CR ***130/2001***

MARGARET *MALAMA-KEAN* vs THE MAGISTRATE FOR THE DISTRICT OF OSHAKATI N.O. & THE PROSECUTOR-GENERAL

CONSTITUTIONAL LAW

Meaning of "released" in Article 12(l)(b) considered. The Court differed from the judgment in van as & *Another* v *The State* (A. *267/99).* The Court held that "released" constitutes not only release from *custody and release from bail* or conditions of bail; but also release from further *prosecution.*

MARGARET MALAMA-KEAN **APPLICANT**

and

HAKATI N.O. **SECOND RESPONDENT**

THE PROSECUTOR-GENERAL **FIRST RESPONDENT**

THE MAGISTRATE

CORAM:

HANNAH, J *et* MARITZ, J *et* MAHONI: 2001-10-15

HANNAH, J.: On 7th September, 2001 we made the following order in this application:

"IT IS ORDERED

1. The Notice of Motion is amended by the insertion of the words "and/or the decision of the first respondent on 5th July 2001" after the word "proceedings" in paragraph 2 thereof;

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2. The order of the first respondent made in the Magistrate's Court, Oshakati, in case no. 491B/2000 on 5th July 2001 refusing to release the applicant under Article 12(l)(b) of the Constitution from the conditions of her bail is set aside and substituted for the following order:

"The accused is released on bail in the amount ofN$50 000.00 and she is warned to appear in the Regional Magistrate's Court at Oshakati on 13 July 2001, failing which, she may be arrested and her bail may be forfeited";

2. The applicant is released in terms of Article 12(1)(b) of the Constitution from all the of the application."

We said that we would give our reasons for making the order at a later date. Our reasons are as follows.

We heard the application on 31s1 August simultaneously with an appeal brought by the applicant against the order of the first respondent made on 5th July and referred to in paragraph 2 of our order made on 7th September. When dealing with the background I will extract certain facts which are to be found in the appeal record.

The applicant is a Zambian citizen married to a British national. They have six year old twins and their home is in the United Kingdom. In February, 1997

the applicant was appointed as Chief Executive Officer of a Non-Governmental Organisation called

required to report once daily. The State agreed that the reporting condition be reduced to once daily but otherwise opposed the application. It was pointed out that it was for the Prosecutor-General to decide whether the case against the applicant should be withdrawn and as it involved N$l 000 000,00 all the other conditions of bail should remain in place. This submission was upheld by the magistrate and the case was postponed to 19th December for the finalisation of the investigation.

On 19th December Ndamona Ndeulita

was joined as second accused and she was granted bail of NS50 000. The State was still not ready to proceed and the case was postponed to lstFebruary, 2001. On that day the public prosecutor informed the court

that the case was still under investigation and a further adjournment was granted to 9lh April. On 9lh April the

re the High Court on 15th June. Also before court on that day was an application by the State that the matter be remitted to the Magistrate's Court for a proper hearing of the applicationfor postponement. The basis for that application was an allegation that the magistrate had erred by allowing the applicant to testify before the investigating officer was called and then compounded that error by refusing to allow the public prosecutor to call the investigating officer. The High Court ruled in favour of the State and remitted the matter to the Magistrate's Court for further consideration.

On 26th June the application for a postponement resumed in the Magistrate's Court and the State called the investigating officer, Inspector Mulimina. His explanation for the delay in

com pleti ng the inve stiga tion was that in July, 200 0 he was told by the law yer acti ng for CD Na mibi a and the law yer

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as envisa ged i Rule 6(12) of th rules of th High Court of Nami bia.

4. Order ing that the proce eding s i the Magis trate's Court for the distric t o Oshal ati, held at Oshal ati i case numb er 491/B /2000 (State versu Marg ret Mala ma- Kean be se aside.

5. Order ing that the Appli cant be releas ed, forth

with, as envisaged in Article 12(l)(b) of the Constitution of the Republic of Namibia.

6. Ordering the Second Respondent to pay:

(i) the costs of this application;

(ii) the costs of the High Court proceedings incurred by the Applicant in the appeal lodged by the Applicant against the nding or order of the First Respondent handed down on 9 April 2001;

(iii) the costs incurred by the Applicant in all the proceedings conducted in the Magistrate's Court for the district of Oshakati after 30 July 2000, to date, on a scale as between attorney and own client.

