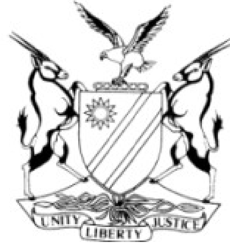
REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: HC-MD-CRI-APP-CAL-2023/00050

In the matter between:

ALBERTUS ENGELBRECHT **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Engelbrecht v S* (HC-MD-CRI-APP-CAL-2023/00050) [2023] NAHCMD 705 (3 November 2023)

Coram: LIEBENBERG, J et CHRISTIAAN AJ

Heard: **6 October 2023**

Delivered: **3 November 2023**

Flynote: Criminal Procedure – Trial – Single witness evidence of complainant – Treated with caution – Court should weigh evidence – Consider merits and demerits –

Decide whether trustworthy despite contradictions and shortcomings in testimonies – Complainant credible witness – No basis for appeal court to interfere.

Mutually destructive versions – Proper approach – Court to apply its mind to merits, demerits of State, defence witnesses' evidence and probabilities of case – Court not to isolate each piece of evidence – Court to look at evidence holistically and to consider whether defense's case has a reasonable possibility of being substantially true – Evidence in its totality supported by inherent probabilities proves that accused person stole the two calves from the complainant.

Criminal Procedure – Duplication of convictions – Offence under section 6 of POCA punishable if person acquires, possess or uses property derived from proceeds of criminal activity – Whilst consequence of theft is that accused person will be in possession of property proceeds of unlawful activities – Elements of offence created under section 6 similar to elements of theft – Convicting accused persons for theft and contravening section 6 of POCA amounts to duplication of convictions.

Criminal Procedure – Accused person was charged under section 4 and section 6 of POCA – Distinction between sections 4 and 6 of POCA.

Summary: The accused person was charged with three counts, count 1 – stock theft, count 2 - ccontravening section 6 of POCA - acquisition, possession or use of proceeds of unlawful activities, count 3 - contravening s 4 of POCA - Disguising unlawful origin of property of stock theft. The State rested its case on evidence of the complainant and three witnesses. The defense rested its case on the evidence of the accused. Single witness evidence. Appellant alleging that the evidence of the state regarding the identification rested on the evidence of the complainant, who was a single witness.

Mutually destructive versions – Appellant alleging that the court misdirected itself on how it dealt with the mutually destructive versions of the complainant and the accused.

Duplication of convictions – In this matter the accused person was convicted and sentenced for offences having the nature of stock theft (predicate offence), and for contravening both sections 4 and 6 of the Prevention of Organised Crime Act 29 of 2004 (hereinafter 'POCA'). The issue before court was whether this did not amount to a duplication of convictions. Appellant alleging that conviction on stocktheft and contravention of section 6 of POCA amounted to a duplication of convictions.

Formulation of charges – The appellant alleged that the formulation of the charges on count 2 and 3 did not meet the standard outlined in section 84 of the Criminal Procedure Act 51 of 1977 and the provisions of sections 4 and 6 of POCA, and are therefore defective.

Held that evidence of a single witness to be treated with caution. The court should weigh evidence, consider its merits, demerits and decide whether it is trustworthy despite contradictions and shortcomings in the testimonies – Complainant credible witness – No basis for interference by appeal court.

Held further that when the court is confronted with mutually destructive versions, the proper approach is for the court to apply its mind to the merits, demerits of both State, defence witnesses' evidence and to inherent probabilities of the case. The court must not isolate each piece of evidence but must look at the evidence holistically and consider whether the defence case has a reasonable possibility of being substantially true. Consideration of evidence in its totality supported by inherent probabilities proves that accused person stole the two calves from the complainant.

Held further that the tests to be applied are the single evidence test and same evidence test. The court a quo found that stock theft and aacquisition, possession or use of proceeds of unlawful activities are two distinct offences, with separate elements. The evidence required to prove the elements of stocktheft and those of a contravention under section 6 of POCA does not differ materially. Accused acted with a single intent when committing the two offences. The court found a misdirection. Conviction on count 2 is set aside.

