

REPUBLIC OF NAMIBIA

REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CR No: 86/2019

In the matter between

1. THE STATE versus AMOS HENOCK

(HIGH COURT MAIN DIVISION REVIEW REF NO. 630/2019)

2. THE STATE versus HERMANUS KANDJOZE & ALBERTUS KANDJOZE

(HIGH COURT MAIN DIVISION REVIEW REF NO. 935/2019)

3. THE STATE versus NOBEL AOAGUB

(HIGH COURT MAIN DIVISION REVIEW REF NO. 1016/2019)

4. THE STATE versus ALEX KATJANGUA, PAUL ABRAHAM AND ALBERTUS GOEIEMAN

(HIGH COURT MAIN DIVISION REVIEW REF NO. 1095/2019)

5. THE STATE versus ALBERTUS ORTMAN

(HIGH COURT MAIN DIVISION REVIEW REF NO. 1134/2019)

6. THE STATE versus KAARINA PETRUS

(HIGH COURT MAIN DIVISION REF NO. 653/2019)

7. THE STATE versus DAWID MUSONGO & STANLEY MAY

(HIGH COURT MAIN DIVISION REF NO. 1560/2019)

8. THE STATE versus JONAS PETRUS

(HIGH COURT OF MAIN DIVISION REF NO. 1558/2019)

9. THE STATE versus JACO SASS

(HIGH COURT OF NAMIBIA REF NO. 587/2019)

Neutral citation: *State v Henock and Others* (CR 86/2019) [2019] NAHCMD 466 (11 November 2019)

CORAM: LIEBENBERG J, SHIVUTE J et UEITELE J

HEARD: 08 October 2019

DELIVERED: 11 November 2019

Flynote: Criminal Review – Section 4 and 6 of Prevention of Organised Crime Act 29 of 2004 (POCA) – Money–laundering – Part 3 not limited to predicate offences of serious nature – Penalty clause in POCA sets fine not exceeding N\$100 million or imprisonment

not exceeding 30 years – Severity of punishment implies legislature's intention at criminalising offence of money-laundering for serious predicate offences – In absence of legislation not distinguishing between predicate offences of serious nature discretion to prosecute under POCA lies with the Prosecutor-General – Such discretion to be exercised judiciously.

Criminal Review – Accused persons were either charged under section 4 or section 6 of POCA – Distinction between sections 4 and 6 of POCA – Section 4 applies to authors of predicate offences whilst section 6 to recipients of proceeds of criminal activity – Money-laundering committed under section 4 requires further distinct act and not section 6.

Criminal Review – Duplication of convictions – Offence under section 6 of POCA punishable if person acquires, possess or uses property derived from proceeds of criminal activity – Whilst consequence of theft is that accused person will be in possession of property proceeds of unlawful activities – Elements of offence created under section 6 similar to elements of theft – Convicting accused persons for theft and contravening section 6 of POCA amounts to duplication of convictions.

Summary: The nine review cases came before this court on review in terms of s 302 of the Criminal Procedure Act 51 of 1977, as amended (the CPA). In each of these matters the accused persons were convicted and sentenced for offences having the nature of theft (predicate offence), except for one where the predicate offence was receiving stolen property, and for contravening either sections 4 or 6 of the Prevention of Organised Crime Act 29 of 2004 (hereinafter 'POCA'). The court was faced with the question as to whether this did not amount to a duplication of convictions.

Held, that, in the absence of legislation not distinguishing between predicate offences considered to be serious for the purpose of offences under POCA, the discretion whether or not to charge under POCA lies exclusively within the discretion of the Prosecutor-General.

Held, further that, under section 4 the author of the predicate offence can equally commit money-laundering when he commits any further act in connection with property being the proceeds of unlawful activities.

Held, further that, section 6 only applies to a person other than the one who committed the predicate offence. Where the state prosecutes a person under both the predicate and the money-laundering offence, this would constitute a duplication of convictions.

ORDER

- (a) The conviction and sentence imposed on count 1 of all nine review cases are confirmed.
- (b) In *S v Henock* the conviction and sentence on count 2 are confirmed.
- (c) In the matters of *S v Kandjoze; Auagub; Ortman; Musonga* and *Jonas Petrus*, the conviction and sentence on count 2 are set aside.
- (d) In the matters of *S v Kaarina Petrus, Katjangua* and *Sass*, the conviction and sentence on count 2 are confirmed, subject to an amendment of the charge to the extent that subsection (ii) is substituted with subsection (i) where it appears in the charge.

JUDGMENT

LIEBENBERG J: (Concurring SHIVUTE J, and UEITELE J)

Introduction

[1] The above captioned cases came before this court on review in terms of s 302 of the Criminal Procedure Act 51 of 1977, as amended (the CPA). In each of these matters the accused persons were charged on count 1 with the predicate offence and on count 2 with money-laundering under the Prevention of Organised Crime Act 29 of 2004 (hereinafter 'POCA') in respect of properties, being the subject matter of the predicate offence. In each case (except for the *Henock* matter¹) the predicate offence charged incorporates the elements of theft, while the accused were further charged with a contravention of either section 4 or 6 of POCA. In all instances the accused were convicted and sentenced on both counts, which raised the question as to whether it did not amount to a duplication of convictions.

[2] It was against this background that the Judge-President directed the review matters referenced above to be arranged before a Full Bench of the High Court for argument. Dr *Akweenda* and Mr *Nekwaya* agreed to argue the matter *amicus curiae* while Mr *Marondedze* represented the state. We are indebted to counsel for their diligence and assistance provided herein.

Statement of legal issues to be considered

[3] '1. Where an accused unlawfully acquires property and thereafter enters into a transaction with another person in which the said property is disposed of, would the subsequent act constitute a separate offence under either section 4 or 6 of POCA? In addition thereto, does the accused have the required *mens rea* when he/she so acted or had he/she acted with a single intent and committed only one offence?

2. Where the accused persons in the above matters are convicted in respect of both counts, would that not constitute a duplication of convictions?

