SCSL-04-15-T
(10531-10550)

THE SPECIAL COURT FOR SIERRA LEONE

BEFORE:

Hon. Justice Benjamin Itoe, Presiding Judge
Hon. Justice Bankole Thompson
Hon. Justice Pierre Boutet

Registrar: **Mr. Robin Vincent**

Date filed: **18th February 2005**

The Prosecutor

-v-

Issa Hassan Sesay

Case No: SCSL – 04 – 15 – T

DEFENCE RESPONSE TO "FURTHER RENEWED WITNESS LIST PURSUANT TO ORDER TO THE PROSECUTION CONCERNING RENEWED WITNESS LIST" (10TH February 2005)

Office of the Prosecutor

Luc Cote
Lesley Taylor
Peter Harrison

Defence

Wayne Jordash
Sareta Ashraph
Chloë Smythe

LEN DOLPHIN
2.40pm

1. On the 10th February 2005 the Prosecution filed their "Renewed witness list pursuant to the Order to the Prosecution concerning renewed witness list" ("the Request"). In paragraph 5 of the request the Prosecution seeks to "move witnesses TF1 – 029 and TF1 – 122 from the "back up" to the "core list" (to replace TF1 -085 and TF1-126 respectively). The Prosecution submits that it "does not require leave of the Trial Chamber to move witnesses from the "back up" to the "core list" because it "involves no addition to the list of witnesses filed with the Trial Chamber on 26th April 2004" and moreover it submits "that for witnesses who have not been identified as deleted or withdrawn from the original list of 266 it does not require leave of the Trial Chamber to move them between the "back up" and "core lists". In the event that this is not correct the Prosecution seek leave on the basis that the "selection of the core witnesses is sometimes displaced by the inability, unsuitability or latent unwillingness of such witnesses to give evidence. In such circumstances, the Prosecution may seek to substitute "core" witnesses with "back- up" witnesses".[1]

RESPONSE

2. The Defence dispute the discretion as asserted by the Prosecution. The Defence submit that the 3rd December 2005 Order of the Trial Chamber reaffirmed, "that the Prosecution is required to seek leave and demonstrate good cause in order to add witnesses to its witness list" and that this should not be read restrictively to encompass only numerical addition (that is exceeding the core 102). The Prosecution should have to demonstrate "good cause" pursuant to Rule 66 and the 3rd December 2005 Order before substituting witnesses from the "core list with witnesses from the "back up list".

3. In other words it is the submission of the Defence that the existence of a "back up" list of witnesses which the Prosecution "does not currently intend to call at trial" should not simply be used interchangeably with the "core list" according to the discretion of the Prosecution.

4. The Defence have a right to know, with certainty, which witnesses will be giving evidence against the Accused. The only way in which the Defence "can properly prepare for trial is by having notice in advance of the material on which the Prosecution intends to rely"[2]. The purpose of Rule 66 (and the 3rd December 2005 Order) is to give the Defence that certainty. In the event that the Prosecution is entitled to use the "back up" list interchangeably with the "core list" the Defence is denied the certainty which Article 17 of the Statute implicitly provides.

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[1] See paragraph 5 and 6 of the Request.

[2] Prosecutor v. Krajisnik, Decision on Prosecution Motion for Clarification in respect of Application of Rules 65 *ter*, 66(B) and 67(C), August 1, 2001 *para.* 7. Also to be effective, disclosure has to be done at the earliest possible time to allow the accused to prepare thoroughly his reply to the charge in his defence (State v. Scholtz (1997) 1 LRC 67; Namibia, Supreme Court 6th February 1996).

5. The replacement of witnesses from the "core list" is not simply an administrative act. It may often involve significant changes in the nature and quality of the case which the accused has to meet. It substitutes a witness account with another account which has consequences in relation to proof of the Prosecution case; the strength of the Prosecution case (in relation to acts of the Accused, support for counts on the indictments and issues which arise in relation to the alleged Joint Criminal Enterprise and Command Responsibility) and Defence preparation.

Changes in the nature and quality of the case

6. The Prosecution seeks to substitute TF1 – 085 with TF1 – 029 and TF1 – 126 with TF1 – 122.

TF1 – 085

TF1 – 085 is a crime base witness whose evidence relates to Wellington; Allen Town; Waterloo; Lunsar and Masiaka. The evidence concerns (i) abductions, burning of houses and amputations in Kissy town (ii) the use of child soldiers, and the burning of houses in Wellington (iii) abductions and rapes in Allen Town (iv) abductions from Lumpah and Mile 38 (to Masiaka) and (v) forced conscription in Port Loko. The evidence will describe inter alia Major James, CO Daramy, 55, Rambo, Superman, Issa Sesay, 55, 05 and Gullit as Commanders.

TF1 – 029

TF1 – 029 will testify to events in Magburaka around the 22nd January 1999. This witness' evidence includes (i) alleged abductions and rapes in Benguma (ii) killings, rapes and burning of property in Calabtown (iii) killings between Calabtown and Hastings. The evidence will describe Rambo, Colonel 05 and Brig. 55 as Commanders.

TF1 – 126

The witness describes (i) joint operations of SLA and RUF in Kenema during the junta period and (ii) The killing of BS Massoquoi

TF1 – 122

The witness describes (i) attacks, looting and killings (including BS Massoquoi) by rebels in Kenema. The Commanders inter alia include Mosquito and Eddy Kanneh.

7. The changes in the Prosecution case in the event of a substitution of TF1 – 029 in place of TF1 – 085 are significant both factually and legally. The changes in evidence in relation to the substitution of TF1 – 126 with TF1 – 122 impacts considerably on issues of Command Responsibility and the alleged Joint Criminal Enterprise for the death of BS Massoquoi.

8. The Defence should not have to prepare for all witnesses from both the "core witness list and the "back up" witness list – just in case the Prosecution have a change of heart. It should be allowed to focus on the 102 "core witness" list (a huge task in itself) and any changes in the Defence focus ought not to occur according to the discretion of the Prosecution but *only* with the sanction of the Trial Chamber giving due consideration to the Accused's Article 17 rights.

"Good Cause"

9. Moreover it is submitted that the Prosecution has failed to show "good cause". The presumption of regularity (that is in the suitability, ability and willingness of witnesses to testify – as indicated by the Prosecution's core list as filed on 23rd November 2004) cannot be simply displaced by a generalised assertion that, "the selection of the core witnesses is sometimes displaced by the inability, unsuitability or latent unwillingness" of such witnesses to give evidence".[3]

10. It is respectfully submitted that the Prosecution must show "good cause" in relation to each witness sought to be added (or substituted). This would ensure judicial control of discretion with far reaching consequences for the nature and quality of the Prosecution case. It would also prevent the Prosecution from "shifting" the parameters of their case and from developing it according to their assessment of the progress of the case.

