IN THE HIGH COURT OF NAMIBIA

CASE NO. CC 40/93

In the matter between

THE STATE

versus

HAUPINDI NTOSE

CORAM: TEEK, J.

JUDGMENT

TEEK, J.: The accused in this matter, Haupindi Ntose, a 28 year old male of Namibian nationality, is charged with the crime of murder. In that on or about the 1 December 1991, and at or near Mupini in the district of Kavango, the accused unlawfully and intentionally killed one Kapumburu, a male person.

On the 25 March 1993, when the matter was called before me and before accused pleaded, the prosecution, handled by Mr Potgieter, applied for a postponement and let the evidence of the investigating officer, Serg. van Wyk, in support of this application. The application was apposed by the Defence which is handled by Mrs. Turck.

Serg. van Wyk, in essence testified that the key witnesses are absent, though he received the subpoenas in January

1993, he failed to serve them on the witnesses because he had inter alia transport problems. He merely informed the witnesses sometime in February 1993 that he will pick them up on the 23 March 1993 and also informed them about the trial date. On the 23 March 1993, he could not find the witnesses who have moved to Angola. The witnesses are family of the accused and according to him appeared to be reluctant to testify against the accused. He, that is Serg. van Wyk, does not know where in Angola the witnesses find themselves and conceded that he has no authority to compel witnesses in a foreign country to attend trial in Namibia. He also conceded that he cannot guarantee or give the assurance of the presence of the witnesses at Court if a postponement was granted. He further conceded under cross-examination that on the 13 July 1992 the magistrate at Rundu refused further postponement for purposes of further investigation. On that same day, the magistrate was informed that the investigation was complete and the accused was eventually asked to plead. The accused pleaded not guilty. He further conceded that the witnesses' statements were in fact only obtained in the case of Mr Jacob Mbange on the 17 July 1992, in the case of Nkayi and Gwosa, on the 18 June 1992. From this it can be concluded that when he informed the Court that his investigation was complete, he was referring to the two statements of Nkayi and Gwosa, which were taken on the 18 June 1992, but not that of Mbange, which was taken on the 17 July 1992 which is about 4 days after he informed the magistrate of the finality of his investigation.

The accused has been in custody for about 16 months now and

the case against him has been postponed approximately 9 times for further investigation. For all these reasons stated above, it appears that the chances of procuring the presence of these witnesses referred to are minimal. Our Constitution, article 12 stipulates that a trial of an accused,

> "shall take place within reasonable time, failing which the accused shall be released".

As mentioned above, the accused has been in custody for about 16 months now. This trial has been lingering since December 1991. The accused did nothing to cause or contribute to the delay of the trial. He cannot be held responsible or punished for the State's failure to find the needed witnesses. In the circumstances of this particular case, for a trial to take more than 16 months before it takes place, can hardly be referred to as "within a reasonable time" as required by our Constitution. What is "reasonable time" depends on the facts and circumstances of the peculiar case. In my view, one cannot couple "reasonable time" to a definite or approximate time or period, for this is dependant on the facts and circumstances of a particular case and circumstancej and procedures applicable in such an instance vary from country to country. According to section 168 of the Criminal procedure Act 51 of 1977, the Court may adjourn proceedings to any

an oversight or because of a mistake that can be rectified.

b. That an accused person who is deemed to be innocent is entitled to once indicted to be tried with expedition."

I refer here to the State vs Geritis, 1966(1) SA, p.753, (W.L.D.) in which it was stated inter alia at pp 754 H -755 A.

"It is necessary, therefore, in such a case as this first to satisfy the Court the persons are material witnesses, secondly to show that the party applying has been guilty of no laches or neglect in omitting to apply to them and endeavour to procure their attendance, and thirdly, to satisfy the Court there is a reasonable expectation of his being able to procure their attendance at the future time to which he prays the trial to be put."

I am satisfied that the absent witnesses are material ones, but equally there has been some neglect on the part of the investigating officer by failing to serve the subpoenas on the witnesses. There is no prove that there is a reasonable prospect whatsoever that the witnesses will be traced and their attendance in Court secured on the anticipated date in September 1993. Indeed the investigating officer conceded that there is no assurance that the witnesses will be traced and their presence in Court secured. Bearing in mind that the accused has been in custody for over 15 months and that the postponement sought is not a short one, but approximately another 6 months, and in all the facts and circumstances I have referred to, I cannot visualise facts

and circumstances in which such an application can be granted. The neglect and lack of reasonable expectations in this matter are such that it would cause an injustice to the accused to grant the application.

In the result the application for adjournment is refused and it is ordered that the proceedings proceed.

Now, Mr Haupindi Ntose, the case against you has been withdrawn by the prosecution, you are free to go. Your counsel will explain to you the possible implications and consequences of such withdrawal.