REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

CR NO.: 15/2016

In the matter between:

THE STATE

and

JOSEPH IIPINGE ERASTUS **ACCUSED**

HIGH COURT NLD REVIEW CASE REF NO.**: 409/2016**

Neutral citation*: The State v Erastus* (409/2016) [2016] NAHCNLD 97 (1 December 2016)

Coram: **JANUARY J *and* TOMMASI J**

Delivered: 1 December 2016

Flynote: Criminal procedure — Sentence — Several offences — Taking of counts together for purposes of sentence — Should only be done in exceptional circumstances.

Summary: 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 the court as well as judgments of other jurisdictions. Although the procedure is neither expressly allowed nor prohibited by the Criminal Procedure Act 51

of 1977, it is undesirable and should only be adopted by lower courts in exceptional circumstances. These exceptional circumstances could for instance be present where the charges were closely connected or where the charges flow from one and the same act or where the charges are or similar in point of time, place or circumstances. Magistrates are discouraged to follow the practise save when the circumstances are exceptional. In this case the magistrate could take sentences together for purpose of sentence. The charges were however taken together for the purpose to suspend a portion of the cumulative sentences. This is wrong.

ORDER

As a result:

1. The sentences imposed by the district court are corrected to read as follows:

(a) All the counts are taken together for purposes of sentence.

(b) The accused is sentenced to 12 months' imprisonment of which 6 months' imprisonment are suspended for 3 years on condition that the accused is not convicted for theft committed within the period of suspension.

(c) The sentence is backdated to 11 October 2016.

JUDGMENT

JANUARY, J and TOMMASI, J (concurring)

[1] The accused in this matter pleaded guilty to 4 (four) charges of theft (shoplifting) committed on the same date, the 07th of October 2016 at a shopping complex, Yetu complex, in Oshakati. From the charge sheets it is clear the accused was on a stealing spree at different shops in the shopping complex.

[2] The accused stole a pair of trousers valued N$159.99 at Mr Price, 2 pairs of babies' cardigans valued N$69.98, 2 babies' trouser valued N$89.98 and 3 babies' dresses valued N$239.97 at Pep Stores, a pair of jeans trousers valued N$298.00 at Dunns Yetu Complex and padlocks (44-99) + (44-99) valued N$99.98 at Oshakati Shoprite.

[3] The accused was convicted on his plea of guilty in terms of section 112(1)(a) of the Criminal Procedure Act 51 of 1977 (the CPA). The accused is a first offender. The accused informed the court *a quo* that he is a student in grade 11. He has a child aged 2 years old. He wanted the clothes for his child and for himself. He wanted to sell the padlocks. He was prepared to do community service at Oshakati Police Station. He was not in a position to pay a fine. The indicated that he was 24 years old

[4] The accused was sentenced on each charge to 3 months' imprisonment. The record reflects in addition the following: "on the total 12 months imprisonment 6 months imprisonment is suspended for 3 years on condition accused is not convicted of theft committed during the period of suspension." It is in my view clear that the magistrate took the sentences together for purposes of suspension of the cumulative sentences only and not for the overall purpose of sentence. He indeed sentenced the accused on the individual convictions and did not impose one sentence on all the charges as is usually done. The CPA does not specifically provides for the taking of counts together for sentence but it is allowed in accordance with guidelines developed in precedent over the years.[1]

[5] Hoff J (as he then was) referred to these guidelines in S v Tjikotoke 2014 (1) NR 38 (HC) at 39 G to 40A - B

> "[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 (unreported Namibian High Court review judgment delivered on 5

[1] See; Du Toit *et Al*, Commentary on the Criminal Procedure Act, {Service 3, 1989] at p28-18 'Counts taken together for purpose of sentence'

> 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), 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)."

[6] One of the guidelines emphasizes that it is undesirable and should only be adopted by lower courts in exceptional circumstances. 'Exceptional circumstances' may be present where the charges are closely connected similar in point of time, place or circumstance.[2] One of the reasons is that it might create difficulty on appeal or review when some but not all charges are set aside.

[7] I agree with Hoff J where he said stated the following;

> "[19] 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 statutory contraventions.[3]"

Magistrates are once again reminded that this practice is undesirable save in acceptable and exceptional circumstances.

[8] In my view the circumstances *in casu* are exceptional in that the crimes are all theft (shoplifting), with the same *modus operandi*, at one shopping complex although different shops and on the same date. The magistrate could therefore have taken the counts together for purposes of sentence and have imposed <u>one</u> sentence. This is however not what the magistrate did as stated above in paragraph 4. The magistrate only took the crimes as one for purposes of suspending part of the cumulative sentences. In my view this is wrong and the sentences stand to be set aside and corrected.

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[2] See: S v Akonda 2009 (1) NR 17 (HC) at 17 H - I

[3] S v Tjikotoke 2014 (1) NR 38 (HC) *(supra)* at 41 F - H

[9] As a result:

1. The sentences imposed by the district court are corrected to read as follows:

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(c) The sentence is backdated to 11 October 2016.

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HC JANUARY, J

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MA TOMMASI, J