

plarguant

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

DONALD ACHESON

HEADS OF ARGUMENT

Any application for the adjournment of Criminal proceedings are governed by the provisions of Section 168 of Act 51/1977 i.e.

"A court before which criminal proceedings are pending, may from time to time during such proceedings, if the court deems it necessary or expedient, adjourn the proceedings to any date on the terms which to the court may seem proper and which are not inconsistent with any provision of this Act."

The decision as to whether to adjourn the proceedings is in the discretion of the Court. Two basic

principles should guide a Court in considering an application for adjournment namely:

- (a) it is in the interests of society that guilty persons should not evade conviction by reason of an oversight or because of a mistake that can be remedied.
- (b) that an accused person, deemed to be innocent, is entitled, once indicted, to be tried with expedition.

See Hiemstra S A Straffproses, 4de Uitgawe, p. 374.

Du Toit, De Jager, Paizes, Skeen and Van der Merwe, Commentary on the Criminal Procedure Act p. 22 - 25.

and

S v Geritis 1966(1) SA 753 SALR on 754 C - F.

S v Magoda 1984(4) SA 462 on 465, par H - I and 466, par A.

These principles have been further propounded in two English cases in which certain desiderata in matters of this sort were prescribed namely:

R v Le Chevalier D'Eon, 3 Burr 1513; 97 E.R.

955, the King's Bench Division in the year 1764
and
The Queen v Mitchell reported in Vol 111 of Cox's
Criminal Law Cases (1848).

In the former case the court referred to certain requirements as being essential before such an application could be granted in the following language:

"It is necessary, therefore, in such a case as this first to satisfy the Court the persons are material witnesses, secondly to show that the party applying has been guilty of no laches or neglect in omitting to apply to them the endeavour to procure their attendance, and thirdly, to satisfy the Court there is a reasonable expectation of his being able to procure their attendance at the future time to which he prays the trial to be put."

In applying the desiderata laid down in the above cases Vieyra, J propounded the following principles on P 755 B - D.

"It would seem, according to these cases, that in order to obtain a postponement all three points mentioned should be satisfactorily answered. Although I accept them as being of great importance I do not think that this must necessarily be so. No doubt it is a *sine qua non* that the evidence be material. But, assuming there has been neglect in procuring the attendance of a witness, the Court, it seems to me, might nevertheless grant a postponement if satisfied that there was a reasonable expectation that the witness would attend at a later date. I think that a Court would also take into consideration whether the accused is on bail, how long the prosecution has been pending and the period of the postponement that has been requested. There are instances where there has been no neglect and yet the witness does not attend on the day of trial. A short postponement might then well be granted to enable investigations to be made as to the cause for the absence. Then again I venture to suggest that the nature of the charge must

.../..

be taken into account. Thus there is a difference between a murder charge and one of theft or of fraud."

A. It is accepted for the purposes of our address that the four witnesses, namely:

W B Knox	(witness no 9)
Ferdinand Barnard	(witness no 11)
Abram van Zyl	(witness no 16)
Carl Botha	(witness no 17)

are vital to the State's case, and are therefore material witnesses.

See R v Le Chevalier D'Eon, *supra*.

With regard to the question whether the State has been guilty of neglect in endeavouring to procure their attendance as witnesses, the matter is open for debate.

See R v Chevalier D'Eon, *supra*.

It must be assumed that the State case was fully investigated and ready for trial not later than the 25th of January 1990.

Vide a letter addressed by the then Attorney-General, Mr E Pretorius to the

...

Chief Magistrate, Windhoek.

The State must firstly convince the court that timeous and adequate steps were taken by the relevant authorities in order to ensure that the above witnesses are in attendance at Court.

Serious doubts exist as to whether such steps were taken by the State.

State versus. Geritis (*supra*) p. 755 E - H.

Very serious doubts exist as to whether the State can prove that there is any expectation whatsoever, reasonable or tenuous, that the witnesses will attend on the future date.

The above witnesses are all experienced former South African Police Officers of the Brixton Murder and Robbery Squad. As opposed to ordinary laymen they are fully au fait with the pro's and cons and the implications of giving evidence.

It is common cause that the above

...

It is common cause that the above witnesses were given an indemnity against any possible prosecution by the Attorney-General of Namibia. Irrespective thereof the witnesses have not only refused to attend court but stated categorically that they do not wish to give evidence. A greater lure to testify cannot be imagined and it reflects adversely on the possibility of securing their future attendance.