¹ The accused was charged with a contravention of s 7 of Ordinance 12 of 1956 – Receiving stolen property.

3. Should the applicability of the provisions of sections 4 and 6 of POCA depend on the facts and circumstances of each case?

[4] The context in which the above questions will be decided is on the basis that 'unlawful acquisition' of property is a criminal offence, i.e. theft, fraud, possession/receiving/use of stolen property, either under common law, or by statute. This offence will be referred to as the 'predicate offence'. What essentially must be considered is whether any subsequent or new act committed by the accused with such property, constitute an offence under either sections 4 or 6 of POCA. If answered in the affirmative, the real question would then be whether a conviction of a contravention under these sections constitute a separate offence and whether it amounts to an improper duplication of convictions.

Money-laundering in the international context

[5] In order to fully comprehend the import of the relatively innovative offence of money-laundering, it seems apposite to briefly state the circumstances that gave rise to the birth of POCA in the Namibian context.

[6] The existence of international organised syndicates is real and their activities are primarily aimed at the accumulation of wealth through illegal means, such as human trafficking, drugs, poaching, fraud etc. In order to benefit from their illegal activities and avoid prosecution, syndicates would endeavor to hide the illicit origin of their assets, being the proceeds of crime. These assets may then be used to finance further criminal operations. If left unchecked money-laundering could facilitate illegal activities at the expense of countries' development. Furthermore, because of the result of technological advancements and globalisation, syndicates have discovered ways and means to transfer assets from one place to another and across borders. The crime of money-laundering is thus an international problem which called for an international solution.

[7] In response, the United Nations on 15 November 2000 adopted by resolution of the United Nations General Assembly the **United Nations Convention against Transnational Organized Crime** (the 'Convention'). The Convention sought to provide a minimum standard for party states to adhere to as part of their efforts to control the proceeds of criminal activities. Article 1 of the Convention states that '[t]he purpose of the Convention is to promote cooperation to prevent and combat transnational organised crime more effectively. To this end, Articles 6 and 7 of the Convention address the criminalisation and combating of money-laundering.

Criminalisation of the laundering of proceeds of crime (Article 6)

[8] Article 6 of the Convention establishes four offences relating to money-laundering in the following terms:

Article 6. Criminalization of the laundering of proceeds of crime

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;

(ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;

(b) Subject to the basic concepts of its legal system:

(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;

(ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.'

(Emphasis provided)

[9] In sub-article 2 it is required of each state party to implement and apply paragraph 1 to the *widest range of predicate offences* which should include all *serious crimes* as defined in article 2 of the Convention² and the offences related to organised crime,³ corruption⁴ and the obstruction of justice⁵ as predicate offences. As will become apparent later in the judgment, Namibia did not conform to the Convention as regards money-laundering being limited to instances where the predicate offence is a serious crime. It would thus appear that the aim of the Convention was to criminalise money-laundering in respect of *serious crimes*. Article 6 further requires of state parties to establish the offences stated above as punishable offence under their domestic laws.

Domestication of the Convention

[10] Namibia is part of the international community and we respect our international obligations as can be gleaned from Article 144 of the Namibian Constitution which provides:

'Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.'

[11] Namibia was a signatory to the Covenant on **23 December 2000** and it has ratified the Convention on **16 August 2002**. The implication of ratification is that the Covenant becomes legally binding on Namibia and the courts, moreover, the obligation imposed on a party state by Article 6 of the Covenant. This culminated in the passing of the Prevention of Organised Crime Act 29 of 2004 (POCA). Part 3 of POCA contains

² "Serious crime" shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of **at least four years or a more serious penalty**.

³ Article 5.

⁴ Article 8.

⁵ Article 23.

the provisions that deal with money-laundering, the specific sections that criminalise the offence of money-laundering being sections 4 to 7.

[12] With regards to the interpretation of statutes which derive from international agreements such as Covenants, the author *Devenish*⁶ is of the view that courts, when interpreting statutes, should endeavor to interpret those statutes in conformity with international law. Furthermore, that there is a presumption that Parliament, in enacting a statute, intended it to be in agreement with international law. To this end, the **Legislative Guides drafted by the United Nations office on Drugs and Crime Division for Treaty Affairs** assist in the interpretation of those provisions. When interpreting domesticated laws, it is imperative to look at the legislative guides, especially where the domesticated law is silent on a certain aspect.

Wide ambit of money-laundering in the Namibian context

[13] POCA in the Namibian context provides that money-laundering may be committed if the proceeds are illegally derived from any type of offence. If the provisions are interpreted literally, it means that proceeds derived from *any offence* is punishable under POCA as money-laundering, irrespective whether it is serious or not. Botswana and Malawi, on the other hand, in their anti-money-laundering legislations,⁷ respectively provide that the offence of money-laundering may *only* be committed in respect of *serious predicate offences* (serious crimes).⁸ This is in line with the definition of 'serious crime' as intended in the Convention.

[14] Whilst in Namibia, in the absence of legislation not distinguishing between predicate offences deemed serious in relation to Part 3 of POCA, the discretion whether or not to charge the accused with money-laundering lies exclusively with the

⁶ Devenish, GE. 1992. *Interpretation of Statutes*. Cape Town: Juta & Co, at p 129.

⁷ Botswana: Proceeds of Serious Crime: Chapter 08:03;

Malawi: Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act 11 of 2006.

⁸ Botswana: "**Serious offence**" means an offence the maximum penalty for which is death, or imprisonment for not less than two years.

Malawi: "**Serious crime**" means an offence against a provision- . . . for which the maximum penalty is death or imprisonment for life or other deprivation of liberty for a period of not less than 12 months

Prosecutor-General. The penalty clause set out in section 11 of POCA provides that a person convicted of money-laundering in respect of sections 4, 5 or 6 'shall be liable to a fine not exceeding N\$100 million, or to imprisonment for a period not exceeding 30 years.' When looking at the severity of penalty provisions provided for in the Act, it could be inferred that the Legislature's intention was aimed at criminalising the offence of money-laundering in respect of *serious predicate offences*, as opposed to offences that are of less serious nature (minor offences). Thus, whether the predicate offence preferred against an accused is appropriately serious – justifying a further charge under POCA – lies with the prosecution. Despite the wide discretionary powers vested in the prosecuting authority, it is still under a duty to exercise its discretion judiciously, guided by the provisions of the Act and international agreements binding on Namibia. The need for this approach will be shown below, borne out by the manner in which the charges preferred against the accused persons in the matters under consideration were drawn.

