Reportable

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Review Case **No.** C512/11

High Court Ref. No. 121093

Magistrate's Serial No

THE STATE

V

CHASLIN WILLIAMS ACCUSED

CORAM The Hon Ms Justice T C **Ndita, (YEKISO J) concurs**

DATE OF JUDGMENT 21 December 2012

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THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT)

REVIEW CASE NO. C512/11
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THE STATE

VS

CHASLIN WILLIAMS ACCUSED

REVIEW JUDGMENT

NDITA: J

[1] This matter came before me by way of special review. The accused was charged and convicted of escaping from lawful custody in the George magistrate court in contravention of section 117 (a) read with section 1 of the Correctional Services Act 111 of 1998 ('the Act'), as amended. The allegation is that he escaped from a place of safety known as House Onteniqua, George. The accused, who was legally represented pleaded guilty to the charge. A statement made in terms of s 112 (2) of the Criminal Procedure Act 51 of Act 51 of 1977 wherein the accused admitted all the elements of the offence was read into the record. He was thus convicted on the basis of his plea. He was cautioned and discharged.

[2] The matter was brought on special review by the presiding magistrate with a request

that the entire proceedings be reviewed and set aside as the accused was erroneously charged and convicted under s 117 of the Act, which does not create an offence in respect of a person remanded to a place of safety. Section 117 provides as follows:

‘117. Escaping and absconding Any person who
'(a) Escapes from lawful custody;

is guilty of an offence and liable on conviction to a fine or to incarceration for a period not exceeding ten years or to incarceration without the option of a fine or both’.

[3] Before the amendment, s 117 was applicable to ‘any prisoner’. Pursuant to the amendment, it applies to ‘any person’. In order to fully comprehend the persons to whom this section is intended to apply, it is necessary to refer to the relevant portions of s 1 of the Act. Section 1 provides that:

'....and for the purposes of sections 115 and 117 ... prisoner’ means any person, whether convicted or not, who is detained in custody in any prison or who is being transferred in custody or is en route from one prison to another prison.’

[4] The accused, as earlier alluded to in this judgment, it seems, was remanded by the trial court to a place of safety. He therefore is not a prisoner as defined above. The likelihood is that the presiding officer who remanded him to a place of safety invoked the provisions of s 29 of the Child Justice Act which provide as follows:

’29 Placement in a **child and youth care centre**

(1) A presiding officer may order the detention of a child who is alleged to have committed any offence in a specified child and youth care centre/

[5] As correctly pointed out by the presiding magistrate, the section under which the accused was charged creates neither an offence nor punishment for the conduct in respect of which he was convicted. Courts do not have the power to create new crimes. In *S v Malgas*[1] the Supreme Court of Appeal reaffirmed that subject to the Constitution, Parliament is obviously empowered to create new offences and abolish old ones and to provide the penalties courts may impose. To this end, it was further held that:

'No court exercising criminal jurisdiction in South Africa could convincingly claim to the sole constitutional repository to do such things. Indeed, the courts have no inherent power to do any such thing. They cannot create new crimes. Nor can they invent a new kind of penalty, such as, for example physical detention under lock and key at some other place other than prison.'

Whilst it is of vital importance that criminal conduct be discovered and the perpetrator punished, it has been equally recognised that where conduct of an accused person is not recognised by the law as a crime, in line with the principle of legality, commonly known as *nuHum crimen sine lege ,* he or she cannot be found guilty of any offence . Similarly, 'the nature and range of any punishment, whether determinate or indeterminate, has to be founded in the common or statute law; the principle of *nulla poena sine lege* requires this'.[2] *Snyman*[3] succinctly summarises the application of these principles and states that:

'An accused may not be found guilty of a crime and sentenced unless the type of conduct with which he is charged

(a) Has been recognised by the law as a crime,

(b) In dear terms,

1 S v *Malgas* 2001 (1) SACR 469 (SCA) at 472 f-g

2 See S v *Dodo* **2001 (1)** SACR595 **(CC)** at **604 e-f**

3 ***CR Snyman,*** Criminal Law, **4th** ed, page **39**

(c) Before the conduct took place

(d) Without the court having to stretch the meaning of the words and concepts in the definition to bring the particular conduct of the accused within the compass of the definition., and

(e) After the conviction the imposition of punishment also complies with the four principles set out immediately above.'

[6] The convicting and sentencing of the accused in the present circumstances further constitutes a violation of his right to a fair trial. This I say because the Constitution of the Republic of South Africa specifically provides as follows:

'Section 35 (3) Every accused person has a right to a fair trial, which includes the right___
(I) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed.'

[5] In the light of the fact that provisions of s 117 with which the accused has been charged, convicted and sentenced do not make escaping from a place of safety a criminal offence, it stands to reason therefore that both the conviction and sentence must be set aside.

[7] In the result, 1 propose that both conviction and sentenced be reviewed and set aside.

NDITA; J

I agree, and it is so ordered

YEKISO; J