

if it is in the interest of justice to have counts separated-if accused will not be prejudiced thereby-court may order separation of trial.

RULING

- [1] The accused is charged with murder, it being alleged by the Crown that on 23 September 2016 at Holneck in the Shiselweni district he unlawfully and intentionally killed Sifiso Dlamini.
- [2] The accused is further charged with the offence of rape with aggravating factors of Ntokozo Sikhosana. The accused is alleged to have intentionally and unlawfully had sexual intercourse with the said complainant without her consent and thereby committed the offence of rape. The accused is alleged to be an uncle to the complainant; it is alleged further that when he committed the said offence he did not use a condom thereby exposing the complainant to sexually transmitted infections.
- [3] The accused pleaded not guilty to both counts.
- [4] I will refer to the applicant as the Crown and to the respondent as the accused.
- [5] During the trial Miss Hlophe for the Crown applied for the separation of the rape count. The reason for the application is that the Crown has not been able to locate witnesses to testify in relation to the rape count.
- [6] The application was opposed by Advocate Maziya who represents the accused person.

[7] It was the submission of the Crown that the application of separation of the count of rape should be allowed in order for the Crown to be able to secure attendance of its witnesses in relation to the rape charge. The Crown argued that the accused will suffer no prejudice if the application is allowed. This, the Crown averred was because during the trial no evidence regarding the count of rape has been led; neither was there any link between the two counts as the offences were committed on different dates under different circumstances. It was the contention of the Crown further that the separation of the count of rape will allow for the expeditious trial of the accused on the count of murder. The accused has been in custody for a period of almost five years having been initially taken into custody on 23 September 2016.

[8] The Crown does not seek postponement of the matter as much as it prays for the application of separation of the charge of rape to succeed.

[9] Both parties are agreed that the CP&E Act allows the separation of counts¹. Section 120 of the CP&E Act states as follows:

‘(2) If there are more counts than one in an indictment or summons they shall be numbered consecutively and each count may be treated as a separate indictment or summons.

(3) If the court thinks it conducive to the ends of justice to do so, it may direct that the accused shall be tried upon any one or more of such counts separately.

(4) Such order may be made either before or in the course of the trial.

(5) The counts in the indictment or summons which are not then tried shall be proceeded with in all respects as if they had been found in a separate indictment or summons.’

[10] The wording of section 120 (3) of the CP&E Act states that the Court has discretion to order a separation of counts, however this discretion must be

¹ Section 120

exercised judiciously. Where it is desirable and in the interest of justice to allow for the separation of trial, the court may order that the accused should be tried separately on any one or more of the counts set out in the indictment. Consequently, the counts that are not tried can be the subject of fresh proceedings.

- [11] Mr Maziya for the accused submitted that the accused is entitled to a fair and speedy hearing in line with provisions of the Constitution². He argued that this matter should not be unnecessarily delayed or postponed any further because the accused has spent an inordinate time in pre-trial incarceration already.
- [12] It was argued further on behalf of the accused that if the separation of counts is allowed, it will prejudice the accused. Mr Maziya indicated that the prejudice that the accused will suffer is of a financial nature. It was contended that the accused is currently represented by *pro deo* counsel because he is indigent. If the accused is tried for both counts in the current proceedings he would kill two birds with one stone as it were-because he will not have to pay for legal representation as he is charged with murder among others. The law and the practice is that indigent accused persons are provided with legal representation at the expense of the State if they are charged with murder and not with rape.
- [13] Financial prejudice, in my view cannot be equated to real prejudice. Financial prejudice cannot be elevated to some special feature rendering a single trial prejudicial or embarrassing to the accused. After all there are procedural guard-rails to ensure an unrepresented accused is assisted by the court during the conduct of a criminal trial.

² Section 21 of the Constitution Act 1/2005

[14] It was Mr Maziya's contention that the Crown should rather withdraw the charge of rape against the accused as there is no guarantee that the witnesses in the count of rape will be found and brought to testify. I disagree. If the Crown withdraws the charge of rape after the accused has pleaded but before judgment, the accused is entitled to an acquittal and he cannot be charged again with the same offence³. Mr Maziya says so much in paragraph ten of respondent's written submissions. It is difficult to see how the interest of the administration of justice would be served if the Crown is not allowed reasonable time to secure attendance of its witnesses in a trial where the accused will also be allowed to confront the Crown witnesses with his defence. The separation of trial in this regard would also ensure that the trial on the murder count is dealt with expeditiously in order to avoid any further and unnecessary delays and to finalise the trial within the periods of set down.

[15] The law is settled with regard to applications of this nature. One of the general principles is that a multiplicity of proceedings should as far as possible be avoided, as a duplication of trials wastes resources and time to the detriment of the interests of society⁴. The purpose of joinder of counts is to save time and trouble. It is also to ensure that all charges the Crown has against an accused are brought against him at the same trial rather than piecemeal. If, however there are compelling reasons for separation of trials, the court, acting judiciously should allow the application. It all depends on the circumstances of each case.

³ This is because once the accused has pleaded he is in jeopardy of being convicted of the crime and if he is charged again he would be entitled to plead *autrefois acquit*. Again, the decision to withdraw is the prosecutor's alone and the court is not entitled to proceed with trial after a withdrawal of the charge.

⁴ See Kruger, *A Hiemstra's Criminal Procedure* at page 22-28.

[16] Where the Crown makes an application for separation of trial and the application is opposed by the accused, the latter must show, on a balance of probabilities that he will suffer prejudice if the separation of counts is allowed. In the case at hand, it was argued that the accused will suffer financial prejudice if the application is allowed. With regard to the requirement of prejudice, a mere possibility of prejudice is insufficient; there should be a substantial possibility of prejudice. In the same breath, financial prejudice cannot be equated to real prejudice.

In the result, it is ordered that the application for a separation of counts/trial succeeds.

LANGWENYA

JUDGE OF THE HIGH COURT

For the Applicant: Ms L Hlophe

For the Respondent: Advocate M.L.M Maziya