Held further that s 4 applies to authors of predicate offences whilst s 6 to recipients of proceeds of criminal activity – Money laundering committed under section 4 requires further distinct act and not s 6. The court found misdirection. Conviction on count 2 and 3 is set aside.

ORDER

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1. The point in limine is dismissed.
2. The appeal on conviction of count 1 is dismissed.
3. The appeal on conviction of counts 2 and 3 is upheld.

JUDGMENT

CHRISTIAAN AJ, LIEBENBERG J (concurring)

Introduction

[1] The appellant was convicted in the Magistrate Court of Keetmanshoop on 17 March 2023 on the following charges: Count 1: Theft of stock (considering the provisions of sections 11(1)(a), 1, 14 and 17 of the Stock Theft Act, Act 12 of 1990 as amended; Count 2: Contravening s 6 read with sections 1, 7, 8 and 11 of Act 29 of 2004 (POCA) - acquisition, possession or use of proceeds of unlawful activities, and Count 3: Contravening section 4 read 2 with sections 1, 7, 8 and 11 of Act 29 of 2004 (POCA) - Disguising unlawful origin of property of stock theft in contravention of the provisions of s 11(1) 1, 14 and 17 of the Stock Theft Act, as amended.

[2] The appellant pleaded not guilty to all the counts and after evidence was led, he was convicted on all counts.

[3] On 22 March 2023 he was sentenced as follows:

> 'Count 1: three years imprisonment, Count 2 and 3 each to a fine of N$5000-00 or 3 years imprisonment each, and it was ordered in terms of section 280 of the Criminal Procedure Act 51 of 1977, that the sentence in Count 2 and 3 should run concurrently.'

The appeal lies against conviction of count 1.

Grounds of Appeal: Conviction

[4] The grounds of appeal against the conviction can be summarised as follows:

4.1 The learned magistrate erred in law and fact in the manner she dealt with mutually destructive versions between the complainant and the appellant, more particularly:

4.2 The magistrate erred in fact or in law by finding that the state proved positively the identity of the two calves and the value mentioned in the charge sheet.

4.3 The learned magistrate erred in fact and/or law in accepting the version of the complainant, a single witness, that he is the lawful owner of the two calves and rejecting the version of the appellant as reasonably possibly true.

4.4 The learned magistrate erred in fact and/ or law in not cautioning herself that the complainant did not make any prior description of the two calves prior to purportedly identifying the two calves found in the kraal of the Mr Viljoen.

4.5 The learned magistrate erred in fact and/or law in finding that the two calves were stolen on 11 October 2019 despite the evidence of Mr Viljoen that the

appellant already called him on 09 October 2019, that the appellant is selling the two calves in question, and further the uncontested evidence of Mr Viljoen that the two calves were already registered in the name of the appellant's wife two months prior to the transaction of 11 October 2019.

[5] When the matter came before us on appeal the parties were directed to address the court on:

5.1 Whether the appellant was correctly charged on counts 2 and 3, if not, what the correct charge(s) would be, and whether the conviction can stand in view of the charge as it was phrased.

5.2 Whether the conviction on counts 1 and 2 did not amount to a duplication of convictions in light of the *dictum* in *S v Henock and 8 Other Cases*.[1] It is important to mention that only the appellant filed supplementary heads to address the aforementioned issues.

Point in limine – The Condonation Application

[6] At the inception, Ms Shilongo raised a point *in limine*. She submitted that the appeal should be struck from the roll for non-compliance with the rules of the court, in that the purported notice of appeal had been filed out of time and the appellant's explanation for delay is not reasonable. She further argued that the late filing of the appeal should not be condoned as the appellant does not have prospects of success on the merits.

[7] During the hearing of the appeal, the appellant abided by the initial documents filed. Appellant in his affidavit explained the reason for the delay. He stated that he was sentenced on 22 March 2023, however, the matter was not finalised on that date but as it was postponed several times for the court to conduct an enquiry in terms of s 32 of the POCA. The aforementioned proceedings were only finalised on 24 April 2023. He finished preparing his notice of appeal and forwarded it to the Clerk of the Court in

[1] *S v Henock and 8 Other Cases* (CR 86/2019) [2019] NAHCMD 466 (11 November 2019).

