



CASE NO.: CR 93/2011

## IN THE HIGH COURT OF NAMIBIA

In the matter between:

**THE STATE**

versus

**JAKOB COLLIN**

(HIGH COURT REVIEW CASE NO.: 525/2010 )

**CORAM:** Liebenberg J et Tommasi, J

**DELIVERED ON:** 18 October 2011

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### REVIEW JUDGMENT

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**TOMMASI J** [1] The matter came before me on automatic review. The accused was convicted of having contravened section 75(e) read with

section 75(h), 77, 78 and 79 of the Prisons Act <sup>1</sup> as amended and sentenced to one year imprisonment.

[2] The accused pleaded guilty to the offence and was questioned by the magistrate in terms of section 112(1)(b).<sup>2</sup> The accused admitted to having escaped from lawful custody. It was however his admission that he escaped from Du Plessis police station which caused me to enquire from the magistrate whether the accused was a prisoner as defined in terms of the Prisons Act. The magistrate correctly conceded that the accused was not a prisoner and that the holding cells at Du Plessis police station was not a prison as defined by the Prisons Act. The magistrate helpfully referred me to an unreported judgment of this court.<sup>3</sup>

[4] In *S v BABIEP*<sup>4</sup> Mtabanengwe J, in a review matter with an almost identical set of facts, concluded that:

*“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.*

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<sup>1</sup> Act 17 of 1998

<sup>2</sup> Of the Criminal Procedure Act 51 of 1977

<sup>3</sup> The State v Thomas Amweelo, High Court Review case No CR111/2009 delivered on 4 November 2009 where Hoff J stated that: A “prison” means a prison established under section 13 of Act 17 of 1998. In terms of Government Notice 160 dated 6 August 1999 and promulgated under section 13, Katima Mulilo police station cells were the only police cells in Namibia declared as a prison for the purposes of Act 17 of 1998

<sup>4</sup> 1999 NR 170 (HC) at page 173 B - C

[5] The same is applicable in this instance where the accused was charged with contravention of section 75(e) of the Prisons Act and pleaded guilty of having escaped from lawful custody.

[6] In the premises the following order is made:

1. The conviction on the charge of having contravened section 75(e) of the Prisons Act, 17 of 1998 is set aside and substituted with a conviction for escape from lawful custody.
2. The sentence is confirmed.

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**Tommasi J**

I agree

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**Liebenberg J**