

IN THE SUPREME COURT OF NAMIBIA

IN THE MATTER BETWEEN:

DAWID ROOI

APPELLANT

And

THE STATE

RESPONDENT

CORAM: STRYDOM, A.C.J., TEEK, J.A., *et* MTAMBANENGWE, A.J.A.

Heard on: 01/04/2004

Delivered: 01/04/2004

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APPEAL JUDGMENT

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STRYDOM, A.C.J.: The appellant appeared before O'Linn, J, together with two other accused, on a charge of murder and a charge of robbery with aggravating circumstances.

The appellant was styled as accused no. 1. After a lengthy trial he was convicted on both

charges and on the charge of murder sentenced to life imprisonment and on the robbery sentenced to 18 years imprisonment. Mr. Grobler represented the appellant throughout his trial and is again representing him. We want to thank Counsel for his assistance to the Court as *amicus curiae*. Mr. Small, who also appeared in the Court *a quo*, again appeared before us to represent the respondent.

Subsequently to his conviction and sentence the appellant applied to the Court *a quo* for leave to appeal, which application was unsuccessful. It is however clear that this application only concerned the conviction of the appellant and that no application for leave to appeal was launched in respect of the sentences imposed on the appellant. The history of the matter was set out by Mr. Small in his heads of argument. Although it seems that there was at some stage an application launched by the appellant to apply for leave to appeal also against his sentence this application, for some or other reason, was never heard. Then, after the lapse of some years the appellant petitioned the Chief Justice for leave to appeal against his conviction and sentence. The petition was dismissed in regard to the convictions but leave was granted to the appellant to appeal against the sentences.

Because no prior leave was obtained from the Court *a quo* to appeal against the sentences Counsel were requested to address the Court on whether the appeal was regularly before this Court. Both Counsel submitted, correctly in my view, that this Court could not entertain the appeal against the sentences because no prior leave to appeal was applied for in the Court *a quo*.

Appeals in criminal matters are regulated by sections 315 and 316 of the Criminal Procedure Act, Act 51 of 1977. In terms of sec. 315 the Supreme Court of Namibia shall be the Court of appeal in regard to criminal cases heard by the High Court and that such appeals shall only lie as provided for in sections 316 and 319 of the Act, and not as of right. Sec. 316, which is relevant to the present proceedings, provides for applications for leave to appeal to the Court *a quo*, and, if unsuccessful, for petitions to the Chief Justice. Leave could be applied for by an accused in regard to conviction or sentence or both.

Act 55 of 1977 is an act of the Republic of South Africa which was applied to South West Africa and survived the Independence of Namibia by virtue of Article 140(1) of our Constitution. Our provisions concerning leave to appeal in criminal cases were therefore similar to that applicable in South Africa at the time of Independence and decided cases on this issue are therefore relevant to the interpretation of our sections 315 and 316. In the case of S v Mamkeli, 1992 (2) SACR 5, the Appeal Court of South Africa, Hefer, JA, stated the following in this regard, at p 7 f to g:

“An appeal under s 316 could, depending on the extent of the leave granted, be against the conviction or against the sentence (or both) or any order following thereon. Where leave had been granted to appeal against sentence only, the Court was not competent to consider the merits of the conviction (*S v Matshoba and Another* 1977 (2) SA 671(A) at 677 G-H; *S v Cassidy* 1978 (1) SA 687(A); *S v Langa en Andere* 1981 (3) SA 186(A) at 189H)”

In the case of David Silunga v The State, an unreported judgment of this Court, delivered on 2000/12/08 by O'Linn, A.J.A., we followed the South African decisions on this point. In this particular case the application launched in the Court *a quo* was only in respect of sentence. When the application was refused the accused petitioned the Chief Justice for leave to appeal against conviction and sentence and this was granted. On appeal the Court found that it was not competent to extend the appeal to include leave to appeal also against conviction where previously there was no application in the Court *a quo* to appeal also against conviction. The Court came to the conclusion that the order whereby leave was granted was a nullity, as was now also submitted by Mr. Grobler and Mr. Small, and any order made on appeal in pursuance of the order granting leave to appeal against conviction, would likewise be a nullity.

I have therefore come to the conclusion that it would not be competent for us to consider an appeal against the sentence as no application for leave to appeal against sentence was launched and considered by the High Court. Under the circumstances the appeal must be struck from the roll as was submitted by both Counsel.

In the result the appeal is struck from the roll.

STRYDOM, A.C.J.

I agree,

TEEK, J.A.

I agree,

MTAMBNENGWE , A.J.A.

COUNSEL ON BEHALF OF THE APPELLANT: ADV. Z.J. GROBLER  
(*Amicus Curiae*)

COUNSEL ON BEHALF OF THE RESPONDENT: ADV. D.F. SMALL  
(PROSECUTOR-GENERAL)