CASE NO.: SA 21/2001

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

PIETER JOHAN MYBURGH APPELLANT

AND

THE STATE

RESPONDENT

CORAM: Strydom, C.J.; O'Linn, A.J.A. *et* Chomba A.J.A.

HEARD ON: 19 June 2002

DELIVERED ON: 14/10/2002

APPEAL JUDGMENT

O'LINN, A.J.A.:

SECTION A:

INTRODUCTORY REMARKS:

The appellant appeals, with leave of this Court against a finding of the Court *a quo* against the rejection of his application for a permanent stay of prosecution and against the sentence imposed on 2 counts of fraud.

The appellant was represented before us by Mr. Du Toit, S.C., assisted by Mr. Grobler. The respondent was represented by Mr. Small, a representative of the Prosecutor-General.

Counsel on both sides provided this Court with detailed and well-researched heads of argument as well as the *viva voce* arguments which were extremely helpful.

The background to this appeal is as follows:

> "1. On 30 November 2000 the Appellant was found guilty of three counts of fraud, the State having withdrawn four other counts of fraud on which the Appellant originally appeared before the Honourable Mr. Justice Mainga from 2 August 1999 in the High Court of Namibia.
>
> 2. On 14 December 2000 the Appellant was sentenced as follows:
>
> 2.1 Count 5 (Gagiano): Three years imprisonment of which two years were suspended;
>
> 2.2 Count 6 (Kheimseb): Four years imprisonment;
>
> 2.3 Count 7 (Seibeb): Four years imprisonment.

The Appellant therefore received an effective period of nine years imprisonment in respect of the conviction of the three counts of fraud.

3. On 22 March 2001 the Appellant's application in the Court *a quo* for leave to appeal against sentence, was dismissed.

4. The Appellant petitioned the Honourable Chief Justice and leave was granted as follows:

4.1 Against sentence on counts 6 and 7;

4.2 Against the refusal of the Trial Court to grant Appellant's application for the stay of the criminal proceedings on the basis of a lack of urgency and against the accompanying cost order.

5. Leave against the convictions was not granted, nor was leave to appeal against the sentence on count 5."

<u>The background to the appellant's application for the stay of the criminal proceedings:</u>

1. On 2 August 1999, before the trial on the merits commenced, application was made for a permanent stay of the criminal proceedings against the Appellant, on an urgent basis.

2. The Trial Court refused the application for the permanent stay of the criminal proceedings and gave as its only reason that the Appellant failed to show that the matter was urgent; it was ordered that the criminal trial proceed. No formal judgment was handed down.

3. On 14 August 2000 an application for leave to appeal against the judgment of Mr. Justice Mainga in refusing the application for the permanent stay was filed, but was turned down on 14 December 2000.

4. The application for a permanent stay of the criminal proceedings was brought on the following main grounds, as set out in the appellant's heads of argument on appeal:

> "1. The complainant (Commercial Bank) laid criminal charges against the Appellant on 13 July 1996;
>
> 2. Detailed negotiations between representatives of the complainant and the Appellant took place and continued in an attempt to resolve the differences and the disputes in existence.

3. During the discussions and negotiations the Appellant made detailed and extensive disclosure of facts known to him as well as his defence to the allegations of fraud.

4. The Appellant was not warned of his right to remain silent and was unaware of the fact that the complainant intended making use of the information gained during the discussions and negotiations in subsequent criminal proceedings.

5. The Appellant furthermore discussed the allegations made against him with the police officer in charge of the investigation, Inspector Oelofse, without being warned of his right to remain silent.

6. It was only on 26 July 1996 that the Appellant was arrested without warning.

7. Also on 26 July 1996 the complainant brought an application for the sequestration of the Appellant. In support of the application for sequestration the complainant filed the affidavits of one Willie Dames, containing a series of allegations which appellant described as untrue. The Appellant laid a charge of perjury against Willie Dames.

8. The Appellant also laid charges of perjury against certain officials of the complainant for reasons set out fully in the Appellant's founding affidavit to the application.

9. As a result of the charges brought against Dames and the officials of the complainant, the Appellant discussed in detail the merits of the allegations of fraud brought against him by the complainant with officials of the Office of the Prosecutor-General. These officials included Dr. N. Horn and Advocate D.F. Small. Advocate D.F. Small subsequently appeared for the State in the matter against the Appellant, and at no stage was the Appellant informed that the information disclosed by him would be used or could be used in the subsequent criminal trial of the Appellant.

10. In the light of the abovementioned, the Appellant claimed before the Trial Court that he would be seriously prejudiced in his defence and that the trial against him should not proceed, since he will not be able to enjoy a fair trial.

11. The Appellant also referred to certain irregularities he alleged was committed by the complainant, in support of

his application for a permanent stay of criminal proceedings.

12. Furthermore, and importantly, the Appellant also averred that he would be severely prejudiced because of the period of four years that lapsed before he was formally prosecuted."

The main ground on which leave to appeal against the verdict of the Court *a quo* in regard to the application for a permanent stay of prosecution was granted, was that it appeared that the learned judge *a quo* rejected the application on the sole ground that it was not urgent and without going into the merits of the application at all.

SECTION B:

THE INTERPRETATION OF ART. 12(1)(a) AND (b) OF THE NAMIBIAN CONSTITUTION AS A BASIS FOR AN APPLICATION FOR A PERMANENT STAY OF PROSECUTION

The appellant in this case relies primarily on sub-article 12(1)(b) read with 12(1)(a) of the Namibian Constitution as the basis for his application in the Court *a quo* for a permanent stay of prosecution.

In another appeal presently before this Court, namely Margaret Malama-Kean v The Magistrate for the District of Oshakati NO and the Prosecutor-

General NO, the accused similarly relies on the provisions of Art. 12(1)(a) and (b) for her appeal.

Although the two appellants were represented by different attorneys and advocates, this Court had the benefit of hearing counsel in both cases.

At the outset it is best to set out the contents of the whole of Art. 12. It reads:

> "12 Fair Trial
>
> (1) (a) In the determination of their civil rights and obligations or any criminal chares 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 or morals, the public order or national security, as is necessary in a democratic society.
>
> (b) A trial referred to in sub-article (a) hereof shall take place within a reasonable time, failing which the accused shall be released.
>
> (c) Judgments in criminal cases shall be given in public, except where the interest of juvenile persons or morals otherwise require.
>
> (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.
>
> (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 of 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 on 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.

It is apparent from the structure of Art. 12 that whereas subparagraph (a) of sub-article (1) deals with certain basic requirements of a fair trial relating to the determination of civil rights and obligations of persons as well as criminal charges against them, subparagraphs (b) to (f) of sub-article (1) as well as sub-articles (2) and (3) deal exclusively with certain specific requirements for fair trials in criminal cases.

Furthermore no remedies are specified in the event of a breach of any of these requirements, except in the case of subparagraph (b) of article 12(1) wherein it is made mandatory for the trial as described in subparagraph (a), "to take place within a reasonable time, failing which the accused shall be released".

The principle and requirement that a trial must take place within a reasonable time is established in the Constitutions of the USA and Canada in provisions providing for a speedy trial and in the criminal law systems of all democratic countries. It is clearly a principle and requirement of international law. So e.g. the International Covenant of Political and Human Rights provides in Art. 14.3(c) as a "minimum guarantee" that "Everyone charged with a criminal offence shall have the right … to be tried without undue delay." This Covenant has become part of Namibian law.[1]

It is important to emphasize that the principle and requirement of a "speedy trial" or "trial within a reasonable time" has been accepted in South African and Namibian common law and criminal law and procedure long before the entering into force of the Namibian Independence Constitution on 21 March 1990 and the South African Interim Constitution of 1994 and final Constitution of 1996. The significance of this fact is that the common law has been developed by statute and court precedents into a body of law not only recognizing the right of an accused to a trial within a reasonable time as one of the many requirements of a fair trial, but has provided remedies for ensuring a fair trial and for even quashing a conviction and sentence where the accepted requirements for a fair trial were not met.

Several provisions of the Criminal Procedure Act were available to ensure a fair trial. So e.g. failure to provide sufficient particulars to a charge or a charge not disclosing an offence may lead to a quashing of the charge

[1] The Government of the Republic of Namibia and Others v G.K. Mwilima and Others, unreported, NmS, delivered on 7/6/2002

before trial.[2] This however, does not amount to a permanent stay of the prosecution. The prerogative of the Attorney General to prosecute was also not untouchable. Should he unreasonably and unduly delay his decision whether or not to prosecute, it is conceivable that both a victim and/or a private prosecutor or even an accused may apply to Court to obtain a mandamus to decide, and if he has decided, then to proceed with the prosecution, within a reasonable time.[3]

It was even possible and still is, to sue the Attorney-General (after Namibian independence the Prosecutor-General) for malicious prosecution, should the facts show that he/she was acting maliciously.

Then section 317 of the Criminal Procedure Act 51 of 1977 and its predecessor provides for a special entry for the formulation of any alleged irregularity either during or after the trial, which could lead to the quashing of any conviction or sentence on appeal.

As was stated in State v Xaba[4], the basic concept underlying section 317(1) is that an accused be fairly tried."

But even though convictions and sentences were often quashed on appeal subsequent to conviction and sentence, because of irregularities committed during the trial and even before the trial if related to the trial, a further prosecution and retrial was not barred if the accused was not in jeopardy of

[2] Section 85 and 87 of the Criminal Procedure Act 51 of 1977
[3] See Wronsky v Attorney-General, 1971(3) SA 292
[4] 1983(3) SA 717 AD at 728

being legally convicted, such as e.g. where the Court did not have the necessary jurisdiction to hear the matter.

A Court, in the exercise of its discretion, could also refuse a further postponement, or put the prosecution on terms, thus forcing the prosecution to proceed or alternatively to withdraw the case against the accused. Section 6 (six) however expressly provides that such withdrawal does not amount to an "acquittal". Then of course an accused could be released on his own recognisance or warning or on bail by the Court or in the case of certain specified less serious offences, also by an officer at a police station. Most of these methods were available and are still available to prevent or minimise non-trial related prejudice.

