



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case Title:		Case No: CC 19/2017
Gotlieb Panduleni	Applicant	Division of Court: High Court, Main Division
v		
State	Respondent	
Heard before:		Heard on: 3 July 2023
Honourable Justice D Usiku		Delivered on: 5 July 2023
Neutral citation: <i>Panduleni v S</i> (CC 19/2017) [2023] NAHCMD 379 (5 July 2023)		
ORDER:		
<ol style="list-style-type: none"> 1. The application to have the three state witnesses re-called for cross-examination in respect of the applicant is refused. 2. It is ordered that the defence case should commence forthwith. 		
REASONS FOR ORDERS:		

D USIKU J:

Introduction

[1] The applicant herein stands jointly charged with four others with several crimes. When the matter was allocated before this court on 24 May 2018 for review roll, it was postponed to 28 June 2018. Mr Nhinda appeared on behalf of the applicant, but withdrew thereafter. When the matter returned to court on 12 November 2018, the applicant was represented by Mr Mbaeva. Whereafter the matter was postponed to 14 November 2018, in order for Mr Mbaeva to receive the disclosure.

[2] On 16 November 2018, the applicant brought an application for further particulars which was heard and the matter was postponed to 30 November 2018, for ruling on the application. The application was refused and the matter was postponed to 13 until 16 August 2019 for plea and trial. On that date, the applicant's legal representative withdrew and the matter was again postponed to 20 August 2019 for status hearing.

[3] Mr Muchali came on board and the matter was again postponed until 10 September 2019 for status hearing. Another postponement was requested by the applicant's legal representative in order to go through the disclosure, whereafter the case was postponed from 23 to 27 September 2019 for plea and trial. On 23 September 2019 there was no interpreter and the matter was rolled over to 24 September 2019 for plea and trial.

[4] On 24 September 2019, Mr Muchali informed the court that he was unable to proceed with the trial because the applicant herein did not instruct him as to how to proceed with the trial and the matter was once more postponed until 26 September 2019. The matter was again postponed on several occasions due to various reasons and set down for plea and trial from 17 to 21 August 2020. Upon resumption on 17 August 2020, Mr Muchali appearing on behalf of the applicant, informed the court that he did not receive instructions from the applicant herein and gave notice to withdraw. The matter was again postponed to 21 August 2020 in order for the applicant to obtain a legal aid lawyer.

[5] Mr Kaurivi was appointed and came on board whereafter the matter was postponed to 18 September 2020. On that date the matter was again postponed to 28 September 2020, for status hearing. This time it was due to covid-19 lock down. The matter was postponed to 29 September 2020, and again postponed for several other reasons until 9 August 2021.

[6] On that date, charges were put to the accused person's, whereafter the matter was postponed to 10 – 12 August 2021 for continuation of trial. On 12 August 2021, the court held a trial within a trial in respect of the applicant and the matter was postponed to 6 September 2021 for ruling in the trial within a trial. After the ruling, the matter was postponed to 7 – 10 September 2021 for continuation of trial. On 10 September 2021 the matter was again postponed to 4 – 8 October 2021. Again, the matter was postponed for various reasons until 7-11 March 2022 for continuation of trial. From that date there were several postponements until 3 October 2022 for continuation of trial. The trial resumed and on 6 October 2022, the state closed its case, whereafter the case was postponed to 7 – 11 November 2022 for the defence case.

[7] On 7 November 2022, Mr Kaurivi appearing on behalf of the applicant withdrew and the matter was postponed to 8 November 2022. The applicant requested the matter to be postponed again in order to apply for a legal aid lawyer. The matter was again postponed to 25 November 2022. On that date, the applicant informed the court that he has obtained the services of a legal aid lawyer, a certain Ms Kandoni who was not present at court, whereafter the matter was postponed to 13 – 17 February 2023 for the defence case. On resumption, Ms Kandoni informed court that she filed a notice of withdrawal and further that the applicant had instructed a private lawyer, Mr Siyomunji who at the time was not at court. The matter was postponed to 14 February 2023.

[8] On resumption, Mr Siyomunji appeared for the applicant and the matter was postponed until 3-7 July 2023 for defence case.

[9] On 3 July 2023, the applicant through his legal representative, filed a notice of

motion supported by an affidavit sworn to by the applicant, praying that three state witnesses be recalled to be cross examined in respect of the applicant.

