

REPUBLIC OF NAMIBIA

HIGH COURT OF
WINDHOEK
RULING ON
THE STATE TO PROVIDE
TERMS OF S 87 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977



NAMIBIA MAIN DIVISION,
APPLICATION TO COMPEL
FURTHER PARTICULARS IN

Case Title: The State v Dirk Von Weidts Accused Jors Arrie Accused	Case No: CC 13/2022 Division of Court: Main Division Heard on: 28 September 2023 First Second
Heard before: Justice N N Shivute	Delivered on: 12 October 2023
Neutral citation: <i>S v Weidts and Arrie</i> (CC 13/2022) [2023] NAHCMD 641 (12 October 2023)	
The order: The application to compel the State to provide further particulars in respect of counts 1, 3,5,6,8 and 9 is dismissed.	

Reasons for order:

SHIVUTE J:

Introduction

[1] The two accused persons are jointly charged in an indictment containing 15 counts and some alternatives. The charges they are indicted on range from trafficking in persons read with the provisions of the Combating of Trafficking in Persons Act 1 of 2018, committing or attempting to commit an indecent or immoral act with a child under the age of 16 read with the provisions of the Combating of Immoral Practices Act 21 of 1980, indecent assault, rape, contravening section 2(1)(a) of the Combating of Rape Act 8 of 2000, abduction and kidnapping. The first applicant lodged an application in terms of s 87(1) of the Criminal Procedure Act 51 of 1977 (CPA) for the court to compel the State to provide further particulars in respect of counts one, three, six of trafficking in persons, and counts five, eight and nine of rape.

[2] The State has provided disclosure and replied to further particulars. However, the first accused was not satisfied, hence this application. The State opposed the application.

[3] Counsel for the first accused in respect of count 1 requested the State to provide further particulars on how the first accused recruited, received and harboured complainant HGS, a minor child by means of coercion, deception, an abuse of power, or her being in a position of vulnerability, deception and/or abuse of power with intent to subject her to sexual exploitation. Furthermore, when exactly, during 2020 and 2021, did the first accused commit the crimes, in which location at Noordoewer, and how exactly, it is alleged that the first accused exploited HGS.

[4] With regard to count 3, further particulars requested were:

(a) From which place did the first accused transport HGS and to which place was she transported?

(b) By what means was HGS transported?

(c) For which organisation did the first accused recruit HGS and how many times was she transferred with the intention to subject her for sexual exploitation?

(d) Where did the first accused transfer HGS and how was she transferred with intent to subject her for sexual exploitation?

[5] In connection with count 5, the State is to be compelled to provide further particulars as to how the first accused applied physical force to HGS and how exactly was she affected by helplessness?

[6] With regard to count 6, counsel for the first accused requested for further particulars similar to the ones requested in respect of count 3. Again, further particulars requested in respect of count 8 are similar to the ones in respect of count 5 except for the question as how did the first accused's penis become erect as a result of the touching of HGS.

[7] Pertaining to count 9, further particulars were requested as to how the first accused played with HGS' vagina and how many times, the type of physical force applied by the first accused to HGS and how she was affected by helplessness.

[8] The State's reply to the first accused's request for further particulars is as follows:

'(a) The charges as levelled by the State against the accused are clear and specific. The accused was able to reply to the questions as contained in the pre-trial memorandum and stated the pleas he would tender in respect of all the charges. This is a clear indication that he understands all the charges against him.

(b) The first accused was provided with the content of the docket which contains statements of witnesses from which the charges were drawn and which indicate what evidence the State will rely on during trial.

(c) The answers to the questions raised in the request for further particulars are contained in the content of the docket which has been availed to counsel for the first accused.'

Argument by counsel

[9] Counsel for the applicant argued that the State did not provide the particulars requested. Counsel argued that the only reference to counts one, three and six are the words 'trafficked and sexually exploit.' The words trafficked and sexually exploit can by no stretch of the imagination be regarded as adequate particulars to inform an accused person adequately of the charges he is facing.

