REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 27/2012

In the matter between:

DANIËL ASHIMBANGA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Ashimbanga v State* (CA 27/2012) [2012] NAHCMD 49 (2 November 2012)

Coram: VAN NIEKERK J and UEITELE, J
Heard: **21 September 2012**
Delivered: **02 November 2012**

Flynote: **Criminal procedure** – Appeal - Notice of appeal – Failure to properly set out grounds of appeal – Complaint should be approached with some leniency as appellant is a lay person drawing up notice of appeal while serving custodial sentence – One is able to discern what appellant is taking issue with – Respondent able to file full heads of argument on merits – No material prejudice – In interests of finality the appeal was not struck

Escaping from custody – Contravention of section 51(1) of Criminal Procedure Act, 51 of 1977 – Elements of offence set out – Requirement of lawful arrest and arrest without a warrant under section 40 of the Act discussed – No need for accused to be charged with offence or booked into police registers – Conviction upheld - Appellant a second offender sentenced to 10 months imprisonment about a year before repeating the offence – Sentence of three years upheld

Summary: The accused was convicted in the magistrate's court of escaping from custody in contravention of section 51(1) of the Criminal Procedure Act, 51 of 1977 (the "CPA"). He was sentenced to three years imprisonment. The appellant has a previous conviction for escaping from lawful custody. On 7 August 2009 he was sentenced to 10 months imprisonment. He committed the offence in the present matter about 1 year later.

On appeal the State objected to the notice of appeal as not setting out properly the grounds of appeal.

Held, that the matter should be approached with some leniency bearing in mind that the appellant is a lay person drawing up a notice of appeal while serving a custodial sentence. Although the notice of appeal is not in the clearest language, one is able to discern that the appellant is taking issue with the conviction on the basis (i) that he was not informed that he was under arrest; (ii) that he was not officially detained by an entry in the occurrence book of the police station and the so-called POL 9 book (the cell register); and (iii) that the evidence of the two police officers who testified for the State was not in accordance with their witness statements which were disclosed to the appellant. In respect of the sentence the grounds of appeal may be said to be (i) that the trial court did not give adequate weight to certain facts about the appellant's personal circumstances presented in mitigation; and (ii) that the trial court should have imposed a shorter custodial sentence. The State was able to file full heads of argument on the merits of the appeal and was therefore not materially prejudiced by the lack of clarity in the notice of appeal. In light hereof and in the interests of finalizing the matter, the appeal was not struck.

On the merits the court dealt with the various appeal grounds discerned. The Court set out the elements of the offence of contravening section 51(1) as being (i) a lawful arrest; (ii) lawful custody; (iii) an escape; and (iv) *mens rea*. The manner in which a lawful arrest is to be carried out is set out in section 39. The jurisdictional facts for an arrest without a warrant in terms of section 40 of the CPA set out and discussed.

Held, on the facts, that the appellant was informed that he was under arrest.

Held, further, that it is not a requirement of the offence of escaping in contravention of section 51(1) that the appellant must have been charged or "booked" or any entries made in any police register.

Held, further, that the appellant is not permitted to rely on the witness statements or on the third ground of appeal as he did not raise the issue during the proceedings *a quo.*

ORDER

The appeal against conviction and sentence is refused.

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JUDGMENT

VAN NIEKERK J (UEITELE, J concurring):

[1] On 20 January 2011 the appellant was convicted on a count of contravening section 51(1), read with section 51(3) of the Criminal Procedure Act, 1977 (Act 51 of

1977), as amended, in that he escaped from lawful custody before being lodged in any prison, police-cell or lock-up. He was sentenced to two years imprisonment. The appeal is against the conviction and sentence.

[2] Condonation was granted for the late noting of the appeal and consequently the appeal was heard on the merits.

[3] Mr *Nyambe* on behalf of the State objected to the notice of appeal as not setting out properly the grounds of appeal. In my view the matter should be approached with some leniency bearing in mind that the appellant is a lay person drawing up a notice of appeal while serving a custodial sentence. Although the notice of appeal bearing the heading 'application for appeal notices' is not in the clearest language, one is able to discern that the appellant is taking issue with the conviction on the basis (i) that he was not informed that he was under arrest; (ii) that he was not officially detained by an entry in the occurrence book of the police station and the so-called POL 9 book (the cell register); and (iii) that the evidence of the two police officers who testified for the State was not in accordance with their witness statements which were disclosed to the appellant.

[4] In respect of the sentence the grounds of appeal may be said to be (i) that the trial court did not give adequate weight to certain facts presented in mitigation, namely that the appellant was the breadwinner in his family and the father of four school going children; that he paid their school fees and for other essential family needs; and that he was a small business entrepreneur; and (ii) that the trial court should have imposed a shorter custodial sentence.