Keetmanshoop during May 2023 simultaneously applied for legal aid. The appellant further explained that his legal aid application was approved in August 2023, and Mr Andreas was appointed to represent him. He further stated that his legal practitioner, after consultation, advised him to file an amended notice of appeal and this was done on 11 August 2023. Mr Andreas argued that the appellant did not wilfully and or deliberately disregard the rules of the court but that the late filing was purely as a consequence of the aforementioned reasons.

[8] It is well established that the granting of condonation for non-compliance with the rules of court, is not for the mere asking. A litigant seeking condonation bears the onus to satisfy the court that there is sufficient cause to warrant the granting of condonation and to launch the condonation application without delay. Moreover, the applicant is firstly required to provide a full, detailed and accurate explanation for the period of the delay, including the timing of the application for condonation. Secondly, the applicant must satisfy the court that there are reasonable prospects of success on appeal.[2]

[9] The appellant filed his application for appeal on the 08 October 2015, which is clearly out of time. Rule 67 of the Magistrates Court Rules provides that an accused person wishing to appeal, is required to do so within a period of 14 days after sentence.

[10] This in itself, in our view, the reasons advanced by the appellant for the late filing of the appeal, meets the threshold of a reasonable and acceptable explanation, and is therefore condoned. We will deal with the second requirement, which is whether there are prospects of success on appeal.

[2] See *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC) para 5; *Balzer v Vries* 2015 (2) NR 547 (SC) at 551J).

Brief Factual Background

[11] The complainant, Mr Kisting, testified that during October 2019, his herder called him to inform him that there is a suspicious movement of cattle. He immediately informed the police as well as the neighbouring farmers to warn them about the sale of cattle. He and his wife drove to Koes, met the police and went to Mr Viljoen's farm, the third state witness, to which the appellant allegedly sold the two calves and a cow. The complainant testified that he inspected the two calves amongst a group of different cattle and recognised them. He further testified that his wife called the cattle by their names Meisie and Seun, and they reacted to the call by moving away and looking around. Further to the aforementioned, he testified that the cattle were marked and branded. He further stated that there was a new brand mark, placed on top of his old brand mark which had faded but the new brand mark still had blood on it. The new brand mark, he confirmed was not his, but he was informed that it belonged to the wife of the appellant. Further identifying features was the fact that one of the cattle was dark brown in colour with a white spot in front of the face and the second one was brownish red in colour. The appellant was not there when the identification was done. The complainant further testified that he recognised the old brand mark under the new brand mark, as his.

[12] The third state witness, Mr Viljoen, testified that the appellant telephonically enquired from him whether he is not interested in buying cattle from him. He informed the appellant to bring the cattle, so that he can buy it. On 11 October 2019, the appellant brought three cows with the following numbers 66040817, 66040833 and 66040828, which were listed on a permit numbered HQ10963071 on the name of Lea Appolus, who was later identified as the appellant's wife. Mr Viljoen further testified that he verified the information to see whom the cows belonged and confirmation was received that it belonged to Lea Appolus and that it was registered in her name two months before the transaction. Mr Viljoen paid the appellant N$1865 in cash and transferred the balance of N$4000 into the bank account number belonging to Lea

Appolus, provided to him by the appellant. Mr Viljoen confirmed that he bought one cow and two calves from the appellant. It was further clarified during cross examination that the amount paid for the two calves was N$3105. He testified that the two calves had the same brand mark numbers. Mr Viljoen clarified that besides the brand marks on the animals, there were other old brand marks, which were not very clear and the ear tags of Lea Appolus. It was his further testimony that two days after the transactions was finalised, the police approached him with a request to inspect cows in his possession, he gave permission and the police did an inspection in the presence of the complainant. The complainant identified the two calves as his, on the earmarks and an old brand mark, which was branded over. The complainant came to collect the two calves. Sergeant Jansen corroborated his evidence relating to the identification of the two calves.

