

DELETE WHICHEVER IS NOT APPLICABLE

REPORTABLE: YES/NO. ☒ YES

(1) OF INTEREST TO OTHER JUDGES: YES/NO. ☒ YES

(3) REVISED: ☒ YES

10/12/2010

DATE

SIGNATURE

10/12/2010

REPORTABLE /bh

IN THE HIGH COURT OF SOUTH AFRICA
[NORTH GAUTENG HIGH COURT, PRETORIA]

CASE NO: A1099/09

IN THE MATTER BETWEEN:

MOSES MAKOFANE
TM MALAPANE
VERSUS
THE STATE
DATE: 24/11/2010

FIRST APPELLANT
SECOND APPELLANT

RESPONDENT

APPEAL JUDGMENT

BAM AJ

1. On 25 October 2009 the appellants were convicted in the magistrate's court, Lydenburg, on a charge of having contravened section 51(1) of the Criminal Procedure Act, 51 of 1977, escaping from custody. They were each sentenced to 3 years imprisonment in terms of section 276(1)(i) of the said Act. Leave to appeal was dismissed by the court *a quo* but subsequently granted upon petition to the Judge President of this division. Hence this appeal.
2. Section 51(1) of the Criminal Procedure Act provides for a situation where an arrestee escapes during the period after his lawful arrest but **before** being locked up. According to the charge sheet the

appellants allegedly escaped **after** having been locked up. The escaping of a person, **after** having been detained in custody, is governed by the provisions of section 117 of the Correctional Services Act, 111 of 1998. It therefore appeared, *prima facie*, that the appellants were not correctly **charged** in terms of the Criminal Procedure Act. The question which accordingly arose is whether the appellants could, correctly in law, whilst charged as aforesaid, be **convicted** of contravening section 51(1) of the Criminal Procedure Act in the event of the facts proving escape from custody after they were locked up. Counsel appearing for the appellants and for the state, respectively Mr Moeng and Mr More, did not address this issue in their heads of argument, and were accordingly requested to furnish us with supplementary heads of argument regarding the said question. Counsel complied, and we are indebted to them.

3. The state adduced the evidence of a single witness, inspector JK Masangu. This witness testified that he came on duty at the police station, Lydenburg, at 18:45 on the evening of 21 November 2007. He did not visit the cells. He was told that it was done by a certain student constable Shabangu before his arrival at the police station.

Constable Shabangu had reported that everything was in order. The next morning, the morning of the 22nd, at around 05:00, inspector Masangu visited the cells accompanied by a certain inspector Nyanga, now deceased, with the intention to count the inmates. He knew from the entries in the registers how many detainees there had to be. They found that cell unit 5, where he knew ten detainees had been locked up, had been broken open. Steel bars at a door had been sawn through. Five of the inmates were missing. The witness testified that the appellants were two of the five missing escapees. He then laid a charge of escaping. In his evidence he conceded that he had a vague memory of the two appellants but that he, at the time, deposed to a statement regarding the facts from which he could refresh his memory. He testified that the detention of the appellants was recorded in the registers kept at the police station, namely the occurrence book and the cell register. These two registers were however not handed in as exhibits.

5. The appellant's defence was that they had been released on the 21st, the previous afternoon, at about 17:00, by inspector Nyanga, before the witness came on duty. Inspector Masangu denied it and replied

that inspector Nyanga was not at the police station at that time. He further stated that their release would have been noted in the said registers if that was the said position, which was not the case.

6. After the State had closed its case the appellants applied for their discharge in terms of section 174 of the Criminal Procedure Act. It was refused and the appellants closed their case without testifying.
7. It was submitted by Mr Moeng that the state had failed to prove that the two appellants were in fact detained in the police cell from where they allegedly escaped. He contended that inspector Masango's evidence did not prove that the appellants had not been released by the late inspector Nyanga: for an unknown reason the state did not produce the registers of the police station containing the relevant evidence as the State should have done and the state was obliged to call student constable Shabangu as a witness, which the State failed to do.
8. When the evidence of Inspector Masango is evaluated it appears that he had all the relevant information regarding the appellants at his

disposal at the time of the escape. He testified that he knew that the appellants were detained in the cell from where they allegedly escaped. He also knew that inspector Nyanga was not at the police station when the appellants claimed they were released. There was further no entry in the relevant registers that the appellants were released on bail.

9. The appellants' sole defence was that they were released by inspector Nyanga as aforesaid. That was put to inspector Masango during cross-examination. The appellants, however, did not contest the evidence of inspector Masango that there was no entry in the registers reflecting their release as there would have been if they were in fact released as claimed.

