



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case No: CR 50/2013

In the matter between:

THE STATE

versus

FANIE VAN ROOI

Neutral citation: *S v Van Rooi* (CR 50/2013) [2013] NAHCMD 218 (29 July 2013)

Coram: SHIVUTE, J

Delivered: 29 July 2013

Flynote: Criminal law – Escaping from lawful custody – State must prove accused in lawful custody at the time of escape – When Court invokes s 112 (1) (b) – it should ask questions pertaining to whether accused was in lawful custody.

Summary: Criminal law – Escaping from lawful custody - For an accused to be convicted of escaping from lawful custody the State bears the *onus* to prove that the accused was in lawful custody. If the court

invokes the provisions of s 112 (1) (b) of Act 51 of 1977 the court should ask questions pertaining to whether the accused was in lawful custody at the time he escaped.

ORDER

1. The matter is remitted to the magistrate to question the accused in terms of s 112 (1) (b) to determine whether the accused was in lawful custody.
2. When sentencing the accused the magistrate should take into consideration the sentence already served by the accused.

REVIEW JUDGMENT

SHIVUTE J:

[1] The accused person appeared in the Karibib Magistrates' Court on the offence of escaping from lawful custody – common law. He pleaded guilty and he was convicted as charged.

[2] I raised a query with the learned magistrate as how she satisfied herself that the accused was in lawful custody if no questions were asked to establish whether he was in lawful custody.

[3] The learned magistrate who handled the matter could not respond to the query since she is on leave. However, the magistrate who is in the office responded to the query and stated that she discussed with the trial magistrate, and the trial magistrate indicated that it was an oversight on her part that she did not question the accused person whether he was in lawful custody when he escaped from the clinic.

[4] The essential elements of the common law offence of escaping from lawful custody are (1) an escape; (2) from lawful custody and (3) *mens rea*.

[5] According to the evidence which was obtained through questioning in terms of s112 (1) (b) of Act 51 of 1977 the accused was at Karibib Clinic on 2 September 2011. He asked for permission to go to the toilet, from the toilet he saw an opening in the fence and he went through the opening. There were no questions asked to establish whether he was in lawful custody at the time he was at the clinic or before he was taken to the clinic.

[6] For an accused to be convicted of escaping from lawful custody, the State must prove that the accused was in lawful custody. If the court invokes the provisions of s 112 (1) (b) the court must ask questions pertaining to whether the accused was in lawful custody, in order to satisfy itself that the accused was indeed in lawful custody.

[7] In the present matter it has not been established through questioning in terms of s 112 (1) (b) that the accused was in lawful custody. Therefore, the conviction cannot be allowed to stand. It follows that the sentence imposed cannot also stand.

[8] In the result the conviction and sentence are set aside.

1. The matter is remitted to the magistrate to question the accused in terms of s 112 (1) (b) to determine whether the accused was in lawful custody.
2. When sentencing the accused the magistrate should take into consideration the sentence already served by the accused.

N N Shivute
Judge

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C Parker
Acting Judge