CASE NO.: CC 22/2010

IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI

In the matter between:

THE STATE

and

JONAS HALEINGE NGESHEYA

CORAM: LIEBENBERG, J.

Heard on: 19 September 2011
Delivered on: 29 September 2011

JUDGMENT
Section 174 Application

LIEBENBERG, J.: [1] At the close of the State case Ms. *Kishi*, appearing on behalf of the accused, made application in terms of section 174 of the Criminal Procedure Act[1] for the discharge of the accused on all three charges.

[1] Act 51 of 1977

Mr. *Wamambo*, representing the State, opposed the application. Both counsel submitted oral arguments in support of their opposing views.

[2] The charges preferred against the accused and to which he pleaded not guilty, were: murder; robbery (with aggravating circumstances); and defeating or obstructing or attempting to defeat or obstruct the course of justice. The defence raised by the accused is that he was not present when the offences were committed but somewhere else; which amounts to an alibi. The detail of the alibi was set out in his plea explanation and it is trite law that the accused does not bear the burden of proving that his alibi is true.[2] In this instance the accused gave the particulars of his alibi and the prosecution accordingly knew from the onset which allegations it had to rebut during the State case.

[3] Counsel appear to be in agreement that the commission of the offences are closely related to the extent that proof of the one would obviously prove the other. In the circumstances of the case I consider that to be a fair conclusion.

[4] Section 174 of the Criminal Code provides that:

> *"If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty."*

[2] *R v Biya*, 1952 (4) SA 514 (A) at 521D-E; *R v Hlongwane*, 1959 (3) SA 337 (A) at 340H and 341A-B

[5] It is now a well-established principle that the words *"no evidence"* in the section means no evidence upon which a reasonable court, acting carefully, may convict. It is clear from the section that the court has a discretion (which must be exercised judiciously[3]) to discharge the accused at the end of the State case if there is no evidence to convict on. The criterion was reaffirmed in *S v Teek*[4] where Brand AJA had the following to say at 130I – 131C:

> *"[7] Over the years the trite principle has been established - both in Namibia and with reference to the identically worded s 174 of the South African Criminal Code - that no evidence in terms of the section means no evidence upon which a reasonable court, acting carefully, may convict (see eg* ***S v Nakale*** *2006 (2) NR 455 (HC) at 457 and the authorities there cited). Somewhat more controversial is the question whether credibility of the State witnesses has any role to play when a discharge is sought under the section. But the generally accepted view, both in Namibia and in South Africa, appears to be that, although credibility is a factor that can be considered at this stage, it plays a very limited role. If there is evidence supporting a charge, an application for discharge can only be sustained if that evidence is of such poor quality that it cannot, in the opinion of the trial court, be accepted by any reasonable court (see eg* ***S v Mpetha and Others*** *1983 (4) SA 262 (C) at 265; S v* ***Nakale*** *supra at 458). Put differently, the question remains: is there, having regard to the credibility of the witnesses, evidence upon which a reasonable court may convict?"*

[6] The application is brought on two bases namely, (i) that the credibility of the State witnesses are of such poor quality that no reasonable court would

[3] *S v Shilamba*, 1991 NR 334 (HC)
[4] 2009 (1) NR 127 (SC)

accept it; and (ii) that on the evidence adduced, no connection can be made between the accused and the offences committed. The State in its opposition of the application contended that although the State case is entirely based on circumstantial evidence, the totality thereof is sufficient to put the accused on his defence. It was also submitted that the quality of the evidence adduced was not of such poor quality that it must be outright rejected. The Court was furthermore urged to favourably consider the evidence of Deputy Commissioner Agas pertaining to a pointing out made to him by the accused of the crime scene on the 8th of April 2008.

[7] The witnesses who allegedly gave unreliable evidence were Fransina Kautwima and Martha Shilunga and their evidence mainly focussed on whether or not there was a romantic relationship between Fransina and the accused (the same time she was involved in a relationship with the deceased); and whether the accused was in possession of the mobile phones of the two witnesses during the period immediately preceding the disappearance and subsequent death of the deceased.

[8] Despite Fransina's protestation that the romantic relationship between her and the accused had been terminated earlier, it would not appear to have been the case as they were still sharing the same bed at the time. Furthermore, according to Martha they still had an on-going affair and it seems to me that Fransina had been hiding this fact from the Court during her testimony. A possible explanation for this might lie in the fact that both Fransina and Martha were suspects in the early stages of the investigation

and that Fransina now tries to distance herself from the accused as far as possible. However, on the evidence adduced, one is inclined to conclude that Fransina was simultaneously involved in two romantic relationships i.e. with the accused and the deceased. This, the State contended, was the accused's motive for killing the deceased.

[9] The relevance of the mobile phones lies therein that from records obtained from the mobile phone provider (MTC) which were handed into evidence, it was established that several text messages (16) were sent to and from the deceased's phone and that of Martha, on the 19th of February 2008. That was the day on which the deceased was allegedly murdered. It would also appear that the SIM card of Martha's phone was interchanged with Fransina's phone when phone calls were made. It must be noted that with text messages the records only reflect the numbers of the respective SIM cards and not the serial numbers of the phones used; which means that a text message could have been sent from a phone other than that of its owner. Besides the call register, the records also do not reflect the content of the text messages. Because the whereabouts of the deceased on that particular day are unknown, it would be impossible to determine whether or not he was in possession of his phone; and to date, the deceased's mobile phone has not been recovered.

[10] According to the witnesses Fransina and Martha, the accused got possession of their phones when they sent it to have the batteries recharged. When he returned to their room on the night of the 19th they enquired from him

where their phones were; to which he replied that it remained at Ohangwena. Fransina later retrieved their phones from the pocket of his trousers and found same to be wet. The accused, however, denied that he had possession of the witnesses' phones at that stage.

