



**REPORTABLE**

CASE NO: SA 15/2018

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**THE STATE**

**Appellant**

and

**DINALOMWENE HAIKALI**

**Respondent**

**Coram:** MAINGA JA, HOFF JA and FRANK AJA

**Heard:** 4 July 2019

**Delivered:** 30 July 2019

**Summary:**

The respondent was discharged in terms of s 174 of the CPA by the Walvisbay Magistrate's District Court. Aggrieved with the discharge, the State filed with the court a *quo* application in terms of s 310 of the CPA. In place of granting leave to appeal, the learned judge considered or treated the application as if it was an appeal before her. She set aside the discharge of the respondent in terms of s 174 and remitted the matter back to the trial court to proceed in compliance with the order. Although the State received the judgment they ultimately desired, they

realised that allowing it to stand would set a bad precedent, so they approached the court *a quo* again in terms of s 310(5) to grant them leave to appeal to this court.

*Held* that the court *a quo* delivered an appeal judgment which in terms of s 310 was wrong.

*Held* that the learned judge jumped the gun, when she set aside the decision of the Walvisbay Magistrate's District Court, which is procedurally bad in law.

*Held* that it was procedurally incompetent for the prosecution to have approached the court *a quo* again for leave to appeal to this court.

*Held* that the leave granted by the court *a quo* is invalid and therefore there is no proper leave before this court.

*Held*, given the irregularities in this case, and the period the case has been on the District court roll since 2012, it would be an injustice to the respondent and his co-accused for this court to strictly abide by the rules of procedure denying the PG the relief she is seeking correcting a wrong judgment.

*Held* in terms of s 16 of the Supreme Court Act, this court reluctantly without establishing a precedent reviews the proceedings that took place before the court *a quo*, by setting aside the judgment of the court *a quo* delivered on 23 June 2016 and substituting that judgment as follows: The PG is granted leave to appeal the s

174 discharge of the respondent in case number MVB-CRM 4051/2012 in the Walvisbay District Court.

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## APPEAL JUDGMENT

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MAINGA JA (HOFF JA and FRANK AJA concurring):

### Introduction

[1] This is an appeal against a judgment of Usiku J delivered on 23 June 2016.

[2] The State had filed with the Registrar of the High Court (Main Division) an application in terms of s 310(1) read with s 310(2) of the Criminal Procedure Act 51 of 1977 (“the Act”), as amended. The application was filed with the sole purpose to apply for leave to appeal against the discharge of the respondent in terms of s 174 of the Act by the Walvisbay Magistrate's District Court.

[3] The record shows that the application for leave to appeal was heard on 23 April 2016, and argued by one Mr Moyo of the office of the Prosecutor-General (“the PG”) who was assigned to handle the application appearing for the appellant and Mr Siyomunji appearing for the respondent. It is not clear from the record whether the hearing was in chambers or in open court, but from Mr Siyomunji's confirmatory affidavit in the application for leave to appeal to this court, he states that judgment was delivered in court, hence it is very likely that the s 310 application was also heard in court.

[4] Both Mr Moyo and Mr Siyomunji were present to note judgment. In place of granting leave to appeal, the learned judge considered or treated the application as if it was an appeal before her. In fact the judgment is headed "Appeal Judgment". The learned judge found that on the evidence on record, respondent should have been put on his defence. She set aside the discharge of respondent in terms of s 174 and remitted the matter back to the trial court to proceed in compliance with the order.

[5] Mr Moyo in his affidavit seeking condonation for the late filling of the application for leave to appeal to the Supreme Court states that when the judgment was delivered on 23 June 2016 he noticed the anomaly in the handling of the s 310 application by the learned judge and intended to inform the PG, but she was on sick leave at the time. He thought the judgment was in any case the ultimate result the PG's office desired and believed that it was in order. The PG's office then gave instructions to the prosecutors at the Walvisbay District Court to comply with the judgment.

[6] When the PG returned to her office, Mr Moyo continued to believe that the judgment was in order. Much later upon reflection he realised that the judgment would be a bad precedent. On 19 July 2016 he approached the PG and informed her of the judgment. The PG's reaction was to instruct him to appeal the judgment immediately.

[7] In accordance with the PG's instruction, Mr Moyo filed a condonation application and an application for leave to appeal to the Supreme Court, which

applications were accompanied by the supporting affidavits of the PG and Mr Siyomunji for the respondent. He purports to have acted in terms of s 310 (5)(a) and (b) of the Act, but sought leave from Usiku J. Section 310 (5) provides:

(5) (a) Any decision of a judge under subsection (1) in respect of an application for leave to appeal referred to in that subsection, may be set aside by the Supreme Court on application made to it by the Prosecutor-General or other prosecutor or the accused within 21 days after the decision was given, or within such extended period as may on application on good cause be allowed.

(b) Any application to the Supreme Court under paragraph (a) shall be submitted by petition addressed to the Chief Justice, and thereupon the provisions of section 316 (6), (7), (8), (9) ad (10) shall apply *mutatis mutandis* in respect thereof.'

See also *S v Mujiwa* 2007 (1) NR 34 HC at 39A. The application for leave to appeal to this court was argued by Mr Moyo appearing for the State and Mr Ipumbu for the respondent. The ground of appeal in the application for leave to appeal to this court was that the learned judge erred to have considered the application in terms of s 310 (1) of the Act as if it was an appeal. The condonation application was not opposed and leave was granted. What necessarily follows from the provisions of s 310(5) is that it was procedurally incompetent for the prosecution to have approached Usiku J for leave to appeal. That much Mr Moyo conceded in his oral argument before us. It further follows that the leave granted by Usiku J is invalid and one can safely say there is no proper leave before us.