5. Further and/or alternative relief."

the applicant with a copy of the investigation diary on 24th August, 2001, the very same day that Mulimina swore his affidavit. This diaiy tells a very different story to that told by Mulimina when he testified in the Magistrate's Court. According to the investigation diary, which is annexed to the applicant's replying affidavit, Mulimina took at least twenty statements between the end of July and November, 2000 and also obtained a variety of documents. If the investigation diary is correct, and there is no reason to think that it is not,

Mulimina withheld this vital information when making the affidavit which was placed before the High Court and also when testifying in the Magistrate's Court. And it is also highly significant that the alleged instructi

on give n to Mul imin a to stop the inve stiga tion find s no men tion avits which have been filed do, of course, reveal a dispute of fact and the general rule is that relief may only be granted if the facts as stated by the respondent together with the admitted facts in the applicant's affidavits justify an order. However, there are exceptions to this general rule. Where a statemen t in the responde nt's affidavits is clearly untenabl e then the Court may

reject it merely on the papers. *See Associated South African Bakeries (Pty) Ltd* v *Oryx Vereinigte Backereien (Pty) Ltd en Andere* 1982(3) SA 893 (A) at 923G-924D. In my view, the statement made by Mulimina that Thambapilai requested him to suspend the investigation falls squarely into this category. Once account is taken of the investigation diary kept by Mulimina it becomes clear that his stratagem of laying the blame for the delay in completing the investigation at the feet of the applicant is without proper foundation. What happened seems to me to be clear. Mulimina pursued the investigation with some vigour but a month or so after learning that settlement negotiations were in progress he lost interest and for several months did nothing. The delay complained of is the responsibility of the State.

Further, even if we were to decide this matter on the basis of the alleged instruction by the defence lawyer to stop investigations we would be driven to the same conclusion. Once the State commences criminal proceedings it has a duty actively to pursue those proceedings. It is not for the State or its officials to take instructions and allow the proceedings to lie dormant.

The applicant asserts that the delay in bringing her to trial was unreasonable and that her constitutional right to be tried within a reasonable time has therefore been infringed. What constitutes a reasonable time for the purposes of Article 12(l)(b) was considered at some length in *S* v *Heidenreich* 1995 NR 234 and I do not propose to repeat what was said in that case in this connection.

Time started to run on 27th June, 2000 when the applicant was arrested. At that stagethe police had not started their investigation. The arrest was made on the complaint of CD Namibia and was in

the nature of a pre-emptive strike due to the fairly imminent departure of the applicant from the country. In these circumstances there was a heavy burden on the State to pursue the investigation with vigour and complete it as soon as was reasonably possible. Yet it was not until June of the following year that the investigation was completed and the earliest trial date which could be given was October, 2001, some sixteen months after the applicant's arrest. That, in my view, is delay which is presumptively prejudicial.

I take account of the fact that the case against the applicant is, in all probability, a complex one but that does not weigh too heavily with me. I respectfully agree with the following observation of Kriegler, J. in *Sanderson* v *Attorney-General, Eastern Cape* 1998(1) SACR 227 at 243 f:

> "If a person has been charged very early in the complex case that has been inadequately prepared, and there is no compelling reason for this, a court should not allow the complexity of the case to justify an over-lengthy delay."

Next, there is the neglect on the part of the investigation officer to pursue the in\estigation with vigour. The ultimate responsibility for such neglect must rest with the State, not the applicant.

Then there is the question of the applicant asserting her rights. While it is true that it was not until April, 2001 that the applicant resisted an application by the State for a further postponement she and her lawyers had, in the year 2000, been misled by statements by the public prosecutor suggesting that the investigation was continuing when in fact it was not. As the applicant's lawyer, Thambapilai, states, and it is stated on oath, had he been aware of the fact that the investigation had been halted he would have objected to the postponements.

Coming to the question of prejudice suffered by the applicant due to the delay, there are present tre obvious kinds of prejudice such as social prejudice and the requirement in her conditions of bail that she reports daily to the police. But looming larger is the fact that her husband and children were required to leave Namibia and as a result of the delay she has been separated from her family month after month. Also, she has not been in a position to take gainful employment.

Still under the heading of prejudice lies the question of trial-related prejudice. The applicant alleges that

due to the inordinate delay it will be difficult, if not impossible, to trace potential defence witnesses many of whom will have left the country as CD Namibia has, since her arrest, ceased its operations. The applicant can do no more than generalize because at the stage when this application was launched she was not in possession of the prosecution docket and therefore had no knowledge of the details of the case being presented against her. Trial-related prejudice is only speculative at this stage.

As was pointed out in *Heidenreich's* case *(supra),* what is required when considering whether the time which has lapsed in bringing an accused to trial is reasonable or not is a balancing exercise and ultimately a value judgment. Having weighed and considered all the factors just mentioned I am satisfied that the trial of the applicant has not taken place within a reasonable time and accordingly she is entitled to relief in terms of Article 12(l)(b).

