REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case no: CA 26/2015

In the matter between:

THE STATE **APPELLANT**

and

DINALOMWENE HAIKALI
RESPONDENT

Neutral citation: *S v Haikali* (CA 26/2015) [2021] NAHCMD 204 (06 May 2021)

Coram: USIKU J and CLAASEN J
Heard: **12 April 2021**
Delivered: **6 May 2021**

Flynote: Criminal Procedure – Appeal – State appeal against s 174 discharge – Standard of proof of evidence at that juncture confirmed.

Criminal Appeal – Evidence of State witnesses sufficient for a prima facie case against the respondent to be placed on his defence – Appeal against the discharge of the respondent succeeds.

Summary: The respondent was discharged in terms of s 174 of the CPA on a theft charge. The State appealed against the order and the respondent opposed

the appeal. The crux of the appeal is that the court a quo erred in the conclusion that the evidence was insufficient for the respondent be placed on his defence.
Both accused 1 and the respondent were employees at a fishing company. The respondent was working on the day shift but did not leave the workplace at 17h00. Accused 1 was working on the night shift. According to the complainant who described activities as recorded on closed circuit television, hereinafter referred to as CCTV footage, of 17 September 2012, the respondent was amongst others wrapping blue bins and at some stage he and accused 1 conversed with each other. Later that night these bins were loaded onto a truck by accused 1 and was transported from the work premises. The driver of the truck testified that he was requested by accused 1 to transport and deliver the bins to a house that will be pointed out by another person. The owner of the house testified that the fish was delivered to his house under the auspices that it was contaminated and that he could pay for it the next Monday. Before he could pay, the complainant arrived at his house and discovered the fish.

Held, the court a quo misdirected itself by reasoning that certain evidence was not sufficient 'to justify a conviction'. The court confirms the approach in respect of the standard of proof required at an application of s 174 of the CPA as set out in *Matroos v S.* The evidence required at the closure of the State's case may not conclusively prove the guilt of the respondent. The test is that of prima facie evidence on which a reasonable court, acting carefully, might convict and not will convict.

Held, further that, cumulatively considered, it was not a situation that there was no prima facie evidence in respect of the respondent, nor was the evidence so incurably weak that the State witnesses were left with no shred of credibility.

Held, further that, the respondent was discharged prematurely and appeal succeeds.

ORDER

1. The appeal succeeds.

2. The decision of the learned Magistrate granting the respondent's section 174 (of the CPA) application is set aside.
3. The matter is remitted to the District Court of Walvisbay for continuation and finalisation of the matter before the trial Magistrate.

JUDGMENT

CLAASEN J (USIKU J concurring):

[1] This is an appeal against the respondent's discharge in terms of s 174 of the Criminal Procedure Act, (the CPA). The respondent was jointly charged with another accused, in the district court of Walvisbay for theft of fish valued at N$ 30 678.79 that belonged to Pereira Seafood Company, hereafter referred to as Pereira. After hearing the evidence of three state witnesses, the erstwhile legal practitioner for the respondent successfully brought an application for the discharge of her client.

[2] The appellant was aggrieved by this order and filed a notice of appeal against the judgment. For reasons not quite known to this court, the appeal only made its way to this court earlier this year, although the discharge in terms of s 174 of the CPA was given in 2013.

[3] There is a degree of overlap in the grounds of the notice of appeal, which will not be reproduced here. The crux of the appeal is that the court a quo erred in disregarding material evidence presented by the State and erred in law by arriving at the conclusion that the evidence was insufficient for the respondent be placed on his defence. In support of the contention the appellant specified that the Magistrate disregarded critical evidence, that respondent was on the scene at the material time, that the respondent had no legal authority to be at the premises after-hours, nor did the respondent dispute that he was at the premises. A further ground of appeal was that the Magistrate accorded too much weight on Naftali Shahulwa's inability to recall who between the two accused sold him the fish.

[4] Counsel for the appellant, Mr Moyo argued that there was sufficient evidence upon which a reasonable court could convict. He referred to the presence of the respondent on the premises at the material time. As for common purpose Mr Moyo moved that contention on the basis that the respondent was seen in the CCTV footage inter alia to be wrapping the blue bins, which bins subsequently was loaded onto a truck by accused 1 and was transported from Pereira's premises later that night.

