

Memorandum

The COVID-19 pandemic taught the world that it is time to do things differently. In many countries, it brought the criminal justice system to a standstill, including Namibia. There is a need to bring Namibia to the 4th industrial revolution and to leverage against electronic systems and digitization. The giving of evidence using a live video link or similar electronic media may be necessary to prevent unreasonable delay, to save costs, for convenience and where to do so would be in the interest of the security of the State or of public safety or in the interests of justice or the public; and also where to do so would prevent the possibility of harm or prejudice resulting to any person if he or she testifies or is present at criminal proceedings. The furnishing of evidence to a judge of the High Court, Regional Court Magistrate, and Magistrate without the need for a person to appear.

There is a need to give police powers to make use of traps and undercover operations and admissibility of evidence so obtained. The Mutual Evaluation Report identified a deficiency in that Under-cover operations and control delivery are only recognised by the courts in Namibia under common law and not in legislation.

The Mutual Evaluation Report identified a shortcoming in the investigative techniques and powers of competent authorities / law enforcement agencies, in that they do not have powers to access computer systems as ACC investigative officers have in terms of section 24(1)(g) and (h) of the ACC Act. In order to cure the deficiency, it is suggested that section 26A be inserted after section 26 of the CPA to include and cover access to computer systems with consequential amendments to sections 21 and 22 of the CPA.

Accordingly, it is proposed that sections 21, 22, 26, 158 and 205 of the Criminal Procedure Act 51 of 1977 be amended and a new section 252 be introduced to achieve this.

EXPLANATORY NOTE:

- _____ Words underlined with a solid line indicate insertions in existing provisions
- [] Words in bold type in square brackets indicate omissions from existing provisions

BILL

To amend the Criminal Procedure Act, 1977 to provide for the giving of evidence through a live video link or similar electronic media; to provide for the furnishing of evidence to a Judge of the High Court, Regional Court Magistrate, or District Court Magistrate without the need for appearance and to provide for police powers to use traps and undercover operations and for the admissibility of evidence so obtained, to allow matters adjudicate din the Regional Court to be referred to the High Court for sentencing

BE IT ENACTED as passed by the Parliament, assented to by the President, of the Republic of Namibia as follows:

Amendment of section 26 of Act No 51 of 1977

The following section is inserted after section 26:

Access to, search and seizure of electronic records

26A. (1) the Inspector-General, a Police officer of or above the rank of Chief Inspector, shall request in writing any person in charge of a financial institution, any juristic person or any other person authorized thereto to disclose any record, book,

register, correspondence or other document, information or material relating to the affairs or the account of any customer of the financial institution, including data stored in electronic form, which may assist the police officer in his/her investigation.

(2) A person who without reasonable cause fails to comply with a request in terms of subsection (1) above, or who obstructs or fails to grant access to a police officer conducting a search in terms of sections 21, 22, 23, 24, 25, 27 commits an offence and is liable to a fine not exceeding N\$100 000 or to imprisonment not exceeding five years or to both such fine and such imprisonment.

Amendment of section 158 of Act No. 51 of 1977

The following section of the Criminal Procedure Act, 1977: Insert after Section 158 A

Amendment of section 158 of Act No. 51 of 1977

The following section of the Criminal Procedure Act, 1977: Insert after Section 158 A

“158 B. Special arrangements for witnesses to testify through live video link

(1) A court may, on its own motion or on the application of any party to such proceedings or the witness concerned, order that a witness, in or outside Namibia, give evidence through live video link or similar electronic transmission.

(2) A court may make an order contemplated in subsection (1) only if facilities therefor are readily available or obtainable and if it appears to the court that to do so would-

- (a) prevent unreasonable delay;
- (b) save costs;
- (c) be in the interest and wellbeing of the witness concerned;

(d) be in the interest of the security of the State or of public safety or in the interests or administration of justice or the public interest; or

(e) prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings.

