

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

APPLICATION ITO SECTION 174 OF ACT 51 OF 1977

Case no: CC 16/2019

In the matter between:

**THE STATE**

and

**BENJAMIN GEORGE STRONG**

**ACCUSED**

**Neutral citation:** *S v Strong* (CC 16/2019) [2020] NAHCMD 49 (13 February 2020)

**Coram:** SIBEYA, A.J.

**Heard:** 2-6 December 2019, 20-23 January and 7 February 2020.

**Delivered:** 13 February 2020.

**Flynote:** Criminal procedure – Application in terms of section 174 of the Criminal Procedure Act, 51 of 1977 - Discharge of accused at close of State case where there is no evidence supporting the charge – Interpretation of ‘no evidence’ in *S v Nakale* and *S v Teek* followed – Credibility plays a limited role at this stage - Whether there is evidence on which a reasonable court acting carefully may convict – Accused’s right against self-incrimination to be protected – circumstantial evidence

to be considered at this stage and inferences may be drawn from proven facts which must be consistent with such facts – Application dismissed.

**Summary:** The accused was arraigned on five charges, namely: count 1 - murder, count 2 - attempted murder, counts 3 and 4 - two counts of assault with intent to do grievous bodily harm and count 5 - defeating or obstructing the course of justice or attempt to do so. At the close of the state's case the accused brought an application for discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977 only in respect of counts 3 - 5. The application for discharge was opposed by the state.

*Held* that, section 174 protects the rights of the accused to a fair trial and ensures the court's vigilance of the accused's right against self-incrimination which is inclusive of the right to remain silent and the right to be presumed innocent until proven guilty according to law.

*Held* further that, the state needs to lead substantive evidence to prove a *prima facie* case against the accused and should therefore not remain hopeful that the accused will seal holes in its case by incriminating himself.

*Held* further that, in the absence of direct evidence on the charge the court can resort to circumstantial evidence and in the process apply the cardinal principle as set out in *S v Blom* 1939 AD 188.

*Held* further that, evidence led so far establishes a *prima facie* case on which a reasonable court acting may convict.

---

**ORDER**

---

The Application by the accused in terms of section 174 is hereby dismissed.

---

**RULING**

---

**SIBEYA AJ:**

[1] At the close of the State's case, the accused has a right to apply for a discharge in terms of section 174 of the Criminal Procedure Act ('the CPA')<sup>1</sup> on all or some of the charges.

[2] Mr Malumani appeared for the state while Mr Engelbrecht appeared for the accused.

[3] The accused face the following five charges:

Count: 1 - Murder;

Count: 2 - Attempted murder;

Count :3 - Assault with intent to do grievous bodily harm;

Count :4 - Assault with intent to do grievous bodily harm;

Count: 5 - Defeating or obstructing or attempting to defeat or obstruct the course of justice.

[4] The accused opted to apply for discharge only in respect of counts 3, 4 and 5 of the charges preferred against him. Counts 3 – 5 more fully reads that:

'Count 3: Assault with intent to grievous bodily harm read with the provisions of Act 4 of 2003

In that on or about 16 September 2017 and at or near Windhoek in the district of Windhoek the accused did unlawfully assault Johanna Resandt by slapping her and/or kicking her over her body with the intention to cause the said Johanna Resandt grievous bodily harm.

Count 4: Assault with intent to do grievous bodily harm read with the provisions of Act 4 of 2003

In that on or about 16 September 2017 and at or near Windhoek in the district of Windhoek the accused did unlawfully assault Johanna Resandt by slapping her and/or kicking her over her body with the intention to cause the said Johanna Resandt grievous bodily harm.

---

<sup>1</sup> 51 of 1977.

Count 5: Defeating or obstructing the course of justice or an attempt thereto

In that during 16 -17 September 2017 and at or near Windhoek in the district of Windhoek the accused did unlawfully and with intent to defeat or obstruct the course of justice:

1. Hide a shirt and/or a pair of tekkies /trainers shoes and/or a cell phone at the house of his friend Marius Madjjet, and/or
2. Clean the knife he used in stabbing the deceased and/or Phillip Gadi Matsaya by placing it in a bowl of water.