Authoritative decisions of the South African and Namibian Courts in regard to irregularities before trial which led to convictions and sentences being set aside or an accused being acquitted at the end of the trial, have recently been referred to in the decision of this Court in the case of Monday v The State.[5]

Although many principles relating to a fair trial were thus entrenched in the South African and Namibian Law, the remedy of a permanent stay of the prosecution applied for and granted at the pre-trial stage, was not resorted to as far as I am aware in the period prior to Namibian independence. Be

[5] NmS, 21/02/2002, not reported.
See also: Mushimba v The State, 1977(2) SA 829(A); S v Xaba, 1983(3) SA 717 AD at 728; S v Burger and v/d Merwe, High Court, SWA, 11/5/89, not reported, S v Alexander & Ors(1) 1965(2) SA 796 (AD) at 809 C – D; S v Ebrahim, 1991(2) SA 553 AD.

that as it may, this fact serves to underline that a pre-trial remedy of a permanent stay of prosecution, is an extraordinary remedy, certainly to be reserved for exceptional circumstances.

Once the aforesaid principles and requirements of a fair trial became embodied in article 12, they became entrenched in the Supreme Law of Namibia as part of Chapter 3 of the Namibian Constitution and as such no longer at the mercy of the Legislature or the Executive, even irrespective of security considerations and the declaration of a State of Emergency, a State of National Defence and Martial Law. Moreover, the provisions for the fundamental rights and freedoms contained in Chapter 3 cannot be repealed or amended by Parliament, in so far as such repeal or amendment diminishes or detracts from the fundamental rights and freedoms as contained and defined in Chapter 3.[6]

The only limitation upon the aforesaid Fundamental Rights and Freedoms is that provided for in Art. 22, which deals with limitations contemplated by Chapter 3 itself, such as those apparent from the definition of the fundamental rights themselves or provided for in Art. 21(2) in regard to fundamental freedoms.

The Namibian Constitution is not only unique in the world in regard to this feature of rigidity and unamendability of the provisions for fundamental rights and freedoms, but in its prescription of a mandatory sanction in par

[6] Art 24, 26, 131

(1)(b) of Art. 12, should the trial as defined in 12(1)(a), not take place within a reasonable time.

It is this mandatory remedy expressly prescribed, which distinguishes this provision from "speedy trial" provisions in the USA and in the rest of the world.

1. THE FIRST LEG OF THE ENQUIRY

Before dealing with the more difficult and controversial issue of the interpretation of the words "shall be released", it is apposite to briefly deal with the interpretation of the words in which the specific right under 12(1)(b) is formulated, namely:

> "A trial referred to in sub-article (a) hereof shall take place within a reasonable time."

Although not specifically raised or argued before us, I will assume for the purposes of this decision that when the issue of whether or not art. 12(1)(b) has been complied with must be decided, time begins to run from the time a person has been arrested on a particular charge or when not arrested, from the time that he is officially informed by the police or prosecutor of the charge against him and some official action is taken against him in regard to the charge, such as a summons served upon him to appear in Court on a specified charge or given a warning to appear in Court on a specified date on a specified charge.[7]

[7] Compare the South African Interim Constitution of 1994 where art. 25(3)(a) provide the time to run from "having been charged". Art. 35(3)(d) of the final Constitution of 1996 does not specify and merely describes the right as: "To have their trial begin and conclude without unreasonable delay".

I assume also for the purposes hereof that although not spelled out in the Namibian Constitution, the right formulated in art. 12(1)(b) includes by implication that the trial "begins and concludes without unreasonable delay".

The South African Constitutional Court pointed out that separate and distinct requirements of the right and that of the remedy, should not be overlooked, even though the analysis should not be performed in watertight compartments.

The Constitutional Court said:

> "The first leg of the enquiry is whether the right under s. 25(3)(a) has been infringed. If not, that is the end of the matter. If the right is found to have been infringed then the enquiry turns to potential remedies under 7(4)(a). A finding that the consequential relief sought is inappropriate must not be confused with the antecedent finding as to infringement."[8]

In my respectful view, this approach should be applied *mutatis mutandis*, to the analysis to be undertaken in Namibia.

The enquiry is a difficult one. This was underlined in the Canadian decision of R v Morin in regard to the wording of the speedy trial requirement of a fair trial:

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[8] Wild & A v Hoffert NO & Others, 1998(2) SACR 1 at 13 b-c

> "Though beguiling in its simplicity, the language has presented the Court with one of the most difficult challenges in search of an interpretation that respects the right of the individual in an era in which the administration of justice is faced with dwindling resources and a burgeoning case load ...
>
> Evidence presented to us indicates that between October 22, 1990 and September 5, 1991, over 47 000 charges have been stayed or withdrawn in Ontario alone. The reaction to this has been mixed...
>
> On the other hand, many other deprecate what in their opinion amounts to an amnesty for criminals, some of whom were charged with very serious crimes. They assert that accused persons are discharged when they have suffered no prejudice to the complete dismay of victims who have suffered, in some cases, tragic losses."[9]

In Namibia, the remedy provided - namely "the accused shall be released", complicates not only the interpretation of this provision relating to a remedy, but complicates the interpretation of the right – being the right to a trial within a reasonable time.

The interpretation of the words establishing the right as well as the remedy impacts on each other and cannot be done in watertight separate compartments, even less so than the enquiry about whether there was in fact a breach of the right and the enquiry as to the applicable remedy. To illustrate: Whether or not the words – "shall be released" must be interpreted as providing exclusively for a permanent stay of prosecution or at least a permanent stay as one of the mandatory remedies in the discretion of the Court on the one hand, or merely for a release from detention or a release from the pending trial, on the other, is influenced by the interpretation of the words "within a reasonable time" and *vice versa*.

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[9] R v Morin, 8 CRR (2nd) 193 (SCC) at p. 196/7

This is so because an order for a permanent stay of prosecution is an extreme, radical and exceptional remedy. If according to the interpretation of the Court, the remedy for the breach is a permanent stay of prosecution, as the only remedy or even as one of several mandatory remedies, then the Court will be inclined in its interpretation of the provision establishing the right and its breach, to impose a greater and more onerous burden on the applicant to establish a breach than would be the case if the words "shall be released" are interpreted as merely mandating a release from custody.

If however, the interpretation of the right and the requirements for establishing a breach are relatively onerous and difficult to establish, then a Court will be more inclined to interpret the remedy as being a permanent stay of prosecution, or at least a permanent stay as one of the mandatory remedies.

The consequence is that when interpreting the provision for the right and the remedy – the two "legs" so to speak, must each be considered in conjunction with the other.

In State v Strowitzki and Another, the Court adopted the words of the learned judges in Baker v Wingo where it was said:

> "The approach we accept is a balancing test, in which the conduct of both the prosecution and the defendant are weighed. A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in

> determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. The length of the delay is to some extent the triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for enquiry into the other factors that go into the balance. Nevertheless, because of the impression of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge. Closely related to length of delay is the reason the Government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defence should be weighed heavily against the Government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the Government rather than the defendant… We have already discussed the third factor, the defendant's responsibility to assert his right. Whether and how a defendant asserts his right is closely related to the other factors we have mentioned… We emphasise that failure to assert the right will make if difficult for a defendant to prove that he was denied a speedy trial. A fourth factor is prejudice to the defendant. Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pre-trial incarceration; (ii) to minimise anxiety and concern of the accused; and (iii) to limit the possibility that the defence will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defence witnesses are unable to recall accurately events of the distant past."

The Court then also specifically agreed with the following remarks in Baker v Wingo dealing with requirements of a "speedy trial":

> "Delay is not a uncommon defence tactic: … If the witnesses support the prosecution, its case will be weakened, sometime seriously so. And it is the prosecution which carries the burden

> of proof. Thus, unlike the right to counsel or the right to be free from compelled self-incrimination, deprivation of the right to a speedy trial does not per se prejudice the accused's ability to defend himself.
>
> Finally, and perhaps most importantly, the right to speedy trial is a more vague concept than other procedural rights. It is, for example, impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate. As a consequence there is no fixed point in the criminal process when the State can call upon the defendant to make the choice of either exercising or waiving the right to a speedy trial."[10]

The factors to be considered in deciding when "long is too long" were summed up in the Canadian case of R v Morin and accepted as useful guidelines in Strowitzki. They are:

> "1. Length of delay;
>
> 2. waiver of time periods;
>
> 3. the reasons for the delay
>
> (a) inherent time requirements of the case;
>
> (b) actions by the accused;
>
> (c) actions of the Crown;
>
> (d) limits on institutional resources;
>
> (e) other reasons for the delay; and
>
> 4. prejudice to the accused.[11]

There is little or no discernible difference between Strowitzki and the Namibian cases that followed in regard to the interpretation of the terms "within a reasonable time".

[10] 407 US 514, 33 L ED 2d 101, 92 S Ct 2182 at 116 - 118
[11] IBID, p. 203

In Heidenreich it was said:

> "Reasonable is of course a relative term and what constitutes a reasonable time for the purposes of Art. 12(1)(b) must be determined according to the facts of each individual case. The Courts must endeavour to balance the fundamental right of an accused to be tried within a reasonable time against the public interest in the attainment of justice in the context of the prevailing economic, social and cultural conditions to be found in Namibia… What is required at the end of the day is a value judgment. …"[12]

In the following Namibian decision, that of Van As & Another v Prosecutor-General, Namibia,[13] no effort was made to interpret the words "within a reasonable time" but emphasis was placed on the meaning of the words – "shall be released".

Again in the Malama-Kean decision of the High Court, the approach in Heidenreich in this regard was merely reaffirmed, but the interpretation of the words "shall be released", concentrated on.

The decisions of the Constitutional Court in South Africa, proceeded in substance on the same lines as those already discussed to establish what was meant by the words "within a reasonable time".[14]

2. THE SECOND LEG OF THE ENQUIRY

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[12] S v Heidenreich, 1996(2) SACR 171 (Nm) at 178 d
[13] 2002(1) SACR 70
[14] Sanderson v Attorney General, Eastern Cape, 1998(2) SA 38 CC
Wild & An v Hoffert NO & Others, 1998(2) SACR 1

I can now turn to the second leg of the enquiry, being the interpretation of the words “shall be released”.

