

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

EX TEMPORE JUDGMENT

In the matter between:

Case no: CC 1/2018

**JACO KENNEDY**

**APPLICANT**

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Kennedy v State* (CC1/2018) [2019] NAHCMD 165 (17 May 2019)

**Coram:** MILLER AJ

**Heard:** 14 May 2019

**Delivered:** 17 May 2019

**Released on:** 23 May 2019

**Flynote:** Applicant charged together with co-accused with kidnaping, attempted murder, rape and attempting to obstruct or defeat the ends of justice – Matter serious transferred from Magistrate Court o to High Court – applicant filed review application with high court to set aside Prosecutor-General's decision to prosecute – on backdrop of review, applicant applied for stay of prosecution of criminal trial pending finality of the review application – Court second guess applicant relief sought – application not case specific but of general nature – coupled with absent of application to review decision to prosecute - No reason why the criminal prosecution should be stayed – application dismissed.

**Summary:** Applicant together with co-accused are charged with kidnapping, attempted murder, rape and attempt to obstruct or defeat the ends of justice. The matter was transferred from Magistrate Court to High Court due to seriousness of charges. Applicant filed application to review Prosecutor-General to transfer or to prosecute. Thereafter applicant filed application to stay criminal proceeding pending finalisation of review application. Held that application is not case specific and is of general nature, coupled with absence of application to review decision to prosecute. Held that no reason to stay criminal proceedings. Application to stay is dismissed.

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### ORDER

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1. The application for stay of criminal prosecution is dismissed.

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### JUDGMENT

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MILLER AJ:

[1] The applicant is accused no.1 in a criminal trial which is presently pending before this Court. The applicant together with one Raymond Cloete are charged with various offences including those of kidnapping, attempted murder, rape and attempting to obstruct or defeat the ends of justice.

[2] They initially appeared in the Magistrate's Court and the matter was thereafter transferred to the High Court for trial presumably in the light of the seriousness of the offences with which the applicant and his co-accused are charged.

[3] What is before me at present is an application brought by the applicant for the following relief and I quote, "criminal proceedings in the above mentioned matter to be still, pending finalisation of application proceedings in case number HC-MD-CIV-MOT-EXP2018/1117".

[4] In an affidavit supporting the application the applicant shed some light on the nature and scope of the application under the aforementioned case. He stated that he contemplates to take the decision of the Prosecutor-General in respect of matters incidental to his criminal case on judicial review. The application raises certain questions regarding the scope and powers of the Prosecutor-General to institute prosecutions.

[5] These include inter alia whether the Prosecutor-General's office is an administrative body and therefore subject to the provisions of Article 18 of the Constitution. Secondly whether the Prosecutor-General is obliged in law to afford an accused person an opportunity to make representations prior to taking a decision. Thirdly whether the Prosecutor-General has a duty to provide persons charged with written reasons for the decision. And fourthly, inter alia, whether the decisions of the Prosecutor-General are subject to judicial review.

[6] The applicant states that the relief he seeks in that application is of a declaratory nature and the strategy, if I may call it that, seems to be that depending on how the Court seized with that matter resolves the issues, to then bring an application to review the decision of the Prosecutor-General to prosecute as I understand the matter.

[7] It is apparent that at present there is no application before any Court to review the Prosecutor-General's decision. It would seem that the prayers for declaratory relief is intended to be used as a spring board to institute review proceedings should those questions be answered in favour of the applicant. The application in case 2018/1117 to which I have referred is presently pending before this Court and before another Judge who was assigned to case manage the matter. It is common cause that, that matter has still not been finalised and is still awaiting final determination. It is not certain at this stage when that particular application will be finalised.

[8] In so far as the application for a stay of the proceedings are concerned, counsel for the Prosecutor-General referred me to several cases regarding the stay of criminal proceedings where civil proceedings are pending. What these cases have in common is the fact that, the same facts in those cases gave rise to both criminal proceedings and civil proceedings and the Courts in those cases were

tasked to consider whether the criminal proceedings should be stayed pending the finalisation of the civil proceedings or vice versa.

[9] It is immediately apparent from a perusal of those cases that they are distinguishable from the facts of the present case, both in relation to the circumstances and peculiar facts pertaining to each case.

[10] The question which I should consider is whether I should stay the proceedings pending the final determination of the declaratory orders that the applicant seeks. It is clear that what the applicant ultimately seeks is an attempt to review and set aside the Prosecutor-General's decision. I do not express any view on the merits or otherwise of that pending application both in the form in which it is brought and the nature of the relief that the applicant seeks. Those questions must be determined and answered by the Court seized with that matter. The only question before me is whether I should permit criminal proceedings to proceed while that application is pending.