[5] The State was able to file full heads of argument on the merits of the appeal and was therefore not materially prejudiced by the lack of clarity in the notice of appeal. In light hereof and in the interests of finalizing the matter, the appeal is not struck.

[6] Before considering the grounds of appeal as described above, it is appropriate to give a short summary of the evidence presented at the trial.

[7] Sgt L Mujiwa testified that he arrested the appellant on a stock theft matter on 6 October 2010. He had earlier attended to a complaint laid by one Mr Musha about the alleged theft of a sheep at the complainant's farm. During the investigation he received information that the appellant was the culprit. He located the appellant's house based on information supplied by an informant. He found the appellant lying on a bed. He called the appellant and informed him that he is a police officer and that he is under arrest for stock theft. The appellant dressed himself and accompanied Sgt Mujiwa to the police station where he was briefly questioned. Sgt Mujiwa informed Sgt Muhange that the appellant must be detained. Sgt Mujiwa made an entry about the appellant's detention in the occurrence book, an extract of which was handed in as exhibit 'A'. The entry reflects that an entry had been made in the POL 9 register. He left the appellant in the charge office with Sgt Muhange to be locked up and went to town. At that stage the appellant was not yet charged, although he had been arrested. Later Sgt Muhange informed him by telephone that the appellant had escaped. They went to search for the appellant but only arrested him again on 11 October 2011.

[8] The appellant posed only one question to this witness during cross-examination and that was 'Who booked me?' to which the witness replied that it was Sgt Muhange.

[9] Sgt D Muhange of the Namibian Police told the court *a quo* that he was alone on duty at the Grootfontein charge office on the particular day when Sgt Mujiwa brought the accused to the police station on a charge of stock theft. He asked Sgt Mujiwa to make an entry in the occurrence book regarding the appellant's detention and to take the appellant to the cells. However, Sgt Mujiwa only made the required entry, but did not lock the appellant up. Sgt Muhange left the office to take a statement at the counter in another section of the building. The appellant used this opportunity to leave the premises without permission of the Namibian Police.

[10] The appellant asked in cross-examination who ‘booked’ him and his belongings into the registers, to which the witness replied that it was Sgt Mujiwa. Then the appellant denied that he was ever ‘booked’, to which the witness persisted that he was indeed ‘booked.’

[11] The appellant testified in his defence and stated that he was brought to the charge office and told the sit down. The two police officers spoke in a language he did not understand and then Sgt Mujiwa left. He was left there waiting for almost an hour. The appellant then left and went home where he stayed for 4 days until he was apprehended for escaping from the police station. During cross-examination he acknowledged that he was informed that he was arrested, but when asked why he left the police station, he appeared to contradict his earlier answer by stating that he was not informed. However, the apparent contradiction was clarified while he addressed the trial court on the merits of the State’s case, when he stated that he is not guilty as he was not informed that he was ‘charged’. It appears then that the State and the appellant are in agreement that he had been arrested, but not charged with the offence of stealing stock.

[12] I now turn to the grounds of appeal against the conviction. The first ground is that he was not informed that he was under arrest. Based on what I have already stated in the previous paragraph, it appears to be moot. However, it might be that the appellant does not understand the difference between being arrested and being charged. Giving him the benefit of the doubt on this issue, I shall consider the first ground of appeal in more detail, although this also does not avail the appellant. The reason is that he never expressly disputed during the trial that he was informed that he was under arrest. More particularly, he did not take issue with the evidence by Sgt Mujiwa that he was indeed so informed. The trial magistrate clearly accepted the State’s evidence on this point and I see no reason to differ from the magistrate on this issue.

[13] I now consider the second ground of appeal. The appellant throughout emphasised that he had never been 'booked', by which I understand him to say that certain book entries were never made at the police station. He also relied on the fact that the two police officers each said that it was the other officer who 'booked' him. The fact that they did not agree on this point is not important. It is not a requirement of the offence of escaping in contravention of section 51(1) that the appellant must have been charged or "booked" or any entries made in any police register.

[14] In *S v Thamaha* 1979 (3) SA 487 (O) at 489G the elements of the offence of contravening section 51(1) are listed as being (i) a lawful arrest; (ii) lawful custody; (iii) an escape; and (iv) *mens rea*. In *S v Matthias* 1993 NR 420 (HC) at 421B this Court held that it is necessary to prove a lawful arrest in order to make out a contravention of section 51(1).

