

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: CC 181/1998

KAIN MCNAB

1ST APPLICANT

THOMAS HEITA

2ND APPLICANT

TUHAFENI HELMUTH AMWAAMA

3RD APPLICANT

and

THE STATE

Neutral citation: *Mcnab v State* (CC 181/1998 [2013] NAHCMD 256 (16 September 2013))

Coram: SHIVUTE, J

Heard: 22 July 2013

Delivered: 16 September 2013

Flynote: Criminal Procedure – Application for condonation – Section 317 –
Special entry - Application to lead evidence - Petition to Chief Justice – Such

petition final – Court has no jurisdiction to entertain the application – Accordingly application struck from the roll.

Summary: Criminal Procedure – Applicants applied for condonation for the late filing of an application to make a special entry in terms of s 317 of the Criminal Procedure Act and to lead fresh evidence. Prior to that, they had petitioned the Chief Justice for leave to appeal. The petition was refused by the Supreme Court. Such decision is final. Therefore, this court has no jurisdiction to entertain this application. Accordingly, the application is struck from the roll.

ORDER

1. This Court has no jurisdiction to entertain the application to lead further evidence and to make special entry.
2. The application is struck from the roll.

JUDGMENT

SHIVUTE, J:

[1] The applicants applied for condonation for the late filing of a special entry in terms of s 317 of the Criminal Procedure Act 51 of 1977. They alleged that the proceedings were riddled with irregularities, illegality and unlawfulness in the sense that the State counsel who handled the trial was 'incompetent, corrupt, dishonest, biased

and partial' towards a former co-accused whose charges were withdrawn and turned into a State witness.

[2] The applicants further wanted to re-open the trial in order to lead further evidence. They were all convicted during 1999 and sentenced on 16 August 1999 in this Court. They applied for leave to appeal against conviction and sentence. Their application for leave to appeal was refused. They then petitioned the Chief Justice for special leave to appeal. Their application was considered by three judges of the Supreme Court and it was refused.

[3] The third applicant filed an application to lead further evidence which was removed from the roll on 2 May 2002. The matter was again placed on the roll and on 10 March 2004 the application to lead further evidence was refused by this Court on the basis that the Court had no jurisdiction to entertain the matter and that the applicant had no further avenues of appeal.

[5] All three applicants mounted a constitutional challenge in this Court to attack the constitutionality of the petition procedure to the Chief Justice in terms of s 316 (6) (7) and (9) of the Criminal Procedure Act. Their application was dismissed on the grounds that the petition procedure is not inconsistent with Articles 12 (a) (c) (e) and 10 of the Namibian Constitution.

[6] All applicants approached this Court for leave to appeal to the Supreme Court against the above mentioned judgment but later on changed their minds and indicated that they only wanted to seek an order of the Court granting them relief in terms of Articles 10, 12 and 138 (3)(c) of the Constitution. They alleged that they wanted protection on the basis that there were irregularities in the proceedings during their trial and that they did not therefore receive a fair trial in terms of Article 12 of the Constitution. The Court ruled that it had no jurisdiction.

[7] This led to the present application in which the third applicant read from a statement with which the rest of the applicants associated. He alleged that there were 'irregularities and corruption related to misconduct' by the investigating officer and counsel who appeared for the prosecution during their trial. Their main complaint was that charges were withdrawn against a former co-accused who was arraigned in this Court for trial. The former co-accused was subsequently turned into a state witness. According to the applicants, this was contrary to the initial instructions from the Prosecutor-General's office. Third applicant further alleged that due to corrupt conduct by the investigating officer and State counsel their former co-accused fabricated evidence to incriminate them.

[8] The applicants further stated that they had applied for leave to appeal to the Supreme Court because the proceedings relating to their trial was 'illegal, unlawful and wrongful in the sense that counsel for the prosecution was incompetent, corrupt, dishonest, malicious bias and partial' towards their former co-accused who was utilised as a State witness. As already pointed out, these are also some of the reasons why the applicants wish to lead fresh evidence and make a special entry on the record. The applicants additionally wish to produce certain pages of the transcribed record of the court proceedings during their trial, a letter that was written by one of the applicants to the Minister of Home Affairs dated 5 October 1997 and NAMPOL Occurrence Book entries ostensibly to prove that their former co-accused who was turned into a witness was not on bail contrary to what the State counsel allegedly told the Court at a certain stage of the proceedings.