[12] The powers of the Prosecutor-General to institute criminal proceedings are derived both from the Constitution and the relevant provisions of the Criminal Procedure Act, No. 51 of 1977. The Prosecutor-General is empowered both by the Constitution and Criminal Procedure Act to institute prosecutions on behalf of the public and in the name of the State. It also includes the powers to terminate proceedings instituted either before the accused pleaded by withdrawing the charges or by stopping the prosecution once the accused had pleaded. In limited instances a private prosecution may be instituted but only once the Prosecutor-General has issued a certificate authorising a private person to institute a prosecution and even in that event the Prosecutor-General is empowered at any stage to intervene and take over the prosecution so to speak.

[13] The sum total of all this is that the Prosecutor-General's powers to institute and terminate criminal proceedings are fundamental to the criminal process itself. The Prosecutor-General's decision to institute a prosecution is a fundamental corner stone of the criminal trial itself, since without it, no prosecution can legitimately take place, except in those limited instances as I have indicated where a private prosecution is authorised.

[14] In case 2018/1117 the applicant seeks to attack the validity of the powers of the Prosecutor-General and the extent and nature of those powers, and may ultimately as I have indicated seek to review the decision based on those findings. It goes without saying that in granting the stay of the criminal prosecution as I am asked to do, will have the inevitable result that the commencement of the trial will be delayed. It is a matter of speculation at this stage as to what period of time such delay will take. The applicant says in his founding affidavit that the application is not concerned with the legality of Section 65 to request by the Prosecutor-General to transfer the case to the Windhoek High Court. He says that he however takes issue with the process employed to hastily formulate the decision and to use it as a basis for the unexpected sudden transfer by the prosecution. He goes on to add that if the declaratory prayers are answered in his favour and particularly the first two I have mentioned it would mean that the process of formulating the decision would be fundamentally flawed and inconsistent with Articles 12 and 18 of the Constitution. He goes on to add that in that event the transfer process from the criminal, of the criminal case from the lower Court to the High Court would constitute a potentially irregular proceeding.

It follows from all this that the essence of the applicants complaint is the transfer of the matter from a Lower Court to the High Court. Section 75 of the Criminal Procedure Act entitles the Prosecutor-General to transfer a case from the Lower Court to the High Court in appropriate circumstances and without going through the procedures prescribed by Section 119 of the Criminal Procedure Act.

[15] It is apparent from the foregoing that it is not always easy to discern what exactly it is that the applicant has in mind. By that I mean does he seek to challenge the validity of the decision taken by the Prosecutor-General to prosecute him or does he simply seek to challenge the decision of the Prosecutor-General to transfer the case to the High Court in terms of Section 75 of the Criminal Procedure Act? If it is the former, the question ultimately arises why there has been no attempt thus far to seek to review and set aside the Prosecutor-General's decision.

[16] Had that been a live issue before this Court at present, it may well have been that I would have been inclined to grant a stay of the prosecution pending the

outcome of that review. However as I had indicated the application presently pending before the High Court does not seek to review or set aside the Prosecutor General's decision to prosecute the applicant. As far as I can discern from the applicant's founding affidavit the questions which he seeks to have answered by the Court are of a general nature and not case specific to the case presently pending against the applicant and his co-accused.

[17] The question which ultimately requires an answer from me is whether the declaratory orders that the applicant seeks should have the result that the present criminal proceedings should be stayed. Having considered these factors which I have mentioned and for all the reasons I have indicated it seems to me that absent an application to review or set aside the decision of the Prosecutor General to institute criminal proceedings against the applicant in the High Court, there is no reason why the criminal prosecution should be stayed. Even if the questions posed by the applicant in the declaratory order, were to be answered in his favour it does not automatically follow that the decision to prosecute the applicant is automatically reviewed and set aside.

[18] It seems to me that even if those questions were to be answered in favour of the applicant, he would then be able if so advised to bring an application to review and set aside the decision to prosecute him.

[19] On the papers before me there is nothing to indicate any irregularity in the decision of the Prosecutor General to continue with the prosecution and in my view the criminal prosecution should be allowed to continue despite the pending application for the declaratory orders that the applicant seeks.

[20] In the result:

1. The application for stay of criminal prosecution is dismissed.

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K. MILLER

APPEARANCES:

APPLICANT:

B. Isaacks

Directorate of Legal Aid, Windhoek

RESPONDENT:

I Nyoni

Prosecutor-General, Windhoek