(3) The court may, in order to ensure a fair and just trial, make the giving of evidence in terms of subsection (1) and (2) subject to such conditions as it may deem necessary: Provided that the accused, his or her legal representative, the prosecutor in the case and the presiding officer shall be able to hear the witness and shall also be able to observe the witness while such witness gives evidence.

(4) An order issued under subsection (1) shall order the witness to attend at a time and place fixed by the court to give his/her testimony through a live video link and to remain in attendance until excused by the court.

159A Postponement of certain criminal proceedings through audio-visual link

(1) For purposes of this section and sections 159B, 159C and 159D, unless the context indicates otherwise-

(a) 'appropriate person' means any court official or any other person at the court point and remote point who is required to be, or may be, present at the proceedings, including the presiding officer, the prosecutor, the accused person's legal representative, any technical assistant, the clerk of the court, any witnesses, and members of the public who are entitled to be present;

(b) 'audio link' means a live telephone link between the court point and the remote point which are both equipped with facilities which will enable audio communication between all appropriate persons at the court point and the remote point;

(c) 'audio-visual link' means a live television link between the court point and the remote point which are both equipped with facilities which will enable all appropriate persons at the court point and the remote point to follow the proceedings and see and hear all the appropriate persons;

(d) 'court point' means the courtroom or other place where the court having jurisdiction is sitting;

(e) 'correctional facility' means a correctional facility as defined in the Correctional Service Act, 2012 (Act 9 of 2012) and a place used as a police cell or lock-up; and

(f) 'remote point' means the room or place at the designated correctional facility where the accused person appearing through audio-visual link is located.

(2) An accused person-

(a) who is over the age of 18 years;

(b) who is in custody in a correctional facility in respect of an offence;

(c) who has already appeared before a court;

(d) whose case has been postponed and who is in custody pending his or her trial; and

(e) who is required to appear or to be brought before a court in any subsequent proceedings (whether before, during or after the trial or conviction and sentence) for the purpose of-

(i) a further postponement of the case;

(ii) consideration of release on warning in terms of section 72(1)(a), where the release on warning is not opposed by the prosecutor or where the release on warning does not require the leading of evidence; or

(iii) consideration of release on bail in terms of section 60, 63, 307, or 321, where the granting of bail is not opposed by the prosecutor or where the granting of bail does not require the leading of evidence, is not required to appear or to be brought physically before the court but may, subject to the provisions of this section, sections 159B, 159C and 159D, appear before court by audio-visual link and is deemed to be physically before court, unless the court directs, in the interests of justice, that he or she appears or be brought physically before it.

(3) Any proceedings in terms of subsection (2) shall be regarded as having been

held in the presence of the accused person if, during the proceedings, that person-

(a) is held in custody in a correctional facility; and

(b) is able to follow the court proceedings and the court is able to see and hear the accused person by means of audio-visual link.

(4) The remote point shall be regarded as being a part of the court.

Insertion of section 159B into Act 51 of 1977

159B Requirements for audio-visual appearance by accused person

(1) An accused person appearing before a court by audio-visual link must do so from a place at which the requirements referred to in subsections (2) and (3) and section 159C are complied with.

(2) The Minister may, subject to the provisions of this section, designate any correctional facility which has been suitably equipped as a place where proceedings in terms of section 159A can be held.

(3) Both the court point and the remote point in the correctional facility designated in terms of subsection (2) must be equipped with facilities that, in accordance with any requirements prescribed by regulations and any directions of the court referred to in section 159C, allow-

(a) private communication to take place between the accused person and any legal practitioner representing that person in the proceedings at the court point; and

(b) documents to be transmitted between both points by the persons referred to in paragraph (a)-

(i) at any time during the proceedings;

(ii) during any adjournment of the hearing in the proceedings referred to in paragraph (a); or

(iii) at any time on the day of a hearing, shortly before or after the hearing.

(4) The court must, at every appearance of an accused person in terms of section 159A, inquire into the physical and mental well-being of the accused person and for that purpose may, where necessary, direct that the facilities referred to in section 159C be used in such a manner which will enable the presiding officer to satisfy himself or herself as to the accused person's well-being as that presiding officer would be able to do if the accused person were physically before the court.