Those who drew up the South African Interim Constitution in 1994 and its final Constitution in 1996, which followed upon the Namibian Constitution and which had the Namibian Constitution as a precedent, clearly declined to follow the Namibian precedent in regard to the prescription of a remedy.

In South Africa the writers of both the 1994 Interim Constitution and the final Constitution in 1996, prescribed a general remedy for the breach of any fundamental right and left it to the Court to exercise its discretion within the wide parameters of the Constitution. Section 7(4)(a) of the Interim Constitution merely provided that the Court shall apply an “appropriate remedy” or “combination of remedies” whereas Art. 38 of the Final Constitution provided that the Court “may grant appropriate relief, including a declaration of rights”.

Mr. Small, for the State, was the only counsel who traced a Constitution where the words – “shall be released” were used as part of the specific sanction prescribed for instances where a person “arrested or detained”, “is not tried within a reasonable time”. This is Art. 15(3) of the Constitution of Jamaica, which reads as follows:

> “…if any person arrested or detained … is not tried within a reasonable time, then, without prejudice to any further proceedings which may be brought against him, shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably

> necessary to ensure that he appears at a later stage for trial or for proceedings preliminary to trial."

The right protected is that of a person arrested or detained and the remedy is a release from such arrest or detention, not amounting to a permanent stay of prosecution.

A general remedy for the breach of any of the Namibian fundamental rights and freedoms and which corresponds to the aforesaid South African remedy for such a breach, is contained in Art. 25 of the Namibian Constitution, sub-article (3) and (4) of which provides:

> "(3) Subject to the provisions of this Constitution, the Court referred to in sub-article (2) hereof shall have the power to make all such orders as shall be necessary and appropriate to secure such applicants the enjoyment of the rights and freedoms conferred on them under the provisions of the Constitution, should the Court come to the conclusion that such rights or freedoms have been unlawfully denied or violated, or that grounds exist for the protection of such rights or freedoms by interdict.
>
> (4) The power of the Court shall include the power to award monetary compensation in respect of any damage suffered by the aggrieved persons in consequence of such denial or violation of their fundamental rights and freedoms, where it considers such an award to be appropriate in the circumstances of particular cases"
> (My emphasis added.)

The aforesaid sub-articles thus give the competent Court the power to make any order necessary and appropriate, which include interdict and damages. A permanent stay of prosecution is consequently clearly included as one of a range of possible remedies in the discretion of the Court. One would have

thought that the founding fathers would have been satisfied with these wide partly discretionary powers, making it unnecessary and even inappropriate to add the specific and mandatory remedy for a breach of the right of a accused to a trial within a reasonable time. The words – "shall be released", merely complicates and confuses the issue. What was intended by the founding fathers is difficult to imagine. Unfortunately the proceedings of the sessions of the General Assembly of the Constituent Assembly does not reflect any debate by the representatives or their legal advisers on the issue and the minutes of the Committees of the Constituent Assembly are not freely and readily available to facilitate a study by counsel or the Court of these minutes in order to establish or at least to attempt to establish, what the founding fathers had in mind. But from what has been available to the Court, it seems that issues such as these were left to the discretion of the available legal advisers.

It seems therefore that at present, there is little or no assistance which this Court can derive from a reference to and study of the minutes of the said Constituent Assembly and its Committees.[15]

In view of the fact that sub-article (3) of article 25 of the Constitution makes the said wide discretion of the Court "subject to the provisions of this Constitution", those powers would be subject to article 12(1)(b) which makes

[15] The relevance and usefulness of such records are also acknowledged in the US Supreme Court case of Dickey v Florida, 398 US 30 (1970) 398 US 30 where it was said: "Records are scarce. There is eg no account of the Senate Debate, and the House deliberations give little indication of the Representatives intent". See also Makwanyane & Another, the quotation from the judgment written by Chaskalsen, P, infra, when referring to a judgment written by Kentridge in S v Zuma & Others. Ex Parte Attorney-General in re the Constitutional relationship between the Attorney-General and the Prosecutor-General, 1995(8) BCLR 1070 (NmS) at 1080 D – I.

it mandatory for the Court to order the release of the accused, should the trial not take place within a reasonable time

If the intention was to allow any one or more of the remedies “release from custody”, “release from onerous conditions of bail”, a “stay of prosecution”, whether temporary or permanent, then those remedies would have been adequately covered by the powers provided under sub-articles (2) and (3) of articles 25 and the mandatory provision that the accused “shall be released” if the trial does not take place within a reasonable time as provided in part 12(1)(b) would be superfluous and without any purpose.

It seems that the only way that Art. 25(2) and 25(3) could legally co-exist with Art. 12(1)(b), is if it could be said that in Art. 12(1)(b), it was intended to provide for a specific but limited breach of the requirements of a fair trial – namely the requirement that the trial shall be held within a reasonable time and that the remedy for that particular breach shall be limited to the “release”, of the accused.

It further follows that if the breach is a breach other than the mere failure of the trial to take place within a reasonable time, then Art. 12(1)(b) will not apply. Art. 25(2), (3) and (4) will then apply and the remedy will be sought and given in accordance with Art. 25(2) read with Art. 25(3). Art. 25(2), 25(3) and 25(4) read with article 5, provides comprehensive remedies, in the discretion of the Court, which will include an appropriate remedy for failure of a trial to take place within a reasonable time.

The problem which has crystalized in this case, is a Namibian problem in the first place, emanating from a peculiar and unique provision of the Namibian Constitution. Decisions in the South African Courts and the courts of the USA, Canada, Great Britain and other democracies, are consequently not directly in point and not very helpful in regard to the provision: "shall be released". The Namibian High Court has however, attempted to come to grips with this difficult and important problem on various occasions but the solutions found were not uniform. It has now become necessary for this Court to strive to provide an authoritative and binding final decision.

In the first case where an attempt was made to address the difficult problem of interpreting the words "shall be released", the accused had applied before plea for an order "quashing and permanently staying the criminal proceedings". The application was based on the alleged failure of the trial to be held within a reasonable time, combined with several other alleged irregularities[16]. The Court interpreted the words in Art. 12(1)(b) which read:

> "A trial referred to in sub-article (a) hereof shall take place within a reasonable time, failing which, the accused shall be released."

The Court commented as follows on the remedy provided by the words "shall be released":

> "A permanent stay amounts to a dismissal with prejudice. This according to certain writers is only permissible where the ability of the accused to defend himself or herself is gravely infringed. See 71 L Ed 2 at 990 where the following comment appears:

[16] S v Strowitzki & A, 1995(1) BCLR 12 Nm at 35 - 36

> 'According to one commentator, Amsterdam. Speedy Criminal Trial: Rights and Remedies, 27 Stanford L Rev 525 (February 1975), the proposition that the only remedy for the violation of the right to a speedy trial is dismissal with prejudice is incredible. The commentator suggested that the Supreme Court, in the case of Strunk v United States (1973) 412 US 434, 37 L Ed 2d 56, 93 S Ct 2260, was merely stating that dismissal with prejudice is an exclusive post trial remedy, as the Strunk case came to court after conviction. The author noted that the lower federal courts in the past have included dismissal without prejudice, the expediting of the trial, and discharge from custody as remedies for the rights violation, and noted that the English Habeas Corpus Act of 1979 provided that persons not timely tried should be discharged from imprisonment. The commentator stated that the speedy trial clause is designed to protect three distinct interests: (1) the undue incarceration of an accused prior to trial, (2) the prolongation of anxiety and other vicissitudes accompanying public accusation, and (3) the possibility of the ability of the accused to defend himself. Only where the third interest is violated in a particular situation, according to the commentator, should dismissal with prejudice be the remedy.'

The Namibian constitution provides a specific remedy for failure to bring to trial within a reasonable time: namely:

> 'The accused shall be released.'

This appears to mean 'released from incarceration'. It may also include release from onerous conditions of bail. *Prima facie*, it does not seem to include a permanent quashing of stay of prosecution.

See also article 5 of the Namibian constitution where it provides that the Court shall protect the fundamental rights and freedoms 'in a manner hereafter prescribed'.

I am not convinced as argued by Mr. Geier, that the provision in article 25(3) for the protection of a fundamental right or freedom by interdict overrides the specific provision in article 12(1)(b) that if a trial does not take place within a reasonable time, the accused shall be released. The interdict in the form of a mandatory interdict is then granted to ensure the release, not the permanent stay or quashing of a criminal charge."

The words "*prima facie*, it does not seem to include a permanent quashing or stay of prosecution" indicate that the opinion was expressed as an obiter opinion but was part and parcel of the interpretation of the whole of Art. 12(1)(b).

The application by the accused however, was rejected because the accused had failed to prove the first leg of the Art. 12(1)(b), being that the trial did not take place, or cannot take place within a reasonable time.

The following case was State v Heidenreich, a judgment written by Hannah, J, in which Strydom, J.P., as he then was, concurred.[17]

In the Heidenreich case, the presiding magistrate refused a postponement requested by the State and found that Art. 12(1)(b) had been breached because the trial had not taken place within a reasonable time. It is not quite clear from the judgment what were the precise words of the magistrate, but it was stated in the High Court judgment that the magistrate had said that "an order should be made releasing him from his trial and such an order was made". Thereafter the magistrate had second thoughts about this order and submitted the record for review expressing the opinion that she "had no jurisdiction to make the order". The case was set down for argument and it was agreed between counsel for the State and the accused that three points were to be argued being:

[17] 1996(2) SACR 171 Nm

(1) Was the magistrate correct in holding that the trial of the accused had not taken place within a reasonable time as required by article 12(1)(b) of the Constitution?

(2) If so, is the magistrate's court a competent court in terms of Art. 25(2) to take the necessary action to enforce or protect the right of an accused to a fair trial?

(3) Was it competent for the magistrate to order that the accused be released and what is the effect of such an order?

The Court found:

(1) The magistrate was wrong in finding that the trial of the accused had not taken place within a reasonable time.

(2) The magistrate had the necessary jurisdiction to enforce the accused's right to a fair trial, but the High Court was the only competent court to act in terms of Art. 25(2), 25(3) and 25(4).

