



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
APPEAL JUDGMENT

Case no: CA 38/2015

THE STATE

APPELLANT

and

NDEUZU VENAANI

RESPONDENT

Neutral citation: *S v Venaani* (CA 38/2015) [2017] NAHCMD 114 (18 April 2017)

Coram: NDAUENDAPO J et SHIVUTE J

Heard: 23 January 2017

Delivered: 18 April 2017

Summary: Constitutional Law – Whether a wife is a compellable witness for the prosecution to give evidence against her spouse where offence allegedly committed by her spouse against her person – Whether s195 of Act 51 of 1977 has been rendered unconstitutional by the provisions of Article 12 (1)(f) of the Namibian Constitution – General approach when construing Constitutional provisions – Provisions to be broadly, liberally and purposively interpreted – Provisions of Article 12 (1)(f) which states that no person shall be compelled to give evidence against themselves or their spouses, should not be interpreted in isolation – It should be interpreted contextually with the rest of the provisions of the Constitution particularly the fundamental human rights enshrined in Articles 8,10 and 14 (3). Court should consider the purpose of the provisions and the values embodied in the Constitution –

There core values of the Constitution are to promote human rights and not diminish them – s 195 (1) promotes the core values of the Constitution as it compels a spouse to give evidence against the other spouse where any offence is committed against the person of either spouse or of their children – The wife is a competent and compellable witness, Section 195(1) not rendered unconstitutional and is still good law.

Summary: Criminal Procedure – Section 174 Act 51 of 1977 – Test whether there is a prima facie case to answer or not – The question is whether there is evidence on which a reasonable Court acting carefully may convict. Credibility of witnesses plays only a very limited role at this stage – Court a quo discharged Respondent in terms of s 174 because complainant did not want to proceed with the case – Prosecution dominus litis – has the sole discretion to proceed with the matter or not – Although the prosecution insisted on proceeding with the prosecution contrary to her will – Complainant was not forced to give false testimony against the Respondent. What is required of her is to give a truthful account of her version of events. Complainant was obliged to give evidence at the pain of being dealt with in accordance with the law if she refuses to testify – Evidence established a prima facie case against Respondent. The Court a quo misdirected itself by not placing Respondent on his defence. There is a need for this court to interfere.

ORDER

- (a) The appeal is upheld.
- (b) The Court a quo's discharge of the Respondent on all counts is set aside. The Respondent is placed on his defence.
- (c) The complainant is a competent and compellable witness.
- (d) The matter is referred back to the Court a quo for continuation and finalisation of the trial before the same magistrate if available.
- (e) The Respondent should be brought before court by way of a summons.

APPEAL JUDGMENT

SHIVUTE J (NDAUENDAPO J CONCURRING):

[1] This is an appeal by the State against the discharge of the Respondent in terms of s 174 of the Criminal Procedure Act 51 of 1977.

[2] The Respondent who was charged with five counts of rape in contravention of the Combating of Rape Act 8 of 2000, one count of assault with intent to do grievous bodily harm and one count of kidnapping was discharged in terms of s 174 of Act 51 of 1977 on all charges at the close of the State. The Appellant (the State) was granted leave to appeal against the discharge.

[3] Grounds of appeal may be summarised as follows:

- (a) The learned magistrate misdirected herself in law and or on the facts by discharging the Respondent when there was sufficient evidence adduced by the complainant which established a prima facie case against the Respondent on all counts.
- (b) The learned magistrate in discharging the Respondent paid insufficient regard to the evidence of Ms Iyambo who corroborated the version of the complainant that she found the complainant lying in bed with injuries on her body. That she observed the complainant's underpants that were torn and that complainant reported to her that she was assaulted and raped by the Respondent for five days.
- (c) The learned magistrate also disregarded medical evidence that complainant had injuries on the upper back as well as on the abdomen.
- (d) The learned magistrate in discharging the Respondent failed to consider the fact that although the complainant had indicated that she wanted to withdraw the case, she was adamant in her evidence that the Respondent forcibly had sexual intercourse with her.

