



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI
REVIEW JUDGMENT**

Case no CR: 13/2017

In the matter between:

THE STATE

and

DAVID NANGOMBE

ACCUSED

HIGH COURT NLD REVIEW CASE REF NO: 77/2016

Neutral citation: *S v Nangombe* (CR13 /2017) [2017] NAHCNLD 79 (10 August 2017)

Coram: TOMMASI J and JANUARY J

Delivered: 10 August 2017

Flynote: Criminal law — Escaping from lawful custody contravention of s 51 of Criminal Procedure Act 51 of 1977 (RSA) — Accused in lawful custody after having been lodged in a police cell — Accused then escaping — Accused wrongly convicted of having contravened s 51 — Conviction altered to common law offence of escaping from lawful custody.

ORDER

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1. The conviction of escaping from lawful custody read with section 51(1) of the Criminal Procedure Act, 1977 (Act 51 of 1977) is hereby substituted with a conviction of escaping from lawful custody contrary to common law.
 2. The sentence of 12 months imprisonment wholly suspended for 3 years on condition the accused is not convicted of escaping from lawful custody committed during the period of suspension is hereby confirmed.
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REVIEW JUDGMENT

TOMMASI J (JANUARY J concurring):

[1] This is an automatic review. The accused in this matter was charged with escape from lawful custody read with the provisions of section 51 (1) of the Criminal Procedure Act, 1977 (Act 51 of 1977). Two other accused were charged with the offence of defeating or obstructing the course of justice. All the accused pleaded not guilty and the matter proceeded to trial.

[2] After the close of the State's case the accused testified under oath. Before cross-examination, he altered his plea of not guilty to guilty and the he was questioned by the court in terms of section 112(1)(b). He was convicted and sentenced to 12 months' imprisonment which was wholly suspended for 3 years on condition the accused is not convicted of escaping from lawful custody committed during the period of suspension.

[3] I raised a number of issues with the learned magistrate but the main issue was the conviction of the accused on the charge of escape from lawful custody read with the provisions of section 51(1) of the Criminal Procedure Act, 1977 (Act 51 of 1977).

[4] The accused, according to his own testimony, was arrested for having assaulted someone. He was already detained in the police cells for 5 days when he requested the police to go home as he needed to pick up clothes. He admitted that he was accompanied by a police officer to collect his clothes when he ran away.

[5] The issue here is that section 51 creates an offence if a person escapes from custody after he/she has been lawfully arrested and before he/she is lodged in any correctional facility, police-cell or lock-up. The accused herein escaped after he was arrested and after he had been lodged in a police cell. The accused could therefore not have been convicted of having contravened section 51(1) of the Criminal Procedure Act.

[6] In *S v Babiep* 1999 NR 170 (HC) Mtambanengwe J, as he then was, at p173 B-C stated the following:

‘Section 270 of the Criminal Procedure Act authorises the conviction of an accused of an offence which by reason of the essential elements thereof is included in the offence with which he is charged if the evidence adduced in support of such charge does not prove the commission of the offence so charged. Counsel agree that in this case the elements of the common law offence of escape from lawful custody are covered by both the charge put to the accused and his plea of guilty, and that the conviction in this case be set aside and substituted with one of escaping from lawful custody.’ (See also *S v Matsuis* 1993 NR 234 (HC))

[7] In the circumstances of this case it would also be proper to invoke the provisions of section 270 and to substitute the conviction to a conviction of escaping from lawful custody contrary to common law. The sentence may be confirmed.

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

1. The conviction of escaping from lawful custody read with section 51(1) of the Criminal Procedure Act, 1977 (Act 51 of 1977) is hereby substituted with a conviction of escaping from lawful custody contrary to common law.

2. The sentence of 12 months imprisonment wholly suspended for 3 years on condition the accused is not convicted of escaping from lawful custody committed during the period of suspension is hereby confirmed.

M A TOMMASI

Judge

I agree

H C JANUARY

Judge