

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case no: CR 46/2017

THE STATE

versus

WYNAND SEUN PETERSON

(HIGH COURT MAIN DIVISION REVIEW REF NO. 160/2017)

Neutral citation: *S v Peterson* (CR 46/2017) [2017] NAHCMD 209 (7 August 2017)

Coram: LIEBENBERG J and SHIVUTE J

Delivered: 7 August 2017

ORDER

a) The conviction on the first count is confirmed. However, the sentence on the review sheet is set aside and replaced with the sentence that appears on page 30 of the record namely: Four (4) years' imprisonment of which two (2) years are suspended for five (5) years on condition that the accused is not convicted of housebreaking with intent to steal and theft or theft committed during the period of suspension. The sentence is back dated to 19 September 2016.

b) The conviction and sentence on the second count are set aside.

REVIEW JUDGMENT

SHIVUTE J, (LIEBENBERG J CONCURRING)

[1] The accused was convicted of housebreaking with intent to steal and theft on the first count and of malicious damages to property on the second count, following a trial after a plea of not guilty. According to pages 30 and 31 of the record he was sentenced to '(4) years direct imprisonment of which two (2) years are suspended for a period of five (5) years on condition that you are not convicted of housebreaking with intent to steal or theft committed during the period of five (5) years. Second count, you are sentenced to two hundred Namibia dollar (N\$200 or two (2) months and the sentence will run after the other.'

However, on the charge sheet as well as on the review sheet the sentence is as follows:

'Count 1-4 (Four) years direct imprisonment of which 2 (Two) years are suspended for a period of 5 (five) years on condition that you are not convicted as charged during the period of suspension.

Count 2: N\$200 (two hundred Namibia Dollar) or 2 (two months in default to run concurrently with sentence on first count if fine not paid.'

[2] I queried the learned magistrate why the sentence on the review sheet does not reflect the sentence imposed as it appears at pages 30-31 of the record of proceedings. I directed the learned magistrate to see to it that the correct sentence is reflected on the review sheet and as soon as the mistake is rectified the matter should be returned for review.

[3] The learned magistrate explained that the sentence imposed is the one that appears on pages 30-31 of the record that the sentence is ordered to run consecutively and not concurrently as it is reflected on the review and charge sheets.

[4] However, when the matter was returned for review I realised that the accused was charged with malicious damage to property as a result of the bathroom window which he broke when he gained entry to the premises, in the process of committing the first count of housebreaking with intent to steal and theft. Although in terms of the law, I am supposed to raise a query with the magistrate whether by convicting the accused of housebreaking with intent to steal and theft and malicious damage of property in respect of the same window that was broken at the same time to enable the accused to gain entry, does not amount to duplication of convictions. However, for the interests of justice I deem it not necessary to refer the matter to the magistrate again and to cause unnecessary delays. I have decided to deal with the issue at this stage.

[5] In determining whether or not there is a duplication of convictions there are two tests to be applied namely: 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 170. 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 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.’ *S v Seibeb and Another*; *S v Eixab* 1997 NR (HC) 254 at 256 E-I.

These two tests were approved by the Supreme Court in *S v Gaseb and Others* 2000 NR 139 (SC).

[6] Both offences the accused is charged with relate to the same place and time. The accused damaged the window in order to gain entry. He could not have gained entry to the premises without him having broken the window. The accused acted with a single intent and to convict him of both counts is impermissible as it amounts to duplication of convictions. Therefore, the conviction on malicious damage to property cannot be allowed to stand. The sentence imposed on the second count also falls away.

[7] Coming back to the issue of two different sentences reflected by the record, this Court had written several judgments stating that, before the magistrate affixes her/his signature to the record of proceedings certifying that the annexed record is the true reflection of the record of proceedings tried before her/him, he /she should first proof read the record and make sure that what is reflected on the review sheet is a true reflection of the proceedings. The sentences reflected on the review sheet cannot be allowed to stand in its current form, it has to be altered.

[8] In the result the following order is made:

- a) The conviction on the first count is confirmed. However, the sentence on the review sheet is set aside and replaced with the sentence that appears on page 30 of the record namely: ‘Four (4) years’ imprisonment of which two (2) years are suspended for five (5) years on condition that the accused is not convicted of housebreaking with intent to steal and theft or theft committed during the period of suspension.’ The sentence is back dated to 19 September 2016.
- b) The conviction and sentence on the second count are set aside.

NN SHIVUTE

Judge

JC LIEBENBERG

Judge