[4] The facts of the case may be briefly stated as follows:

The Respondent and the complainant were in an intimate relationship in which two children were born. The offences were allegedly committed from 23 - 27 March 2012 at the time when the couple was not married to each other. However, at the time the complainant testified, she had married the Respondent. Hence, she wanted to withdraw the charges against the Respondent because she said she had forgiven him. The State refused the complainant's request and proceeded with the trial.

[5] The complainant testified that the Respondent found her on the way and assaulted her with his hands and stabbed her with a knife on top of the shoulder. He took her to his house and continued to assault her. He locked her in the house for five days. Whilst she was locked up in the room the Respondent also assaulted her with a tyre lever. He undressed her and started having sexual intercourse with her by putting his penis into her vagina. For the five days that the complainant was locked in the house, the Respondent had sexual intercourse with her every evening. Complainant had to agree to have sexual intercourse with the Respondent because there was no other way as she was locked in the house. Her underpants were torn by the Respondent. She stated that she never authorised the Respondent to tear her underpants or to lock her in the room. She did not allow the Respondent to assault her either. Complainant was unable to leave the house because it was locked by the Respondent. She only left the house on the fifth day. Complainant was asked by the Court whether she had given permission to the Respondent to have sexual intercourse with him. She responded that:

'I just agreed, what could I do? I could not scream. We just had sexual intercourse; he was having sex with me.'

She was further asked rather rhetorically whether it was a problem to her. She responded:

'I had a problem, my body was paining.'

As to the question whether she said 'No' to the assault, she replied that she had given an indication that she did not want to have sexual intercourse but there was no way she could get out of the room as the door was locked.

[6] Through cross-examination complainant testified that she was forced to go to the Respondent's house because they went there whilst they were walking and fighting. The fight started because the complainant told the Respondent that she did not want to go to the Respondent's house. However, certain questions were put to the complainant by counsel for the Respondent and she declined to respond thereto.

[7] One Ms Iyambo, the complainant's friend, testified that she found the complainant lying in bed and she observed injuries on the complainant's body as well as the complainant's torn pair of underpants. The complainant made a report to her that she was raped and assaulted for five days. Ms Iyambo took the complainant to the hospital.

[8] There is corroborative medical evidence that the complainant had injuries on the upper back as well as on the abdomen.

[9] At the end of the State case, the Court ruled that it could not place the Respondent on his defence because the complainant from the beginning did not want to continue with the case. The learned magistrate reasoned that the complainant had given a withdrawal statement; that she had been forced to testify before court, and that she felt misled by the State. The other reason for the Respondent's discharge was that complainant had declined to answer certain questions put to her by defence counsel and that if the Respondent were to be placed on his defence, it would be unjust in the circumstances as it would amount to supplementing the State's case.

[10] Counsel for the Appellant argued that the evidence summarised above has established a case against the Respondent and the learned magistrate was supposed to place him on his defence. Counsel further argued that the learned magistrate overlooked the fact that although at the time of the trial the complainant and the Respondent were legally married, the complainant was not only a competent witness but also compellable to give evidence against the Respondent by virtue of the fact that the Respondent committed offences against her. She referred this court to the provisions of s 195 of the Criminal Procedure Act 51 of 1977.

[11] It was further counsel for the Appellant's argument that the magistrate seemed to have lost sight of the fact that after the complainant had reported the matter to the police the decision whether or not to proceed with the matter was no longer in the hands of the complainant, but the Public Prosecutor was entitled to proceed with the prosecution of the case in terms of s 2 of Act 51 of 1977.

