

IN THE SUPREME COURT OF NAMIBIA

In the case between

THE STATE

Applicant

and

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"The question is whether the Court may deliver a verdict in respect of an accused in his absence, where the Court has directed in terms of Section 160(3)(b) of Act 51 of 1977 that the proceedings in respect of the accused who is present, be concluded as if such proceedings had been separated from the proceedings at the stage at which the first-mentioned accused became absent."

Section 319 of the Criminal Procedure Act, read with Sections 317(2), (3), (4) and (5) as well as Section 318(2) thereof, clearly entitles the State Prosecutor inter alia to apply for such a question of law to be reserved. Formerly the State could not reserve a question of law if the accused had been acquitted, but subsequent legislation had changed the position, and the State may now/ also reserve a question of law where the accused was acquitted - see Section 319 read with Section 322, and in particular sub-section 4 thereof, which provides that

"(4) Where a question of law has been reserved on the application of a prosecutor in the case of an acquittal, and the court of appeal has given a decision in favour of the prosecutor, the court of appeal may order that such of the steps referred to in Section 324 be taken as the court may direct."

In order to deal with the specific question of law reserved, it is necessary to deal with the provisions of section 159 and 160 of the Criminal Procedure Act.

Section 159 provides as follows:

"CIRCUMSTANCES IN WHICH CRIMINAL PROCEEDINGS MAY TAKE PLACE IN ABSENCE OF ACCUSED

1) If an accused at criminal proceedings conducts himself in a manner which makes the continuance of the proceedings in his presence impracticable, the court may direct that he be removed and that the proceedings continue in his absence.

2) If two or more accused appear jointly at criminal proceedings and-

(a) the court is at any time after the commencement of the proceedings satisfied, upon application made to it by any accused in person or by his representative -

(i) that the physical condition of that accused is such that he is unable to attend the proceedings or that it is undesirable that he should attend the proceedings; or

(ii) that circumstances relating to the illness or death of a member of the family of that accused make his absence from the proceedings necessary; or

(b) any of the accused is absent from the proceedings, whether under the provisions of subsection (1) or without leave of the court,

the court, if it is of the opinion that the proceedings cannot be postponed without undue prejudice, embarrassment or inconvenience to the prosecution or any co-accused or any witness in attendance or subpoenaed to attend, may-

(aa) in the case of paragraph (a), authorize the absence of the accused concerned from the proceedings for a period determined by the court and on the conditions which the court may deem fit to impose; and

(bb) direct that the proceedings be proceeded with in the absence of the accused concerned.

(3) Where an accused becomes absent from the proceedings in the circumstances referred to in subsection (2), the court may, in lieu of directing that the proceedings be proceeded with in the absence of the accused concerned, upon the application of the prosecution direct that the proceedings in respect of the absent accused be separated from the proceedings in respect of the accused who are present, and thereafter, when such accused is again in attendance, the proceedings against him shall continue from

the stage at which he became absent, and the court shall not be required to be differently constituted merely by reason of such separation."

The section envisages three grounds which would entitle the court to order that criminal proceedings may take place in the absence of an accused, contrary to the fundamental rule that criminal proceedings may only take place in the presence of the accused -see sec. 158 of the Act. The three exceptions to the general rule are where the court orders that an accused be removed if he conducts himself in a manner which makes the continuance of the proceedings in his presence impracticable (sec. 159(1)), or secondly where an accused makes application to be excused from the proceedings, and where such application is granted (sec. 159(2)(a), read with section 159(2)(aa), and thirdly where the accused is absent from the proceedings without leave of the court (sec. 159(2)(b)).

In each one of the three situations envisaged in section 159(2) the court may, if it is of opinion that the proceedings cannot be postponed without undue prejudice, embarrassment or inconvenience to the prosecution or any co-accused or any witness in attendance or subpoenaed to attend, in the case of the excusal of an accused in terms of section 159(2)(a) authorize such absence of the accused for a specific period and subject to such additional conditions which the court may impose, and in both the second and third situations that is absence with and without leave of the court in terms of sections 159(2)(a) and 159(2)(b)

direct that the proceedings be proceeded with in the absence of the accused concerned.

