



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case no: CR 3/2017

In the matter between:

THE STATE

and

FRITZ KHAIRIROB KHARUCHAB

ACCUSED

Neutral citation: *S v Kharuchab* (CR 3/2017) [2017] NAHCMD 5 (20 January 2017)

Coram: NDAUENDAPO J *et* SHIVUTE J

Delivered: 20 January 2017

Flynote: Criminal Law-two distinct criminal acts-single intent to escape from lawful custody-One criminal transaction-conviction in respect of count 2 set aside.

Summary: The accused pretended to be Piet Thomas who had paid bail in respect of his own matter, although he (the accused) was in reality remanded in custody. As a result of his misrepresentation to the police, he was released from lawful custody. He was subsequently convicted of escaping from lawful custody and fraud. On automatic

review, the conviction and sentence in respect of count 2 were set aside, because although, the accused committed two distinct criminal acts, the accused had the single intent to escape from lawful custody. His acts thus constituted a single criminal transaction.

ORDER

In the Result, the following order is made:

1. The conviction and sentence in respect of count 1 are confirmed.
2. The conviction and sentence in respect of count 2 are set aside.
3. The order is antedated to 01 February 2016.

JUDGMENT

NDAUENDAPO, J et SHIVUTE, J

[1] This case comes before this Court on automatic review. The accused escaped from lawful custody after he presented police with a bail receipt issued in the name of Piet Thomas, thereby giving the police the impression that he was Piet Thomas and that he received that bail receipt after he posted bail. He was then released from custody, although he was in reality remanded into custody in respect of his own matter. The accused was unrepresented during the proceedings in the Magistrate's Court.

[2] The accused was charged on 20 March 2015 with two counts, the particulars of the charges are:

a) Count 1, the common law crime of escaping from lawful custody, in that;

‘upon or about 7th March 2015 at or near the Gobabis Police Station in the district of Gobabis the accused did, after being arrested and in lawful custody, intentionally, wrongfully and unlawfully escape...from lawful custody’.

b) Count 2, fraud, in that;

‘upon or about the 7th March 2015 at or near Gobabis Police Station in the district of Gobabis the said accused did unlawfully, falsely and with the intent to defraud, misrepresent to the Namibian Police, that a certain bail receipt number 790455 paid and issued in the name of Piet Thomas which he then and there produced and exhibited to the Namibian Police at Gobabis Police charge office was a copy of this bail receipt he received after he posted bail in his case and did by means of the said misrepresentation induce the Namibian Police to its prejudice to unlawfully release him from custody. Whereas in truth and in fact at the time the accused made the afore misrepresentation well knew that the said bail receipt was not his and he was not entitled to use it to be released on bail under that receipt, he was not the inmate granted bail under the said receipt and thus the accused committed the crime of fraud.’

[3] The accused pleaded guilty to both counts, but after an inquiry in terms of section 112(1)(b) of the *Criminal Procedure Act*,¹ the court altered the plea of guilty in respect of count 2 to that of not guilty. The State called its witness, who was the complainant in the matter in the court a quo. At the close of the State’s case, the accused was called upon to adduce his evidence upon which he opted to remain silent and closed his case. This was despite the fact that the court cautioned him that the unchallenged evidence of the sworn State witness could justify a conviction on the charges. The accused was thus convicted on both counts on 01 February 2016.

¹ No. 51 of 1977.

[4] In sentencing the accused, the learned Magistrate (hereafter, presiding officer) considered both mitigating and aggravating factors. The Court applied the trite principles of sentencing namely, the gravity of the offence, the personal circumstances of the accused and public interest. The Court also for its decision on the sentence, considered the aims of punishment. The presiding officer concluded that the punishment the Court will impose will be aimed at punishing and deterring the accused as well as protecting the interest of society. He was sentenced to, 6 Months imprisonment in respect of count 1 and 8 months imprisonment in respect of count 2.

[5] The presiding officer submitted in his covering letter to this Honourable Court that, he was wrong to convict the accused on count 2. He submitted that, count2 amounts to a 'spreading of charges'. According to him, 'although the accused's act(s) constitute separate or different acts, there was only a single intent and that intention was to escape from lawful custody.' He thus called upon this Court as the review Court, to set aside the conviction on count 2. In support of this submission he referred to *S v Radebe*² and *S v Davids*³.

[6] The Court is indebted to the presiding officer for the detailed record of the relevant proceedings.

[7] The task of this court is to determine, whether the proceedings in respect of this matter in the court a quo were in accordance with justice. In determining this issue, the Court will necessarily have to determine whether there has been a duplication of convictions.