Dated this 18th day of February 2005

Wayne Jordash
Sareta Ashraph
Chloë Smythe

[3] See para. 6 of the Request.

BOOK OF AUTHORITIES

1. Prosecutor v. Krajisnik, Decision on Prosecution Motion for Clarification in respect of Application of Rules 65 *ter,* 66(B) and 67(C), August 1, 2001 *para.* 7
2. State v. Scholtz (1997) 1 LRC 67; Namibia, Supreme Court 6th February 1996.

1. Prosecutor v. Krajisnik, Decision on Prosecution Motion for clarification in respect of Application of Rules 65*ter*, 66(B), August 1, 2001 *para.*

10537

IN THE TRIAL CHAMBER

Before:
Judge Richard May, Presiding
Judge Patrick Robinson
Judge Mohamed Fassi Fihri

Registrar:
Mr. Hans Holthuis

Decision of:
1 August 2001

PROSECUTOR

v.

MOMCILO KRAJISNIK
&
BILJANA PLAVSIC

DECISION ON PROSECUTION MOTION FOR CLARIFICATION IN RESPECT OF APPLICATION OF RULES 65 *TER*, 66 (B) AND 67 (C)

Office of the Prosecutor:

Mr. Mark Harmon
Mr. Alan Tieger

Counsel for the Accused:

Mr. Deyan Brashich, for Momcilo Krajisnik
Mr. Robert. J. Pavich and Mr. Eugene O'Sullivan, for Biljana Plavsic

I. INTRODUCTION

1. The Trial Chamber hereby gives its decision in relation to a motion filed by the Office of the Prosecutor ("Prosecution") seeking clarification in respect of the application of Rules 65 *ter*, 66 (B) and 67 (C) of the Rules of Procedure and Evidence ("Rules").[1]

2. The Prosecution has identified 800 "core" documents[2] which, it is understood, are documents on which they intend to rely at trial. To date, nearly 400 of those documents have been disclosed to the Defence. The Prosecution now seeks to clarify their obligations with regard to the remainder.

3. The disclosure regime in so far as relevant to this Decision proceeds by the following steps:

(a) All supporting material accompanying the indictment must be disclosed within 30 days of the initial appearance (Rule 66 (A)(i));

(b) Copies of the statements of witnesses who the Prosecution intends to call at trial must be disclosed within a time limit set by the Pre-Trial Judge or Trial Chamber (Rule 66 (A)(ii));

(c) The Prosecution, on request, must permit the Defence to inspect material for preparation of the Defence or "intended for use by the Prosecutor as evidence at trial" (Rule 66 (B));

(d) However, such a request triggers an entitlement for reciprocal discovery by the Prosecution of material which the Defence intends to use as evidence at trial (Rule 66 (C)); and

(e) Not less than six weeks before the Pre-Trial Conference the Prosecution must file, *inter alia*, "the list of exhibits the Prosecutor intends to offer stating where possible whether the defence has any objection as to authenticity" (Rule 65 *ter* (E)(iii)).

II. ARGUMENTS OF THE PARTIES

4. The Prosecution is only prepared to disclose the remainder of the documents under the reciprocal disclosure provisions of Rules 66 (B) and 67 (C) and argues that these Rules are substantive Rules and have primacy over Rule 65 *ter* (E)(iii), which is purely procedural: therefore, the Defence are not entitled to disclosure of the exhibits under the latter Rule if they have not triggered the reciprocal disclosure provisions.[3] The Prosecution argues that the reciprocal disclosure provisions increase the efficiency of proceedings, protect equality of arms and protect the integrity of documentary evidence.[4] In support of its argument, the Prosecution relies on a ruling of Trial Chamber I that to force it to disclose the exhibits in its list in circumstances where the reciprocal disclosure provisions had not been triggered would be to create an imbalance in the equality of arms and, therefore, there was no obligation on the Prosecution to do so.[5]

5. Defence counsel for the accused Momcilo Krajisnik submits that a true equality of arms requires the disclosure of the exhibits since the Prosecution has access to material, such as government archives, to which the Defence does not have access.[6] Defence counsel for Biljana Plavsic, having triggered the reciprocal disclosure provisions, has no direct interest in this matter.[7]

III. DISCUSSION

6. The Trial Chamber notes that the ruling of Trial Chamber I, referred to above, has not been followed in other cases. Indeed, the usual Prosecution practice has been to engage in open pre-trial disclosure without relying on the reciprocal disclosure provisions. This practice was followed in the cases in Trial Chamber II, in *Dokmanovic*, *Kovacevic*, *Kupreskic*, *Kunurac* and *Krnojelac*, and in Trial Chamber III, in *Kordic*, *Sikirica* and *Simic*. Indeed, in the instant case this practice was followed until a recent change in counsel who have conduct of this prosecution: this practice was to make open and early disclosure to the Defence of all relevant material as it was identified by the Prosecution and this led to the disclosure of the 400 documents, referred to above, among other material.[8]

7. The Trial Chamber considers that this practice should be followed rather than that favoured by Trial Chamber I. The only way in which the Defence can properly prepare for trial is by having notice in advance of the material on which the Prosecution intends to rely, including exhibits. The Prosecution, by not disclosing the documents prior to trial, places the Defence in a position in which it will not be able to prepare properly; and it is this fact that is likely to lead to a violation of the principle of equality of arms. In addition, the practice may lead to applications for adjournment during the trial to allow the Defence to deal with exhibits of which they had no prior notice, and

given the number of documents concerned in this case, such applications might be frequent.

