

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

RULING

Case Title: <i>The State v Hafeni Hipangelwa</i>	Case no: CC 3/2021
	Division of Court: Northern Local Division
Heard before: Honourable Mr. Justice Kessler AJ	Delivered on: 7 March 2023

Neutral citation: *S v Hipangelwa* (CC 3/2021) [2023] NAHCNLD 21 (7 March 2023)

IT IS ORDERED THAT:

1. The State's application in terms of s 167 of the Criminal Procedure Act 51 of 1977, as amended, for the recalling of witness T. S. Nakalemo, is granted.

Reasons for the above order:

KESSLAU AJ:

[1] The accused is arraigned before this Court on two counts *to wit* Count 1: Murder and Count 2: Robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act 51 of 1977, as amended (CPA).

[2] The matter at hand is an application from the State to recall a witness in terms of s 167 of the CPA. The witness, T. S. Nakalemo, an employee of the Namibian Police Forensic

Science Institute (NPFISI), testified for the State regarding preliminary scientific results obtained from certain exhibits *inter alia* a knife and items of clothing. Her evidence was that the final report was outstanding due to budgetary constraints at the institute. An application from the State to remand the matter awaiting the final report was previously refused by this court.¹ Since that order was made, the report was finalized and is now available. The trial has progressed up to the point where the State has closed its case and the defense unsuccessfully brought an application for a discharge.

[3] The second scientific report was disclosed to the defence and this application is not opposed.

[4] During November 2018 the Police (Scene of Crime Unit), submitted items found on the crime scene and items allegedly found with the accused, to the NPFISI laboratory. Blood samples of both the deceased and the accused were also submitted. The laboratory was requested to determine firstly if the items contain human blood stains and secondly if either the blood of the accused or the deceased can be linked to any of the items.² A report, dated 21 January 2021, compiled by scientist T. S. Nakalemo was presented and forms part of the record as Exhibit “K”. The report states that a white jersey and a pair of flip-flops of the deceased tested positive for the presence of human blood whilst an okapi knife and striped t-shirt, allegedly seized from the accused, similarly tested positive for human blood. These articles appears to be the subject of the second and more detailed report which the State wish to present into evidence.

[5] Section 167 of the CPA reads that:

‘The court may at any stage of criminal proceedings examine any person, other than an accused, who has been subpoenaed to attend such proceedings or who is in attendance at such proceedings, and may recall and re-examine any person, including an accused, already examined at the proceedings, and the court shall examine, or recall and re-examine, the person concerned if his evidence appears to the court essential to the just decision of the case.’ (Emphasis added)

[6] The State’s application is relying on the second part of s 167 submitting that the final DNA report relating to items found on the scene and allegedly with the accused are essential evidence for the court to reach a just decision. It is trite law that once established that the evidence is essential to reach the truth, the court has a duty to see that substantial justice is achieved and ‘shall’ re-call the witness.³

¹ *S v Hipangelwa* (CC 3/2022) [2022] NAHCNLD 117 (26 October 2022).

² Application for scientific examination, Exhibit “J”.

[7] The question for determination is thus whether the additional evidence is essential for a just decision by this court. The State submitted that DNA results were done on a pair of slippers/flip-flops of the deceased; a white jersey of the deceased and the knife allegedly found with the accused upon arrest. The accused is denying that he was the assailant. I am of the opinion that the evidence might assist this court to get to the truth and in that regard I find that it is essential for the just decision of the matter. Having reached the conclusion of the essential nature of the evidence, the recalling of the witness became mandatory.

[8] In the result, it is ordered that:

1. The State's application in terms of s 167 of the Criminal Procedure Act 51 of 1977, as amended, for the recalling of witness T. S. Nakalemo, is granted.

Judge(s) signature	Comments:
KESSLAU AJ:	None
Appearances:	
Applicant:	Respondent:
Mr L. Matota Office of the Prosecutor-General, Oshakati	Mr L. P. Shipila Directorate of Legal Aid, Oshakati

³ *S v Van Den Berg* 1995 NR 23 (HC)