CASE NO.: CC 03/04

SUMMARY

THE STATE

versus

PROGRESS KENYOKO MUNUMA
SHINE SAMULANDELA SAMULANDALE
MANEPELO MANUEL MAKENDANO
VINCENT LISWANISO SILIYE
VINCENT KASHU SINASI
ALEX SINJABATA MUSHAKWA
DIAMOND SAMUZULA ZALUFU
FREDERICK NTAMBILWA
HOSTER SIMASIKU NTOMBO
BOSTER MUBUYAETA SAMUELE
JOHN MAZILA TEMBWE
ALEX MWAFILA LISWANI

MANYARARA, AJ

09 FEBRUARY 2006

Criminal Procedure - Application for leave to appeal - From dismissal by High Court of a special plea to jurisdiction on the grounds that the accused were lawfully before the Court for trial - Section 316 of the Criminal Procedure Act 51 of 1977 does not permit an interlocutory appeal prior to conviction.

The accused had been indicted to stand trial in the High Court on charges of High Treason and related charges. They entered special pleas to jurisdiction in terms of s 106(1)(f) of the Criminal Procedure Act 51 of 1977. The special pleas were dismissed. They applied for leave to appeal to the Supreme Court on the ground that they were unlawfully abducted from Botswana to stand trial in

Namibia and that their trial would therefore be unfair. The State lodged an

objection *in limine* that the Court had no jurisdiction to entertain the application as s 316 of the Criminal Procedure Act 51 of 1977 does not permit an interlocutory appeal prior to conviction. The accused contended that this was unfair and offended against art 12(1)(a) of the Constitution and the Court should, in the interests of justice, grant leave to appeal at an interlocutory stage where the question of jurisdiction was involved.

Held, that the Court could not lean towards granting what would amount to an automatic right to appeal as the jurisdiction of the High Court with regard to criminal appeals is governed by s316 of the Criminal Procedure Act 51 of 1977 which does not permit interlocutory appeals or the bringing of an appeal by leave of the Court prior to conviction and sentence.

Held, accordingly, that the point *in limine* had to be upheld. Application for leave to appeal struck off the roll.

CASE NO.: CC 03/04

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

PROGRESS KENYOKO MUNUMA Accused 1

SHINE SAMUNLANDELA SAMULANDALE Accused 2

MANEPELO MANUEL MAKENDANO Accused 3

VINCENT LISWANISO SILIYE Accused 4

VINCENT KASHU SINASI Accused 5

ALEX SINJABATA MUSHAKWA Accused 6

DIAMOND SAMUZULA SALUFU

Accused 7

FREDERICK NTAMBILWA Accused 8

HOSTER SIMASIKU NTOMBO Accused 9

BOSTER MUBUYAETA SAMUELE Accused

10

JOHN MAZILA TEMBWE Accused

11

ALEX MAFWILA LISWANI Accused

12

CORAM: MANYARARA, A J.

Heard on: 2006.01.13
Delivered on: 2006.02.09

JUDGMENT

MANYARARA, A J.:

[1.] The accused, other than eight accused, applied for leave to

appeal against the refusal by this Court to uphold their special pleas to jurisdiction.

At the hearing on 6 December 2005, Mr Small raised a point *in limine* that it was not open to the accused to appeal at this stage.

Mr Ndauendapo for accused 1 to 7 and 9, 10 and 12 and Mr Grobler for accused 11 requested an adjournment to consider the point *in limine* with a view to either concede or argue the point.

The postponement was granted until 13 January 2006 when, after reflection, Mr Ndauendapo and Mr Grobler elected to argue the point. At the close of the hearing, the Court took time to consider the matter and reserved judgment. This now follows:

[2.] Mr Small prefaced his argument by drawing attention to a relevant difference between Namibian and South African legislation in this matter. This is that in Namibia an

accused may appeal from the Magistrate's Court to the High Court as of right but the South Africans have amended their Criminal Procedure Act to require leave to appeal from the Magistrate's Court as well.

South African judgments must be read with this difference in mind.

