THE STATE VERSUS ADOLF WALTER PAUL KAREL HEIDENREICH

STRYDOM, J.P. HANNAH, J

CONSTITUTIONAL LAW

Trials - Must take place within a reasonable time, failing which accussed shall be released. Magistrate's Court is not a "competent Court" in terms of Article 25(2). - But it is implicit in the terms of Article 12 that a trail court, including magistrate's courts, has the power, authority and duty to ensure that the fundamental rights entrenched in that Article are observed. - This includes the right to be tried within a reasonable time. - A Magistrate's Court also has the power to release an accused prisnant to Article 12(2) in terms of Article 5. - General approach when dealing with an application made prisnant to Article 12(2) considered. - "Released" in Article 12(2) means released from further posecution.

CASE NO. 218/95

IN THE HIGH COURT OF NAMIBIA

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In the matter between

THE STATE

versus

ADOLF WALTER PAUL KAREL HEIDENREICH

CORAM: STRYDOM, J.P. et

HANNAH,J.

JUDGMENT

HANNAH, J: This review concerns the interpretation and application of Article 12(1)(b) of the Constitution which provides that:

> "A trial referred to in Sub-Article (a) hereof shall take place within a reasonable time, failing which the accused shall be released."

The brief facts of the case leading to the magistrate sending it for review are as follows. On 25th June, 1993 the accused appeared before the Karibib Magistrate's Court on charges of attempted murder, negligent use or handling of a firearm, assault with intent to do grievous bodily harm and resisting, obstructing or hindering a police officer in the exercise of his duties. Mrs Figueira, who appeared before us as amicus curiae and to whom the Court is indebted for her assistance, indicated that she had reason to believe

that at that early stage of the proceedings no charges at all had been formulated but looking at the record that does not seem to me to have been the position. As I understand the record brief statements of the charges had been formulated but without particulars.

On 25th June, 1993 the case was postponed to 30th June for further investigation and on 26th June the accused was released on bail. Then on 30th June the prosecution and the accused's attorney informed the Court that 4th August had been agreed as the date of trial and the case was postponed to that date. On 4th August no interpreter was available and the case was further postponed to 9th September, the defence attorney indicating that he had no objection. On 9th September a further postponement was granted to 7th October because the Prosecutor-General had not yet made a decision in the matter and as the accused was absent a warrant was issued for his arrest. Apparently the accused's absence was with the consent of the State and the issue of the warrant of arrest on this occasion and the provisional cancellation of his bail at the next hearing were mere formalities. What is of some relevance is that on 7th October the magistrate, after noting on the record that bail was provisionally cancelled, added "Final order 27/10/93 as requested by Attorney" and as the case was postponed to that date Mrs Figueira suggested that this meant that a final postponement had been granted. However, it seems to me more likely that the words in question referred to the date when the provisional order cancelling bail would become final and not to a final postponement. One sees the same words

recorded on 27th October when the case was once again postponed because of the lack of an interpreter.

On 1st December the case was postponed by agreement to 23rd February, 1994 and it is clear from the record that that was the date when it was intended that the actual trial would take place. Apparently the defence attorney asked for the postponement to that date because he had not received the Prosecutor-General's decision that the trial should take place in the magistrate's court timeously and because he wanted to be served with the charges well in advance of the trial date so that he could have the opportunity to request further particulars.

On 23rd February, 1994 the accused was represented by counsel and counsel complained that despite letters written by his instructing attorney to the prosecutor in November and January a copy of the charge sheet had only been provided that very morning. I take this to mean a copy of the particularised charges to be found in the record. He contended that the defence was entitled to seek further particulars and if the case were to proceed that day the defence would be deprived of that opportunity. He submitted that the case should not be heard that day or at all. He said that the State had provided no explanation why the charge sheet had not been supplied timeously and submitted that the Court should release the accused in terms of Article 12(1)(b) of the Constitution. The prosecutor responded by giving the rather lame excuse that his office had run out of stationery and the magistrate, clearly not

impressed, then held that as the accused had not been given an adequate opportunity to prepare his defence by reason of the late service of the charges and as more than a reasonable period of time had elapsed for his trial to take place an order should be made releasing him from his trial and such an order was made.