(3) It was competent for the magistrate to make an order for the release of an accused.

The learned judges, with reference to the judgment in Strowitzki, concluded: "But when regard is had to the underlying purpose of Art. 12(1)(b) I am of the view that a broader, more liberal, construction should be given to the

word. Once the main purpose of the sub-article is identified as being not only to minimise the possibility of lengthy pre-trial incarceration and to curtail restrictions placed on an accused who is on bail but also to reduce the inconvenience, social stigma and other pressures which he is likely to suffer and to advance the prospects of a fair hearing, then it seems to me that "released" must mean released from further prosecution for the offence with which he is charged. It is only by giving the term this wider meaning that the full purpose of the sub-article is met. Release from custody or from onerous conditions of bail only meets part of the purpose of the sub-article". (My emphasis added.)

As I understand it the learned judges did not find that "released" has the meaning of "released from further prosecution" as one of its meanings, in addition to be released from incarceration or onerous conditions of bail, but that "released" "must mean" released from further prosecution and that that is the meaning of the word as contained in article 12(1)(b) of the Constitution.

I am not convinced that this finding is justified by the so-called "main purpose" of the provision – even though I have no problem with the formulation of the "main purpose" in the judgment.

When dealing with the element of "reasonableness" in the phrase "reasonable time", the Court *inter alia* referred to the Canadian decision in R v Askov where the learned Cary, J., inter alia said:

> It can never be forgotten that the victims may be devastated by criminal acts. They have a special interest and good reason to expect that criminal trials take place within a reasonable time. From a wider point of view, it is fair to say that all crime disturbs the community and that serious crime alarms the community. All members of the community are thus entitled to see that the justice system works fairly, efficiently and with reasonable dispatch. The very reasonable concern and alarm of the community which naturally arises from acts of crime cannot be assuaged until the trial takes place. The trial not only resolves the guilt or inconvenience of the individual, but acts as a reassurance to the community that serious crimes are investigated and that those implicated are brought to trial and dealt with according to law."[18]

The Namibian High Court and the Supreme Court have in recent years placed much emphasis on the need to balance the rights and interests of accused persons with those of the victims of crime and to consider also the public interest in the balancing process. In Namibia a Judicial Commission was even appointed called "The Commission of Inquiry into Legislation for the More Effective Combating of Crime". The Commission was mandated specifically to enquire into and make recommendations regarding the balancing of the rights of convicted and accused persons with those of victims and with the public interest.

It must also be borne in mind that a permanent stay of prosecution would gravely impact on and even qualify the prerogative of the Prosecutor-General to prosecute, embodied in Art. 88 of the Namibian Constitution and section 2 of the Criminal Procedure Act No. 51 of 1977[19]. It will also similarly affect the periods of prescription for the institution of crimes provided for in section 18 of the Criminal Procedure Act. In terms of the latter provision, the

[18] (1991) 49 CRR 1 (Supreme Court of Canada) at 20.
[19] Ex Parte Attorney-General, Namibia: In re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General, 95(2) BCLR 1070 NmS.

right to institute a prosecution for crimes for which the death sentence could previously have been imposed, "shall not be barred by the lapse of time", whereas the prosecution for other crimes, "lapse only after the expiration of 20 years from the time when the offence was committed", "unless some other period is expressly provided by law". The concern that the permanent stay of the proceedings based on "the mere passage of time would be the equivalent of imposing a judicially created limitation period for a criminal offence" was also expressed in a decision of the Supreme Court of Canada.[20]

One can therefore imagine why the sanction or remedy of permanent release from prosecution, or permanent stay of prosecution, being a sanction or remedy which may adversely affect the interests of the victims of crime and the public interest, as well as that of the accused, should not be imposed in other than the most exceptional and extreme cases of unreasonable delay. No wonder then that in those Namibian cases where a permanent stay of prosecution has been applied for, not one has been successful so far. In S v Uahanga & Others,[21] however, the accused was acquitted on the authority of the Heidenreich decision, but that decision can be distinguished because the order was made after the accused had pleaded "Not Guilty".

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[20] R v Francois, 18 CRR (2nd) 1994, 187 at 190, quoting with approval from R v L, (UK) 1991 4 CRR (2nd), 304 - 305

[21] 1998 NR 160. But in the cases of Strowitzki and Heidenreich, *supra*, and Van As and Malama-Kean, *infra*, the Namibian High Court rejected the applications for a permanent stay.

In South Africa, where the Court has a discretion to impose and/or to provide necessary and appropriate relief, the Constitutional Court has stated in regard to an application for the permanent stay of the prosecution:

> "The relief the applicant seeks is radical, both philosophically and socially politically. Barring the prosecution before the trial begins and consequently without any opportunity to ascertain the real effect of the delay on the outcome of the case is far-reaching. Indeed it prevents the prosecution from presenting society's complaint against an alleged transgression against society's rule of conduct that will seldom be warranted in the absence of significant prejudice to the accused…"

> "Ordinarily, and particularly, where the prejudice alleged is not trial related, there is a range of "appropriate" remedies less radical than barring the prosecution. These would include a mandamus requiring the prosecution to commence the case, a refusal to grant the prosecution a remand, or damages after an acquittal arising out of the prejudice suffered by the accused. A bar is likely to be <u>available only in a narrow range of circumstances, for example where it is established that the accused has probably suffered irreparable trial prejudice as a result of the delay</u>."[22]

In the following decision of the South African Constitutional Court, namely <u>Wild and An v Hoffert & Ors</u>[23], where Kriegler, J, writing the judgment for the Court as in Sanderson, reaffirmed the test in Sanderson, and added:

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[22] Sanderson v Attorney General, Eastern Cape, 1988(1) SACR 227 at 245.
[23] 1998(2) SACR 1 at 12.

> "The appellant do not allege, nor is there any suggestion of trial prejudice here. Consequently their claim for a stay of the prosecution must fail unless there are circumstances rendering the case so extraordinary as to make the otherwise inappropriate remedy of a stay, nevertheless appropriate."

It has been argued that in interpreting art. 12(1)(b) the Court must apply a broad, liberal and purposive approach.

In this regard it is appropriate to repeat what was said in the majority judgment of this Court in Minister of the Interior v Frank and Another:

> "In my respectful view, the starting point in interpreting and applying a constitution, and establishing the meaning, content and ambit of a particular fundamental right, or freedom, must be sought in the words used and their plain meaning. This principle is endorsed by *Seervai* in his authoritative work '*Constitutional Law of India*' where he quotes with approval from the *Central Provinces case* (1939) FCR 18 at 38:
>
> > '…for in the last analysis the decision must depend upon the words of the Constitution which the Court is interpreting and since no two constitutions are in identical terms, it is extremely unsafe to assume that a decision on one of them can be applied without qualification to another. This may be so even when the words or expressions are the same in both cases, for a word or phrase may take a colour from its content and bear different senses altogether.'
>
> But I am mindful of the dictum of this Court in the *Namunjepo*-decision where the learned Chief Justice Strydom said:

> 'A court interpreting a Constitution will give such words, especially the words expressing fundamental rights and freedoms, the widest possible meaning so as to protect the greatest number of rights…'

The 'widest possible meaning' however, means no more than what Kentridge, J.A. said in the case of *Attorney-General v Moagi.*

He declared: '… a Constitution such as the Constitution of Botswana, embodying fundamental rights, should as far as its language permits be given a broad construction…'.

And as Friedman, J. comments in *Nyamkazi v President of Bophuthatswana*, 'this is in my view the golden mean between the two approaches' meaning the approaches of the 'positivist' and 'libertarian' schools. (My emphasis added.)

I am also mindful of the many Namibian decisions where the basic approach in interpreting a constitution has been expressed in poetic and stirring language. So e.g. it was said in *Government of the Republic of Namibia v Cultura 2000,* :

> 'It must be broadly, liberally and purposively interpreted so as to avoid the 'austerity of tabulated legalism' and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government.'
> (My emphasis added.)

But as pointed out by Seervai, citing what was said by Gwyer, C.J.,

> '… a broad and liberal spirit should inspire those whose duty it is to interpret the constitution, but I do not imply by this that they are free to stretch and pervert the language of the enactment in the interests of any legal or constitutional theory, or even for the purposes of supplying omissions or correcting supposed errors. A Federal Court may rightly reflect that a Constitution of Government is a living and organic thing, which of all instruments has the greatest claim to be construed *ut res magis valeat quam pereat.*'
> (My emphasis added.)

This dictum was quoted by this Court, apparently with approval, in the decision of *Minister of Defence, Namibia v Mwandingi*.

In the aforesaid decision, this Court also relied *inter alia* on a dictum by Lord Wilberforce in *Minster of Home Affairs & An v Fisher & An*, wherein the learned Law Lord had said:

> 'A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a Court of Law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition of the character and origin of the instrument, and to be guided by giving full recognition and effect to those fundamental rights and freedoms with a statement of which the constitution commences…' (My emphasis added.)

Kentridge, A.J., who wrote the unanimous judgment of the South African Constitutional Court in the *State v Zuma*, quoted with approval the following passage from a judgment of Dickson, J., (later Chief Justice of Canada) in the decision *R v Big M. Drug Mart Ltd:*

> '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 rights or 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.'

Kentridge, A.J., also pointed out in *S v Zuma & Ors* that 'it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean…'

In the same decision, Kentridge said:

> 'Both Lord Wilberforce and Dickson, J., later Chief Justice, of Canada, had emphasised that regard must be had to the legal history, traditions and usages of the country concerned, if the purposes of its constitution must be fully understood. This must be right.'
> (My emphasis added.)

The dictum was again approved by the Constitutional Court in *State v Makwanyane and Another* although Chaskalson, P., in his judgment added:

> 'Without seeking in any way to qualify anything that was said in the *Zuma*'s case, I need say no more in this judgment than that s 11(2) of the Constitution must not be construed in isolation, but in its context, which includes the history and background to the adoption of the Constitution, other provision of the Constitution itself and, in particular, the provisions of chap 3 of which it is part. It must also be construed in a way which secures for 'individuals the full measure' of its protection.'