Provisions in POCA on money-laundering

[15] The Legislature summarised its intentions in the preamble of the Act and for purposes of this judgment the relevant part reads:

'To introduce measures to combat organised crime, money laundering and criminal gang activities; to prohibit certain activities relating to racketeering activities; to provide for prohibition of money laundering and for an obligation to report certain information; to criminalise certain activities associated with gangs;...'

(Emphasis provided)

[16] Part 3 of POCA specifies the offences relating to money-laundering and the sections relevant to this review are exclusively sections 4 and 6.⁹ The subject matter of these sections is the proceeds of unlawful activities which is defined in section 1 as:

⁹ Section 5 of POCA creates the offence of assisting another person to benefit from the proceeds of unlawful activities.

"unlawful activity" means any conduct which constitutes an offence or which contravenes any law whether that conduct occurred before or after the commencement of this Act and whether that conduct occurred in Namibia or elsewhere as long as that conduct constitutes an offence in Namibia or contravenes any law of Namibia.

"proceeds of unlawful activities" means any property or any service, advantage, benefit or reward that was derived, received or retained, directly or indirectly in Namibia or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived and includes property which is mingled with property that is proceeds of unlawful activity;

"property" means money or any other movable, immovable, corporeal or incorporeal thing and includes any rights, privileges, claims and securities and any interest in the property and all proceeds from the property;

(Emphasis provided)

The provisions of section 4

[17] Section 4 provides as follows:

'Disguising unlawful origin of property

Any person who knows or ought reasonably to have known that property is or forms part of proceeds of unlawful activities and-

(a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether that agreement, arrangement or transaction is legally enforceable or not; or

(b) performs any other act in connection with that property, whether it is performed independently or in concert with any other person,

and that agreement, arrangement, transaction or act has or is likely to have the effect-

(i) of concealing or disguising the nature, origin, source, location, disposition or movement of the property or its ownership, or any interest which anyone may have in respect of that property; or

(ii) of enabling or assisting any person who has committed or commits an offence, whether in Namibia or elsewhere-

(aa) to avoid prosecution; or

(bb) to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence,

commits the offence of money laundering.'

[18] The heading of section 4 signifies that the provisions of this section is aimed at the prohibition of *disguising the unlawful origin of property that forms part of the proceeds of crime*. The offence of money-laundering under either subsections (a) or (b) is clearly subject to the *effect* contemplated in subsections (i) or (ii) of the section. In turn, the effect envisaged in (ii) provides for circumstances where assistance is rendered to any person who committed an offence to avoid prosecution (aa), or to remove or diminish any property acquired as a result of the commission of an offence (bb). Put differently, the conduct of activities contemplated in subsections (a) and (b) do not upon themselves establish the offence of money laundering, *only* if satisfying either of the effects contemplated in subsections (i) and (ii).

[19] The elements of the offence under this section are:

- (a) Any person who knows, or ought reasonably to have known (*mens rea*), that property is or forms part of the proceeds of unlawful activities; and
- (b) enters into an agreement, or engages in any arrangement, or transaction with anyone in connection with that property; or performs an act in connection with that property, independently, or in concert with someone else;
- (c) which is likely to have the effect of concealing, or disguising the nature, origin, source, location, disposition or movement of the property, or its ownership, or interest someone may have in respect thereof; or
- (d) enables or assists any person who has committed or commits an offence, whether in Namibia or elsewhere, to avoid prosecution; or

- (e) remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence.

[20] Although the majority offences of money-laundering can only be committed by third parties who facilitate the laundering of proceeds of another, under section 4, the author of the predicate offence can equally commit money-laundering¹⁰ when he commits any further act in connection with property being the proceeds of unlawful activities.

[21] The offence of money-laundering under section 4 regulates the concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime (Article 6, para. 1(a)(ii)). From a reading of the section it is clear that the ambit of this offence is extremely broad and includes the concealment or disguise of almost any aspect of or information about property being the proceeds of unlawful activities. As will be demonstrated in the review cases under review, criminals who steal merely want to enjoy the proceeds of their crimes by selling it whereby they try to improve their lifestyles. However, given the broad definition of laundering under POCA, such transactions would still constitute the offence of money-laundering. Section 4 (contrary to section 6), distinguishes itself in that it requires some further activity in connection with the predicate offence aimed to convert the status of property from illegitimate, to legitimate. The objective of such activity is to conceal or disguise the illicit origin of the property or to obscure its link with the predicate offence and make it appear legitimate.

[22] The section further distinguishes between different possibilities of activity where the author of the predicate offence disguises (launders) the proceeds of his/her crime (section 4(b)). For example, a person commits the offence of theft or fraud and then, on his own and without involving anyone else, performs some (further) act in connection with the spoils or proceeds of his/her unlawful activity, for example, depositing it into an account over which he/she has control. In these circumstances, the person could be

¹⁰ It is called 'self-laundering'.

prosecuted for the predicate offence (theft or fraud) *and* money laundering under s 4(b) of POCA.

[23] In contradistinction, the activity may involve the participation of a person or persons other than the author of the predicate offence (section 4(a)). In the latter instance, this would be a person who may, or may not, be implicated in the predicate offence, but who knows that the property forms part of the proceeds of crime and, notwithstanding, participates in some activity with another person in connection with the proceeds, aimed at concealing or disguising the source of such property. A case in point with regards to the provisions of section 4 is *S v De Vries and Others*¹¹ the facts, briefly summarised are as follows:

The appellant and 11 others were arraigned on various charges relating to the hijacking of trucks transporting cigarettes. It was, however, not alleged that the appellant had personally participated in any of the robberies but the state alleged that he had purchased the stolen cigarettes and had received them for the purpose of resale, well knowing that they had been stolen. He was charged for racketeering in contravention of sections 2(1)(e) and 2(1)(f) of POCA; robbery with aggravating circumstances; and three counts of money laundering in contravention of section 4 of POCA (191A-B). The appellant was convicted on two counts of theft (having bought the stolen property); two counts of money laundering (purchasing stolen cigarettes for resale); and one count of racketeering (191G-J).