[13] The appellant testified that he telephonically contacted Mr Viljoen, on 09 October 2019, with the aim of enquiring whether he is not interested in buying cattle from him. Mr Viljoen agreed to buy the cattle from him and directed that he should bring the cattle to him on the 11th of October 2019. On 11 October 2019, he drove to the farm of Mr Viljoen with two calves and one cow, which were registered in the name of his wife, branded with a new brand mark over the old brand mark, which he claims was not visible and had to be rebranded. The cattle were offloaded on the farm of Mr Viljoen, whereof they inspected the two calves and the cow and negotiated the price. Mr Viljoen, after verifying the permit, paid him an amount of N$3600 for the two calves. He paid the appellant half the amount in cash and the other half via bank transfer into the bank account of his wife, Lea Appolus.

[14] He further testified that the two calves and the cow belonged to his wife Lea Appolus, in whose name the brand mark is registered and the transport permit was made out. The appellant denied that the two calves belonged to the complainant and that the invisible brand mark belonged to the complainant. He further testified that as head of the household, he has the responsibility of taking care of the sale of cattle. The

appellant further testified that he registered the two calves on his wife's name, two months before the transaction, and branded the cattle with a new brand over the old brand as it was no longer visible. He closed his testimony by informing the court that a few days after this transaction was concluded, the police arrived at his house and arrested him for charges of stocktheft.

[15] Sergeant Jansen corroborated the version of the complainant in all material respects. He added that he was present at Mr Viljoen's farm, when the cattle were recovered by the complainant. He further testified that he observed the new brand marks on top of the old brand mark on the left thigh of the calves. He confirmed that the complainant identified the two calves and it was returned to him.

<u>Discussion of grounds of appeal</u>

First ground: Count 1- Mutually destructive versions and single witness evidence

[16] It was argued on behalf of the appellant that the learned magistrate erred in law and/or fact in the manner that she dealt with the mutually destructive versions between the complainant and the appellant, by finding that the state proved positively the identity of the two calves and the value mentioned in the charge sheet. Counsel further submitted that by accepting the version of the complainant, a single witness, that he is the lawful owner of the two calves and rejecting the version of the appellant as not being reasonably possibly true.

[17] Another issue raised by counsel was that the learned magistrate erred in not cautioning herself that the complainant did not make any prior description of the two calves prior to purportedly identifying the two calves found in the kraal of Mr Viljoen.

[18] Counsel also criticised the learned magistrate for not finding that the two calves were stolen on 11 October 2019 despite the evidence of Daniel Viljoen that the appellant already called him on 09 October 2019. Finally, counsel criticised the learned magistrate for finding that the appellant is selling the two calves in question. And for further ignoring the uncontested evidence of Daniel Viljoen that the two calves were already registered on the name of the appellant's wife two months prior to the transaction of the 11th of October 2019.

[19] Counsel for the respondent on the other hand, argued that the proper approach for the court when confronted with mutually destructive versions was laid down in the matter of *Coleman v State*[3] where the court considered the evidence of the state carefully in its totality and not in isolation to arrive at the correct decision. It was further argued that although the appellant want the court to believe that the complainant is a single witness, it is not the case as the state called a total of four witnesses and that there were no mutually destructive versions. Even if it were to be argued that the complainant was a single witness, in as far as the identification of the calves is concerned, his testimony cannot be judged in isolation.

[20] In regard to the second argument raided by the appellant, counsel for the respondent argued that this ground has no merit, as there is no evidence to back up the argument and there was no registry provided with the description of the two calves. The only evidence provided was the transportation permit.

[21] It was further argued by the respondent, that considering the evidence on record, the state proved its case beyond reasonable doubt. The state called four witnesses who all corroborated on the number of calves stolen, the newly branded marks over the old brand marks, the sex/gender of the calves, the seller, the buyer, the farm where the calves were recovered, and that the recovery was recent considering that the calves were stolen on the 11th of October 2019 and recovered on the very next day, which raises the doctrine of recent possession.

[3] *Coleman v State* (HC-MD-CRI-APP-CAL-2021/00061) [2022] NAHCMD 31 (4 February 2022).