It was also pointed out in the latter decision that background material, such as the reports of technical committees which advised the Multi-party negotiating process, could provide a context for the interpretation of the Constitution…

It follows from the above that when a Court interprets and applies a constitution and adheres to the principles and guidelines above-stated, a 'purposive' interpretation also requires that a Court has regard to 'the legal history, traditions and usages of the country concerned, if the purposes of its constitution must be fully understood'.

To sum up: The guideline that a constitution must be interpreted 'broadly, liberally and purposively', is no license for constitutional flights of fancy. It is anchored in the provisions of the Namibian Constitution, the language of its provisions, the reality of its legal history, and the traditions, usages norms, values and ideals of the Namibian people. The Namibian reality is that these traditions, usages, norms, values and ideals are not always 'liberal' and may be 'conservative' or a mixture of the two. But whether or not they are 'liberal', 'conservative' or a 'mixture of the two', does not detract from the need to bring this reality into the equation when interpreting and applying the Namibian Constitution".[24]

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[24] The Chairperson of the Immigration Selection Board v Frank & An, unreported, NmS dated 05/03/2001.
See also: Minister of Defence v Mwandinghi, 1992(2) SA 355 (NmS); Van As & A v Prosecutor-General of Namibia, 2002(1) SACR 70 at 76 C – I. Compare also: Berg v Prosecutor-General, Gauteng, 1995(11) BCLR 1441 (T) at 1445 G – 1446 E. Ex Parte Attorney-General, Namibia: In re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General, 95(2) BCLR 1070 NmS. At 1080

When interpreting Art. 12(1)(b) of the Namibian Constitution, one should also keep in mind that there has never been a principle in South African and Namibian law making a permanent stay of prosecution a mandatory remedy for any breach of any of the principles of a fair trial. So e.g. in South Africa, in the decision of Klein v Attorney-General, Witwatersrand Local Division, it was stated:

> "There has however never been a principle that a violation of any of the specific rights encompassed by the right to a fair trial would automatically preclude the trial. Such a rigid principle would operate to the disadvantage of law enforcement and the consequent prejudice of the society which the law and the Constitution is intended to serve..."

In the light of the foregoing, it seems extremely unlikely that the Constituent Assembly of Namibia, could ever have intended to prescribe to the Courts as a mandatory remedy, and as the one and only remedy, a permanent stay of prosecution.

None of counsel who appeared in this appeal and the one of Malama-Kean referred to *supra*, have been able to point to any court decision, or legal dictionary, where the word "release" was used to provide for a permanent stay of the prosecution in a criminal case or a permanent release from prosecution. The nearest one counsel could get was "The Oxford Companion to Law", by David M. Walker, MA, PL D, LLD, FBA, One of Her

Majesty's Counsel in Scottland, of the Middle Temple, Barrister, Regius Professor of Law in the University of Glasgow.

In this dictionary, the meaning of the word release is given as: "A discharge or renunciation of a claim or right of action. Also at common law the conveyance of a larger estate, or a remainder or reversion, to a party already in possession". (My emphasis added.) A "claim or right of action" clearly refers to civil law and procedure, not criminal law.

It is significant that even an academic, professor of law and Barrister with such credentials could not find an application for the word "release" in criminal law and procedure. As far as dictionary meanings are concerned contained in non-legal dictionaries, reference can be made to the "Oxford Advanced Learners Dictionary of Current English" by A S Hornsby where the following meanings are given with a measure of relevance to the word in Art. 12(1)(b): "To allow to go; to set free; release a man from prison on order for his release from prison; given up or surrender (a right, debt property) to another".

In Heidenreich the Court did however refer to the reference by Mr. Small, counsel for the State, to various dictionary meanings of the term "released" showing that the word "released" can have a variety of meanings, including released from detention or relieved from onerous conditions of bail but concluded as I have shown *supra*, on the ground of the need for a broader, more liberal construction, that "a permanent release from prosecution", must be the true and exclusive meaning to be given to the words. Counsel

as well as the Court in that case, appears to have given insufficient weight to the fact that in the most relevant legislation the Criminal Procedure Act, the word “released” is only used in the sense of released from custody, released on bail, on own recognizances etc.

Section 39(3) of the Criminal Procedure Act provides:

> “A person arrested shall be in lawful custody until lawfully discharged or released”. Section 50(1) further deals with the case of a person arrested, whether with or without warrant who, “if not released by reason that no charge is brought against him …” Section 56(2) provides: “If an accused is in custody, the effect of a written notice handed to him under subsection (1) shall be that he be released forthwith from custody”. In the South African final Constitution of 1996, the terms “released” is used in art. 35(1)(f) in the sense of “release from detention”.

Section 58 provides:

> “The effect of bail granted in terms of the succeeding provisions is that an accused who is in custody shall be released from custody upon payment of or the furnishing of a guarantee to pay, the sum of money determined for his bail, and that he shall appear at the place and on the date and at the time appointed for his trial or to which the proceedings relating to the offence in

> respect of which the accused is released on bail are adjourned, and that the release shall, unless sooner terminated under the said provisions, endure until a verdict is given by a court in respect of the charge to which the offence in question relates, or, where sentence is not imposed forthwith after verdict and the court in question extends bail, until sentence is imposed." (My emphasis added.)

The term "released" is also used in regard to bail in section 59, 60, 61, 66(1), 71 and 179. Section 72 deals with release on warning instead of bail. Section 185 deals with the detention of witnesses and the release from detention of such witnesses who had been detained to secure their safety.

Nowhere in the Act is the term "released" used in any other sense than released from detention.

The Prison Act of 1995 also uses the term in sections 5, 61, 62, 64, 66, 67, 69 and 71, in regard to the release of prisoners from imprisonment.

The notorious section 103 *ter* (4) and (5) of the Defence Act as it stood before Namibian independence, serves as a precedent for the authors of legislation should they wish to bar a prosecution whether before or after plea. In the case of a bar before plea, these provisions provided that the State President could authorize the Minister of Defence to issue a certificate "directing that the proceedings shall not be continued". The task for the

Court then was to determine whether there was such a certificate. Once it determines that there was such a certificate, then "the proceedings shall be deemed to be void".[25] These provisions further serve to indicate how explicit the language must be to effect a permanent bar to prosecution.

Furthermore, the Legislature in enacting the Criminal Procedure Act, has used the express term "acquit" in section 6(b) when it intended to provide for that effect in cases where the State stops the prosecution after plea. If an acquittal or a permanent stay of prosecution or discharge from prosecution as the exclusive remedy was intended, why not say so, considering the fact that it is an extraordinary remedy with wide-ranging implications. This need to use the terms "shall be acquitted" or "the prosecution shall be permanently stayed" or "the accused" shall be permanently discharged from prosecution or similar words to the same effect, becomes even more apparent if sub-article (2) of article 12 is considered. Sub-article (2) provides as follows: "No persons shall 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 defence of "previous acquittal" and "previous conviction". (My emphasis added.)

Sub-article (2) must also be read in conjunction with the provisions of section 106 of the Criminal Procedure Act 51 of 1977 which was in existence

[25] See the decisions in:
Mweuhanga v Cabinet of the Interim Government & Others, 1989(1) 976 (SWA)
Shifidi v Administrator General of SWA & Others, 1989(4) SA 631 SWA

at the time the Namibian Constitution was enacted and is still valid and applicable in accordance with Art. 138(2)(a) of the Namibian Constitution. It will remain in force until repealed by an Act of Parliament or declared unconstitutional by the Court. There has been no repeal by Parliament and no declaration by any Court that it is unconstitutional. I can also see no reason at all for declaring the said section 106 unconstitutional.

The significance of section 106 is that it provides in sub-section 1(c) and (d):

> "When a accused pleads to a charge he may plead –
>
> (c) that he has already been convicted of the offence with which he is charged; or
>
> (d) that he has already been acquitted of the offence with which he is charged;
>
> (e) that he has received a free pardon under section 327(6) from the State President for the offence charged; or
>
> (f) …
>
> (g) that he has been discharged under the provisions of section 204 from prosecution for the offence charged."

(My emphasis added.)

Section 204 provides for a person who may be charged but is used as a state witness and who, should the Court find at the end of the trial that he has answered all questions frankly and honestly, “such witness shall, subject to the provision of subsection (3), be discharged from prosecution”. Subsection (3) deals with a case where the witness testifies at a preparatory examination and after having been given the immunity, does not testify frankly or honestly at a subsequent trial.

In all these cases the special pleas are tendered before any plea to the merits and exhaust the pleas under statute where an accused can be permanently released from prosecution.

The accused can also demand, in accordance with section 108 that the issues raised by the plea, other than a plea of guilty, be tried.

The language used to provide for a discharge from prosecution or a permanent stay of prosecution is significant. In subsection 1(d) of section 106 a permanent stay is obtainable provided an accused has previously been “acquitted”; in the case of subsection 106(1)(e) read with section 204(2), the remedy provided is if the accused in terms of 204(2)(g), has been “discharged from prosecution”. The words “discharge from prosecution” are not used in any other part of the Criminal Procedure Act.

It is also significant that in the USA and Canada where a so-called dismissal with prejudice is the remedy, it is equivalent to a permanent stay of prosecution and/or an acquittal, the relief applied for is the "dismissal of indictment" or "dismissal of the charge" and the focus is not on the person of the accused but on such indictment or charge.[26] In Namibia, in art. 12(1)(b) the focus is on the person of the accused and provides that the "accused shall be released", not the "indictment" or "charge" shall be dismissed.

In the provisions of the Criminal Procedure Act, and Prisons Act where released from detention is intended, the focus is similarly on the accused or detained person, but where the order contemplates a permanent stay of prosecution in terms of the Criminal Procedure Act the terms "discharge from prosecution" or "acquittal" or "acquitted" are used respectively.

The Court in Heidenreich held that Art. 25 "is concerned with specific and independent claims made by aggrieved persons that a fundamental right or freedom guaranteed by the Constitution has been infringed and whilst such claims must be made in proceedings before the High Court, it does not mean that a magistrate's court has no jurisdiction to ensure the observance of certain fundamental rights guaranteed by the Constitution during the course of proceedings which take place before it..." (My emphasis added.)