[12] On the other hand, counsel for the Respondent argued that the complainant was a reluctant and non-compellable witness. She filed a withdrawal statement and the forcing of the complainant to give evidence against the Respondent was contrary to Article 12(1)(f) of the Namibian Constitution. The fact that the complainant and the Respondent were not married at the time of the alleged incident is irrelevant as at the time of giving evidence they were in a domestic relationship as spouses. Counsel further argued that the complainant was not a compellable witness, and when she first gave an indication that she did not want to give evidence and continued with the case, the court should have intervened and should have explained to her that she could not be made to give evidence against her spouse. It was again counsel for the Respondent's argument that the provisions of s 195 of Act 51 of 1977 have been overridden by the provisions of Article 12(1)(f) of the Constitution and they are thus rendered unconstitutional.

[13] As the issue of competency and compellability of the complainant was not raised by the defence during the trial except, when it was mentioned by the court and the State, we asked both counsel to submit further heads of argument on the question whether s 195 of the Criminal Procedure Act has been rendered unconstitutional by the provisions of Article 12(1)(f) of the Constitution.

[14] In supplementary heads of argument, counsel for the Respondent argued that there is no need to declare the provisions of s 195 of the Criminal Procedure Act unconstitutional as the provisions of s 195 are subjected to a constitutional provision, namely Article 12(1)(f) and therefore they are automatically null and void and of no effect. Counsel went on to argue that the Constitution is the Supreme law of Namibia and takes preference over all other laws or legislation in conflict with it. Although the

complainant was a competent witness, she was not a compellable witness, so counsel argued.

[15] Counsel for the Appellant in her supplementary heads of argument argued that in terms of s 195 Act 51 of 1977, the complainant was not only a competent witness but a compellable one as well. The Respondent was charged with offences committed against the person of the complainant. Although she later became the Respondent's wife, the provisions of s195(1) have not been declared unconstitutional and they are still good law.

[16] Counsel for the Appellant further argued that if the court finds that s 195(1) should not have been invoked by virtue of the provisions of Article 12(1)(f) of the Constitution, the Court should in deciding what to make of the complainant's evidence, look at the constitutionality of illegally obtained evidence which is not automatically inadmissible and that the Court has a discretion whether to accept or reject it. Both counsel referred us to authorities in support of their respective propositions and we are indebted to them for their industry.

[17] Issues to be determined by this court are whether the complainant who is a spouse to the Respondent is a compellable witness or not and whether the State has established a prima facie case against the Respondent.

[18] In determining the issues, I deem it fit to first deal with the question whether the complainant is a competent and compellable witness to testify against her husband, the Respondent who allegedly committed offences in respect of her person, and whether the provisions of s95(1) of the Act have been rendered unconstitutional by Article 12(1)(f) of the Constitution.

[19] Section 195(1) of the Criminal Procedure Act reads as follows:

- '(1) The wife or husband of an accused shall not be competent to give evidence for the prosecution in criminal proceedings, but shall be competent and compellable to give evidence for the prosecution at such proceedings where the accused is charged with-
- (a) any offence committed against the person of either of them or of a child of either of them.'

The section goes on to list other exceptions where a spouse is a compellable witness for the prosecution. However, I do not intend to refer to that list of exceptions. I would rather confine myself to the provisions of s 195(1)(a).

[20] Article 8 of the Constitution provides for respect for human dignity in the following terms:

- '(1) The dignity of all persons shall be inviolable.
- (2) (a) In any judicial proceedings or in other proceedings before any organ of the State and during the enforcement of a penalty, respect for human dignity shall be guaranteed.
- (b) No persons shall be subjected to torture or to cruel, inhuman or degrading, treatment or punishment.'

Article 10 deals with equality and freedom from discrimination and provides:

- '(1) All persons shall be equal before the law.
- (2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

Article 12(1)(a) of the Constitution makes provision for a fair trial and reads in part as follows:

- '(a) In determination of their civil rights and obligations or any criminal charges against them all persons shall be entitled to a fair and public hearing by an independent, impartial and competent court or Tribunal established by law:

Article 12(1)(f) provides:

- '(f) No person shall be compelled to give testimony against themselves or their spouses, who shall include partners in a marriage by customary law, and no court shall admit in evidence against such person's testimony which has been obtained from such persons in violation of Article 8 (2) (b) hereof.'