[22] On this grounds of appeal taken together, counsel for the appellant criticised the manner in which the trial court assessed the complainant's evidence. It was submitted that the trial court failed to exercise caution in dealing with the evidence of the complainant who was a single witness, that too much weight was placed on his identification of the calves. Counsel criticised the contradictions and shortcomings in the complainant's evidence, and argued that such discrepancies negatively affected his credibility. Counsel for the respondent argued that the trial court correctly applied the cautionary rule in dealing with the complainant's evidence, in that the appellant himself and other witnesses corroborated the complainant's version.

[23] In its evaluation of the single witness evidence of the complainant, the court below was alive to relevant case law where the test had been laid down namely, that the testimony of a single witness should be clear and satisfactory in all material respects, and that the guilt of the accused must be proved beyond reasonable doubt. When considering the two mutually destructive or irreconcilable versions, the court was guided by the approach followed in *Stellenbosch Farmers' Winery Group Ltd & Another v Martell ET Cie and Others,*[4] and which had been endorsed in this jurisdiction.[5]

[24] In its final analysis, the court found the complainant, despite being a single witness, credible. He was found to have testified in a clear and coherent manner, full of detail as to the ownership of the two calves. Regard was also had to the fact that complainant's version was corroborated by the appellant, Mr Viljoen and Sergeant Jansen in material respects. The court considered the testimony of Mr Viljoen who testified that the appellant approached him with an offer to buy cattle from him, two calves and a cow. He accepted the offer, after verifying the transport permit. He paid for the two calves and the cow as agreed between him and the appellant. Mr Viljoen further corroborated the evidence of the complainant, regarding the identification of the two calves, in that he confirmed that the complainant identified the two calves on the

[4] *Stellenbosch Farmers' Winery Group Ltd & Another v Martell ET Cie and Others* 2003(1) SA 11 (SCA).

[5] *Sakusheka and Another v Minister of Home* Affairs 2009(2) NR 524 (HC); *S v BM* 2013(4) NR 967 (NLD).

earmarks and the faded brand marks. He further confirmed that the transport permit and the new brand mark belonged to Lea Appolus, the wife of the appellant, and that it was the appellant that sold the two calves to him. He further confirmed that the appellant received half of the payment in cash and the remainder was paid into the bank account of Lea Appolus, provided by the appellant. The court in the end, and after considering the two inconsistent versions, was satisfied that it could safely rely on the complainant's testimony while rejecting that of the appellant as being a flimsy after thought, aimed at exonerating himself and misleading the court.

[25] Section 208 of the Criminal Procedure Act allows a court to convict an accused on the evidence of a single witness. However, in terms of our law, this evidence should be clear and satisfactory. Our courts have been following the approach set out in *S v Sauls* and Others[6] where the court stated the following:

> 'There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness. The trial judge will weigh his evidence, will consider its merits and demerits and having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings, or defects or contradictions in the testimony, he is satisfied that the truth has been told.'

[26] As regards the credibility of a witness, the court in *S v Hepute*[7]said the following:

> 'Sitting as a Court of appeal and without the numerous advantages a trial magistrate enjoys in assessing the credibility of witnesses, this Court is normally reluctant to upset the trial magistrate's findings of fact (see *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705 to 706). However, if it is apparent that the magistrate has misdirected him- or herself and that that misdirection materially impacted on the conclusion he or she arrived at on the guilt or innocence of the accused, this Court is charged with the duty to reassess the evidence and at liberty to make its own findings on the facts.

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[6] *S v Sauls* and Others[?] 1981 (3) SA 172 (A) 180 (E-G).
[7] *S v Hepute* 2001 NR 242 (HC) at 243G-H.

[27] The court had the version of the accused person, the complainant and three other state witnesses. There was no independent eye witness to the events that transpired regarding the rebranding of the two calves, the registration of the two calves, two months prior to the sale and the collection of the transport permit. Therefore, it was presented with mutually destructive versions. The proper approach to mutually destructive versions is set out in *S v Engelbrecht* [8] where the court cited *S v Singh*[9] as follows:

> 'The proper approach… is for the court to apply its mind not only to the merits and demerits of the state and the defence witnesses but also to the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond all reasonable doubt. The best indication that a court has applied its mind in the proper manner … is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses.'

