

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case no: CC 1/2018

In the matter between:

THE STATE

and

JACO KENNEDY

1ST ACCUSED

R CLOETE

2ND ACCUSED

Neutral citation: *State v Jaco Kennedy* (CC 1/2018) [2021] NAHCMD 249
(15 April 2021)

Coram: MILLER AJ
Heard: 12 April 2021
Delivered: 15 April 2021 (*Ex tempore*)
Judg. made available: 21 April 2021

ORDER

- (1) The application of the State will be granted.
- (2) It is ordered that the evidence of two witnesses Ms Rooi and Ms Groenewald will be given in another room, which is connected by closed circuit television to the Court room

JUDGMENT

MILLER AJ

[1] Before me is an application brought at the instance of Mrs Nyoni who appears for the State, asking the court to invoke the provisions of Section 158 (A) of the Criminal Procedure Act, No. 51 of 1977, in respect of two witnesses the State wishes to call. These witnesses are said to be Ms Mary-Anne Groenewald and Ms Francois Rooi.

[2] It is submitted and accepted for present purposes that the provisions of s 158 (A) 3(b) find application. The section reads as follows:

‘For the purposes of this section, a vulnerable person is a person against whom an offence, either sexual or indecent nature, has been committed.’

[3] I am informed that Ms Groenewald and Ms Rooi allege that they are persons falling within that category. This is not disputed by any of the accused. The Court will in due course hear the evidence of Ms Groenewald and Ms Rooi.

[4] Section 158 (A)(1) reads as follows:

‘A Court before whom a vulnerable witness gives evidence in criminal proceedings may, on the application of any party to such proceedings or a witness concerned on its own motion, make an order that special arrangements be made for the giving of the evidence of that witness’

[5] This sub-section must be read in conjunction with sub section 2 (d) which reads as follows:

‘The granting of permission to the witness to give evidence behind a screen or in another room which is connected to the court room by means of closed circuit television or a one way mirror, or by any other device or method that complies with subsection 6.’

[6] Which brings me to subsection 6, which is to the effect that where the Court allows a witness to testify from a separate room, the accused, his or her legal

practitioner, the prosecutor and the presiding officer should be able to hear and observe the witnesses while they are giving evidence.

[7] As matters stand this Court has the necessary facilities, if the need arises to allow witnesses to testify in the circumstances contemplated in the relevant legislation. In support of the application. I heard the evidence of Ms Viall who is a Social worker, attached to the Gender Based Violence Unit as well as the evidence of Accused no.1.

[8] The evidence of Ms Viall as far as it is relevant is that she was requested by the office of the Prosecutor General to prepare, as she put it, Ms Groenewald and Ms Rooi for court. As I understand the evidence, that involves counselling sessions with the witnesses where inter alia their rights as witnesses and that of the accused are explained and it also involves a process where the witness is taken to a Court room where it is explained to the witness where the relevant role players being the Presiding Officer, the Prosecutor, Defence Counsel and the Accused are seated and during which the proceedings were explained.

[9] The evidence of Ms Viall is that as far as the complainant Ms Groenewald is concerned, she harbours a fear of Accused n.1, which she considers to be a powerful figure if she were to testify in open Court. As far as Ms Rooi is concerned, the evidence of Ms Viall is that when taken to Court, Ms Rooi was in an emotional state and appeared to be very frightened and not able to testify freely in an open Court because of the fear she has. The evidence of Accused no. 1 centres mainly on the fact that as he says he has a right as an accused person to face his accuser and conversely for his accuser to face him in open court when she testifies.

[10] The provisions of s 158 (A) of the Criminal Procedure Act, confers upon this court a wide discretion, whether to invoke the provisions of the legislation or not. It permits of no doubt that whatever discretion I must exercise must be exercised judicially. The exercise of a judicial discretion entails that I will take into account those factors which are relevant and can be brought to bear upon the issue in question.

[11] It also involves an exercise of affording to each relevant circumstance the weight it carries depending on the circumstances of the case. And in the final

analysis there must be a balancing exercise between the relevant and often competing considerations in order to arrive at a conclusion which appears to me to be fair and just in all the circumstances. The argument advanced by accused no. 1 that he is entitled to have his accuser face him in open court when she testifies, is the articulation of an existing right which existed in our law, and our legal system for a long time. That must be apparent from Section 152 of the Criminal Procedure Act.

[12] It is however not an absolute right. Section 158 (A) of the Criminal Procedure Act, to the extent that it does seek to curtail that right in appropriate circumstances. It does however remain a relevant consideration and one which must be considered in conjunction with all the other relevant considerations. Much of this trial will depend on the facts and the evidence that will be given during the course of the trial. I consider it to be an important and relevant consideration that those witnesses who testify will be able to do so in circumstances where their evidence is tendered in circumstances and surroundings which make it more conducive to a free and frank disclosure of the facts.

[13] The provisions of the relevant legislation is wide enough to permit accused no.1 and accused no. 2, as well as their legal representatives to see and hear the witness. As the Presiding Officer, I will be able to see and observe the witness, or witnesses, if and when they give evidence.

[14] Upon a balance of the relevant considerations, I have come to the conclusion that.

(1) The application of the State will be granted.

(2) It is ordered that the evidence of two witnesses Ms Rooi and Ms Groenewald will be given in another room which is connected by closed circuit television to the Court room.

K MILLER
Acting Judge

APPEARANCES

State: Mrs Nyoni
Office of the Prosecutor-General, Windhoek

1st Accused: Mr Isaacks
Isaacks & Associated (Instructed by Legal Aid)

2nd Accused: Mr Engelbrecht
Engelbrecht Attorneys (Instructed by Legal Aid)