



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

Case No: CC 63/2007

**THE STATE**

Versus

**JAN J JULIUS**

**GEORGE JAMBEINGE**

**BENEDICTUS KASIMBINGWE**

**ELITANA NGHIMWENA**

**MATHEUS HAUWANGA**

**JASON AWENE**

**Neutral citation:** *S v Julius and 5 Others* (CC 63/2007) [2014] NAHCMD 59 (20 February 2014)

**Coram:** SHIVUTE, J

**Heard:** 18 – 27 January 2010, 1-8 February 2010, 30 November 2011,  
10 – 27 April 2012, 21 January 2013 until 8 February 2013,  
28 March 2013, 4 June 2013 and 19 – 29 November 2013.

**Delivered:** 20 February 2014

**Summary: Criminal Procedure – Trial – Application in terms of s 174 – Test to be applied – Whether there is evidence on which a reasonable court acting carefully may convict – There is no hard and fast rule that can be laid down – Each case must be considered on its own merits and circumstances- It is a consideration whether there is a reasonable possibility that the defence evidence may supplement the State evidence – Other considerations, including the accused’s fundamental rights play a role.**

---

**VERDICT**

---

1. There is a *prima facie* case made against accused 1 and 2 and they are placed on their defence.
2. No *prima facie* case made against accused 3, 4, 5 and 6 and each of them is found not guilty and discharged in terms of s 174 Act 51 of 1977.

---

**RULING ON APPLICATION IN TERMS OF S 174 OF THE CRIMINAL  
PROCEDURE ACT 51 OF 1977.**

---

**SHIVUTE J:**

[1] The accused persons pleaded not guilty to an indictment containing one count of robbery with aggravating circumstances as defined in s 1 of Act 51 of 1977. It is alleged that on 29 December 2004 at or near Brakwater road, Windhoek in the district of Windhoek the accused did unlawfully and with intention of forcing him into submissions, assault Stefanus Iyambo by pointing a pistol at him unlawfully and with intent to steal took from him N\$5 735 000 cash, the property of or in lawful

possession of the said Stefanus Iyambo and or Fidelity Services Group, Namibia, and that aggravating circumstances as defined in S 1 of Act 51 of 1977 are present in that the accused and/or an accomplice were, before, after or during the commission of the crime, in possession of a dangerous weapon, namely a pistol. A summary of substantial facts alleges that the accused persons acted with a common purpose before, during and after the incident.

[2] At the end of the State case counsel for the accused persons applied for a discharge in terms of s 174 of Act 51 of 1977. The State opposed the application in respect of accused persons Nos. 1, 2 and 6.

[3] It was argued on behalf of accused Nos. 1 and 2 that there is no *prima facie* case made out by the State against the two accused persons. Counsel argued that there is no evidence that the money that was recovered was part of the money that was robbed in respect of this case. Furthermore, the money was not counted in the presence of the accused persons and it was not signed for when it was collected. Counsel further argued that it is not an offence to give a lift to a hitch hiker. He further criticised the testimony of Iyambo who testified that it was accused No. 1 who disarmed him. This is contrary to what he said in his testimony that it was a hand which is light in complexion that disarmed him. Counsel argued that there is no evidence that accused persons acted in common purpose. In respect of accused No. 2 counsel argued that although he took the police to the place where the car was, he never told the police that he was going to show them the money that was involved in the robbery. Counsel argued that accused no. 2 told the police that he had sold his vehicle and that he was given the money by one Sunny Boy Emvula but no investigations were made regarding this allegation. No evidence was adduced as to how the trunk of money got into the boot of the vehicle where it was found. Although accused 2 had keys to the vehicle and opened the boot where the money was found it is not an offence to have the keys to the car. Counsel argued that the court should not place accused 1 and 2 on their defence because there is no evidence on which a reasonable court may convict and urged the court to discharge both accused persons.

[4] Counsel for accused no. 6 asked for the court to discharge him because there is no evidence on which a reasonable court may convict. Counsel argued that no evidence adduced in this court that accused no. 6 was the hitch hiker.

[5] On the other hand, counsel for the State argued that there is ample evidence warranting placing accused nos. 1 and 2 on their defence. Accused 1 was employed by Fidelity Services at the time of the commission of the offence. He had actively participated in the commission of the offence as he was the driver and in physical control of the vehicle that was carrying the money. He deviated from the route which he was supposed to use and picked up a hitch hiker. After they drove with a hitch hiker, the hitch hiker struggled with witness Iyambo and pointed a firearm at him. Witness Iyambo screamed for help but accused no. 1 did not help him. When Iyambo tried to get his firearm, accused 1 removed it and told the witness not to shoot the hitch hiker because accused 1 knew him. Witness Iyambo was kicked and sprayed with pepper spray whilst accused 1 came out of this incident unscathed. Whilst State witness Iyambo was held to the ground, he saw accused no. 1 opening the safes one by one and removed the money bags from the Fidelity truck. Counsel further argued that had it not been for accused 1 who cooperated with the hitch hiker this robbery was not going to be committed.