8. Accordingly, the Trial Chamber interprets the requirement in Rule 65 *ter* (E)(iii) for the Prosecution to file a list of exhibits to mean that the exhibits themselves should be filed and disclosed. (It may also be noted that were this not so, there would be little point in the Rule referring to Defence objections to authenticity since it is difficult to see how the Defence can be in a position to indicate any objections if it has not had the opportunity of viewing the exhibits.)[9]

9. The Trial Chamber does not accept the Prosecution's characterisation of Rules 65 *ter*, 66 and 68, referred to above and does not accept that the latter has precedence. To do so would mean that the only way that an accused could obtain disclosure of the Prosecution case would be by incurring a disclosure obligation. This would be to allow a narrow interpretation of the Rules to override elementary notions of a fair trial, i.e. that the accused, without incurring the obligation of disclosure, should know the case he or she has to meet and should be given adequate opportunity to prepare a Defence. Furthermore, the Chamber, whilst considering how conflicts in the Rules are to be resolved, must take into consideration the requirement under the Statute of the International Tribunal that the proceedings be fair and expeditious and that there be equality between the parties in the preparation for and conduct of trial. There is also a danger in literal interpretation of the Rules that read narrowly the rights and obligations of the parties, particularly where such interpretations compromise these requirements of fairness and expedition. The reciprocal disclosure provisions remain of utility with respect to a broader range of material than the exhibits upon which the Prosecution intends to rely, and to conduct a general trawl through the Prosecution files.

10. Therefore, the Prosecution must disclose all the exhibits on which it intends to rely, at least, by the time that it files its pre-trial brief.

IV. DECISION

11. For these reasons, and pursuant to Rule 65 *ter* of the Rules, the Trial Chamber orders the Prosecution to serve on the Defence the balance of the core documents together with all documents listed pursuant to Rule 65 *ter* (E)(iii) at the time of filing its pre-trial brief.

Done in English and French, the English text being authoritative.

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Richard May
Presiding

Dated this first day of August 2001
At The Hague
The Netherlands

[Seal of the Tribunal]

1. "Prosecution's Motion for Clarification in Respect of Application of Rules 65 *ter*, 66 (B) and 67 (C)", filed by the Prosecution on 25 June 2001 (hereafter "the Motion"). Note that oral submissions were made by the parties with respect to the Motion on 10 July 2001.
2. Status Conference, 23 May 2001, Transcript page 25.
3. The Motion, paras. 4, 21-23; Motions Hearing, 10 July 2001, Transcript page 48.
4. *Prosecutor v. Krstic*, Case No. IT-98-33-PT, Status Conference, 6 March 2000, Transcript pages 398-400.
5. *Ibid.*

6. "Accused Krajisnik's Opposition to Motion for Clarification" filed by the Defence for Krajisnik on 6 July 2001 (hereafter "the Response"), paras. 5-8. Defence counsel for Krajisnik also submitted that the Motion was an attempt to review an order already made by the Pre-Trial Judge that the documents should be disclosed (Response, paras. 3-5). In fact, no such order was made, the Pre-Trial Judge having merely indicated to the Prosecution that the sooner the remaining documents were disclosed the better (Status Conference, 23 May 2001, Transcript page 46).
7. Motions Hearing, 10 July 2001, Transcript page 56.
8. Status Conference, 25 January 2001, Transcript page 74.
9. The Prosecution has also expressed concern that pre-trial disclosure, in circumstances where reciprocal disclosure has not been triggered, might risk destruction, alteration or creation of evidence in order to assist the Defence. It is noted, however, that this has never been raised before by the Prosecution under its previous disclosure regime and, at any rate, without specific information supporting such an allegation in this case, the argument carries no weight.

2. State v. Scholtz (1997) 1 LRC 67; Namibia, Supreme Court 6th February 1996.

secretly and anonymously authorising telephonic intercepts, is clearly much closer to the functions of the other branches than are those of a statutory reporter, publicly identified, evaluating evidence and submissions, judicially reviewable and presenting a report which reality suggests would inevitably find its way into the public domain, save for any specially confidential parts. Yet by the authority of this court, *Hilton* and *Grollo* permit the former and that authority was not challenged. This case will prohibit the latter. It is said that 'historically' judges have been vested with functions such as authorising the issue of warrants. So they have. But they have also, in our history, been called upon to report to the executive upon difficult and sensitive questions. History does not stand still.

In my respectful opinion, the decision in this case involves a departure from long-standing practice in Australia in the use of judges, including federal judges; a rejection of the principles found to be appropriate in the more rigid constitutional context considered by the Supreme Court of the United States; an undue constriction of Parliament's decision to authorise utilisation of 'any person' as a reporter; and a serious limitation on the privilege of the executive government to choose a person, who happens to be a judge, where the sensitivity and importance of the particular case is considered by it to warrant that course.

Conclusion and orders

Having rejected both the construction and constitutional arguments advanced for the plaintiffs to attack the nomination of Justice Mathews as reporter under the Act, I favour giving the following answers to the questions reserved by the Chief Justice: (a) Question 1.1 Yes, (b) Question 1.2 No.

The matter should be remitted to the Federal Court of Australia to hear and determine the proceedings upon the plaintiffs' statement of claim in accordance with the answers given to the questions reserved.

The plaintiffs should pay the costs of the minister of the special case and of the hearing and determination of the questions reserved.

Solicitors:
Piper Alderman for the plaintiffs.
Australian Government Solicitor for the defendants.

Namibia

State v Scholtz

Supreme Court
Mahomed CJ, Dumbutshena and Leon Ag JJA
6 February 1996

(1) *Constitutional law – Fundamental rights – Fair trial – Equality before the law – Access to information – Criminal trial – Disclosure by prosecution – Police dockets – Witness statements – Whether full disclosure of evidential material requirement for fair trial – Constitution of the Republic of Namibia 1990, arts 7, 10, 12.*

(2) *Criminal procedure – Disclosure by prosecution – Police dockets – Witness statements – Appropriate principles.*

The respondent was arraigned in the High Court on various charges and during the trial he applied for an order for the disclosure by the Prosecutor General of statements of prosecution witnesses. The appellant opposed that application. The court granted an order restricted to disclosure of statements of state witnesses who had not yet testified. Following completion of the trial the appellant was granted leave to appeal on the sole ground that the trial judge had erred in law by ordering that certain witness statements were not privileged and should be made available to the defence.

HELD: Declaratory order granted in terms of (2) below.

(1) The principles of procedure that protected witness statements against disclosure where such statements were procured for the purpose of evidence to be given in a contemplated lawsuit were incompatible with art 12(1)(a) of the Constitution of the Republic of Namibia 1990, since the purpose for which that article was enacted was to enable courts to determine the civil rights of citizens and criminal cases fairly and under conditions of equality for all, an objective also recognised in art 10 of the Constitution which demanded that '[a]ll persons shall be equal before the law'. The rules and standards of a fair trial therefore had to be known to both sides in order for the contest to be fair. Although regard had to be paid to the legal history, traditions and usages of the country concerned if the purposes of its Constitution were to be fully understood, constitutional rights should not have implicit restrictions read into them in order to bring them into line with the common law. A trial could not be just and balanced when the prosecution hid from the defence relevant material of evidential importance which might be used to spring a surprise on the defence during the cross-examination. It followed that refusal to disclose witness statements to the defence could not be justified on the ground that the material would be used to enable the defence to tailor its evidence to conform with information in the Crown's possession. Full disclosure was in accord with arts 7 and 12 of the Constitution (see pp 72, 75–76, 77, 79, 81–83, 86–88, post).

