CASE NO.: SA 6/94

IN THE SUPREME COURT OF NAMIBIA

WINDHOEK, TUESDAY, 6 DECEMBER 1995

BEFORE THE HONOURABLE MR. JUSTICE MAHOMED, C.J.
THE HONOURABLE MR. JUSTICE DUMBUTSHENA, A.J.A.
THE HONOURABLE MR. JUSTICE LEON, A.J.A.

In the matter between:

THE STATE APPELLANT

and

GERT JOHANNES SCHOLTZ RESPONDENT

Coram: Mahomed, C.J.; Dumbutshena, A.J.A., et Leon, A.J.A.
Heard on: 1994/12/06 Delivered on: 1996/02/06

APPEAL JUDGMENT

DUMBUTSHENA. A.J.A.: .This appeal comes to this Court by leave of the court a quo. That leave was granted on the understanding 'that only one ground of appeal was to be argued. That ground is:

> "That the Honourable Judge erred in law to order that certain witness statements are not privileged and should be made available to the defence".

In this appeal the State is the Appellant and the Respondent was the accused at the criminal trial. During the trial an application was made on his behalf for the disclosure, by the ? rcsecutor-General to the accused of the witness statements of these witnesses who had not yet testified. Hannah, J, granted the order directing the Prosecutor-General to produce the specified witness statements.

In passing it is proper to mention that the Respondent has no interest in the appeal. He was acquitted on one count of murder and one count of attempted murder and convicted for assault with intent to do grievous bodily harm. He was sentenced to 18 months imprisonment which was wholly suspended en appropriate conditions. The court a, quo ordered him to pay to the complainant, Patricia Waters, the sum of one thousand Rands (R1000,00).

This appeal and the judgment thereof have wide implications and effects on the administration of justice and more so on

the work of the Prosecutor-General's Department. It was for this reason that after hearing argument this Court made and handed in a declaratory order. We did not want to delay the consequences flowing from our judgment.

This is the order we made:

"ORDER:

A formal order upholding or dismissing the appeal would in the circumstances of this case be inappropriate and will not serve or fulfil the object of this litigation which is to provide helpful guidance in future prosecutions in which the accused seeks to obtain the contents of police dockets relevant to the prosecution on a particular matter. The most useful course would be to make an order in the form of a declarator.

It is accordingly declared that:

1. 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. 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. (Examples of such claims are where the information sought to be withheld would disclose the identity of an informer which it is necessary to protect, or where it would disclose police techniques of investigation which it is similarly necessary to protect, or where such disclosure might imperil the safety of a witness or would otherwise not be in the public or state interest.)

3. The duty of the State to afford to an accused person (or his legal representative) the right referred to in paragraph 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.

4. Nothing contained in this declaration shall be interpreted so as to preclude an accused person appearing before a court other than the High Court from contending that the provisions of Paragraphs l, 2 and 3 hereof should mutatis mutandis also be of application to the proceedings before such other Court."

We indicated at the end of reading the Order that our reasons would follow later. These are our reasons:

The trial in this case coitunenced in February 1994 to 30 August 1994. On 23 August the Defence counsel in S v Nassar, 1995(1) SA 212 (Nm), applied for an order seeking disclosure by the Prosecutor-General of witness statements in his possession. The relief sought was as follows:

"1. That the State be ordered to provide the Accused with the following:

11 Copies of all witnesses' statements in the possession of the State relating to the charges against the Accused;

12 Copies of all relevant documents in the possession of the State relating to the charges against the Accused;

13 Copies of all video recordings or tape recordings which are in the possession of the State and/or the Police and relating to the charges against the Accused;

2. Granting the Applicant further and/or alternative or related relief."

I make reference to the prayer and the order of the Court a quo in S v Nassar, supra, because the case covered wider

ground than the instant case and Hannah, J, was part of the two judge bench in that case. In Nassar, supra, the following order was made:

> "1. The State provides the accused or his legal representatives within 14 days of this order with a copy of all witness statements in its possession relating to the charges contained in the indictment;
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> 2. The State provides the accused and his legal representatives with the opportunity to view the screening of all video tape recordings and to listen to all audio tape recordings in its possession or in the possession of the police relating to the charges contained in the indictment;
>
> 3. The State provides the accused with a copy of the transcript of such video and audio tape recordings within 14 days of compliance with paragraph 2;
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> 4. The opportunity to view and listen to such video and audio tape recordings shall be at a time convenient to both the State and the accused's legal representative and shall be provided within 7 days of this order unless otherwise agreed."

When the trial in the instant case resumed on 3 0 August the Respondent's counsel similarly applied for an order for the disclosure by the Prosecutor-General of statements of prosecution witnesses. The application was vigorously opposed by the State, as was that in the Nassar case. However, the Court a quo granted an order restricted to disclosure of statements of state witnesses who had not yet testified. The appeal against the decision in the Nassar case, supra, has not yet been heard for reasons which have nothing to do with the present appeal. Judgment in the Nassar case, suora, was only handed down on 21 September 1994. By that time the judgment in the instant case had already been delivered. What stands to be decided in this appeal is whether disclosure or

non-disclosure of prosecution witness statements to the defence falls 'within the ambit of Article 12(1)(a) of the Namibian Constitution which provides:

> "12.(1}(a) In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law..."

If disclosure of statements of prosecution witnesses falls within the ambit of Article 12 of the Constitution, then such disclosure constitutes one of the important elements of a fair trial. Non-disclosure of relevant material might therefore be vulnerable to attack on this ground.