[5] The appeal was opposed by the respondent and Mr Ipumbu appeared for the respondent. Counsel for the Respondent agreed with the court a quo's ruling, that the presence of the respondent after his working hours ended, is not sufficient for an inference of theft on the part of the respondent. He argued that the workers were not prohibited from being at the office premises after hours. It appears from statements put by the legal representative during cross-examination, that the respondent's explanation for being at the premises was to practice on a certain machine called a stacker.

[6] It was the view of Mr Ipumbu that there was no direct evidence that the alleged theft took place on 27 September 2012 especially since the security official at the gate checked the truck and did not find anybody transporting fish from the company premises. Furthermore that the other State witnesses did not have any encounters with the respondent.

[7] The court a quo summarised the reasons for the discharge in terms of s 174 of the CPA. The gist thereof was that the evidence of the complainant implicates the respondent to a limited extent. Furthermore it was pointed out that by viewing the CCTV footage, a person could not conclude that it was indeed accused 1 and the respondent in the footage. She also stated that apart from the complainant, no other witness directly implicated the respondent. She also referred to the fact that the third State witness confused the respondent and accused 1. She concluded that it would be prejudicial to place the respondent on his defence for the sole purpose of him implicating himself.

[8] After the appeal was noted in 2015, the court a quo provided further reasons to correspond to each of the grounds of appeal. The court a quo inter

alia referred to the *Shuping*[1] test[2] and that the second leg thereof was declared to bad law in *S v Ningisa and Others*.[3] She held that the respondent was placed on the scene by questionable evidence by the complainant and the statements that were made by his legal representative. As for the identification issue she held that though the complainant testified that he knew the two accused persons well and he was in a position to identify them, the court could not see their faces in the CCTV footage. She also stated that the footage does not show that accused 1 and the respondent had a conversation and furthermore that there were also other persons on the premises. As regards to the ground that rests on the fact that the respondent, in his version as put to the complainant during cross-examination, do not dispute that he was at Pereira afterhours at the material time, she reasoned that it was not sufficient for the court to conclude that the respondent was engaged in theft in concert with accused 1.

[9] A brief summary of the evidence follows. The complainant, Mr Rocco Viljoen who is the operations manager of Pereira testified that he learnt on 01 October 2012 that boxes of fish bearing the logo of the company were seen at a house in Kuisebmund. He and the security official drove to that house and found people unpacking fish. He identified the white boxes that contained fish as fish that belongs to Pereira. There he got information that on 27 September 2012 the owner of the owner of the house, Mr Naftali Shahulwa, was informed by an employee about a Herero man that wants to offload contaminated fish. The complainant was given the cellphone number of the person who initiated the sale. Upon dialling the number it turned out to be the number of accused 1.

[10] Closed circuit television footage was presented. According to the complainant it depicted accused 1, who was on the night shift and the respondent who was on the dayshift. The footage showed that the respondent did not leave the workplace at 17h00. They were moving in forklifts around the factory floor and cold storage facilities for approximately an hour as from 18h23 on 27 September

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[1] *S v Shuping and others* 1983 (2) SA 119 (B).

[2] The test: (i) is there evidence upon which a reasonable court might convict, if not, (ii) is there a reasonable possibility that the defence might supplement the State's case?

[3] *S v Ningisa and Others* Case No CC4/2002 delivered 14 October 2003.

2012. We will return to the forklift activities and the drivers thereof later in the judgment.

[11] The complainant furthermore identified the white delivery truck as that of Talanam, a company that usually drive fish products to Pereira. Subsequently the driver who delivered the fish at the said premises was identified by Mr Shahulwa as Antonio Makiena.

[12] The second State witness, Mr Antonio Makiena was a driver at Talanam. He testified that on the night of 27 September 2012, he offloaded fish products from Talanam at Pereira's premises. At Pereira accused 1 requested him to wait and transport fish to a certain house, that will be pointed out by a certain Amulungu who will meet him in the street. Accused 1 then loaded fish that was contained in four big blue bins. At the gate, the security official just gave a cursory look at the truck and he proceeded. He found a person in the street and asked him if he is Amulungu to whom he must give the fish that was sent by Ricky. The answer was in the affirmative. They drove to a certain house, which turned out to be that of Mr Shahulwa. There people offloaded fish which task took quite some time.