[10] Whereas the state opposed the application, none of the accused persons who are jointly charged with the applicant opposed the application sought. Mr Siyomunji submitted that it is in the interest for justice to have the matter finalised because it has taken a long time.

[11] He further submitted that the application to have the three witnesses recalled is not meant to delay the proceedings, but because the three state witnesses are key witnesses in the case. It was further his submission that there were certain instructions that were not put to those witnesses during the course of the cross examination. They based their application on Article 12(2) of the Constitution. Thus it is their prayer that the applicant be afforded the opportunity to have the three state witnesses recalled for cross examination.

[12] It was further submitted that in order for the court to make a proper determination at the end of the trial, those state witnesses be recalled. Further reference was made to ss 167 and 186 of the Criminal Procedure Act 51 of 1977 as amended.

[13] Section 167 provides:

‘The court may at any stage of criminal proceedings examine any person, other than an accused, who has been subpoenaed to attend such proceedings or who is in attendance at such proceedings, and may recall and re-examine any person, including an accused, already examined at the proceedings, and the court shall examine, or recall and re-examine, the person concerned if his evidence appears to the court essential to the just decision of the case.’

[14] And s 186 provides:

‘The court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case.’

[15] It is important to note that the two sections referred to are not peremptory and as such the court retain its right to exercise its discretion depending on the

circumstances of each particular case.

[16] On the other hand, the state opposed the application. In his submissions, Mr Lilungwe referred the court to the requirements to be made for an application for the recalling of witnesses, emphasising that it should be in the interests of justice. It was further submitted that throughout the proceedings the applicant was legally represented. Reference was made to the matter of *State v Likoro*¹, in which the appellant had failed during the court proceedings to protest against the manner his counsel conducted his defence. Section 167 of the Criminal Procedure Act 51 of 1977 entitles the court to recall and re-examine any person in circumstances where the evidence of such person appears to the court essential. In the present case, the three state witnesses gave their testimony and were subjected to cross-examination.

[17] The applicant is further relying on the right to a fair trial and in particular Article 12 1(e) of the Namibian Constitution which provides that:

‘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.’

[18] In *Prosecutor General of Namibia v Gomes and others*², 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. Thus, the concept of a fair trial is flexible, requiring a balance to be struck between individuals’ right to a fair trial and the state’s obligation to protect the interest of the public and effectively combating and prosecuting crime.’

[19] In *casu*, the applicant had ample time to bring his application prior to the closure of the state’s case through his legal representative. At this stage he cannot be heard to complain about his right to a fair trial being infringed upon.

[20] The right to a fair trial should not be for the exclusive benefit of the applicant as a trial should also be fair towards alleged victims of a crime and society.

[21] Looking at the drawn out period this case has been ongoing, the applicant on various occasions sought several postponements which in my view has hindered the

¹ *Likoro v S* (1) (CA 19-2016) [2017] NAHCMD 355 (8 December 2017)

² *Prosecutor-General of the Republic of Namibia v Gomes and Others* (62-2013) [2015] NASC 19 (19 August 2015).

smooth running of the administration of justice. The current defence counsel is the sixth to represent the applicant herein.

[22] In *S v Van der Berg*³ the court had the following to say:

‘The role of the court in Criminal matters and the primary aim of criminal procedure should be to ensure that substantial justice is done.’

[23] There cannot be substantial justice when criminal proceedings are prolonged for an unreasonable period of time.

[24] In the same matter, the court went on to state the following:

‘A perception exists in some circles that the fundamental right to a fair trial focuses exclusively on the rights and privileges of accused persons. The rights however, be interpreted and given effects to in the context of the rights and interests of the law-abiding persons in society and particularly the persons who are victims of crime, many of whom may be unable to protect themselves on their interest because they are dead or otherwise incapacitated in the course of crimes committed against them.’

[25] This court associate itself with the above sentiments and endorse same.

[26] Thus in conclusion, when weighing the potential prejudice of the applicant against the interest of justice, the following order is made:

1. The application to have the three state witnesses re-called for cross-examination in respect of the applicant is refused.
3. It is ordered that the defence case should commence forthwith.

Judge's signature	Note to the parties
	Not applicable

³ *S v Van der Berg* 1996 1 SACR 19 (NM).

Counsel:	
Applicant	Respondent
M Siyomunji Of Siyomunji Law Chambers	B Lilungwe Of Office of the Prosecutor General, Windhoek