



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case no: CR 28/2019

In the matter between:

THE STATE

v

**APPOLLUS NAOBEB
STANLEY ANDREW
IMMANUEL GASEB**

**ACCUSED 1
ACCUSED 2
ACCUSED 5**

**(HIGH COURT MAIN DIVISION REVIEW REF NO. 1419/2018)
(MAGISTRATE SERIAL NO.: 40/2018)**

Neutral citation: *S v Naobeb* (CR 28/2019) [2019] NAHCMD 88 (9 April 2019)

Coram: NDAUENDAPO J *et* SHIVUTE J

Delivered: 9 April 2019

Flynote: Criminal Procedure – Convictions – Duplication – Two separate acts committed – One criminal transaction – single intent to hunt huntable game – accused 1 and 2 – Unlawful possession of game meat accused 5 – Conviction and sentence on Trespassing in contravention of s (1)(1) of the Trespass Ordinance 1962 as amended – set aside in respect of all.

ORDER

- (a) The conviction and sentence on count 1 (one) and 2 (two) are confirmed.
- (b) The conviction and sentence on count 3 (three) are set aside in respect of all.

REVIEW JUDGMENT

SHIVUTE J, (NDAUENDAPO J concurring)

[1] Accused 1 and 2 were convicted of count 1, contravening sections 1,30(1)(b), (30)(1)(c), 85, 89 A of the Nature Conservation Ordinance 4 of 1975 as amended read with ss 90 and 250 of Act 51 of 1977. Accused 1 was sentenced to N\$ 5000 fine or in default of payment 2 years imprisonment whilst accused 2 was sentenced to 2 years' imprisonment. I queried the learned magistrate whether the sentence imposed on accused 1 was a competent one.

[2] The learned magistrate explained that the penalty clause was amended by s 5 of the Nature Conservation Amendment Act 3 of 2007 which stands at N\$ 500 000 fine or 2 years imprisonment.

[3] I partially agree with the learned magistrate that the penalty clause was amended by s 5 of the Nature Conservation Amendment Act 3. However, the amendment Act is 3 of 2017 and not Act of 2007 as stated by the learned magistrate. I believe she intended to refer to Act 3 of 2017. Section 5 of Amendment Act 3 of 2017 amended section 30(1)(c) of the Ordinance as follows -

'(c) Any person who contravenes or fails to comply with any provision of paragraph (a)

or (b) or any condition, requirement or restriction of any permit granted in terms of this subsection, shall be guilty of an offence and liable on conviction to a fine not exceeding N\$ 500 000 or to a period of imprisonment not exceeding five years, or to both such fine and imprisonment.’

[4] As the penalty clause was amended the learned magistrate imposed a competent sentence and her explanation is accepted in this regard.

[5] Accused 5 was convicted of the first alternative to count 1 – Possession of game meat contravening s 51 of Ordinance 4 of 1975 and sentenced to N\$4000 fine or 6 months’ imprisonment. I directed a query to the learned magistrate whether the sentence imposed does not exceed the penalty provided for. The learned magistrate rightly explained that the penalty clause in s 87 of the Ordinance was also amended by s 8 of the Nature Conservation Amendment Act 3 of 2017. Section 87 (1)(a) provides for a fine not exceeding N\$ 6000 or imprisonment not exceeding six months or to both such a fine and such imprisonment in case of a first offender.

[6] This court is equally satisfied in this regard with the learned magistrate’s explanation. The sentence imposed is within the court a quo’s jurisdiction.

[7] Furthermore, all accused persons were convicted of count 2, contravening s 40(1)(a)(i) of Nature Conservation Ordinance, killing game without a firearm. Each accused was sentenced to a fine of N\$ 4000 or in default of payment, 6 months’ imprisonment. The learned magistrate was queried whether the sentence imposed was competent. She explained that the sentence imposed was competent as it was in accordance with the penalty provided for in s 8 of Amendment Act 3 of 2017. I fully agree with the magistrate that the sentence is in order.

[8] Again, all accused persons were further convicted of trespassing, contravening s 1(1) of the Trespass Ordinance 3 of 1962 as amended by Act 20 of 1985 and sentenced to N\$ 1000 fine each or in default of payment, 1 year imprisonment. I queried the learned magistrate whether considering count 1 and first alternative to count 1 is not a duplication of charges.

[9] The learned magistrate rightly conceded that it amounted to a duplication of charges given the single intent theory. She therefore asked for the conviction and sentence to be set aside.

[10] In *S v Gaseb and Others*, 2000 NR 139 (SC); (2001 (1) SACR 438) — extract from headnote. O'Linn, AJA as he then was held that:

'There were usually two tests applied in deciding whether there had been a duplication of convictions, namely the single intent test or the same evidence test: in deciding which test to apply the court must apply common sense and fair play'.

[11] In *R v Sabuyi* 1905 TS 170, Innes CJ stated that the test for determining whether a duplication of convictions has occurred, is as follows:

'Where a man 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 it seems to me that he ought only to be indicted for one offence, because two acts constitute one criminal transaction.'

[12] In the present matter, the accused persons committed two separate acts of which standing alone, was criminal and in contravention of the provisions of two separate statutes but with a single intent to hunt in respect of accused 1 and 2 and to possess game meat in respect of accused 5. In order for the accused persons to do so they had to enter the restricted area and could only have carried out the hunting and possess the meat once they were inside the restricted area. In the premises, accused 1 and 2 should only have been convicted of hunting of huntable game and possession of game meat in respect of accused 5 instead of contravening s 1(1) of the Trespass Ordinance, 1962 as amended by Act 20 of 1985. Although two distinguishable acts were committed, they constituted one criminal transaction, namely hunting huntable game and possession of game meat.

[13] It follows that for the above reasons, it was a misdirection by the court a quo to convict the accused persons of the offence of hunting huntable game in respect of accused 1 - 2, possession of game meat in respect of accused 5 and trespassing as

this amounted to a duplication of convictions. Therefore, the conviction and sentence imposed on count 3 cannot be allowed to stand and must be set aside.

In the premise, the following order is made:

- (a) The conviction and sentence on count 1 (one) and 2 (two) are confirmed.
- (b) The conviction and sentence on count 3 (three) are set aside in respect of all accused persons.

N N SHIVUTE
Judge

G N NDAUENDAPO
Judge