[13] The third State witness, Mr Naftali Shahulwa testified that on 27 September 2012 he received a call about a man that brought fish. He told the man to wait. Upon his arrival at home the truck was at his house and the fish was offloaded. The next morning he got a call from a certain Ricky, saying he was the owner of the fish and that the fish is for sale. Ricky then arrived at his shop and said that the fish was rejected at the factory. They negotiated a price for the fish and that the due date for payment will be not later than the following Monday. Before he could pay, the complainant discovered the fish, which led to the criminal case. Initially Mr Shahulwa was confused about whether Ricky was accused 1 or the respondent. He corrected himself during cross-examination by the legal representative of accused 1 and pin- pointed accused 1 as Ricky.

[14] Section 174 the CPA provides that:

'If at the close of the State's case 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 concept 'no evidence' is interpreted as no evidence on which a reasonable man/court could properly convict.[4]

[15] In *S v Nakale & others*[5], Muller J remarked that there cannot be a single and all-inclusive formula, and a set of guidelines were suggested, which inter alia included the consideration of whether the there is a reasonable possibility that defence's evidence may supplement the State's evidence. On this issue, the Supreme Court in *S v Narimab*[6] commented that there is disharmony in our courts and that of South Africa on the vexed question of whether an application for the discharge should be dismissed where there is no direct State evidence of an accused's involvement, but there exist a reasonably possibility that such an accused may be implicated by himself when put on the defense or by the evidence of a co-accused.

[16] We return to the matter before us, which according to us turn on the first leg of the *Shuping* test. Thus the pertinent issue is whether the evidence, viewed holistically, fall below the threshold of constituting no evidence upon which a reasonable court might convict?

[17] Mr Ipumbu contended that there was no direct evidence that the theft occurred on the date as contended by the State. He stated that there was no evidence that Pereira conducted a stocktake exercise and missed the stock on the relevant date. We disagree with Counsel on this issue in view of Mr Makiena's evidence. Not only did he testified about the unusual request by accused 1 on 27 September 2012, but he transported blue bins loaded by accused 1 to a certain house. At the point of delivery he noticed that it was boxes of fish indeed, which took a considerable time to offload it. As for the contention that the truck was 'checked' by the security at the gate and nothing suspicious noted, the complainant testified that because there was no paperwork for that consignment, the security official at the gate could not have known to check for fish on the outgoing truck that night.

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[4] *S v Teek* 2009 (1) NR 127 (SC).supra at 1301-I-J.

[5] *S v Nakale & others* 2006 (2) NR 455 (HC).

[6] *S v Narimab* 2019 (SA-2017/71) [2019] NASC 11 (21 May 2019) at para 17.

[18] Mr Ipumbu also argued that the State did not dispute the instructions by Counsel for accused 1, that his client did not act in concert with anyone and did not instruct anyone about fish. This instruction was put to the complainant who was not in a position to comment on accused 1's instruction. In any event the opportunity had not arrived yet for the State to cross-examine accused 1 on this issue.

[19] We turn to the grievance by the appellant that points to issues pertaining to identification of the accused and the respondent on the scene at the material time. The court a quo relied on the inability to identify the faces of the accused persons. The complainant justified his identification of accused 1 and the respondent by saying these employees worked for the company for some time and the supervisors of the various departments also confirmed their identity on the footage. Moreover, by virtue of the version of the respondent, as canvassed by Counsel for the respondent in cross-examination to the complainant, the respondent was on the scene. Thus there is no doubt that the respondent was on the scene at the material time.

[20] We turn to the ground that the Magistrate did not accord sufficient weight to the complainant's evidence that the respondent had no legal authority to be at the premises that late afternoon. The respondent's explanation for being there was that he wanted to practice on the stacker and whilst there he was requested by accused 1 to wrap blue trays. This version emanated from questions posted by Counsel for the respondent during cross-examination of the complainant.

[21] We are inclined to agree with Counsel for the appellant on this point. That is in view of the consideration that the respondent's shift had already ended and there was no official request from his supervisor for him to work overtime. Notwithstanding that, the respondent was performing certain activities on the forklift such as moving and wrapping bins. Though there was no prohibition for a worker to be on the premises after hours, the complainant explained that employees can stay behind to take a shower. The complainant reiterated that the after-hours activities performed by the respondent were definitely not in line with the duties of the respondent. In any event, he testified that the respondent would

also need permission from his supervisor before he could stay behind and practice on the stacker. Yes, the fact that the respondent was on the premises it itself does not proof theft beyond reasonable doubt. That, however is not the standard of proof at that juncture, neither should that fact be considered in isolation.