It is therefore of no consequence that the Criminal Procedure Act does not have a provision for a general right of disclosure of materials in a police docket as submitted by Ms Winson, for the Appellant. The right resides in Articles 7 and 12 of the Constitution.

The provisions in the Criminal Procedure Act were common law principles meant to introduce some measure of fairness in the conduct of criminal cases. A summary of some of those principles or rules will suffice. Section 39(2) of the Act requires that the arresting officer should inform the accused of the reason for arrest. If a warrant was used to effect arrest, a copy of the warrant must be handed to him upon demand. In terms of section 80 the accused may examine the charge at any time of the relevant proceedings. In section

84(1) particulars of the offence must be set forth in the charge includirtg where the offence was committed and against whom it was committed, if any, and the property, if any, in respect of which the offence is alleged to have been committed. But all that is required in this section is that the information is reasonably sufficient to inform the accused of the nature of the charge. If the accused believes that the information does not contain sufficient particulars of any matter alleged in the charge, he can object and, in proper circumstances, move to quash the charge (s. 106). There are other sections meant to make it possible for an accused to know what case he is being asked to meet in order to prepare his defence.

Under the then prevailing conditions section 144 of the Act could be considered an improvement on the other methods of informing an accused person of his rights. Sub-section (4) requires that an indictment be served on an accused ten days before he stands trial in the High Court unless he agrees to shorter notice.

If the accused is arraigned in the High Court in a summary trial, sub-section (3) provides:

> "(a) ...the indictment shall be accompanied by a summary of the substantial facts of the case that, in the opinion of the Prosecutor-General, are necessary to inform the accused of the allegations against him and that will not be prejudicial to the administration of justice and the security of the State, as well as a list of the names and addresses of the witnesses the Prosecutor-General intends calling at the summary trial on behalf of the State:

Provided that -

(i) 'this provision shall not be so construed that the State shall be bound by the contents of the summary;

(ii) the Prosecutor-General may withhold the name and address of a witness if he is of the opinion that such witness may be tampered with or be intimidated or that it would be in the interest of the security of the State that the name and address of such witness be withheld;

(iii) the omission of the name or address of an witness from such list shall in no way effect the validity of the trial.

(b) Where the evidence for the State at the trial of the accused differs in a material respect from the summary referred to in paragraph (a) , the trial court may, at the request of the accused and if it appears to the court that the accused might be prejudiced in his defence by reason of such difference, adjourn the trial for such period as to the court may deem adequate."

On behalf of the Appellant, Ms Vfinson contended both in her written argument and in oral submissions before us that section 144 bears all the elements of a fair trial. Ms. Winson may be right but all that the accused receives is a summary of substantial facts meant to inform him of the allegations made against him. He is given a list of witnesses the Prosecutor-General intends to call at his trial without a summary of their evidence. The contents of the substantial facts do not bind the State during the trial. Names and addresses of witnesses may be withheld for fear that they may be tampered with or intimidated or for reasons of the security of the State. And more importantly what is revealed to him is subject to the subjective judgment of the Prosecutor-General. It does not guarantee the accused a fair trial. Fairness depends on the personal whim of the Prosecutor-General or his/her representative.

It is generally agreed that a preparatory examination, in as far as a fair* trial is concerned, is nearer to what is desirable. Ms. Winson argued with conviction that Chapter 20 which provides for preparatory examinations to be held at the discretion of the Prosecutor-General guaranteed a fair trial. There is some substance in this submission. The accused is provided with the full case of the prosecution because at the end of the preparatory examination he gets a record of the proceedings. He, if he so wishes, can cross-examine prosecution witnesses during the preparatory examination proceedings. But not all cases require preparatory examinations. And what is more, the systems has fallen into disuse. Ms Vfinson submitted further that the preparatory examination was useful only to the accused as he was informed in detail of the State's case without disclosing his, and this gave him or her an unfair advantage. This may be so, but it is the State that accuses and seeks to prove the guilt of the accused. However, preparatory examinations brought openness to trials and, to a significant extent, did away with trial by ambush.

SOUTH AFRICA

In South Africa the question of non-disclosure of witness statements was dealt with in R v Stevn, 1954 (1) SA 324 (AD) which was based on English law, as it was on 31st May 1961. That case decided that a witness statement was a privileged document and there was no entitlement to its disclosure to an

accused. I will refer briefly to the long reign R v Steyn, supra, had on the Courts in South Africa and Namibia and the long list of cases that followed it. But Steyn. supra, and those other cases have of recent times been overtaken by new developments.

It was contended on behalf of the Appellant that there could not be disclosure of state witness statements to the defence because of the common law privilege attaching to witness statements since 1954 and that the Courts of our country have recognised that:

> "When statements are procured from witnesses for the purpose that what they say shall be given in evidence in a lawsuit that is contemplated, these statements are protected against disclosure until at least the conclusion of the proceedings which would include any appeal or similar step after the decision in the court of first instance".
> Per Greenberg, J.A., in R v Stevn. (supra). at 335 A.

In ray view the old rule cannot still survive in the face of Article 12(1)(a). Its survival in my view would militate against the purpose for which the Article was enacted, that is, to enable the Courts to determine the civil rights of the citizens and criminal cases fairly and under conditions of equality. The right to a fair trial can no longer mean that it is "an intelligible principle that as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as the materials for the brief see Anderson v Bank of British Columbia, L.R. 2 Ch. D644 at 656 and R v Steyn. (sjipxa) , at 332A - B, S V

Yengeni & Others. (1) 1990 (1) Sa 639 © at 664A - F, S v Mavela.

1990(1) SACR (A).