Dicta of Dickson J in *R v Big M Drug Mart Ltd* [1986] LRC (Const) 332 at 364, of Sopinka J in *R v Stinchcombe* [1992] LRC (Crim) 68 at 73–74 and of Kentridge AgJ in *State v Zuma* [1995] 1 LRC 145 at 154–155 applied. *R v Heikel (Ruling No 8)* (1990) 5 CRR (2d) 362, *R v Maguire* [1991] LRC (Crim) 227, *R v Ward* [1993] 2 All ER 577 and *Shabalala v A-G of the Transvaal* [1996] 1 LRC 207 approved. *State v Nassar* [1994] 3 LRC 295 considered. *R v Steyn* 1954 (1) SA 324 (A) disapproved.

Per curiam. (i) To be effective disclosure has to be done at the earliest possible time to allow the accused to prepare thoroughly his reply to the charge in his defence (see pp 88–89, post).

(ii) If before any trial the prosecution has in its possession documents or other evidential material helpful to the defence case but wants to claim public interest immunity the defence should be informed of that fact and the court should be asked to give directions or a ruling on the prosecution's claim to public interest immunity. The decision has to be made by a judge. It would not be proper to allow the prosecution to decide which of the relevant materials should be denied to the accused on the grounds of public interest immunity. The prosecution should not be judge in their own cause on the claim to immunity (see pp 84, 88, post).

(2) To provide guidance in future prosecutions in which an accused might seek to obtain contents of police dockets relevant to the prosecution on a particular matter, the court declared as follows. In prosecutions before the High Court, an accused person (or his legal representative) should ordinarily be entitled to the information contained in the police docket relating to the case prepared by the prosecution against him, including copies of the statements of witnesses, whom the police have interviewed in the matter, whether or not the prosecution intended to call any such witness at the trial. The state should be entitled to withhold from the accused (or his legal representative) any information contained in any such docket, if it satisfied the court on a balance of probabilities that it had reasonable grounds for believing that the disclosure of any such information might reasonably impede the ends of justice or otherwise be against the public interest. The duty of the state to afford to an accused person (or his legal representative) the right of access to the prosecution information held against him should ordinarily be discharged upon service of the indictment and before the accused was required to plead in the High Court; provided, however, that the court should be entitled to allow the state to defer the discharge of that duty to a later stage in the trial, if the prosecution established on a balance of probabilities that the interests of justice required such deferment in any particular case. Nothing should preclude an accused person appearing before a court other than the High Court from relying on those provisions (see pp 70–71, post).

[*Editors' note*: Articles 7, 10 and 12 of the Constitution of the Republic of Namibia 1990, so far as material, are set out at pp 78, 79, 72, post.]

Cases referred to in judgment

A-G of Namibia, Ex p, Re Corporal Punishment by Organs of State [1992] LRC (Const) 515, 1991 (3) SA 76 (NmS), Nam SC

A-G v Moagi 1982 (2) BLR 124, Bot CA

Anderson v Bank of British Columbia (1876) LR 2 Ch D 644, [1874–80] All ER Rep 396, UK CA

Boucher v R [1955] SCR 16, (1955) 110 CCC 263, Can SC

Dallison v Caffery [1964] 2 All ER 610, [1965] 1 QB 348, [1964] 3 WLR 385, UK CA

Dersch v Canada (A-G) [1990] 2 SCR 1505, (1990) 77 DLR (4th) 473, (1990) 60 CCC (3d) 132, Can SC

Duke v R [1972] SCR 917, (1972) 7 CCC (2d) 474, (1972) 28 DLR (3d) 129, Can SC

Kristman, Re (1984) 32 Alta LR (2d) 325, (1984) 12 DLR (4th) 283, (1984) 13 CCC (3d) 522, Alta QB

Minister of Defence, Namibia v Mwandinghi 1992 (2) SA 355 (NmS), Nam SC

Minister of Home Affairs v Fisher [1979] 3 All ER 21, [1980] AC 319, [1979] 2 WLR 889, Berm PC

Minister van Justisie, ex p, Re, State v Wagner 1965 (4) SA 504 (A), SA AD

R v Big M Drug Mart Ltd [1986] LRC (Const) 332, [1985] 1 SCR 295, (1985) 18 DLR (4th) 321, Can SC

R v Bourget (1987) 54 Sask R 178, (1987) 41 DLR (4th) 756, (1987) 35 CCC (3d) 371, Sask CA

R v Bryant (1946) 31 Cr App R 146, UK CCA

R v Davis [1993] 2 All ER 643, [1993] 1 WLR 613, UK CA

R v Heikel (Ruling No 8) (1990) 5 CRR (2d) 362

R v Lawson (1989) 90 Cr App R 107, UK CA

R v Maguire [1991] LRC (Crim) 227, [1992] 2 All ER 433, [1992] QB 936, UK CA

R v McIlkenny [1991] LRC (Crim) 196, [1992] 2 All ER 417, (1992) 93 Cr App R 287, UK CA

R v Steyn 1954 (1) SA 324 (A), SA AD

R v Stinchcombe [1992] LRC (Crim) 68, [1991] 3 SCR 326, Can SC

R v Ward [1993] 2 All ER 577, [1993] 1 WLR 619, (1993) 96 Cr App R 1, UK CA

Shabalala v A-G of the Transvaal [1996] 1 LRC 207, 1995 (12) BCLR 1593 (CC), SA CC

State v Acheson 1991 (2) SA 805 (NmH), Nam HC

State v Alexander (1) 1965 (2) SA 796 (A), SA AD

State v B 1980 (2) SA 946 (A), SA AD

State v Fani 1994 (1) SACR 635 (E), 1994 (1) BCLR 43

State v James 1994 (2) SACR 141 (E), 1994 (3) SA 881, 1994 (1) BCLR 57

State v Mavela 1990 (1) SACR 582 (A), SA AD

State v Nassar [1994] 3 LRC 295, (1995) 2 SA 82 (Nm), Nam HC

State v Yengeni (1) 1990 (1) SA 639 (C)

