

CASE NO.: SA 5/2003

IN THE SUPREME COURT OF NAMIBIA

In the matter between

JOHN NARIB

APPELLANT

And

THE STATE

RESPONDENT

CORAM: Strydom, A.C.J., Teek, J.A. et O'Linn, A.J.A

HEARD ON: 07/10/2003

DELIVERED ON: 13/11/2003

APPEAL JUDGMENT

O'LINN, A.J.A.:

INTRODUCTION:

The appellant was accused no. 3 in the Court *a quo*. He was one of two accused convicted on 11/03/1997 on two (2) counts of murder and one (1) of robbery with aggravating circumstances. He, as well as Patrick Somseb, accused no. 4, was sentenced on 13/03/1997 as follows:

Imprisonment for life on each of two counts of murder and ten (10) years on the count of robbery.

Accused no. 1 and 2 were found “Not Guilty” at the end of the State case. Appellant launched his first application for leave to appeal eighteen months after sentence. The said application was refused on the same day. Thereafter application was made for leave to lead new evidence but was similarly rejected in the Court *a quo*. After repeated further delays the judges of this Court granted leave to appeal in response to a petition for leave to appeal. The wording of the grant of leave was somewhat ambiguous and need some clarification at the outset. It reads:

“The petition by the accused for leave to appeal against the refusal of the Court *a quo* to reopen the matter and to hear further evidence, is granted by three judges of the Supreme Court on 12th February 2003.

The application for leave to appeal against his conviction and sentence stand over till the above appeal is heard.”

It seems that the intention was to consider whether leave to appeal against conviction and sentence will be considered only once the appeal against the Court *a quo*'s refusal to allow new evidence has been decided upon.

However, it would follow as a matter of course that once this Court grants leave for the reopening of the case in the Court *a quo*, the case will be referred back to the Court *a quo* for the taking of such further evidence. In that case leave to appeal against conviction and sentence will follow as a matter of

course. After remittal and the taking of the proffered evidence, the case will be referred by the Court a quo to this Court for the consideration of the appeal against conviction and sentence.

On the other hand, if this Court rejects the appeal for the reopening of the case for the purpose of taking the new evidence, this Court will at the same time consider whether or not leave to appeal against conviction and sentence should be granted notwithstanding the rejection of the reopening of the case for the purpose of the taking of the suggested new evidence.

In the latter event, the appeal will be postponed until the next session of this Court for consideration of the appeal on the merits of the conviction and sentence. In that event, the legal representatives of the appellant and the State will be required to submit full written heads of appeal on the merits prior to the hearing of such appeal.

THE APPLICATION FOR NEW EVIDENCE

I will now proceed to deal briefly with the appeal against the Court a quo's refusal to allow a reopening of the case for the purpose of taking of certain specified alleged new evidence.

Ms. Schimming-Chase appeared before us for the appellant and Ms. Jacobs for the State. Ms. Schimming-Chase only received her brief from the Chief: Legal Aid on 5th September 2003. She applied for condonation for the late filing of her heads of argument. There was no objection from the side of Ms. Jacobs.

There was no reason whatever not to grant condonation and condonation was consequently granted.

As is evident from the papers and the judgment of the Court *a quo*, the appellant was responsible for considerable and undue delay both in bringing his application for leave to appeal as well as the later application for new evidence. These late applications manifested a lack of will and even a lack of belief in the merits of his case. However this Court granted leave to appeal mainly because of the gravity of the sentences and the reasonable possibility that the proposed new evidence could turn the scales, alternatively that a reasonable argument may be forthcoming amounting to reasonable prospects of success on appeal against conviction.

The prospects of new credible evidence however, dissipated by the time that argument had been concluded. I say so for the following reasons:

1. The main proposed “new” evidence was a letter allegedly written by one Maleagi Richter to the appellant wherein Maleagi Richter allegedly stated that he committed the crimes together with accused no. 4, one Patrick Somseb, and that the appellant, John Narib was completely innocent.
2. This letter was unsigned.
3. Neither the present counsel of appellant, nor the previous counsel have been able to obtain any evidence from the said Maleagi

Richter confirming that he wrote the letter, notwithstanding the lapse of a long time.