Subsequent to 23rd February the magistrate had second thoughts about this order and on 9th March she submitted the record to this Court for review expressing the opinion that she had had no jurisdiction to make the order. After a further unfortunate delay the matter was finally argued and judgement was reserved.

The points set down for argument were as follows:

1. Was the magistrate correct in holding that the trial of the accused had not taken place within a reasonable time as required by Article 12(1)(b) of the Constitution?

2. If so, is the Magistrate's Court a competent Court in terms of Article 25(2) to take the necessary action to enforce or protect the right of an accused to a fair trial?

3. Was it competent for the magistrate to order that the accused be released and what is the effect of such order?

Article 25 of the Constitution provides:

"Enforcement of Fundamental Rights and Freedom"

and Article 25(2) provides:

> "(2) Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient."

"Competent Court" is not defined in the Constitution but it seems to me clear that what is meant by "a competent Court" is a court which has jurisdiction to hear and adjudicate a claim brought in terms of Sub-Article 2 . The High Court clearly has such jurisdiction (see Article 80(2) and section 2 of the High Court Act, No. 16 of 1990) but in my opinion a Magistrate's Court has not. Article 83(1) provides that:

> "Lower Courts shall be established by Act of Parliament and shall have the jurisdiction and adopt the procedures prescribed by such Act and regulations made thereunder."

Lower courts are established under the Magistrates' Courts Act, No. 32 of 1944, and it is clear from the terms of Chapter VI of that Act (civil jurisdiction) and Chapter XII (criminal jurisdiction) that the jurisdiction of a magistrate's court does not extend to a claim brought in

terms of Article 25(2) . The second question must therefore be answered in the negative.

However, it by no means follows from the foregoing conclusion that it was not competent for the magistrate to make the order in question. Article 25 is concerned with specific and independent claims made by aggrieved persons that a fundamental right or freedom guaranteed by the Constitution has been infringed and while such claims must be made in proceedings before the High Court it does not mean that a magistrate's court has no jurisdiction to ensure the observance of certain fundamental rights guaranteed by the Constitution during the course of proceedings which take place before it. Indeed it would, in my view, be absurd if that were not the case when regard is had to the provisions of Article 12. That Article provides, inter alia, that all persons shall be entitled to a fair and public hearing, that judgments in criminal cases shall usually be given in public, that all persons charged with an offence shall be presumed innocent until proven guilty and 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. Obviously a magistrate's court, like any other trial court, must ensure that these constitutional rights are observed in proceedings conducted before it and I see no reason in logic or law why the same should not apply to the observance of the requirement set out in Sub-Article (1) (b) that a trial referred to in Sub-Article (1) (a) shall take place within a reasonable time, failing which the accused shall be

released.

In my view, it is implicit in the terms of Article 12 that a trial court has the power, authority and indeed the duty to ensure that the fundamental rights entrenched in that Article are observed in proceedings conducted before it and it is unnecessary to look for some express provision in the Constitution to that effect. However, if one does look for an express provision cloaking all trial courts with the authority to order the release of an accused whose trial has not taken place within a reasonable time such provision is, in my opinion, to be found in Article 5. That Article provides:

> "Article 5 Protection of Fundamental Rights and Freedoms
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> The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed." (My emphasis)

Article 12(1)(b) provides that the manner in which the fundamental right to be tried within a reasonable time shall be enforced is by ordering the release of the accused and as Article 5 refers to courts generally enforcing fundamental rights that must, in my opinion, embrace lower trial courts as well as the High Court. The first part of the third question is therefore answered in the affirmative.

It is convenient to deal with the general approach to be

adopted when considering the second question before considering what is meant by the word "released" in Article 12(1)(b). The question is whether in the circumstances of the present case the accused's right to be tried within a reasonable time would have been infringed if his trial had taken place any later than 23rd February, 1994.

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 (NmSC) at 418 F, and if this canon of construction is to be relied upon it is as well to identify expressly the underlying purpose of the constitutional provision under consideration. In Re Mlambo 1992(4) SA 245 (ZS) Gubbay C.J. set out what, in his view, was the purpose underlying the right to be afforded a fair hearing within a reasonable time under section 18(2) of the Constitution of Zimbabwe and, if I may respectfully say so, the words used also aptly describe the underlying purpose of Article 12(1)(b) of the Namibian Constitution. I can do no better than quote what the learned Chief Justice said at p. 248 C - 249 D:

> "In the opinion of the Supreme Court of the United States, the speedy trial guarantee in the Sixth Amendment to the Constitution is
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> > 'designed to minimise the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nonetheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges'.
>
> See: United States v MacDonald (1982) 456 US 1 at

8, adopted in United States v Loud Hawk (1986) 474 US 302 at 311.

