

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
REVIEW JUDGMENT

Case No: CR 17/2017

In the matter between:

**THE STATE**

and

**RUDOLF GOAGOSEB**

**ACCUSED**

(HIGH COURT MAIN DIVISION REF. NO. 267/2017)  
(MAGISTRATE SERIAL NO. 29/2016)

**Neutral citation:** *S v Goagoseb* (CR 17/2017) [2017] NAHCMD 36 (16 February 2017)

**Coram:** SIBOLEKA J AND USIKU J

**Delivered:** 16 February 2017

**Flynote:** Criminal law: Standard of proof to secure a conviction on a criminal matter is beyond reasonable doubt.

**Summary:** The accused was in custody at Karibib Police Station Holding Cells, on two cases, namely escaping and attempted escape. He told the Court he was released by a police official which was confirmed under oath by his cell mate.

**Held:** The offence of escaping from lawful custody has not been proved beyond reasonable doubt by the prosecution.

Held: The conviction and sentence are set aside. The accused should however remain in custody for the finalization of the pending trial against him.

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### **ORDER**

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In the result I make the following order:

The conviction and sentence are set aside. The accused should however remain in custody for the finalization of the pending trial against him.

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### **REVIEW JUDGMENT**

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SIBOLEKA J (USIKU J concurring):

[1] The accused appeared before the District Magistrate's Court at Karibib on a charge of escaping from lawful custody – common law.

[2] He pleaded not guilty and after the trial he was convicted as charged and sentenced to three years imprisonment.

[3] The undefended accused did not give an explanation for his not guilty plea. During the trial the prosecution called two witnesses in support of its case. One of these was Howard Katambo who shared the Cell with him. The accused put the following questions to him. I quote verbatim at page 7 of the typed record:

'Accused: On the 27<sup>th</sup> when I was released by the police, was Howard in the Cells?

State witness 1: We usually returned back to the cells at 05h30 and you returned. If you were released it was maybe when I was fast asleep but that I do not know because when I went to bed you were in the Cell.

Accused: The time I was released I also did not see you because you may have been under the blankets. I was released by the police and told to go.

State witness 1: It can be, maybe I was asleep.'

[4] The second and last prosecution witness was a police officer, Stefanus Muhenga Kandeni. The accused again put his case to this officer as follows:

I quote verbatim from page 9 of the record:

'...Accused: On the day that I left I was released by the police and even went to the Charge Office and from there I took a hike in a lorry standing there and I hiked until Usakos where I slept at my uncle's place.'

[5] The accused did not testify. The prosecution case was none the less dealt the most crushing blow by the accused's witness who shared a Cell with him. Raymond Syburg told the Court under oath that it was the police officer Sinvula who came, opened their Cell door, called the accused out and went away with him. During cross-examination this witness gave a detailed account of how the police officer Sinvula came to fetch the accused from the Cell they were sharing.

[6] The state of the prosecution case was in shambles, such that it was peremptory to have called the police officer Sinvula to come and tell the Court what had happened. However, this route was not followed and instead the prosecution proceeded to close its case.

[7] Inferential reasoning cannot be used to convict an accused in a case where he has succeeded to place an undisputed credible defence that completely exculpates him from the alleged wrongdoing. The reason being that there was nothing that the trial Court could infer because the police officer Sinvula was not called to displace such evidence under oath.

[8] The basic element of the allegations against the accused "... that he intentionally, wrongfully and unlawfully escaped from ... lawful custody have not been proved because Sinvula unlocked the Cell took him out and told him to go, which he did."

[9] It follows from the above that the escape from lawful custody has not been proved beyond reasonable doubt.

[10] In the result I make the following order:

The conviction and sentence are set aside.

The accused should however remain in custody for the finalization of the pending trial against him.

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A M SIBOLEKA  
Judge

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D N USIKU  
Judge