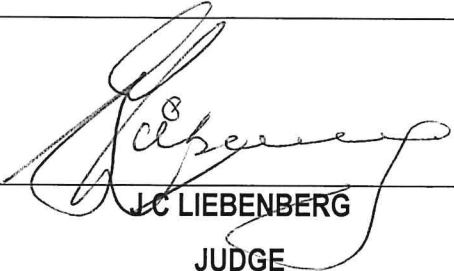
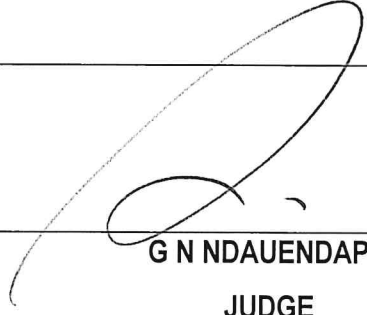


<p>Case Title: <i>The State v Dudu Ndilishange</i></p>	<p>Case No: CR 82/2018</p>
<p>Heard before: Honourable Mr Justice Ndauendapo <i>et</i> Honourable Mr Justice Liebenberg</p>	<p>Division of Court: Main Division</p> <p>Delivered on: 22 October 2018</p>
<p>Neutral citation: <i>S v Dudu Ndilishange</i> (CR 82 /2018) [2018] NAHCMD 334 (22 October 2018)</p>	
<p>The order:</p> <ul style="list-style-type: none"> (a) The conviction and sentence are set aside. (b) The matter is remitted to the magistrate in terms of s 312 of Act 51 of 1977 with the direction to enter a plea of not guilty in terms of s 113 and to bring proceedings to its natural conclusion. (c) In the event of a conviction the sentence already served by the accused must be taken into consideration. 	
<p>Reasons for order:</p>	
<p>LIEBENBERG J (concurring NDAUENDAPO J)</p> <ol style="list-style-type: none"> 1. This is a review brought in terms of section 304 (2) of the Criminal Procedure Act 51 of 1977, as amended (the Act). 2. The accused was charged and convicted in the magistrate's court for the district of Otjinene for escaping from lawful custody (common law). He was thereafter sentenced to 18 months' imprisonment. 3. During the court's questioning in terms of s 112(1)(b) of the Act, the court enquired from the accused as to why he was in custody, to which he replied that it was because he wasn't in possession of a Namibian identification document. 	

4. The trial magistrate sent a memo to the reviewing judge that he subsequently realised that the accused not having been in possession of a Namibian identification document did not *prima facie* constitute an offence for which the accused could be arrested. Hence, the lawfulness of the accused's detention had to be established. The magistrate expressed the view that the court ought to have invoked s 113 of the Act instead of convicting the accused.
5. The essential elements of the common law offence of escaping from lawful custody are (1) an escape; (2) from lawful custody and (3) *mens rea* (See *S v Van Rooi* (CR 50/2013) [2013] NAHCMD 218 (29 July 2013)). In that case it was said that if 'the court invokes the provisions of s 112 (1) (b) the court must ask questions pertaining to whether the accused was in lawful custody, in order to satisfy itself that the accused was indeed in lawful custody.'
6. In the present matter it has not been established through questioning in terms of s 112 (1)(b) of the Act that the accused was in lawful custody, which the magistrate also realised prior to sending the matter on review. Therefore, the conviction and sentence cannot be allowed to stand.
7. A further side issue that emerged during the trial court's questioning was that when the accused was asked whether a promise or benefit was made to him to plead guilty out of his own free will, the accused replied in the affirmative. The trial court once more omitted to further question the accused to ascertain what type of promise or benefit the accused would have received if he pleaded guilty.
8. For this reason alone, it would have resulted in the conviction and sentence being set aside.
9. In the result, it is ordered:
 - (a) The conviction and sentence are set aside.
 - (b) The matter is remitted to the magistrate in terms of s 312 of Act 51 of 1977 with the direction to enter a plea of not guilty in terms of s 113 and to bring proceedings to its natural conclusion.
 - (c) In the event of a conviction the sentence already served by the accused must be taken into consideration.

	
JC LIEBENBERG JUDGE	G N NDAUNDAIPO JUDGE