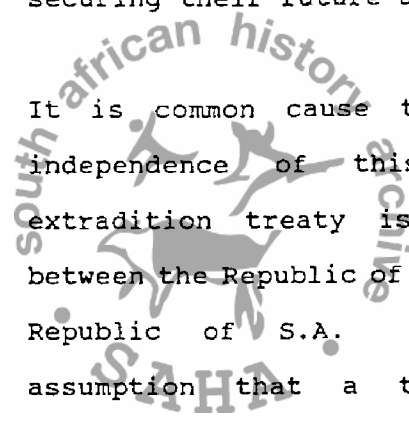
Indemnity shown that [unclear] to [unclear] [unclear]

Planned to [unclear] [unclear] [unclear] [unclear]

to [unclear] [unclear] [unclear] [unclear]

Significantly more by [unclear] [unclear] [unclear] [unclear]

It is common cause that since the independence of this country no extradition treaty is in existence between the Republic of Namibia and the Republic of S.A. Even on the assumption that a treaty can be negotiated for on some unknown future date, such an agreement can only make provision for the possible extradition of accused persons and has no bearing on the attendance of witnesses in foreign countries. See Du Toit, De Jager, Peizes, Skeen and Van der Merwe "Commentary on the Criminal Procedure



Wetters

Section 7 of Act no 8 of 1962.

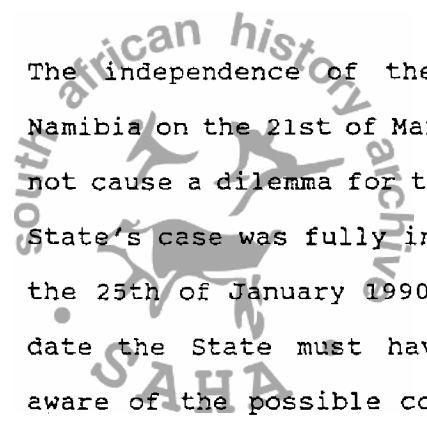
Due to the refusal of the witnesses to testify any possibility of taking their evidence on commission will also be a wastage of time.

See Hienstra "Suid-Afrikaanse Strafproses" Vierde Uitgawe - page 399 "Onwillige Getuies".

The independence of the Republic of Namibia on the 21st of March, 1990, did not cause a dilemma for the State. The State's case was fully investigated on the 25th of January 1990, and on that date the State must have been fully aware of the possible consequences of the independence of the Republic of Namibia.

Any possible undertaking, no matter how well intended, that the above witnesses will attend Court at a future date is without substance and therefore any postponement to secure their future

Question:
Any app at
diplomatic level
State?
(a) that an appointment
has indeed been
made at 200?
(b) or without date?
(c) how far
proceeded &
when going
down?
(d) to present &
presently
containing
(g) The Republic
of SA has
been
how
many
going to
income
(i) Co. Brange
etc



postponement to secure their future attendance will be an exercise in futility.

Conk

The next and probably one of the most important requirements is, that the accused who is deemed to be innocent, is entitled, once indicted to be tried with expedition. This requirement has to be judged against the background of the following facts:

The accused was apprehended on the 13th of September 1989. It is uncertain whether he was initially arrested on a charge of alleged murder on the deceased.

It appears that on the 15th of September 1989 he was served with a notice purporting to be issued in terms of Section 13(1)(f) of Act 59 of 1972 (Admissions of Persons to the Territory of Namibia Regulation Act).

On the 6th of November 1989 an application was lodged in the then Supreme Court of S W A for an order setting aside the declaration of the accused as a prohibited person in terms of

section 13(1)(f) of the above Act (Act 59/72.)

*Sum of
27/11/82 was
submitted*

This application was allowed.

Immediately after the above order, the accused was arrested on the 6th of November 1982 on a charge of murder of the deceased.

On the 13th of November 1989 a formal application was lodged for the release of the accused on bail. After objection by the State and evidence which had been given by the Chief Investigating Officer, Col Smith, the application was refused. An appeal against the above ruling was noted.

On the 12th of February 1990 the appeal was heard by the Honourable Mr Justice Hendler of this Honourable Court and refused.

On the 3rd of April 1990 an indictment and summary of substantial facts were served on the accused in accordance with the provisions of Section 114(4)(a)(i) of the Criminal Procedure Act (51/77).

On the 10th of April 1990 a Request for Further

Particulars was served, on the Prosecutor-General of Namibia. (A copy thereof is annexed).

On the 12th of April 1990, a letter was handed to the Prosecutor-General urgently requesting a reply to the above request. A reply to the above request was received on the afternoon of the 17th of April 1990.

