

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

Case no: HC-MD-CRI-APP-CAL-2023/00046

In the matter between:

JACKSON BABI

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Babi v S* (HC-MD-CRI-APP-CAL-2023/00046) [2023] NAHCMD 810
(8 December 2023)

Coram: January J et Shivute J

Heard: 30 October 2023

Delivered: 8 December 2023

Flynote: Appeal – Conviction – Hunting of specially protected game, theft, unlawful supply of arms and ammunition, possession of controlled wildlife products, money laundering, corruptly giving gratification to an agent – Appellant represented in court a quo – Guilty pleas on all charges – s 112(2) statements – Claims of duplication of convictions – Not evident from pleas, evidence or facts during trial – Tests for duplication re-stated and applied - No duplication.

Sentencing – Punishment pre-eminently a matter for the discretion of the trial court – Court of appeal can only interfere when sentence wrong – The court *a quo* did not consider cumulative effect of sentences – Misdirection found – Sentences interfered with to ameliorate cumulative effect thereof.

Summary: The appellant was charged with two charges of hunting of specially protected game, two charges of theft, unlawful supply of arms and ammunition respectively, possession of controlled wildlife products, money laundering, corruptly giving gratification to an agent. He was represented during the trial in the court *a quo*. The appellant pleaded guilty on all charges. His legal representative handed up s 112(2) statements. After conviction, the appellant testified in mitigation and the investigating officer in aggravation. No facts emerged during the proceedings which were indicative of the possibility of duplication of conviction and neither was the magistrate alerted thereto. This court found no duplication of convictions. The court however found that the magistrate did not consider the cumulative effect of the sentences and thus, interfered.

Held, no evidence, facts and indication to alert the magistrate of duplication of convictions.

Held further; appellant was defended and pleaded guilty to all substantive charges. His legal representative made submissions on the substantive charges and suggested individual sentences in respect thereof without considering any duplication of convictions

Held further, there was no duplication of convictions.

Held further, there was a misdirection in relation to sentence; the cumulative effect was not considered.

Held further, sentences partly interfered with and ameliorated and partly confirmed.

ORDER

1. The appeal against convictions is dismissed.
2. The sentences in counts 1 and 2 are set aside and substituted with the following sentences:
 - 2.1. Count 1 and 2 are taken together for the purpose of sentence; the appellant is sentenced to N\$100 000 or 5 years' imprisonment of which N\$40 000 or 2 years' imprisonment are suspended for five years on condition that the appellant is not convicted of contravention of s 26(1) read with ss 1, 26(2), 26(3), 85, 81A, 87, 89 and 89A of the Nature Conservation Ordinance 4 of 1975, as amended, committed within the period of suspension.
3. The sentences on counts 3 and 4 are confirmed but it is ordered in terms of s 280(2) of the Criminal Procedure Act 51 of 1977 that the sentence in count 4 is to be served concurrently with the sentence in count 3.
4. The sentences in counts 5 and 6 are confirmed but it is ordered in terms of s 280(2) of the Criminal Procedure Act 51 of 1977 that the sentence in count 6 is to be served concurrently with the sentence in count 5 if the fines are not paid.
5. The sentences on counts 11, 12, 17, 18 and 19 are confirmed.

JUDGMENT

JANUARY J (Shivute J concurring)

Introduction

[1] The appellant stood charged in the Regional Court Gobabis with eight co-accused. The appellant opted to plead guilty and his trial was separated in term of s 157 of the Criminal Procedure Act 51 of 1977, as amended, from the other accused persons. He was convicted on 05 September 2023 on the following charges:

