



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case No: CR 25/2017

THE STATE

versus

BERNADUS GARISEB

ACCUSED 1

PRESLEY LEKHODA

ACCUSED 2

TOIVO TJITAURA

ACCUSED 3

LAZARUS JEBO GAWESEB

ACCUSED 4

(HIGH COURT MAIN DIVISION REVIEW REF NO. 199/2015)

(MAGISTRATE'S SERIAL NO. 212/2014)

Neutral citation: *S v Gariseb* (CR 25/2017) [2017] NAHCMD 82
(16 March 2017)

Coram: LIEBENBERG J and SHIVUTE J

Delivered: 16 March 2017

Flynotes: **Duplication of charges** – Accused persons convicted of escaping from lawful custody and malicious damage to property – The accused persons were in lawful custody whilst being transported in a police van – Accused persons damaged the police van in order to escape – Test whether there has been

duplication of charges – Application of intention test – disclosing that all accused persons acted with single intent to escape although different criminal transactions were carried out – Intention to escape a dominant one – Accused persons ought not to have been convicted of malicious damage to property.

Summary: The accused persons were in lawful custody and being transported from one point to another in a police van. They damaged the police van with the intention to escape. They were convicted of escaping from lawful custody and malicious damage to property. When one applies the intention test, it discloses that the accused persons damaged the police van in order to escape. Therefore, they had a single intent to escape although they had committed separate criminal transactions. Accused persons were only supposed to be convicted of escaping from lawful custody instead of both counts.

ORDER

- a) The conviction and sentence for each accused in respect of count 1 are confirmed.
- b) The conviction and sentence on count 2 in respect of each accused are set aside.

REVIEW JUDGMENT

SHIVUTE J (LIEBENBERG J concurring):

[1] The accused persons were convicted of escaping from lawful custody under common law in respect of count 1 and malicious damage to property in respect of count 2. The accused persons were sentenced as follows:

Count 1: each accused sentenced to 16 (sixteen) months' imprisonment

Count 2: each accused sentenced to a fine of N\$3000 (three thousand Namibian Dollars) or 3 months' imprisonment wholly suspended for a period

of 3 years on condition that accused is not convicted of malicious damage to property committed during the period of suspension.

[2] I directed the following query:

'Accused persons were convicted of escaping from lawful custody while being transported from Windhoek to Gobabis and malicious damage to property, by breaking and damaging the tailgate weld, tailgate brackets as well as the rods on the tailgate of the police van Pol. 7828 by using an unknown object or their hands to break open parts of such vehicle in order to escape from lawful custody. Does this not amount to duplication of convictions?'

[3] The learned magistrate replied:

'I agree with the Honourable Reviewing Judge that having convicted the accused on the first count of Escape, a conviction on the second count of malicious damage to property would amount to a duplication of convictions. In fact, I did realize that there might be a duplication of convictions only during sentencing, but by then I was already *functus officio*, and this is the main reason why a wholly suspended sentence was imposed. May I now with respect request the Honourable Reviewing Judge to set aside both the conviction and sentence on the second count.'

[4] The accused persons were lawfully arrested and they were being transported in a police van from one place to another. They damaged the police motor vehicle in which they were being transported with the intention to escape. The accused persons were convicted of escaping from lawful custody and malicious damage to property instead of one count.

[5] There are two practical aids to determine whether there has been duplication of charges (*S v Davids* 1998 (2) SACR 313; *S v Benjamin en 'n Ander* 1980 (1) SA (A) at 956E – H):

i. If the evidence which is necessary to establish the one charge also establishes the other charge, there is only one offence. If one charge does not contain the same elements as the other, there are two offences, (*R v Gordon* 1909 EDC 254 at 268) this can be called 'the same evidence test'.

ii. If there are two acts, each of which would constitute an independent offence, but only one intent, and both acts are necessary to realise this intent, there is only one offence

(*R v Sabuyi* 1905 TS 170). There is a continuous criminal transaction. This test is referred to as 'the single intent test'.

[6] In the present case, the accused persons damaged the police van in order to escape from lawful custody. They had a single intent although different criminal transactions were committed. The intention to escape was a dominant one. Therefore, the accused persons were only supposed to be convicted of one offence of escaping from lawful custody. The court a quo by convicting the accused persons on both counts amounts to duplication of convictions. Therefore, the conviction on the second count and sentence cannot be allowed to stand.

[7] In the result, the following order is made:

- a) The conviction and sentence for each accused in respect of count 1 are confirmed.
- b) The conviction and sentence on count 2 in respect of each accused are set aside.

N N Shivute

Judge

J C Liebenberg

Judge