[24] I pause to observe that the offence of 'money-laundering' envisaged in section 4 of the Prevention of Organised Crime Act 121 of 1998 of South Africa is fundamentally identical to that of the equally numbered section of POCA in this jurisdiction. The Court on appeal at p 208B-D reasoned as follows:

'[56] By receiving the cigarettes for himself, well knowing they were stolen, the appellant made himself guilty of theft as it is a continuing crime. By proceeding to use the cigarettes as part of his stock in trade as a wholesaler as if they were goods lawfully acquired, and thereby

¹¹ 2012 (1) SACR 186 (SCA).

disguising or concealing the source, movement and ownership of the cigarettes and enabling and assisting the robbers to either avoid prosecution or to remove property acquired in the robberies, the appellant clearly made himself guilty of a contravention of s 4. Doing so involved different actions and a different criminal intent to that required for theft. In these circumstances there was no improper splitting of charges.'

(Emphasis provided)

[25] Due to the broad ambit of section 4, the prosecution in the majority of cases would prefer this charge against the author of the predicate offence who commits any further act in relation to the property, provided that the facts establish the effect of concealment or disguise of the proceeds of crime. The section also operates against persons who enter into an agreement with the author of the predicate offence, subject to satisfying the requirements set out in subsections (i) and (ii) of section 4.

[26] As is demonstrated in the *De Vries* matter, it is evident that section 4 covers various possible acts that can be taken by the author of the predicate offence, falling outside the ambit of the original offence, which would have the effect to disguise the unlawful origin of the stolen property. The accused's intention in this instance is primarily to do something with the property in order to disguise its origin. To this end, it creates a separate offence with distinct elements and there can be no improper duplication of convictions.

The provisions of section 5

[27] Although section 5 does not find application to any of the review matters under consideration, it seems imperative to briefly consider the context in which the sections in Part 3 are set, all of which criminalise certain acts committed in relation to the proceeds of unlawful activities by different persons, culminating in the offence of money-laundering.

[28] Section 5 criminalises the conduct of a person who *assists* the person who obtained the proceeds of unlawful activities, when entering into an arrangement or

transaction to facilitate the retention or control of the proceeds, or use it to make funds available to the person who obtained the unlawful proceeds, to the latter's benefit.

[29] From a reading of the relevant sections it appears that the Legislature's intention was to distinguish these sections from one another as regards the perpetrator. Where in section 4 the actions of the author of the predicate offence is criminalised when any further act is taken in connection with the proceeds of unlawful activities which is likely to disguise the origin of such property, the purview of section 5 is to criminalise the actions of another person (other than the self-launderer) who *assists* the latter to benefit from the proceeds of his/her unlawful activities. In this section there is a clear shift from the actual perpetrator to *another person*, not directly involved in the commission of the predicate offence and/or the primary launderer of the proceeds. In the same vein and for the reasons set out below, the Legislature with the enactment of section 6 equally criminalised the acts of acquisition, use or possession by *another person* of the proceeds of the unlawful activities perpetrated by the author of the predicate offence. Had the Legislature intended to also include under section 6 the author of the predicate offence, I can think of no reason why the prohibited acts under section 6 could not have been incorporated under section 4, instead of decreeing those acts in a separate section. The logical reason why the prohibited acts enumerated in sections 5 and 6 are distinguished from those set out in section 4 is because it criminalises the conduct of another person who knowingly retains, controls, acquires, uses or possesses the proceeds of unlawful activities for his/her own benefit, or to that of the primary launderer.

[30] From the afore-going, one is able to see the chronological layout of the Legislature's intentions with the respective sections in Chapter 3 by which a clear distinction is created between the different role-players in committing the same offence of money-laundering, but in different circumstances. After providing for the prohibition of certain acts by the individual in sections 4, 5 and 6, the Legislature (with the same structured approach), turned to money-laundering committed by a body of persons as provided for in section 7 of the Act.

The provisions of section 6

[31] This section provides as follows:

‘Acquisition, possession or use of proceeds of unlawful activities

Any person who-

- (a) acquires;
- (b) uses;
- (c) has possession of; or
- (d) brings into, or takes out of, Namibia,

property and who knows or ought reasonably to have known that it is or forms part of the proceeds of unlawful activities commits the offence of money laundering.’

(Emphasis provided)

[32] Section 6 of POCA is aimed at targeting the acquisition, use or possession of *the proceeds* of unlawful activity. This clearly relates to the *secondary* acquisition (by any [other] person) of what constitutes the *proceeds of an unlawful activity* and not the primary acquisition committed by the author of the predicate offence. For one to be found in contravention of section 6 the following elements have to be proved:

- (a) The act, that is, *X had acquired the property or had used it, or it was found in his/her possession;*
- (b) *whilst knowing, or reasonably ought to know, at the time that it was proceeds of unlawful conduct.*

[33] In respect thereof, counsel for the accused persons argued that section 6 applies to ‘another person’ as opposed to the author of the predicate offence. Their argument is premised on the wording found in section 6, namely ‘any person who ... ‘knows or ought reasonably to have known . . . that it is or forms part of the proceeds of unlawful

activities commits the offence'. Conversely, state counsel argued that section 6 applies to 'any person' which may include the recipient *and* the author of the predicate offence. In support of his proposition *Mr Marondedze* cited the matter of *S v Manale*¹² as authority for section 6.