Whereas at the time of the commission of these acts the accused knew or foresaw the possibility that his conduct may:

1. Obstruct or interfere with police investigation into the death of the deceased and/or the stabbing of Phillip Gadi Matsaya, and/or
2. Hide and/or conceal and/or destroy, evidence implicating him in the stabbing of the deceased and/or Phillip Gadi Matsaya, and/or;
3. Protect him from being prosecuted in connection with the death or stabbing of the deceased and/or Phillip Gadi Matsaya.'

[5] The accused pleaded not guilty to counts 3 – 5 and opted not to make a statement in terms of section 115 of the CPA. The accused therefore offered no plea explanation.

[6] It emerged during cross examination that the accused denies assaulting Johanna Resandt (the deceased) on 16 September 2017 as charged in counts 3 and 4 respectively and further denies committing the offence of defeating or attempt to defeat or obstruct the course of justice as alleged in count 5.

[7] The state led evidence of several witnesses after which it closed its case. Following the closure thereof, the accused brought an application for discharge in terms of section 174 of the Act. Section 174 provides that:

'If, at the close of the case of 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’.

[8] The interpretation of the words ‘no evidence’ overloaded our law reports with several judgments unravelling the meaning thereof. The consensus in the interpretation of the words ‘no evidence’ is unambiguously that it means no evidence on which a reasonable court acting carefully may convict. This interpretation was set out in *S v Nakale and Others*,<sup>2</sup> and endorsed by the Supreme Court in the matter of *S v Teek*.<sup>3</sup>

[9] Section 174 should be read cheek by jowl with Article 12(1)(f) of the Constitution which protects accused persons from self-incrimination. By extension therefore it follows that section 174 compliments Article 12(1)(f) in securing that accused persons do not incriminate themselves. The right not to incriminate oneself includes the right to remain silent inclusive of the right to be presumed innocent until proven guilty accordingly to law. Thus, where there is no evidence led on which a reasonable court acting carefully may convict, the court may return a verdict of not guilty and discharge such accused person as opposed to placing the accused on his or her defence in the hope of incriminating himself or herself. The application of the said hope, in the absence of the evidence on which a reasonable court may convict offends against the presumption of innocence which is at the heart of our Constitution. To unnerve the presumption of innocence disconcerts the values of our society which are the pillars of our Constitution, without which diminishes the Constitution of a ceremonial document.

[10] When it comes to credibility of witnesses at this stage *Brand AJA* stated as follows in *S v Teek*:<sup>4</sup>

‘Somewhat more controversial is the question whether credibility of the state witnesses has any role 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 such evidence is of such poor quality that it cannot, in the opinion of the trial court, be accepted by any reasonable court (see e.g. *S v Mpetha and Others* 1983 (4) SA 262 (C) at 26; *S v Nakale*

---

<sup>2</sup> 2006 (2) NR 455 (HC).

<sup>3</sup> 2009 (1) NR 127 (SC).

<sup>4</sup> (supra) para 7.

supra at 458). Put differently, the question remains: is there, having regard to the credibility of witnesses, evidence upon which a reasonable court may convict?’

[11] Amongst the witnesses called by the state was Phillip Gadi Matsaya (Mr Matsaya). Mr Matsaya is the only witness who testified about events mentioned in counts 3 and 4. Sergeant Deoline Jarson (Sgt Jarson) and Chief Inspector Hendrick Martinus Olivier (C/Insp Olivier) testified regarding the averments set out in count 5.

In respect of count 3:

11.1 Mr Matsaya testified, *inter alia*, that on 16 September 2017 he was called to fix a microwave, fridge and a washing machine which he carried out with the help of the accused. He was rewarded for the service rendered after which he handed over some of that money to the accused for his assistance. On Mr Matsaya’s advice, the accused gave N\$100 to the deceased for groceries. The accused later demanded the N\$100 from the deceased to be given back to him, which demand was refused.

