



CASE NO.: CC 15/2011

IN THE HIGH COURT OF NAMIBIA

HELD AT OSHAKATI

In the matter between:

THE STATE

versus

MPASI JOHANNES HAUSIKU

FIRST ACCUSED

HAINDERE JOHANNES NDOKO

SECOND ACCUSED

HAUTA KONSTANTIUS

THIRD

ACCUSED

FRANS MUNANGO MBAMBA

FORTH

ACCUSED

ANDREAS KARUPU NZARO

FIFTH ACCUSED

CORAM: TOMMASI J

Heard on: 01/05/2011 -

Delivered on: 02/05/2011

RULING: APPLICATION IN TERMS OF SECTION 37(3)

TOMMASI J: [1] The State, after leading evidence of all the witnesses they intended to call, brought an application to this Court in terms of section 37(3) for this court to order that sample of the accused's saliva be taken for purposes of forensic analysis.

[2] The defense opposed this application on the basis that the State failed to make the allegation that the police are not empowered under section 37(1) and furthermore that a further postponement would be an infringement of the accused's constitutional right for their trial to be concluded within a reasonable time.

[3] Both counsel argued in respect of both the application in terms of section 37(3) and the postponement that would of necessity follow if the Court should grant the application of the State. I have decided to separate the two issues and to consider the application that is before me without pre-empting any application by the State for a postponement or any substantive application by the accused in terms of article 12(1)(b) of the constitution. Suffice it to say that there is no application in terms of article 12(1)(b) of the constitution before the Court apart from the submission made by counsel

that a postponement would amount of an infringement of the accused right to have their trial concluded within a reasonable time.

[4] The backdrop for the State bringing the application in terms of section 37(3)(a) can be summarized as follow: The accused were arrested on 8 June 2008 and are facing multiple charges of rape. They all pleaded not guilty and the State proceeded to lead evidence. One of the witnesses, the medical doctor that examined the complainant, testified that he took samples of the complainant on 8 June 2008. This was placed in a rape kit, sealed and handed over to a police official on the same day. The form which accompanies the rape kit when submitted for forensic analysis was only completed on 7 October 2008 by the investigating officer. The form and the rape kit were transported from Rundu to Windhoek by the Scene of Crime Unit on 28 November 2008 to the Forensic Laboratory which declined to take the rape kit without the samples of the accused. The rape kit was thereafter brought back to the investigating officer who kept it in her office until the trial when she brought it with her.

[5] The accused was granted bail on 1 October 2008 in the magistrate's court. It is not clear from the record of proceedings in the magistrate's court when bail was paid as copies of the bail receipts are not attached to the record. The matter was postponed several times in the magistrate's court

until 26 January 2010 when it was transferred to this Court as per the instructions of the Prosecutor General. All the accused appeared in this Court for pre-trial proceedings for the first time on 25 February 2010. The matter was enrolled for trial on 16 May 2011.

[6] The first issue to be determined is whether the police are empowered to take samples of the saliva of the accused. The relevant parts of section 37 of the Criminal Procedure Act, 51 of 1977 provides as follows:

- '1. *Any police official may:*
 - (a) *take fingerprints, palm-prints, or footprints, or may cause any such prints to be taken,*
 - (i) *of any person arrested upon any charge;*
 - (ii) *of any such person released on bail or on warning, under s 72;*
 - (c) *take any such steps as he may deem necessary, in order to ascertain whether the body of any person referred to in paragraph 1 (i) or (ii) has any mark characteristic or distinguishing feature, or shows any condition or appearance: Provided that no police official shall take any blood sample of the person concerned, nor shall a police official make any examination of the person concerned, where the person is a female and the police official concerned is not a female;*
- (2) (a) *Any medical officer of any prison or any district surgeon or, if requested thereto by any police official, any registered medical practitioner or registered nurse may take such steps, including the taking of a blood sample as may be deemed necessary in order to ascertain whether the body of any person referred to in paragraph (a)(i) or (ii) of subsection 1 has any mark,*

characteristic or distinguishing feature or shows any condition or appearance.

[7] Taking a saliva sample of the accused forms part of what can be categorized as a “*characteristic or distinguishing feature*” and it is clear from the above provisions that the police with the assistance of a medical practitioner are empowered to take a sample of the saliva of the accused.