Although Stevn. supra, was consistently followed in many decisions such as, among others, as Ex parte: Re: Minister van Justisie: In Re: S v Wanner, 1965 (4) Sa 504 at 514C, 515A; S v Alexander and Others. (1), 1965(2) SA 796 (A) at 811; £ v B and Another. 1980(2) SA 946(A) at 952; S v Yenaeni and Others. (1) 1990(1) Sa 639 © at 643 A - F; S v Mavela. 1990(1) SACR 582 (A) , these decisions and many others have been overtaken by the enactment, in both Namibia and South Africa, of Constitutions entrenching justiciable Bills of Rights. The principles of procedure fervently followed before now need to be brought into line with provisions of Bills of Rights laying down tenets of procedure as entrenched rights. These are now the foundations upon which fair trials are built.

Under these entrenched rights what Greenberg, J.A., said in Stevn. supra, at 335A that:

> "...when statements are procured from witnesses for the purpose that what they say shall be given in evidence in a lawsuit that is contemplated, these statements are protected against disclosure until at least the conclusion of the proceedings/ which would include any appeal or similar step after the decision in a court of first instance",

no longer fits in with notions of open justice which requires transparency and accountability.

The rules of procedure relating to fair trials in South Africa and Namibia were the same, that is before the new

Constitutions were enacted. The same authorities on ono-disclosure were followed in the two countries.

South Africa has a new Constitution with a justiciable Bill of Rights. Comparison between the relevant provisions of the S.A. Constitution and the Namibian Constitution leaves one with impression. Section 23 of the South African Constitution provides that:-

> "Every person shall have the right of access to all information held by the State or any of its organs at any level of Government in so far as such information is required for the exercise or protection of any of his or her rights"

Namibia does not have a similar section.

In Shabalala and Five Others v The Attorney-General of the Transvaal and The Commissioner of South African Police: Case no.: CCT/23/94, the Constitutional Court considered whether section 23 of the Constitution of South Africa is of application when an accused seeks the disclosure of contents of a police docket for use in his defence. At page 22, paragraph 34 of the judgment, Mahomed, D.P., who wrote the judgment for the Court remarked as follows:

> "The applications for the production of documents in the present case was made during the course of a criminal prosecution of the accused. In that context, not only is section 25(3) of the Constitution of direct application in considering the merits of that application, but it is difficult to see how section 23 can take the matter any further. If the accused are entitled to the documents sought in terms of section 25(3), nothing in section 23 can operate to deny that right and conversely, if the accused cannot legitimately contend that they are entitled to such documentation in terras of section 25(3) it is

difficult to understand how they could, in such circumstances, succeed in an application based on

> section 23. The real enquiry therefore is whether or not the accused were entitled to succeed in their application on the basis of a right to a fair trial asserted in terms of section 25(3)."

But section 25(3) of the South African Constitution which reads:

> "Every accused person shall have the right to a fair trial which shall include..."

is similar to Article 12 of the Namibian Constitution. Before the matter was finally settled in South Africa by the judgment of the Constitutional Court in Shabalala's case, a number of judges of Provincial Divisions of the Supreme Court delivered judgments relative to both section 23 and section 25(3). Some of these judgments had varying degrees of conflict but they were the first steps towards the interpretation of section 23 and 25(3).

In S v Fani and Others, 1994(1) SACR 6356(E) at 641 I - j Jones, J. Held that the common law of privilege could exist side by side with rights entrenched in section 23 and 25 of the South African interim Constitution. In the same breath at 639e - 640c he went on to state that those sections gave the accused greater rights of information than hitherto enjoyed and expressed the view on the information which should be disclosed to an accused before he or she was called on to plead.

Zietsman, J.P., in S v James. 1994(2) SACR 141 (E) refused to order the State to hand over either copies or summaries of

witness statements. He expressed doubts about the applicability df section 23 to criminal trials.

I agree with Mr. Navsa, for the Respondent, that the Constitution of Namibia and in particular Chapter 3 reflects Namibia's commitment to preserving and protecting fundamental rights and freedoms. Article 12, on fair trial, entrenches the right to a fair trial and public hearing when civil rights and obligations or any criminal charges against the people are being determined. The words in which Article 12 is couched show more that anything else Namibia's commitment to justice. That commitment is not less than that of other constitutional democracies. Mr. Navsa urged the Court to adopt the principles on fair trials expressed in R v Stinchcombe (1992) LRC (Crim) 68. I shall refer to this case below.

Ms. Winson, argued in support of keeping witness privilege because since 1977 it has been preserved by section 206 of the Criminal Procedure Act, 1977 (Act 51 of 1977) which provides:

> "206. The law in rases not provided for. The law as to the competency, compellability or privilege of witnesses which was in force in respect of criminal proceedings on the thirteenth day of May, 1961, shall apply in any case not expressly provided for by this Act or any other law."

That may be so. What we are considering is the effect of Art. 12 of the Constitution on those principles.

"This means that it would not be necessary for the

courts to concern themselves with the issue of whether an accused has been prejudiced

> in the sense that he would probably not have been convicted but for the irregularity." (See the English case cited above.)
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> "This is especially so in the light of the fact that the Bill of Rights expressly enables individuals to apply to the courts for appropriate relief in the case of any infringement of any of the entrenched rights contained in the bill." See Rights and Constitutionalism: The New South African Leoal Order, suora. at 413, see also Art. 25(2) of Namibian Constitution.

