

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

In the matter between:

Case no: CC 14/2018

JACO KENNEDY
RAYMOND CLOETE

APPELLANT
SECOND ACCUSED

and

THE STATE

RESPONDENT

Neutral citation: *Kennedy v State* (14/2018) [2018] NAHCMD 270 (12 July 2019)

Coram: Miller AJ
Heard: 6 July 2019
Delivered: 12 July 2019

Flynote: Leave to appeal – Appellant seeks leave to appeal to Supreme Court – Court a quo refused appellant’s application to stay criminal prosecution – Consideration is reasonable prospect that another court will come to a different conclusion – Court a quo unpersuaded that another court will come to different conclusion - Application dismissed.

ORDER

1. The application for leave to appeal is dismissed.
2. The criminal trial is placed back on the criminal mentions roll on the 15th of August 2019 at 9 o'clock.
3. Accused number one will remain in custody.
4. The bail of accused number two is extended on the same conditions.

JUDGMENT

MILLER AJ:

[1] I have before me an application for leave to appeal against the Judgement I delivered on the 17th of May 2019, in the course of which I ordered that the application for stay of the criminal proceedings is dismissed.

[2] The test as to whether to grant or refuse the stay of prosecution application, against the Judgement is well settled and it boils down to the issue as to whether another Court could reasonably expect it to overturn my Judgement. I have once more perused my Judgement which I delivered at the time, and the question remains whether there is a reasonable possibility that the Supreme Court of Namibia will come to a different conclusion on appeal.

[3] During the course of argument counsel for appellant, or both counsel in fact submitted as the only authority for the proposition in support of the application and in opposition to it, the matter of *Ex parte Attorney General of Namibia: In re the Constitutional Relationship between the Attorney General and the Prosecutor General*. (SA 7/93) 1995 NASC 1, 13 July 1995. *Ex Parte*. I have in the circumstances with respect to counsel, nothing much by way of argument and I say that with all respect to counsel. I have in the circumstances before me for the reasons that I have explained not much by way of argument. I do not mean that as

any sign of disrespect or criticism for the efforts of Counsel. I know that applications of this type in this jurisdiction relatively were rare and there is not much authority I could find on the point if any.

[4] As far as the authority that was cited is concerned, I have once again studied the Judgement delivered by His Lordship Mr Justice Leon as he then was. My view is that the authority which I have quoted does not support the argument, the issues and the circumstances were entirely different to what I have presently before me.

[5] What was before me was an application to temporarily stay the prosecution of the applicant. In his Ex parte Attorney General matter which I have quoted, the issue was basically a constitutional issue concerning the powers of the Attorney General in terms of the constitution, over the office of the Prosecutor General. It basically centered around the phrase in the constitution which was to the effect that the Attorney General shall have full and final responsibility of the office of the Prosecutor General.

[6] Consequently, the case itself is of little assistance. I have once more read the Judgement I wrote at the time and the question which must be answered as I have indicated is whether there is a reasonable prospect that another court in this case the Supreme Court of Namibia, may come to a different conclusion. As I have indicated in my Judgement what was before me was an application to stay the prosecution because there was a pending application to review the Prosecutor General's decision.

[7] The matter may very well have been different, as I indicated if such application is presently pending before any court in this jurisdiction. I concluded that absent an application to review and set aside the Prosecutor General's decision to prosecute the applicant, there was no reason why the prosecution could not proceed and that the proceedings pending before a different judge in case HC-MD-CAV-MOT-EXP 2018-1117 will not such have any bearing on the prosecution of the applicant.

[8] Moreover, as indicated in my Judgement, the application pending before the civil court does not as such attack the decision of the Prosecutor General to institute

criminal proceedings against the applicant. It is rather directed at the process employed, as he puts through haste, for transfer of the proceedings from the Lower Court to the High Court. As such it does not go to the heart of the decision by the Prosecutor General to institute the criminal proceedings in the first place.

[9] Having considered the matter in the light of the test formulated by our Courts in application of this nature, in so far as it is possible divorced myself from my own convictions as to the correctness otherwise of my Judgement, the question is rather different and it is one whether the Supreme Court of Namibia may come to a different conclusion for reasons that I have indicated.

[10] For the reason indicated above I remain unpersuaded that the Supreme Court of Namibia will come to a different conclusion.

[11] As a result I make the following order:

1. The application for leave to appeal is dismissed.
2. The criminal trial is placed back on the criminal mentions roll on the 15th of August 2019 at 9 o'clock.
3. Accused number one will remain in custody.
4. The bail of accused number two is extended on the same conditions.

K MILLER
Acting Judge

APPEARANCES

APPELLANT:

B Isaacks

Isaacks & Associates, Windhoek

RESPONDENT:

I Nyoni

Office of the Prosecutor-General, Windhoek