[3.] Mr Small then referred to Section 315 of the Criminal Procedure Act, 1977 (the Act) as amended by Section 4 of the Appeal Laws Amendment Act 10 of 2001. The Section as amended provides as follows:

> "(1) In respect of appeals and questions of law reserved in connection with criminal cases heard by the High Court of Namibia the court of appeal shall be the Supreme Court of Namibia.
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> 2. An appeal referred to in subsection (1) shall lie to the Supreme Court of Namibia only as provided in sections 316 to 319 inclusive, and not as of right."

In other words, the only avenue for criminal appeals from the High Court to the Supreme Court is by way of Sections 316 to 319 of the Act.

[4.] Section 316(1) as amended provides as follows:

> "(1) An accused convicted of any offence before the High Court of Namibia may, within a period of fourteen days of the passing of any sentence as a result of such conviction or within such extended period as may on application (in this section referred to as an application for condonation) on good cause be allowed, apply to the judge who presided at the trial or, if that judge is not available, to any other judge of that court for leave to appeal against his or her conviction or against any sentence or order following thereon (in this section referred to as an application for leave to appeal), and an accused convicted of any offence before any such court on a plea of guilty may, within the same period, apply for leave to appeal against any sentence or any order following thereon."

The rest of the provisions of section 316 are purely procedural and do not arise for consideration. The same

applies to the provisions of section 317 (special entry of irregularity or illegality in trial proceedings), section 318 (appeal on special entry under section 317) and section 319 (reservation of a question of law).

[5.] Section 316(1) was dealt with at length in *S v Strowitzki* 1994 NR 265 (Hc). The Court was there dealing with criminal appeals from magistrate's courts. Hannah J who wrote the judgment (Strydom JP and Teek J as they then were concurring) cited *Wahlhaus and Others v Additional Magistrate, Johannesburg and Another* 1959(3) SA 113(A) in which that Court approved the following statement in Gardner & Landsdowne 6th Edition Vol I at 750:

> "While a superior Court having jurisdiction in review or appeal will be slow to exercise any power, whether by *mandamus* or otherwise upon the unterminated course of proceedings in a court below, it certainly has the power to do so, and will do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained... In general, however, it will hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of
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> proceedings in the court below, and to the fact that redress by means of review or appeal will ordinarily be available."

The Court then explained that the above principle relates to appeals from magistrate's courts (in which no leave to appeal is required). The explanation is crucial to an understanding of this matter and it bears to be quoted *in extenso* at 270 H – 271 D of the judgment as follows:

> "As already pointed out, s 316 of the Criminal Procedure Act provides that an accused convicted of any offence by a superior Court may, within a period of 14 days of the passing of any sentence, apply to the Judge who presided at the trial for leave to appeal against his conviction, sentence or order following thereon. It has been held that this provision is a bar to interlocutory appeals: see *S v Harman* 1978 (3) SA 767 (A) where Jansen JA said at 771 B:
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> > '...(I)t is clear that the Act, 51 of 1977, does not envisage the bringing of an appeal by leave of the Court *a quo* before sentence has been imposed. Section 316(1) specifically refers to an application after "the passing of any sentence." It follows that this Court cannot at this stage consider the merits of this conviction."

[6.] Hannah J continued as follows:

"And although in *S v Majola* 1982 (1) SA 125 (A) Trollip JA considered that the section does not absolutely prohibit a convicted accused from applying for leave to appeal before sentence, he went no further than that. He said at 132F:

> 'That provision reflects, of course, the general rule that a convicted accused cannot appeal against his conviction until he has also been sentenced. That rule is enforced in order to avoid piecemeal appeals and to induce expeditious finality in criminal litigation. But, that notwithstanding, it will be immediately observed that the provision merely regulates the time limits within which the application for leave to appeal is to be made. It does not expressly and absolutely prohibit the convicted accused from applying for leave to appeal, or the trial Court from granting it, before he is sentenced.'

It is clear that both Jansen JA and Trollip JA considered that the clear effect of s 316(1) is that no appeal can be launched prior to conviction and I respectfully agree. When regard is had to the plain words of the section – 'An accused *convicted* of any offence' – (my emphasis) that is the only construction which can properly be given to it. In other words, s 316 does not permit an interlocutory appeal prior to conviction."