1. Hunting of Specially Protected game in contravention of s 26(1) read with ss 1, 26(2), 26(3), 85, 81A, 87, 89 and 89A of the Nature Conservation Ordinance 4 of 1975, as amended and further read with s 90, 155 and 250 of the CPA, as amended.
2. Hunting of Specially Protected game in contravention of s 26(1) read with ss 1, 26(2), 26(3), 85, 81A, 87, 89 and 89A of the Nature Conservation Ordinance 4 of 1975, as amended and further read with s 90, 155 and 250 of the Criminal Procedure Act 51 of 1977, as amended.
3. Theft.
4. Theft.
5. Supplying of a firearm in contravention of s 32(1)(a) read with s 1, 38(2) and 39 of the Arms and Ammunition Act 7 of 1996, as amended.
6. Supplying of ammunition in contravention of s 32(1)(a) read with s1, 38(2) and 39 of the Arms and Ammunition Act 7 of 1996, as amended.
11. Racketeering in contravention of s 2(1)(a) and (b) read with ss 1, 2(2) (a) and (b),3, 8 and 11 of the Prevention of Organised Crime Act 29 of 2004 and further read with the provisions of s 94 and 155 of the CPA, as amended.

12. Money Laundering in contravention of s 4(b)(i) and (ii) read with s 1, 11 and 97 of the Prevention of Organised Crime Act 29 of 2004-Disguising unlawful origin of property; alternatively, Acquisition, possession or use of proceeds of unlawful activities in contravention of s 6 read with s 1, 11 and 97 of the prevention of Organised Crime Act 29 of 2004, as amended.

17. Possession of any controlled wildlife products in contravention of s 4(1)(a) read with s 1, 4(2)(a), 8, 9, 12, 13 and 14 of the Controlled Wildlife Products and Trade Act 9 of 2008, the possession of which is unlawful in terms of schedule 1.

18. Disguising unlawful origin of property in contravention of s 4(b)(i) and (ii) read with s 1, 11 and 97 of the Prevention of Organised Act 29 of 2004, as amended; alternatively, Acquisition, possession or use of proceeds of unlawful activities in contravention of s 6 read with s 1, 11 and 97 of the prevention of Organised Crime Act 29 of 2004, as amended.

19. Corruptly giving gratification to an agent as an inducement in contravention of s 35(2) (a) read with s 32, 35(5), 46, 49 and 51 of the Anti-corruption Act 8 of 2003.

He was sentenced on 09 September 2023 to cumulative sentence of fines in the amount of N\$370 000 or 21 years' imprisonment if the fines are not paid. In addition he was sentenced to effective imprisonment on counts one and two to three years' imprisonment each. The total period of incarceration if the fines are not paid is 27 years' imprisonment.

Grounds of appeal

[2] The notice of appeal was filed within time and reflects as follows:

Ad conviction, *inter alia*;

1. The court erred in law/fact by convicting the appellant on both counts 1 and 2 as this was a duplication of convictions.
2. The court erred in law/fact by convicting the appellant on both count 2 and 4 as this was a duplication of convictions alternatively selective splitting of a charge.
3. The court erred in law/fact by convicting the appellant on both count 4 and count 17 as this was a duplication of convictions.
4. The court erred in law/fact by convicting the appellant on both count 5 and count 6 as this was a duplication of convictions.
5. The court erred in law/fact by convicting the appellant on count 11, count 12 and count 18 as this was a duplication of convictions.
6. The court erred in law/fact by convicting the appellant on both count 12 and count 18 as this was a duplication of convictions.

Ad sentence

1. The imprisonment term imposed by the court, in the prevailing, circumstances, is shockingly inappropriate.
2. The court unjustifiably overemphasised the seriousness of the offence at the expense of mitigating circumstances.
3. The court did not take into effect the cumulative effect of the sentences when it imposed the sentence on the appellant.
4. The court failed to take into account the charges stemmed from one action and therefore the sentences should have been made to run concurrently.

5. The court unjustifiably emphasised on irrelevant aggravating factors namely stating greed was the reason for the commission of the offence without any evidence to that effect.
6. The court unjustifiably made the appellant the scapegoat, hence overemphasised the principle of deterrence when imposing the sentence on the appellant.
7. The court failed to take into account the accused's 2 years and 3 months of pre-trial incarceration.

[3] The appellant was represented in the court a quo by Mr Siyomunji and the public prosecutor was Mr Hoeb. Mr Scheepers is representing the appellant in this court. The respondent is represented by Mr Kalipi.

