

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

RULING

Case No: CC 1/2023

In the matter between:

**THE STATE**

v

**RF**

**ACCUSED**

**Neutral citation:** *S v RF* (CC 1/2023) [2023] NAHCNLD 104 (11 October 2023)

**Coram:** KESSLAU J

**Heard:** 18 September 2023

**Delivered:** 11 October 2023

**Flynote:** Criminal Law-Criminal Procedure – Application for adequate disclosure – Article 12 of the Namibian Constitution - Right to disclosure - Best interest of the child - Section 234(1)(d) read with section 234(7) of the Child Care and Protection Act 3 of 2015 – Court to weigh the two interests.

**Summary:** The Legal representative of the accused brought an application for the disclosure of the images that will form the basis of the charges against his client, however the State objected to providing copies of the requested images

as they deemed sensitive given their nature and that the alleged victim is a minor.

*Held*, that the State relied on the principle of protecting the best interest of the child as enshrined under the UNCRC, African Charter, Child Care Protection Act 3 of 2015. The State suggests to provide the accused and/or his legal representatives the opportunity to privately view and consult regarding the images in its possession but not to make copies thereof.

*Held*, that before court is not a question of non-disclosure, but rather if the disclosure on the terms suggested by the State, being in the presence and under their control, will satisfy the values of a fair trial as provided for in Article 12 of the Constitution and in particular Article 12 (1)(e).

*Held*, that public interest dictates that no risk should be created with the further copying and distribution of the alleged pornographic images of children.

*Held*, that defence counsel as an officer of the court will treat the images with the desired respect however, with every copy made there is an increased risk of the exposure of the identity and a violation of the privacy of the alleged victims.

*Held*, that when weighing the inconvenience against the risk of these images falling into the wrong hands, and the possible infringement on the dignity of the children, the latter carries more weight.

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### **ORDER**

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1. The application by the defence to be provided with copies of the 59 so-called sensitive images is dismissed.
2. The State is to provide disclosure of the remainder of the images to defence counsel.
3. The State to provide the accused and/or his legal representatives the

opportunity to privately view and consult regarding the 59 images in its possession relating to the charges contained in the indictment.

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## REASONS

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KESSLAU J

### Introduction

[1] The accused is arraigned before this Court on various charges of which seven counts of the contravention of section 234(1)(d) read with section 234(7) of the Child Care and Protection Act 3 of 2015: Inducing, allowing or causing a child to be used for the purposes of creating child pornography, alternatively *crimen injuria*.

### The application

[2] Mr Greyling for the accused brought an application for the disclosure of the images that will form the basis of the above charges against his client. He conceded that he had access to all images in that he was able to view same in the presence of the State however, he did not receive a copy. Furthermore he submitted that, as the accused is in custody, it makes proper consultation impossible. He submitted that disclosure in its current form is inadequate and prevents the accused from receiving a fair trial.

[3] It appears that the State intends to rely on 265 images allegedly found on electronic devices of the accused. These have been copied onto a compact disk and is currently part of the docket. Ms Petrus for the State submitted that these images were fully disclosed to counsel for the defence in that he was allowed to view all. She further submitted that copies of all the images will be copied and disclosed for the use of counsel except for 59 images which are of a sensitive/abusive nature. The argument is that the best interest of the children should be protected and for that reason these 59 sensitive images should not be

copied.<sup>1</sup> The argument was further that there is a risk of these sensitive images being reproduced and published. Ms Petrus therefore suggested that consultation regarding the 59 sensitive images should only take place on devices in control of the State and under supervision.

### Legal principles

[4] Counsel for the accused submitted, correctly so, that it has become an entrenched legal principle that the accused's fundamental rights include the right to disclosure.<sup>2</sup> Counsel however conceded that the right to disclosure is not an absolute one and in certain instances may be limited. In *S v Nassar*<sup>3</sup> it was held that to ensure a fair trial and to uphold the provisions of Article 12 of the Constitution, an accused should be provided with disclosure. Only then will an accused be in a position to properly and fully prepare for trial.<sup>4</sup>

[5] In *S v Scholtz*<sup>5</sup> it was said that the State shall be entitled to withhold from the accused (or his legal representative), any information contained in any such docket, if it satisfies the Court on a balance of probabilities, that it has reasonable grounds for believing that the disclosure of any such information might reasonably impede the ends of justice or otherwise be against the public interest. Also that any system of justice that tolerates procedures and rules that put accused persons appearing before the courts at a disadvantage by allowing the prosecution to keep relevant materials close to its chest in order to spring a trap in the process of cross-examining the accused and thereby secure a conviction cannot be said to be fair and just. Non-disclosure might lead to the denial of justice.<sup>6</sup> The circumstances of each case plays a role in this determination.<sup>7</sup>

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<sup>1</sup> *Du Toit v Ntshinghila* (733/2015) [2016] ZASCA 15 (SCA (11 March 2016)).

<sup>2</sup> *Conrad v S* (HC-MD-CRI-APP-CAL-2022/00030) [2023] NAHCMD 258 (12 May 2023).

<sup>3</sup> *S v Nassar* 1994 NR 233.

<sup>4</sup> See also *S v Kahevita* (CR 11/2011) [2011] NAHCMD 25 (14 February 2011).

<sup>5</sup> *S v Scholtz* (2) (SA 6 of 1994) [1996] NASC 2 (6 February 1996).