159C Technical requirements for use of audio-visual link

(1) For the purposes of proceedings in terms of section 159A, both the court point and the remote point must be equipped with facilities that enable all appropriate persons-

(a) at the court point to see and hear a person appearing before the court or making a submission or any other appropriate person at the remote point and to follow the proceedings; and

(b) at the remote point to see and hear all appropriate persons at the court point and to follow the proceedings.

(2) (a) In the event of-

(i) an interruption of an audio-visual link;

(ii) an audio-visual link being of a poor quality which, in the opinion of the court, is not in the interests of justice to continue the proceedings by way of audio-visual link; or

(iii) any of the facilities referred to in subsection (1) malfunctioning, the court must, subject to paragraph (b), direct that the matter stand down and cause the accused person to be brought physically before the court on the day in question.

(b) If it is not reasonably practicable to bring the accused person to court on the day, as provided for in paragraph (a), the court must, prior to the expiry of the existing court order for the accused person's detention, postpone the proceedings in the absence of the accused person, to the next court day.

(3) The Minister may make any regulations necessary to give effect to the technical requirements referred to in subsection (1).

(4) A court may, in order to ensure a fair trial, give any directions in any case as it may deem necessary, which may not be inconsistent with any provision of this Act or any regulation made thereunder.

159D Protection of communication between accused person and legal Representative

Without limiting any other protection applying to it, a communication by audio link or audio-visual link, or a document transmitted between an accused person and his or her legal representative as provided for in section 159B (3), is confidential and inadmissible in any proceedings as if the communication took place or the document was produced while they were in the presence of each other.

Amendment of Section 205 of Act No. 51 of 1977

The following section is substituted for section 205 of the Criminal Procedure Act, 1977:

“205. Magistrate or Magistrate may take evidence as to alleged offence

(1) A magistrate may upon the request of the Prosecutor General or a public prosecutor, require the attendance before him or her or any other judge, regional court magistrate or magistrate, for examination by the Prosecutor General or the public prosecutor, of any person who is likely to give material or relevant information as to any alleged offence, whether or not it is known by whom the offence was committed: Provided that if such person furnishes that information to the satisfaction of the public prosecutor concerned prior to the date on which he or she is required to appear before a judge, regional court magistrate or magistrate, he or she shall be under no further obligation to appear before such judge, regional court magistrate or magistrate.

Amendment of Chapter 24 of the Criminal Procedure Act No. 51 of 1977

Chapter 24 of the Criminal Procedure Act, 1977 is hereby amended by insertion of the following section after section 252.

“252A. Authority to make use of traps, undercover operations and control delivery and admissibility of evidence so obtained – copied from 2004 CPA which never came into operation

(1) A police official may make use of a trap or engage in an undercover operation to detect, investigate or uncover the commission of an offence, or to prevent the commission of an offence, and the evidence so obtained is admissible if that conduct does not go beyond providing an opportunity to commit an offence, but where the conduct goes beyond providing an opportunity to commit an offence a court may admit evidence so obtained subject to subsection (3).

(2) In considering the question whether the conduct goes beyond providing an opportunity to commit an offence, the court must have regard to the following factors:

(a) The nature of the offence under investigation, including-

(i) whether the security of the State, the safety of the public, the maintenance of public order or the national economy is seriously threatened thereby;

(ii) the prevalence of the offence in the area in question; and

(iii) the seriousness of the offence;

(b) The availability of other techniques for the detection, investigation or uncovering of the commission of the offence or the prevention thereof in the particular circumstances of the case and in the area in question;

(c) whether an average person who was in the position of the accused, would have been induced into the commission of an offence by the kind of conduct employed by the police official concerned;

(d) the degree of persistence and number of attempts made by the police official before the accused succumbed and committed the offence;

(e) the type of inducement used, including the degree of deceit, trickery, misrepresentation or reward;

