



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case no: CR 71/2020

In the matter between:

**THE STATE**

v

**JULIUS SUNDAY ENDJALA**

**ACCUSED**

(HIGH COURT MAIN DIVISION REVIEW REF NO. 1136/2020)

**Neutral citation:** *S v Endjala* (CR 71/2020) [2020] NAHCMD 432 (23 September 2020)

**Coram:** LIEBENBERG J, et SIBEYA J

**Delivered:** 23 September 2020

**Flynote:** Criminal Procedure – Review – Substitution of charge on review – When competent to do so – Accused convicted on escaping from lawful custody in terms of common law – Accused escaped *before* being locked up in a police cell – Essential elements of the two offences not the same – Review court not entitled to substitute conviction to a contravention of s 51 of the Criminal Procedure Act 51 of

1977 – Substitution on review only competent where essential elements not altered by substituted offence or where wrong label attached to charge.

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### ORDER

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1. The conviction and sentence are set-aside;
2. The matter is remitted to the court a quo to invoke the provisions of section 113 of the CPA and to proceed to trial and to bring the matter to its natural conclusion;
3. Should a conviction follow; the magistrate is directed to take into consideration any time the accused already spent in custody.

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### REVIEW JUDGMENT

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LIEBENBERG J (concurring SIBEYA J)

[1] This is a review in terms of s 302(1) of the CPA.

[2] The accused was charged in the magistrate's court for the district of Outjo in respect of 1 count of escaping from lawful custody in terms of common law. The accused pleaded guilty and subsequent to the learned magistrate's questioning in terms of section 112 (1)(b) of the CPA, was convicted and sentenced to 4 months' imprisonment.

[3] This court directed a query to the magistrate requesting whether in light of the fact that the accused escaped *before* being locked up in a police cell, the accused was correctly charged and convicted?

[4] The magistrate replied that the accused ought to have been charged in terms of section 51 of the CPA and requested this court to substitute the conviction on escaping under common law with escaping in terms of section 51 of the CPA. According to the magistrate, the wrong label was simply attached to the charge.

[5] Our law recognises 3 forms of escaping, namely under common-law; under section 51 of the CPA; and contravening section 86 (1)(j) of the Correctional Services Act 9 of 2012. For purposes of this judgment, the enquiry will be limited to first and second forms of escaping. In this regard escaping in terms of section 51 of the CPA reads as follows:

‘Escaping and aiding escaping before incarceration, and penalties therefor

51. (1) Any person who escapes or attempts to escape from custody after he has been lawfully arrested and before he has been lodged in any correctional facility, police-cell or lock-up, shall be guilty of an offence and liable on conviction to the penalties prescribed in section 91 of the Correctional Service Act, 2012 (Act No. 9 of 2012).’

(My emphasis)

[6] However, under common law an offender must escape from *lawful custody*. Though lawful custody commences immediately after a lawful arrest,<sup>1</sup> this offence, according to CR Snyman<sup>2</sup> is qualified to where an offender escapes from a prison or other place of lawful detention.

[7] Therefore, it is clear from the three different forms of escaping that the definitional elements, although similar, are not the same in its nature and application. Section 51 specifically adds the element of ‘before he has been lodged in any correctional facility, police cell or lock-up’, whereas this element is not present in the common law definition, the latter requiring an escape from ‘detention’. Opposed thereto, the offence under Act 9 of 2012 is only applicable to offenders housed in a *correctional facility*.

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<sup>1</sup> Section 39 (3) of the Criminal Procedure Act.

<sup>2</sup> Snyman CR. *Criminal Law*, 6<sup>th</sup> Edition, 339.

[8] The learned magistrate quoted various authorities in a bid to convince this court that a simple substitution of the charges will cure the error. The first of these cases is *S v Nangombe*.<sup>3</sup> The magistrate submitted that the accused in the aforementioned matter was convicted based on his plea in terms of section 112 (1) (b) contravening section 51 of the CPA, which was then altered in terms of section 270 of the CPA to the offence of escaping under common law.

[9] Firstly, on perusal of the *Nangombe* matter, it becomes apparent that the accused's pleaded *not guilty* and the matter proceeded to trial. To this end the magistrate clearly got it wrong in her reply when stating that the accused was convicted on his plea of guilty. Secondly, although the court in the *Nangombe* matter indeed substituted, on review, a conviction on escaping in terms of section 51 of the CPA with a conviction of escaping from lawful custody in terms of common law, this court does not find it to be authority for substitution in the current matter.