[4] The appellant pleaded guilty on all the main counts and not guilty to the alternatives, where there were alternative counts preferred. Mr Siyomunji confirmed the pleas to be in accordance with his instructions, he prepared and handed up statements in terms of s 112(2) in relation to all counts the appellant had pleaded guilty to.

The 112(2) plea statements

[5] Only the material parts containing the elements of the respective charges are stated and we will not regurgitate the whole statement:

'Count 1. I fully admit that on or about the 21-22 May 2020 at or near Farm Ohlshenhagen in the Regional Division of Gobabis, I did wrongfully and unlawfully hunt specially protected game, to wit a White Rhinoceros cow valued at N\$700 000 without a permit to do so from the Minister.

Count 2. I further admit that on or about the 21-22 May 2020 at or near Farm Ohlshenhagen in the Regional Division of Gobabis, I did wrongfully and unlawfully hunt

specially protected game, to wit a White Rhinoceros calf valued at N\$700 000 without a permit to do so from the Minister.

Count 3. I further admit that on or about the 21-22 May 2020 at or near Farm Ohlshenhagen in the Regional Division of Gobabis, I did wrongfully and unlawfully remove and steal two white Rhinoceros cow horns with a mass of 3.35 kg with a value of N\$267 600, the property of or in the lawful possession of Cornelius Jakob Steenkamp.

Count 4. I further admit that on or about the 21-22 May 2020 at or near Farm Ohlshenhagen in the Regional Division of Gobabis, I did wrongfully and unlawfully remove and steal two white Rhinoceros cow horns with a mass of 2.20 kg with a value of N\$167 600, the property of or in the lawful possession of Cornelius Jakob Steenkamp.

Count 5. I further admit that between February and May 2020 at or near Windhoek in the district of Windhoek, I wrongfully and unlawfully supplied Alberto Mbware, Joseph Mateus, Vaaruka Musutua, Elias Nashivela and Onesmus Haufikua a hunting rifle, Winchester calibre (270) with erased serial number, a telescope and silencer without a license to possess such arm with which that frame, receiver, magazine or cylinder can be used.

Count 6. I further admit that between February and May 2020 at or near Windhoek in the district of Windhoek, I wrongfully and unlawfully supplied Alberto Mbware, Joseph Mateus, Vaaruka Musutua, Elias Nashivela and Onesmus Haufikua ammunition, to wit several rounds of 270 Winchester ammunition without a license to possess such arm capable of firing the ammunition supplied and without a permit for the acquisition of the ammunition supplied.

Count 11. I further admit that between 21-27 May 2020 at or near Farm Ohlshenhagen in the Regional Division of Gobabis, I did wrongfully and unlawfully receive or retained

property derived directly or indirectly from a pattern of racketeering activity while I knew that the property was so derived with reference to counts 1, 2, 3, 4, 5, 6, 11, 12, 17 and 18.

Count 12. I further admit that between 21-26 May 2020 at or near Farm Ohlshenhagen, Gobabis in the district of Gobabis, I wrongfully and unlawfully entered into an agreement or engaged in an arrangement or transaction of hiding the two rhinoceros horns in a bag and transporting them to Otjiwarongo district and attempted to sell them. This act was likely to have the effect of concealing or disguising the nature, source, location disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof.

Count 17. I further admit that between 23-27 May 2020 at or near Windhoek in the district of Windhoek I wrongfully and unlawfully had in my possession, a controlled wildlife product to wit two Rhinoceros horns with a total mass of 2.20 kgs valued at N\$176 000 for a white Rhinoceros calf, the possession of which is unlawful in terms of schedule 1.

Count 18. I further admit that between 21-26 May 2020 at or near Farm Ohlshenhagen, Gobabis in the district of Gobabis, I wrongfully and unlawfully entered into an agreement or engaged in an arrangement or transaction of hiding the two rhinoceros horns with a total mass of 2.20 kgs valued at N\$176 000 from a white Rhinoseros calf in a bag and transporting them to Windhoek district and hiding them at accused 8's residence with a view to hide or disguise the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof.