[22] That takes us to the contention that there was no trace of common purpose. The appeal court, is at the disadvantage of not having observed the footage which the court a quo observed. Nevertheless the complainant described the activities at the relevant premises at the material time. In having regard thereto it was described that accused 1 and the respondent was seen in the video footage operating forklifts and taking bins in and out of the cold store. The relevant portion of the evidence of the complainant was that four bins were seen taken into the cold store by accused 1 and the respondent. Accused 1 was thereafter seen packing blue bags into the four bins which the respondent was seen wrapping. At some stage whilst still on the premises they also conversed with each other, which was captured as that: 'Ac 2 then speaks to another driver going into the cold storage who is ac 1.'[7]

[23] It was also apparent from the complainant's evidence that only white bins are used for the transportation of products to Talanam, whilst blue bins are utilised at Pereira for the frozen products in the Pereira factory and cold store. The impression that he created is that blue bins ordinarily remain at Pereira's premises.[8] Notwithstanding that, blue bins were prepared by the respondent, where-after he left the premises at 19h55. Thereafter instead of loading the big blue bags and empty white bins intended for Talanam, accused 1 was seen going to the 'prepared' blue bins. He took the four blue bins from the factory and loaded it on the delivery truck driven by the second State witness who delivered it to the third State witness. According to the driver, Mr Makiena's evidence these blue bins indeed had fish in it at the time.

[7] Page 18 line 35-36 of the record.

[8] Page 18 of record.

[24] Furthermore, although the respondent gave instructions explaining why he was at the premises at the material time, the value afforded to what he said and its reliability may only be fully evaluated if its tested under cross-examination.[9]

[25] Against this background, cumulatively considered, it was not a situation that there was no evidence in respect of the respondent nor was the evidence so incurably weak that the State witnesses were left with no shred of credibility. In any event, credibility plays a limited role at the stage of a discharge application, unless the evidence was of so poor quality that it cannot be accepted by any reasonable court.[10]

[26] In perusal of the reasons given by the court a quo after the appeal was noted, language used therein intimates that the degree of proof in the court a quo was the standard as at the end of a complete trial, namely once both the State and the defence's witnesses have testified. It was stated that: 'I have already noted that only SW1 mentions ac2 and although his evidence against ac 2 may be direct, it is not sufficient to justify a conviction.'[11] My emphasis. That is not the degree of proof required at the stage of an application in terms of s 174 of the CPA. It is apposite to refer to *Matroos v S*[12] wherein it was held at para 13 that:

'Our law, as set out in the leading cases of *S v Teek*[13] and *S v Nakale and Others*[14] provides that, evidence required at the closure of the State's case may not conclusively prove the guilt of the respondent, as at this stage, all that the State is required to establish is prima facie evidence on which a reasonable court, acting carefully, might convict and not will convict.'

[27] As such, we conclude that had the court a quo applied the standard of 'prima facie proof' instead of 'sufficient to justify a conviction, which resembles that of 'proof beyond a reasonable doubt', a different conclusion would have been reached. That in our view amounts to a misdirection.

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[9] *S v February* (CC 4/2016) [2018] NAHCMD 249 (21 August 2018).

[10] *S v Teek* 2009 (1) NR 127 (SC) at 1301-I-J

[11] Page 57 of the Record.

[12] *Matroos v S* (HC-MD-CRI-APP-SLA-2018/00071) [2019] NAHCMD 255 (20 September 2019).

[13] *S v Teek* 2009 (1) NR 127 (SC) at para 7

[14] *S v Nakale and Others* 2006 (2) NR 455 (HC).

[28] For these reasons, we conclude that on the basis of the evidence as tendered by the State it could not be said that there was no prima case against the respondent and the respondent was discharged prematurely.

[29] Accordingly we make the following order.

1. The appeal succeeds.

2. The decision of the learned Magistrate granting the respondent's section 174 (of the CPA) application is set aside.

3. The matter is remitted to the District Court of Walvisbay for continuation and finalisation of trial before the trial Magistrate.

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C CLAASEN

JUDGE

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D USIKU

JUDGE

APPEARANCES

For The Appellant:	Mr Moyo Of the Prosecutor General
For the Respondent	Mr Ipumbu Titus Ipumbu Legal Practitioners Windhoek