

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

LEAVE TO APPEAL JUDGMENT

Case no: CA 19/2016

In the matter between:

VINCENT KAPUMBURA LIKORO

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Likoro v S* (CA 19/2016) [2018] NAHCMD 58 (20 March 2018)

Coram: USIKU J and SALIONGA AJ

Heard: 12 March 2018

Delivered: 20 March 2018

ORDER

The application for leave to appeal to the Supreme Court is hereby granted.

JUDGMENT

USIKU J, (SALIONGA AJ concurring)

[1] This is an application for leave to appeal. The grounds for the application for leave to appeal are as follows:

[2] That the learned judges of appeal erred in the law and/or on the facts to conclude that the cumulative effect of the alleged failures or omissions by the appellant's legal representative in his conduct of the defence of appellant falls short of constituting an irregularity that would necessitate vitiating the conviction on appeal.

[3] That the learned judges of appeal erred in the law and/or on the facts not having found that the cumulative effect of the failures or omissions by the appellant's legal representative in his conduct of the defence indeed constituted an irregularity of such profound and material nature that same impermissibly and unlawfully infringed the appellant's right to a fair trial, inclusive of his right to effective legal representation.

[4] That the learned judges on appeal, despite accepting that there is nothing on record, 'showing that the appellant before us had not fully consulted with counsel' that his (appellant's) answer, when he was challenged on certain aspects, that had not been put to the state witnesses by his counsel, to which he responded by referring to the onus of proof being on the state, and how counsel chose to approach the case was for him to decide, erred in the law and/or on the facts to conclude that:

- (a) Appellant through his answers appeared to have been acquainted with the law and legal principles (at least as far as cross-examination is concerned); and
- (b) He was clearly satisfied with the manner in which his defence was being conducted. This implies that effect was given to his instructions, but there clearly does not exist an iota of evidence that support such a conclusion and/or inference let alone a reasonable one.

[5] That the learned judges of appeal erred in the law and/or on the facts in finding that the failure of the legal representative of the appellant to plead the defence of consent from the beginning.

[6] The test in application of this nature is that the applicant must satisfy the court that there are reasonable prospects of success on appeal should the application be granted.

[7] The now applicant was the appellant in this court who was charged with two counts of Rape in Contravention of section 2(1)(a) of the Combating of Rape Act No. 8 of 2000. He pleaded not guilty to all the charges and after trial the applicant was convicted on count one but acquitted on the second count. He was sentenced to 10 years imprisonment on count one. He appealed to this court against both his conviction and sentence. His appeal was dismissed. The applicant has now approached this court for an application for leave to appeal to the Supreme Court. He is represented by Mr Botes, whereas the State is represented by Mr Lisulo.

[8] In essence the gist of the matter is whether the applicant herein had an effective legal representation during the course of his trial in the court a quo and henceforth whether he received a fair trial as provided for in terms of the Constitution.

[9] Secondly whether the learned magistrate had properly carried out his obligations in terms of section 168 and 186 of the Criminal Procedure Act 51 of 1977 as expected.

[10] It is a principle of our law that courts must ensure justice only to be done, but be seen to be done whereby aggrieved persons receive fair trials.

[11] It is common cause that the test in applications of this nature is that the applicant must satisfy the court that there are reasonable prospects of success on appeal should the application be granted. In the case of *S v Nowaseb*¹ the full court

¹ S v Nowaseb 2007 2 NR 640.

pointed out that 'In the exercise of his or her power, the trial judge (or as in this present case, the appellate judge must disabuse his/her mind of the fact that he/she has no reasonable doubt as to the guilt of the accused. The judge must ask himself or herself whether, on the grounds of appeal raised by the applicant, there is a reasonable prospect of success on appeal; in other words, whether there is a reasonable prospect that the court of appeal may take a different view.'

[12] Having considered the above grounds upon which this application is based, the absence of any precedent in our jurisdiction on the subject matter and the authorities referred to by the applicant which are of a persuasive nature, this court is persuaded that there is a reasonable possibility that the Supreme Court may or would arrive at a different view.

[13] As a result, the application for leave to appeal to the Supreme Court is hereby granted.

D N USIKU
Judge

SALIONGA
Acting Judge

APPEARANCES

APPELLANT: Mr Botes

Instructed by Stern & Barnard, Windhoek

RESPONDENT:

Mr Lisulo

Of the Office of the Prosecutor-General, Windhoek