[28] From the trial court's judgement, it is evident that proper consideration was given to the fact that the complainant was a single witness, whose evidence was corroborated by other witnesses. His evidence was considered as a whole. The court was satisfied that the complainant was credible and his evidence being reliable. The trial court, in our view, correctly followed a holistic approach in its assessment of the evidence and in the end was satisfied that the appellant had sold the two calves, which belonged to the complainant to Mr Viljoen. We are not persuaded that the trial court committed any misdirection on its evaluation of the evidence.

[29] Considering the evidence on record, this court endorses the court *a quo's* findings that appellant's version of his wife being the lawful owner of the two calves, which he sold to Mr Viljoen, as improbable. Further, one would have expected the appellant's wife (in whose name the new brand mark is registered and in whose name the transport permit and the ear tags were registered) to testify in the his defence in order to clarify

[8] *S v Engelbrecht* ?2001 NR 224 at 226 (HC).
[9] *S v Singh*? 1975 (1) SA 227 N at 228 F- H.

and corroborate his version. In the absence of her evidence, the act of rebranding and registration of the two calves, before it was sold, can be viewed as acts of concealment of the true identity of the two calves. The court cannot be faulted for placing due weight on such ommission.

This ground of appeal therefore falls to be dismissed.

Counts 1 and 2: Duplication of convictions

[30] It was argued on behalf of the appellant that the learned magistrate erred by convicting the appellant of stocktheft and acquisition, possession or use of proceeds of unlawful activities as it amounted to a duplication of convictions. Counsel for the respondent on the other hand argued that the evidence required to prove the offence of stock theft is the same as that of acquisition, possession or use of proceeds of unlawful activities. Therefore the similar test evidence apply.

[31] The counsel for the respondent, on the other hand, although given the opportunity to make written presentations on this aspect, neglected to make written submissions, sighting absence from the office and technical failure of the computer, and did not address the court fully on this aspect. Counsel for the respondent, requested a postponement from the bar, which was not granted, as it would not be in the interest of the administration of justice. We will now proceed to deal with the first aspect, and that is whether the conviction on count 1 and 2 did not amount to a duplication of convictions in light of the *dictum* in *S v Henock and 8 Other Cases*.[10]

[32] This raises the pertinent question whether a person who is the author of the predicate offence, can also be convicted under section 6 of POCA? The tests used to establish whether a duplication of convictions exist or not, were stated clearly in *S v Eixab* 1997 NR 254 (HC) where the following appears at 256E-I:

[10] *S v Henock and 8 Other Cases* (CR 86/2019) [2019] NAHCMD 466 (11 November 2019).

'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.'

[33] The charges stem from an incident where the accused wrongfully and unlawfully stole two calves belonging to the complainant which he thereafter sold and received an amount of N$3 100.

[34] The accused person was convicted as charged under section 6 of POCA, having acquired, possessed or used the proceeds of unlawful activities. The appellant argues that the accused persons were not correctly charged and convicted as they acquired and used the proceeds of their unlawful activities when stealing the goods. It is common cause that the author of the predicate offence (stock theft) and the alleged self-launderer under s 6, in this instance, is the same person. From the appellant's version and that of the state, it can be gleaned that the evidence on record essentially proves the elements in terms of section 4 of POCA, as opposed to section 6 under which he was charged. As the evidence on record indicated, it was clear that the accused person did not merely possess, acquire or use the proceeds of the crime, but rather *sold* the proceeds of his crime. He therefore ought to have been charged under section 4.

[35] Given the circumstances of this case, the conviction on count 2 cannot be permitted to stand and falls to be set aside.

[36] We will now proceed to deal with the second aspect, and that is whether the appellant was correctly charged on counts 2 and 3, if not, what the correct charge(s) would be and whether the conviction can stand in view of the charge as it was phrased.

Counts 2 and 3 – Correct formulation of charges

[37] On this aspect, it was argued on behalf of the appellant that the charges were formulated incorrectly, as the provisions of section 84 of the Criminal procedure Act 51 of 1977, regarding the formulation of charges was not adhered to. Counsel argued that the charges on counts 2 and 3 lacked sufficient particularity to inform the accused of the nature of the charge he was facing.