The evidence of inspector Masango, to my mind, proved *prima facie* that the appellants escaped from the police cell where they were detained.

10. It is trite that the state bears the *onus* to prove the guilt of an accused beyond reasonable doubt. There is no evidential burden on the

accused to prove anything. The constitutional right of an accused (in terms of section 35(3)(h) of the Constitution) to remain silent is also kept in mind and respected.

11. Where the state however adduces evidence which *prima facie* proves the State's case, an accused's silence strengthens the State's case, and justifies a negative inference against the accused person. This is the situation in this case. See *S v Chabalala* 2003 (1) SASV 134 (SCA).
12. Accordingly, to my mind, the evidence of Insp. Masango was correctly accepted by the court *a quo* as proof beyond reasonable doubt that the appellants did escape from custody after they were locked up in a police cell.
13. Pertaining to the correctness of the conviction, it was, correctly to my mind, submitted by Mr Moeng and conceded by Mr More that the appellants should have been charged with having contravened the provisions of section 117 of the Correctional Services Act. The evidence proved that this was not a situation where the appellants were charged with escaping before they were detained in custody. It

was accordingly common cause that the provisions of section 51(1) of the Criminal Procedure Act were not applicable in this case.

14. Regarding the powers of a court to convict an accused of having committed an offence other than the offence alleged in the charge sheet, section 270 of the Criminal Procedure Act provides as follows:
s 270.

"If the evidence on a charge for any offence not referred to in the preceding sections of this chapter does not prove the commission of the offence so charged but proves the commission of an offence by reason of the essential elements of that offence is included in the offence so charged, the accused may be found guilty of the offence so proved." (The offence of contravening the provisions of section 51(1) is not referred to in the preceding sections of the relevant chapter.)

15. The elements of the offence in terms of s51(1) of the Criminal Procedure Act, as alleged in the charge sheet, are essentially the same

as the elements of the offence in terms of section 117 of the Correctional Services Act. Except for the difference in the situation regarding the escape referred to above, the only dissimilarity seems to be that for an offence in terms of the former, lawfulness of the arrest is required, whilst in terms of the latter, lawfulness of the custody is not an element. Section 51(2) of the Criminal Procedure Act further provides for the same penalties prescribed for the contravention of section 117 of the Correctional Services Act.

16. By reason of the facts *in casu* not justifying a conviction on a charge of contravening section 51(1) of the Criminal Procedure Act such a conviction, is not competent in law and should in terms of section 270 of the said Act be substituted by a conviction on a charge of the contravention of section 117 of the Correctional Services Act, 111 of 1998. The appellants will not be prejudiced in any way.

SENTENCE

17. This court's powers to interfere with the sentence imposed by a lower court are limited. It has to be shown that the magistrate committed

an irregularity or misdirected himself in one way or the other. See *S v Pieters* 1987 (3) SA 717 (A) and *S v Malgas* 2001 (1) SACR 469 (SCA).

18. I do not consider the conviction on section 51(1) of the Criminal Procedure Act to be an irregularity of the nature that would entitle this court to interfere with the sentence. I have already stated that the appellants were not prejudiced. Mr Moeng's submission that the correct charge sheet would have caused a different approach with the cross-examination holds no water. I can see no reason how it could have affected their defence that they were lawfully released.
19. The appellants were awaiting trial on a charge of housebreaking and theft. It is *per se* a serious charge.
20. The legislature deemed it appropriate to prescribe a sentence of a fine or imprisonment of ten years or both such fine and such imprisonment for this offence. (In this regard the magistrate erred in finding that the legislature did not prescribe a fine.

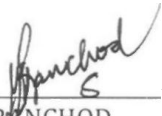
I have already remarked above that section 51(2) of the Criminal Procedure Act provides for the same penalties the legislature prescribed in section 117 of the Correctional Services Act).

21. The magistrate took into consideration all the relevant facts as well as the personal circumstances of the appellants, including that they were first offenders.
22. Save for what I have stated above I could not find any other misdirection or error committed by the magistrate. Although the sentence imposed by the magistrate in terms of section 276(1)(i) of the Criminal Procedure Act seems to me somewhat lenient, there is, to my mind, no reason in law why we should interfere with the sentence.
22. Accordingly I suggest, save for substituting the conviction on a charge of s51(1) of Act 51 of 1977 by a conviction on a charge of s117 of Act 111 of 1998, that the appeal against both the conviction and sentence should be dismissed.



AJ BAM
ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered.



N RANCHOD
JUDGE OF THE HIGH COURT