[6] As for accused 2 counsel for the State argued that accused 2 voluntarily took the police officers to a house in Hochland Park or Tauben Glen where his sedan vehicle, a white Honda, was parked. The accused had the keys to this vehicle. A green metal box was found locked in the boot of accused 2's vehicle. Accused 2 went with the police to collect the key of the green metal box from his vehicle that was at the police station. After they collected the key, they went back to Tauben Glen and the box was opened. Inside the box was a large amount of money that was covered with magazines. The money was counted and it was N\$1,515 000 (one million five hundred and fifteen thousand Namibia dollars).

[7] Concerning accused 2's allegations that he informed the police that he was given the money by one Sunny Boy Emvula, counsel argued that it was disputed by State witnesses that accused 2 informed the police officers as such. Therefore,

counsel considered such allegation as an afterthought to enable accused 2 to explain his possession of such a large amount of money. In respect of the criticism levelled against the State by counsel for accused 1 and 2 that the money found in accused 2's car was not linked to the robbery, counsel for the State argued that State witness Mr Pegram testified that he worked at First National Bank on 28 December 2004 and they audited a large amount of money from Bank of Namibia in the amount of N\$3 700 000 to be distributed to the local branches at the coast. Furthermore, there is evidence from Ms Bachnote, an employee of Bank of Namibia, whose testimony was that Bank of Namibia orders money from the South African bank notes company. When the money arrives at Bank of Namibia there is a logo on a strip that is used to fasten the money written SABN. The same logo was identified by the witness on the packages of money found in accused 2's car. Counsel argued that there is a link between the money that was involved in the robbery and the money found in accused 2's vehicle. Again counsel for the State argued that according to State witness Ndakalako, accused 2 went to her house on December 2004 and requested to park his vehicle at her house. Counsel argued that this was less than 24 hours after the robbery was committed on 29 December 2004.

[8] Counsel argued that accused 2 was in possession of the car keys as well as the key to the green metal box and he must have known what was in the metal box. Although it was not proved that accused 2 was at the scene of crime there is sufficient evidence placed before this court establishing a *prima facie* case against accused 2 that may lead to the convictions of competent verdicts to the offence of robbery. Counsel contended that the State had placed ample evidence on which a reasonable court may convict. Therefore, she urged the court to place accused 1 and 2 on their defence.

[9] With regard to accused persons 3 – 6 counsel for the state conceded that there is no sufficient evidence adduced to warrant them to be placed on their defence and that they should therefore be discharged in terms of s 174.

[10] I was referred by counsel on both sides to authorities concerning application in terms of s 174 of Act 51/77 which I have fully considered.

[11] Section 174 of the Act provides as follows:

'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.'

The purpose of s 174 is to acquit the accused where there is no evidence on which a reasonable court may convict. See Hoffmann & Zeffert *The South African Law of Evidence* 4<sup>th</sup> edition at 503-4.

[12] When deciding whether or not to discharge in terms of s 174, it is not easy to provide a test that remains applicable to all circumstances. In order to reach a just decision each case must be decided on its own merits.

*S v Ningisa and Others* unreported delivered on 14 October 2003 in which Silungwe J adopted the position followed in *S v Phuravatha and Others* 1992 (2) SACR 544 (V).

[13] Furthermore, in deciding whether or not to discharge in terms of s 174, I will be guided by the principles as set out in *S v Nakale and Others* 2006 (2) NR 455 (HC) at 466.

I have considered that the court has a discretion to discharge or to place an accused on his or her defence at the end of the State case. The criterion at this stage is whether there is no evidence on which a reasonable court, acting carefully, may convict; credibility of witnesses plays only a very limited role at this stage. It is a consideration whether there is a reasonable possibility that the defence evidence may supplement the State evidence. I have also taken into consideration that certain factors may have an impact on whether the accused may provide evidence to substitute that of the State like the type of the offence alleged, the manner of questioning and putting statements to witnesses during the cross-examination and allegation or admissions made during trial. The rights of the accused as entrenched in the Namibian Constitution should always be kept in mind and that every case should be considered on its own merit and circumstances.

[14] Another point of consideration is whether the court's discretion in terms of s 174 to discharge or not is affected by Article 12(f) of the Constitution of Namibia which affords protection to an accused in a criminal trial not to be compelled to give evidence against himself. Fundamental rights to an accused person enshrined in the Namibian Constitution do not affect the discretion to be exercised by the court in terms of s 174. See *S v Nakale and Others supra*.

[15] As far as credibility of State witnesses is concerned, there are conflicting views whether and to what extent consideration should be given to the credibility of witness at the closing of the State case.

Brand AJA in *S v Teek* 2009 (1) NR 127 (SC) at 131 stated the position as follows:.

'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 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?

[16] I will now propose to consider the application in the light of the aforementioned principles. I do not wish to recite the evidence because the relevant facts for the purpose of this application are already placed on record by counsel from both sides through their arguments.