[10] In respect of count 1, counsel argued that the charge reads inter alia that during the months of October 2020 and January 2021, the first accused recruited, and/or received and/or harboured the complainant by means of coercion, deception, abuse of power or being in position of vulnerability with the intent that the said HGS is subjected to sexual exploitation. It is quite clear that the section can be contravened in a number of ways as indicated above. However, recruit is not the same concept as received and harbour is also not the same concept as recruit and/or receiving. The same goes for the

means by which the first accused is alleged to have committed the offence. The question one is compelled to ask is by which means did the first accused commit the offences, was it by means of coercion, deception, abuse of power or, by the complainant being in a position of vulnerability?

[11] Counsel went on to define the words coercion and deceive as defined in the new Oxford Thesaurus of English by the Oxford University Press. According to the definition, each of the above concepts carry varying and diverse meanings. From the wording of the charge, these words are used alternatively, so counsel argued.

[12] In respect of count 3, the first accused is alleged to have transported and/or transferred (complainant) HGS. It is not clear what the first accused is alleged to have done. The first accused is entitled to sufficient particularity of the charge against him to enable him to properly prepare his defence. The period during which the first accused alleged to have committed count 3 is exactly the same as the period that is alleged in count 1 namely, during the months of October 2020 and January 2021.

[13] With regard to counts 5, 6, 8 and 9, first accused is confronted with concepts of physical force and helplessness. However, there is nothing in any of the statements provided by the State that accused 1 applied physical force and how the complainant was affected by helplessness and what helplessness entails.

[14] In connection with the ninth count, there is no indication how the first accused is alleged to have played with the complainant's vagina or how many times he did so. The State simply followed the wording of the Act, and expects the first accused to unravel a number of possibilities of how he was supposed to contravene the Act. Counsel made it a point of criticism that the State in its summary of substantial facts, failed to comply with

the requirements of s144 (3)(a) of the CPA.

[15] Counsel for the State argued that the first accused was provided with disclosure of the indictment during pre-trial proceedings and a summary of substantial facts with the list of witnesses, the State's pre-trial memorandum, list of the content of the docket as well as the actual content of the case docket. The first accused filed a reply to the State's pre-trial memorandum in respect of which he indicated that he would tender a plea of not guilty in respect of all the counts.

[16] Counsel argued that concerning the request for further particulars under consideration, counsel for the first accused is confusing such particulars with seeking guidance on the evidence that may be tendered by the State to establish the commission of the offences charged for the following reasons:

16.1 The indictment is crafted having reference primarily to the statement of the complainant, which has been availed to the accused.

16.2 The indictment is clear and specific, having regard to the fact that the alleged victim was a minor at the time the offences were allegedly committed and therefore, not able or in a position to link specific acts or occurrences to a specific date, hence the reference to the months October 2020 and January 2021.

16.3 The misgivings with the terms "trafficking" and "sexual exploitation" used in the summary of substantial facts not being adequate particulars are untenable. The charges as depicted in the indictment clearly expound or define what is meant with trafficking and the sexual exploitation the victim was allegedly subjected to, so counsel submitted.

16.4 Counsel further argued that, the State had availed to the first accused all that he will need for the preparation of his case, which is what the State will be relying on in prosecution of the matter. The State had nothing more to disclose. If forced to comply with what the accused is demanding, then, this would in essence require the State to inform the first accused what evidence it will lead to prove the charges against him, which the court should not permit. This would go against the principle of fair trial.

Applicable law

[17] In determining this application, this court will have to consider the provisions of the applicable law. Section 87 under which this application is brought provides as follows:

'87. Court may order delivery of particulars.

(1) An accused may at any stage before any evidence in respect of any particular charge has been led, in writing request the prosecution to furnish particulars or further particulars of any matter alleged in that charge, and the court before which a charge is pending may at any time before any evidence is in respect of that charge has been led, direct that particulars or further particulars be delivered to the accused of any matter alleged in the charge, and may, if necessary adjourn the proceedings in order that such particulars may be delivered.

(2) The particulars shall be delivered to the accused without charge and shall be entered in the record, and the trial shall proceed as if the charge had been amended in conformity with such particulars.

(3) In determining whether a particular is required or whether a defect in the indictment before a superior court is material to the substantial justice of the case, the court may have regard to the summary of the substantial facts under paragraph (a) of section 144(3) or as the case may be,

the record of the preparatory examination.'