Count 19. I further admit that between 23-27 May 2020 at or near Windhoek in the district of Windhoek I wrongfully and unlawfully, directly or indirectly attempted to conspire or corruptly offer or give an agent or give or agree to give an agent to wit Detective Sergeant Daniel Katua Gilbert a member of Namibian Police gratification to

wit thirteen thousand Namibian Dollars (N\$13 000) as an inducement to do or not to do anything in relation to their affairs, business of the agent's principle to do it for him to facilitate my release on bail.

Mitigation

[6] After conviction, no previous convictions were proven against the appellant. He testified in mitigation. He is a 32 year old Namibian national. He is married for seven years with three children, respectively, aged seven, six and four years old. He testified that before his arrest, he was a preacher, motivational speaker and singer. He earned a monthly income between N\$50 000 and N\$60 000 from his activities. He was responsible for medication and fees for his children who were at a private school. The children have been removed from the private school and the appellant was responsible for their transport and extra mural activities. He spent around N\$11 000 per month. He was arrested on 27 June 2022 until the date of sentence. Since his arrest, he was unable to carry out any activities, not able to do anything for his kids and they were removed from the private school. His wife was unemployed and was dependent on him. The family is now relocated as they cannot afford to pay the bills at the house where they were staying. They are staying at his brother`s residence.

[7] The appellant testified that he was in custody for two years and four months. He decided to plead guilty not to waste the court's time and resources. He pleaded for mercy and promised to assist as a State witness. He expressed that he is remorseful for his actions. He has no previous convictions and no other pending matters against him. As a preacher, he undertook to talk about the case and his activities to prevent people to follow suit. Further, he was informed that his extended family all passed away and they have young children who need to be cared for. One of those boys who were in secondary school, as he was informed, quit school and now roams the streets and abuses alcohol.

[8] In his address, Mr Siyomunji emphasised the triad of sentencing factors to be considered as guided in *S v Zinn (infra)* and amplified in *S v Tjiho (infra)*. Further he highlighted the personal circumstances of the appellant and the time that he spent in custody awaiting his trial. He is remorseful and wants to discourage other would be offenders. Counsel prayed for mercy, that a portion of the sentence be suspended and emphasised that options of fines are catered for referring the court to similar cases in the past. He conceded that the crimes are serious. By extension, he recommended sentences of fines ranging between N\$5000 and N\$30 000 for the different offences. Finally, he proposed a cumulative sentence of N\$130 000 as well as two years imprisonment wholly suspended for two years on conditions imposed. Significantly, there is no submission that any of the convictions amount to a duplication of convictions or splitting of charges.

Aggravation

[9] The prosecution called the investigating officer who is 39 years old and in the PRU (Protected Resources Unit) for eight years. He investigates wildlife and high value mineral related cases. He testified about the amendments in 2017 in the legislation where the sentences were increased in the Nature Conservation Ordinance 4 of 1975 from five to 25 years imprisonment and the fines from N\$200 000 to N\$25 million. He testified that this increase was seen to be necessary due to the prevalence and seriousness of poaching. In addition, there is fear that protected animals like rhinos and pangolins will get extinct and not be available for future generations to see. Further, the economic value thereof for Namibia in the tourism sector will be erased.

[10] The witness testified that the offences commenced in Windhoek where firearms were provided and transported to Gobabis where the crimes were committed and the rhinos being poached. The accused person returned to Windhoek where the pair of rhino horns were kept and the other horns were taken to Tsumeb where the co-accused were. They, thereafter proceeded to Otjiwarongo to sell a pair of rhino horns. The other pair of rhino horns were discovered in Windhoek.

[11] Mr Hoeb, who represented the State in the court a quo submitted and emphasised the seriousness and prevalence of the crimes with reference to statistics and opening of special courts as testified to by the investigating officer. He submitted that the emphasis should be on deterrence in cases of this nature. He further, emphasised the interests of society in these types of crimes. That courts should join hands with law enforcement agencies in curbing crimes in relation to controlled wildlife products and trade, nature conservation and possession of arms and ammunition related to the poaching of wildlife. He pointed out what negative effect this type of crime has on the economy of the country. Further, that the fight for the preservation of game, huntable, protected and otherwise is not limited to Namibia but worldwide.