State v Zuma [1995] 1 LRC 145, 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC), SA CC

Legislation referred to in judgment

Canada

Canadian Charter of Rights and Freedoms 1982, ss 7, 11

Criminal Code am RSC 1985, c 27 (1st Supp) ss 101(2)(d), 603

Namibia

Constitution of the Republic of Namibia 1990, arts 5, 7, 10(1), 12(1)(a), 25(2)

Criminal Procedure Act 1977, ss 39(2), 80, 84(1), 106, 144, 206

South Africa
Constitution of the Republic of South Africa 1993, ss 23, 25(2), (3)

United Kingdom
Criminal Appeal Act 1968, s 2(1)(c)

Other sources referred to in judgment
Attorney General's Practice Note [1982] 1 All ER 734
Rights and Constitutionalism: The New South African Legal Order p 413

Appeal
The state appealed on the ground that Hannah J in the High Court erred in law to order that certain witness statements in a criminal trial against the respondent Scholtz were not privileged and should be made available to the defence. The facts are set out in the judgment of the court.

K Van Niekerk and *F Winson* for the appellant.
M S Navsa SC and *L Mpathi* for the respondent.

6 February 1996. The following judgment of the court was delivered.

DUMBUTSHENA Ag JA. This appeal comes to this court by leave of the court a quo. That leave was granted on the understanding that only one ground of appeal was to be argued. That ground is—

> '[t]hat the Honourable Judge erred in law to order that certain witness statements are not privileged and should be made available to the defence.'

In this appeal the state is the appellant and the respondent was the accused at the criminal trial. During the trial an application was made on his behalf for the disclosure, by the Prosecutor General to the accused, of the witness statements of those witnesses who had not yet testified. Hannah J granted the order, directing the Prosecutor General to produce the specified witness statements.

In passing it is proper to mention that the respondent has no interest in the appeal. He was acquitted on one count of murder and one count of attempted murder and convicted for assault with intent to do grievous bodily harm. He was sentenced to 18 months' imprisonment which was wholly suspended on appropriate conditions. The court a quo ordered him to pay to the complainant, Patricia Waters, the sum of R1,000.

This appeal and the judgment thereof have wide implications and effects on the administration of justice and more so on the work of the Prosecutor General's department. It was for this reason that, after hearing argument, this court made and handed in a declaratory order. We did not want to delay the consequences flowing from our judgment. This is the order we made:

> 'A formal order upholding or dismissing the appeal would in the circumstances of this case be inappropriate and will not serve or fulfil the object of this litigation which is to provide helpful guidance in future prosecutions in which the accused seeks to obtain the contents of police dockets relevant to the prosecution on a particular matter. The most useful course would be to make an order in the form of a declarator. It is accordingly declared that:
>
> (1) In prosecutions before the High Court, an accused person (or his legal representative) shall ordinarily be entitled to the information contained in the police docket relating to the case prepared by the prosecution against him, including copies of the statements of witnesses, whom the police have interviewed in the matter, whether or not the prosecution intends to call any such witness at the trial.
>
> (2) The state shall be entitled to withhold from the accused (or his legal representative), any information contained in any such docket, if it satisfies the court on a balance of probabilities, that it has reasonable grounds for believing that the disclosure of any such information might reasonably impede the ends of justice or otherwise be against the public interest. (Examples of such claims are where the information sought to be withheld would disclose the identity of an informer which it is necessary to protect, or where it would disclose police techniques of investigation which it is similarly necessary to protect, or where such disclosure might imperil the safety of a witness or would otherwise not be in the public or state interest.)
>
> (3) The duty of the state to afford to an accused person (or his legal representative) the right referred to in paragraph 1 shall ordinarily be discharged upon service of the indictment and before the accused is required to plead in the High Court. Provided, however, that the court shall be entitled to allow the state to defer the discharge of that duty to a later stage in the trial, if the prosecution establishes on a balance of probabilities that the interests of justice require such deferment in any particular case.
>
> (4) Nothing contained in this declaration shall be interpreted so as to preclude an accused person appearing before a court other than the High Court from contending that the provisions of paragraphs 1, 2 and 3 hereof should *mutatis mutandis* also be of application to the proceedings before such other court.'

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

The trial in this case commenced in February 1994 and resumed on 30 August 1994. On 23 August the defence counsel in *State v Nassar* [1994] 3 LRC 295 applied for an order seeking disclosure by the Prosecutor General of witness statements in his possession. The relief sought was as follows ([1994] 3 LRC 295 at 299–300):

> '1. That the State be ordered to provide the accused with the following:
>
> 1.1 Copies of all witnesses' statements in the possession of the State relating to the charges against the accused;
>
> 1.2 Copies of all relevant documents in the possession of the State relating to the charges against the accused;

1.3 Copies of all video recordings or tape recordings which are in the possession of the State and/or the police and relating to the charges against the accused.

2. Granting the applicant further and/or alternative or related relief.'

I make reference to the prayer and the order of the court a quo in *State v Nassar* because the case covered wider ground than the instant case and Hannah J was part of the two-judge bench in that case. In *Nassar* the following order was made ([1994] 3 LRC 295 at 299):

'(1) The State provides the accused or his legal representatives within 14 days of this order with a copy of all witness statements in its possession relating to the charges contained in the indictment;

(2) The State provides the accused and his legal representatives with the opportunity to view the screening of all video tape recordings and to listen to all audio tape recordings in its possession or in the possession of the police relating to the charges contained in the indictment;

(3) The State provides the accused with a copy of the transcript of such video and audio tape recordings within 14 days of compliance with paragraph 2;

(4) The opportunity to view and to listen to such video and audio tape recordings shall be at a time convenient to both the State and the accused's legal representatives and shall be provided within 7 days of this order unless otherwise agreed.'

When the trial in the instant case resumed on 30 August the respondent's counsel similarly applied for an order for the disclosure by the Prosecutor General of statements of prosecution witnesses. The application was vigorously opposed by the state, as was that in *Nassar*. However, the court a quo granted an order restricted to disclosure of statements of state witnesses who had not yet testified. The appeal against the decision in *Nassar* has not yet been heard for reasons which have nothing to do with the present appeal. Judgment in *Nassar* was only handed down on 21 September 1994. By that time the judgment in the instant case had already been delivered. What stands to be decided in this appeal is whether disclosure or non-disclosure of prosecution witness statements to the defence falls within the ambit of art 12(1)(a) of the Constitution of the Republic of Namibia 1990, which provides:

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

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

It is therefore of no consequence that the Criminal Procedure Act 1977 does not have a provision for a general right of disclosure of materials in a police

docket as submitted by Ms Winson for the appellant. The right resides in arts 7 and 12 of the Constitution.

