

Annexure PD 61

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

LEAVE TO APPEAL JUDGMENT

Case Title: <i>The State v Romeo Manellitto Schiefer</i>	Case No: CC 17/2008
	Division of Court: High Court Main Division
Heard before: Honourable Justice Shivute	Delivered on: 28 February 2020
Neutral citation: <i>S v Schiefer</i> (CC 17/2008) [2020] NAHCMD 72 (28 February 2020)	
The order: Having heard Mr Tjombe (Amicus Curiae), for the applicant, and Ms Verhoef for the respondent, and having read the documents filed of record and the submissions made by the parties: IT IS ORDERED THAT: 1. This Court has no jurisdiction to entertain the application for condonation for late filing of leave to appeal, to lead further evidence and to make a special entry. 2. The application is struck from the roll and it is regarded as finalised.	
Reasons for order:	

Shivute J

[1] This is an application for condonation for late filing of leave to appeal to the Supreme Court and leave to lead further evidence and make a special entry in terms of sections 316,317,318 and 319 of the Criminal Procedure Act 51 of 1977.

[2] On 25 September 2013, the applicant was convicted in this court on two counts of murder with direct intent read with the provisions of the Combating of Domestic Violence Act 4 of 2003 and one count of theft. He was sentenced to 28 years' imprisonment on each count of murder of which 8 years' imprisonment on the second count was ordered to run concurrently with the sentence on the first count. He was warned and cautioned in respect of the third count.

[3] Dissatisfied with the outcome of the proceedings, the applicant lodged an application for leave to appeal to the Supreme Court against his conviction and sentence, which application was heard on 14 April 2014.

[4] On 16 September 2014, this court refused to grant the applicant leave to appeal to the supreme court against his conviction and sentence .Thereafter the applicant petitioned the Chief Justice for special leave to appeal against his conviction and sentence.

[5] The Supreme court refused to grant leave to appeal against his conviction but he was partially successful as he was granted leave to appeal against his sentence. On 12 September 2017 the Supreme court confirmed the sentence imposed on count 1 and 2 but, ordered that the 14 years' of the sentence imposed in count 2 should run concurrently with the sentence imposed in count 1.

[6] In the current application *Mr Tjombe* argued the application *amicus curiae* and the court is indebted to him for his assistance herein. The state was represented by Mrs *Verhoef*.

[7] Briefly the applicant's application was brought on the following grounds:

In respect of the special entry for alleged irregularities or illegalities in terms of section 319 of the Criminal Procedure Act 51 of 1977 (herein after referred to as the Act), it was contended that:

7.1 The State failed to disclose certain evidence including documents of procedural nature. The warning statement was handed over to the court before the trial had started therefore, it was not properly produced. The Confession was taken before the warning statement was taken and this is in contravention of Article 12 of the Constitution. There were fingerprints taken from the scene of crime but, such fingerprints were not produced as exhibits during the trial. The video footage taken at the scene of crime indicating how the offence was committed was not produced. The court a quo erred in accepting the testimony of police officer Mr Unandapo and that the proceedings were not in accordance with justice as the court a quo failed to take into consideration all the evidence.

In respect of the application to lead further evidence in terms of section 316(3) of the Act, the argument is that:

7.2 The applicant applied for his conviction and sentence to be set aside and for the matter to be remitted before the trial judge for hearing of further evidence regarding the warning statement.

[8] In response to the issues raised by the applicant, Counsel for the state submitted that the applicant, in his application for special entry and irregularities, does not refer to any new evidence. Further that all the issues raised have already been ventilated during trial and some were part of his grounds for leave to appeal which was refused by this court and this court would therefore, not have jurisdiction to hear the applicant on the same issues. It was further submitted by Counsel for the state that even if this court had jurisdiction to entertain the matter the applicant's application to lead further evidence would require to meet certain requirements namely;

(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial. (b) There should be a prima facie likelihood of the truth of the evidence (c) The evidence should be materially relevant to the outcome of the trial. See *S v De Jager* 1965 (2) SA 612 (A).

[9] Both Counsel for the state and counsel *amicus curiae* are *ad idem* that the application for leave to appeal was already heard by this court and that this court lacked jurisdiction to hear the matter.

Both counsel referred me to several authorities.

[10] Having heard arguments from both counsel, it should now be determined as to whether this court has jurisdiction to entertain the application for condonation for leave to appeal, to lead further evidence and to make a special entry after the applicant had petitioned the Chief Justice as already stated, his application was partially successful when he was granted leave to appeal against sentence.

[11] Section 316(9)(a) of the Act states as follows:

‘The decision of the Appellate Division or of the judges thereof considering the petition, as the case may be, to grant or refuse any application shall be final.’

[12] This court heard the application for leave to appeal against conviction and sentence in 2014 and dismissed it. After petitioning the Chief Justice, the applicant’s case was heard in the Supreme Court where the court gave its decision. An application for leave to appeal can therefore not be entertained by this court as the matter has already been adjudicated upon by a superior court whose decision is final.

See *S v Strowitzki* 2003 NR 145 (SC)

As to the application for a special entry, I can only quote with approval the passage from *Sefatsa and Others v Attorney-General, Transval*, (304/88)[1988] ZASCA 143;[1989] 4 All SA

336 (AD) (23 November 1988) which reads as follows:

'There is no judgment of this Court in which it has been held that a special entry may be made after an appeal against a conviction has been dismissed by this Court, and I am of the opinion that the Legislature did not intend that a special entry relating to a conviction could be made after the dismissal of an appeal against that conviction.'

[13] In applying the above principles, the applicant has no right to bring this matter back to this court. He had exhausted all the avenues available to him. This court has no jurisdiction to entertain the matter as it is *functus officio*.

In the premises the following order is made:

- (a) This Court has no jurisdiction to entertain the application for condonation for late filing of leave to appeal, to lead further evidence and to make a special entry.
- (b) The application is struck from the roll and it is regarded as finalised.

Judge's signature	Note to the parties:
	Not applicable.
Counsel:	
Applicant	Respondent
<p><i>Mr Romeo Manellito Schiefer</i></p> <p><i>Mr Norman Tjombe (Amicus Curiae)</i></p> <p style="text-align: center;"><i>of</i></p> <p><i>Tjombe Elago Incorporated</i></p>	<p><i>Mrs Verhoef</i></p> <p style="text-align: center;"><i>of</i></p> <p><i>The Office of the Prosecutor General</i></p>

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