[12] He referred the court to the Namibian Constitution providing for the protection of the environment, mandating the maintenance of ecosystems, essential ecological processes and biological diversity and the utilization of living natural resources on a sustainable basis for the benefit of all Namibians. He further submitted that stiffer sentences are called for as provided for by legislation. He submitted that the reason why these crimes were committed was because of greed as the appellant was gaining sufficient income to sustain himself and his family before.

[13] In conclusion, he submitted that the crimes involved pre-planning; committed in more than one district, involving two rhinos. The appellant is an educated person who was gainfully employed, and the orchestrator of his own demise. In addition, he referred the court to the principle of uniformity with reference to *S v Kramer*¹ where it was stated:

‘It is certainly true that Courts should aim for uniformity of sentence in regard to the same offence, equal or similar criminals or offenders and the same or similar facts and circumstances. Individualisation of sentences must be balanced by consistency, otherwise the community will not comprehend the principles applied and as a consequence the confidence of the public in the impartiality of Judges and the fairness of the trial will be undermined (see *Du Toit Straf in Suid-Afrika* at 118-24).’

¹ *S v Kramer* 1990 NR 49 at 53 D-E.

[14] Mr Hoeb, likewise did not mention anything about duplication of convictions. He suggested sentences of three years imprisonment each for counts 1, 2, 3, 4 and 17; For counts 5 and 6, N\$5000 or 12 month's imprisonment, respectively; For count 11, N\$100 000 or 10 years' imprisonment; For count 12, four years imprisonment; Count 18, four years' imprisonment and count 19, N\$30 000 or two years' imprisonment.

[15] The magistrate considered the evidence and submissions in mitigation, aggravation and with reference to precedence² i e the triad in sentencing; mercy and uniformity. She considered the particular circumstances of the case and the prescribed fines for the statutory offences. She found that the appellant acted in common purpose with his co-accused and he supplied the firearm, making the illegal hunting possible. Further, that the appellant understood what racketeering is and that he participated in organised crime. She considered his personal circumstances, the period of pre-trial incarceration, that he is remorseful, the seriousness and prevalence of the offences.

[16] The appellant was sentenced as follows as per the charges in sequence:

1. N\$100 000 or two years' imprisonment and in addition three years' imprisonment.
2. N\$100 000 or two years' imprisonment and in addition three years' imprisonment.
3. Two years' imprisonment.
4. Two years' imprisonment.
5. N\$5000 or 12 months' imprisonment.
6. N\$5000 or 12 months' imprisonment.
11. N\$30 000 or two years' imprisonment.
12. N\$30 000 or two years' imprisonment.
17. N\$50 000 or three years' imprisonment.
18. N\$30 000 or two years' imprisonment.
19. N\$20 000 or two years' imprisonment.

² S v Zinn 1969 (2) SA 537; S v Rabi 1975 (4) SA 55; S v Tjiho 1991 NR 361.

[17] I went through the strenuous exercise to scrutinise the evidence, submissions and reasons of the magistrate to determine, consider and find justification for the submissions that there were duplications of convictions. The record of proceedings clearly reflects that nothing was mentioned about it during the trial. In addition there is no iota of an indication that duplications of convictions were a possibility, scrutinising the charges and what is reflected on the record. It is trite that the prosecution may charge with as many as possible charges justified by the evidence/facts and it is the duty of the presiding officer at the end of the case to consider whether or not that possibility exists or not.