I have difficulty in understanding the distinction apparently made between claims under Art. 25 and claims under Art. 12 and that claims under Art. 25

[26] Barker v Wingo, 407 US 514 and Dickey v Florida, 398 US 30

“are specific and independent claims” and that such claims “must be made in proceedings before the High Court” and that a magistrate’s court will not have jurisdiction to hear such claims, but will have jurisdiction to hear complaints about the “observance of certain fundamental rights … during the course of proceedings which take place before it…”. The Court went on to indicate that claims under Art. 12(1)(b) would be justiciable by the magistrate’s court in terms of art. 5 if raised in the course of criminal proceedings before it. In view thereof that the Court also found that the remedy provided for in art. 12(1)(b) is a permanent stay of prosecution, it follows that it also found, by implication, that the magistrate’s court has jurisdiction by virtue of article 5 read with 12(1)(b), to order a permanent stay of prosecution.

In the subsequent decision of Van As, the Court held that: “If the effect of the order made by the magistrate to release an accused is to grant a permanent stay of prosecution, the magistrate would be exceeding his jurisdiction. If the magistrate has the power to release an accused person by virtue of art. 5, by necessity “release” does not have the extended meaning given to it in the Heidenreich’s case. It seems that the learned judges in Van As based their view on the fact that a permanent stay of prosecution amount to an interdict and that the magistrate’s court has no jurisdiction to grant such an interdict in terms of the Magistrate’s Court Act.

It follows that the Court in Van As correctly argued that if the words “shall be released” mean that the Court shall grant a permanent stay of prosecution, then a magistrate’s court will not have the jurisdiction to grant such an

order. In my respectful view, the Court in Van As came to the correct conclusion in this regard.

This is so because art. 5 clearly provides that the Court and others, having the duty to uphold and protect the fundamental rights and freedoms, provided expressly that such rights and freedoms "shall be enforceable by the Courts in the manner hereinafter prescribed". (My emphasis added.)

The question must therefore be further examined what is the manner hereinafter prescribed?

The regime of enforcement is contained in art. 25(3) of the Constitution, read with articles 80(2), 80(3), 12 read with section 2 of the High Court Act 16 of 1990, the Magistrate's Court Act 32 of 1944, Chapter (VI) – Civil Jurisdiction and Chapter XII – Criminal Jurisdiction and the Criminal Procedure Act No. 51 of 1977.

Art. 25(2) introduces the concept of a so-called "competent" court which in terms of sub-article (3), has wide powers in regard to providing remedies for the breach of any fundamental human right or freedom but these powers are again "subject to the provisions of the Constitution" which obviously also mean that it will be "subject" to art. 12(1)(b) which provides a specific remedy of "shall be released" should a trial not take place within a reasonable time.

Art. 80(2) provides that the High Court shall have original jurisdiction to hear and adjudicate upon all civil disputes and criminal prosecutions, including cases which involve, the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms guaranteed thereunder..."

Art. 83, in contrast provides: "Lower Courts shall be established by Act of Parliament and shall have the jurisdiction and adopt the procedures prescribed by the Act and the regulations made thereunder..." (My emphasis added.)

It is common cause that neither the Magistrate's Court Act, its abovestated Chapters on jurisdiction, nor the Criminal Procedure Act provides for a jurisdiction and /or procedures in terms of which an interdict can be granted in a criminal case.

It is consequently beyond doubt that the only so-called "competent Court" for the purposes of article 25 is the High Court and as such, that Court has wide discretionary powers to provide remedies for breeches of fundamental rights and freedoms, including interdicts and damages and obviously in the case of interdicts, irrespective of whether the order is made in a civil proceeding or criminal proceeding. The said "competent court" can consequently order a permanent stay of a criminal prosecution. On the other hand, a magistrate's court has no jurisdiction to do so as the law stands at the moment. Even if art. 12(1)(b) envisages a permanent interdict as its only remedy, alternatively, one of the envisaged remedies for the trial

as envisaged in art. 12(1)(a) not taking place within a reasonable time, that fact, read with art. 5, does not allow a magistrate's court to order a permanent stay of prosecution prior to pleading to the merits by an accused.

Once the accused has pleaded to the merits, the Prosecutor-General is no longer *dominus litus* and the magistrate's court could in an appropriate case, where the trial has not taken place within a reasonable time, refuse further postponements and acquit the accused. This was done in the case of State v Uahanga & Others, referred to *infra*.

In my respectful view, the Legislature should seriously and urgently consider an amendment to the Magistrate's Court Act and the Criminal Procedure Act, extending the jurisdiction of magistrate's courts, particularly courts with the status of Regional Courts, to be "competent" courts, for the purposes of art. 25(2) or at any event clothe such courts with the necessary jurisdiction to enable such courts to order a permanent stay of prosecution prior to pleadings in appropriate cases.

The fact that a magistrate's court does not have the jurisdiction to apply the remedies provided for in art. 25, is not an insuperable obstacle to the granting of the remedies provided for in art. 25. Should an aggrieved accused insist on a permanent stay of prosecution, a postponement of the trial before the magistrate's court can be requested to enable the accused to apply to the High Court as the "competent" Court, for such a remedy.

The Namibian High Court decision following on State v Heidenreich was S v Uahanga & Others, referred to *supra*. Smuts, A.J., wrote this judgment and Mtambanengwe, J, concurred.

This was a case where a prosecutor, after some delay on the side of the State to proceed with the prosecution, requested a postponement. The magistrate apparently did not deal with the application for postponement, but acquitted the accused in view thereof that he had already pleaded "not guilty" on a previous occasion. This time the State appealed. The appeal was dismissed on the authority of State v Heidenreich. The Court did not voice any criticism and did not raise any new point pertaining to the problem.

The next decision of the High Court was that in Van As & Another v Prosecutor-General of Namibia, a full bench decision of three judges where the judgment was written by Levy, A.J.[27]

The first point made by the Court in this judgment with reference to the decision in S v Heidenreich is that that decision was an *obiter dictum* in so far as it held that the words "shall be released" must mean that the prosecution is permanently stayed. The contention that the *dictum* in Heidenreich relating to the meaning and effect of the words "shall be released" in Art. 12(1)(b) was an *obiter dictum* is probably correct because once it was found that it was not proved that the trial did not take place

[27] 2002(1) SACR 70

within a reasonable time, it was not necessary to decide the question of the meaning and effect of the words “shall be released”.

In the following case, that of Malama-Kean, it was argued that the decision in Van As relating to the words “shall be released” was obiter. It is not necessary for this Court to further elaborate on whether or not the aforesaid decisions were obiter in regard to the Court’s interpretation of the words “shall be released”, because this Court will not be bound by those decisions, whether or not they were *obiter dicta*. This Court will in any event consider all those decisions and decide to what extent those precedents have persuasive value. It is apposite however, to point out at this stage that it is not always easy to draw the line between what is a binding precedent and what is obiter. A rigid approach to avoid at all costs overstepping the line is not necessarily in the interests of justice. Very often judicial guidelines are appropriate for guidance in regard to recurring legal problems in a developing legal system, particularly in a new developing constitutional dispensation. *Obiter dicta* may be justified, particularly in those cases where the points were properly raised and argued before the Court. It is also undeniable that our case law has been enriched by many decisions, which amounted to *obiter dicta*.

In Van As, the Court in my respectful view, correctly accepted that the ratio of Heidenreich on the issue of the interpretation of the words “shall be released”, was that the word must mean and therefore means that the mandated remedy is “a permanent stay of prosecution”.

The Court in Van As disagreed with this conclusion in Heidenreich and followed S v Strowitzki and Another, which was the first decision on the issue, even though the Strowitzki *dictum* was probably obiter in this regard.

The reasons for the Van As decision were set out as follows:

> "With great respect to the learned Judges who heard Heidenreich's case, the effect of art 12(1)(b) was never intended to be more than release 'from arrest or from onerous conditions of bail' as decided by O'Linn J in S v Strowitzki, 1995 (1) SACR 414 (Nm), 1995 (1) BCLR 12 (Nm).
>
> The learned Judges in Heidenreich's case gave to the word 'release' a meaning similar to 'acquit'. At 239 I - J, the Court said:
>
> > 'The general approach when construing constitutional provisions is that the provisions are to be ''broadly, liberally and purposively'' interpreted: Government of the Republic of Namibia v Cultura 2000 and Another 1994 (1) SA 407 (NmS) at 418F, and if this canon of construction is to be relied upon it is as well to identify expressly the underlying purpose of the constitutional provision under consideration.'
>
> With due respect, this 'canon of construction' does not permit a Court to give a word the meaning it does not have. In Minister of

Defence v Mwandinghi 1992 (2) SA 355 (NmS), 1993 NR 63 (SC) at 69I - J (NR) a Full Bench in a joint decision by Berker CJ, Mahomed AJA and Dumbutshena AJA, said the following:

> 'H M Seervai, citing what was said by Gwyer CJ, remarked, in The Constitutional Law of India 3rd ed vol 1 at 68, that
>
> > ''...a broad and liberal spirit should inspire those whose duty it is to interpret the Constitution; but I do not imply by this that they are free to stretch or pervert the language of the enactment in the interests of any legal or constitutional theory, or even for the purposes of supplying omissions or correcting supposed errors.'' '

It is true that a Court must start with the interpretation of any written document whether it be a Constitution, a statute, a contract or a will by giving the words therein contained their ordinary literal meaning. The Court must ascertain the intention of the legislator or authors of document concerned and there is no reason to believe that the framers of a Constitution will not use words in their ordinary and literal sense to express that

intention. As was said by Innes CJ in Venter v R 1907 TS 910 at 913:

> 'By far the most important rule to guide courts in arriving at that intention is to take the language of the instrument, or of the relevant portion of the instrument, as a whole; and, when the words are clear and unambiguous, to place upon them their grammatical construction and give them their ordinary effect.'

This has been followed in Namibia on countless occasions. Where a particular word in its ordinary sense has more than one meaning, an ambiguity can arise and only then does one have recourse to other methods of ascertaining the intention of the authors concerned as to what the meaning was which the authors intended the word should have.

