

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION  
HELD AT OSHAKATI**

**REVIEW JUDGMENT**

Case no: CR 16/2019

In the matter between:

**THE STATE**

**v**

**IMMANUEL KAHANA**

**ACCUSED**

(HIGH COURT NLD REVIEW CASE REF NO. 629/2018)

**Neutral citation:** *S v Kahana* (CR 16/2019) [2019] NAHCNLD 29 (8 March 2019)

**Coram:** JANUARY J and SALIONGA J

**Delivered:** 8 March 2019

**Flynote:** Convictions — Duplication — What constitutes — Two separate acts committed namely assault on a police officer, resists a member of police and damaging her eye spectacles in the process — One criminal transaction — Single intent of assaulting a police officer and malicious damage to property — Duplication of charges — Conviction and sentence on malicious damage to property charge set aside.

---

## ORDER

---

1. The conviction and sentence in respect of count 1 and 2 are confirmed;
  2. The conviction and sentence in respect of count 3, malicious damage to property are set aside.
- 

## REVIEW JUDGMENT

---

SALIONGA J (JANUARY J concurring):

[1] The accused herein was charged with three counts namely assault on a member of the police in contravention of section 35(1) of the Police Act, 1990 (Act 19 of 1990), resists a member of police in contravention of section 35(2)(a) of the Act and malicious damage to property. Count 1 arises from an assault of a police officer by the accused who was a suspect to be arrested, count 2 relates to resists a member of the police and count 3 to malicious damage of the spectacles of the complainant in count 1.

[2] The accused pleaded guilty to all counts however a plea of not guilty was entered on count 1 in terms of s 113 of the Criminal Procedure Act, after he denied to have acted wrongfully and unlawfully. In respect of count 2 and 3, the accused was found guilty upon his own admission in terms of s 112(1) (a) of the Act. On count 1 the accused was convicted after evidence was led.

[3] The State called the complainant in the assault and malicious damage to property cases. She testified that on the day in question she was in the company of other police officers, on their way to arrest the accused at a cuca shop. The accused was brought to the police van by Sgt Hainditi and his rights were fully explained. When the police wanted to handcuff him, accused refused. In that process accused started throwing punches at the complainant several times until she fell down. Whilst complainant was on the ground accused sat on her and in that process her glasses were broken.

[4] The learned magistrate convicted the accused on count 1 of assault on a member of the police in contravention of section 35(1) of the Police Act, 1990 (Act 19 of 1990), count 2 for resisting a member of the police and count 3 for malicious damage to property. The convictions of assault and resisting a member of the police and the sentences of N\$1000 or 6 months' imprisonment each are in accordance with justice and may be confirmed.

[5] When the matter was sent on automatic review I requested reasons from the magistrate for convicting the accused on all counts and in particular whether that did not constitute a duplication of convictions. In the alternative, I queried the magistrate why the counts were not taken together for sentencing purposes. In her reply the magistrate stated that 'the accused was resisting arrest and the witness used minimum force and by resisting the arrest he punched the complainant on the face that caused the property to be damaged'. Further that the accused should have foreseen that by beating the complainant on the face there was a likelihood of the glasses to be damaged. The magistrate conceded to have made a gross error not to have taken counts together for sentencing purposes.

[6] I am not sure if I understood the magistrate correctly, to concede that it was a single intent. Her reply is unhelpful in this regard apart from conceding that she should have taken the counts together for sentencing purposes. In *S v Kharuchab* 2017 (1) NR 116 (HC) 'this court sets out the law in respect of duplication of convictions and I need not restate same in this judgment, save to cite the following extract from the headnote in *S v Gaseb & others* 2001 (1) SACR 438 where that court held that:'

"...there were usually two tests applied in deciding whether there had been a duplication of convictions, namely the single intent test or the same evidence test: in deciding which test to apply the court must apply common sense and fair play. I align myself to this judgement as the correct position in law."<sup>1</sup>

---

<sup>1</sup> *S v Johannes* (CR 16/2018) [2018] NAHCNLD 33 (12 April 2018).

[7] It is evident that the accused had the single intent to assault the police officer when he punched her on the face several times and sat on her while lying on the ground resulting in her eye spectacles being damaged. This was one single transaction, with single intent to assault a member of the police and resist the arrest. The learned magistrate clearly erred in convicting the accused on both counts as same amounts to an improper duplication of convictions.

[8] In the result the following order is made:

1. The conviction and sentence in respect of count 1 and 2 are confirmed;
2. The conviction and sentence in respect of count 3, malicious damage to property are set aside.

---

J T SALIONGA  
Judge

I agree

---

H C JANUARY  
Judge