[17] Concerning Mr Stefanus Iyambo's testimony, apart from what was submitted, when it was put to Mr Iyambo that when he testified in court he said it was accused 1 who disarmed him but in his statement at the police he said the hand that removed his firearm was light in complexion and he allegedly did not say it was accused 1. This court had the opportunity to read the witness' statement made at the police after it was produced as an exhibit in court. According to the witness statement, the

witness said he looked back and could see that the hand that was removing his firearm was light in complexion. He continued to say that he was sure it was the hand of Jan Julius. Concerning the identity of the hitch hiker, the witness first said the hitch hiker wore clothes similar to that of accused 6. Later on he said it was accused 6 who was the hitch hiker. However, when he was cross-examined he retracted his second version that the hitch hiker was not accused 6 but he only wore clothes similar to the clothes of accused 6. Furthermore, when it was put to the witness that accused 1 will deny that he assaulted the witness or disarmed him; the witness maintained that accused 1 disarmed him.

[18] Apart from the evidence incriminating accused 1 and 2 as pointed out by counsel for the State, there is no other evidence linking accused persons 3, 4, 5 and 6 to the crime. Although counsel for the State earlier on indicated that she was going to oppose the application for discharge in respect of accused 6, she later on conceded that the State did not establish a *prima facie* case against accused 6.

[19] The test for discharge in terms of s 174 is different from the test to be used at the end of the case in the sense that the evidence as a whole, including the probabilities of the particular case is required to be assessed by the court at the end of the case. The value to be accorded to the evidence adduced and its reliability will be determined once the court is in a position to consider the evidence as a whole. I do not wish to make a credibility finding at this stage in respect of the witness who testified. However, it is trite law that not all the contradictions render the testimony of the witness inadmissible.

In *S v Oosthuizen* 1982 (3) SA 571 (T) at 576A Nichols J made the following observations with which I respectfully agree:

'There is no reason in logic why the mere fact of contradiction, or of several contradictions, necessarily leads to the rejection of the whole of the evidence of a witness.'

[20] The question to be decided is whether the evidence adduced by the State is of such poor quality that no reasonable court may possibly convict. The State led



direct evidence incriminating accused 1 who allegedly picked up a hitch hiker and the hitch hiker turned into a robber. The hitch hiker was allegedly working in cohort with accused 1 who allegedly disarmed the witness and told him not to shoot the hitch hiker because accused 1 allegedly knew the hitch hiker. Although accused 1 gave instructions that he did not cooperate with the robber, the value to be accorded to what he said and its reliability may only be determined if it is tested through cross-examination.

[21] Furthermore, the State has led evidence alleging that there was money found in accused 2's vehicle. Accused 2 was in possession of the keys to the vehicle and the key to the trunk where a large amount of money was found. The accused was in control of the vehicle where the money was found. The money was allegedly linked to the money that was robbed on 29 December 2004 because of the logo that was found on the strap that was used to tie the money. Although it was put on behalf of accused 2 to State witnesses that the money was given to him by Sunny Boy Emvula, the allegation that was disputed by the State witnesses, the value to be accorded to this assertion and reliability may only be determined if it is tested through cross-examination.

[22] For the above mentioned reasons, I am satisfied that the State has established a *prima facie* against accused 1 and 2. I will therefore place them on their defence.

[23] With regard to accused 3, there is no sufficient evidence to warrant him to be placed on his defence. According to counsel for the State this is due to the death of a certain Sunny Boy Emvula and a witness residing in South Africa who was subpoenaed but refused to come to Namibia to give his testimony. The State alleged that their testimonies were supposed to link accused 3 to the commission of this offence. Concerning accused 4 and 5 their link to this case depended on the evidence against accused 6 if he was proved to be the hitch hiker. It was alleged that they assisted accused 6 in furtherance of this crime. There is no sufficient evidence that accused 6 was the hitch hiker. Therefore, counsel for the State properly conceded that no sufficient evidence against accused 3, 4, 5 and 6 has been

established. The evidence adduced in respect of these accused persons is of such a poor quality that no reasonable court acting carefully may convict.

[24] In the premises the following order is made:

1. There is a *prima facie* case made against accused 1 and 2 and they are placed on their defence.
2. No *prima facie* case made against accused 3, 4, 5 and 6 and each of them is found not guilty and discharged in terms of s 174 Act 51 of 1977.

-----  
N N Shivute  
Judge

#### APPEARANCES

STATE	:	Ms Meyer Office of the Prosecutor-General
ACCUSED 1 & 2	:	Mr Neves Instructed by Directorate of Legal Aid
ACCUSED 3	:	Adv. Louw Instructed by Neves Legal Practitioners
ACCUSED 4	:	Adv. Hamutenya Instructed by Directorate of Legal Aid
ACCUSED 5	:	Adv. Hinda

11  
11  
11  
11  
11

ACCUSED 6

:

Mr Kavendjii

Instructed by Directorate of Legal Aid