[8] Subsection 37 (c) furthermore give the police officer powers to take any such steps as he may deem necessary in order to obtain the sample. In *S v EIGOWAB 1994 NR 192 (HC) at p201-202 I-J & A-C*, the following was stated:

“As the legislation stands at the moment, the policeman who requests a blood sample to be taken by the doctor may also use force should the suspect or accused refuse and/or resist. This is also the clear implication of s 225, which makes the evidence of the blood sample and test admissible even if taken against the will of the accused. See S v Binta 1993 (2) SACR 553 (C) at 561J-562B”

[9] From the above it is apparent that the police officers are empowered not only to take the sample but to also use reasonable force to obtain such a sample.

[10] The next question to be determined is whether, this Court is empowered to order that the sample be taken. Section 37 (3) provides as follow:

'Any court before which criminal proceedings are pending may -

(a) In any case in which the police official is not empowered under ss (1) to take finger-prints, palm-prints or foot-prints, or to take steps in order to ascertain whether the body of any person has any mark, characteristic, or distinguishing feature, or shows any condition or appearance, order that prints be taken of any accused at such proceedings, or that the steps, including the blood sample, be taken, of which such court may deem necessary in order to ascertain whether the body of the any accused at such proceedings, has any mark, characteristic, or distinguishing feature, or shows any condition or appearance.(my emphasis)

[11] In *S v MAPHUMULO 1996 (2) SACR 84 (N)* a similar application was brought by the State and COMBRINK J, at page 86 stated the following:

"...from a mere reading of s 37(3)(a), in its context with particularly s 37(1), it appears that a court will be empowered only to authorise the steps which this application was sought to achieve where the police official in question does not have that authority or power, under s 37(1). Indeed this prima facie meaning appears to be correct,"

The learned judge finds support for this view in *NKOSI V BARLOW NO EN ANDERE 1984 (3) SA 148 (T)*,

[11] The State in *S v MAPHUMULO, supra*, urged the Court to exercise what the learned judge termed his “*limited power*” because the accused refused to have their fingerprints taken and the investigating officer feared that if he forcibly takes it, he might impinge upon the accused's fundamental rights. That Court held that the taking of the accused's fingerprints, whether voluntarily or under compulsion in terms of s 37(1), did not infringing right against self-incrimination in s 25(3)(d) of Constitution Act 200 of 1993. (See *S v EIGOWAB, supra*) and dismissed the application.

[12] The State however referred me to a Supreme Court judgment of *S v MONDAY 2002 NR 167 (SC)* where O'LINN AJA at page 185 D-F made the following remarks:

“The fact that the examination was not done, on any of these occasions, was not the fault of the accused. Once it was found that the alleged victim Ms L was probably suffering from gonorrhoea, it was obvious that an examination of the accused to establish whether or not he was suffering from gonorrhoea was the obvious course for the prosecution, consisting of the police and prosecutors, to take. They, and Dr Liebenberg, had the power to do so in terms of s 37(1)(c) of the Criminal Procedure Act. The Court furthermore had the power to order such an examination in terms of s 37(3) of the said Act.”

The purpose of these provisions is quite clearly not to aid or prejudice one or other of the parties, but to assist in the search for the truth and so ensure that justice is done.”(my emphasis)

[13] The facts as they presented themselves in *S v MONDAY, supra* are vastly different to the facts in this case. This Court is bound to what has

been decided in that case. What remains then is for this Court to apply its discretion to the facts of this case.

[14] The police and the prosecution, despite having had ample opportunity to do so, did not make any effort either on their own or on the instructions of the office of the Prosecutor General to request the accused to make themselves available for the taking of the samples prior to the application being brought. I take note of the fact that the purpose of these provisions is not to aid or prejudice one or other of the parties, but to assist in the search for the truth and so ensure that justice is done.

[15] The stage at which the State however brought the application, will result in a definite delay of the proceedings of at least 140 days. The Court has a duty to balance the interest of all parties and guard against the infringement of the accused fundamental right to have this trial concluded within a reasonable time. I suspect that the State brought this application to avoid approaching the Court for a postponement which would have been the appropriate application to make given the stage of the proceedings. There is a real risk that and should this court allow the application it would be entering the proverbial arena by investigating a case against the accused. It is indeed so that the test may be done in search of the truth but there are competing interest at stake such as the constitutional right of the accused to

a fair trial before an impartial court and for the trial to be concluded within a reasonable time.

[13] In the result the application by the State is dismissed.

Tommasi J