Article 14 provides for family

- '(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

[21] I have referred to the above Articles of the Constitution, because Article 12(1) (f) should not be read in isolation but rather in conjunction with other provisions of the Constitution. In the present matter, the Articles referred to are applicable to the issue at hand. As mentioned before, Article 8 provides for respect for human dignity which should be afforded to all persons including spouses. Article 10 deals with equality and freedom from discrimination, which are afforded to all persons, of course including spouses. Article 14(3) describes the family as ‘the natural and fundamental unit of society’, which is entitled to protection by society and the State.

[22] The general approach when construing constitutional provisions is that the provisions are to be ‘broadly, liberally and purposively’ interpreted. (See, for example, *Government of the Republic of Namibia v Cultura 2000 and Another 1994* (1) SA 407 (NMSC) at 418F). The Preamble to the Namibian Constitution reads *inter alia*:

‘Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace; Whereas the said rights include the right of the individual to life, liberty and the pursuit of happiness regardless of race, colour, ethnic origin, sex, religion, creed or social or economic status...’

[23] The Preamble to the Constitution contains a declaration of intent with regard to fundamental human rights as contained in our constitution. Therefore, when the Courts interpret provisions of the Constitution they must do so by looking at the Constitution as a whole. In other words, the Court should adopt a holistic approach towards constitutional interpretation so as to ensure that fundamental rights are promoted rather than curtailed. The Court should also consider the purpose of the provisions and the values embodied in the Constitution. The core values of the Namibian Constitution are to promote, amongst others, fundamental human rights and the rule of law. The Constitution should be interpreted contextually with the rest of the provisions of the Constitution, particularly the fundamental human rights enshrined in Articles 8, 10 and 14 read together and not in isolation.

[24] Although there appears to be some tension between the provisions of Article 12(1)(f) and s 195 (1) of the Criminal Procedure Act in the sense that Article 12(1)(f) does not include in it the exceptions provided for in s 195(1), the Constitution should not be interpreted mechanically. As pointed out above, it must be interpreted in a way that best promotes basic human rights and not in the manner that diminishes them. Article 12(1)(f) of the Constitution should not be understood to take away the right of the bodily integrity of the spouse who has been a victim of abuse by his/her spouse. As already indicated, the core value of the Constitution is to protect fundamental human rights. Such rights include non-discrimination on the ground of social status. In my opinion section 195(1)(a) promotes the core values of the Constitution as it compels a spouse to give evidence against the other spouse where any offence is committed against the person of either the spouse or of their children. It prevents situations such as the one exemplified by the facts of this case whereby one partner in a domestic relationship is alleged to have been abused by the other and after criminal charges are laid against the alleged abuser, the couple marries and now it is argued that the complainant is not a compellable witness. The section promotes the values enshrined in the Constitution as it enables the State to compel the alleged victim of domestic violence to testify against her or his spouse to ensure that the State fulfils the obligation imposed on it by Article 14(3), namely to give protection to the family, the fundamental unit of the society. It also ensures, amongst other things, that spouses who are victims of the alleged crimes of violence on their person or their children are not discriminated against on the ground of social status, namely being spouses of alleged perpetrators. The argument that the complainant who is an alleged victim of domestic violence at the hands of her husband is not a compellable witness merely because she is the Respondent's wife, who apparently does not want to proceed with the charges she has laid against her husband, is fundamentally flawed. As pointed out above, it has the effect of depriving the spouse of the protection she is entitled to. It also appears to encourage spouses who are accused of domestic violence against their partners to escape the consequences of their alleged criminal conduct. Such a situation is not what is intended by Article 12(1)(f). Such an interpretation will also deprive spouses who are victims of domestic violence at the instance of their spouses of their dignity as it would have the effect of condemning them to perpetual abuse without the intervention of the law, so long as they remain married to their spouses and they are unwilling or reluctant to testify

possibly for domestic considerations. For these and many other reasons, I am not persuaded that s 195(1)(a) has been rendered unconstitutional by the provisions of Article 12(1)(f) of the Namibian Constitution. On the contrary, the section is in harmony with the Article in question.