The provisions in the Criminal Procedure Act were common law principles meant to introduce some measure of fairness in the conduct of criminal cases. A summary of some of those principles or rules will suffice. Section 39(2) of the Act requires that the arresting officer should inform the accused of the reason for arrest. If a warrant was used to effect arrest, a copy of the warrant must be handed to him upon demand. In terms of s 80 the accused may examine the charge at any time of the relevant proceedings. In s 84(1) particulars of the offence must be set forth in the charge including where the offence was committed and against whom it was committed, if any, and the property, if any, in respect of which the offence is alleged to have been committed. But all that is required in this section is that the information is reasonably sufficient to inform the accused of the nature of the charge. If the accused believes that the information does not contain sufficient particulars of any matter alleged in the charge, he can object and, in proper circumstances, move to quash the charge (s 106). There are other sections meant to make it possible for an accused to know what case he is being asked to meet in order to prepare his defence.

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

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

'(a) ... the indictment shall be accompanied by a summary of the substantial facts of the case that, in the opinion of the Prosecutor General, are necessary to inform the accused of the allegations against him and that will not be prejudicial to the administration of justice and the security of the State, as well as a list of the names and addresses of the witnesses the Prosecutor General intends calling at the summary trial on behalf of the State: Provided that—(i) this provision shall not be so construed that the State shall be bound by the contents of the summary; (ii) the Prosecutor General may withhold the name and address of a witness if he is of the opinion that such witness may be tampered with or be intimidated or that it would be in the interest of the security of the State that the name and address of such witness be withheld; (iii) the omission of the name or address of a witness from such list shall in no way effect the validity of the trial.

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

On behalf of the appellant, Ms Winson contended both in her written argument and in oral submissions before us that s 144 bears all the elements of

a fair trial. Ms Winson may be right but all that the accused receives is a summary of substantial facts meant to inform him of the allegations made against him. He is given a list of witnesses the Prosecutor General intends to call at his trial without a summary of their evidence. The contents of the substantial facts do not bind the state during the trial. Names and addresses of witnesses may be withheld for fear that they may be tampered with or intimidated or for reasons of the security of the state. And more importantly what is revealed to him is subject to the subjective judgment of the Prosecutor General. It does not guarantee the accused a fair trial. Fairness depends on the personal whim of the Prosecutor General or his/her representative.

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

South Africa

In South Africa the question of non-disclosure of witness statements was dealt with in *R v Steyn* 1954 (1) SA 324 (A), which was based on English law, as it was on 31 May 1961. That case decided that a witness statement was a privileged document and there was no entitlement to its disclosure to an accused. I will refer briefly to the long reign *R v Steyn* had on the courts in South Africa and Namibia and the long list of cases that followed it. But *Steyn* and those other cases have of recent times been overtaken by new developments.

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

> 'When statements are procured from witnesses for the purpose that what they say shall be given in evidence in a lawsuit that is contemplated, these statements are protected against disclosure until at least the conclusion of the proceedings which would include any appeal or similar step after the decision in the court of first instance.' (See *R v Steyn* 1954 (1) SA 324 (A) at 335 per Greenberg JA.)

In my view the old rule cannot still survive in the face of art 12(1)(a). Its survival in my view would militate against the purpose for which the article

was enacted, that is, to enable the courts to determine the civil rights of the citizens and criminal cases fairly and under conditions of equality. The right to a fair trial can no longer mean that it is—

> 'an intelligible principle that as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as the materials for the brief.'

See *Anderson v Bank of British Columbia Anderson v Bank of British Columbia* (1876) LR 2 Ch D 644 at 656, *R v Steyn* 1954 (1) SA 324 (A) at 332, *State v Yengeni* (1) 1990 (1) SA 639 (C) at 664 and *State v Mavela* 1990 (1) SACR 582 (A).

Although *Steyn* was consistently followed in many decisions such as, among others, *Ex p Minister van Justisie, Re State v Wagner* 1965 (4) SA 504 (A) at 514, 515, *State v Alexander* (1) 1965 (2) SA 796 (A) at 811, *State v B* 1980 (2) SA 946 (A) at 952, *State v Yengeni* (1) 1990 (1) SA 639 (C) at 643 and *State v Mavela*, these decisions and many others have been overtaken by the enactment, in both Namibia and South Africa, of Constitutions entrenching justiciable Bills of Rights. The principles of procedure fervently followed before now need to be brought into line with provisions of Bills of Rights laying down tenets of procedure as entrenched rights. These are now the foundations upon which fair trials are built. Under these entrenched rights what Greenberg JA said in *Steyn* 1954 (1) SA 324 (A) at 335—

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

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

The rules of procedure relating to fair trials in South Africa and Namibia were the same, that is before the new Constitutions were enacted. The same authorities on non-disclosure were followed in the two countries.

South Africa has a new Constitution with a justiciable Bill of Rights. Comparison between the relevant provisions of the Constitution of the Republic of South Africa 1993 and the Constitution of the Republic of Namibia 1990 is instructive. Section 23 of the South African Constitution provides:

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

Namibia does not have a similar section.

In *Shabalala v A-G of the Transvaal* [1996] 1 LRC 207 the Constitutional Court considered whether s 23 of the Constitution of South Africa is of application when an accused seeks the disclosure of contents of a police docket for use in

his defence. Mahomed D-P, who wrote the judgment for the court, remarked as follows ([1996] 1 LRC 207 at 222 (para 34)):

> 'The application for the production of documents in the present case was made during the course of a criminal prosecution of the accused. In that context, not only is s 25(3) of the Constitution of direct application in considering the merits of that application, but it is difficult to see how s 23 can take the matter any further. If the accused are entitled to the documents sought in terms of s 25(3), nothing in s 23 can operate to deny that right and, conversely, if the accused cannot legitimately contend that they are entitled to such documentation in terms of s 25(3) it is difficult to understand how they could, in such circumstances, succeed in an application based on s 23. The real inquiry therefore is whether or not the accused were entitled to succeed in their application on the basis of a right to a fair trial asserted in terms of s 25(3).'

