

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

RULING

Case No: CC 7/2021

In the matter between:

THE STATE

v

MENAS THOMAS HIFANYE

ACCUSED

Neutral citation: *S v Hifanye* (CC 7/2021) [2022] NAHCNLD 106 (6 October 2022)

Coram: KESSLAU AJ
Heard: 5 October 2022
Delivered: 6 October 2022

ORDER

The objection raised by the defence counsel is overruled.

RULING

KESSLAU AJ:

[1] The accused is arraigned before this Court on charges of count 1: Housebreaking with the intent to rob and robbery with aggravating circumstances as defined in Section 1 of Act 51 of 1977; Count 2: Murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003; Count 3: Murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003 and; Count 4: Contravening Section 2(1)(a) of the Combating of Rape Act 8 of 2000 read with the Combating of Domestic Violence Act 4 of 2003.

[2] The accused, represented by counsel, plead not guilty to all charges and a statement in terms of Section 115 (1) of Act 51 of 1977 was handed in as Exhibit "B". The accused denied being near the scene of crime on the day of the incidents. The accused admits domestic relationships between himself and the complainant in counts 1 and 4 and the two deceased in counts 2 and 3.

[3] The State called S. N. Liswaniso, an employee of the Namibian Police Forensic Science Institute (NPFSI) to present evidence regarding a forensic report. Defence counsel raised an objection to parts of his evidence being presented on the grounds that it will be in violation of Article 12 of the Namibian Constitution and in particular an infringement of Article 12 (e).

[4] From the evidence up to this point it appeared that after the alleged crime various samples were collected from the accused, victim and the two deceased persons. These were forwarded to the NPFSI after which a report (dated 23 March 2021) was returned requesting additional samples to be submitted. The request was complied with by the police. No result was forthcoming from these second samples sent and in the meantime the decision was made by the Prosecutor-General regarding the charges and the matter was transferred to the High Court for trial. All documentation available at this point were disclosed to the defence, including the NPFSI report which also requested additional samples. The trial started in this court during July 2022.

[5] It appears that during September 2022 the State received a second report from the NPFSI which was done after the second set of samples. It was then disclosed to the defence counsel seven days before this witness was called to testify. The content of the said second report is unknown at this stage to this court.

[6] The objection from defence counsel is against evidence of the second report being presented in court. It was submitted that the State is conducting a 'trial by ambush' and that they conducted further investigations in secret. Considering that the accused already plead to the charge and thus played his cards, it was submitted, he will be severely prejudiced if the second forensic report is allowed into evidence.

[7] Counsel in support referred to the matters of *S v Scholtz*¹, *S v Nassar*², *Nowaseb v State*³ and *S v Malumo and others*⁴ and submitted, rightfully so, that disclosure is essential to the conduct of a fair trial. He submitted that it was not only held to be essential that the state disclose to the defence that which it intended to use at trial but to do so timeously. The right time to disclose was said to ordinarily be when the indictment is delivered to the defence.

[8] It is noted that the matters referred to by counsel are somewhat different to the circumstances before court. These matters are all dealing with non-disclosure in cases where the State refuse to provide same. The circumstances before this court relates to the late disclosure of part of a document.

[9] The State argued that the said witness was indicated on their list of witnesses and that the first part of the forensic report was disclosed, admitted into evidence and is referring to the additional samples requested.⁵ Furthermore that there was no intended malice as the second report was disclosed as soon as it was received.

¹ *S v Scholtz* 1998 NR 207 (SC) at 210J-211A.

² *S v Nassar* 1994 NR 233 (HC).

³ *Nowaseb v State* (HC-MD-CRI-APP-CAL-2019/00046) [2020] NAHCMD 78 (6 March 2020).

⁴ *S v Malumo and others* (CC 32-2001) [2011] NAHC (24 February 2011).

⁵ Exhibit 'Y'.

[10] Defence counsel is relying the right to a fair trial, in particular Article 12 (1)(e), of the Namibian Constitution which states: 'All persons shall be afforded adequate time and facilities for the preparation and presentation of their defence, before the commencement of and during their trial, and shall be entitled to be defended by a legal practitioner of their choice'.

[11] In *The Prosecutor-General of the Republic of Namibia v Gomes and Others*⁶ it was held that not all rights under article 12 of the Constitution are absolute and that the true content of article 12 was the right to a fair trial which is not absolute and unlimited. It was said that 'the concept of a fair trial is flexible, requiring a balance to be struck between an individual's rights to a fair trial and the State's obligation to protect the interest of the public in effectively combating and prosecuting crime'.

[12] *In casu* it was disclosed to the defence that a second set of samples were forwarded to the NFL for evaluation thus the potential of a second report was known to the defence from the time disclosure was made, during consultations and when the trial started. It thus cannot be argued that it comes as a surprise or that it was investigations that were done secretly. The name and workplace of the witness, S.N. Liswaniso, was included on the list of witnesses that the State intended to call. Furthermore the report was made available as soon as it became available and I find no malice on the side of the prosecution.

[13] Additionally there are remedies available to the defence as the late disclosure could be cured by a postponement to enable counsel to prepare on the issue.⁷ Secondly the evidence of the witness can be disputed in cross-examination and by way of presenting evidence in the defence case.⁸

[14] The right to a fair trial should not be for the exclusive benefit of an accused as a trial should also be fair towards the alleged victims and Society. Thus, in conclusion, when weighing the potential prejudice of the accused against the interest of justice the following order is made:

⁶ *Prosecutor-General of the Republic of Namibia v Gomes and Others* 2015 (4) NR 1035 (SC)

⁷ *S v Mbok* (CC 4/2011) [2020] NAHCMD 263 (15 June 2020)

⁸ *S v Katsamba* (CC 14/2018) [2021] NAHCNLD 39 (16 April 2021)

Order:

The objection raised by the defence counsel is overruled.

E. E. KESSLAU
ACTING JUDGE

APPEARANCES

FOR THE STATE: Ms. S. Petrus
Office of the Prosecutor - General, Oshakati

FOR THE ACCUSED: Mr. L.S. Kabajani
Directorate of Legal Aid, Ondangwa