REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CR No: 63/2018

In the matter between

THE STATE

v

WILLEM KATI PAULUS

(HIGH COURT MD REVIEW CASE NO. 1087/2018)

Neutral citation: S v Paulus (CR 63/2018) [2018] NAHCMD 255 (23 August 2018)

CORAM: **LIEBENBERG J *et* SHIVUTE J**

DELIVERED: **23 August 2018**

Flynote: Criminal procedure – Charge – Duplication of convictions – Charged with diverse contravention under the Nature Conservation Ordinance and trespassing (c/s 1(1) of Ordinance 3 of 1962) – Accused persons convicted on both counts – Accused persons acted with single intent to hunt game – Constituted one criminal transaction.

Criminal Procedure – Sentence – Cumulative sentence – Section 280(2) makes plain that multiple custodial sentences commence the one after the expiration of the other – There is no need for the court to make an order stating that sentences should be served consecutively.

ORDER

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1. The convictions and sentences on counts 1, 3 and 4 are confirmed.
2. The conviction and sentence on count 5 are set aside.
3. The order that 'All sentences to run cumulatively' is struck.

JUDGMENT

LIEBENBERG J (concurring SHIVUTE J)

[1] The accused appeared in the magistrate's court for the district of Karibib on four counts in contravention of diverse sections[1] of the Nature Conservation Ordinance 4 of

[1] Section 26(1) Hunting of specially protected game; s 27(1) Hunting of protected game; s 40(1)*(a)*(i) Killing game without a firearm; and s 38(1)*(b)* Hunting at night.

1975, and trespassing in contravention of s 1(1) of the Trespass Ordinance 3 of 1962, as amended.

[2] The accused was, except for count 2, convicted on the remaining counts on pleas of guilty. He was questioned in terms of s 112(1)*(b)* of the Criminal Procedure Act 51 of 1977 (the Act) only in respect of count 1, while on the remaining counts he was convicted in terms of s 112(1)*(a)* of the Act. On counts 1 and 5 each, he was sentenced to 12 months' imprisonment while fines were imposed on counts 3 and 4.

[3] When the matter came on review a query was directed to the magistrate in the following terms:

1. From the accused's answers it is evident that the sole reason for entering the farm was for purposes of hunting. Would the conviction on a count of trespassing not constitute a duplication of convictions?
2. Whereas count 5 (trespassing) was disposed of in terms of s 112(1)*(a)* of the CPA, was the court entitled to impose a sentence of direct imprisonment?
3. What was intended by the court's order that 'All sentences to run cumulatively'?

[4] In response to the first question the magistrate strenuously defended the two convictions and reasoned that the commission of the offences denotes two separate and different acts, and 'irrespective of whether Accused entered Farm Bethel to hunt this Zebra on Count 1, he still trespassed …. on Count 5 because he did not have the permission of the lawful occupier of such land in the first place'.

[5] Despite numerous past judgments delivered in this court in which the tests applicable in determining whether there is a duplication of convictions have been discussed, the same mistakes are repeatedly made by magistrates who are either ignorant of these judgments or who simply refuse to follow the guidelines set out therein. It therefore seems necessary to repeat once again what was stated in the review matter of *S v Hamukwaya* (CR 40/2018) [2018] NAHCMD 155 delivered on 11 June 2018, where the accused persons were convicted of contravening s 30(1)*(b)* of the Nature Conservation Ordinance and trespassing in contravention of s 1(1) of the Trespassing Ordinance. The following appears at par 5:

'Case law dictates that in order to determining whether there is a duplication of convictions, the court should apply two tests. (See *S v Gaseb and Others*[2]*).* These tests are the single evidence (intent) test and the same evidence test. The court in *S v Seibeb and Another; S v Eixab*[3] stated:

> "Where a person commits two acts of which each, standing alone, would be criminal, but does so with a single intent, 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 act being brought into the matter, the two acts are separate criminal offences. See Landsdown and Campbell South African Criminal Law and Procedure vol V at 299, 230 and the cases cited. This is the same evidence test. Both tests or one or other of them may be applied and in determining which, or whether both, should be used the Court must apply common sense and its sense of fair play. See Lansdown and Campbell ((supra)) at 228." (Emphasis provided)

[6] It is not in dispute that the reason for accused entering the complainant's farm was for purposes of hunting. In order to achieve that, he obviously had to access the farm. The same would apply to a person who enters the premises of the complainant in order to break into his house with intent to steal. Is the accused also guilty of trespassing? The answer is a definite 'no' as he acted with the single intent to gain access into the house in order to steal. The same applies to where the accused entered the complainant's farm in order to hunt. Both acts were necessary to carry out that intent and constituted one criminal transaction.

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[2] 2000 NR 139 (SC).
[3] 1997 NR 245 (HC) at 256E-I.

[7] A conviction on both counts in this instance clearly constituted a duplication of convictions and the conviction on count 5 falls to be set aside. That would equally apply to the sentence which, in any event, was improper as the court was not permitted to impose a custodial sentence where it had convicted in terms of s 112(1)*(a)* of the Act.

[8] As regards the third leg of the query the magistrate has drawn the court's attention to s 280 of the Act and specifically to the heading which reads *Cumulative or concurrent sentences*. She goes on to say that cumulative and concurrent sentences however means the same thing and by making the order that all sentences should run cumulatively, it was intended that the sentences must be served consecutively.

[9] Section 280 reads:

'**Cumulative or concurrent sentences**

(1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose.

(2) Subject to section 99(2) of the Correctional Service Act, 2012 (Act 9 of 2012) punishments referred to in subsection (1), when consisting of imprisonment, commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment must run concurrently.'

[10] Subsection (2) makes plain that multiple custodial sentences commence the one after the expiration of the other and there would be no need for the court to make an order to that effect. The word 'cumulative' in the heading clearly relates to the cumulative effect of multiple punishments, in which instance the court may order same to be served concurrently. The court in *S v Sevenster*[4] correctly explains the purpose of s 280(2) of the Act where it says:

[4] 2002(2) SACR 400 (CPD) at 405a-b.

'[I]f an accused is sentenced in respect of two or more related offences, the accepted practice is that the sentencing court should have regard to the cumulative effect of the sentences imposed in order to ensure that the total sentence is not disproportionate to the accused's blameworthiness in relation to the offences in respect of which he or she has to be sentenced. (See *S v Coales* 1995 (1) SACR 33 (A) at 36e - f; *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA) at 523g - h.)'

[11] In addition, the meaning of 'cumulative' as per the Shorter Oxford English Dictionary is: '2) Formed by or arising from accumulation: increasing in quantity or effect by successive additions.'

[12] From the above it is clear that the magistrate's understanding of the word 'cumulative' is wrong and has been used in the wrong context when making the order. As stated, there is no need to order that the sentences should be served *consecutively* as that is the legal consequence of multiple punishment, *unless* ordered otherwise in terms of s 280 of the Act.

[13] In the result, it is ordered:

1. The convictions and sentences on counts 1, 3 and 4 are confirmed.
2. The conviction and sentence on count 5 are set aside.
3. The order that 'All sentences to run cumulatively' is struck.

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J C LIEBENBERG

JUDGE

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N N SHIVUTE

JUDGE