FA 4/2000

THE STATE vs DAVID AMBROSE DELIE

APPEALS

Review Court exercising powers in terms of section 304 of Act 51 of 1977 sits as a court of appeal.

An appeal from a judgment or order of such court lies, in terms of section 18 of Act 16 of 1990, to the Supreme Court and not to the Full Bench of the High Court.

Case No.: FA 4/2000

IN THE HIGH COURT OF NAMIBIA

In the appeal of:

THE STATE

APPELLANT

and

DAVID AMBROSE DELIE

RESPONDENT

CORAM: HANNAH, J et MARITZ, J et

MAINGA, J Heard on: 2001-03-19 Delivered on:

2001-03-19 APPEAL JUDGMENT

HANNAH, J: The respondent was convicted by the Ltideritz Magistrate's Court of failing to pay maintenance and was sentenced to a term of imprisonment. The record of the proceedings was transmitted to the High Court for automatic review in terms of section 303 of the Criminal Procedure Act, No. 51 of 1977, (the Act) and, upon considering the proceedings in terms of section 304 of the Act, the High Court (Teek, J.P. and Manyarara, A.J.) ordered that the respondent be released immediately. Reasons for that order were given in a judgment delivered on 7th June, 2000 and the conviction and sentence were set aside.

The respondent pleaded guilty in the Magistrate's Court and, before conviction, was questioned pursuant to section 112(l)(b) of the Act. The reviewing judges took the view that in the course of that questioning the respondent raised a defence to the offence with which he was charged and that the magistrate should have recorded a plea of not guilty in terms of section 115 of the Act (the correct section is, of course, section 113) and should have proceeded with the trial on such plea.

The appellant then sought leave to appeal to the Supreme Court against the decision of the High Court on the ground that the reviewing judges erred by not applying section 312 of the Act. That section requires a court which has set aside a conviction and sentence on the ground, *inter alia*, that section 113 should have been applied to remit the case to the court of first instance and direct that court to act in terms of section 113.

Judgment on the application for leave to appeal was delivered by Teek, J.P. on 1st August, 2000 and the learned judge commenced his judgment as follows:

> "This is an application for leave to appeal in terms of the Criminal Procedure Act No. 51 of 1977 to the Supreme Court by the State. Why the Prosecutor-General is seeking leave to appeal to the Supreme Court rather than the Full Bench is beyond my comprehension, perhaps only for reasons best known to himself."

The learned Judge-President was sympathetic to the Prosecutor-General's application for leave to appeal but, as foreshadowed by the comment which I have quoted, granted leave to appeal to the Full Bench of the High Court and not to the Supreme Court. Manyarara, A.J. concurred. It is in this way that the appeal has been set down for hearing before us sitting as a Full Bench of the High Court.

Prior to the hearing we asked counsel for both parties to fde heads of argument dealing with the question whether this Court sitting as a Full Bench has jurisdiction to hear this appeal. We are indebted to both counsel for their industry in preparing heads of argument. Both Ms Prollius for the appellant and Mr Potgieter for the respondent submit that this Court has no jurisdiction to hear the appeal although the reasons advanced by each counsel in support of their respective submissions differ to some extent.

The first question to be addressed is in what capacity did the Court comprising Teek, J.P. and Manyarara, A.J. sit when considering the proceedings in the Magistrate's Court? Initially, I thought this might be a complex question to answer but, as Mr Potgieter points out, it is not. The answer is to be found in section 304(2) of the Act which deals with the procedure to be followed on automatic review where the reviewing judge is of the preliminary view that the proceeding in the Magistrate's Court are not in accordance with justice. The subsection provides:

> "(2)(a) If, upon considering the said proceedings, it appears to the judge that the proceedings are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice, he shall obtain from the judicial officer who presided at the trial a statement setting forth his reasons for convicting the accused and for the sentence imposed and shall thereupon lay the record of the proceedings and the said statement before the court of the provincial or local division having jurisdiction for consideration by that court as a court of appeal:"

It is clear from this subsection that the Court comprising Teek, J.P. and Manyarara, A.J. sat as a court of appeal when considering the proceedings in the Magistrate's Court and when delivering judgment setting aside the respondent's conviction and sentence.

The next question to be addressed is to what court does an appeal lie from a decision of the High Court sitting as a court of appeal? The answer to that question is to be found in section 18(1) of the High Court Act, No. 16 of 1990. That subsection provides:

> "(1) An appeal from a judgment or order of the High Court in any civil proceedings or against any judgment or order of the High Court given on appeal shall, except in so far as this section otherwise provides, be heard by the Supreme Court."

I agree with Mr Potgieter that this subsection contains two distinct parts. The first part deals with an appeal from a judgment or order of the High Court in any civil proceedings. And the second part deals with an appeal against any judgment or order of the High Court given on appeal. The word "appeal" in the second part is not qualified in any way and, in my view, must mean any appeal whether in civil or criminal proceedings. The only qualification lies in the words:

> "except in so far as this section otherwise provides"

and I therefore turn to consider the other provisions of the section. Subsection (2) deals with an appeal from any judgment or order of the High Court in any civil proceedings and therefore has no application to the present case. Subsection (3) deals with an appeal from an interlocutory order or an order as to costs and likewise has no application to the present case. Subsections (4),(5) and (6) deal with an appeal to the Full Court in civil proceedings and therefore have no application to the present case. Subsection (7) deals with an appeal in certain matrimonial matters and subsection (8) contains a procedural provision relating to the Supreme Court.

It is clear from the foregoing that none of the other provisions of section 18 impinge in any way on the second part of subsection (1) and it must follow that an appeal from a judgment or order of the High Court given on appeal from the Magistrate's Court lies only to the Supreme Court. As the judgment and order in the present case fall squarely into that category we have no jurisdiction to hear this appeal.

In conclusion I wish to make brief reference to the recent case of *S* v *McMillan* 2001(1) SACR 148 (W) in which the Full Court of the Local Division was concerned with the question whether it had jurisdiction to entertain a further appeal from a decision of two judges of that Division. The legislation which required consideration differs from ours but I respectfully endorse and adopt the observations of Cloete, J. concerning the anomalies which arise if a Full Court is permitted to sit on appeal from a decision of the same Division given on appeal. The learned judge said at 151 g-i:

> "A Provincial Division and the Witwatersrand Local Division, sitting as a Court of appeal on the judgment or order of a magistrate's court, does not have to consist of only two Judges. Section 13(2)(a)(i) provides that such a court shall be constituted 'before *not less than* two Judges' (emphasis supplied). It is not unusual, in this Division at least, for such a Court to consist of three Judges where it is known before the appeal is heard that a disagreement between the members of a two-judge Court is possible (in which case a third Judge is assigned to the Court) or where the two Judges appointed to hear the appeal in fact disagree after the appeal has been heard (in which case a new three-Judge Court is constituted). It cannot have been the intention of the Legislature to permit a Court to sit on appeal against a judgment or order of a Court of equivalent jurisdiction."

We have the same situation from time to time here in Namibia particularly in automatic review cases when a constitutional or complex legal question arises and the Judge-President sees fit to direct that the Reviewing Court shall consist of three judges.

For the foregoing reasons it is ordered that this appeal is struck off the roll.

For the Appellant:	**Advocate S. Prollius**
Instructed by:	**The General Prosecutor-**
For the Respondent;	**Advocate Potgieter D.**

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THE STATE **vs** DAVID AMBROSE DEME

APPEALS

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