



HIGH COURT OF NAMIBIA, MAIN DIVISION

CASE NO.: CC 26/2018

In the matter between:

THE STATE

APPLICANT

versus

ANDRE MADJIET

RESPONDENT

Neutral Citation: *State v Madjiet* (CC 26/2018) [2021] NAHCMD 152 (8 April 2021)

Coram: Claasen J

Heard: 30 March 2021

Delivered: 08 April 2021

Flynote: Criminal Law – Criminal Procedure – Opposed application – Special Arrangements for Vulnerable Witnesses – Section 158A of the CPA considered – Application granted.

Summary: Application brought to permit the complainant to be regarded a vulnerable witness as contemplated under s 158A of the CPA. The special arrangements applied for was that the complainant testify from another room which is connected to the court

room by means of closed circuit television and that the complainant be assisted by a support person. The application was opposed by the accused who testified under oath.

Held: that testimony from the closed circuit television will not impede effective cross-examination, nor will it deprive any of the parties to observe the demeanor of the witness, in view of the pre-requisites contained in s158A(6) of the CPA.

Held: that the State witness, the complainant, Gabriela Cee Jay Madjiet is a vulnerable witness as contemplated by s 158A of the Criminal Procedure Act, No. 51 of 1977 as amended.

Held: that this witness is permitted to give evidence from a closed circuit television room with the assistance of a support person.

ORDER

The application by the State is granted.

1. It is ordered that the State witness, Gabriela Cee Jay Madjiet is a vulnerable witness as contemplated by s 158A of the Criminal Procedure Act as amended.
2. It is furthermore ordered that this witness is permitted to give evidence from a closed circuit television room with the assistance of a support person.

RULING ON APPLICATION FOR SPECIAL ARRANGEMENTS FOR VULNERABLE WITNESSES IN TERMS OF SECTION 158A OF THE CRIMINAL PROCEDURE ACT, ACT 51 OF 1977 AS AMENDED

CLAASEN J

[1] This is an application by the State in terms of s 158A of The Criminal Procedure Act, as amended¹ (the CPA), which was opposed by the accused. Thus, the court was confronted with the question of whether the complainant herein qualifies as a vulnerable witness and whether the circumstances of this case justifies permission for this particular witness to give evidence within the framework of special arrangements as contemplated by s 158A of the CPA.

[2] Counsel for the State, tendered oral submissions in support of the application for the court to grant an order to facilitate the evidence of the complainant from another room by means of closed circuit television, as well to grant permission that a support person be present in the room with the complainant. Counsel for the State relied on two grounds on which the complainant meets the criteria of a vulnerable witness, namely that she is a person against whom an offence of a sexual or indecent nature has been committed and that she is a person against whom an offense involving violence has been committed by a close family member.² Counsel for the State emphasized the considerations stipulated in subsection 7 of the relevant provision. He furthermore impressed upon the court the nature of the offences and the familial bond between the accused and the complainant and how that dynamics might affect the complainant, in her testimony.

[3] The accused testified under oath in opposition of the application. He raised four points in his testimony namely:

- i) The complainant visited him in custody, whilst trial awaiting;
- ii) The complainant sent text messages to his cellphone during 2013 and 2014;
- iii) During an adjournment of the proceeding in his bail application, which had to be stopped on account of the complainant's emotional state, before court started, he observed her on the screen and she and the persons in the room were happy;

¹ The Criminal Procedure Act, No 51 of 1977 as amended.

² Section 158A(3)(b) and Section 158A(3)(c) of the Criminal Procedure Act No 51 of 1977 as amended.

- iv) Whilst out on bail he received a telephone call from a person who identified himself as the boyfriend of the complainant who said that the complainant want to talk to the accused which contact the accused declined.

[4] Cross-examination canvassed the issue of whether the accused accepts that the allegations in the charge involves sexual offences perpetrated against his daughter, which was answered in the affirmative. Along the same lines it could not be disputed that part of the charge allegations are comprised of threats by the accused to the complainant. Finally the accused was asked whether he expects the complainant to always cry to which the accused replied in the negative.

[5] In submissions it was the view of Counsel for the accused that the application was flawed as it was based on a prosecutorial assumption that the complainant will not be free to testify, without tangible information such as social worker's report about side effects of testimony of this nature on the complainant.

[6] As for the so-called distress by the complainant he referred to the evidence of his client that the complainant initiated contact with the accused. According to Counsel for the accused, the State did not meet the requirements of a vulnerable witness as defined in the law, as both the provisions on which the State rely contains the phrase to the effect that the offense must have been committed, which condition is not fulfilled and it has not been proven that any offences were 'committed.'

[7] Counsel stated that there is no reason why the complainant cannot testify as a normal witness in open court. Additionally he argued that his client is prejudiced in the conduct of cross-examination and will not be able to observe the demeanor of the complainant whilst giving evidence.

[8] In deciding an application of this nature, the court must have regard to the guidelines stipulated in s 158(A)(7) of the CPA namely:

- (a) the interest of the state in adducing the complete and undistorted evidence of a vulnerable witness concerned;
- (b) the interests and well-being of the witness concerned;
- (c) the availability of necessary equipment and locations;
- (d) the interests of justice in general.