[8] In this court Mr Moyo supported by Mr Ipumbu for the respondent persisted with the same ground of appeal.

[9] Section 310 is headed, 'Appeal from Lower Court by Prosecutor-General or other prosecutor.' In summary form that section provides:

'(1) The Prosecutor-General or, if a body or a person other than the Prosecutor-General or his or her representative, was the prosecutor in the proceedings, then such other prosecutor may appeal against any decision given in favour of an accused in a criminal case in a lower court, including-

(a) any resultant sentence imposed or order made by such court;

(b) any order made under s 85(2) by such court;

to the High Court, provided that an application for leave to appeal has been granted by a single judge of that court in chambers.'

[10] Subsection 2(a) then provides that the application for leave to appeal contemplated in subsection 1(b) shall be lodged with the registrar of the High Court by the PG or other prosecutor within a period of 30 days of the decision, sentence or order of the lower court, as the case may be, or within such extended period as may on application on good cause be allowed. Subsection 2(b) provides that the notice should briefly state the grounds for the application.

[11] Subsection 3 which is irrelevant for this judgment because the respondent was represented provides that at least 14 days before the day appointed for the hearing of the application, the PG or other prosecutor should cause to be served by

any police official or deputy sheriff upon the accused in person a copy of the notice, together with a written statement of the rights of the accused as provided for in ss 4. Subsection 4 requires the accused within a period of 10 days of the serving of the PG's notice upon him or her or within such extended period, lodge a written submission with the registrar and the registrar should submit the same to the judge who is to hear the application and a copy thereof to the PG or other prosecutor.

[12] In this case the notice contemplated in ss 3 must have been served on Mr Siyomunji who represented the respondent and he must have complied with the provisions of ss 4, for the record shows that he appeared before the judge who heard the application and noted the judgment when it was delivered.

[13] The record reveals that the PG or her representative Mr Moyo complied with the provisions of ss 1(b), 2(a) and (b) and 3 and Mr Siyomunji, with ss 4 given my observations in para [12] above.

[14] All that the judge who heard the application needed to do was to grant or refuse the application. It is apparent that she was inclined to grant the application and should only have granted the leave to appeal, but instead she inadvertently delivered an appeal judgment which in terms of s 310 was wrong. Had she granted the application, the order granted and the record of the proceedings of the Walvisbay District Court would have been returned to the registrar who in turn would have made the same available to the PG or her representative Mr Moyo. The PG would then thereafter instruct the Walvisbay District Court or the prosecutors at that court to cause the record to be prepared and the appeal

against the decision of the Walvisbay Magistrate would have been lodged in the High Court and heard by a full bench. If the judge had refused the application, the PG or her representative would have petitioned the Chief Justice for leave to appeal as provided for by ss 5(b).

[15] What the learned judge did in this case, was to jump the gun so to speak which is procedurally bad in law.

[16] The scenario I sketched above is rife with irregularities occasioned by both the State and the court. As I have already stated, in my opinion, but for the irregularities, there is no appeal before us and we should have struck the matter from the roll, which would have placed the prosecution back in the position they were before they approached this court. The chances that they would have successfully petitioned the Chief Justice for leave, given the prosecution's own mistakes are nil which would leave the bad judgment standing. Given this dilemma, Mr Moyo argued that this court can rescue the situation by exercising its powers in terms of s 16 of the Supreme Court Act, 15 of 1990. Mr Moyo further indicated that once the PG had asked him to appeal the decision of Usiku J, they reversed the earlier on decision instructing the Walvisbay District Court to comply with the decision of Usiku J. He further stated that the case has stalled in the Walvisbay Magistrate District Court pending the outcome of the appeal. The district court shows that respondent and his co-accused were arrested on 2 October 2012 and first appeared in court on 3 October 2012. In October this year, this case would be seven years on the roll of the district court. What a sad



situation, anxiety of the outcome of the case must be killing the respondent and his co-accused.

[17] Section 16 (1) and (2) provides-

‘(1) In addition to any jurisdiction conferred upon it by this Act, the Supreme Court shall, subject to the provisions of this section and section 20 have the jurisdiction to review the proceedings of the High Court or any lower court, or any administrative tribunal or authority established or instituted by or under any law.

(2) The jurisdiction referred to in subsection (1) may be exercised by the Supreme Court mero motu whenever it comes to the notice of the Supreme Court or any judge of that court that an irregularity has occurred in any proceedings referred to in that subsection, notwithstanding that such proceedings are not subject to an appeal or other proceedings before the Supreme Court: Provided that nothing in this section contained shall be construed as conferring upon any person any right to institute any such review proceedings in the Supreme Court as a court of first instance.’

[18] Given the circumstances of this case including the period the case has been on the roll in the district court Walvisbay, we have no choice but to reluctantly, without establishing a precedent, review the proceedings that took place before Usiku J. To strictly follow the letter and spirit of the Act particularly leave to appeal would further cause untold injustice to the respondent and his co-accused in this case.

[19] As a result I make the following order:

1. The judgment of Usiku J of 23 June 2016 is set aside and it is substituted as follows:-

The Prosecutor-General is granted leave to appeal the s 174 discharge of the respondent in case number WVB-CRM 4051/2012 in the Walvisbay District Court.

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**MAINGA JA**

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**HOFF JA**

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**FRANK AJA**

APPEARANCES:

Appellant:

E Moyo

Of the office of the Prosecutor-General,

Windhoek

Respondent:

T Ipumbu

Of Ipumbu Legal Practitioners,

Windhoek