[9] Counsel for the respondent raised points in *limine* that the court has no jurisdiction to entertain the application to lead further evidence and the application to make a special entry. If the court does not have jurisdiction it cannot even entertain the application for condonation, so counsel argued. Therefore the matter should be struck

from the roll. She supported her argument in respect of the application to lead further evidence that when a trial judge has given a final judgment he has no jurisdiction to reconsider or alter it. Furthermore, the applicant's petition for leave to appeal was refused. Concerning application for the making of a special entry counsel argued that the applicants were refused leave to appeal when they petitioned the Chief Justice therefore there cannot be an appeal against conviction on a special entry under s 318 after an appeal against conviction has already been dismissed in an appeal contemplated in s 316. She further argued that for the court to entertain the application for condonation, the applicants should show that the Court has jurisdiction. The court was referred to several authorities in this respect.

[10] On the other hand, the third applicant submitted and the rest of the applicants associated themselves with his argument that this Court has jurisdiction to entertain the application because this type of application was the first of its kind in the history of Namibia. Concerning the application for condonation of the late filing of application to lead evidence and to make special entry third applicant argued that the application was made late due to the fact that they requested for Occurrence Book entries and Pol 9 to submit to the Court but the station commander at the time had refused to avail the documents to them. Although it was their intention to apply to make a special entry shortly after their conviction, it was useless to make an application without those documents. The documents were recently forwarded to them and the delay was not due to their fault. Furthermore, he argued that charges were 'corruptly' withdrawn against their former co-accused.

[11] Counsel for the respondent argued in reply that without conceding that the application was the first of its kind, even if this was the case, that does not vest the Court with jurisdiction. This Court has no inherent jurisdiction to entertain the matter. As for the application for condonation, the applicants were out of time for about 12 years therefore they should explain the delay in respect of each time they have been out of

time. Furthermore, the respondent disputed the relevance of the documents to be produced in respect of the applicants' convictions. She further made it a point of criticism that whether the former co-accused was on bail or not it is irrelevant to the applicant's convictions. Furthermore, she argued that there was nothing irregular to withdraw the case against the former co-accused and utilize him as a witness. The judge who handled the matter warned himself when he handed down his judgment that the evidence of an accomplice should be treated with caution.

[12] Having heard arguments from the applicants as well as the respondent I must now consider whether this court has jurisdiction to entertain the application for condonation to lead further evidence and to make a special entry after the petition has been refused by the Supreme Court.

[13] Section 316(9)(a) of the Criminal Procedure Act provides as follows:

"The decision of the Appellate Division or of the judges thereof considering the petition, as the case may be, to grant or refuse any application shall be final."

The applicants had their petition for leave to appeal by the Supreme Court refused. They applied to lead further evidence and to make special entry. They have exhausted all the avenues of appeal available to them. Although they claim that they wanted to lead further evidence and to make a special entry, what they wanted to lead as evidence and to make special entry about, was canvassed during the trial and it was also one of the grounds of their application for leave to appeal to the Supreme Court as per their heads of arguments. This court has no jurisdiction to entertain the application as the decision by the Supreme Court to refuse the application is final. Therefore, it is not necessary to deal with the application for condonation. This approach was adopted in *S v Strowitzki* 2003 NR 145 (SC).

[14] In the result, the following order is made:

1. This Court has no jurisdiction to entertain the application to lead further evidence and to make special entry.
2. The application is struck from the roll.

N N Shivute
Judge

APPEARANCES

STATE : Ms Verhoef
Office of the Prosecutor-General

1ST APPLICANT: In Person

2ND APPLICANT: In Person

3RD APPLICANT: In Person

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