The burden of Appellant's submissions is that the notion of a fair trial is not a new one created by Art. 12 of the Constitution. It is an extension of the law as it existed before independence. That may be so. What, however, has happened is that that law has undergone some metamorphosis or transformation and some of the principles of criminal procedure in the Criminal Procedure Act are now rights entrenched in a justifiable Bill of Rights. That is, in my view, the essence of their inclusion in Art. 12 of the Constitution. Any person whose rights have been infringed or threatened can now approach a competent Court and ask for the enforcement of his right to a fair trial. Se Art. 25(2) which reads:

> "Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient."

These entrenched tenets of a fair trial strengthen in a significant way the due process proceedings. The fundamental rights or freedoms guaranteed by the Constitution ensure that rights and freedoms are not

ignored. The Courts are there to

enforce them.

Generally Art. 7 of the Constitution lays down broadly the due process requirement. It provides:

> "No person shall be deprived of personal liberty except according to procedures established by law".

That requirement is followed by provisions of Art 12 which lay down specifics albeit not all of them, which in the main guarantee a fair trial and the protection of personal liberty. Art. 12 reads as follows:

> "Fair Trial
>
> (1) (a) In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: provided that such Court or Tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society.
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> b) A trial referred to in Sub-Article (a) hereof shall take place within a reasonable time, failing which the accused shall be released.
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> c) Judgments in criminal cases shall be given in public, except where the interest of juvenile persons or morals otherwise require.
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> d) 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 those called against them.
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> e) All persons shall be afforded adequate time and facilities for the preparation and presentation of their defence, before the commencement of and during their trial, and shall be entitled to be defended by a legal

practitioner or their choice.

(f) No persons shall be compelled to give testimony against themselves or their spouses, who shall include partners in a marriage by customary law, and no Court shall admit in evidence against such persons testimony which has been obtained from such persons in violation of Article 8(2)(b) hereof.

2) No persons shall be liable to be tried, convicted or punished again for any criminal offence for which they have already been convicted or acquitted according to law: provided that nothing in this Sub-Article shall be construed as changing the provisions of the common law defences of "previous acquittal' and "previous conviction'.

3) No persons shall be tried or convicted for any criminal offence or en account of any act or omission which did not constitute a criminal offence at the time when it was committed; nor shall a penalty be imposed exceeding that which was applicable at the time when the offence was committed."

The rights and freedoms enshrined in the Constitution are fundamental to the wellbeing and existence of Namibia. Article 5 calls for their protection. They are to "be respected by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed". Article 10(1) is fundamental and central to the new perceptions.

Courts of law have to interpret and enforce the protection of fundamental rights and freedoms. Art. 10(1) provides: "All persons shall be equal before law." Apart from this equality pervades the political, social and economic life of the Republic of Namibia. A reading of the Constitution leaves one in no doubt as to what is intended to be achieved in order for

the people of Namibia to live a full life based on equality and liberty.

It is in this light • that Art. 12 should be looked at and interpreted in a broad and purposeful way. And the Courts must ask whether the retention of privileges of witness statements accords with the exercise of the rights in the Constitution. If the Constitutional purpose or intention is equality for all, one must ask whether non-disclosure accords with that purpose or intention? I think not. To achieve equality between the prosecution and the defence is what the |

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Constitution demands when it says "All persons shall be equal before the law". That is why in my view Art. 12 and the ' tenets of a fair trial therein cannot be given an interpretation that supports R v Stevn, supra, and the authorities that followed it. But those authorities cannot be ignored because they form the historical foundation upon which the procedural rights now enshrined in Art. 12 were built. It is however the Constitution which is the Supreme Law of Namibia.

It would be a sad waste of time were I to venture into the interpretation of the fundamental rights and freedoms in the Namibian Constitution, sufficient has been said in reported cases both in this jurisdiction and other jurisdictions. I refer to S v Acheson, 1991(2) SA 805 (NmHC) ; Ex Parte Attorney-General Namibia: In re Corporal Punishment bv Organs of State, 1991(3) SA 76 (NmSC); Minister of Defence. Namibia v Mwandinghi. 1992(2) SA 355 (NmSC); Minister of Home Affairs (Bermuda) and Another v Fischer and Another, 1979(3) All ER 21 (PC) ; Zuma & Two Others v S, 1995(1) SACR 568 *(CO .* 1995(2) SA 642 (CO . I would like to extract from that judgment what

was said by Kentridge, A.J., at 651F - 652A because it refers to section 25(3) of the South African Constitution which deals with a fair trial and because that • section is in many ways similar to Art. 12 of the Namibian Constitution. The learned Acting Judge remarked:

> "[15] In R v Big M Drug Mart Ltd (1985) 18 DLR (4th) 321 at 395-6 (18 CCC (3d) 385), Dickson J (later Chief Justice of Canada) said, with reference to the Canadian Charter of Rights -
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> > •The meaning of a right of freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view this analysis is to be undertaken, and the purpose of the right of freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be ... a generous rather than legalistic one, aimed at fulfilling the purpose of a guarantee and the securing for individuals the full benefit of the Charter's protection.'
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> Both Lord Wilberforce and Dickson J emphasised that regard must be paid to the legal history, traditions and usages of the country concerned, if the purposes of its constitution are to be fully understood. This must be right. I may nonetheless be permitted to refer to what I said in another court of another constitution albeit in a dissenting judgment -
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> > 'Constitutional rights conferred without express limitation should not be cut down by reading implicit restrictions into them, so as to bring them into line with the common law.'
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> Attorney-General v Moagi. 1982(2) Botswana LR 124, 184.
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> That caveat is of particular importance in interpreting section 25(3) of the constitution. The right to a fair trial conferred by that provision is broader than the list of specific rights set out in paragraphs (a) to (j) of the sub-section. It embraces a concept of substantive fairness which is not' to be equated with what might have passed muster in our criminal courts before the Constitution came into force."