<sup>6</sup> Article 7 and 12 of the Constitution.

<sup>7</sup> *Phillipus v S* (HC-NLD-CRI-APP-CAL-2022/00037) [2023] NAHCNLD 80 (11 August 2023).

[6] Before court is not a question of non-disclosure, but rather if the disclosure on the terms suggested by the State, being in the presence and under their control, will satisfy the values of a fair trial as provided for in Article 12 of the Constitution and in particular Article 12 (1)(e) which provides that: 'All persons shall be afforded adequate time and facilities for the preparation and presentation of their defense, before the commencement of and during their trial, and shall be entitled to be defended by a legal practitioner or their choice.'

[7] The State's argument is relying on Article 34 of the United Nations Convention on the Rights of the Child<sup>8</sup> which in summary states that all children must be protected from all forms of sexual exploitation and abuse, including unlawful sexual activity, prostitution and in pornographic materials.

[8] The Optional Protocol to the Convention on the Rights of the Child (OPCRC) on the sale of children, child prostitution and child pornography<sup>9</sup> in Article 8 deals with measures to be adopted to protect the rights and interests of child victims of the practices prohibited under the present Protocol at all stages of the criminal justice process, in particular in Article 8(1) (e) states that:

'Protecting, as appropriate, the privacy and identity of child victims and taking measures in accordance with national law to avoid the inappropriate dissemination of information that could lead to the identification of child victims.'

[9] Article 8 (3) of the OPCRC states that:

'Parties shall ensure that, in the treatment by the criminal justice system of children who are victims of the offences described in the present Protocol, the best interest of the child shall be a primary consideration.'

[10] Furthermore Article 8 (6) takes it a step further by stating that:

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<sup>8</sup> Ratification 30 September 1990.

<sup>9</sup> Ratification 16 April 2002.

‘Nothing in the present article shall be construed to be prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial.’

[11] Closer to home, according to the African Charter in Article 4 it is stated that:

‘In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.’

[12] The African Charter, UN Convention and protocols formed the basis of our Child Care and Protection Act 3 of 2015 (The Act) enacted with the aim to ‘give effect to the rights of children as contained in the Namibian Constitution and international agreements binding on Namibia; to set out principles relating to the best interests of children.’

[13] The relevant section of the Act that the accused is indicted on, section 234 (1) (d) deals with the prevention of exploitation of children, and state that:

‘A person may not induce, procure, offer, allow or cause a child to be used for purposes of creating child pornography, whether for reward or not.’

[14] The Act furthermore provides in section 3(1), under the heading of ‘Best interests of the child’, that:

‘This Act must be interpreted and applied so that in all matters concerning the care, protection and well-being of a child arising under this Act or under any proceedings, actions and decisions by an organ of state in any matter concerning a child or children in general, the best interests of the child concerned is the paramount consideration.

[15] The Act furthermore define an "organ of state" as being:

‘(a) any office, ministry or agency of State or administration in the local or regional sphere of government; or

- (b) any other functionary or institution-
- (i) exercising a power or performing a function in terms of the Namibian Constitution; or
  - (ii) exercising a public power or performing a public function in terms of any law,
- but does not include a court or a judicial officer;' (emphasis added)

[16] The exclusion of the above in my view means that, in matters concerning children, the court still has the judicial duty to, after careful consideration of all the circumstances, including the accused's rights to a fair trial, makes a ruling that might not necessarily reflects the best interest of the child in all circumstances.

#### Applying the law to facts before court

[17] The State is commended for their stance in protecting the best interest of the vulnerable witnesses and I am convinced that they do not act with any malice<sup>10</sup> when suggesting that the unnecessary re-production of these images might be an infringement on the dignity of the victims. The images is not before court however it was not disputed by the defence that they are of a sensitive nature. I have the fullest confidence that Mr Greyling as an officer of the court will treat the images with the desired respect however, having said that, with every copy made there is an increased risk of exposure of the identity and a violation of the privacy of the alleged victims. Even the slightest of risk for the so-called sensitive images to end up in the wrong hands would be too much.

[18] Public interest dictates that no risk should be created with the further copying and distribution of the alleged pornographic images of children. In my view disclosure as suggested by the State will not necessarily be the fairest of results but will be fundamentally fair to all parties involved. The fact that the accused is in custody will add to the challenges faced by defence when consulting in the manner suggested by the State, however when weighing the

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<sup>10</sup> *S v Hanse-Himarwa* 2019 (3) NR 706 (HC).

inconvenience against the risk of these images falling into the wrong hands, and the possible infringement on the dignity of the children, the latter carries more weight. This court should display due respect for the rights of the child and in particular their right to privacy and dignity.

Order

[19] In conclusion and after consideration of the above, the following order is made:

1. The application by the defence to be provided with copies of the 59 so-called sensitive images is dismissed.
2. The State is to provide disclosure of the remainder of the images to defence counsel.
3. The State to provide the accused and/or his legal representatives the opportunity to privately view and consult regarding the 59 images in its possession relating to the charges contained in the indictment.

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E.E. KESSLAU  
JUDGE



## APPEARANCES

FOR THE STATE:

S Petrus

Office of the Prosecutor - General, Oshakati

FOR THE ACCUSED:

P Greyling

Greyling &amp; Associates, Oshakati