

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

APPEAL JUDGMENT

Case no: HC-NLD-CRI-APP-CAL-2018/00019

In the matter between:

ANTONIUS LEONARD KAFUNGA

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Kafunga v S* (HC-NLD-CRI-APP-CAL-2018/00019) [2019]
NAHCNLD 7 (29 January 2019)

Coram: TOMMASI J and JANUARY J

Heard on: 8 November 2018

Delivered: 29 January 2019

Flynote: Convictions — Duplication — What constitutes — Two tests - single intent or same evidence — Fraud, forgery and uttering — Whether you apply any one of the tests the same conclusion would be reached — In casu there is an improper duplication of convictions.

Summary: The appellant presented a cash cheque in the sum of N\$70 000 to the Bank. The bank however called the signatory and ascertained that, although he signed the cheque, he was not the one who filled out the cheque. The appellant was convicted of three counts i.e. fraud, forgery and uttering. The court held whether you apply the single intent or same evidence test, the same conclusion would be reached i.e. that there is an improper duplication of convictions. The convictions of forgery and uttering were set aside. All the counts were taken together for purpose of sentencing and the court consequently had to consider sentence afresh.

ORDER

1. The appellant's application for condonation for the late filing of the notice of appeal is granted;
2. The convictions of forgery and uttering are set aside;
3. The sentence imposed is substituted with the following sentence:

The appellant/ accused is sentenced to 5 years' imprisonment of which two years' imprisonment is suspended for five years on condition that the appellant/ accused is not convicted of the crime of fraud committed during the period of suspension.

4. The sentence is ante-dated to 6 March 2018.
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JUDGMENT

Tommasi J (January J concurring):

[1] The appellant appealed against conviction and sentence. He was convicted of fraud, forgery and uttering. The appellant simultaneously applied for condonation for the late noting of the appeal. The respondent opposes the application for

condonation on the ground that there are no reasonable prospects of success. The court thus heard the parties on the merits.

[2] The appellant, represented by Ms Amupolo, raised one ground of appeal against conviction but wisely withdrew same at the hearing of the appeal. The court however invited counsel to address it on the issue of duplication of convictions.

[3] The respondent, represented by Mr Pienaar submitted that there is no duplication of convictions whereas Ms Amupolo was of the view that there is an improper duplication of conviction.

[4] The particulars of main count are as follow:

'The accused is guilty of the crime of fraud in that upon or about the 17th day of May 2016 and at or near Nedbank, Oshakati in the Regional Division of Namibia, the accused did wrongfully, falsely and with intent to defraud, gave out and pretended to Adams Victor Denworth that a certain cheque drawn by Namibia funeral Supply CC on the Nedbank Branch of Oshakati for the sum of Seventy Thousand Namibian Dollars (N\$70 000-00) to a cash cheque was a good and available cheque and would be met on presentation thereof and did then and there by means of said false presence cause prejudice to the said Namibia Funeral Supply the following (sic), to wit: Seventy Thousand Namibian Dollars (N\$70 000-00) in cash whereas in truth and in fact the accused when he so gave out and pretended as aforesaid knew that the cheque was not a good and available cheque and would not be met on presentation thereof.'

Count 2 is the fraudulent forgery of the above cheque and count 3 is the uttering the same cheque.

[5] It is trite that two tests are applied in deciding whether there is a duplication of convictions, namely the single intent test or the same evidence test and in each case the court ought to use common sense and fair play to determine whether there would be a duplication of convictions¹

[6] The appellant presented a cash cheque in the sum of N\$70 000 to Nedbank for payment. The teller referred the cheque to the supervisor who contacted the signatory to determine whether he wrote out a cheque in the sum of N\$70 000. The clear intention of the appellant was to defraud Namibia Funeral Supply CC and or

¹ *S v Gaseb & others* 2000 NR 139 (SC).

Nedbank. In this case, whether one applies the single intent or the same evidence test, the conclusion is the same i.e. that there is an improper duplication of convictions. The learned magistrate ought not to have convicted the appellant of forgery and uttering and in light of this misdirection these convictions stand to be set aside.

Sentence

[7] The learned magistrate took all three counts together for purposes of sentencing. The sentence which takes into account those convictions, would not be appropriate in light of the court's finding that the counts of forgery and uttering ought to be set aside. This court may remit the matter to the learned magistrate to sentence afresh or consider an appropriate sentence. We opted to consider sentence afresh due to the prejudice such a delay would cause.

[8] The appellant is a first offender who is the sole breadwinner for his two minor children and their mother who is furthering her studies. He is 27 years old and is not employed but sells goat meat to earn an income. The owner of Namibia Funeral Supply CC is his uncle. He testified that he apologized to him. The appellant pleaded guilty. The court is mindful of the fact that he was caught red-handed thanks to the vigilance of the bank officials. There is undisputed evidence of his apology to his uncle. His contrition and clean criminal history makes him a candidate for a sentence with a rehabilitative objective.

[9] The offence is serious and prevalent. The appellant's crime was selfish and designed to enrich himself at the expense of the business of his uncle. The appellant was in a position of trust and his conduct is a gross breach of the trust his uncle had placed him. The amount of N\$70 000, although not actually lost, would have caused considerable damage to the business of his uncle. The sentence ought not to be 'calculated to make the game seem worth the candle'.²

[10] Having considered the crime, the offender and the interest of society; the objectives of punishment; and the mitigating and aggravating factors, the court finds that a custodial sentence is indeed appropriate.

² *S v Sadler* 2000 (1) SACR 331 (SCA) at page 335G.

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

1. The appellant's application for condonation for the late filing of the notice of appeal is granted;
2. The convictions of forgery and uttering are set aside;
3. The sentence imposed is substituted with the following sentence:

The appellant/ accused is sentenced to 5 years' imprisonment of which two years' imprisonment is suspended for five years on condition that the appellant/ accused is not convicted of the crime of fraud committed during the period of suspension.

4. The sentence is ante-dated to 6 march 2018.

M A TOMMASI
JUDGE

I agree

J C JANUARY
JUDGE

Appearances:

For the Appellant:

M M Amupolo
Amupolo & Co. Inc., Ongwediva

For the Respondent:

J W Pienaar
Office of the Prosecutor General, Oshakati