"***REPORTABLE***"

CASE NO. CA 17/05

IN THE HIGH COURT OF NAMIBIA

In the matter between:

DINO ARAEB **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: NDAUENDAPO, A.J.

Heard on: 2006.09.21

Delivered on: 2006.10.25

APPEAL JUDGMENT

[1] **NDAUENDAPO, A.J.:** On 6 May 2004 the appellant was convicted in the Grootfontein magistrate's court for escaping from lawful custody contrary to the common law. He was sentenced to an effective imprisonment term of five years. The appellant was unrepresented in the court *a quo.*

On 6 May 2004 the appellant filed a notice of appeal against conviction only.

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

"1. The learned magistrate erred in convicting the appellant on the following grounds.

1.1 That the conviction was against the evidence and the weight of the evidence.

1.2 That he had erred in finding that the State had proved the guilt of the Applicant beyond a reasonable doubt.

1.3 That the learned magistrate had not properly analysed and/or evaluated the evidence of the State witnesses.

1.4 That he failed to have due and proper regard to the fact that the evidence of all the State witnesses is hearsay and inadmissible.

2. The learned magistrate erred in not finding that the evidence of the State witnesses is inconsistent on material vital important issues.

3. The learned magistrate erred in not making a negative inference of the failure of the State not to produce the warrant of arrest, which was issued to arrest the applicant.

Furthermore the magistrate erred in not finding that there is no documentary prove, of such warrant Constable Lungameni failed to produce such warrant in court.

4. The learned magistrate erred in not making a negative inference of the failure of the State not to call two suspects who gave information to the police about the alleged escape of the applicant from the police cells.

5. The learned magistrate erred in failing to apply Section 186-187 of the Criminal Procedure Act, Act 51 of 1977 by not calling these witnesses. The applicant made an application in Court that these suspects to be called, who gave information to the police about his escape as alleged by the State. The Court refused the applicant's application. This failure of the Court had prejudiced the applicant not to have a fair trial and this failure is a violation of the Namibian Constitution Article 12 "Fair Trial".

6. The learned magistrate erred in not making a negative inference of the failure of the State not to produce an register which proves that the applicant was detained at the police cells and the applicant had indeed escaped from the lawful custody. The Registers are the police occurrence book and the cell register.

7. The learned magistrate erred in rejecting the evidence of the applicant and his witness.

8. The learned magistrate erred in finding that the State had proved it's case beyond reasonable doubt. The learned magistrate erred in failing to summarise the evidence of the State witnesses and he concluded that the State had proved its case, without summarising the evidence of the State witnesses.

9. The learned magistrate erred seriously in stopping the applicant not to continue with his arguments, why he says he is not guilty. Furthermore the magistrate failed to assist the applicant who was unrepresented during the trial. The learned magistrate was bias and this had prejudiced the applicant not to have a fair trial.

10. The learned magistrate erred in not finding that the State had failed to produce any photo plan to show where the accused escaped.

11. In not finding that the State's version was suspect and that accordingly the State had not proved the commission of the offence by the applicant beyond a reasonable doubt.

12. I respectfully submit that the above resulted in a failure of justice."

[3] In my judgment I intend dealing with grounds 1.1; 1.2 and 1.3. The rest of the grounds are, in my respectful view, meritless.

[4] Ms van der Westhuizen appeared on behalf of the appellant, *amicus curiae.* The court wishes to thank her for her assistance. The Respondent was represented by Mr Truter.

[5] The facts of the case can be summarised as follows: The appellant was in police custody at Grootfontein cells. On 30 March 2002 the appellant escaped from the police cells. He "jumped out of the cells and ran away" as testified by Constable Albert Sinvula. He was re-arrested by Constable Mbehani on February 3, 2003. It is for that escape (for there are many, it seems) that the appellant was arraigned, convicted and sentenced, which forms the subject matter of this appeal.

[6] Mr Truter submitted, firstly, that the appellant was in lawful custody after being arrested on a warrant of arrest issued in Otjiwarongo as testified by Constable Lungameni. Secondly, he submitted that the appellant was not released by Constable Murungu as alleged by the appellant.

[7] Ms van der Westhuizen on behalf of the appellant submitted that for the appellant to be convicted of escape from custody, the State must prove beyond a reasonable doubt that at the time when he escaped, he was indeed in lawful custody. That, the State did not prove she submitted.