One need not consult a dictionary for the meaning of the word 'release'. It is frequently used by members of the public and by lawyers in Courts and in documents. In the instant case, the word is used in art 12 which deals with a fair trial. In the same article the framers of the Constitution used the word 'acquit' and dealt with the effect thereof, namely having been acquitted an accused could not be charged again.

These two concepts namely 'release, because the trial has not taken place within a reasonable time' and 'acquit' where the trial has been completed appear in the same article. It is therefore logical to contrast the concepts and not to give them the same meaning.

It is true the framers of the Constitution did not recite what the effect of a 'release' would be. This is not a *casus omissus* as it was not necessary to elaborate on the normal consequences of a person who is being prosecuted, being released. A person who is prosecuted is arrested in order to be prosecuted but may be on bail. When such person is released from arrest and bail it does not terminate the prosecution. One can attend a trial on a 'warning' from the Court and one can be on one's own recognisance and still be prosecuted.

In R v Stevens 1969 (2) SA 572 (RA) at 577H, Beadle CJ said:

> '... when the meaning of a section is plain ..., the mere fact that there may be a *casus omissus* in the section does not seem to need to justify a departure from its plain meaning and this is more especially so when that plain meaning appears to accord with the intention of the Legislature.'

In any event there is no need to interpret the sub-article as having a '*casus omissus*'. In Dhanabakium v Subramanian and Another 1943 AD 160 at 170 - 1, Centlivres JA said:

> 'The conclusion at which I have arrived avoids what would otherwise be a *casus omissus* in s 70 and it seems to me that if a reasonable construction of an Act does not lead to a *casus omissus* while another construction does lead to that result, the construction which should be applied is the one which does not lead to that result.'

I conclude this aspect by once again referring to the Full Bench judgment in Mwandinghi's case quoted above, where the learned Judges referred with approval to the remarks of Gwyer CJ which included a warning that in the interpretation of Constitutions one should not 'supply omissions' even when applying that 'broad and liberal spirit' for interpreting Constitutions.

To give the word 'release' its ordinary meaning (to release from arrest or bail) fits in with the scheme of the Constitution and with the existing common law and the Criminal Procedure Act (Act 51 of 1977) applicable before independence in Namibia and since independence by virtue of art 140 of the Constitution."

The Court concluded its argument as follows: "Accordingly, I am satisfied that should a person be 'released' in terms of article 12(1)(b), such person would not thereby be granted a permanent stay of prosecution".

The next decision of the High Court, is now also on appeal before this Court, namely that of Margaret Malama-Kean v The Magistrate for the District of Oshakati & The Prosecutor-General, referred to supra.[28]

The judgment was written by Hannah, J., concurred in by Maritz, J., and Mainga, J. Hannah, J., was also as indicated earlier, the judge who wrote the judgment in the Heidenreich case, referred to *supra*.

I will only deal in this judgment with the part of the High Court judgment in Malama-Kean which relates to the interpretation and application of the words "shall be released" in art. 12(1)(b) of the Constitution because all the other aspects relating to the Malama-Kean judgment, will be dealt with in the Malama-Kean appeal.

The High Court in Malama-Kean not only differed from the judgment in State v Strowitzki, and Van As & Another v The State, *supra*, but also the judgment in State v Heidenreich.

[28] NmHC, 15/10/2001, not reported

In Malama-Kean it was found that the words “shall be released” allows “not only release from custody and release from bail or conditions attached to bail, but it can also constitute release from further prosecution”.

After carefully considering the decisions in S v Strowitzki, Heidenreich, Van As and Malama-Kean, I have reached the conclusion that all of them were wrongly decided in part in regard to the correct interpretation of the words “shall be released” in art. 12(1)(b).

It seems to me that counsel for appellant who argued the Malama-Kean appeal before us, was correct in his contention that “released” in art. 12(1)(b) read with art. 12(1)(d) means “released from the trial as envisaged in 12(1)(a)”. The Court *a quo* in Malama-Kean came to its conclusion on the three possible forms of the order, without first concluding that the words “shall be released” were intended in the first place to mean – “released from the trial as envisaged in 12(1)(a)”. Mr. Heathcote’s contention also makes sense because such an interpretation will also extend the remedy contemplated by art. 12(1)(b) to accused persons who are not in detention, who would not have had a remedy under art. 12(1)(b) if the term “released” in 12(1)(b) is restricted to release from detention.

Notwithstanding various pointers to the contrary in my analysis supra, this construction appears to me to be the most logical solution to the dilemma caused by the vague language of art. 12(1)(b) and the interpretation which best reflects the probable intention of the authors of the Namibian Constitution. It is also in line with a broad, liberal and purposive approach.

The decisive consideration for the aforesaid construction however, is that the principle that those criminal courts, which are “competent” courts with the necessary jurisdiction, should have in their armoury of sanctions, the power and the responsibility in an appropriate case of unreasonable delay, to order a permanent stay of prosecution as at least one of its discretionary powers. This is in accordance with principles and procedures in most of the advanced criminal justice systems in democratic countries. It must be assumed that the framers of the Namibian Constitution also had this objective in mind.

The question however still remains what is the full significance of an order – “shall be released from the trial”.

It is clear that the remedy provided in art. 12(1)(b) – “shall be released”, is couched in mandatory and peremptory terms. Nevertheless it does not seem to me that only one form of release from the trial would meet the peremptory requirement.

The following forms of release from the trial, will in my view all be legitimate forms meeting the peremptory requirement:

(i) A release from the trial prior to a plea on the merits, which does not have the effect of a permanent stay of the prosecution and is broadly tantamount to a withdrawal of the charges by the State before the accused had pleaded.

This form of release from the trial will encompass:

(a) Unconditional release from detention if the accused is still in detention when the order is made for his/her release;

(b) Release from the conditions of bail if the accused had already been released on bail prior to making the order;

(c) Release from any obligation to stand trial on a specified charge on a specified date and time if the accused had previously been summoned or warned to stand trial on a specified, charge, date and time.

(ii) An acquittal after plea on the merits;

(iii) A permanent stay of prosecution, either before or subsequent to a plea on the merits.

Which form the order of “release from the trial” will take, will depend not only on the degree of prejudice caused by the failure of the trial to take place within a reasonable time, but also by the jurisdiction of the Court considering the issue and making the order.

So e.g. as I have indicated in the discussion *supra*, a magistrate's court would not be able, as the law stands at the moment, to order a permanent stay of prosecution before plea and remedy no. (iii) *supra* would thus fall outside the options available before the magistrate's court.

The High Court on the other hand, will be competent to grant all the remedies enumerated under (i), (ii) and (iii) and as far as (iii) is concerned, it will act in terms of its powers as a "competent" court under art. 25(2) read with article 5 and 12(1)(a) and 12(1)(b) of the Constitution.

It is necessary to reiterate that the remedy of a permanent stay of prosecution will only be granted if the applicant has proved that the trial has not taken place within a reasonable time and that there is irreparable trial prejudice as a result or other exceptional circumstances justifying such a remedy.

Courts making an order under 12(1)(b) must not merely state that the accused "shall be released" but use one of the forms of order enumerated in (i), (ii) or (iii), supra, so that the ambit of the order will be clearly understood by all concerned.

SECTION C:

THE APPEAL IN REGARD TO THE REFUSAL OF A PERMANENT STAY OF PROSECUTION

It was conceded by counsel on both sides that the only ground given by the learned presiding judge in the Court *a quo* for rejecting the application was that it was not urgent.

It was also common cause that the Court *a quo* did not go into the merits of the application at all. Mr. Du Toit made the following two submissions:

(1) "The trial Court should have found … that the appellant was entitled to approach the Court by notice of motion for a permanent stay of his prosecution; it should also have held that there is no reason why such an application cannot be considered in accordance with the normal Rules of Court applicable to an application by way of notice of motion."

(2) "The trial Court should have held that there is every reason why the application for a stay of prosecution could not wait until the criminal trial was finalized and that in fact such an approach would defeat the very purpose of the application."

Mr. Small in his argument set out the various stages of the proceedings before the application was actually launched. As I understand it, the crux of Mr. Small's argument was that the requirements for a party relying on urgency were not met, particularly that the grounds of urgency on which the applicant relied were not properly set out in the application and that the urgency, if any, was self-induced in that the applicant used various delaying tactics and did not act in good faith. All this may have some substance, but

unfortunately such reasons do not appear from the judgment as the ratio of the judge *a quo*.

In view of my conclusion on the merits of the application, it is not necessary to deal with this aspect in detail, particularly in view of the fact that the judgment is already extensive.

Suffice to say that an application for a permanent stay of prosecution prior to plea, will naturally be launched at some stage before plea. In view of the fact that the purpose of such an application is obviously to prevent the trial from taking place at all, such an application would normally be intrinsically urgent and a Court should not regard it as fatal to the application merely because the grounds of urgency are not spelled out with the same precision and particularity as in cases where only the applicant can say why the application is urgent.

In regard to the notice of motion procedure, it seems to me that a formalistic approach does not serve the interests of justice.

This Court has recently, in the case of The Government of the Republic of Namibia & Ors. v G.K. Mwilima & Ors., dealt with the issue of whether a notice of motion procedure was permissible where the subject matter was in substance related to relief required for an alleged breach of the requirements of a fair trial, which was in substance related to the pending criminal trial.

The Court held that the notice of motion procedure was not only permissible in that case but actually preferable, particularly in order to give all the parties involved a proper opportunity to state their case.[29] Although the present case is not identical, the basic approach in Mwilima is applicable, *mutatis mutandis*.

In my respectful view, the Court *a quo* erred in rejecting the application on the sole ground that the application was not urgent. However, that is not the end of the matter.

The fact that the Court did not go into the merits, places this Court in a dilemma as to the course of action to follow. In the usual type of case where the merits of a matter were not decided because of a point *in limine*, this Court would refer the matter back to the Court *a quo* to decide the merits where the point *in limine* was wrongly decided.

In the present case however, where so much time has already been lost, it would not be in the interests of justice of delay the final decision on the issues any longer. The merits of the application can be decided on the record, not only of the application but of the trial which followed and which are before this Court, even though the Court of first instance did not decide it. It seems to me therefore that a robust approach is necessary to reach finality in the matter and that this Court could and should decide the issue on the merits.