That brings me to the meaning to be given to the word "released" as used in the Sub-Article. In *Heidenreich's* case *(supra)* the following was said on this question at 242 F- 243 A:

> "This question was briefly considered by O'Linn in *S v Strowitzki and Another* 1995(1) BCLR 12 (Nm) at 35-6. Having referred to what is called in the United States 'dismissal with prejudice' and the fact that according to certain writers this remedy is only permissible in the United States where the ability of the accused to defend himself is gravely impaired, the learned Judge continued:
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> "The Namibian Constitution provides a specific remedy for failure to bring to trial within a reasonable time, namely: "The accused shall be released."
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> This appears to mean 'released from incarceration'. It may also include release from onerous conditions of bail. *Prima facie,* it does not seem to include a permanent quashing or stay of prosecution.'
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> As Mr Small, who appeared for the State, pointed out to us by reference to certain dictionaries, the term 'released' can have a variety of meanings and could, as O'Linn J rather tentatively concluded, mean freed from custody or relieved from certain onerous conditions of bail. But when regard is had to the underlying purpose of art 12(1)(b) I am of the view that a broader, more liberal, construction should be given to the word. Once the main purpose of the sub-article is identified as being not only to minimize the possibility of lengthy pre-trial incarceration and to curtail restrictions placed on an accused who is on bail but also to reduce the inconvenience, social stigma and other pressures which he is likely to suffer and to advance the prospect of a fair hearing, then it seems to me that 'released' must mean released from further prosecution for the offence with which he is charged. It is only by giving the term this wider meaning that the full purpose of the sub-article is met. Release from custody or from onerous conditions of bail only meets part of the purpose of the sub-article."

However, in the case of *Van As & Another* v *The State* (A. 267/99) a Court comprising of three judges took a different view of the matter. It made a declaration that where an accused is released by virtue of the provisions of Article 12(1)(b) such release will not constitute a permanent stay of prosecution. The

Van As case was a curious one. Van As and his co-applicant were on trial in the High Court on a charge of murder. They wanted to bring an application for their release in terms of Article 12(l)(b) but before doing so applied to the High Court to

"provide guidelines as to the procedure to be followed and the legal principles applicable to an application for the permanent stay of criminal proceedings in terms of an accused person's right to a fair trial in terms of Article 25(2) of the Namibian Constitution." The application then posed a number of questions.

In contending that the Court had jurisdiction to provide guidelines and lay down legal principles, counsel for the applicants purported to rely on Rule 33(4) of the High Court Rules but in its judgment, which was delivered on 14 December 2000, the Court held that that Rule was not applicable. The Court then went on to consider whether the word "release" in Article 12(1)(b) means release from prosecution and made the declaration to which I have already referred purporting to do so, according to the written judgment, in terms of section 16(4) of the High Court Act. The reference to (4) must have been a mistaken reference to (d).

The material part of section 16 reads as follows:

> "The High Court shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within Namibia and all other matters of which it may according to law take cognizance, and shall, in addition to any powers of jurisdiction which may be vested in it by law, have power-
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> (a) .....
>
> (b) .....
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> (d) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."

I very much doubt whether the declaration made by the Court constituted a determination of an "existing, fumre or contingent right or obligation" but even if it does it is quite clear that in the application before the Court there was no person, let alone an interested person, seeking such a determination. The meaning of "release" in Article 12(l)(b) was not a question before the Court. And neither counsel for the applicants nor the Deputy Prosecutor-General, Mr Small, who appeared for the

State, argued for the restrictive construction which the Court ultimately gave to Article 12(l)(b). It must follow that what was said by the Court in that connection was entirely obiter.

Quite apart from the foregoing, and I say this with great respect for the learned judges concerned, I am convinced that the decision was wrong. The principal reasoning appears in the following passage:

