REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REASONS

Case No: CC 14/2018

In the matter between:

THE STATE

v

TATENDA KATSAMBA **ACCUSED**

Neutral citation: S v *Katsamba* (CC 14/2018) [2021] NAHCNLD 39 (16 April 2021)

Coram: SMALL AJ
Heard: **9 and 11 December 2020**
Delivered: **8 April 2021**
Released on: **16 April 2021**

ORDER

1. The objection against the State calling the witness Edward Natangwe is dismissed.

REASONS

SMALL AJ

[1] The accused, a Zimbabwean male, is arraigned before this Court on a charge of Murder, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003. The charge is worded as follows: 'In that upon or about the 28th day of July 2017 and at or near Oshakati West in the district of Oshakati the accused did unlawfully and intentionally kill Panashe Sande a female person.'

[2] The State is represented by Mr. Matota, assisted by Ms. Petrus and the accused is represented by Mr. Shipila.

[3] The matter has been set for trial from 1-11 December 2020. On 2 December 2020, the accused pleaded not guilty to the aforesaid charge and elected not to give a plea explanation.

The objection

[4] The trial against the accused commenced and continued with the State calling several witnesses. On 9 December 2020 when the State called Edward Natangwe a police officer to the witness stand, Mr Shipila raised an objection to the witness giving evidence in the trial.

[5] After preliminary submissions the matter was adjourned to 11 December 2020 to grant both parties an opportunity to formalize and finalize their submissions on the aforesaid objection. After the submissions, the matter was postponed to 1 April 2021 for the Court's ruling on the objection and for the continuation of the trial from 1 to 16 April 2021.

[6] Both parties were given the opportunity to provide further written submissions prior to the contemplated ruling if they so wished. The Court is grateful that both the Defence and the State made use of this opportunity and provided the Court with extremely helpful heads of argument.

[7] On 1 April 2021 the State applied for a postponement of the matter to 8 April 2021. The request came because of other commitments State counsel had. The

Defence did not oppose the postponement. The matter was subsequently postponed for the continuation of the trial and the ruling on 8 April 2021. This was necessitated also by the limited availability of the casual Shona interpreter Mr Hondo.

Submissions by the Defence

[8] Mr Shipila objected to the State calling of the witness Edward Natangwe, a witness the State submitted will testify about how he arrested the accused. He submitted that this witnesses' name does not appear on the list of witnesses titled "Annexure A". This annexure was furnished to the defence as part of the disclosure in this matter. Defence counsel was thus unaware about what this witness is coming to testify and has not made provision for this witness's testimony in its analysis of and preparation for this matter. To allow this witness to testify, counsel submitted is thus prejudicial in that it amounts to an ambush.

[9] He further submitted that the accused, who was at the time unrepresented, was served with the decision of the Prosecutor-General, the indictment, summary of substantial facts, list of witnesses and Annexure A, which is in essence a list of the statements and documents disclosed to the accused, on 15 November 2018. It is common cause that the statement of this witness was not part of the aforesaid disclosure.

[10] The accused was transferred to the High Court for his first appearance in pre-trial proceedings on 24 January 2019. Counsel further submitted that they were only provided with a copy of the purported "Annexure A" as amended on 11 December 2020, shortly after the state indicated that it was calling Edward Natangwe. The witness's name appears on the "amended Annexure A". There is, however, no indication that the "amended Annexure A" was filed with the registrar or served on the accused before the accused had pleaded. There is no stamp or acknowledgement of receipt or return of service to that effect. The purported amendment is therefore not properly before the Court.

[11] I just wish to pause here to point out that counsels' submissions refer to 11 December 2020 as the date on which he was provided with the amended annexure

and the aforesaid statement of the witness. This however happened on 9 December 2020. Nothing much turns on this difference.

[12] As this disclosure happened after the accused had pleaded counsel submitted it amounted to an ambush, was irregular and contrary to what was ordered by the Supreme Court in *S v Scholtz*[1]

[13] The first declaration read as follows:

'In prosecutions before the High Court, an accused person (or his legal representative) shall ordinarily be entitled to the information contained in the police docket relating to the case prepared by the prosecution against him, including copies of the statements of witnesses, whom the police have interviewed in the matter, whether or not the prosecution intends to call any such witness at the trial.'[2]

[14] It is not necessary to refer to the second declaration as it is common cause that the State does not rely on the exception to the general rule contained therein.