[25] Section 195(1) makes the complainant in this case to be a competent and compellable witness to give evidence against her husband because she is the alleged victim of domestic violence at the instance of her now husband. I have therefore come to the conclusion that the complainant in this case is a competent and compellable witness for the prosecution.

[26] Having made a finding that the complainant is a competent and compellable witness for the prosecution, I will now deal with the issue whether the State has established a prima facie case against the Respondent. Applications for discharge at the end of the State case are governed by s 174 of the Criminal Procedure Act which provides as follows:

'If at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.'

[27] Section 174 gives the discretion to the Court to not put the accused on his defence if there is no case for the accused to answer. There is no formula or test applicable to all circumstances when deciding whether or not to discharge. Each case must be decided on its own merits in order to reach a just decision. (See *S v Ningisa and Others*, unreported judgement of this court delivered on 14 October 2013)

[28] The test for a discharge under s 174 differs from that at the end of the case where the court is required to assess the evidence as a whole, including the probabilities of the particular case.

[29] The criterion to be used by the court in exercising its discretion whether to discharge or not is whether there is evidence on which a reasonable Court acting

carefully may convict. Credibility of witnesses plays only a very limited role at this stage. (*S v Nakale and Others* 2006 (2) NR 455 (HC); *S v Teek* 2009 (1) NR 127 (SC))

[30] In the present matter the learned magistrate failed to apply the established test for a discharge in terms of s174. Because, in discharging the Respondent she stated that she could not place the Respondent on his defence because the complainant from the beginning did not want to continue with the case as she had filed a withdrawal statement and that the complainant declined to answer certain questions put to her by the defence counsel. The complainant is alleged to have been a victim of kidnapping, rape and assaults by the Respondent who is her husband. She can be compelled to testify against him even if she prefers not to do so.

[31] As counsel for the Appellant rightly argued, the complainant having reported the matter to the police, the question whether or not to prosecute was no longer in her hands. The prosecution was entitled to proceed with the case in terms of s 2 of Act 51 of 1977. Furthermore, the State is *dominus litis* and has the sole discretion to proceed or not to proceed and how to present evidence, what evidence to present and the sequence within which such witness will be called. (*S v Malumo and 116 Others* (No.2) 2008 (1) NR 335 (HC) at 339). Therefore, the court a quo misdirected itself by reasoning that the complainant was misled by the prosecution to give evidence. The complainant was obliged to give evidence at the pain of being dealt with in accordance with the law if she refuses to testify.

[32] Although the prosecution insisted on proceeding with the prosecution of the case against the Respondent contrary to the complainant's wishes, by being compelled to testify, the complainant was not forced to give false testimony against the Respondent. What is required of her is to give a truthful account of her version of events.

[33] From the complainant's testimony as stated above as well as corroborative evidence of Ms Iyambo and the medical evidence, I am of the opinion that the State has established a prima facie case against the Respondent on all counts. The

learned magistrate's exercise of discretion to not place the Respondent on his defence is tainted by misdirection. Therefore, there is a need for this court to interfere with the Court a quo's exercise of discretion as it was not exercised judiciously.

[34] In the result the following order is made:

- (a) The appeal is upheld.
- (b) The Court a quo's discharge of the Respondent on all counts is set aside. The Respondent is placed on his defence.
- (c) The complainant is a competent and compellable witness.
- (d) The matter is referred back to the Court a quo for the continuation and finalisation of the trial before the same magistrate if available.
- (e) The Respondent should be brought before court by way of a summons.

NN SHIVUTE
Judge

G N NDAUENDAPO
Judge

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