[7.] As already mentioned, *in casu* the accused seek leave to appeal against the dismissal of their special pleas. The entering of the special pleas is an interlocutory proceeding and, therefore, subject to the rule against interlocutory appeals. This much is not disputed. In order to circumvent this difficulty Mr Ndauendapo adopted the argument advanced by the State in a similar application in *S v Mushwena and 12 Others* Case No. (P) 268/2003. The argument is that, although as a general rule the courts will not allow interlocutory appeals in criminal matters, a court may, in exceptional circumstances, allow an application for leave to appeal. He cited circumstances in which jurisdiction is the issue as exceptional and relied on a South African decision, *S v Rosslee* 1994 (2) SACR 441 (C) in which the court allowed an interlocutory appeal.

[8.] However, it is evident that Mr Ndauendapo has not read the relevant passage as a whole. It commences at 445f to 445h as follows:

> "The general rule is plain. What are alleged to be wrong decisions made in the course of a criminal trial, and which are capable of correction by way of appeal or review after the trial has ended, should not be permitted to be challenged before the trial has run its course unless there is a compelling reason justifying it. See *Wahlhaus and Others v Additional Magistrate*, *Johannesburg and Another* 1959 (3) SA 113 (A) at 119E-120E; *Ismail and Others v Additional Magistrate, Wynberg and Another* 1963 (1) SA 1 (A) at 5G-6A. In the particular circumstances of this case, I consider that this Court should entertain the challenge to the regional court's decision now rather than at the end of the criminal trial. I do not suggest that challenges to jurisdiction are always to be regarded as deserving of this special consideration but this particular challenge does seem to me to fall within the rare category of cases which merit such consideration."

[9.] The Court then proceeded to set out its reasons for departing from the general rule at 445i-446a as follows:

> "If it is indeed so, as appellant alleges is the case, that the State's hands are not clean because its functionaries colluded with Namibian functionaries to deport appellant

> unlawfully from Namibia to overcome the State's inability to secure his
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> presence here by lawful means, and that, as a consequence, jurisdiction over him is ousted, or should be declined, it strikes me as only right that the proceedings should be brought to a halt as soon as possible. To my mind, no good purpose is served by insisting that an accused who may have been the victim of such conduct should have to remain in custody, participate in a trial by a court which should have declined to exercise jurisdiction over him, and patiently wait until the end of the trial before he may challenge on appeal the court's assumption of jurisdiction over him."

Per Marais J.

No great learning is required to appreciate that the Court would not have entertained the interlocutory appeal but for the above reasons.

[10.] The position *in casu* is different. This Court dismissed the special plea to jurisdiction after it found positively on the facts that there had been no collusion between the Namibian and Botswana authorities in the deportation of

the accused by Botswana as a sovereign state. To borrow

from the *Rosslee* judgment, the hands of the State were clean.

[11.] The present matter is a sequel to *S v Mushwena and 12 Others* Case No. SA 6/2004 in which the Supreme Court allowed the appeal by the State against the judgment of the High Court (Hoff J) by which the learned judge upheld the special plea to jurisdiction and ordered the release of the accused.

Thereupon the State applied to the learned judge for leave to appeal against his judgment. Leave was refused and the State petitioned the Chief Justice. Leave to appeal was granted and, at the hearing, the appeal succeeded on the merits.

It is the Supreme Court judgment overturning the decision of the Court below to uphold the special plea

which this Court followed in dismissing the special plea entered by the present accused. The reason was that the facts *in*

casu were indistinguishable from the facts placed before the Supreme Court in the *Mushwena* case. I respectfully consider the probability of the Supreme Court arriving at a different conclusion in the present matter to be so remote as to be safely disregarded. This consideration blunts the edge of this application.

[12.] In fairness, Mr Ndauendapo does not take issue with the outcome of the *Mushwena* case. His point is that the Supreme Court set a precedent by granting leave to appeal after refusal by the High Court, and this Court should follow that precedent and grant leave at this stage.

[13.] The argument is ingenious but lacks merit because, as I have said the substantive issue is jurisdiction and this has already been settled against the accused by the

Supreme Court judgment in the *Mushwena* case, *supra*. Therefore, to entertain this application would fly in the face of the principles so clearly enunciated in the *Rosslee* case itself as well as *Strowitzki's* case and the authorities

therein cited that the general rule against interlocutory appeals serves to prevent "piecemeal appeals and to induce expeditious finality in criminal litigation". Per Trollip JA in *S v Majola*, *supra*.

