

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CR 49/2019

In the matter between:

THE STATE

and

MICHAEL SWARTZ

(HIGH COURT MAIN DIVISION REF: NO. 678/2019)

Neutral citation: *S v Swartz* (CR 49/2019) [2019] NAHCMD 225 (4 July 2019)

Coram: LIEBENBERG J *et* SHIVUTE J

Delivered: 4 July 2019

Flynote: Criminal procedure – Duplication of convictions – Test – Accused convicted on charges of malicious damage to property, and of contravening section (1) of Trespass Ordinance 3 of 1962, – Accused acted with a single intent to pass through Karibib Townland Skietbaan – Malicious damage to property in the course of passing through not constituting a separate offence.

ORDER

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

SHIVUTE J (LIEBENBERG J concurring):

[1] This is a review in terms of s 302 of the Criminal Procedure Act 51 of 1977 (the CPA).

[2] The accused was charged in the magistrate's court for the district of Karibib with the offences of (1) malicious damage to property, and (2) a contravention of section 1(1) of the Trespass Ordinance, 1962 (Ordinance 3 of 1962), as amended by Act 20 of 1985.

[3] The accused pleaded guilty to both charges and after the court's questioning in terms of s 112(1) (b) of the CPA he was convicted on both counts. Thereafter the court sentenced the accused: *"Count 1 fined N\$ 2 000 (Two Thousand) or in default of payment 18 (Eighteen) months imprisonment.*

Count 2 fined N\$ 1 000 (One Thousand) or in default of payment 1 (one) year imprisonment.” (sic)

[4] On review a query was directed to the presiding magistrate enquiring whether the convictions on both counts did not amount to a duplication of convictions. In response the magistrate reasoned that the accused trespassed on Karibib Townland Skietbaan as he wanted to walk through the farm, and that the accused’s intent changed once he reached the fence which he damaged.

[5] This court in *The State v Luhepo* (CR 12/2014) [2014] NAHCNLD 23, delivered on 20 March 2014, referred to the applicable test regarding duplication of convictions:

[15] It is trite that there is no single test when determining whether or not a duplication of convictions has taken place and the tests which have been developed by the courts serve as practical guidelines only (*S v Seibeb and Another; S v Eixab* 1997 NR 254 (HC)). The two tests most commonly used are the single intent test and the same evidence test (*S v Benjamin en ‘n Ander* 1980 (1) SA 950 (A)). When two separate offences were committed with a single intent and were part of one continuous transaction, there is only one offence. This is referred to as the ‘single intent test’. When the offences differ from one another in their elements but the same evidence would prove both offences, there is only one offence and this is referred to as ‘the same evidence test’.

[6] When applying either of the aforementioned tests to the present facts it is clear that though the accused committed two separate offences, he had done so with the single intent to pass through the Karibib Townland Skietbaan. The fence which the accused damaged was situated on the property over which he trespassed in the course of passing through the land.

[7] During the court’s s 112(1)(b) questioning relating to count 1 the accused was asked what happened before he cut the fence. In response the accused stated that he “*wanted to enter there and pass through the kraal*”.

Furthermore, in response to a question why he cut the fence the accused stated "*I wanted to enter there*". This was followed up by a further question by the court as to why he could not climb over the fence instead of damaging it, to which the accused responded "*Because I was with things so I wanted to pass through there*". This unmistakably shows that the accused had but a single intent, thus, to pass through the fence so as to continue to pass over the property, therefore only one offence was committed. It follows that the convictions on both counts constituted an improper duplication of convictions and the conviction and sentence imposed on count 1 falls to be set aside.

[8] In the result, it is ordered:

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

NN SHIVUTE
JUDGE

JC LIEBENBERG
JUDGE