**REPUBLIC OF NAMIBIA**

NOT REPORTABLE

**HIGH COURT OF NAMIBIA, MAIN DIVISION**

**RULING ON THE: APPLICATION FOR THE DISCHARGE OF THE ACCUSED AT THE CLOSE OF THE PROSECUTION'S CASE IN TERMS OF SECTION 174 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977**

**CASE NO.: CC 5/2019**

In the matter between:

**RYNARDT WYLIE ROELF**

**APPLICANT**

**and**

**THE STATE** **RESPONDENT**

**Neutral Citation:** *Roelf v State* (CC 5/2019) [2019] NAHCMD 268 (12 July 2019)

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| **Coram:** | RAKOW, AJ |
| **Heard on:** | 28 June 2019 |
| **Delivered on:** | 12 July 2019 |
| **Released on**: | 02 August 2019 |

**Flynote:** Criminal Law: Discharge of applicant in terms of section 174 of the Criminal Procedure Act, no. 51 of 1977. Criminal Procedure – Trial – Discharge of accused at close of States case in terms of section 174 of Criminal Procedure Act, no. 51 of 1977 – Approach by court and guidelines set out in *S v Nakale* and *S v Teek* followed.

**Summary:** The accused is charged with the murder of the deceased in that he caused her death by repeatedly beating her, throwing her on the ground and strangling her. Three state witnesses testified as to what they observed over the period of two days between the accused and the deceased. Cause of death was an assault-impacted head injury, which caused intracranial bleeding. The court decided that there was indeed a case made out for the accused to answer upon.

Held: The application for the discharge of the applicant in terms of section 174 of the Criminal Procedure Act, no. 51 of 1977 is dismissed.

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**ORDER**

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In the result I make the following order:

The application for the discharge of the applicant in terms of section 174 of the Criminal Procedure Act, no. 51 or 1977 is dismissed.

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**JUDGMENT**

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**RAKOW, AJ**

[1] At the close of the State's case counsel for the accused person applied in terms of section 174 of the Criminal Procedure Act, no. 51 of 1977 (the Act) for

the discharge of the accused on the charge of murder read with the provisions of the Domestic Violence Act, 4 of 2003. The state opposes the application.

[2] The accused is facing one count of murder read with the provisions of the Domestic Violence Act, no. 4 of 2003 in that during the period of 22 to 23 January 2018 in Karasburg, the accused unlawfully and intentionally killed Kathrina Aloysia Alexander by repeatedly beating her, throwing her on the ground and strangling her. The accused pleaded not guilty and did not disclose a defence at the time of plea.

[3] The state called five witnesses. Of these, three lived at, or in close proximity to the house the deceased and the accused shared and were present during the whole period or at least some part of the period 22 – 23 January 2018. All three the witnesses, Ms Ingrid Meintjies, Mr Valencius Roelf and Ms Bonaventura Ortman observed various interactions and assaults between the accused and the deceased. These witnesses testified to the accused picking up the deceased and throwing her on the floor on more than one occasion, hitting her in the face, slapping her on the cheeks and kicking her on the body. Whilst they do not corroborate one another in every aspect, they do testify that the accused was unhappy with the deceased when he arrived home on the 22nd of January 2018 and that a fight ensued between him and the deceased. All three the state witnesses also testified that they saw the deceased during the morning of the 23rd and were asked at different times by the accused either to assist with cleaning up the deceased or looking after her and reporting on her condition. All of them testified that they noticed her eyes which was purple or blue as well as blood running from her mouth.

[4] The medical doctor, Dr Rufanus Kooper, who conducted the post mortem on the deceased, was called and he testified regarding the cause of death and the injuries he observed on the body of the deceased. He found that the cause of death was an assault-impacted head injury, which caused intracranial bleeding.

He further testified that the deceased was at some stage strangled which caused the hyoid bone to break. Both eyes also displayed massive haematomas.

[5] Sgt. Petrus Ndilimani Kueyo also testified that he was called to the scene and found the body of the deceased there, which was later removed to the mortuary. He also arrested the accused later on the 23rd of January 2018 on the charge of murder. A number of statements were handed in by consent as exhibits in the beginning of the trial, dealing with matters like the identity of the accused, the transportation to the morgue, a photo plan as well as a scene of crime sketch plan and of Nurse Nakhom who declared the deceased dead upon arrival at the scene.

