

REPUBLIC OF NAMIBIA

NOT REPORTABLE



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

CASE NO: CA 114/2016

In the matter between:

RUBEN AWASEB

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Awaseb v S* (CA 114/2016) [2017] NAHCMD 73 (13 March 2017)

Coram: LIEBENBERG J and SIBOLEKA J

Heard on: 16 January 2017

Delivered on: 13 March 2017

Flynote: Criminal Procedure: Appeal – charge escape from lawful custody – misplaced if there is an order of detention by the court - manner in which appellant came before court not relevant – appeal against conviction dismissed.

Summary: On 23 February 2016 the appellant was convicted for escaping from lawful custody and sentenced to two years imprisonment. He now appeals against his conviction.

Held: The common law offence of escaping from lawful custody has been proved beyond reasonable doubt.

ORDER

The appeal against conviction is dismissed.

APPEAL JUDGMENT

SIBOLEKA J (LIEBENBERG J concurring):

[1] The legally represented appellant appeared before the Magistrate at Mariental on the charge of escaping from lawful custody – common law. He pleaded not guilty, and after trial he was convicted as charged and sentenced to two years imprisonment. It is the above conviction that forms the basis of this appeal.

[2] In his notice of appeal the appellant stated the following:

The learned magistrate erred in finding that the State had proved beyond reasonable doubt against the accused/appellant that:

- i. That the evidence presented by the State did not prove the guilt of the accused person beyond reasonable doubt;
- ii. The State who bears the onus to prove all the essential elements of the charge failed to prove each specific element as set out in the charge annexure;
- iii. The accused person was lawfully arrested and in lawful custody at the time of his escape;
- iv. The exhibits marked A(1) and A(2) of record did not prove the lawfulness of the accused person being in custody; and
- v. The State had not made out a prima facie case at the close of State's case and should have granted a discharge in favour of the accused in terms of section 174 of the Criminal Procedure Act 51 of 1977.

[3] The appellant's counsel conceded at the beginning of the hearing that the issues raised in columns 1.1 and 1.2 were not grounds as enunciated in Rule 67(1) of the Magistrate's Court rules because they do not state clearly and specifically how the trial court has misdirected itself in convicting the appellant. That being stated, it follows that I will deal with the main ground related to the alleged unlawfulness of the appellant's detention.

[4] The facts of the matter are that two Mariental police officers Njenjema and Stoffel while on high court duties in Windhoek, arrested the appellant at Katutura for escaping from lawful custody at Mariental police cells on 21 October 2014.

[5] During the trial in the court a quo two warrants of detention exhibits A(1) and A(2) were handed in as part of the record. On these documents the magistrate at Mariental ordered that the appellant be locked up and detained at Mariental police holding cells for trial on two separate cases (charges) of housebreaking with intent to steal and theft Case No. CRM 1163/2014: trial date 10 November 2014 and Case No. CRM 1148/2014: trial date 15 December 2014 respectively (own emphasis). It follows from these two court orders that the

appellant's detention was lawfully sanctioned by the court for purposes of his trial on the foretasted matters. It is from this lawful detention that the appellant unlawfully escaped resulting in his arrest.

[6] From the filed documents before this court the appellant contended for the very first time that he was incorrectly convicted because the prosecution in the court below did not give evidence showing how it came about that he should be in custody from where he escaped. Looking at the charge that was preferred against the appellant, it is my considered view that such evidence was irrelevant, that is the reason the evidence was not placed before the trial court.

[7] This court is an appeal forum which is mandated to attend to appeal matters from the lower court. During the hearing of such appeals this court looks at the grounds of appeal; the record of proceedings; arguments from both parties to see whether there is a misdirection on the law or facts on the part of the trial court or not. This forum is not a court of first instance. It will therefore not save any purpose to raise fresh issues that were not brought up and attended to during trial in the court a quo.

[7.1] In *S v Paulo and another*¹ the Supreme Court per Mainga JA, stated the following:

'It should be as a matter of general principle be required that issues of the nature under consideration be raised in court from which the appeal arises, before it can be entertained in this court.'

[8] In reference to the matter of *Isaacs v Minister van Wet en Order*² the respondent's counsel correctly submitted that the applicability of s 50(1) of the

¹ *S v Paulo and another* 2013 (2) NR 366 SC at p374 para 18.

² *Isaacs v Minister van Wet en Order* 1996(1) (SACR 314(A) page 316 e-f.

Act is not subject to the unlawfulness of the foregoing arrest.

[9] From the whole record of proceedings in the trial court it is clear that the appellant was correctly convicted for escaping from the police cells where he was locked up and held on two separate orders of detention.

[10] In the result the appeal against conviction is dismissed.

A M SIBOLEKA
Judge

J C LIEBENBERG
Judge

APPEARANCES

APPELLANT: Mr L R Samaria
Directorate of Legal Aid

RESPONDENT: Mr C K Lutibezi
Office of the Prosecutor-General, Windhoek