I agree with what the learned Acting Judge said because it is relevant to the interpretation of Art. 12 and other provisions in the Namibian Bill of Rights.

ENGLAND

It is important to consider the changes in procedural rules in England, a country without the benefit of a written constitution and a justiciable Bill of Rights.

In England the law of disclosure of witness statements and other relevant materials has in recent years appreciably developed. To cut a long story short in R v Bryant and Dickson, 1946 31 Cr v App R.146 a statement taken from a person known to the prosecution to contain material evidence favourable to the accused and which the prosecution was not going to use because it had no intention to call him as a witness could be handed to the defence. But as Lord Goddard L.C.J, said at p. 15, there was no duty to supply a copy of the statements to the defence. He asked: "Is there a duty in such circumstances on the prosecution to supply a copy of the statement which they have taken to the defence? In the opinion of the Court there is no such duty, nor has there ever been."

However, that attitude was not maintained for long. The courts changed their stance. It was decided in later cases that where the prosecution intended to call a witness who had given them material evidence and they have in their possession

a statement made by him which was materially inconsistent with his evidence the prosecution should inform the defence of that fact and hand a copy of the statement to the defence. in Dallison v Caffery. (1964) 2 ALL ER 610 at 618 Lord Denning M.R. went a little further and stated:

> "The duty of a prosecution counsel or solicitor, as I have always understood it, is this: if he knows of a credible witness who can speak to material facts which tend to show the prisoner to be innocent, he must either call that witness himself or make his statement available to the defence".

It should be remembered the courts were at no time considering the existence of a general duty to disclose. They were concerned with what they perceived to be fair to the defence and to justice. It must also be noted that it was not until 1989 that the Court of Appeal in R v Lessen (1989) 90 Cr App R 107 at 114 expressed a clear preference for the above approach. Subject to the requirements of any public interest immunity, it was held that the prosecution should have provided the Appellant with all statements or other documents recording relevant interviews with the Appellant. The court was of the view that it made no difference whether the document took the form of a witness statement, or notes of an interview, or a police officer's report.

In this regard recent trends in England and Wales on non-disclosure or disclosure have been influenced to a great extent by a number of what I would call indiscretions on the part of some police investigating crimes and some experts who

elected to leave out' relevant materials or statements they believed favoured the defence in cases they regarded as highly sensitive. As a result courts were forced to make judgments ignorant of evidence, witness statements or relevant materials favourable to the accused. The accused were convicted. After convictions and in some cases long afterwards, upon information received the Home Secretary referred these cases to the Court of Appeal.

I refer below to some of those cases because they helped in the development of a new and vigorous judicial policy on the duty to disclose statements, results of interviews and other relevant materials to the defence.

The first case I would like to refer to is R v Maouirf.

&

Others , 1992 (2) ALL ER 433 (C.A.). In that case all male appellants were found to have positive traces of nitroglycerine under their nails. Mrs. Maguire did not have them but a number of pairs of thin plastic gloves found to have been used by her were examined and the tests were positive for nitroglycerine. They all were convicted.

The case was referred to the Court of Appeal (Criminal Division) : Among other things it was found that there was failure to reveal facts which were relevant and ought to have been revealed. The prosecution witnesses had been selective about experimental data which supported their case and discarded that which did not. They therefore misled the

court. They failed to reveal to the defence matters favourable to the defence. Experts from RARDE were not brought to the attention of the defence during trial. Incorrect evidence was given to the trial court on the significance of nitroglycerine found under finger nails of male defendants. There was the possibility of innocent contamination of fingernails and gloves. Besides it was impossible to distinguish nitroglycerine and pentaerythritol tetranitrate. It was said that the duty to disclose was a continuing one. The effect of all this is summarised in the head note as follows:

> "A failure on the part of the prosecution to disclose to the defence material documents or information which ought to have been disclosed may be a material •procedural' irregularity in the course of the trial providing grounds for an appeal against conviction to be allowed under s.2(l)(c)b of the 1968 Act. Furthermore, the duty of disclosure is not confined to prosecution counsel but includes forensic scientist retained by the prosecution and accordingly failure by a forensic scientist retained by the prosecution to disclose material which he knew might have some bearing on the offence charged and the surrounding circumstances of the case may be a material irregularity in the course of the trial providing grounds for an appeal against conviction to be allowed."

In R v Ward, 1993(2) ALL ER 577 (C.A.) nearly the same happened. Ward was convicted for the murder of 12 people who died after a bomb exploded on board a coach in which soldiers and members of their families were travelling. She was also convicted of causing explosions elsewhere in England. The evidence against her consisted of confession 1 statements made to the police and scientific evidence to the

effect that after the coach explosion traces of nitroglycerine were found in a caravan in which she had stayed. After other explosions traces of nitroglycerine were found on her person.

One of the forensic scientists in the case was Dr. Frank Skuse, whose evidence on the use of Griess test to establish the presence of nitroglycerine had been discredited in investigations which led to the appeal in R v Mcllkennv, 1992(2) ALL ER 4517 (the case popularly known as the Birmingham six). The Home Secretary referred the Ward case to the Court of Appeal because Dr. Skuse's evidence in the Ward case was based on similar use of the Griess test. There was also concern that the scientific evidence carried out in connection with an inquiry by Sir John May into the case of the Macruire family whose convictions were quashed on appeal had shown that other substances could give a result in some of the tests similar to that given by nitroglycerine with the result that Ward might not have been handling explosives at all.

But the point of substance argued on appeal was that there had been material irregularity in the original trial because the prosecution had failed to disclose material relevant to both the confessions and scientific evidence.