[34] The *Manale* case briefly dealt with an accused who was indicted on various counts of fraud and various counts of money-laundering in contravention of section 6 (a), (b) and (c) of POCA. The indictment stems from the fact that the accused transferred monies from the estate accounts of various people into another person's account. Once that person passed on, the accused then transferred those monies back into his own personal account. The court further found that the accused *disguised* the proceeds, which were derived from the predicate offence of fraud, so as to lose their original form.¹³ In the final analysis the court found the accused guilty of contravening section 6 (a), (b) and (c) because he took into his possession and used such monies.

[35] This raises the pertinent question whether a person who is the author of the predicate offence, can also be convicted under section 6 of POCA? Equally, is the *Manale* case authority for this proposition? We have not been referred to any other authority and neither were we able to find any relevant case law on section 6 of POCA.

[36] The United Nations Legislative Guide (*supra*) discusses the criminalization of certain acts under Article 6¹⁴ and states that para 1 (b) (i) thereof is the mirror image of the offences created under para 1(a) (i) and (ii). In the latter provisions liability is imposed on the *providers of illicit proceeds* (our section 4 of POCA) while the former imposes liability on the *recipient* who acquires, possesses or uses such property (our section 6 of POCA).¹⁵ Whereas section 4 may be contravened by the author of the predicate offence acting alone, the offences under sections 5 and 6 are committed by another person. As authority for this proposition *Albert Kruger, Organised Crime and*

¹² 2019 (1) NR 191 (HC).

¹³ *Ibid*: 195A-B.

¹⁴ Which is similar to our sections 4, 5 and 6.

¹⁵ See Legislative guides for the implementation of the United Nations Convention against Transnational Organised Crime and the Protocol Thereto, p.66.

Proceeds of Crime Law in South Africa (2nd Ed.) states on section 6 of POCA at 58 as follows:

‘The offence under section 6 is committed in respect of the proceeds of activities of another person.’¹⁶

(Emphasis provided)

[37] This interpretation to section 6 conforms with what is prescribed in the UN Legislative Guides and makes plain that an offence under this section is committed in respect of the *proceeds of activities of another person*, not the person who committed the actual offence. To this end the actual thief or fraudster when committing the predicate offence does so with a specific intent i.e. to appropriate property in order to sell, use or possess. In deciding whether the thief by so doing commits the further offence of laundering under section 6, it is obvious that the thief cannot *acquire, use or possess* the very same property he/she *already appropriated* when committing the predicate offence with such intent. If that were to be the case, then the Legislature simply substituted theft and the possession, receiving or use of stolen property¹⁷ with the offence of money-laundering; the same offence, only with a different label.

[38] This could never have been the Legislature’s intention as Article 6. 1 of the Convention specifically requires that each party state ‘shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures....’ and, more specifically in relation to the acquisition, possession or use of property, that legislative measures should be ‘subject to the basic concepts of its legal system’. Though a new offence is created under section 6 of POCA, it is evidently aimed at criminalizing the actions of those persons who *acquire* the proceeds of crime from the actual thief or fraudster (the author of the predicate offence) and then use, possess or bring it into, or take it out of Namibia. Hence, for purposes of section 6 ‘any person’

¹⁶De Koker *South African Money Laundering and Terror Financing Law Com* 3-12. This commentary is on section 6 of South Africa’s Prevention of Organised Crime Act 121 of 1998 which is similar worded as our POCA.

¹⁷ Contravening sections 6, 7 or 8 of Ordinance 12 of 1956 (or common law as regards receiving stolen property).

cannot be construed to refer to the author of the predicate offence; the same person from whom the proceeds of crime derive *and* the recipient at the same time. To give a different interpretation to section 6 is illogical and inconsistent with the tenor of Article 6 of the Convention.

[39] As for the *Manale* matter, the facts established that the accused committed the predicate offence of fraud and thereafter set in motion activities to *disguise* the unlawful origin of the stolen money (self-laundering), his actions clearly falling within the ambit of section 4.¹⁸ It would thus appear that the accused was charged and convicted under the wrong section of POCA, as the court's finding on section 6 of POCA is inconsistent with the purport of the section and the UN Legislative Guides.

[40] This brings us to the main issue at hand namely, whether there was any duplication of convictions in the matters under review where the accused was charged with the predicate offence, as well as a contravention of section 6 of POCA.

Test for duplication of convictions

[41] The Supreme Court in *S v Gaseb and Others*¹⁹ approved two tests that should be applied by the court in determining whether or not there is a duplication of convictions and cited with approval these tests as summarised in the Full Bench decision of *S v Seibeb and Another; S v Eixab*²⁰ where the following appears 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

¹⁸ *Pinto v First National Bank of Namibia and Another* 2013 (1) NR 175 (HC) at 195F.

¹⁹ 2000 NR 139 (SC).

²⁰ 1997 NR 254 (HC).

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 either 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.'

[42] With regards to the consideration of fairness in deciding whether or not to convict on multiple charges, the court went on to say that 'fairness to the accused must be balanced with fairness to the State, to society and particularly to the victim'. The court endorsed the sentiments expressed by the learned author *Du Toit* Commentary on the Criminal Procedure Act that 'The logical point of departure for an examination of the duplication of convictions is the definition of those crimes in regard to which a possible duplication has taken place' and, that inferences in regard to duplication may be made from an analysis of the elements of the crime. In view thereof, the court concluded that: 'It follows that in such cases, the single intention test, the "one transaction test" or "continuous transaction" or "same evidence test" are not applicable'. It is contended by the state that the latter approach is particularly apposite in cases of money-laundering.

[43] The approach of the court will thus be to look at the elements of the predicate offences and the offences charged under POCA to determine, firstly, whether the accused were correctly charged. Secondly, whether a further charge of money-laundering in respect of the proceeds of the predicate offence, constitutes a duplication of convictions. With regards to the latter, the court will upon its interpretation of the Act endeavour to give effect to the Legislature's intention when enacting POCA.

