REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 02/2016

In the matter between:

RHYNO RICHARDO du PREEZ **APPLICANT**

v

THE STATE **1st RESPONDENT**

RACHEL ELIZABETH RITTMANN **2nd RESPONDENT**

Neutral citation: *S v du Preez* (CC 02/2016) [2019] NAHCMD 41 (05 March 2019)

Coram: LIEBENBERG J

Heard: **04 March 2019**

Delivered: **05 March 2019**

Flynote: Criminal Procedure – Application for separation of trials in terms of s 157(2) of Criminal Procedural Act 51 of 1977 – Court having discretion to grant or refuse application – Discretion to be exercised judiciously.

Criminal Procedure – Application for separation of trials in terms of s 157(2) of Criminal Procedure Act 51 of 1977 – Primary concern is whether there will be probable prejudice for the applicant by separation of trials – Whether in the interest of the administration of justice to order separation of trials – Duration of trial after applicant's admission made in terms of s 220 of the Criminal Procedural Act 51 of 1977 not probable prejudice – More of inconvenience to applicant – Application refused.

ORDER

In the result, it is ordered that the application for a separation of trials is refused.

RULING *(Application for separation of trials)*

LIEBENBERG J:

[1] This is a ruling on application for the separation of trials brought in terms of s 157(2) of the Criminal Procedure Act 51 of 1977.

[2] Section 157(2) provides that:

'Where two or more persons are charged jointly, whether with the same offence or with the different offences, the court may at any time during the trial, upon the application of the prosecutor or of any accused, direct that the trial of any one or more of the accused shall be held separately from the trial of the other accused.'

The section makes plain that the court has a discretion which must be exercised judiciously.

[3] In determining whether an application for the separation of trials should be granted, the primary concern is whether the applicant will be prejudiced by a separation of trials. Furthermore, the prejudice which the applicant will suffer if separation is refused is set off against the prejudice to the other party and the State if separation is allowed. (See A Kruger *Hiemstra's Criminal Procedure* at 22-36).

[4] In my view the question in the present instance is whether it will be in the interest of the administration of justice to order a separation of trials.

[5] It is settled that a multiplicity of proceedings should as far as possible be avoided. It is generally accepted to be in the interest of the administration of justice that persons charged together with the same count, should be tried together (See *R v Bagas* 1952 (1) SA 437 (A) at 441F). Moreover, where the State as in this instance, relies on the doctrine of common purpose when required to prove its case against the accused persons.

[6] The mere possibility of prejudice is insufficient; <u>probable prejudice</u> is required which will be determined by the facts of each case. In *R v McMillan* 1958 (3) SA 800 (ECD) the requirement was described as a "<u>real danger</u>." This requirement applies not only to the prejudice of the applicant if separation was refused, but also the prejudice of the other party if it were allowed.

[7] It should be borne in mind that the mere fact that the accused persons may incriminate each other reciprocally does not create an injustice. On the contrary, it is often in the interest of justice that accused persons be tried together so that the court can have all the evidence before it, putting the court in a better position as to determine guilt and the respective degrees of each accused's blameworthiness.

[8] In the present instance it is evident from the s 220 statement of the applicant (accused no 1), that accused no 2 is not only implicated, but the admissions contained therein support the State's contention of the accused having acted with common purpose when committing the offences alleged in the indictment. Applicant also places substantial blame on his co-accused as to who was the main perpetrator

during the planning stages of the crime, minimising his own blameworthiness significantly. It is on this aspect that the State mainly opposes the application.

[9] Furthermore, both accused pleaded not guilty. Applicant elected not to disclose the basis of his defence at the time and put the State to the proof of its case. This was the course he chose namely, for the matter to proceed to a trial. In turn, besides making a few formal admissions, accused no 2 denied the allegations set out in the indictment. Applicant's decision to proceed to trial was taken 3 (three) months ago (03 December 2018), from which it may be inferred that he elected to go through a full trial. That is inconsistent with the submission that applicant all along intended to admit his guilt.

[10] It is common cause that where multiple accused are tried in the same trial, each will be afforded the opportunity to test the evidence of the other, moreover, where they implicate one another. Any cross-examination to be conducted by either the State or counsel for the co-accused from the s 220 statement of the applicant could therefore not be prejudicial to accused no 2, as correctly conceded by Mr *van Vuuren*, counsel for the accused no 2.

[11] The only form of prejudice identified by Ms *Gebhardt*, counsel for the applicant, is that it will take longer before the case against the applicant is finalised and before he can start serving his sentence. As mentioned, until 3 months ago the applicant had no issue or concern about the ensuing trial. To be required to sit through the trial – a course that the applicant intentionally chose – falls short from satisfying the requirement of probable prejudice to be suffered.

[12] Mr *Olivier*, counsel for the State, argued that the State will suffer prejudice in the form of additional costs incurred in respect of witness fees, legal fees and a congested court roll. However, in my view, these grounds are equally insufficient to persuade the court that it will bring about probable prejudice to the State.

[13] It was conceded by Ms Gebhardt that – in light of the State's submission that they intended leading further evidence on the accused persons having acted with premeditation and communication in that regard – such evidence could still be adduced by the State in the trial continuing against the applicant. It certainly then begs the question as to why should a separation be ordered if the State is required to lead the same evidence in two separate trials? Furthermore, it would at this stage

appear to me that, on the strength of the admissions made, it is questionable as to whether the offence of robbery has indeed been committed. Mr Olivier submitted that the amount admitted by the applicant falls short from what is alleged in the charge which the State will be required to prove. It was however argued on behalf of applicant that this can be implied from the context in which the admissions are made.

[14] This is not an instance where the applicant has pleaded guilty and has been convicted on his guilty plea after the State has indicated to the court that it accepts the plea on the basis tendered, and the State being bound by the admissions made by the accused. Even if a separation were ordered, on the strength of Mr Olivier's submissions, there would be an ongoing trial against the applicant to prove those facts not admitted by applicant.

[15] I have in view of the foregoing come to the conclusion that the applicant has failed to show on a balance of probabilities that he will suffer probable prejudice in a joint trial. In this instance it would be in the best interest of both the applicant and accused no 2 if the court has all the facts before it when finally called upon to decide their respective degrees of guilt, and what the nature of the crime is they committed.

[16] In the result, it is ordered that the application for a separation of trials is refused.

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J C LIEBENBERG

JUDGE

APPEARANCES:

APPLICANT	H Gebhardt
	Instructed by Legal Aid, Windhoek.
1st RESPONDENT	M Oliver
	Office of the Prosecutor-General, Windhoek
2nd RESPONDENT	JJ van Vuuren
	Instructed by Legal Aid, Windhoek.