11.2 He testified further that at around 17h00 the accused stood up while the deceased remained seated and he slapped her in the face for about three times and further kicked her legs three times while wearing shoes. During the assault, the deceased was seated while covering her face. The accused ceased from assaulting the deceased when he was requested to stop by Mr Matsaya. The deceased did not sustain injuries.

In respect of count 4:

11.3 Mr Matsaya testified that at around 20h00 on 16 September 2017, while he was drinking alcohol with the accused and the deceased, the deceased stood up saying she was heading to the house to prepare dinner.

11.4 When she entered the house, the accused followed her into the house and assaulted her. Mr Matsaya heard the accused and the deceased quarrel and further heard when accused assaulted the deceased, so he claimed. Mr. Matsaya went to the said house and as he was entering the house, the deceased screamed ‘stop, stop’ while she was covering her face.

11.5 Mr Matsaya inquired from the accused as to the reasons why he just assaulted the deceased, to which the accused responded that it was due to the deceased withholding his money.

In respect of count 5:

11.6 Sgt Jarson testified that upon explaining the legal rights to the accused, the accused opted to inform her of what happened. He said he was very drunk but remembers stabbing the deceased and Mr Gadi.

11.7 Sgt Jarson testified further that when the accused was asked about the whereabouts of the knife used to stab the deceased, the accused responded that he put the knife in a bucket of water at the house of the deceased. True to his words, whilst at the house of the deceased, the accused proceeded to the bucket of water and retrieved the knife in question.

11.8 D/Chief Inspector Olivier corroborated the evidence of Sgt Jarson that at the house of the deceased the accused produced a knife from a bucket of water.

Assessment of evidence

[12] It is common cause that the evidence led by the state regarding counts 3 and 4 of the charges emanated from Mr Matsaya only. It thus follows that Mr Matsaya is a single witness. Section 208<sup>5</sup> provides that:

‘An accused may be convicted of any offence on the single evidence of any competent witness.’

[13] In evaluating the evidence of a single witness, it is vital to bear in mind that it has become trite that such evidence should be treated with caution. Such caution should however not be allowed to displace common sense. Evidence of a witness is not required to be satisfactory in every respect as it may be safely relied upon even where it has some imperfections, provided that the court can find at the end of the day that although there are shortcomings on the evidence of a single witness, the truth has been told.<sup>6</sup>

[14] It was submitted by Mr Engelbrecht that he takes cognisance of our legal position that credibility of witnesses at this stage of the closure of the state’s case,

---

<sup>5</sup> Of the CPA.

<sup>6</sup> S v HN 2010 (2) NR 429 (HC) para 46; S v Sauls and Others 1981 (3) SA 172 (A); S v Esterhuizen and Another 1990 NR 283 (HC); S v Snyman 1968 (2) SA 582 (A).

plays a limited role. He submitted further that where the evidence is of such poor quality, it cannot be believed. Mr Engelbrecht proceeded to argue with vigour that the evidence of Mr Matsaya is so poor that no court can believe him.

[15] Can it be said that the evidence of Mr Matsaya is so romantic that no court can believe it? The testimony of Mr Matsaya is that he recalled the events of 16 September 2017 and only had difficulties recalling the events of the following day 17 September 2017 as a result of the squabble where he hit his head on the stove and lost consciousness. In respect of count three therefore, Mr Matsaya is an eye witness who testified per his own observation of the assault. The challenge to the evidence led on count three can thus be disposed of with no sweat. In the premises this court find that there is evidence led regarding count three on which a reasonable court acting carefully might convict.

[16] In respect of count 4, the evidence reveals that Mr. Matsaya did not observe the assault. He however heard the deceased scream and further heard the accused assault the deceased (so he claims). When he entered the house, the deceased was shouting 'stop, stop' while covering her face, he then inquired from the accused as to why he was assaulting the deceased to which the accused without denying the assault responded that it was due to the deceased not returning his money.

[17] Mr Engelbrecht submitted that Mr Matsaya was too drunk to recall anything and his evidence left several inferences to be drawn. In *R v Blom*,<sup>7</sup> the requirements to be satisfied by the State before a conviction based on circumstantial evidence can be sustained set out. These requirements are:

1. Whether the inference sought to be drawn is consistent with all proven facts, because if not the inference cannot be drawn; and
2. Whether the proven facts are such that they exclude all other reasonable inferences from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.