Preferring the correct charge under POCA

[44] Because sections 4 to 6 create one offence of money-laundering, but are distinguishable with regards to purpose, the prosecuting authority is obliged to draw up the charge in such manner that the particulars of the charge are clear and specific in respect of the provisions of the section preferred against the accused. The charge must

contain the elements required to prove the specific offence provided for under Part 3 of POCA. A case in point is the Tanzanian case of *Director of Public Prosecution v Harry Msamire Kitilya and Others*.²¹ The respondents were charged with money-laundering in contravention of section 12(a) of the Anti-Money Laundering Act (AMLA) 12 of 2006. The particulars of the indicted offence alleged that the 'engagement' by the accused involved the *transfer* of property. Section 12 (a) creates an offence of money laundering by engaging in a transaction involving property, whereas under subsection (b) the Legislature defines money laundering through an act of converting, *transferring*, transporting or transmitting property. The court *a quo* found that each paragraph of section 12 created a distinct offence and that the charge was defective and confusing as the respondents might not have been in a position of understanding clearly the distinction between the prohibited acts and as such, the case they had to meet. On appeal, the High Court agreed with the trial court's finding that each paragraph under section 12 created a *distinct offence* under which the state should have charged.

[45] Similarly, when the state decides to prosecute under Part 3 of POCA, it would be imperative to decide firstly, is this an instance where the predicate offence is that serious that *it falls within the category of serious offences envisaged by the Convention*? Secondly, is any further act committed by the offender *aimed at disguising the unlawful origin of the property*? When both are answered in the affirmative, the next step will be to decide under which section to prosecute, bearing in mind that each section requires a distinct prohibited act as defined in each section. To follow a blanket approach and incorporate into the charge all possibilities provided for in the section is likely to render the charge defective. This much is borne out by the charges formulated against the accused persons in most of the review cases under consideration.

Answers to the statement of legal issues

[46] Returning to the first and second questions posed in the statement of legal issues pertaining to the disguising of property unlawfully acquired, or any further acts committed in relation thereto by the same person, it must be answered in the

²¹ No 105 of 2016.

affirmative. It is evident that the Legislature's intention in respect of section 4 was to create two separate offences. It then follows that there would be no improper duplication of convictions if the accused is charged under both the predicate offence and money-laundering in contravention of section 4 of POCA.

[47] However, as regards section 6, the author of the predicate offence and the money-launderer cannot be the same person. Though an offence of money-laundering is equally created under section 6, it only applies to a person other than the one who committed the predicate offence. Where the state prosecutes a person under both the predicate and the money-laundering offence, this is likely to constitute a duplication of convictions.

[48] As regards the third question, the applicability of the provisions of sections 4 and 6 will indeed depend on the facts of the particular offence. Although both sections create the offence of money-laundering, the elements of each are clearly distinctive. The question posed should thus be answered in the affirmative.

Application of legal principles to individual review cases

[49] In this part of the judgment the court shall proceed to apply the above stated principles to the individual review cases. It should be noted that the review cases share common features. Firstly, all the review cases – except for the *Henock* matter – deal with the predicate offence of theft. Secondly, all the cases deal with the situation where the accused persons were charged with the offence of money-laundering, either in contravention of section 4 or 6 of POCA. Thirdly, the accused persons all pleaded guilty to the predicate offence and a further count of money-laundering. Fourthly, in none of these cases did the state decide to charge the person(s) with whom the accused entered into an agreement/arrangement to buy, acquire, use or take possession of the proceeds of the crime.

1. *S v Amos Henock* (HC Ref. No 630/2019)

[50] Although charged on count 1 with housebreaking with intent to steal and theft, the accused was convicted on the 1st alternative of receiving stolen property (a cellular phone) in contravention of section 7 of Ordinance 12 of 1956. In count 2 he was convicted of concealing or disguising the unlawful origin of property in contravention of section 4 (a) (b) (i) r/w ss 1,7,8,10,11 of POCA.

[51] During the court's section 112(1)(b) questioning, the accused (having admitted on count 1 that the phone was stolen), further admitted that he sold the phone to his friend for N\$1000. This is clearly an instance where the accused, when entering into an agreement/arrangement with the buyer, committed a separate and distinct act which had the likely effect of concealing or disguising the origin of the phone which, he knew, was the proceeds of theft committed by someone unknown. The accused's latter actions undoubtedly falls within the ambit of section 4 of POCA and constitute the distinct offence of money-laundering.

[52] We are therefore satisfied that the convictions are in accordance with justice and that there was no duplication of convictions. The convictions on both counts will be confirmed

2. S v Hermanus Kandjoze & Albertus Kandjoze (HC Ref. No 935/2019)

[53] The accused persons were convicted on count 1 with theft of goods and on count 2, with money-laundering in contravention of section 6 r/w ss 1,6 and 11 of POCA. They pleaded guilty to both counts and admitted having sold the stolen goods and used the money to buy food.

[54] The accused persons were convicted as charged under section 6 of POCA, having acquired, possessed or used the proceeds of unlawful activities. The state argues that the accused persons were correctly charged and convicted as they acquired

and used the proceeds of their unlawful activities when stealing the goods. It is common cause that the authors of the predicate offence (theft) and the alleged self-launderers under section 6, are the same persons. From the accused persons' answers it can be gleaned that the court's questions were essentially in terms of section 4 of POCA as opposed to section 6 under which they were charged. As the accused persons indicated that they did not merely possess, acquire or use the proceeds of the crime, but rather *sold* the proceeds of their crime, they ought to have been charged under section 4. Irrespective as to whether or not the state at the time of formulation of the charges knew how the goods were disposed of, they should have charged the accused under section 4 because any disposition of the goods would at least have required some further act by the accused, likely to have the effect of disguising the origin of the stolen property.

[55] As stated earlier, the prohibited acts set out under section 6, are directed at persons other than the actual thief. In order to commit theft, the actual thief must commit an unlawful act (appropriation) of moveable property which only then becomes the *proceeds of unlawful activities*. It can only *thereafter* be the subject matter of a further offence when acquired, used or possessed, being the proceeds of unlawful activities as regards the latter offence and not the predicate offence (theft). There is clearly no difference between the act of acquisition under section 6 and that of appropriation under common law.

