



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: CC 31/2019

In the matter between:

THE STATE

and

GAVIN GAWANAB

ACCUSED

Neutral citation: *State v Gawanab* (CC 31/2019) [2021] NAHCMD 176 (21 April 2021)

Coram: USIKU J

Heard: 29 March 2021

Delivered: 21 April 2021

Flynote: Evidence – Ascertainment of bodily features of accused – Taking of bodily features – Whether the taking of bodily features for purposes of Criminal investigations is reasonable and necessary step to ensure that justice is done and whether it is reasonable and necessary in balancing interest of justice against those of individual dignity.

Summary: The accused, charged with three counts of rape, three counts of attempted rape, four charges of attempted murder and several counts of assault as well as assault with intent to do grievous bodily harm, went on trial for the said

offences. During the trial the State led the evidence of several witnesses of whom some were minor children.

The minor children testified that the person who attacked and violated them was a brown male who had tattoos on his arms and legs. With the state's case still not completed, the state has now formally applied for an order in terms of s 37 (3) (a) of the Criminal Procedure Act 51 of 1977 for an order that would compel the accused to allow the state to take pictures of his body features in order to ascertain whether the accused has any mark, characteristics or distinguishing features.

The court restated the principle that the process does not compel a person to give evidence which will incriminate himself or herself as such the accused's contention that he is being forced to incriminate himself by submitting to the photo shoot does not hold water and is not meant to build a case against himself.

ORDER

In terms of s 37 (3) (a) an order is made that, in order to ascertain whether the body of the accused person has any mark, characteristic or distinguishing features or shows any condition or appearance of the accused's bodily features. The investigating officer is ordered to take photographs of the bodily features of the accused before the trial resumes in this court.

RULING

USIKU J

[1] In this matter the accused is charged with three counts of rape, three counts of attempted rape, four charges of attempted murder and several counts of assault as well as assault with intent to do grievous bodily harm. He has denied all the allegations and tendered pleas of not guilty when charges were put to him.

[2] It is common cause that the state has so far not completed its case and has now formally applied for an order in terms of s 37 (3) (a) of the Criminal Procedure Act 51 of 1977 for an order that would compel the accused to allow the state to take pictures of his body features in order to ascertain whether the accused has any mark, characteristics or distinguishing features.

[3] The application has been made by the state following the accused's refusal to submit himself after a request by the state. The application is opposed by the accused who have contended that since his arrest in 2018 the police ought to have taken such photos of his body features and that he cannot be compelled to assist the state to prove their case against himself.

[4] He further claimed that the police have had ample time to complete their investigations and their failure should therefore not be attributed to him. The accused has further attacked the state's failure to conduct a proper identification parade after he was arrested.

[5] It's important to deal with the background to the application now before Court. The offences are alleged to have been committed by the accused during the period of December 2012, May 2013, September 2016, April 2017 and September 2018 as well as during October 2018.

[6] During the trial the State has led the evidence of several witnesses who were minor children. Evidence of the minor children are that the person who attacked and violated them had tattoos amongst other features. They made reference to having been attacked by a brown male person who had tattoos on his arms and legs. One of the victim in fact made reference to the male person having exhibited tattoos in the form of a star on one of his feet.

[7] Though the defence had contended that the victim's statements did not make reference to the alleged tattoos, and therefore could not tally with the evidence presented. They persisted in their evidence that their assailant indeed had tattoos during their cross-examination by the defence. It is trite that police statements are often not, the mere bones and the fact that an aspect is omitted in the statement that

features in the oral evidence that does not in itself means that the event did not occur or that it is fabricated by a witness.

[8] As alluded to the application is seriously opposed by Mr Siyomunji on behalf of the accused on a number of grounds. These include the claim that the accused being subjected to such photo shoot will infringe upon the accused's fundamental constitutional rights to dignity, freedom and security of his person, body integrity and the right to be presumed innocent and not to have to assist the prosecution in proving its case against himself. It is further contended that rendering the relief sought by the state will be unreasonable and is meant to allow the accused to assist the state in building a case against himself which will be prejudicial to the accused if such order is to be granted.

[9] On the other it was submitted by the State that they could not have made prior arrangements to get the images on the accused's bodily features because the details of the body features only arose during the course of the victim's oral testimony, as such the state have had no prior knowledge about the allegations that the accused had any mark, characteristics or distinguishable features. What now remains is that the State has presented evidence in question well realising its inherent shortcomings and this alone would hardly warrant a refusal of the relief which the state now seeks. We are reminded that a criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge or an administrator of justice, he /or she is not merely a figure head, he/or she has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done.

[10] In fact s 37 of the Criminal Procedure Act insofar as it is relevant to this application reads as follows: "37 Powers in respect of prints and body appearance of accused s 37 3(a):

'Any court before which criminal proceedings are pending may- In any case in which a police official is not empowered under subsection (1) to take finger-prints, palm-print or

foot-prints or to take steps in order to ascertain whether the body of any person has any mark, characteristic or distinguishing features or shows any condition or appearance, order that such prints be taken of any accused at such proceedings or that the steps, including the taking of a blood sample, be taken which such court may deem necessary in order to ascertain whether the body of any accused at such proceedings has any mark, characteristic or distinguishing feature or shows any condition or appearance;.’

[11] Furthermore, I am persuaded in what was held, in the matter of *Levack and Others v Regional Magistrate, Wynberg and Another*¹, the Court, per Cameron JA which dealt with an application to require an accused to submit to a voice sample. It held that such a process does not compel a person to give evidence which incriminate himself or herself as such the accused’s contention that he is being forced to incriminate himself by submitting to the photo shoot does not hold water and is not meant to build a case against himself. In effect a Court has the power to issue an order requiring an accused to comply with the request to submit to a photo shoot. This power of the Court is derived from s 37 (1) (c).

[12] It is therefore clear from the wording of that section that the State may seek an order during the trial and that does not in itself render such an application to be unlawful or unreasonable.

[13] Whilst the State’s agents may have been careless by not taking the photos of the bodily appearance of the accused upon his arrest, there appear to be no indications that the State has been mala fide either at that stage or in this application. I find no evidence before me to suggest that the State has come to Court with dirty hands and having regard to the evidence presented so far, the order to compel the accused to submit to a photo shoot may as well exonerate/or incriminate the accused in the alleged commission of the offences he is being tried of.

[14] Under the circumstances the application must succeed, and the following order is made:

¹ *Levack and Others v Regional Magistrate, Wynberg and Another* 2003, (1) SACR 187 SCA.

In terms of s 37 (3) (a) an order is made that, in order to ascertain whether the body of the accused person has any mark, characteristic or distinguishing features or shows any condition or appearance of the accused's bodily features. The investigating officer is ordered to take photographs of the bodily features of the accused before the trial resumes in this court.

D N USIKU

Judge

APPEARANCES:

STATE : Mrs. Nyoni
Office of the Prosecutor-General

ACCUSED : Mr. Siyomunji (Siyomunji Law Chambers)
Instructed by Directorate of Legal Aid