[9] Given that in this matter the accused disputes that the complainant falls within the categories that the State relied upon, I turn to that point first.

[10] In this regard Counsel for the accused emphasized that the verbs in the provisions in s 158A(3)(b) and s 158(3)(c) of the CPA are formulated in the past tense. He interprets it to mean that it must be proven that the offences were committed, which cannot be said at this juncture in the trial is still underway. If this interpretation is correct, Counsel for the State argued, that it will totally defeat the objective of the provision.

[11] As far as the construction of a statute is concerned, the golden rule of interpretation dictates that the words of a statute must be given their ordinary literal meaning, unless it will result in a manifest absurdity, inconsistency, hardship or be contrary to the legislative intent.³

[12] In contemplation of the objective of s 158A of the CPA, I turned to the preamble⁴, which gives the purpose as follows: 'To amend the Criminal Procedure Act, 1977, so as to provide for the making of special arrangements for vulnerable witnesses;...'

[13] It is also imperative to consider the context in which the amendment originated. The amendment became necessary against the ever increasing number of cases that involves physical and sexual violence, and the daunting undertaking by victims of reliving that experience in the strict formalities of the court room. The amendment is an important instrument in the arsenal to fight violence that may be perpetrated against

³ *Adampol (Pty) Ltd v Administrator, Transvaal* 1989 (3) SA 800 at 804 A-C

⁴ Criminal Procedure Amendment Act, No 24 of 2003.

women and children, with a simultaneous safeguard for the fair trial rights of an accused.

[14] I also had regard to the meaning of the word vulnerable in the heading of s 158A of the CPA. The word 'vulnerable' is defined as '...exposed to the risk of being attacked or harmed, either physically or emotionally.'⁵

[15] If the interpretation of s 158A(3)(b) and s 158A(3)(c) of the CPA that is accorded by Counsel for the accused is correct, it results in the absurdity of it not being able to be invoked until the point where the offence is proven to have been committed. That point is not reachable without the testimony of witnesses, which may include that of a vulnerable witness. Furthermore the point of 'proven to have been committed' might not even arise, if there is no conviction.

[16] The sections have to be construed against the objective of the amendment, which in my view is to permit special measures in court to make the process of testifying less traumatic for certain witness. The categories of witnesses are circumscribed in s 158A (3) of the CPA. I accept that in general whilst a trial is ongoing, the offences are mere allegations to have been committed, which allegations may or may not be proven during the trial. As far as s 158A(3)(b) of the CPA is concerned it refers to offences of a sexual or indecent nature, whereas s 158A(3)(c) of the CPA refers to any offence that involves violence and combines it with the perpetrator being in a family relationship to the victim.

[17] In view of this, I agree with the State that Parliament could not have intended the absurdity of these provisions to be operational only after the commission of the offences have been proven. Therefore I do not endorse the meaning as interpreted by counsel for the accused.

⁵ Concise Oxford English Dictionary, Twelfth edition, Oxford University Press.

[18] I pause to consider the evidence adduced by the accused, the theme which was that the complainant contacted him voluntarily, and appeared to have been happy on a certain date of his bail application. In view of that, the argument is that it does not represent a picture of a petrified witness. This is but one of the competing considerations before court.

[19] Counsel for the State reiterated that the facilities are available at the High Court building. It was his argument that it is in the interest of the State and in the interest of the witness to minimize trauma in the ordeal of having to face her own father will have an impact on her evidence. He emphasized that the offences involves threats and sexual offenses. He impressed upon the court that the interest of justice and the interest of the accused do not exclude the rights of a victim.

[20] It is also evident in the indictment that the charge allegations emanates from the years 2009 until 2013. According the charge particulars the complainant was merely 15 years old in 2009.

[21] The issue of prejudice to the accused, is also of relevance. There is no qualm about the existence of an accused's right to challenge evidence to the fullest extent. The prejudice alluded to by Counsel for the accused is that it will be a challenge to cross-examine the complainant if she testify from the closed circuit television room, and that he will not be able to observe her demeanor. S 158A(6) of the CPA clearly articulates the pre-requisites when a witness testifies from another room as that: '...the accused, his or her legal representative, the prosecutor in the case and the presiding officer shall be able to hear the witness and shall also be able to observe the witness while such witness gives evidence.' Against this standard to be observed during the proceedings, the testimony from the closed circuit television will not impede effective cross-examination, nor will it deprive any of the parties from observing the demeanor of the witness.

[22] I agree with counsel for the accused that the granting of special arrangements is not automatic. It's a discretion afforded to the trial court to assess in each application or

case whether the requirements of the relevant provisions are met. In this case the court had sufficient information to make the decision and grants the application for the special measures applied for.

[23] In the result, the application by the State is granted and the following order is made:

1. State witness, Gabriela Cee Jay Madjiet is a vulnerable witness as contemplated by s 158A of the Criminal Procedure Act as amended.
2. It is furthermore ordered that his witness is permitted to give evidence from a closed circuit television room with the assistance of a support person.

CLAASEN C
JUDGE

APPEARANCES:

FOR THE APPLICANT:

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