The accused is presently still in custody.

The accused was informed on the 25th of January 1990 that his case is set down for a summary trial from the 18th - 30th of April 1990.

In view of the above and in view of the serious allegations made against the accused, the accused had to make provision for his defence at great expense. The accused was compelled to make provision for the commencement and continuation of his trial on the 18th of April 1990 and was apprised for the first time by the Prosecutor-General on the 12th of April 1990 that an application would be lodged for the postponement of his case.

It is submitted that the present application constitutes an abuse of the process of court because of the delay in bringing this matter to trial. The crucial question is: how long the accused is supposed (to be incarcerated) in the absence of even a remote possibility that the above witnesses may turn up at Court in future and be willing to testify against the accused.

At the National Conference of State Trial Judges, 1983 - 1984 under the heading "Standards Relating to Court Delay Reduction, American Bar Association, April 1985, P. 5". the following approach was adopted namely:-

"Justice delayed is justice denied. Delay devalues judgments, creates anxiety in litigants, and results in loss or deterioration of the evidence upon which rights are determined Delay signals a failure of justice and subjects the court system to public criticism and the loss of

confidence in its fairness and utility as a public institution."

Article 14(3)(c) of the International Covenant on Civil and Political Rights (1966) provides for the following:

"In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

.....
(c) To be tried without undue delay;."

The Constitution of the Republic of Namibia as promulgated in the Government Notice, No 1 of 1990, proclaims, *inter alia* the following:

(i) Article 7 Protection of Liberty

No persons shall be deprived of personal liberty except according to procedures established by law.

(ii) Article 8 Respect for Human Dignity

(1) The dignity of all persons shall be inviolable.

(2) (b) No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.

(iii) Article 10 Equality and Freedom from Discrimination

(1) All persons shall be equal before the law.

(iv) Article 11 Arrest and Detention

(1) No persons shall be subject to arbitrary arrest or detention.

(v) Article 12 Fair Trial

(1) (a) In the determination of their civil rights and obligations

or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: provided that such Court or Tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society.

(b) A trial referred to in Sub-Article (a) hereof shall take place within a reasonable time, falling which the accused shall be released.

(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.

It is in keeping with the policy of Act no 51 of 1977 that an accused person shall be brought to trial without delay and shall not be held indefinitely in custody. See Kabe and Others v Attorney-General and Another 1958(1) 300 at 302 paragraphs D to H. Albeit that the sections of Act no 56 of 1955 to which reference were made in the above case, were amended by the provisions of Act no 51 of 1977, the principle that an accused person shall be brought to trial without delay and shall not be held indefinitely in custody, remain unchanged. See Du Toit, De Jager, Paizes, Skeen and Van der Merwe Commentary on the Criminal Procedure Act, p. 5-34: "Section 50 (Act 51 of 1977) not only prescribes the manner in which all suspects must be dealt with after their arrest, but also rules that an ordinary suspect may not be detained indefinitely without knowledge thereof and intervention by a lower court. Since section 50 lays down that an arrested person must be brought before a court within a prescribed period of time, the court concerned would obviously be aware of the existence of

the detainee from the moment of his appearance. If an order for his further detention is issued, the case will be adjourned to a particular day. Now the court would be in possession of first-hand knowledge of his further detention and if in the view of the court as a result of consecutive postponements, he had been detained for an abnormal length of time, the court itself will want to know why he should not be brought to trial.", and p. 5-35: "Although section 50 would appear to deal only with the speedy arraignment of persons in detention, it also provides the machinery which makes it possible for a Lower Court before which an arresting appears for the first time to determine which court has jurisdiction to trial the case."

In view of the fact that it is recognised that the right to a speedy trial is fundamental to the process of Justice in the courts of the Republic of Namibia, it remains to define this right, set it's limits and quantify it's contents.

Factors which must be taken into account in order to arrive at an equitable decision, includes the following:-

- (1) the entire length of the delay from the time the event arose through to the date of the trial;
- (2) reasons given by the prosecution to justify the delay;
- (3) whether the delay is due in part to the accused or is consented to by the accused;
- (4) actual and presumptive prejudice to the accused;
- (5) the effect of the delay on the accused's personal and private life;
- (6) the seriousness of the allegation against the accused and the complexity of the case;
- (7) any institutional resources that gave rise to the delay.

~~(8)~~
 Fact ~~is~~ relevant in Gent's case:
 Negligence was an issue.

Any reasonable possibility of witness
 being able and willing to testify?
 Will state?
 Vested with