

REPUBLIC OF SOUTH AFRICA

**SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)**

CASE NO: D1664/2010

REVIEW NO 166/11

DATE:14/10/2011

NOT REPORTABLE

In the matter between

THE STATE

and

PULGARIN OSPINA HAROLD EVELIO

ACCUSED

Criminal Procedure – automatic review in terms of s 302 of Criminal Procedure Act 51 of 1977 – accused convicted of escaping from lawful custody in contravention of s 51(1) of the CPA – onus on State to prove that the accused was lawfully arrested – failure to call arresting police official - no evidence of lawful arrest – conviction and sentence set aside.

**J U D G M E N T
(REVIEW)**

VAN OOSTEN J:

[1] This matter comes before me by way of automatic review. The accused was convicted in the Magistrate's court, Kempton Park, of escaping from lawful custody in contravention of s 51(1) of the Criminal Procedure Act, 51 of 1977 (the Act) and sentenced to 18 months imprisonment.

[2] The facts of the matter are these: the accused after he "had been arrested" was placed in the care and custody of a police official at the Oliver Tambo International Airport when he requested to go to the bathroom. He was escorted to the bathroom but unexpectedly started running down the corridor.

He however unsuccessfully attempted to jump through a window and was then apprehended.

[3] Having read the record of the proceedings I was not satisfied that there was any evidence to prove that the accused had been lawfully arrested. I accordingly addressed a request for supplementary reasons on this aspect to the magistrate who has responded thereto. The matter was thereafter referred to the NDPP for their opinion. In view of the urgency of the matter Mr *Muhangane* of the NDPP approached me in chambers, and fairly and properly conceded that the conviction could not stand in view of the lack of evidence concerning the accused's arrest.

[4] The only evidence concerning the arrest of the accused was given by Sergeant Ralufwanga, who, on this aspect, testified as follows:

'He (the accused) had been arrested being a suspect in a drug case'

From this evidence one must necessarily infer that the arrest was affected by another person and not the witness himself. It accordingly not only constituted hearsay evidence but was also, in any event, plainly insufficient to prove that the accused's arrest was lawful. The *onus* is on the State to prove a lawful arrest, which is one of the essential elements of the charge of escaping from lawful custody, as envisaged in s 51(1) of the Act (See *Hiemstra's Criminal Procedure*: 5-3; 5-6 and 5-34). The fact that the accused in his evidence did not deny that he was arrested, which the magistrate relied upon in convicting the accused, is of no moment: the absence thereof could not and did not constitute proof of the arrest on which the State has failed to lead the necessary evidence. It follows that the accused was wrongly convicted and that the conviction and sentence ought to be set aside.

[5] In the result the conviction and sentence are set aside.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

I agree.

MB MAHALELO
ACTING JUDGE OF THE HIGH COURT