[14.] Mr Grobler had no quarrel with the principle that the trial of a criminal case should be continuous and not (unnecessarily) interrupted by interlocutory appeals. His argument is that, in terms of Article 12 of the Namibian Constitution, "all persons shall be entitled to a fair trial and public hearing by an independent, impartial and competent court". On that basis, this Court cannot be regarded as a "competent court" until the issue of jurisdiction has been settled by the Supreme Court and this can only happen if leave to appeal is granted.

[15.] The argument is also ingenious but equally devoid of merit. It is premised on a fallacy which Mr Small exposed by the example he gave of a confession admitted in a criminal trial in the face of objection by the defence and that the defence is not entitled to appeal the admission

before the conclusion of the trial. This would be the position even if the confession happened to be the only evidence against the accused. The submission is unanswerable.

[16.] Mr Small also pointed out that the crucial aspect of the granting of leave in the petition filed in the matter before Hoff J is that, in upholding the special pleas, the learned judge ordered that the accused be released. In other words, the learned judge's order brought the trial at an end, paving the way for the Prosecutor-General to apply to the learned Judge for leave to appeal against his judgment and, when this was refused, the Prosecutor-

General was entitled to go further and petition the Chief Justice.

Aliter if Hoff J had dismissed the special pleas. Then the rule against allowing interlocutory appeals would have applied to preclude the Court from entertaining an application by the accused for leave to appeal.

As Mr Small poignantly remarked, comparing the application for leave in the *Mushwena* case, *supra*, and the present matter is like comparing oranges with apples, which is unhelpful. I agree.

[17.] Mr Grobler persisted in his argument as follows:

> "The very basis of the proceeding is a serious question and in my view it will be contrary to sound public policy to postpone consideration on appeal or review of such a question until the trial has run its course".

[18.] In my view, Mr Grobler was inviting the Court to formulate a special procedure to deal with his understanding of "fair trial" as a constitutional point deserving of such a course. He did not go as far as counsel in the *Strowitzki* case, *supra*, went to suggest that the Act places an accused person in an unequal position vis-à-vis the State when it comes to an appeal. This must be because Act 10 of 2001 section 4 deleted section 316 A which made special provision for appeals by the State.

[19.] The point was analysed in the *Strowitzki* case, *supra*, at 268 J to 269 Bas follows:

> "The third argument is based on Art 80(2) of the Constitution which provides that:
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> > 'The High Court shall have original jurisdiction to hear and adjudicate upon all civil disputes and criminal prosecutions including cases which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms guaranteed there under….'

> The argument is that this subarticle provides for three categories of case, civil, criminal and constitutional; and that the appellant's case falls into the third category which must be regarded as *sui generis*. As no procedure exists to govern an appeal against a decision made in such an application the Court should formulate its own procedure and such procedure should allow an appeal as of right.

[20.] Hannah J effectively buried Mr Grobler's argument in the *Strowitzki's* case, *supra*, at 272D-F as follows:

> "Counsel's third argument can be disposed of quite shortly. In my view, it is based on a misconstruction of art 80(2) of the
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> Constitution. The clear effect of art 80(2) is that when hearing and adjudicating upon civil disputes and criminal prosecutions the High Court can also adjudicate upon matters which involve the interpretation, implementation and upholding of the Constitution and the fundamental rights which it guarantees. With all due respect to counsel's submission that his subarticle makes provision for three categories of case, the plain and short answer is that it does not. No question therefore arises of the appellant's application being *sui generis* or of a need for this Court to

formulate a special procedure to deal with an appeal from a case in which a constitutional issue is decided."

[21.] For the reasons set out above, this Court cannot at this stage entertain the application for leave to appeal. It follows that the point *in limine* raised by the State is well founded and must be upheld. The provisions of the Act apply. The application for leave to appeal is ill-conceived and irregular. The proper course is to strike it from the roll.

The application is struck from the roll.

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MANYARARA, A.J.