To cut a long story short it was found that the police and the DPP had failed to disclose to the defence information

about witnesses from whom statements had been taken, including the statements of certain R.U.C. officers who had interviewed Ward indicating a belief in her innocence.

There was failure to disclose a number of statements made by the appellant to the police which contained inaccuracies, inconsistencies and retractions.

Psychologists who had made a report before her trial had failed to record in their report a second suicide attempt made by her whilst in prison awaiting trial.

Three senior government forensic scientists had deliberately withheld scientific tests from the defence which threw doubt on the scientific evidence. One of these tests showed that dyestuffs present in boot polish could be confused with nitroglycerine in the tests that were used to identify nitroglycerine.

As a result the Court found that prosecution's failures to disclose were of such order that individually and collectively they constituted material irregularities in the course of the trial. The court held:

> "(1) The prosecution's duty at common law to disclose to the defence all relevant material, i.e. evidence which tended either to weaken the prosecution case or to strengthen the defence case, required the police to disclose to the prosecution all witness statements and the prosecution to supply copies of such witness statements to the defence or to allow them to inspect the statements and make copies unless there were good

> reasons for not doing so. Furthermore, the prosecution were under a duty, which continued during the pre-trial period and throughout the trial, to disclose to the defence all relevant scientific material, whether it strengthened or weakened the prosecution case or assisted the defence case and whether or not the defence made a specific request for disclosure. Pursuant to that duty the prosecution were required to make available the records of all relevant experiments and tests carried out by expert witnesses. Furthermore, an expert witness who had carried out or knew of experiments or tests which tended to cast doubt on the opinion he was expressing was under a clear obligation to bring the records of such experiments and tests to the attention of the solicitor who was instructing him so that they might be disclosed to the other party. On the facts, the non-disclosure of notes of some interviews by the police to the Director of Public Prosecutions, the non-disclosure of certain material by the Director of Public Prosecutions, the non-disclosure of certain material by the Director of Public Prosecutions and prosecuting counsel to the defence and the non-disclosure by forensic scientists employed by the Crown of the results of certain tests carried out by them which threw doubt on the scientific evidence put forward by the Crown at the trial cumulatively amounted to a material irregularity which, on its own, undoubtedly required the appellant's conviction to be quashed".

In the instant appeal it was argued on behalf of the Appellant that disclosure of the contents of a police docket would among other things retard police investigations. Although this point does not arise in the present appeal it is dealt with in general in the body of this judgment. But one has to bear in mind what was said by Gildwell, L. J. , in R v Ward, 1993(2) ALL ER 577 at 601J:

> ". . . 'all relevant evidence of help to an accused[1] is not limited to evidence which will obviously advance the accused's case. It is of help to the accused to have the opportunity of considering all material evidence which the prosecution have gathered, and from which the prosecution have made their own selection of evidence to be led."

There may be in the police docket a piece of paper referring to some event, incident, time or other thing that will assist the accused in selecting material for his defence or in reminding him of the time and place where he was.

It used to be the practice that all instruments or documents recording relevant interviews, witness statements or notes of interviews or a police officer's report should be disclosed. See R v Ward[f] (supra) at 602d.

I agree with Ms Winson's conclusion that the English approach with regard to disclosure of evidence in the possession of the State has undergone dramatic changes which are primarily attributable to the Attorney-General's Practice Note, 198 2(1) ALL ER 734. In my view the courts have gone beyond the Attorney-General's guidelines. These developments were expedited by the nature of the cases the courts were hearing and the ominous consequences brought about by acts of violence and terrorism and the subsequent reaction of the police to those acts and the serious nature of the crimes arising from them. There were attempts by the police and others to hide away pieces of evidence of help to the defence in the preparation of the accused's case. This resulted in a failure of justice.

But what is significant for our purposes is that these developments have taken place in England and Wales without a Bill of Rights and without the benefit of a written

constitution. England has in a very significant way moved away from the law in force on 31st May 1961 which in terms of our Crimina-l Procedure Act we still follow and enforce.

Before I consider the position in Canada I would like to deal with public interest immunity. I share the view of Appellant's counsel that public interest immunity is protected by privilege, but is that still the position? It is necessary under certain circumstances to protect public interest immunity in order to safeguard the interests of public administration and the protection of the state. I do not however share the view that public interest immunity should be preferred in order to deny an accused a fair trial and justice. Open justice requires fairness to be evenly applied between the prosecution and the defence.

Rather than make public interest immunity an exception to the general duty to disclose, it should be weighed in the scales of justice. That weighing in should be done by the Courts. If before any trial the prosecution has in its possession documents or other evidential materials helpful to the defence case but wants to claim public interest immunity the defence should be informed of that fact and the Court should be asked to give directions or some ruling on the prosecution's claim to public interest immunity. The decision must be made by a judge. It would not be proper to allow the prosecution to decide which of the relevant materials should be denied to the accused on the grounds of

public interest immunity. The prosecution should not be judge in their own cause on the claim to immunity. As to how to proceed before a judge in chambers it would, in my view, be proper for the Chief Justice to draw up a practice direction. The compelling reason for allowing the Court to decide on documents or other material claimed by the prosecution to be covered by public interest immunity is not unduly to compromise accused's right to a fair trial.

See R v Davis & Others, (suora) , at 646 - 647e, and R____v Ward. (supra), at 601 - 602b.