[18] The object to call for further particulars is to enable the accused to know the case he is facing in order to prepare his defence properly. In determining whether or not further particulars are reasonably required to be furnished to the accused, the court must have regard to the charges as well as the summary of substantial facts. From what has been stated above, the court needs to ask itself whether the particulars availed to the accused by the State reasonably and fairly inform the accused of the charges preferred against him in order to properly prepare his defence. In *S v Cooper and Others* 1976 (2) SA 875 (T) at 886 A-B, the court warned that care must be exercised 'not to confuse particulars which may be essential to inform the accused fairly and reasonable of the case he has to meet with the evidence which may be tendered to prove the commission of the offence.

[19] Although the prosecution is under obligation to furnish such particulars of the material facts which it intends proving and in line with the principle of a fair trial which is enshrined in Article 12(1)(a) of the Namibian Constitution, it need not disclose the evidence by which it proposes to prove the facts.

[20] The prosecution has been heavily criticised that the charges are vague as they lack particularity and the prosecution merely recited the provisions of the Acts. With regard to reciting contextual provisions of the Act, the two accused persons are charged, inter alia, with statutory offences. Section 84(3) of the CPA with regard to the essentials of the charges provides that:

'(3) In criminal proceedings the description of any statutory offence in the words of the law creating the offence, or in similar words shall be sufficient.'

It therefore, follows that the contention of the state having recited the provisions of the Act has no merit.

[21] Again, counsel for the first accused contended that the summary of substantial facts provided did not meet the requirements of the provisions of s 144(3)(a) of the CPA. The summary of substantial facts states that during the months of October 2020 and January 2021, the complainant on several but different occasions, was trafficked to the respective homes of the two concerned accused persons, whereby each of the accused in seclusion proceeded to accost the complainant and sexually exploit her.

[22] *S v Nghixulifa and Others* 2016 (2)NR at 356 'A reading of the section (144(3)(a)) makes plain that the [Prosecutor-General] has a wide discretion as to the facts considered necessary to inform the accused of the allegations against him, there is nothing in the section compelling the PG to elaborate in the summary of substantial facts on the allegations contained in the charge.'

[23] Counsel for the State in reply to the request for further particulars stated that the content of the police docket which contains statements of witnesses from which the charges were drawn and which indicate what evidence the State will rely on during trial have been disclosed to counsel for the first accused. Furthermore, the answers to the questions raised in the request for further particulars are contained in the content of the docket. She further submitted that the indictment is crafted having reference primarily to the statement of the complainant that was disclosed to the first accused. The reference to the months October 2020 and January 2021 was due to the fact that the complainant was a minor at the time the offences were allegedly committed and therefore, not able or in a position to have specific acts or occurrences linked to specific dates.

[24] Section 84(2) of the CPA provides that where any of the essentials of the charge are unknown to the State, the prosecution is entitled to State that fact in the charge. If the State does not know the exact dates requested, then at best 'it can only inform the accused of what it does know and upon what it is going to rely.' *S v Nghixulifa and Others*

supra at 361 para 12.

[25] I associate myself with the above legal principles. In the present matter, the State does not know the specific dates on which the offences were allegedly committed. It is only able to provide the months since that is what is available to them. Therefore, it cannot be compelled to provide what it does not know or have.

[26] Counsel for the first accused also raised the issue of the means used by the first accused to commit the offences. The answer to this question appears to be stated in the Combating of Trafficking in Persons Act 1 of 2018.

[27] The other questions sought clarification on how the accused was involved in the commission of the alleged offences. To determine whether or not the first accused has a reasonable need for further particulars to prepare for his defence, it suffices for the court to have regard to the indictment, summary of substantial facts and what has been disclosed to him.

[28] At the pain of being repetitive, counsel for the State in her reply for further particulars provided the first accused with the content of the docket which contains statements of witnesses from which the charges were drawn and that they did not have additional information to offer. This court is of the opinion that the prosecution has provided disclosure containing what is available to them and what the State says it will rely upon in proving the charges against the accused. Compelling the State under the circumstances to provide further particulars that it does not have, may amount to ordering the State to inform the accused of the evidence it will likely lead to prove the charges against him.

[29] In the result, the following order is made:

The application to compel the State to provide further particulars in respect of counts 1, 3,5,6,8 and 9 is dismissed.

N N SHIVUTE Judge	
Counsel:	
State	Accused
F Vendura Office of the Prosecutor General	First Accused: P McNally Second Accused: J Andreas Instructed by the Directorate of Legal Aid