[6] The application brought by the defense rests on the premise that the state did not proof intent in the form of *dolus directus* nor *dolus eventualis*. If the argument is understood correctly, the test according to the defense, is whether *dolus* to cause the death of the deceased was proved in any way. He submitted that there was no proof before court that the accused assaulted or had the intention to assault the deceased in such a manner that it caused blood vessels to burst in her brain which subsequently caused the death of the deceased. He further urged the court to remain open to a possible collusion between the second and third state witnesses. Counsel for the defense further alluded to the fact that the accused person is considered innocent until proven guilty and that the principle is enshrined in the Namibian Constitution under the fair trial rights in chapter 3. Counsel invited the court to make a finding at this stage about the credibility of the witnesses presented by the state and to find that their evidence contradict one another in such a way that it impacts negatively on the prima facie case the state has to put before court.

[7] Counsel for the state argued that the only person who can tell us what his intent was at the time of the assault on the deceased, is the accused and he must have the opportunity to put his version before the court. The evidence presented by the state clearly shows the cause of death was related to an

assault and three witnesses testified about assaults they saw effected by the accused onto the deceased. In all fairness, a fair trial should also be afforded to the deceased as her interests should also form part of the balancing process when considering an interpretation of Article 12 of the Namibian Constitution.

[8] Section 174 of the Act makes plain that the court, at the close of the case for the state, has discretion to return a verdict of not guilty if it is of the opinion that there is no evidence that the accused committed the offence charged, or can be convicted on any of the competent verdicts finding application. No evidence has been interpreted to mean no evidence which a reasonable man acting carefully may convict[1] and in our Namibian Courts in *S v Nakale*[2] the words 'no evidence' was interpreted to mean no evidence upon which a reasonable court acting carefully may convict (also see *S v Teek*[3]). This approves the reasoning in an earlier case, in *R v Herhold and Others* [4] at page 722-H where the following was stated regarding the application before Court:

'It has repeatedly been held in our Courts that the test to be applied in an application of the present nature is not, whether there is evidence upon which a reasonable man should convict, but, whether the evidence presented by the prosecution is such that a reasonable man, acting carefully, might properly convict. If there is such evidence then an application of this nature is not to be sustained.'

[10] There is no formula or test that remains applicable to all circumstances when deciding whether or not to discharge. Each case must be decided on its own merits in order to reach a just decision (*S v Ningisa and Others*, unreported judgment of this Court delivered on 14 October 2003).

[11] The inquiry was not, and has never been whether the evidence was cogent, plausible or constituted proof of guilt beyond a reasonable doubt. The

[1] R v Shein 1925 AD 6
[2] 2006 (2) NR 455 (HC) at 457.
[3] 2009 (1) NR 127 (SC).
[4] R v Herholdt and Others (3) 1956(2) SA 722-H.

court in *Teek* (*supra*) also re-affirmed the generally accepted view that, although credibility is a factor that may be considered during the section 174 application, it plays a very limited role. It is only if the evidence is of such poor quality that, in the court's opinion, no reasonable court could accept it as reliable, that the application for discharge will succeed.

[12] Despite the contradictions in the evidence of the state witnesses it cannot be said that the evidence does not support any of the charges the accused is facing. The credibility of the witnesses and the reliability of their evidence on the various assaults they testified about must be decided in the light of all the evidence adduced. The weight accorded to the evidence would inter alia depend on whether or not it is rebutted by other evidence.

[13] I therefore find that the state did present a case to the court that should be answered and that they made out a *prima facie* case against the accused.

[14] In conclusion and for the above reasons, it is ordered:

In respect of the accused the application in terms of section 174 of The Criminal Procedure Act, no. 51 of 1977 is dismissed.

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E RAKOW

ACTING JUDGE

APPEARANCES:

APPLICANT: Q S HAOSEB
Of Directorate Legal Aid, Windhoek

RESPONDENT: T IITULA
Of Office of the Prosecutor-General, Windhoek