[15] The third declaration by the Supreme Court was worded as follows:

'The duty of the State to afford to an accused person (or his legal representative) the right referred to in para 1 shall ordinarily be discharged upon service of the indictment and before the accused is required to plead in the High Court. Provided, however, that the Court shall be entitled to allow the State to defer the discharge of that duty to a later stage in the trial, if the prosecution establishes on a balance of probabilities that the interests of justice require such deferment in any particular case.'[3]

[16] Referring to *S v Scholtz*[4] and *S v Nassar*[5] counsel submitted that disclosure is essential to the conduct of a fair trial. He submitted that it was not only held to be essential that the state disclose to the defense that which it intended to use at trial but to do so timeously. The right time to disclose was said to ordinarily be when the indictment is delivered to the defence. In terms of section 144(a) of the

[1] *S v Scholtz* 1998 NR 207 (SC).
[2] At 210G-H.
[3] At 210J-211A.
[4] Supra.
[5] *S v Nassar* 1994 NR 233 (HC).

Criminal Procedure Act, the indictment must be accompanied by a summary of substantial facts to enable the defence to understand the case brought against the accused.

[17] He submitted that there must also be a list of the names and addresses of the witnesses that the state intends to call at the trial subject to the provisions of section 144(a)(ii) and (iii) which essentially allow for the omission of names of witnesses from that list for reasons of the protection of those witnesses and public policy. The state must however satisfy the court that circumstances contemplated in (ii) and (iii) exist. As the State did not allege that the name of the witnesses, they intend to call was omitted for the reasons contemplated in Section 144(a)(ii). More-over, the fact that the State avers that it had amended the list of its witnesses says that it was not intended to conceal the identity of this witness as contemplated in the section above. What remains to be argued therefore is the effect of the omission of the name from the list given to the defence together with the indictment.

[18] He further referred the court to *S v Kandovazu*[6] and submitted that the decision confirmed that the access of the defence to the statements of witnesses is essential to accused's right to a fair trial and that a breach of such fundamental right amounts to an irregularity. The Court held further, regarding the consequences of such an irregularity, that if the irregularity was of such a fundamental nature that the accused had not been afforded a fair trial, then a failure of justice per se had occurred and the accused person was entitled to an acquittal for there had not been a trial, therefore there was no need to go into the merits of the case at all.

[19] He concluded that it is clear not only that disclosure must be made but also that it must be made at the earliest possible opportunity. This, taken in tandem with what was held in *Kandovazu* decision above, supports the argument that for a witness statement to be withheld at the time of indictment when it could have been disclosed then falls short of the requirements to disclose timeously and thus militates against the right to a fair trial.

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[6] *S v Kandovazu* 1998 NR 1 (SC).

[20] Notwithstanding the State's averment that they had attempted to serve the amended "Annexure A" on the accused and that he had refused to accept it, there is nothing before court to illustrate that the state had done so. There is also nothing before court to illustrate that the state had complied with rule 8 of the rules of this court which deals with service of process. That rule is comprehensive and caters for situations where no-one at a specific place is willing to accept service. It also sets out how service is to be affected and how such service or non-service can be proved. In terms of rule 8, process is to be served via the deputy sheriff and it is proven by means of a return of service or a return of non-service. There is no such return before court and thus no proof that the state had attempted to serve the accused.

Submissions by the State

[21] Mr Matota submitted that the disclosure of the statement of this witness was offered to the accused together with an amended list of witnesses. This was done during the review conference where the accused refused to receive the necessary documentation. Another attempt to provide the said documentation was during the pre-trial proceedings dated 6 March 2019.

[22] On that date the prosecution made the following submissions:

'My Lord during the pre-trial review there was additional disclosure documents that the State wanted to hand to the Accused person. However, he refused to accept these documents. My Lord and as such the State would like to hand it to him today, because it is part of his disclosure. And subsequently My Lord the State would then also file an amendment to the Annexure A that was previously filed, as well as a list of Witnesses.' And 'My Lord there is two additional statements as well as the forensic report, those are the documents that the State is referring to'.

[23] After the submission by the State, the accused indicated to the court that he refuses to accept the documents. As the Prosecutor-General's decision to prosecute him was made without the said documents.

[24] The Court on this date stated:

'This court cannot sustain your objection. The Court will not prescribe to you whether you should receive it or not, it is your decision. It is your decision to represent yourself. And I think I have previously indicated to you the problems of representing yourself. The same goes, only a fool represents himself. The Court cannot sustain your objection. It is your decision whether you receive it or not'

[25] The court further went on to state the following:

'You must understand this Court has no say on whatever the PG decides to prosecute you for, neither has this Court any say or any power to prescribe to the PG what they should do, how they should present their case, what they should disclose and when to disclose.'

