SUMMARY

CASE NO: CR 66/2008

THE STATE

and

ABNER AKONDA

SILUNGWE, AJ *et*
FRANK, AJ

17/06/2008

CRIMINAL PROCEDURE

SENTENCE - Taking several counts together for sentence – Undesirability of – To be resorted to in exceptional circumstances only.

CASE NO.: CR 66/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

vs

ABNER AKONDA

(HIGH COURT REVIEW CASE NO.: 849/2008)

***CORAM*: SILUNGWE, AJ *et* FRANK, AJ**

Delivered on: 2008.06.17

REVIEW JUDGMENT

SILUNGWE, AJ

[1] Following his own pleas of guilty, the accused was convicted on three counts, to wit: (1) housebreaking with intent to steal and theft (of building materials valued at N$800-00), (2) use of a motor vehicle without the owner's consent in contravention of section 83(2) read with sections 86 and 106(2) of the Road Traffic and Transportation Act, Act 22 of 1999; and (3) driving under the influence of intoxicating liquor contrary to section 82(1) read with sections 1, 50, 51(1), (2) and (3), 82(3) and (4), 86, 89(1) and 106(1) and (2). Thereafter, he was sentenced as follows:

> All 3 counts are taken together for purposes of sentencing: N$4 000-00 or 12 months imprisonment and the court suspends N$2 000-00 or 6 months thereof for a period of three years on condition that accused is not convicted of similar offences committed during period of suspension.

[2] The convictions are in accordance with justice but the sentence is not.

[3] This case brings into sharp focus the practice, in Magistrates' Courts, of taking counts (in the same mater) together for the purpose of imposing one sentence thereon. Although that procedure is neither

authorised nor forbidden by the Criminal Procedure Act, Act 51 of 1977, it has emerged as a matter of practice. In principal, however, the practice should be resorted to in exceptional circumstances only, such as where various counts are part of a single transaction or are closely connected or similar in point of time, place or circumstance. See: *S v Young* 1977 (1) SA 605 (AD) at 610E; *S v Mofokeng* 1977 (2) SA 447 (O) at 448H; *S V Keulder* 1994 (1) SACR 91 at 93i-j. This means that, in other cases, Magistrates should refrain from having recourse to such practice because, not only is it desirable that each separate crime should be punished separately (*S v Swart* 2000 (2) SACR 566 (SCA) at 568F), for example, where crimes of disparate gravity are involved, but also because a global sentence might present difficulties if some of the convictions are, for one reason or another, set aside, as it would then be difficult to ascertain on what basis the sentencer reached the global sentence. It is thus undesirable to take convictions in respect of divergent counts together for the purpose of sentence.

[4] For the reasons given in the preceding paragraph, it is not surprising that the practice in question has attracted, and continues to attract, adverse judicial comments. For instance, in the landmark case of *S v Young*, supra, Trollip, JA made the following at observations at 610E-G:

> *"Appellant's counsel contended that counts 1 to 4 should be taken together for the purpose of imposing one sentence thereon, and that counts 5 to 7 should be dealt with similarly. That procedure is neither sanctioned nor prohibited by the Criminal Procedure Act … Where multiple counts are closely connected or similar in point of time, nature, seriousness or otherwise, it is sometimes a useful, practical way of*

> *ensuring that the punishment imposed is not unnecessarily duplicated or its cumulative effect is not too harsh on the accused. But according to several decisions by the Provincial Divisions (see, eg., S v Nkosi 1965 (2) SA 414 (C), where the authorities are collected) the practice is undesirable and should only be adopted by lower courts in exceptional circumstances. The main reason for frowning upon the practice mentioned in these cases is the difficulty it might create on appeal or review, especially if the convictions on some but not all of the offences were set aside."*

See, also: *S v Mofokeng* 1994 (2) SACR 24 (A) at 30i—31c; *S v Keulder*, *supra*, at 93i-j; *S v Swart*, *supra*, at 568f.

[5] In *casu*, housebreaking with intent to steal and theft, on one hand, and using a motor vehicle with the owner's consent and driving under the influence of intoxicating liquor, on the other, are neither closely connected nor similar in point of time of commission or nature. With regard to the second and third counts, it would appear that they are closely connected in point of time of their commission only.

[6] As the first count and the other two counts are divergent, their being lumped together for the purpose of sentence was a fatal misdirection.

[7] Before I conclude, I would like to comment on the presiding Magistrate's condition of suspension of the sentence. The condition reads in part:

> "… on condition that the accused is not convicted of ***similar offences*** *committed during the period of suspension."*

The expression: **"similar offences"** is improper in the sense that it is imprecise. The Magistrate should thus have formulated the condition of

suspension in specific terms but he failed to do so. Nevertheless, the misdirection is, in the circumstances of this case, inconsequential as the determination of the matter rests upon the core and decisive issue already referred to in paragraphs 3, 4, 5 and 6 above which taints the sentence in its entirety.

[8] In the light of what has previously been said in this mater, the following order is made:

1. The global sentence is set aside.

2. The matter is remitted to the presiding Magistrate for the purpose of passing appropriate sentences.

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SILUNGWE, AJ

I agree

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FRANK, AJ