> "The effect of R v Ward is to give the court the role of monitoring the views of the prosecution as to what material should or should not be disclosed and it is for the court to decide. Thus, the procedure described as unsatisfactory in R v Ward, of the prosecution being judge in their own cause, has been superseded by requiring the application in the court. This clearly gives greater protection to the defence than existed hitherto - indeed as much protection as can be given without preempting the issue. Although ideally one would wish the defence to have notice of all such applications, and to have sufficient information to make at least some representations, we recognise that, in a small minority of cases, the public interest prevents that being possible." per Lord Taylor, L C J, in R y Davis & Others, (supra), at 648c - d.

CANADA

Now let me turn to Canada.

The Canadian Charter of Rights and Freedoms in section 7 provides that:

"everyone has the" right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with, the principles of fundamental justice"

Art. 7 of Chapter 3 of the Naraibian Constitution merely confirms the rule of law by requiring that no one shall be deprived of personal liberty except according to procedures established by law. Section 11 of the Canadian Charter reads:

"11. Any person charged with an offence has a right

(a) ...

b) to be tried within a reasonable time;

c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."

Before the proper interpretation of sections 7 and 11 of the Canadian Charter of Riahts and Freedoms by the Supreme Court there were conflicting signals from the provincial courts and the Court of Appeal. The law on fair trial was not settled.

However, section 603 of the Criminal Code (Canada) provided:

"603 An accused is entitled, after he has been ordered to stand trial or at his trial,

a) to inspect without charge the indictment, his own statement, the evidence and the exhibits, if any; and

b) to receive, on payment of a reasonable fee determined in accordance with a tariff of fees fixed or approved by the Attorney-General of the province, a copy

(i) of the evidence;

(ii) of his own statement, if any, and

(iii) of the indictment;

> but the trial shall not be postponed to enable the accused to secure copies unless the court is satisfied that the failure of the accused to secure them before the trial is not attributable to lack of diligence on the part of the accused [am. R.S.G. 1985, c.27 (1st Supp.), sl01(2)(d)].»

The case of R v Heikel. (Ruling No. 8) 5 C.R.R. (2d) at p. 3 62 enumerates classes of documents required to be produced for discovery by those who may be adversely affected by its possible use as evidence at a trial. These included among others business records, certificates of analyses of bodily substances for alcohol content and transcripts of intercepted private communications respectively.

No law required full disclosure to be made. It was left to the courts to develop the law. This, as I pointed up above, resulted in conflicting decisions.

In a very helpful written submission Ms. Winson contended that those courts that ruled in favour of disclosure of information not provided for by legislation argued the failure to disclose other information held by the prosecution effectively denied the accused the opportunity to make full answer and defence as he was entitled to do in terms of section 7 of the Charter and that it impinged on his right to a fair trial in terms of section 11(d) of the Charter. It was those Judges that argued in favour of full disclosure that won the day as can be seen from cases cited below.

The Court said in R v Heikel, (supra), at 363:

> "I am in complete agreement with Tallis, J.A., in R v Bouroet. supra r that .with the advent of the Charter, full and timely discovery of "documents' that are material or relevant to the offences with which the accused are charged, ought properly to be considered a guaranteed right of an accused person within ss. 7 and 11(d) of the Charter. To deny the accused such timely discovery, to my mind, is contrary to the principles of fundamental justice and will deprive an accused of his or her right to make full answer and defence and thereby infringe or deny the accused's ss. 7 and 11(d) Charter rights to liberty and security of the person. Such right, of course, must be subjected to certain exceptions such as "documents' which fall within a category of privilege, those which may require protective orders, the possible timing of the disclosure of Crown witness statements and editing of same by the court and other exceptions which may arise."

Contrast this with what McBain, R. said in Re: Kristman and the Queen, 12 DLR (4th) 283 (Alberta Court of Queens Bench). The learned Judge said there was no right either at common law or under the Charter to require disclosure in favour of an accused or require the State to disclose all evidence relating to the police investigation. The learned Judge said:

> "Parliament in the provisions of the Criminal Code, and in the Charter, have not provided for the sort of pre-trial discovery and examination of witnesses demanded by the applicant's counsel, and thus it is not a "right' enshrined in legislation, fundamental or otherwise. The Charter does not, in the submission of the Crown, require the courts to question the validity of legislation or the reasons for its being formulated as it is. In Duke v The Queen. (1972), 7 CCC (2d) 474 at p. 479, 28 DLR (3d) 129 at p. 134, [1972] SCR 917, Fauteux, C.J.C. said (Lasking, J. dissenting on this, however):
>
> > "In my opinion the failure of the Crown to provide evidence to the accused person does not deprive the accused of a fair trial unless, by law, it is required to do so.'"

The proper approach to full discovery was dealt with by

Sopinka, J. In R v Stinchcombe, supra. The appellant in that case was charged with a criminal breach of trust, theft and fraud. He was a lawyer who was alleged to have appropriated

money from his client. A witness who had given evidence favourable to the accused at the preliminary hearing was subsequently interviewed by agents of the Crown. Crown counsel decided not to call the witness at the trial and would not produce the statements recorded at the interview. Defence counsel applied for the disclosure of those statements. The trial Judge refused to permit their disclosure to the defence on the ground that there was no obligation on the Crown to disclose the statements and in any event the witness was not worth of credit.

He appealed. The Court of Appeal dismissed the appeal. With leave of the Court of Appeal appellant appealed to the Supreme Court.

The Supreme Court sent back the case for retrial holding, among many other reasons, that in indictable offences the Crown had a legal duty to disclose all relevant information to the defence.

The learned Judge proceeded to reply to the fears of the Crown, fears that were amply expressed by Ms. Winson in her submissions in the instant case and which I have mentioned above.