> "With great respect to the learned judges who heard *Heidenreich's* case, the effect of Article 12(l)(b) was never intended to be more than release 'from arrest or from onerous conditions of bail' as decided by O'Linn J *mState v Strowitski* 1995(1) BCLR 12 (Nm) (judgment delivered on 22nd April 1994). The learned judges in *Heidenreich's* case gave to the word 'release' a meaning to 'acquit'. At page 239 I to J, the Court said;
> 'The general approach when construing constitutional provisions is that the provisions are to be 'broadly, liberally and purposively' interpreted; *Government of the Republic of Namibia* v *Cultura 2000 and Another* 1994(1) SA 407 (NmS) at 418F, and if this canon of construction is to be relied upon it is as well to identity expressly the underlying purpose of the constitutional provision under consideration.'
> With due respect, this 'canon of construction' does not permit a court to give a word the meaning it does not have. *In Minister of Defence v Mwandinghi* 1993 NR 63 at 69 I to J a Full Bench in a joint decision by Berker CJ, Mahomed AJA and Dumbutshena AJA said the following: 'H M Seervai, citing what was said by Gwyer CJ, remarked, in *The Constitutional Law of India* 3rd ed Vol I at 68, that
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> a broad and liberal spirit should inspire those whose duty it is to interpret the Constitution; but I do not imply by this that they are free to stretch or pervert the language of the enactment in the interests of any legal or constitutional theory, or even for the purposes of supplying omissions or correcting supposed errors.'
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> It is trite that a court must start with the interpretation of any written document whether it be a Constitution, a statute, a contract or a will by given the words therein contained their ordinary literal meaning. The Court must ascertain the intention of the legislators or author or authors of the document concerned and there is no reason to believe that the framers of a Constitution will not use words in their ordinary and literal sense to express that intention. As was said by Innes CJ in *Venter v R* 1907 T.S. 910 at 913; 'By far the most important rule to guide courts in arriving at that intention is to take the language of the instrument, or of the relevant portion of the instrument, as a whole; and, when the words are clear and unambiguous, to place upon them their grammatical construction and give them their ordinary effect.' This has been followed in Namibia on countless occasions. Where a particular word in its ordinary sense has more than one meaning, an ambiguity can arise and only then does one have recourse to other methods of ascertaining the intention of the authors concerned as to what the meaning was which the authors intended the word should have. One need not consult a dictionary for the meaning of the word 'release'. It is frequently used by members of the public and by lawyers in courts and in documents. In the instant case, the word is used in Article 12 which deals with a fair trial. In the same Article the framers of the Constitution used the word 'acquit' and dealt with the effect thereof, namely, having been acquitted an accused could not be charged again.

These two concepts namely 'release, because the trial has not taken place within a reasonable time' and 'acquit' where the trial has been completed appear in the same Article. It is therefore logical to contrast the concepts and not to give them the same meaning.

It is true the framers of the Constitution did not recite what the effect of a 'release' would be. This is not a *casus omissus* as it was not necessary to elaborate on the normal consequences of a person who is being prosecuted, being released. A person who is prosecuted is arrested in order to be prosecuted but may be on bail. Where such person is released from arrest and bail it does not terminate the prosecution. One can attend a trial on a 'warning' from the Court and one can be on one's own recognisances and still be prosecuted.

In *R v Stevens* 1969(2) SA 572 (RAD) at 577, Beadle CJ said;
'.....when the meaning of a section is plain.…the mere fact that there may be a *casus omissus* in the section does not seem to me to justify a departure from its plain meaning and this is more especially so when that plain meaning appears to accord with the intention of the Legislature.'
In any event there is no need to interpret the Sub-Article as having a *'casus omissus'*. In *Dhanabakium* v *Subramanian and Another 1943* AD 160 at 170-1, Centlivres, J A said;
'The conclusion at which I have arrived avoids what would otherwise be a *casus omissus* in sec. 70 and it seems to me that if a reasonable construction of an Act does not lead to a *casus omissus* while another construction does lead to that result, the construction which should be applied is the one which does not lead to that result.'
I conclude this aspect by once again referring to the Full Bench judgment in *Mwandinglii's* case quoted above, where the learned judges referred with approval to the remarks of Gwyer CJ which included a warning that in the interpretation of Constitutions one should not 'supply omissions' even when applying that 'broad and liberal spirit' for interpreting Constitutions. To give the word release its ordinary meaning (to release from arrest or bail) fits in with the scheme of the Constitution and with the existing Common Law and the Criminal Procedure Act (Act 51 of 1977) applicable before Independence in Namibia and since Independence by virtue of Article 140 of the Constitution. An example illustrates a situation which could arise if the *obiter dictum* in *Heidenreich's* case is correct. Theft in terms of the Common Law is a continuing offence. *SvElling* 1945 AD 234
An accused embezzles and steals N$ 10,000,000-00 over a period of years and invests it in a bank in Europe. He is arrested but due to his cunning, the investigation is involved. A person cannot take advantage of his own bad faith. Therefore any delay in his trial caused by his own cunning will not accrue to his benefit in deciding whether there has been an unreasonable delay. The State, however, similarly cannot benefit from its own ineptitude and if due to such ineptitude the investigation after his arrest is unduly and unreasonably delayed, the accused would be entitled to his release in terms of Article 12(1)(b). If that meant that prosecution was permanently stayed, the accused would be able to enjoy the spoils of his crime with impunity while still committing theft. This could never have been intended by the framers of the Constitution."