4. Ms. Jacobs, at the hearing of the appeal, handed in a sworn statement from Richter wherein he denied ever having written such a letter to appellant, John Narib.
5. It is grossly improbable that a person in the position of Maleagi Richter would have written such a letter.

In the circumstances the letter submitted by the appellant after many years in prison, appears to be a fabrication concocted by appellant in prison, with or without the assistance of accomplices.

6. The application for further evidence also fails to comply with subsection (3) of section 316 of the Criminal Procedure Act no. 51 of 1977 which reads as follows"

"(3) When in any application under subsection (1) for leave to appeal it is shown by affidavit-

- (a) that further evidence which would presumably be accepted as true, is available;
- (b) that if accepted the evidence would reasonably lead to a different verdict or sentence; and
- (c) save in exceptional cases, that there is a reasonably acceptable explanation for the failure to produce the evidence before the close of the trial, the court hearing the application may receive that evidence and further evidence rendered necessary

thereby, including evidence in rebuttal called by the prosecutor and evidence called by the court.”

This effort by the appellant is *prima facie*, not only a fraud, but a contempt of Court. It should be further investigated by the police to establish whether a crime has been committed and in order to discourage this type of activity.

The second basis for alleged new evidence is even more confused and without merit. This basis consist of a request to call accused no. 4, Patrick Somseb, as a witness, for the purpose of confirming that appellant is innocent and that the aforesaid Maleagi Richter was the guilty person in conjunction with accused no. 4. There was no indication whatsoever that Patrick Somseb was willing to testify on behalf of appellant.

This matter was also canvassed to some extent during the trial and cannot be regarded as “new evidence”, nor does it comply in any respect with the said subsection (3) of section 316.

I have no doubt whatsoever that the application for new evidence must be rejected as completely without merit.

THE QUESTION WHETHER OR NOT LEAVE TO APPEAL AGAINST CONVICTION AND SENTENCE SHOULD BE GRANTED NOTWITHSTANDING REFUSAL OF PERMISSION TO ALLOW THE ALLEGED NEW EVIDENCE

Ms. Schimming-Chase has already raised several aspects on the merits which are at least arguable in regard to the question of whether these grounds

constitute reasonable grounds of appeal. Ms. Jacobs for the State however, restricted herself mainly to the application for new evidence.

There are several points in addition to those referred to by Ms. Schimming-Chase which are arguable. The trial in the Court *a quo* was a complicated one where the standard of work of some of the investigating officers left much to be desired. This made the task of the presiding judge extremely difficult.

In the circumstances it would be more satisfactory and in the interest of justice if the merits of the conviction are thoroughly reargued before this Court. It seems to me that as the matter now stand, it cannot be said that there are no reasonable prospects of success on appeal against conviction. However, should the conviction stand, the sentence should also remain in place. The sentence was a fitting sentence for such brutal, cowardly and atrocious crimes. Consequently there are no reasonable prospects of success of an appeal against sentence.

In the result the following order is made:

1. The appeal against the refusal to reopen the case and to lead new evidence is rejected.
2. Leave is granted to appeal against the conviction.
3. The appeal should be set down for the next session of this Court.

4. Counsel for the parties should timeously submit further heads of argument dealing with the merits of the conviction.

O'LINN, A.J.A.

I agree.

STRYDOM, A.C.J.

I agree.

TEEK, J.A.

COUNSEL ON BEHALF OF THE APPELLANT:

MS. E. SCHIMMING-CHASE

Instructed by:

Legal Aid

COUNSEL ON BEHALF OF THE RESPONDENT:

MS. H.F. JACOBS

Instructed by:

PROSECUTOR-GENERAL

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