[56] Therefore, to charge the accused persons in this matter under section 6 would firstly amount to a duplication of convictions, secondly, their answers were along the lines of an offence committed under section 4 and not 6 of POCA, for which they were not charged.

[57] Accordingly, the conviction and sentence in respect of count 2 fall to be set aside.

3. S v Nobel Aoagub (HC Ref. No 1016/2019)

[58] The accused was charged and convicted on count 1 with theft and on count 2 with money-laundering in contravention of section 6 r/w ss 1,7 and 11 of POCA.

[59] The charges stem from an incident where the accused wrongfully and unlawfully stole a cellular phone belonging to the complainant which he thereafter sold.

[60] Besides this being another instance as in case no. 2 above, there is a more compelling issue which concerns the formulation of the charge in respect to count 2. The charge reads as follows;

'Count 2

Money laundering – Acquisition, possession or use of proceeds of unlawful activities contravening section 6 read with section 1,7 and 11 of the Prevention of Organised Crime act 29 of 2004 as amended.

In that upon or about 24th day of April 2019 and at or near Damara Block in the district of Gobabis the said accused, acting in concert, did unlawfully and intentionally acquire, possess or use proceeds of unlawful activities to wit money in the amount of N\$ 230.00 from the sale of a stolen cellphone and which they knew or ought reasonably to have known that it is or forms part of the proceeds of unlawful activities to wit: defrauded from Karuihe Rilensia and therefore accused is guilty of the offence of money laundering.'

(Emphasis provided)

[61] With regards to the proper formulation of a charge, Section 84 of the CPA reads as follows:

'(1) Subject to the provisions of this Act and of any other law relating to any particular offence, a charge shall set forth the relevant offence in such manner and with such

particulars. . . ., as may be reasonably sufficient to inform the accused of the nature of the charge.

...

(3) In criminal proceedings the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient.'

(Emphasis provided)

[62] On this point, the South African court in *S v Hugo*²² stated the following about the particularity of a charge:²³

'An accused person is entitled to require that he be informed by the charge with precision, or at least with a reasonable degree of clarity, what the case is that he has to meet. . .'

[63] In the present case the charge alleges that the accused acted in concert (which denotes that he acted with someone – and the use of the word 'they') whilst he was the only accused. Furthermore, the charge reads that the accused committed the predicate offence of *fraud*, which is clearly not the case as the accused during the court's questioning admitted having *stolen* the phone from the complainant's room.

[64] Judging from the formulation of the charge on count 2, it is evident that the prosecutor had no idea how the accused should be charged; neither did the magistrate attempt to bring any clarity to the ambiguous and contradictory charge preferred against the unrepresented accused. If the prosecutor and the magistrate were of the view that the charge was proper and sufficiently informed the accused to a reasonable degree of clarity about the case he had to meet, then that in itself constitutes a miscarriage of justice. There can be no doubt that the accused person was prejudiced when pleading

²² 1976 (4) SA 536 (A).

²³ *Ibid.* at 540E-G.

guilty to a purported offence of money-laundering. A further point is that the accused, like in case no 2, has been charged under the wrong section of POCA.

[65] In the premises, the conviction and sentence in respect of count 2 fall to be set aside.

4. *S v Alex Katjangua, Paul Abraham and Albertus Goeieman* (HC Ref.No 1095/2019)

[66] The accused persons were charged on count 1 with stock theft and on count 2 with money-laundering in contravention with section 4(a)(ii) r/w ss 1, 7 and 11 of POCA.

[67] They stole nine sheep from the complainant's farm, to which they admitted during the court's questioning. With regards to count 2, the accused persons, during the court's questioning, indicated that they bartered one of the stolen sheep to a passerby in order to acquire transport services. To this end the accused, by exchanging the sheep, entered into 'an agreement' with another which had the effect of concealing or disguising the true origin, location and ownership of the one sheep. This constituted the offence of money-laundering in contravention of section 4(a) and (b)(i) of POCA, opposed to section 4(a)(ii) of POCA (enabling or assisting the author of the predicate offence to avoid prosecution or diminish property ill-gotten) under which subsection the accused persons were charged. This notwithstanding, when the accused were asked to plead, they were to a reasonable degree informed of the clarity of the case they had to meet and admitted committing the offence of money-laundering. This is merely a case of a wrong label attached to the charge. The question is whether the accused will suffer any prejudice if the charge is amended to reflect the correct label as regards the subsection. To this end the court will rely on *S v Goagoseb*²⁴ where the court stated:

' . . . if the body of the charge is clear and unambiguous in its description of the act alleged against the accused. . .the attaching of a wrong label to the offence or an error made in

²⁴ CR 64/2018 [2018] NAHCMD 256 (23 August 2018).

quoting the charge, the statute...alleged to have been contravened, may be corrected on review if the court is satisfied that the conviction is in accordance with justice....'

[68] Furthermore, the answers proffered by the accused persons satisfy the requirements of the offence charged. It should be noted that despite the remaining eight sheep being the proceeds of unlawful activities, they were not laundered and, as such, remained the proceeds of the predicate offence of theft.

[69] For the afore-said reasons, there was no duplication of convictions and the convictions on both counts are in accordance with justice and will be confirmed, subject to a substitution of the charge with a contravention of section 4(a)(i) of POCA.

5. S v Albertus Ortman (HC Ref. No 1134/2019)

[70] The accused was charged and convicted on count 1 of theft of stock (one sheep) and on count 2 of a contravention of section 6 r/w ss 1,7,8 and 11 of POCA. After slaughtering the sheep he took one half for himself and gave the other half to two men in order to sell for N\$400. He however never received the monies.

[71] The facts and circumstances of this case are similar to that of case no. 2 above. There is thus no need to rehash what has been stated in that regard. It is evident that the accused was found in possession of half a carcass, consequential to the offence of theft. To this end, to have charged and convicted the accused under section 6 amounted to a duplication of convictions, the reason being that the accused's actions did not amount to a separate and distinct act, dissimilar of the offence of theft he earlier committed.