Sopinka, J. dealt first with the argument that the duty to disclose must be reciprocal, that is the defence must also disclose. The learned Judge* remarked at 73 a-e:

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Sopinka, J. dealt first with the argument that the duty to disclose must be reciprocal, that is the defence must also disclose. The learned Judge remarked at 73 a-e:

> It is difficult to justify the position which clings to the notion that the Crown has no legal duty to disclose all relevant information. The arguments against the existence of such a duty are groundless while those in favour, are, in my view, overwhelming. The suggestion that the duty should be reciprocal may deserve consideration by this court in the future but is not a valid reason for absolving the Crown of its duty. The contrary contention fails to take account of the fundamental difference in the respective roles of the prosecution and the defence. In Boucher v R, [1955] SCR 16 Rand, J. stated (at 23-24):
>
> > •It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.'
>
> I would add that the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done. In contrast, the defence has no obligation to assist the prosecution and is entitled to assume a purely adversarial role toward the prosecution. The absence of a duty to disclose can, therefore, be justified as being consistent with this role."

He dismissed the argument that the duty to disclose all relevant material could impose an onerous new obligation on the prosecution which would result in increased delays in bringing accused persons to trial. The learned Judge believed, and I agree with his reasoning, that "The adoption of uniform, comprehensive rules for disclosure by the Crown would add to the work-load of some Crown counsel

but this would be offset by the time saved which is now spent resolving disputes such as this one surrounding the extent of the' Crown's obligation and dealing with matters that take the defence by surprise" at 73e-d. In fact more time was spend on adjournments in jurisdictions that do not have a general duty to disclose than those that have it I interpause.

Experience elsewhere has shown that the prosecution abandons cases more readily where it knows that it has no leg to stand on. On the other hand the defence readily enters pleas of guilty once the strength of the prosecution case cannot be met against a defence that is likely to succeed. I agree that much time would be saved and delays reduced by reason of the increased guilty pleas, withdrawal of charges and shortening of proceedings because of the reduction of issues to be contested.

It was submitted on behalf of the Appellant that disclosure of witness statements would enable the accused to tailor his evidence in order to conform with information in prosecution witness statements. Sopinka, J's answer to this problem removes the fear that the accused will be able to tailor his defence in accordance with the information provided in prosecution witness statements. The learned judge said at 74 a-c:

> "Refusal to disclose is also justified on the ground that the material will be used to enable the defence to

> tailor its evidence to conform with information in the Crown's possession. For example, a witness may change his or her testimony to conform with a previous statement given to the police or counsel for the Crown. I am not impressed with this submission. All forms of discovery are subject to this criticism. There is surely nothing wrong in a witness refreshing his or her memory from a previous statement or document. The witness may even change his or her evidence as a result. This may rob the cross-examiner of a substantial advantage but fairness to the witness may require that a trap not be laid by allowing the witness to testify without the benefit of seeing contradictory writing which the prosecutor holds close to the vest. The principle has been accepted that the search for truth is advanced rather than retarded by disclosure of all relevant material."

I agree. But a trial cannot be just and balanced when the prosecution hides from the defence relevant materials of evidential importance in order to spring a surprise on the defence during the cross-examination. The rules and the standards of a fair trial must be known to both sides in order for the contest to be fair. The English cases cited in some detail above prove the folly of refusing to disclose witness statements, information and other documents to the defence.

The other fear which the Appellant feels militates against full disclosure is that it will put to risk the security and safety of persons who provide the prosecution with information. I find the answer given by Sopinka, J. in Stinchcombe, supra. at 74d-f an adequate reply to that fear. It is true that disclosure might put to risk the lives of informers and witnesses. These are matters that the Prosecutor-General should put before a Judge in order to seek his directions. This, however, should be done after informing the defence of the intention of the

prosecution. I repeat the Prosecutor-General must not be the judge in > his own cause. All relevant concerns and fears for the safety of witnesses and informers must be put before a Judge in the manner described above. The proof required is a balance of probabilities.

See: Shabalala & Five Others v The Attorney-General of the Transvaal and the Commissioner of South African Police, suora.

At 74 h-i Sopinka, J. says:

> "there is an overriding concern that failure to disclose impedes the ability of the accused to make full answer and defence. This common law right has acquired new vigour by virtue of its inclusion in s. 7 of the Canadian Charter of Rights and Freedoms as one of the principles of fundamental justice (see Derscher v Canada (Attorney General) [1990] 2 SCR 1505 at 1514). The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted. Recent events have demonstrated that the erosion of this right due to non-disclosure was an important factor in the conviction and incarceration of an innocent person."

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. Full disclosure is in accord with Arts. 7 and 12 of the Constitution. It would be wrong to maintain a system of

justice known to be, in some respects, unfair to the accused. The right to disclose has acquired a new vigour and protection under the provisions of Articles 7 and 12 of the Constitution. English cases cited above are proof beyond doubt that nondisclosure leads to the denial of justice.

For disclosure to be effective it must be done at the earliest possible time. In some instances soon after arrest and in others long before the accused is asked to plead and in some cases only after the witness has given his evidence in chief. This depends on the circumstances of each case. However, the overriding factor should be the sufficiency of time in which the accused should prepare his or her case. In my view it won't be sufficient time to hand witness statements and other materials to the accused a few minutes before plea. There should be reasonable time to allow the accused to prepare thoroughly his reply to the charge and his defence. It is for these reasons that we made the order mentioned above.

Costs will follow the event including costs of two counsel.

DUMBUTSHENA, A. J.

A. I agree:

MAHOMED, CJ

I agree.

LEON, A.
J.A.
- 39

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