[11] Although there are some discrepancies between the evidence of Fransina and Martha pertaining to the events that took place that night, I do not consider these to be material. As far as it concerns relevant issues such as whether or not the accused had possession of their mobile phones during the stages when contact was established with the deceased's phone, they corroborate one another in all material respects. They were clear in their testimony that their phones were found with the accused and I do not consider their evidence to be of such poor quality that no reasonable court would accept it.

[12] In my view, it was duly proved that on the evening of 19 February 2008 the accused was in possession of the mobile phones of the two witnesses Fransina and Martha. Also, that the accused's clothes, including the phones which were in his trouser pocket, were all wet; and that it had been raining during the day.

[13] I now turn to consider whether the totality of the pieces of evidence put together, constitute sufficient evidence before the Court to put the accused on his defence. I shall deal with the pointing out of the crime scene, allegedly made by the accused on 8 April 2008, first.

[14] This Court in its earlier judgment delivered on the admissibility of a statement allegedly made by the accused and noted down by Deputy Commissioner Agas, already expressed its dissatisfaction with the intolerable situation where the officer was actively involved in the investigation;, yet, he considered himself suitable to conduct a pointing out of a crime scene and the recording of a self-incriminating statement made by the accused. Reference was also made to the circumstances giving rise to the pointing out and the making of the statement; and the Court, in the end, was convinced that the accused would not be given a fair trial, should the statement be admitted into evidence. From the evidence of one of the State witnesses it became apparent that forceful methods were adopted to extract information from them whilst they were still suspects; and whereas the accused complained of the same treatment, this creates doubt in the Court's mind as to whether or not the subsequent pointing out of the crime scene and the making of a statement was done without the accused having acted under undue influence. According to the evidence of Warrant Officer Rehabeam the accused informed him that he wanted to make a *confession* to Deputy Commissioner Agas, which Rehabeam arranged. However, from para 1 of the notes on the pointing out of a crime scene prepared by Agas, it is indicated that Rehabeam informed him that the accused *"…is willing to point out the crime scene"*, without any reference what so ever made about a confession. Until then, nothing has been said about a pointing out the accused wished to make. This discrepancy remained unanswered and makes the circumstances surrounding the pointing out of the crime scene by the accused, even more suspicious.

[15] For the aforementioned reasons I have come to the conclusion that, although the photo plan and accompanying notes on the pointing out were handed into evidence and form part of the evidential material against the accused; which have to be considered along with all the other evidence, it should be excluded as evidence, for its inclusion would undoubtedly infringe on the fundamental right of the accused to a fair trial.

[16] By the exclusion of the evidence on the pointing out of the crime scene alleged to have been made by the accused, the only evidence remaining relates to the calls made from the mobile phones of Fransina and Martha (whilst in the possession of the accused), to that of the deceased; and the evidence about a mobile phone that was handed in for repairs by the accused.

[17] According to the testimony of Immanuel Sheyapo the deceased bought a Nokia 70 phone from him the previous year on 30 November 2007. No other particulars about this phone are available.

[18] Simon Shigwedha, a technician, testified that between 20 – 23 February 2008, the accused brought two mobile phones to him for repairs. These were a Nokia N70 and an LG, both having been damaged by water. The accused only returned for the LG and whereas the Nokia remained uncollected, it was eventually sold to an unknown person to cover the repair expenses. No particulars of the phones were recorded at the stage of repairs either. Thus,

the only common feature between the phone the deceased had bought and the one that the accused handed in for repairs, is the make i.e. a Nokia N70.

[19] It follows that the SIM card number and the mobile serial number which appears on the MTC printout against the name of the deceased cannot be compared in order to see whether it corresponds. In the absence of evidence showing that the serial number of the Nokia N70 phone handed in for repairs corresponds with the number registered with MTC, it would by law not be permissible to draw such inference from the proved facts, simply because it is not the only reasonable inference that can be drawn from the facts.[5] This phone must have been one of a series of similar phones manufactured and there was nothing unique about it. In *S v Mtsweni*[6] at 593E-G Smallberger AJA referred with approval to the remarks of Lord Wright in *Coswell v Powell Duffryn Associated Collieries Ltd*[7] which reads as follows:

> *"Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts, which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture …."*

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[5] See: *R v Blom*, 1939 AD 188
[6] 1985 (1) SA 590 (A)
[7] [1939] All ER 722 on 733

[20] The fact that the specific phone was damaged by water does not take the matter any further. No inference can be drawn from the fact that the body of the deceased was found in the water and the damaged phone handed in. Neither can it be inferred that, because the phones of Fransina and that of Martha, when found in the trouser pocket of the accused, were also wet, therefore the accused is linked to the murder. Not only had it been raining during the day, explaining the accused's wet clothes, but there is no evidence showing that the deceased was killed whilst being in the water. Finding otherwise, in my view, would be pure speculation and conjecture.

[21] In conclusion, the totality of what has been said above is that the evidence adduced during the State case is not such that a reasonable court, acting carefully, may convict on any of the charges preferred against the accused or any competent charge; and therefore, the accused should not be put on his defence.

[22] In the result, on counts 1 – 3 the accused is found not guilty and discharged.

[23] In respect of the following exhibits it is ordered that:

Exhibits 1 – 3 are forfeited to the State

Exhibits 4 & 5 are to be returned to the lawful owners.

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LIEBENBERG, J

ON BEHALF OF THE ACCUSED **MS. F. KISHI**

Instructed by: **KISHI LEGAL PRACTIONERS**

ON BEHALF OF THE STATE **Mr. N. WAMAMBO**

Instructed by: **Office of the Prosecutor-General**