[72] With regards to the one half of the carcass the accused decided to sell off, this constituted an agreement or arrangement with another person with the likely effect to conceal the origin, source and ownership of the sheep, a contravention of section 4 of POCA, for which the accused should have been charged.

[73] Similar to the discussion in case no. 3 above, this is another instance where the charge is formulated in such a way that it covers all the possibilities envisaged in section 6.²⁵ For the reasons already stated, it would be an injustice to expect of the unrepresented accused to comprehend the particulars of the charge and to meet the case against him. The objection, however, is moot as the accused was wrongly charged and the state's decision to pursue under section 6 and for the accused to be convicted as charged, constitutes a duplication of convictions. The conviction on count 2 thus falls to be set aside.

6. S v Kaarina Petrus (HC Ref. No 653/2019)

[74] The accused in this matter was charged and convicted on count 1 with theft of cash in the amount of N\$50 679.35 and on count 2 with a contravention of section 4 (a) (b) (ii) r/w ss 1, 7,8,10 and 11 of POCA. The accused used N\$ 45 000 of the stolen cash to settle her personal debts and the remainder of the funds she spent on herself.

[75] In respect to count 2, as can be gleaned from the accused's response to the court's questioning, she admitted that, when using the money to pay off her debt, she in effect disguised the origin of the money i.e. the proceeds of her unlawful activities (theft), a contravention of section 4(a)(i). The circumstances of this case are identical to that of the *Katjangua* matter (case no. 4) and there is no need to expand on what has already been stated therein. Similarly, when the accused was asked to plead, she was duly informed of the necessary clarity of the case she had to meet and admitted to

²⁵ (a) acquiring; (b) using; (c) having possession; and (d) bringing into, or taking out of Namibia the proceeds of unlawful activities.

committing the offence of money-laundering. The charge was just given the wrong label and the accused suffered no prejudice as a result thereof.

[76] For the afore-said reasons, the convictions on both counts are in accordance with justice and will be confirmed, subject to a substitution of the charge with a contravention of section 4(a)(i) of POCA.

7. *S v Dawid Musongo & Stanley May* (HC Ref. No 1560/2019)

[77] The accused persons in this matter were charged and convicted on count 1 of the offence of housebreaking with intent to steal and theft of goods to the value of N\$6 529 and on count 2 of a contravention of section 6 r/w 1, 7 and 11 of POCA, having sold the stolen goods and bought food and drinks with the proceeds.

[78] As demonstrated hereinbefore, offences under section 6 are committed by recipients of the proceeds of the unlawful activities as opposed to the authors of the predicate offences. Therefore, to convict on both counts would constitute a duplication of convictions. This is another instance where the state should have charged the accused persons under section 4 as they clearly committed a further act with the proceeds of their unlawful activities; actions they admitted to during the court's questioning. Accordingly, the conviction on count 2 cannot be permitted to stand and falls to be set aside.

8. *S v Jonas Petrus* (HC Ref. No: 1558/2019)

[79] The accused in this matter was charged and convicted on count 1 with theft of cash in the amount of N\$4 739 and on count 2 with money-laundering in contravention of section 6 of POCA, having used some of the cash for his personal use and giving some to his girlfriend.

[80] In the present instance, the accused committed a separate and distinct act from the predicate offence when using and handing out the money he had stolen, thereby disguising the origin and source of the money. As stated, section 6 is aimed at the recipient of the proceeds of unlawful activities, as opposed to the author of the predicate offence. Consequently, the accused person should not have been charged under section 6, but rather with money-laundering in contravention of section 4(b)(i) of POCA.

[81] Therefore, the conviction and sentence in respect of count 2 cannot be permitted to stand.

9. S v Jaco Sass (HC Ref. No: 587/2019)

[82] The accused was charged and convicted on count 1 with the offence of housebreaking with intent to steal and theft of goods valued at N\$9 100 and on count 2 with money-laundering in contravention of section 4(a)(b)(ii) of POCA, having sold the stolen properties.

[83] This is a similar instance than encountered in cases no's 3 and 6 above, so the outcome should be the same. The accused was correctly charged under section 4(a) and (b) except for subsection (ii) which deals with circumstances where assistance is provided to the author of the predicate offence to avoid prosecution or to remove or diminish property acquired as a result of the commission of an offence. This clearly never happened. To this end the accused will not be prejudiced if the charge is amended to substitute subsection (ii) with (i), as the body of the charge clearly sets out the correct offence and the accused having admitted, when questioned by the magistrate, to disguising the origin of the cash when selling off the proceeds of the criminal activities.

[84] The conviction and sentence in respect of count 2 will thus be confirmed subject to the substitution proposed above.

Conclusion

[85] As discussed earlier in the judgment and borne out by the cases under review, the facts of each case will essentially determine the offence under POCA which the state decides to charge the accused with and, by charging under the wrong section, this could lead to the setting aside of the conviction on review or appeal. As demonstrated above, the offence of money-laundering under section 4 is distinguishable from that under section 6 and is not interchangeable.

[86] Presiding officers, when invoking the provisions of section 112(1)(b) of the CPA, must question the accused in such manner that the elements of the offence charged are covered and admitted by the accused and, if not admitted, to enter a plea of not guilty. If the state persists in prosecuting the author of the predicate offence under section 6, then the court in the end is likely to find that it constitutes an impermissible duplication of convictions.

[87] In the result, it is ordered:

- (a) The conviction and sentence imposed on count 1 of all nine review cases are confirmed.
- (b) In *S v Henock* the conviction and sentence on count 2 are confirmed.
- (c) In the matters of *S v Kandjoze; Auagub; Ortman; Musonga* and *Jonas Petrus*, the conviction and sentence on count 2 are set aside.
- (d) In the matters of *S v Kaarina Petrus, Katjangua* and *Sass*, the conviction and sentence on count 2 are confirmed, subject to an amendment of the charge to the extent that subsection (ii) is substituted with subsection (i) where it appears in the charge.

J C LIEBENBERG

JUDGE

N N SHIVUTE

JUDGE

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