

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA, MAIN DIVISION
JUDGMENT

CR No: 41/2017

In the matter between

THE STATE

and

PATRICK PLAAITJIES

HIGH COURT MD REVIEW CASE NO 401/2017

Neutral citation: S v Plaaityies (CR 41/2017) [2017] NAHCMD 177 (27 June 2017)

CORAM: NDAUENDAPO J et LIEBENBERG J

DELIVERED: 27 June 2017

Flynote: Criminal procedure – Charge – Duplication of convictions – Charged with trespassing (c/s 1(1) of Ordinance 3 of 1962) and theft – Convicted both counts – Accused acted with single intent to steal – Constituted one criminal transaction.

ORDER

1. The conviction and sentence on count 1 are confirmed.
2. The conviction and sentence on count 2 are set aside.

JUDGMENT

LIEBENBERG J: (Concurring NDAUENDAPO J)

[1] This is a review case in which the accused was convicted of theft of a car radio and trespassing in contravention of s 1(1) of Ordinance 3 of 1962. On the first count he was sentenced to imprisonment whilst afforded the opportunity of paying a fine on count 2.

[2] Evidence adduced at the trial shows that the complainant's vehicle was parked inside his yard when the radio was unlawfully removed. The accused was the following day found in possession of the complainant's radio and on the strength of that evidence, convicted of theft. The conviction is in order and will be confirmed.

[3] After convicting on count 1, the court – somewhat belatedly – realised that there was also a second count in which the accused was charged with trespassing and on the same evidence, convicted the accused as charged. On review a query was sent to the magistrate enquiring whether a conviction on both counts, arising from one incident, did not constitute a duplication of convictions. In response the magistrate concedes that the accused on the charge of trespassing lacked *mens rea* and asked for the setting aside of the conviction on count 2. The concession is properly made in my view.

[4] It is trite that in determining whether there is a duplication of convictions, the court should apply two tests as was approved in *S v Gaseb and Others*¹ namely the single evidence (intent) test and the same evidence test. In *S v Seibeb and Another; S v Eixab* 1997 NR 254 (HC) the court said the following at 256E-I:

‘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.

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 added)

[5] When applying the afore-stated principles to the present facts, it is evident that the accused, when entering the complainant’s yard, had done so with the single intent of removing the radio from the car. In order to achieve that he thus had to go onto the premises where the car was parked. Both acts are considered as one transaction for the purpose of a criminal transaction i.e. theft. In these circumstances the conviction on a charge of trespassing constituted a duplication of convictions and cannot be permitted to stand.

¹ 2000 NR 139 (SC).

[6] In the result, it is ordered:

1. The conviction and sentence on count 1 are confirmed.
2. The conviction and sentence on count 2 are set aside.

J C LIEBENBERG

JUDGE

N NDAUENDAPO

JUDGE