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[29] See The Govt. of the Rep. of Namibia & Ors v G K Mwilima & Ors , NmS, unreported, delivered on 7/06/2002

The grounds relied on for the application are set out in Section A, *supra*. These grounds refer on the one hand to a number of alleged irregularities by police officers who investigated the case against the accused and others, the complainant's conduct, the conduct of advocates and attorneys, who acted on behalf of the Prosecutor-General. On the other hand, reliance is placed on the alleged breach of the fundamental right to a trial within a reasonable time.

The applicant/appellant relies for a remedy on art. 5 read with 25(2) and 25(3) of the Namibian Constitution as well as art. 12(1)(b), providing for a trial within a reasonable time failing which, the mandatory sanction of release.

I have dealt extensively with these provisions of the Constitution in Section C of this judgment *infra* and refer to that section in so far as it is necessary for this part of the judgment.

The first question which arises on the merits is whether the applicant/appellant can be said to have proved on a balance of probabilities the breach of any fundamental right and if so, the appropriate remedy.

The allegations of fact made about irregularities are vague and unimpressive. When counsel for the appellant was asked to demonstrate any trial related prejudice from the record of the trial, he was completely unable to do so and conceded as such. No trial related prejudice is apparent or discernable from the record.

The best Mr. Du Toit could do is to contend:

> "The effect of the decision is that the appellant was forced to go through the criminal proceedings and did not enjoy the benefit of the trial Court's considered exercise of its discretion in respect of the application to stay the proceedings. In this, it is respectfully submitted, the applicant was prejudiced and materially so."

This type of prejudice does not constitute the prejudice required in regard to the merits of the application for a permanent stay of the prosecution and is no substitute at all for the trial related prejudice or other exceptional circumstances required for a remedy as radical as a permanent stay of prosecution.

It follows that the application for a stay had no substance and should have been rejected by the trial judge on the merits.

The only issue which remains in regard to the application for a stay, is whether or not the Court *a quo* should have made an order for costs against the applicant/appellant. It is not appropriate to grant costs orders in criminal proceedings or in proceedings which are criminal in nature and substance. However, in this case the appellant proceeded on notice of motion and consequently a cost order would be permissible, particularly where the process launched by the applicant is without merit.

The Court a quo however, did not consider the merits at all and should not have ordered the applicant to pay the costs where the application was merely rejected on the ground of urgency and the State, represented by the Prosecutor-General, was the only respondent.

In the circumstances the order of costs should be set aside.

SECTION D:

THE APPEAL AGAINST SENTENCES ON COUNTS 6 AND 7

The accused was sentenced to three (3) years imprisonment, two (2) years of which were suspended on count 5. This sentence was appropriate in the circumstances and consequently leave to appeal was not granted in respect of this count.

Leave was however, granted in regard to counts 6 and 7 where the sentences imposed were:

Count 6: (Kheimseb): Four (4) years imprisonment.

Count 7: (Seibeb): Four (4) years imprisonment.

Mr. Du Toit made the following submissions in regard to the appeal against the aforesaid sentences:

"1. It is trite law that the sentencing discretion is that of the Trial Court; that the Court of Appeal will only interfere when the Trial Court erred by committing an irregularity or a misdirection in respect of sentence or if the sentence induces a sense of shock and is startlingly inappropriate.

2. It is respectfully submitted generally, that counts 6 and 7 do not warrant as only suitable or reasonable sentence unsuspended terms of imprisonment; that at worst for the Appellant, the Trial Court should have considered suspending considerable portions of the sentences imposed in respect of counts 6 and 7.

3. Furthermore, it is respectfully submitted, the Trial Court erred in not considering the cumulative effect of the sentences; in the premises the effective term of nine years' imprisonment induces a sense of shock and is startlingly inappropriate in all the circumstances of the case.

4. It is respectfully submitted that the Trial Court also should have considered directing sentences to run concurrently under Section 280 of Act 51 of 1977.

3. It is respectfully submitted that the Trial Court erred and/or misdirected itself on the facts and/or the law by not finding that:

3.1 The Appellant at all relevant times had the intention to buy the two trucks;

3.2 The purchase price was paid over to the Appellant before the trucks were purchased;

3.3 The greater part of the purchase price of the two trucks (N$416 250,00) was diverted to Willie Dames to conclude the tyre deal;

3.4 The money was stolen from Willie Dames and the Appellant was not able to buy the trucks;

3.5 The Appellant had no intention to permanently deprive the complainant of the money in that he in fact did pay a few instalments on both agreements before his bank account was closed;

3.6 There was only potential prejudice to the complainant after the money was diverted for the tyre deal;

3.7 It was not due to fault of the Appellant that the money was stolen from Willie Dames;

3.8 The Appellant did not form any intention to defraud the complainant when the applications to finance Kheimseb and Seibeb were made.

4. It therefore appears that the Trial Court erred in not considering material mitigating factors which would have counted in favour of the Appellant at the stage of sentencing.

5. It is respectfully submitted that the sentences in respect of counts 6 and 7 should be set aside and replaced with appropriate sentences."

Mr. Small in reply contended that "none of the misdirections alleged by the Defence was in fact committed, alternatively that they do not vitiate the Court's decision on sentence. It would thus be respectfully submitted that this Honourable Court should dismiss the appeal".

Mr. Small also reminded the Court of all the principles applicable in regard to an appeal against sentence. He referred to the many authoritative decisions which are well-known and can be regarded as trite law at this stage. The principles as set out in precedents can briefly be stated as follows:

1. “Punishment being pre-eminently a matter for the discretion of the trial Court, the powers of the Court of Appeal to interfere with sentence are limited. Such interference is only permissible where the trial Court has not exercised its discretion judicially and properly. This occurs when it has misdirected itself on the facts material to sentencing or on legal principles relevant to sentencing. It will also be inferred that the trial Court acted unreasonably if there exists such a striking disparity between the sentences passed by the learned trial judge and the sentences which this Court would have passed … or to pose the enquiry in the phraseology employed in other cases, whether the sentences appealed against appear to this Court to be so startlingly … or disturbingly inappropriate – as to warrant interference with the exercise of the learned Judge’s discretion regarding sentence. A Court of appeal will not readily differ from a trial Court in its assessment either of the factors to be had regard to or as to the value to be attached to them; …”[30]

It is also relevant in this case to refer to the guidelines as expressed in State v Fazzie, where the Court said:

[30] S v Van Wyk, 1992(1) SACR 147 Nm at 165 d – g and the authorities collected.
S v De Jager & An, 1965(2) SA 616 AD at 629 A – B;
S v Pillay, 1977(4) SA 531 AD at 535 D – G.

> "Where, however, the dictates of justice are such as clearly to make it appear to this Court that the trial Court ought to have had regard to certain factors and that it failed to do so, or that it ought to have assessed the value of these factors differently from what it did, then such action by the trial Court will be regarded as a misdirection on its part entitling this Court to consider the sentence afresh."[31]

The judgment of the Court *a quo,* on sentence, is, generally speaking, thorough and commendable.

It seems to me however, that the Court has given insufficient weight to the role played by Carl von Shicht, the senior bank official who as found by the Court, "masterminded the transactions" and "deceived" the accused to perpetuate the grave and ugly offences against the bank. The Court was of course also correct in pointing out that "the crimes were committed with fraudulent assistance and cooperation" of the accused.

The fact is that the complainant Bank was extremely lax in its administration and control. Having a manager or senior official, who runs the Loan and Hire-Purchase section, not only openly allowing business without the proper security and relaxing all the rules, must have been an open invitation for the sort of business in effect done between the accused and the bank. Where as

[31] S v Fazzie, 1964(4) SA 673 AD at 684 B – C
S v Pillay, 1977(4) SA 531 AD at 535 D – G.

here, the said manager “masterminded the transactions” and deceived or encouraged the accused to proceed as he did, the major cause of the prejudice complainant suffered was caused by the Bank’s own officials. In such a situation a client may think with some justification that the practice to allow these procedures and practices are aimed at increasing the Bank’s turnover and is not intended to harm the Bank.

Although the Court correctly convicted the accused and rejected the argument raised by the defence at the sentence stage that the accused did not “intend” to defraud the Bank, the Court failed to consider and/or give the necessary weight to the argument that the accused did not intend to cause the Bank prejudice and at all times had the intention to pay the Bank what was due on the transactions, even though the representations regarding the security, were false. Proof of this was that certain instalments were in fact paid by the accused on both agreements before his bank account was closed; the greater part of the purchase price of the two trucks (N$416 250) was diverted for a tyre deal but was stolen from Willie Dames with the result that the appellant was not able to buy the two trucks; the appellant never fled from Namibia, as Carl von Shicht did, to evade his responsibility.

Furthermore, it is clear from the judgment that the learned trial judge had failed to consider that counts 6 and 7 were so closely related in *modus operandi*, time, and intention that these two counts could properly be regarded as one crime in substance and that the Court should have followed one or more of the following courses in this regard:

1. Take the two convictions together for the purpose of sentence; or

2. Order that the sentence imposed on count 7 or part thereof, should run together with that on count 6.

The failure of the Court to consider, alternatively to apply this well-established principle of sentencing, amounts in my respectful view, to a misdirection justifying this Court to consider a more appropriate sentence in the light of all the facts and circumstances of the case.

In my respectful view, counts 6 and 7 should be taken together for the purposes of sentence and a sentence of five (5) years imprisonment imposed.

In the result the following order is made:

1. The appeal against the rejection of the application for a permanent stay of prosecution, fails.

2. The order of costs given against the appellant in the Court *a quo* in regard to the application for a permanent stay of prosecution, is set aside.

3. The sentences on counts 6 and 7 are set aide and the following order substituted: Counts 6 and 7 are taken together for the purpose of sentence and a sentence of five (5) years imprisonment substituted for the sentences imposed by the trial Court. The substituted sentence on count 6 and 7 will run from the date of the original sentence, i.e. from 14/12/2000.

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O'LINN, A.J.A.

I agree.

_____

STRYDOM, C.J.

I agree.

_____

CHOMBA, A.J.A.

/mv

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