[18] To determine duplications of convictions, it is trite that 'the 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 act are necessary to carry out that intent, then he ought only be indicted for, or convicted of, one offence because the two acts constitute one criminal transaction.'³

[19] The Namibian Supreme Court dealt with the issue of duplication of convictions in *S v Gaseb and Others*⁴ and referred to *S v Grobler and Another*⁵. 'The Appellate Division in the aforementioned decision specifically dealt with the impact of s 314 of the Criminal Procedure Act 56 of 1955 (similar to the former s 18 of Act 39 of 1926) on the issue of whether or not there is or has been an improper splitting of charges (duplication of convictions). It must be noted that the aforesaid ss 314 and 18 were the forerunners of s 83 of the Criminal Procedure Act 51 of 1977 which provides:

'If by reason of any uncertainty as to the facts which can be proved or if for any other reason it is doubtful which of several offences is constituted by the facts which can be proved, the accused may be charged with the commission of all or any of such offences, and any

³ *S v Seibeb and Another; S v Eixab* 1997 NR 254 (HC).

⁴ *S v Gaseb and Others* 2001 (1) SACR 438 (NmS) at 441 D-G.

⁵ *S v Grobler and Another* 1966 (1) SA 507 (A) at p 513 E-G.

number of such charges may be tried at once, or the accused may be charged in the alternative with the commission of any number of such offences.'

Rumpff JA, one of the eminent Judges in the aforesaid decision of *S v Grobler*, explained:

'The section deals, in my view, with the manner of charging and not the legislative and common law principles in regard to conviction and the imposition of sentence. The consequence of this article, in my view, is that the State is free to draw up as many charges as are justified by the available facts. At the end of the case it is the task of the Court to decide whether a crime has been proved and if so, which crime and how many crimes have been proved. Should it then for example appear according to the proved facts that two charges in the indictment embrace one and the same punishable fact, the Court will find the accused guilty only on one charge. The effect of the article is thus, inter alia, that, no objection can be made against the indictment at the outset of the trial should in terms of the indictment, one punishable fact be charged as multiple crimes.'

(Free translation from Afrikaans p 513 E-G).

[20] It is common sense that the decision of the presiding officer on duplication of convictions should be based on facts that emerged during the plea or during the evidence. Otherwise it is expected from the public prosecutor or legal representative, especially an experienced legal representative like in this case, to alert the presiding officer on that possibility. The legal representative, after all, should have consulted with the appellant and was acquainted with the facts on which the guilty pleas were made. He could have presented evidence from the appellant who testified during the proceedings if there was a duplication of convictions or a splitting of charges for that matter. Nothing to that effect was presented. The guilty pleas were given on the substantive charges and in circumstances where the allegations were that the unlawful acts were committed between two or more days. There is no indication that any of the substantive charges were committed with a single intention or in one criminal transaction. Neither do the facts indicate that the same evidence will prove different crimes. In addition, there is no evidence from which it can be inferred that the same evidence proved different crimes or a single intent to commit same.

[21] The charges and record of proceedings do not reflect that the rhino cow and calf were shot with a single criminal intent or poached with a single intent or for that matter a single shot. All indications are that it was committed on different occasions. Likewise, the theft of rhino horns does not reflect that it was committed on one occasion with a single intent considering that those occurred on or between two different dates in relation to rhino horns of a cow with a different weight and value considered to that of calf horns with their own weight and value.

[22] The submission that count 17 is a duplication of count one, likewise does not hold water. The hunting and theft took place in the district of Gobabis whereas the appellant was found in possession of the horns in the Windhoek district. It is material in the decision on duplication that facts in relation to the same date, time and place plays a significant role. It is not evident from the terse admissions in the guilty pleas and evidence from witnesses that any of the offences took place at the same time and/or with a single action or transaction, although within the same period.

[23] The submissions relating to counts 4 and 5 to be identical crimes are also misplaced. Although both counts refer to the contravention of the same s 32(1)(a) of the Arms and Ammunition Act 7 of 1996, it is clearly a mistake. It is clear from the Act that the crime of unlawfully supplying ammunition is a crime under s 32(1)(b), separate from unlawfully supplying a fire arm under s 32(1)(a). If the legislature intended the two unlawful actions to be one, it would have stated so.

[24] In the circumstances, this court is not convinced that there was a duplication of convictions. Thus the appeal in this regard stands to be dismissed.