[38] With regards to the proper formulation of a charge, Section 84 of the CPA reads as follows:

> '(1) Subject to the provisions of this Act and of any other law relating to any particular offence, a charge shall set forth the relevant offence in such manner and with such particulars. . . ., as may be reasonably sufficient to inform the accused of the nature of the charge.
>
> . . .
>
> (3) In criminal proceedings the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient.'

(Emphasis provided)

[39] On this point, the South African court in *S v Hugo*[11] stated the following about the particularity of a charge:[12]

> 'An accused person is entitled to require that he be informed by the charge with precision, or at least with a reasonable degree of clarity, what the case is that he has to meet.'

[11] 1976 (4) SA 536 (A).
[12] Ibid. at 540E-G.

[40] The charge reads as follows;

'Count 2

Money laundering – Acquisition, possession or use of proceeds of unlawful activities contravening section 6 read with section 1,7 and 11 of the Prevention of Organised Crime act 29 of 2004 as amended.

In that upon or about 11th day of October 2019 and at or near Tses in the district of Keetmanshoop the accused, did wrongfully and unlawfully commit the offense of money laundering by

(a) Acquiring;

(b) using;

(c) having possession of; or

(d) bring into, or taking out of, Namibia

property or cattle or stock and while they knew or ought to have known that it is or forms part of the proceeds of unlawful activities.

Count 3

Money laundering – Disguising unlawful origin of property contravening section 6 read with section 1,7 and 11 of the Prevention of Organised Crime act 29 of 2004 as amended.

In that upon or about 11th day of October 2019 and at or near Tses in the district of Keetmanshoop the accused, being persons who know or ought reasonably to have known that property is or forms part of proceeds of unlawful activities did wrongfully and unlawfully commit money laundering by

(a) entering into agreements or engage in arrangements or transactions with anyone in connection with that property, whether those agreements, arrangements or transactions is legally enforceable or not; or

(b) performing any other act in connection with that property, whether it is performed independently or in concert with any other person,

While those agreements, arrangements, transactions or acts have or is likely to have the effect -

(a) of concealing or disguising the nature, origin, source, location, disposition or movement of the property or its ownership, or any interest which anyone may have in respect of that property;

(b) of enabling or assisting any person who has committed or commits an offense, whether in Namibia or elsewhere -

(aa) to avoid prosecution; or

(bb) to remove or diminish the property acquired directly, or indirectly, as a result of the commission of an offence.'

[41] Judging from the formulation of the charges on counts 2 and 3, it is evident that the prosecutor had no idea how the accused should be charged; neither did the magistrate or counsel for the appellant attempt to bring any clarity to the ambiguous and contradictory charges preferred against him. If the prosecutor, the magistrate and defence counsel were of the view that the charges were proper and sufficiently informed the accused to a reasonable degree of clarity about the case he had to meet, then that in itself constitutes a miscarriage of justice. There can be no doubt that the accused person was prejudiced when pleading to purported offences of money-laundering. Add thereto that the accused has been charged in count 2 under the wrong section of POCA, as explained above.

[42] The court after, a lengthy discussion of the reasons underlying the convictions on counts 2 and 3, found that after a careful consideration of the ordinary meaning of the interpretation of sections 4 and 6 of POCA, a conviction on both counts as formulated, remains inescapable. It is our considered view that the *court a quo* misdirected itself regarding the way the charges were formulated, as the charges did not clarify, with sufficient particularity, the case the accused had to meet.

[43] In the premises, the conviction and sentence in respect of counts 2 and 3 fall to be set aside.

[44] In the result, the following order is made:

1. The *point in limine* is dismissed.
2. The appeal on conviction of count 1 is dismissed.
3. The appeal on conviction of counts 2 and 3 is upheld.

P Christiaan

Acting Judge

J C Liebenberg

Judge

APPEARANCES

THE STATE:	L Shilongo Office of the Prosecutor-General Windhoek.
APPELLANT:	J Andreas Andreas- Hamunyela Legal Practitioners Windhoek.