[26] Mr Matota further submitted that when the first disclosure was made when the matter was transferred to the High Court on 11 December 2018, the statement of the arresting officer did not form part of the disclosure provided to the accused as it was not in possession of the prosecution. As soon as it became available, the State disclosed it to the accused. The accused still has the right to cross-examine the witness and the investigating officer on this aspect.

[27] In this regard State Counsel referred the Court to *S v Hanse-Himarwa* [7] albeit the unreported version of this decision.

[28] It was submitted that the said statement was disclosed to counsel for the accused on 9 December 2020 after the accused refused to accept the previous service. The matter was then adjourned for counsel to consult with the accused. After the consultation with the accused, counsel informed the court that he was instructed to object to the said witness's calling. The contents of the arresting officer's statement were known by the accused and his legal representative because it was disclosed to the legal representative. He consulted his client on it. This statement has been in the defence's possession since December 2020.

[29] Article 12(1)(*d*) of the Namibian Constitution provides that all persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining

[7] *S v Hanse-Himarwa* 2019 (3) NR 706 (HC)

those called against them. As such, the accused and his legal representative did not indicate any prejudice the accused is likely to suffer should this witness be called to testify.

[30] The State submitted that it is not its duty to procure a conviction but to assist the court in ascertaining the truth. The burden to prove a case beyond all reasonable doubt rests with the State. This duty requires the State to lead evidence of any witness whose evidence is relevant to the case or issues in dispute. In this case, the accused's defence is a denial of all the offence elements without formal admissions in terms of section 220 of Act 51 of 1977. No fact was admitted by the accused relating to his arrest to argue that the Court should prevent him from giving evidence.

[31] The State finally submitted that the accused maintains that his right to a fair trial is infringed but fails to indicate how it is affecting him. The accused is aware of the content of the statement. The gist of that testimony is the circumstances surrounding his arrest. Bearing in mind the accused's defence is a bare denial and that he offered no plea explanation. The evidence on the occasions as to how he was arrested will not affect how he conducts his defence. And if there is any discrepancy that may arise, according to him, he still enjoys the right to cross-examine that witness like any other witness as stated above.

Evaluation of the submissions

[32] The objection against the State calling the witness is that the State did not serve the witness’s statement when he was transferred to the High Court. The State counters this with the submission that they are only compelled to disclose what is in their possession at the time, and this they did. When the statement came into their control, they tendered it to the accused, undefended at the time, who refused to accept it.

[33] Except for relying on the general principles for disclosure and describing the late disclosure to defence counsel as trial by ambush Mr Shipila did not address the Court specifically on what exact prejudice the accused would suffer in the trial if the witness testifies. State Counsel submitted that any prejudice that might exist

can be properly addressed in the cross-examination as the accused did not provide a plea explanation.

[34] At the moment, this Court is not exactly sure as to what the witness will say in evidence. From the record of 6 Mach 2019 in the High Court referred to by State Counsel, it seems as if the accused might know who this witness is. He stated the following after January J in Court indicated that he could not sustain the objection:

> 'Then my Lord the arresting officer, the arresting officer is not part of the list of witnesses, but now I am surprise[d] if you want to file the statement today but the case was for [inaudible] and the PG did not even put that [inaudible].'

[35] It is abundantly clear that the statement was tendered to the accused before pleading to the High Court's charge. He elected not to accept the disclosure of, amongst other things, the statement at an earlier stage. Like any right an accused person might have, he also has a right not to exercise such a right. For example, although an accused has the right not to incriminate himself, he might elect not to exercise it and make a statement implicating himself once informed of such a right. In this example, he cannot argue that the State can lead no evidence regarding such a statement.

[36] Whatever the witness says in Court can be disputed in cross-examination and by other evidence. I can see no prejudice in allowing the witness to give evidence at this stage. Whether allowing such evidence might infringe on the accused's right to a fair trial or constitute a constitutional irregularity, if applicable needs to be considered later.

[37] As a result the following order is made:

1. The objection against the State calling the witness Edward Natangwe is dismissed.

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D. F. SMALL

ACTING JUDGE

APPEARANCES

FOR THE STATE:	Mr. L. Matota, assisted by Ms Petrus Office of the Prosecutor - General, Oshakati
FOR THE ACCUSED:	Mr. L.P. Shipila Directorate of Legal Aid, Oshakati