[18] It is well established that in all criminal cases the state bears the burden of proof of the guilt of the accused beyond reasonable doubt at the conclusion of the

---

<sup>7</sup> *R v Blom* 1939 AD 188 at 202-3.



trial. The state further bears the burden of making out a case against the accused on which a reasonable court acting may convict at the closure of its case. It is therefore not for the accused to seal holes in the state's case during the defence case. As stated earlier placing the accused on his defence in the hope of plugging holes in the state's case offends the historically abused right to a fair trial and amounts to a travesty of justice.

[19] In a passage, which is often cited in our jurisdiction, from the matter of *S v Mathebula and Another*,<sup>8</sup> the following was stated:

'(The) duty to prove an accused's guilt rests fairly and squarely on the shoulders of the State. As I said previously, the accused need not assist the State in any way in discharging this onus. If the State cannot prove any evidence against the accused at the end of the State's case, why should the accused be detained any longer and not be afforded his Constitutional rights of being regarded as innocent and thus being acquitted and accorded his freedom? Can it be said that he was given a fair trial if, at the close of the State's case wherein no evidence was tendered to implicate him in the alleged crimes, the trial is then continued owing to the exercise of a discretion in the hope that some evidence implicating him might be forthcoming from the accused himself or his co-accused? To my mind such a discretionary power to continue the trial would fly in the face of the accused's right to freedom, his right to be presumed innocent and remain silent, not to testify and not to be a compellable witness. To my mind it would constitute a gross unfairness to take into consideration possible future evidence which may or may not be tendered against the accused either by himself or by other co-accused and for that reason decide not to set him free after the State had failed to prove any evidence against him.'

[20] It is against this backdrop that this court proceed to address the application for discharge in this matter.

[21] The state is therefore burdened, according to law, with a duty to adduce evidence of such a nature as to enable the court to exercise its discretion in the determination whether there is evidence on which a court may convict and not shall convict. To this end Mr Engelbrecht implored on the court to exercise its discretion to discharge the accused on the charge under review.

---

<sup>8</sup> *S v Mathebula and Another* (1997 (1) SACR 10 (W) et 34 J - 35 D.

[22] Mr Malumani was not to be surpassed as he submitted that, notwithstanding the fact that no witness observed the assault averred in count 4, there is ample circumstantial evidence supporting the charge against the accused on which he may ultimately be convicted.

[23] It is an irrefutable fact that there is no direct evidence regarding count 4, hence circumstantial evidence is resorted to. In assessing the evidence on count 4 this court finds that there is evidence presented on which a reasonable court acting carefully may convict on the charge or any other charge.

[24] In respect of count 5, it was conceded by Mr Malumani that, all the averments regarding the charge of defeating or attempt to defeat or obstruct the course of justice were not proven with the exception of hiding or placing the knife used to stab the deceased and Mr Matsaya in a bucket of water. It was further submitted that placing such knife in water resulted in cleaning the knife of possible blood stains which could further the investigation of this matter. Therefore, the acts of the accused defeated or obstructed the course of justice, so the argument went. Mr Engelbrecht submitted the contrary.

[25] When one has regard to the averments in charge 5 it becomes apparent that part of the allegations is cleaning the knife by placing it in a bowl of water with intent to obstruct or interfere with police investigation or conceal evidence implicating the accused. It is evident that the accused person placed the said knife in a bucket of water. His intention can be inferred from the proven facts which supports the elements of the charge.

[26] In light of the evidence discussed herein above, this court finds that the state managed to prove its case on a *prima facie* basis.

[27] In the result it is ordered that:

The application by the accused in terms of section 174 is hereby dismissed.

---

O S SIBEYA  
ACTING JUDGE

**APPEARANCES:**

**STATE:**

I Malumani  
Of Office of the Prosecutor General  
Windhoek

**ACCUSED:**

Aid)

M I Engelbrecht  
Of Engelbrecht Attorneys (instructed by Legal  
Windhoek