[8] In the court *a quo* the State called four witnesses namely, Constables: Albert Sinvula, Hofeni Elistus, Peter Murungu and Ismael Lungameni. All four Constables were stationed at Grootfontein on the date when the appellant escaped.

[9] Sinvula testified that the appellant was an awaiting trial prisoner when on 30 March 2002 he "jumped out of the cells and ran away". He further testified that the appellant was rearrested on 3 February 2003 by Constable Mbehani who was not called as a witness.

[10] Hofeni Elistus did not witness the escape. Only the next morning (31 March 2002) did he discover that the appellant had escaped the previous day. Peter Murungu testified that he only discovered on 31 March 2002 that the appellant had escaped. He denied that he released the appellant as alleged by the appellant.

[11] Ismael Lungameni testified that he received a warrant of arrest from Otjiwarongo, where the accused had escaped. He then arrested the appellant in January 2003 (my underlining). He arrested the appellant in Omulunga township (although the typed record says Omaruru, from the handwritten notes of the magistrate it is Omulunga town). The appellant was booked in and kept as a prisoner. When cross-examined by the

appellant, Lungameni confirmed that he arrested the appellant on 3 January 2003.

[12] The appellant testified that he came to Grootfontein to attend a funeral. He got drunk behind the shops and felt asleep. He was arrested for that and locked up. He was then released by Constable Murungu.

[13] Kefas Hoeb was called as a witness by the appellant. He testified that according to his investigation the appellant had escaped from Otjiwarongo. A warrant of arrest was issued which was entered (sic) by Constable Lungameni.

[14] The crucial issue that this Court has to decide is whether the appellant was in lawful custody when he escaped on 30 March 2002 from the Grootfontein police cells.

[15] <u>The legal position</u>

In S *v Msuida* 1912 TPD 419 it was correctly held that there must be evidence of a lawful arrest before a person can be convicted of having escaped from lawful custody.

[16] Rabie CJ (as he then was) in the matter of *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 held that:

> 'An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the

person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law'.

[17] Section 39 of the Criminal Procedure Act (No. 51/1977) under the title **manner and effect of arrest** provides:

"(1) An arrest shall be effected with or without a warrant and, unless the person to be arrested submits to custody, by actually touching his body or, if the circumstances so require, by forcibly confining his body,

(2) The person effecting an arrest shall, at the time of effecting the arrest or immediately after effecting the arrest, inform the arrested person of the cause of the arrest or, in the case of an arrest effected by virtue of a warrant, upon demand of the person arrested hand him a copy of the warrant,

(3) The effect of an arrest shall be that the person arrested shall be in lawful custody and that he shall be detained in custody until he is lawfully discharged or released from custody."

[18] In the commentary on the Criminal Procedure Act, Du Toit *et al* and at p 5-1 said the following:

"Thus where an arrest is not in accordance with statutory precepts, anyone about to be so arrested cannot commit a crime of which lawful arrest is an element. It also stands to reason that if, for whatsoever reason, an arrest is unlawful, then the subsequent detention of the arrestee will similarly be unlawful. See *Minister of Law and Order, Kwawlebele, & Others v Motnetse & Another* 1990 (1) SA 114 (A) 122D)

[19] Article 11 (2) of the Namibian Constitution provides that:

> 'No persons who are arrested shall be detained in custody without being informed promptly in a language they understand of the grounds for such arrest'.

[20] Mr Truter relied on the evidence of Mr Ismael Lungameni for the lawful arrest and detention of the appellant. That reliance is clearly wrong. It is wrong because Mr Lungameni testified that he arrested the appellant in January 2003. Constable Hofeni's evidence does not assist the State either. His evidence was to the effect that the appellant was an awaiting trial prisoner. He does not say why the appellant was an awaiting trial prisoner and who arrested him before 30 March 2002 when he escaped from the cell in Grootfontein.

[21] No evidence was placed before the court *a quo* to say when the appellant was arrested, by whom he was arrested and on what grounds he was arrested when he escaped from Grootfontein police cells on 30 March 2002.

[22] The State did not discharge the onus of proving the lawfulness of the appellants' detention, there is accordingly a *lacuna* in its case, fatal to a conviction.

[23] In the result the appeal must succeed. The conviction and sentence are set aside and the appellant must be released forthwith.

NDAUENDAPO, A.J.

ON BEHALF OF THE APPELLANT: **Ms Oosthuizen**

Instructed by: ***Amicus Curiae***

ON BEHALF OF THE RESPONDENT: **Mr Truter**

Instructed by: **Office of the Prosecutor-General**