of an amount of R98 668.98 from the Government Employees Pension Fund (GEPF) after he had been dismissed from the South African Police Service (SAPS). The accused pleaded not guilty and the trial proceeded. The court, however, on the request of the public prosecutor enquired from the legal representative of the accused if he had informed the accused about the competent verdict in terms of section 256 of the CPA. The legal representative confirmed. The accused was not in the alternative charged with theft as is the normal practice in such cases.

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<sup>1</sup> 2015 (2) SACR 637 (WCC)

[10] The trial proceeded with a number of witnesses being called. At some stage the legal representative withdrew. The accused proceeded on his own for a while until he obtained the services of another lawyer who made admissions in terms of section 220 of the CPA. The accused, however, maintained that he did not commit the offence of fraud, and that he did not make any false representations to the complainants. He further conveyed to the court that he had reconsidered the facts and admitted that he is guilty of the competent verdict of theft.

[11] He was convicted of theft on this basis and sentenced to five years' imprisonment suspended on conditions including that he repays the amount of money within one year. The matter was sent on special review in relation to the condition of suspension but the reviewing court *meru motu* considered the conviction on the competent verdict of theft. The reviewing court eventually found that theft was in the circumstances of the case a competent verdict in terms of section 270 of the CPA. I disagree with this finding and endorse the enquiry of *Michael Miller* in an article in *De Rebus* <sup>2</sup> in relation to the finding of the court in the *S v Kok* case.

[12] I agree that the starting point in the enquiry is in accordance with *S v Mavundla* <sup>3</sup> '...simply whether the alleged (lesser) offence by reason of its essential elements is incorporated in the offence charged. The inquiry is in the first instance directed at the essential elements of the (lesser) offence, in other words the definition of the crime. The second step is to determine if those (essential) elements are included in the offence charged. What must, therefore, be considered is whether the essential elements of theft are included in the crime of fraud?'

[13] *Snyman CR Criminal Law 5ed* (Durban: LexisNexis 2008) at 531 defines fraud as: 'fraud' is 'the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another'.

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<sup>2</sup> October 2014:59 [2014] DEREBUS 199, 'Is theft a competent verdict on a charge of fraud?'

<sup>3</sup> 1980 (4) SA 187 (T).

Snyman lists the elements of the crime as following:

- a misrepresentation;
- prejudice or potential prejudice;
- unlawfulness; and
- intention.

According to Snyman at 484, the definition of 'theft' is –

'A person commits theft if he unlawfully and intentionally appropriates movable, corporeal property which:

(a) belongs to, and is in the possession of, another;

...

provided that the intention to appropriate the property includes an intention permanently to deprive the person entitled to the possession of the property, of such property.'

Snyman lists the elements of the crime as:

- an act of appropriation;
- in respect of a certain type of property;
- which takes place unlawfully; and
- intentionally.

[14] On examining the elements of both crimes in comparison, it is evident that not all the essential elements of theft are included in the essential elements of fraud. Both crimes have in common the elements of unlawfulness and intention. However, there is, in the crime of fraud, no element of appropriation. Neither is it required that fraud be in respect of movable, corporeal property. or does the intention in fraud cases have to be to deprive the person entitled to the possession of the property, of such property.

[15] It is therefore evident that a person charged with fraud cannot, on the basis of a competent verdict in terms of s 270, be convicted of theft.

[16] In the result:

1. The conviction and sentence on count one, fraud, are confirmed;
2. The conviction and sentence on count two are set aside.

<b>H C JANUARY JUDGE</b>	<b>P CHRISTIAAN ACTING JUDGE</b>