In the case of the third situation, where an accused has become absent from the proceedings without leave of the court, the court may further, upon the application of the State Prosecutor, instead of ordering the proceedings as a whole to be proceeded with in the absence of the accused concerned, direct that the proceedings in respect of the absent accused be separated from the proceedings in respect of the accused who are present, and thereafter, when such absent accused is again in attendance, the proceedings against him shall continue from the stage at which he became absent.

In the present case there were two accused who appeared jointly on the same charge at the criminal proceedings brought against them. They both pleaded not guilty and the trial proceeded against both of them in the normal course. During the trial, however, accused No. 2 absented himself from the trial without leave of the Court and could not thereafter be traced. The State Prosecutor then applied for a postponement to endeavour to trace accused no. 2 and bring him before the court again. The postponement was refused, and the court ordered the trial against no. 1 accused, who was present, to continue in the absence of accused no. 2 in terms of section 159(2)(b) of the Act. No application was made by the State Prosecutor to separate the trials in terms of Section 159(3).

The case against no. 1 accused was after conclusion of the evidence, then closed by both Defence and State Counsel (accused no. 2 still being absent despite a warrant of arrest having been issued against him), and the court then directed that the case against him that is No. 1 accused be finally concluded in terms of section 160(3)(b) of the Act.

Section 160(3)(b) of the Act reads as follows:

"(b) If it appears to the court that the presence of an absent accused cannot reasonably be obtained, the court may direct that the proceedings in respect of the accused who are present be concluded as if such proceedings had been separated from the proceedings at the stage at which the accused concerned became absent from the proceedings, and when such absent accused is again in attendance, the proceedings against him shall continue from the stage at which he became absent, and the court shall not be required to be differently constituted merely by reason of such separation."

After the ruling by the Court that the case against no. 1 accused be finally concluded, both the State Prosecutor and Defence counsel addressed the court on the merits. The court then delivered judgment and found accused no. 1 guilty of the offence charged, but also found accused no. 2 in his absence not guilty, although no argument had been put before the judge a quo as to the merits of the case against no. 2 accused.



The acquittal of the absent accused no. 2 then gave rise to the special entry now before this court, the precise wording of which was given earlier in this judgment.

The question of law put before this court by way of the special entry is a very simple one, namely whether the trial court, when concluding the proceedings against accused no. 1, who was present at all times, and who was then found guilty and sentenced, could also at the same time give a verdict in respect of the absent accused no. 2 and acquit him.

The answer to this question can be found in the provisions of section 160(3)(b) of the Act, quoted above, which in my opinion are quite clear. Where the court a quo in terms of section 159(2)(bb) ordered, after accused no. 2 became absent, that the trial against no. 1 accused be continued the above quoted provisions of section 160(3)(b) became applicable, namely that if the court considered that the presence of the absent accused no. 2 cannot reasonably be obtained (which the court a quo did in the present case), it may direct that the proceedings in respect of the accused who are present (my underlining) may be concluded as if there had been a separation of trials of the present and absent accused. Clearly this gives the court only the right to conclude the proceedings against the accused who is present, and not against an absent accused.

The position is further put beyond doubt by the additional provision contained in the section that when "such absent accused

is again in attendance, the proceedings against him shall continue from the stage at which he became absent...".

The question of law brought by the State before this Court must therefore be answered as follows, namely, that a trial court is not entitled to deliver a verdict in respect of an accused who was absent during the whole or part of the proceedings against him, and that a final verdict can only be passed v/hen the absent accused is again brought before the court to continue with the trial against him, and finally concluded in his presence.

The State Prosecutor does in her heads of argument, request the Court to set aside the acquittal of accused no. 2 in the present case, and to make an order in terms of section 324, read with section 322(4) of the Criminal Procedure Act that proceedings in respect of the same offence may again be instituted against accused no. 2.

Section 322(4) is clear on this point. It provides that:

"Where a question of law has been reserved on the application of a prosecutor in the case of an acquittal, and the court of appeal has given a decision in favour of the prosecutor, the court of appeal may order that such of the steps referred to in section 324 be taken as the court may direct".

Section 324, read with sub-section 322(4) enables the court of

appeal to order that proceedings for the same offence against an absent accused and of which he was wrongly acquitted, may again be instituted against him.

Under the circumstances it is ordered that the acquittal of accused no. 2 is set aside and the criminal proceedings in respect of the same offence may again be instituted against accused no. 2.

BERKER, C.J.

I agree.

MAHOMED, A.J.A.

I agree.

DUMBUTSHENA, A.J.A