

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION  
HELD AT OSHAKATI

REVIEW JUDGMENT

<b>Case Title:</b> The State v Sakaria Shikende Johannes	<b>Case No:</b> CR 18/2022
	<b>Division of Court:</b> Northern Local Division
<b>Heard before:</b> Honourable Lady Justice Salionga, J <i>et</i> Honourable Mr. Justice Kessler, AJ	<b>Delivered on:</b> 19 April 2022
<b>Neutral citation:</b> <i>S v Johannes</i> (CR 18/2022) [2022] NAHCNLD 40 (19 April 2022)	
<b>The order:</b> <ol style="list-style-type: none"><li>1. The conviction is confirmed.</li><li>2. The sentence imposed is confirmed but amended to read as follows: Accused is sentenced to 24 months' imprisonment, of which 12 months are suspended for a period of five (4) years, on condition that the accused person is not convicted of the offence of escaping from lawful custody, committed during the period of suspension.</li></ol>	
<b>Reasons for order:</b>	
SALIONGA J, (KESSLAU J concurring):  [1] The abovementioned matter came before this court on an automatic review in terms of section 302(1) of the Criminal Procedure Act 51 of 1977 as amended. The accused person pleaded guilty to escaping from lawful custody. Thereafter, he was questioned in terms of s 112 (1) (b) of the Criminal Procedure Act <sup>1</sup> and convicted as charged. He was	

sentenced as follows.

'24 months' imprisonment, of which 12 months' are suspended for a period of five (4) years, in terms of section 297 of Act 51 of 1977 as amended on condition that accused is not convicted of escape from lawful custody'.

[2] On review, I queried the magistrate whether the accused escaped from lawful custody

before he was locked up as per the particulars of the offence and if so why the accused charged with common law escaping from lawful custody. The reviewing judge also wanted to know whether the framing of the condition of sentence is in accordance with section 297 of the Act, 51 of 1977 as amended.

[3] In her reply to my query, the learned magistrate stated that the accused escaped from lawful custody at the time he was taken back to the cells after his court appearance. Meaning that the accused escaped whilst under the police custody in order to be locked up at the police holding cells. The magistrate further stated that the accused was supposed to be charged with a statutory offence for escaping from lawful custody.

[4] The record is confusing in that the annexure to the charge sheet indicates a charge of common law offence of escaping while the particulars of the offence, refer to the contravening section 51 of the Criminal Procedure Act 51 of 1977 form of escaping i.e. escaping before accused was locked up. It is interesting to note that during questioning in terms of section 112 (1) (b) of Act 51 of 1977 accused admitted that he was in lawful custody and escaped from the police custody on his way from attending court proceedings.

[5] Our jurisprudence recognizes 3 (three) forms of escaping, namely under common-law; under section 51 of the CPA; and for contravening section 86 (1) (j) of the Correctional Services Act 9 of 2012. For purposes of this judgment, I will confine myself to the common law escaping from lawful custody.

[6] Under common law the charge needs to allege that an offender was in lawful custody at the time of escape. The effect on an arrest shall be that the person arrested shall be in lawful custody or detention and the lawful custody has to commence immediately after a lawful arrest<sup>2</sup>. According to CR Snyman<sup>3</sup> this offence is

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<sup>1</sup> 51 of 1977

qualified where an offender escapes from a prison or any other place of lawful detention.

[7] From the record it is crystal clear that accused was arrested and locked up by the police during April 2020. He escaped from lawful custody whilst being escorted by the police from Outapi Magistrate court back to police holding cells. By then he had already been locked up. In the present case, it matters not whether accused escaped before or after he was locked up as he was charged with common law escape. The conviction appears to be in accordance with justice. However, the sentence is vague in a sense that the condition of suspension was not clearly formulated. The condition of suspension omitted the word “committed.”

[8] A magistrate is a judicial officer who is expected to exercise due diligence when performing his/her duties, especially when affixing their signature to court documents. A review cover sheet should correspond with the record of proceedings so as to reflect what transpired in the court *a quo*.

[9] I find no misdirection in respect of the conviction. It is the sentence that cannot be allowed to stand as it is.

[10] In the result, the following order is made:

1. 1 The conviction is confirmed.
2. The sentence imposed is confirmed but amended to read as follows: Accused is sentenced to 24 months' imprisonment, of which 12 months are suspended for a period of five (4) years, on condition that the accused person is not convicted of the offence of escaping from lawful custody, committed during the period of suspension.

	E E KESSLAU

<sup>2</sup> Section 39 (3) of the Criminal Procedure Act.

<sup>3</sup> C R Snyman *Criminal Law* 6<sup>th</sup> edition p 339.

<p>J T SALIONGA JUDGE</p>	<p>ACTING JUDGE</p>
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