With great respect, I do not see how the example given at the end of this passage supports the reasoning. The only two significant consequences of theft being regarded as a "continuing" crime are 1) that the thief may be tried at the place where he is found with the stolen property; and 2) those who assist the thief after the initial *contrectatio* but while the theft "continues" are guilty of theft itself. See *South African Criminal Law and Procedure* (Vol II) at 629. I fail to see how consequences of a technical nature such as these could have had any impact on the framing of Article 12(1)(b) of the Constitution.

In its reasoning the Court proceeded on the supposition that the ordinary meaning of "released" in the context of the Sub-Article is released from arrest or bail. In making this supposition the Court appears to have considered that an acquittal and a permanent stay of prosecution amount to the same thing. The Court said:

> "These two concepts namely 'release, because the trial has not taken place within a reasonable time' and 'acquit' where the trial has been completed appear in the same Article. It is therefore logical to contrast the concepts and not to give them the same meaning."

I cannot agree. An acquittal is a setting free by verdict. A release from prosecution is a setting free as a

result of an entirely different process. It is manifestly clear to my mind that "released" in the context of Article 12(1)(b) can have three meanings namely, released from arrest/custody, released from conditions of bail and released from further prosecution, and in order to determine whether the word bears all or some or one of these meanings the Court is entitled to take a broad, liberal and purposive approach. That is what the Court did *mHeidenreich's case (supra)* and it concluded that release from custody or from onerous conditions of bail only meets part of the purpose of the Sub-Article. I adhere to that view. Relief granted in terms of the Sub-Article can constitute not only release from custody and release from bail or conditions attached to bail; but it can also constitute release from further prosecution.

Any conclusion other than that reached in *Heidenreich's case* (supra) would mean that the trial of an accused person could be delayed indefinitely. A refusal to postpone could be followed by a withdrawal of the charge in terms of section 6 of the Criminal Procedure Act and this could be followed by a fresh prosecution and so on. An accused in such a case would indefinitely suffer social stigma, inconvenience and other pressures without remedy. Another illustration, which I think is apt, is the case of an accused who, by reason of unreasonable delay on the part of theState, has suffered irreparable trial prejudice. Vital defence witnesses have died or disappeared. According to the judgment in the *Van* As case *(supra)* the accused who finds himself in such a situation has no remedy in terms of Article 12(1)(b). He must battle on without such witnesses. That could never have been the intention of the Founders of the Constitution. In my respectful view, to follow the *Van As* case *(supra)* would render Article 12(l)(b) partly ineffectual and for the reasons just given I do not intend to do so. I should mention that even Mr Botes, who appeared for the respondents, stated that he could not support that decision.

As for the order which this Court made on 7th September, we considered whether to make an order releasing the applicant from further prosecution but decided against doing so. It is a drastic order and, as was pointed out in the *Sanderson* case *(supra)* at 245 g-h, it is likely to be made only in a narrow range of circumstances such as where it is established that the accused has probably suffered irreparable trial prejudice as a result of the delay or where the State embarks on a deliberate stratagem of delay. As stated earlier, trial-related prejudice is only speculative at this stage. And the delay for which the State was responsible was caused by neglect, not willfulness. The alternatives to making an order releasing an accused from further prosecution are an order releasing him from custody or an order releasing him from some or all conditions of bail. The relief to be given will, of course, depend on the circumstances

of each case and will be governed by

the type of, and extent of, prejudice suffered as a result of the unreasonable delay in bringing him to trial. In the instant case we considered that appropriate relief would be to remove most of the bail conditions leaving only a monetary deposit of NS50 000. If Mulimina is right in his estimation of the applicant she can be trusted to return to Namibia for her trial.

Mr Botes submitted that even if we should find in favour of the applicant we should not make a costs order against either of the respondents. Neither, he submitted, was responsible for the delay. That responsibility lay with the police. In my opinion, that submission is only partly correct. Although direct responsibility for the delay lay with the police those who represented the second respondent at the numerous applications for postponement could have done much more to ascertain the true state of affairs and the second respondent did, of course, choose to oppose this application. Accordingly, we saw fit to order the second respondent to pay the applicant's costs of the application. However, we could find no basis for awarding the costs sought in prayer 4(H) and (iii) of the Notice of Motion.

MAINGA, J

For the applicant: Advocate R Heathcote

Instructed by: Messrs H Barnard & Partners

For the first and second respondent: Instructed Advocate L C Botes

by: The Government Attorney