[10] Having carefully perused the reasoning in *S v Babiep*,<sup>4</sup> the authority used in the *Nangombe* matter, its facts are distinguishable to this matter as well as the *Nangombe* matter. The facts of the *Babiep* matter are briefly: The accused was convicted in the district court for escaping from custody under the erstwhile Prisons Act 17 of 1998 (hereafter referred to as the Act). The charge sheet in that matter correctly reflected the elements of the offence of escaping from custody under the said Act, but simply reflected the incorrect section, heading or label. The heading of the charges reflected contravening section 72(a) of Act, whereas the correct section applicable was section 75 of the Act. The former related to the offence of assisting a prisoner to escape from enumerated places including any prison. The review court as per *Mtambanengwe J* and *Teek J* concurring, then utilized section 270 of the CPA to substitute the conviction with one under section 75 of the Act.

[11] Section 270 of the CPA reads as follows:

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<sup>3</sup> *S v Nangombe* (CR 13/2017) [2017] NAHCNLD 79 (10 August 2017).

<sup>4</sup> *S v Babiep* 1999 NR 170.

'Offences not specified in this Chapter

270. If the evidence on a charge for any offence not referred to in the preceding sections of this Chapter does not prove the commission of the offence so charged but proves the commission of an offence which by reason of the essential elements of that offence is included in the offence so charged, the accused may be found guilty of the offence so proved.'

(My emphasis)

[12] It is clear from the quoted section that the offence for which the court may convict, which does not form part of the sections relating to competent verdicts, must be inclusive of the same essential elements of the offence so charged. The learned magistrate as well as the court in the *Nangombe* matter failed to have regard to this essential requirement under section 270 of the CPA.

[13] The essential aspect in the *Babiep* matter is that the elements of the offence depicted in the charge sheet to which the accused pleaded and the section which it was substituted with, bore the very same material elements of the offence. In fact the elements of *the offence was correct and remained the same*. Thereby making section 270 of the CPA applicable. In our view, section 270 of the CPA was correctly applied in the *Babiep* matter as the issue was simple the incorrect label or heading of the charge. However, with respect, section 270 of the CPA was not applicable to the *Nangombe* matter and therefore incorrectly applied therein, as the elements of the two offences namely, escaping in terms of s 51 of the CPA and escaping from lawful custody in terms of common law, clearly differ.

[14] Suffice it to say that if we were to adhere to the magistrate's request and substitute the charge of common law escaping with a contravention under section 51 of the CPA, on review, it would be adding an additional element to the particulars of the charge as set out in para 7 above. Moreover, this would fall outside the ambit of section 270 of the CPA. Neither section 86 or 88 of the CPA allows for the substitution of a charge, least between statutory and common law offences. These provisions only provide for the correcting or

curing of a defect of an existing charge and not its substitution.<sup>5</sup> It follows that this court has no powers, on review, to substitute the charge of common law escaping with a contravention under section 51 of the CPA and declines to do so.<sup>6</sup>

[15] Moreover, the two offences, albeit dealing with 'escaping' involve distinctive elements which may require additional evidence to be led in order to prove each offence. In other words, evidence sufficient to secure a conviction under common law may not be sufficient to secure same under section 51 of the CPA.

[16] The learned magistrate cited the matters of *S v Korner* (CR 66/2019) [2019] NAHCMD 348 (18 September 2019); *S v Kapi* (CR 30/2020) NAHCMD 171 (13 May 2020); *S v Kapi* (CR 31/2020) [2020] NAHCNLD 68 (10 June 2020); and *S v Cloete* (CR 41/2020) [2020] NAHCMD 240 (22 June 2020). However, the learned magistrate completely misses the point as these matters do not find application and are therefore of no assistance to the review court. These matters deal with instances where the incorrect label was attached to a charge and where the body or description of the charge to which the accused pleaded guilty and admitted was clear and unambiguous. It is trite that where there is no defect in the body or description of the charge, but where there is an error merely in quoting the statutory provision by using the wrong 'label', this may be corrected on review, provided the court is of the opinion that it will not result in a failure of justice or prejudice the accused.

[17] Now turning to the way forward in this matter. The state preferred the charge of common law escaping. It was then incumbent on the learned magistrate during her section 112 (1) (b) of the CPA questioning, when it became apparent that the accused did not admit to being in a place of lawful detention, to enter a plea of not guilty in terms of section 113 of the CPA. At the instigation of trial proceedings, it would be open to the state to either prove the

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<sup>5</sup> *S v Nghixulifwa* (CC 02/2014) [2018] NAHCMD 326 (17 October 2018) para 11.

<sup>6</sup> *S v Matsuis* 1993 NR 234 (HC) at H.

charge as it stands or add an additional charge (c/s 51 of the CPA) before trial proceedings commence.<sup>7</sup>

[18] In the result it is ordered that:

1. The conviction and sentence are set-aside;
2. The matter is remitted to the court a quo to invoke the provisions of section 113 of the CPA and to proceed to trial and to bring the matter to its natural conclusion;
3. Should a conviction follow; the magistrate is directed to take into consideration any time the accused already spent in custody.

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J C LIEBENBERG  
Judge

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O S SIBEYA  
Judge

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<sup>7</sup> Section 105 of the CPA.