[15] The manner in which a lawful arrest is to be carried out is set out in section 39 of the Criminal Procedure Act as follows:

> "**39 Manner and effect of arrest**
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> (1) An arrest shall be effected with or without a warrant and, unless the person to be arrested submits to custody, by actually touching his body or, if the circumstances so require, by forcibly confining his body.
>
> (2) The person effecting an arrest shall, at the time of effecting the arrest or immediately after effecting the arrest, inform the arrested person of the cause of the arrest or, in the case of an arrest effected by virtue of a warrant, upon demand of the person arrested hand him a copy of the warrant.
>
> (3) The effect of an arrest shall be that the person arrested shall be in lawful custody and that he shall be detained in custody until he is lawfully discharged or released from custody."

[16] In this case Sergeant Mujiwa did not state that he actually touched the appellant's body, but it is clear from the evidence that the appellant subjected himself to the custody of the police officer by accompanying him to the police station without any resistance or protest. There was therefore compliance with section 39(1).

Furthermore, Sergeant Mujiwa testified that he informed the appellant of the reason for the arrest as the appellant admitted, or at least did not dispute, during the trial. The provisions of section 39(2) have therefore been met.

[17] In this appeal case the arrest was effected without a warrant. Where an arrest without a warrant takes place –

> "[t]he jurisdictional facts in order to effect a lawful arrest are the following:
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> (a) the arrestor must be a peace officer,
>
> (b) he must entertain a suspicion,
>
> (c) it must be a suspicion that the arrestee committed an offence referred to in Schedule 1 to the Act (other than the offence of escaping from lawful custody),
>
> (d) that suspicion must rest on reasonable grounds."

(See *S v Kazondandona* 2007 (2) NR 394 (HC) at 397H).

[18] I agree with Mr *Nyambe* on behalf of the State that it is clear from the evidence of Sgt Mujiwa that these requirements have been met. It is common cause that he is a police officer. The expression 'peace officer' in section 1 of the Criminal Procedure Act includes a police official. Sgt Mujiwa clearly entertained a suspicion that the appellant committed theft of stock, as he had been informed that the appellant was the culprit. In the circumstances of this case the suspicion was reasonable. Theft is a Schedule 1 offence. The result is that the element of a lawful arrest was proved beyond a reasonable doubt.

[19] During oral argument at the appeal the appellant submitted that the two police officers deviated from their witness statements which were disclosed by the State before the trial. Copies of these statements were attached to his heads of argument. The appellant did not make this point during the proceedings in the court *a quo*, nor did he confront the officers with the contradictions in their witness statements. As the appeal must be decided on the basis of the record of the proceedings *a quo* the appellant is not permitted to rely on those documents or on this ground of appeal.

[20] This concludes the appeal against conviction. I now consider the appeal on sentence.

[21] The appellant has a previous conviction for escaping from lawful custody. On 7 August 2009 he was sentenced to 10 months imprisonment. He committed the offence in the present matter about 1 year later. The court *a quo* gave very brief *ex tempore* reasons for sentence and chose not to provide additional reasons upon appeal. The court *a quo* emphasized that the fact that the appellant repeated the offence, showing a lack of remorse. It further emphasized the seriousness of the offence, which causes delays in the finalization of cases and is costly for the State.

[22] It is so that the trial court did not make any mention of the appellant's personal circumstances when discussing sentence, but this does not mean that they were ignored. The problem for the appellant is that escape from lawful custody usually attracts a custodial sentence because of the seriousness of the offence. For first offenders the length of the period of imprisonment has increased slowly but surely over the years from about six months to about two years, depending on the circumstances of each case. The appellant agreed during argument that direct imprisonment was an appropriate form of sentence, but asked that the period be reduced to 6 months. In view of the sentences usually imposed for first offenders, this suggestion is way out of line with the norm.

[23] It is trite that a Court of Appeal may only interfere with a sentence if (i) the trial court misdirected itself on the facts or on the law; (ii) a material irregularity occurred during the sentencing proceedings (iii) the trial court failed to take into account material facts or over-emphasized the importance of the facts; or (iv) the sentence imposed is startlingly inappropriate, induces a sense of shock or there is a striking disparity between the sentence imposed by the trial court and that which the Court of Appeal would have imposed (*S v Tjiho* 1991 NR 361 (HC) at 366A-B).

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[24] None of the first three situations set out in *Tjiho* apply in this appeal. Although the sentence of three years imposed in this appeal is quite severe, I cannot state that it satisfies the description of the fourth situation described in *Tjiho*.

[25] In my view, the appeal must fail. The appeal against conviction and sentence is accordingly dismissed.

K van Niekerk

Judge

S F I Ueitele

Judge

APPEARANCE

APPELLANT:	In person
RESPONDENT:	Mr S R Nyambe Office of the Prosecutor-General