(f) the timing of the conduct, in particular whether the police official instigated the commission of the offence or became involved in an existing unlawful activity;

(g) whether the conduct involved an exploitation of human characteristics such as emotions, sympathy or friendship or an exploitation of the accused's personal, professional or economic circumstances to increase the probability of the commission of the offence;

(h) whether the police official has exploited a particular vulnerability of the accused such as a mental handicap or a substance addiction;

(i) the proportionality between the involvement of the police official as compared to that of the accused, including an assessment of the extent of the harm caused or risked by such police official as compared to that of the accused, and the commission of any illegal acts by such police official;

(j) any threats, implied or expressed, by the police official against the accused;

(k) whether, before the trap was set or the undercover operation was used, there existed any suspicion, entertained on reasonable grounds, that the accused had committed an offence similar to that to which the charge relates;

(l) whether the police official acted in good or bad faith;

(m) any other factor that in the opinion of the court has a bearing on the question.

(3) (a) If a court in criminal proceedings finds that in the setting of a trap or the engaging in an undercover operation the conduct goes beyond providing an opportunity to commit an offence, the court may refuse to allow such evidence to be tendered or may refuse to allow such evidence already tendered, to stand, if the evidence was obtained in an improper or unfair manner and the admission of such evidence would render the trial unfair or would otherwise be detrimental to the administration of justice.

(b) When considering the admissibility of the evidence, the court must weigh up the public interest against the personal interest of the accused, having regard, where applicable, to the following factors:

(i) The nature and seriousness of the offence, including-

(aa) whether it is of such a nature and of such an extent that the security of the State, the safety of the public, the maintenance of public order or the national economy is seriously threatened thereby;

(bb) whether, in the absence of the use of a trap or an undercover operation, it would be difficult to detect, investigate, uncover or prevent its commission;

(cc) whether it is so frequently committed that special measures are required to detect, investigate or uncover it or to prevent its commission; and

(dd) whether it is so indecent or serious that the setting of a trap or the engaging of an undercover operation was justified;

(ii) the extent of the effect of the trap or undercover operation on the interests of the accused, if regard is had to-

(aa) the deliberate disregard, if at all, of the accused's rights or any applicable legal and statutory requirements;

(bb) the ease, or otherwise, with which the requirements contemplated in item (aa) could have been complied with, having regard to the circumstances in which the offence was committed; and

(cc) the prejudice to the accused resulting from any improper or unfair conduct;

(iii) the nature and seriousness of any infringement of any fundamental right contained in the Namibian Constitution;

(iv) whether in the setting of the trap or the engagement of an undercover operation the means used was proportional to the seriousness of the offence;

(v) any other factor that in the opinion of the court ought to be taken into account.

(4) The Inspector- general in consultation with the Attorney General, may issue general or specific guidelines regarding the supervision and control of traps and undercover operations, and may require any official or his or her agent to obtain his or her written approval in order to set a trap or to engage in an undercover operation at any place within his or her area of jurisdiction, and in connection therewith to comply with his or her instructions, written or otherwise.

(5)(a) A police official who sets or participates in a trap or an undercover operation to detect, investigate or uncover or to obtain evidence of or to prevent the commission of an offence, is not criminally liable in respect of any act that constitutes an offence and that relates to the trap or undercover operation if it was performed in good faith.

(b) No prosecution for an offence contemplated in paragraph (a) may be instituted against a police official without the written consent of the Prosecutor-General.

(6) If at any stage of the proceedings the question is raised whether evidence should be excluded under subsection (3), the burden of proof to show, on a balance of probabilities, that the evidence is admissible, lies with the prosecution, but-

(a) the accused must furnish the grounds on which the admissibility of the evidence is challenged;

(b) if the accused is not represented, the court must raise the question of the admissibility of the evidence.

(7) The question whether evidence should be excluded under subsection (3) may, on application by the prosecutor or the accused or by order of the court of its own motion, be adjudicated as a separate issue in dispute.”