These words aptly describe the main purpose of the right to be afforded a fair hearing within a reasonable time under s 18(2) of the Constitution of Zimbabwe, namely, to minimise the adverse effect on the person charged flowing from the pending disposition of a still to be determined criminal charge. The right, therefore, recognises that, with the passage of time, subjection to a criminal charge gives rise to restrictions on liberty, inconveniences, social stigma and pressures detrimental to the mental and physical health of the individual. It is a truism that the time awaiting trial must be agonising for accused persons and their immediate family. I believe that there can be no greater frustration for an innocent charged with an offence than to be denied the opportunity of demonstrating his lack of guilt for an unconscionable time as a result of delay in bringing him to trial.

The right recognises, also, that an unreasonable delay may well impair the ability of the individual to present a full and fair defence to the charge.

Trials held within a reasonable time have an intrinsic value. If innocent, the accused should be acquitted with a minimum of disruption to his social and family relationships. If guilty, he should be convicted and an appropriate sentence imposed without unreasonable delay. His interest is best served by having the charge disposed of within a reasonable time so that he may get on with his life. A trial at some distant date in the future, when his circumstances may have drastically altered, may work an additional hardship upon him and adversely affect his prospects of rehabilitation.

Although s 18(2) is concerned with ensuring respect for the rights of the individual, its enforcement, which may from time to time admittedly allow the guilty to go unpunished, nevertheless benefits society as well. There is a collective interest in making certain that those who commit crimes are brought to trial quickly and dealt with fairly and justly. Speedy trials strengthen this aspect of the community interest. Important practical advantages flow from an expeditious resolution of the charges, the nature of which can be stated no more eloquently than in the words of Cory, J. in R v Askov (199) 4 9 CRR 1 (Supreme Court of Canada) at 20:

> ' There can be no doubt that memories fade with time. Witnesses are likely to be more reliable testifying to events in

> the immediate past as opposed to events that transpired many months or even years before the trial. Not only is there an erosion of the witnesses' memory with the passage of time but there is bound to be an erosion of the witnesses themselves. Witnesses are people; they are moved out of the country by their employers; or for reasons related to family or work they move from the east coast to the west coast; they become sick and unable to testify in court; they are involved in debilitating accidents; they die and their testimony is forever lost. Witnesses, too, are concerned that their evidence be taken as quickly as possible. Testifying is often thought to be an ordeal. It is something that weighs in the minds of witnesses and is a source of worry and frustration for them until they have given their testimony.
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> It can never be forgotten that the victims may be devastated by criminal acts. They have a special interest and good reason to expect that criminal trials take place within a reasonable time. From a wider point of view, it is fair to say that all crime disturbs the community and that serious crime alarms the community. All members of the community are thus entitled to see that the justice system works fairly, efficiently and with reasonable dispatch. The very reasonable concern and alarm of the community which naturally arises from acts of crime cannot be assuaged until the trial has taken place. The trial not only
> resolves the guilt or innocence of the individual, but acts as a reassurance to the community that serious crimes are investigated and that those implicated are brought to trial and dealt with according the law.'
>
> See also Barker v Wingo (1972) 407 US 514 at 519-20.
> "

"Reasonable" is, of course, a relative term and what constitutes a reasonable time for the purposes of Article 12 (1) (b) must be determined according to the facts of each individual case. The courts must endeavour to balance the

fundamental right of the accused to be tried within a reasonable time against the public interest in the attainment of justice in the context of the prevailing economic, social and cultural conditions to be found in Namibia: Bell v Director of Public Prosecutions of Jamaica and Another (1985)2 ALL ER (PC) 585 at p 591 - 592. What is required at the end of the day is a value judgment. In both the Bell case (supra) and the Mlambo case (supra) the respective courts looked to the judgment of Powell J. in Barker v Wingo (supra) for guidance when deciding what factors the court should take into account in assessing whether an accused has been deprived of his constitutional right to be tried within a reasonable time and, in my view, it is appropriate for the courts of this country to do likewise. The four factors identified by Powell J. are as follows:

1. Length of delay

> "Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." (pp 530 - 531)

2. The reasons given by the State justify the delay.

> "A deliberate attempt to delay the trial in order to hamper the defence should be weighed heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed

less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay." (p 531)

3 . The responsibility of the accused for asserting his rights.