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

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

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

In *State v Fani* 1994 (1) SACR 635 (E) at 641 Jones J held that the common law of privilege could exist side by side with rights entrenched in ss 23 and 25 of the South African interim Constitution. In the same breath he went on to state that those sections gave the accused greater rights of information than hitherto enjoyed and expressed the view on the information which should be disclosed to an accused before he or she was called on to plead (see 1994 (1) SACR 635 (E) at 639–640).

Zietsman JP in *State v James* 1994 (2) SACR 141 (E) refused to order the state to hand over either copies or summaries of witness statements. He expressed doubts about the applicability of s 23 to criminal trials.

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

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

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

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

> 'This means that it would not be necessary for the courts to concern themselves with the issue of whether an accused has been prejudiced in the sense that he would probably not have been convicted but for the irregularity.' (See the English case cited above.)
>
> 'This is especially so in the light of the fact that the Bill of Rights expressly enables individuals to apply to the courts for appropriate relief in the case of any infringement of any of the entrenched rights contained in the Bill.' (See *Rights and Constitutionalism: The New South African Legal Order* p 413, see also art 25(2) of the Namibian Constitution.)

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

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

These entrenched tenets of a fair trail strengthen in a significant way the due process proceedings. The fundamental rights or freedoms guaranteed by the Constitution ensure that rights and freedoms are not ignored. The courts are there to enforce them.

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

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

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

'1.(a) In the determination of their civil rights and obligations or any criminal charge 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, failing which the accused shall be released.

(c) Judgments in criminal cases shall be given in public, except where the interests 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 of 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 for "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.'

The rights and freedoms enshrined in the Constitution are fundamental to the well-being and existence of Namibia. Article 5 calls for their protection. They are to—

'be respected by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the courts in the manner hereinafter prescribed.'

Article 10(1) is fundamental and central to the new perceptions. Courts of law have to interpret and enforce the protection of fundamental rights and freedoms. Article 10(1) provides: 'All persons shall be equal before law.' Apart from this, equality pervades the political, social and economic life of the republic of Namibia. A reading of the Constitution leaves one in no doubt as to what is intended to be achieved in order for the people of Namibia to live a full life based on equality and liberty.

It is in this light that art 12 should be looked at and interpreted in a broad and purposeful way. And the courts must ask whether the retention of privileges of witness statements accords with the exercise of the rights in the Constitution. If the constitutional purpose or intention is equality for all, one must ask whether non-disclosure accords with that purpose or intention? I think not. To achieve equality between the prosecution and the defence is what the Constitution demands when it says '[a]ll persons shall be equal before the law'. That is why, in my view, art 12 and the tenets of a fair trial therein cannot be given an interpretation that supports *R v Steyn* and the authorities that followed it. But those authorities cannot be ignored because they form the historical foundation upon which the procedural rights now enshrined in art 12 were built. It is, however, the Constitution which is the supreme law of Namibia.

It would be a sad waste of time were I to venture into the interpretation of the fundamental rights and freedoms in the Namibian Constitution, sufficient has been said in reported cases both in this jurisdiction and other jurisdictions. I refer to *State v Acheson* 1991 (2) SA 805 (NmH), *Ex p A-G of Namibia, Re Corporal Punishment by Organs of State* [1992] LRC (Const) 515, *Minister of Defence, Namibia v Mwandinghi* 1992 (2) SA 355 (NmS), *Minister of Home Affairs v Fisher* [1979] 3 All ER 21 and *State v Zuma* [1995] 1 LRC 145. I would like to extract from that judgment what was said by Kentridge Ag J because it refers to s 25(3) of the South African Constitution, which deals with a fair trial, and because that section is in many ways similar to art 12 of the Namibian Constitution. The learned acting judge remarked:

'In *R v Big M Drug Mart Ltd* [1986] LRC (Const) 332 at 364, [1985] 1 SCR 295 at 359–360, Dickson J (later Chief Justice of Canada) said, with reference to the Canadian Charter of Rights: "The meaning of right or freedom guaranteed by the Charter was to be ascertained by an analysis of the *purpose* of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view this analysis is to be undertaken, and the purpose of the right 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 securing for individuals the full benefit of the Charter's protection." (Dickson J's emphasis.) Both Lord Wilberforce and Dickson J emphasised that regard must be paid to the legal history, traditions and usages of the country concerned, if the

purposes of its Constitution are to be fully understood. This must be right. I may none the less be permitted to refer to what I said in another court of another Constitution albeit in a dissenting judgment: "Constitutional rights conferred without express limitation should not be cut down by reading implicit restrictions into them, so as to bring them into line with the common law." (See *A-G v Moagi* 1982 (2) BLR 124 at 184.) The caveat is of particular importance in interpreting s 25(3) of the Constitution. The right to a fair trial conferred by that provision is broader than the list of specific rights set out in paras (a) to (j) of the subsection. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force.' (See [1995] 1 LRC 145 at 154–155.)

I agree with what the learned acting judge said because it is relevant to the interpretation of art 12 and other provisions of the Namibian Bill of Rights.

England

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

In England the law of disclosure of witness statements and other relevant materials has in recent years appreciably developed. To cut a long story short, in *R v Bryant* (1946) 31 Cr App R 146 a statement taken from a person known to the prosecution to contain material evidence favourable to the accused and which the prosecution was not going to use because it had no intention to call him as a witness could be handed to the defence. But as Lord Goddard LCJ said, there was no duty to supply a copy of the statements to the defence. He asked ((1946) 31 Cr App R 146 at 155):

> 'Is there a duty in such circumstances on the prosecution to supply a copy of the statement which they have taken to the defence? In the opinion of the Court there is no such duty, nor has there ever been.'

However, that attitude was not maintained for long. The courts changed their stance. It was decided in later cases that where the prosecution intended to call a witness who had given them material evidence and they have in their possession a statement made by him which was materially inconsistent with his evidence the prosecution should inform the defence of that fact and hand a copy of the statement to the defence. In *Dallison v Caffery* [1964] 2 All ER 610 at 618, [1965] 1 QB 348 at 369 Lord Denning MR went a little further and stated:

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

It should be remembered the courts were at no time considering the existence of a general duty to disclose. They were concerned with what they perceived

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

In this regard recent trends in England and Wales on non-disclosure have been influenced to a great extent by a number of what I would call indiscretions on the part of some police investigating crimes and some experts who elected to leave out relevant materials or statements they believed favoured the defence in cases they regarded as highly sensitive. As a result courts were forced to make judgments ignorant of evidence, witness statements or relevant materials favourable to the accused. The accused were convicted. After convictions and in some cases long afterwards, upon information received the Home Secretary referred these cases to the Court of Appeal. I refer below to some of those cases because they helped in the development of a new and vigorous judicial policy on the duty to disclose statements, results of interviews and other relevant materials to the defence.