² 2006(2) SA SACR 604.

³ 1988 (2) SACR 313 C.

APPLICABLE LAW

[8] In *S v Radebe*,⁴ it was held that;

‘the question to be asked is not whether the accused has been charged with the same offence twice, but whether the accused has been convicted and sentenced twice for the same offence.’

[9] In *S v Gaseb & Others*,⁵ 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 intention test or the same evidence test: in deciding which test to apply the court must apply common sense and fair play.’

[10] The court further held in *S v Gaseb & Others*⁶ that,

‘...the concept of fairness would be prostituted, if an accused was allowed to escape conviction and punishment for a series of voluntary, deliberate and separate criminal acts, on the pretext of “fairness to the accused”, the application of common sense did not lead to a different conclusion.’

[11] In *S v Radebe*,⁷ Ebrahim, J referred with approval to *R v Sabuyi*,⁸ where the accused had been convicted and sentenced on the charges of housebreaking with intent to commit an offence in contravention of Ordinance 26 of 1906 and theft. The theft had taken place immediately after the breaking into the premises. In the *Sabuyi* case, Innes CJ stated that the test for determining whether a duplication of convictions has occurred as follows:

⁴ 2006(2) SACR 604.

⁵ 2000 NR 139 (SC).

⁶ 2000 NR 139 (SC) at 140.

⁷ 2006(2) SACR 604 at 607e.

⁸ 1905 TS 170-171.

“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 *S v Steve Simon*,⁹ Liebenberg, J had the following to say:

‘It seems clear from the above that this is an instance where the accused committed two separate acts of which each, standing alone, was criminal and in contravention of the provisions of two separate statutes, but with the single intent to conduct mining activities. In order to do so he had to enter the restricted area and could only have conducted the mining activities once he was inside the restricted area. In these circumstances the accused should only have been convicted of the offence set out in count 3 for having contravened the provisions of s 3(1)(a) of the Minerals Act.

‘For the above reasons the court a quo should not have convicted the accused as well of the offence of entering a restricted area in contravention of s 52 (1) of the Diamond Act as this amounted to a duplication of convictions. It follows that the conviction and sentence imposed on count 2 fall to be set aside.’

[13] In addition Ebrahim, J referred to *R v Gordon*,¹⁰ where Kotze, JP stated that;

“...still we may adopt as a sound principle which will cover many cases that where evidence is necessary to support the one charge likewise supports the other, there the offences are the same. However, on the other hand we may safely say that where two different indictments or counts each lay a charge differing in its elements from that laid in the other though they both relate to one transaction, there the offences are separate and distinct.”

[14] In *S v Grobler and Another*,¹¹ the two appellants were convicted and sentenced on charges of murder and robbery. In deciding whether there had been a splitting of charges in respect of the first appellant, the court considered the elements of both

⁹ (CR80/2014)[2014] NAHCMD (24 November 2014).

¹⁰ 1909 EDC 254 at 268-269.

¹¹ 1966 (1) SA 507 (A).

offences for which the appellant was convicted. Wessel, JA concluded that there was no splitting of charges, because the elements of the crime of murder and robbery differed in material respects. As a result, the court concluded that the criminal conduct of the first appellant could not be brought within the ambit of the one charge and that there was thus no duplication of conviction.

[15] In *S v Gaseb & Others*,¹² it was held that where it seems, 'logical and in accordance with fairness and common sense, that once the evidence proved the elements of the crime in regard to a perpetrator...then the crime...had been proved in regard to that perpetrator. Any repetition thereafter, fulfilling the same requirements, constituted further (commission of that crime).'

[16] In the *S v Radebe*,¹³ which the presiding officer referred to, it was held that, where the intention to commit one offence differs from the intention to commit another offence, it cannot be said that there was a single intent.

APPLICATION OF THE LAW TO THE FACTS

[17] It is evident that the intention of the accused when he pretended to be Piet Thomas who had posted bail, was for him to be set free. He therefore had a single intent when he committed the fraud. He committed two separate acts, but with the single intent to escape from lawful custody. Although, two distinguishable acts were committed, they constituted one criminal transaction, namely to escape from lawful custody.

[18] In the Result, the following order is made:

¹² 2000 NR 139 at 140C.

¹³ 2006 (2) SACR 604 at 605d.

1. The conviction and sentence in respect of count 1 are confirmed.
2. The conviction and sentence in respect of count 2 are set aside.
3. The order is antedated to 01 February 2016.

NDAUENDAPO, J

SHIVUTE, J