"Whether, and how, a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain." (p 531)

4. Prejudice to the accused

" Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial was designed to protect. This court has identified three such interests: (i) to prevent oppressive pretrial incarnation;
(ii) to minimise anxiety and concern of the accused; and (iii) to limit the possibility that the defence will be impaired. Of these, the most serious is the last ... If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defence witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown." (p 532)

These four factors are not necessarily the only factors to be taken into account when assessing whether an accused has been deprived of his right to be tried within a reasonable time but they are the most obvious factors to be taken into account when performing the balancing exercise. And it is important to re-emphasise that the weight to be given to

each factor will vary according to prevailing circumstances. When we reach the stage when Namibia is equipped with a modern, well-trained and efficient judicial system the courts will undoubtedly be much less tolerant of delays than they are at the present time when, for a variety of reasons, such a system has yet to be established.

I come now to the meaning to be given to the word "released" as used in Article 12 (1) (b) . This question was briefly considered by O'Linn, J. in S v Strowitzki 1995(1) BCLR 12 (Nm) at 35 - 36. 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:

> "The Namibian constitution provides a specific remedy for failure to bring to trial within a reasonable time: namely:
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> 'The accused shall be released.'
>
> 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."

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 Article 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 minimise 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.

The onus of persuading the court that the delay complained of is unreasonable clearly rests on the accused: S_____y Strowitzki (supra) at p 34 - 35 and the cases there cited. And with this in mind I turn to the facts of the present case. The accused was arrested on 25th June, 1993 the day when it was alleged he committed the offence in question and he was taken before the magistrate's court that very same day. One of the charges made against him was that of attempted murder, a most serious offence and one which can, depending on the circumstances, give rise to complications. The accused was released on bail and remained on bail until 23rd February, 1994 when the order in terms of Article 12(1) (b) was made. There then followed a number of postponements none of which were opposed by the accused's attorney and by agreement the accused was not put to the

inconvenience of attending court. Indeed the last postponement on 1st December, 1993 was at the request of the defence attorney although the prosecutor was at fault in not yet having supplied a copy of the charges. There was no suggestion that the agreed trial date of 23rd February, 1994 was not within a reasonable time of the arrest of the accused and the question of unreasonableness was raised for the first time on 2 3rd February when a copy of the charges was at last supplied. The defence wanted further particulars of the charges which would have entailed a further postponement and what the magistrate had to decide was whether to delay the trial further would mean that the trial would not take place within a reasonable time. Mrs Figueira conceded that the accused had suffered no prejudice save perhaps for a certain amount of anxiety at having the charges hanging over him and, so far as I can see, he would have suffered no real prejudice had a short postponement been granted to enable further particulars to be sought and supplied. The onus of showing prejudice rested on him. Lastly, the responsibility for the further delay lay with the prosecutor who had not supplied a copy of the charges timeously. His rather lame excuse that his office had run out of stationery did not impress the magistrate but at worst this was no more than negligence on the part of the prosecutor. There was no suggestion that he was deliberately attempting to delay the trial.

Balancing the fundamental right of the accused to be tried

which I have just outlined I am not persuaded that the delay-arising from a further postponement would have infringed the rights of the accused as set out in Article 12(1) (b) . A delay of eight months in bringing the accused to trial on a serious charge such as attempted murder is not in itself presumptively prejudicial and as the accused did not seek to show that he had suffered any serious prejudice or would suffer any if a further postponement were to be granted and as he had not previously complained of delay I am of the opinion that the magistrate should not have made an order in terms of Article 12(1) (b) . The first question is therefore answered in the negative.

For the foregoing reasons the order made on 23rd February, 1994 releasing the accused in terms of Article 12(1)(b) is set aside.

HANNAH, JUDGE

I agree