[25] It is trite that this court's power to interfere with sentence is limited. A court of appeal will only interfere if the sentence is vitiated by irregularity and misdirection or if the sentence is one which no reasonable court would have imposed.⁶ When the

⁶ *S v Tjiho* 1991 NR 361 (HC).

substantive sentences in relation to the individual convictions are considered, it appears to be appropriate. However, considering the cumulative effect of the sentences, it is found to be harsh and shocking. There is no indication in the magistrate's reasons that she considered the cumulative effect thereof. She therefore, committed a misdirection in this regard. In addition, she overemphasised the seriousness of the offence at the peril of the personal circumstances of the appellant and paid lip service to the consideration of mercy or leniency.

[26] Although the appellant did not specify any amount of a fine that he is able to pay, it is evident from the submissions in mitigation by his legal representative that he was able to at least pay a cumulative fine of N\$130 000.

[27] When a sentencing court imposes a fine well beyond the capability of an accused, common sense dictates that it is tantamount to imposing imprisonment and paying lip service of giving him/her the opportunity to stay out of prison. These crimes are indeed serious and prevalent. We agree with the magistrate that they deserve heavy and deterrent sentences. The cumulative effect of the sentences, however, need to be ameliorated in the circumstances. It can be ameliorated for instance by suspending all or a portion of the custodial sentences or ordering a portion or part of it to be served concurrently in terms of s 280(2) of the CPA and taking offences together for purposes of sentence. In relation to the last-mentioned option the guidelines in *S v Tjikotoke*⁷ should be considered. In that case it was stated as follows:

'Special care should be taken when dealing with statutory offences. Although the procedure was neither sanctioned nor prohibited by the Criminal Procedure Act 51 of 1977, it was undesirable and should only be adopted by lower courts in exceptional circumstances. These exceptional circumstances could for instance be present where the charges were closely connected or where the charges followed from one and the same act or where the charges were closely connected or similar in point of time, place or circumstance. (Paragraphs [6] – [8] at 39H – 40D.)'

⁷ *S v Tjikotoke* 2014 (1) NR 38 (HC).

[28] In relation to the fines imposed in the court a quo, we have reminded ourselves that: 'When deciding the extent of a fine, regard must not only be had to the accused's ability to pay the fine, but the fine should also reflect the gravity of the offence committed and in *S v Lekgoale and Another*⁸ the court remarked that '... a serious offence should not be made to look trivial by imposing a small fine merely to stay within the limits of the accused's resources' and that '... fines should not be imposed which are clearly impossible to pay. They must be scaled down, but not so much that the offence looks trivial. If at that point it is still unlikely that the accused will be able to pay, it is an anomaly which has to be accepted.'

[29] In the result:

1. The appeal against convictions is dismissed.
2. The sentences in counts 1 and 2 are set aside and substituted with the following sentences:
 - 2.1. Count 1 and 2 are taken together for the purpose of sentence; the appellant is sentenced to N\$100 000 or 5 years' imprisonment of which N\$40 000 or 2 years' imprisonment are suspended for five years on condition that the appellant is not convicted of contravention of s 26(1) read with ss 1, 26(2), 26(3), 85, 81A, 87, 89 and 89A of the Nature Conservation Ordinance 4 of 1975, as amended, committed within the period of suspension.
3. The sentences on counts 3 and 4 are confirmed but it is ordered in terms of s 280(2) of the Criminal Procedure Act 51 of 1977 that the sentence in count 4 is to be served concurrently with the sentence in count 3.
4. The sentences in counts 5 and 6 are confirmed but it is ordered in terms of s 280(2) of the Criminal Procedure Act 51 of 1977 that the sentence in count 6 is to be served concurrently with the sentence in count 5 if the fines are not paid.

⁸ *S v Lekgoale and Another* 1983(2) SA 175 (B) at 177.

5. The sentences on counts 11, 12, 17, 18 and 19 are confirmed.

H. C. JANUARY
JUDGE

N.N. SHIVUTE
JUDGE

APPEARANCES:

APPELLANT

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RESPONDENT

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