

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

<b>Case Title:</b> <i>The State v Mashangu Mashangu Marshal</i>	<b>Case No:</b> CR 124/2023
<b>High Court Ref. No. 1023/2023</b>	<b>Division of Court:</b> Main Division
<b>Heard before:</b> Lady Justice Shivute J <i>et</i> Lady Justice Christiaan AJ	<b>Delivered on:</b> 16 November 2023
<b>Neutral citation:</b> <i>S v Marshal</i> (CR 124/2023) [2023] NAHCMD 741 (16 November 2023)	
<b>The order:</b> <ol style="list-style-type: none"><li>1. The conviction and sentence on count 1 are confirmed.</li><li>2. The conviction and sentence on count 2 and 3 are set aside.</li></ol>	
<b>Reasons for order:</b>	
CHRISTIAAN AJ (concurring SHIVUTE J)	

[1] The accused appeared in the Katima Mulilo magistrate's court on charges of Assault common read with the provisions of the Combating of Domestic Violence Act 3 of 2003 (count 1), crimen injuria read with the provisions of the Combating of Domestic Violence Act 4 of 2003 (count 2) and Assault by threat, read with the provisions of the Combating of Domestic Violence Act 4 of 2003 (count 3). When the matter came before me on review, I directed a query to the presiding magistrate in order to enquire whether a conviction on both counts did not amount to a duplication of convictions in light of the *dictum* in *S v Henock and Other*<sup>1</sup>

[2] In his reply, the magistrate concedes that a conviction on both counts 2 and 3 may amount to a duplication of convictions but further submitted that in his opinion, none of the counts would be necessary to complete or support the other.

[3] In the *Henock* matter, the court *inter alia* dealt with the question of duplication of convictions. At paragraph. 41 of the judgment, the following is stated:

41. The Supreme Court in *S v Gaseb and Others*<sup>2</sup> 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*<sup>3</sup> 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

<sup>1</sup> (CR 86/2019) [2019] NAHCMD 466 (11 November 2019).

<sup>2</sup> 2000 NR 139 (SC).

<sup>3</sup>

the matter, the two acts are 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 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.'

[4] The accused in the present matter threatened the complainant that he would cut his testicles and kill him and also swore at him using obscene language and then assaulted him by hitting him with a brick on his arm and did thereby and left him with some wounds and injuries. The accused acted with a single intent, namely by unlawfully and intentionally threatening him, using obscene language and thereafter assaulting him. To have charged and convicted the accused on the same facts of assault common, assault by threat and crimen injuria, clearly amounted to a duplication of convictions. The conviction on count 2 and 3 therefore, falls to be set aside.

[5] In the result, it is ordered:

1. The conviction and sentence on count 1 are confirmed.
2. The conviction and sentence on count 2 and 3 are set aside.

<b>P CHRISTIAAN ACTING JUDGE</b>	<b>N N SHIVUTE JUDGE</b>