The first case I would like to refer to is *R v Maguire* [1991] LRC (Crim) 227, [1992] QB 936. In that case all male appellants were found to have positive traces of nitro-glycerine under their nails. Mrs Maguire did not have them but a number of pairs of thin plastic gloves found to have been used by her were examined and the tests were positive for nitro-glycerine. They all were convicted. The case was referred to the Court of Appeal (Criminal Division): among other things it was found that there was failure to reveal facts which were relevant and ought to have been revealed. The prosecution witnesses had been selective about experimental data which supported their case and discarded that which did not. They therefore misled the court. They failed to reveal to the defence matters favourable to the defence. Experts from RARDE were not brought to the attention of the defence during trial. Incorrect evidence was given to the trial court on the significance of nitro-glycerine found under finger nails of male defendants. There was the possibility of innocent contamination of fingernails and gloves. Besides it was impossible to distinguish nitro-glycerine and pentaerythritol tetranitrate. It was said that the duty to disclose was a continuing one. The effect of all this is summarised in the headnote as follows ([1992] 2 All ER 433):

> 'A failure on the part of the prosecution to disclose to the defence material documents or information which ought to have been disclosed may be a material "procedural" irregularity in the course of the trial providing grounds for an appeal against conviction to be allowed under s 2(1)(c) of the [Criminal Appeal Act 1968]. Furthermore, the duty of disclosure is not confined to prosecution counsel but includes forensic scientists retained by the prosecution and accordingly failure by a forensic scientist to disclose material which he knew might have some bearing on the offence charged and the surrounding circumstances of the case may be

a material irregularity in the course of the trial providing grounds for an appeal against conviction to be allowed ...'

In *R v Ward* [1993] 2 All ER 577 nearly the same happened. Ward was convicted of the murder of 12 people who died after a bomb exploded on board a coach in which soldiers and members of their families were travelling. She was also convicted of causing explosions elsewhere in England. The evidence against her consisted of confession statements made to the police and scientific evidence to the effect that after the coach explosion traces of nitro-glycerine were found in a caravan in which she had stayed. After other explosions traces of nitro-glycerine were found on her person. One of the forensic scientists in the case was Dr Frank Skuse, whose evidence on the use of the Griess test to establish the presence of nitro-glycerine had been discredited in investigations which led to the appeal in *R v McIlkenny* [1991] LRC (Crim) 196, (1992) 93 Cr App R 287 (the case popularly known as 'the Birmingham six'). The Home Secretary referred *Ward* to the Court of Appeal because Dr Skuse's evidence in *Ward* was based on similar use of the Griess test. There was also concern that the scientific evidence carried out in connection with an inquiry by Sir John May into the case of the Maguire family, whose convictions were quashed on appeal, had shown that other substances could give a result in some of the tests similar to that given by nitro-glycerine with the result that Ward might not have been handling explosives at all. But the point of substance argued on appeal was that there had been material irregularity in the original trial because the prosecution had failed to disclose material relevant to both the confessions and scientific evidence. To cut a long story short it was found that the police and the Director of Public Prosecutions had failed to disclose to the defence information about witnesses from whom statements had been taken, including the statements of certain RUC officers who had interviewed Ward indicating a belief in her innocence. There was failure to disclose a number of statements made by the appellant to the police which contained inaccuracies, inconsistencies and retractions. Psychologists who had made a report before her trial had failed to record in their report a second suicide attempt made by her whilst in prison awaiting trial. Three senior government forensic scientists had deliberately withheld scientific tests from the defence which threw doubt on the scientific evidence. One of these tests showed that dyestuffs present in boot polish could be confused with nitro-glycerine in the tests that were used to identify nitro-glycerine. As a result the court found that prosecution's failures to disclose were of such order that individually and collectively they constituted material irregularities in the course of the trial. The court held:

'(1) The prosecutions' duty at common law to disclose to the defence all relevant material, ie evidence which tended either to weaken the prosecution case or to strengthen the defence case, required the police to disclose to the prosecution all witness statements and the prosecution to supply copies of such witness statements to the defence or to allow them to inspect the statements and make copies unless there were good reasons for not doing so. Furthermore, the prosecution were under a duty, which continued during the pre-trial period and throughout the trial, to disclose

to the defence all relevant scientific material, whether it strengthened or weakened the prosecution case or assisted the defence case and whether or not the defence made a specific request for disclosure. Pursuant to that duty the prosecution were required to make available the records of all relevant experiments and tests carried out by expert witnesses. Furthermore, an expert witness who had carried out or knew of experiments or tests which tended to cast doubt on the opinion he was expressing was under a clear obligation to bring the records of such experiments and tests to the attention of the solicitor who was instructing him so that they might be disclosed to the other party. On the facts, the non-disclosure of notes of some interviews by the police to the Director of Public Prosecutions, the non-disclosure of certain material by the Director of Public Prosecutions, the non-disclosure of certain material by the Director of Public Prosecutions and prosecuting counsel to the defence and the non-disclosure by forensic scientists employed by the Crown of the results of certain tests carried out by them which threw doubt on the scientific evidence put forward by the Crown at the trial cumulatively amounted to a material irregularity which, on its own, undoubtedly required the appellant's conviction to be quashed.' (See the headnote [1993] 2 All ER 577–578.)

In the instant appeal it was argued on behalf of the appellant that disclosure of the contents of a police docket would, among other things, retard police investigations. Although this point does not arise in the present appeal it is dealt with in general in the body of this judgment. But one has to bear in mind what was said by Glidewell LJ in *R v Ward* [1993] 2 All ER 577 at 601, [1993] 1 WLR 619 at 645:

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

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

It used to be the practice that all instruments or documents recording relevant interviews, witness statements or notes of interviews or a police officer's report should be disclosed. See *R v Ward* [1993] 2 All ER 577 at 602, [1993] 1 WLR 619 at 646.

I agree with Ms Winson's conclusion that the English approach with regard to disclosure of evidence in the possession of the state has undergone dramatic changes which are primarily attributable to the *Attorney General's Practice Note* [1982] 1 All ER 734. In my view the courts have gone beyond the Attorney General's guidelines. These developments were expedited by the nature of the cases the courts were hearing and the ominous consequences brought about by acts of violence and terrorism and the subsequent reaction of the police to those acts and the serious nature of the crimes arising from them.