

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
RULING

Case no: CC 17/2019

In the matter between:

THE STATE

Versus

CHRIS VAN WYK

DESMOND !OWAS-OAB

Neutral citation: *State v Van Wyk and Another* (CC 17/2019) [2021] NAHCMD 5 (4 February 2021)

Coram: CLAASEN, J

Heard: 6-9 October 2020, 02-04 November 2020, 06 November 2020,
21 January 2021.

Delivered: 4 February 2021

Flynote: Criminal Law: Application for discharge in terms of s 174 of the Criminal Procedure Act 51 of 1977 at the close of the State's case. Test is whether there is evidence on which a reasonable court may convict.

Held: The evidence is insufficient to constitute a prima facie case in respect of count 1, 3, 6 and 7 and accused 1 is discharged on that. The position is different on count 2 and accused 1 is placed on his defence on that count.

Held: There was no evidence in relation to accused 2 and he is discharged on all the counts.

ORDER

Count 1 in respect of accused 1: Application for discharge is granted.

Count 2 in respect of accused 1: Application for discharge is refused.

Count 3 in respect of accused 1: Application for discharge is granted.

Count 4 in respect of accused 2: Application for discharge is granted.

Count 5 in respect of accused 2: Application for discharge is granted.

Count 6 in respect of accused 1 and 2: Application for discharge is granted.

Count 7 in respect of accused 1 and 2: Application for discharge is granted.

**JUDGMENT ON APPLICATION FOR THE DISCHARGE IN TERMS OF SECTION 174
OF ACT 51 OF 1977**

CLAASEN J

Introduction

[1] At the close of the State's case counsel for both the accused persons sought discharge on all the counts. The accused persons are before court on multiple charges which all stems from events that allegedly occurred on 1 November 2015 at Mondesa in the district of Swakopmund.

[2] A summary of the charges follows:

Count 1 (accused 1)

It is alleged that the accused wrongfully, unlawfully and intentionally committed a sexual act under coercive circumstances with Trudy Cloete, by inserting his penis into the mouth of the complainant.

Count 2 (accused 1)

It is alleged the accused wrongfully, unlawfully and intentionally committed a sexual act under coercive circumstances with Trudy Cloete, by inserting his penis into the vagina of the complainant.

Count 3 (accused 1)

It is alleged that the accused wrongfully, unlawfully and intentionally caused Desmond !Owas-Oab the perpetrator to commit a sexual act under coercive circumstances with Trudy Cloete, by intimidating her with his presence, and thereby allowing the said !Owas-Oab to insert his penis into the vagina of the complainant.

Count 4 (accused 2)

It is alleged that the accused wrongfully, unlawfully and intentionally committed a sexual act under coercive circumstances with Trudy Cloete, by inserting his penis into the vagina of the complainant.

Count 5 (accused 2)

It is alleged that the accused wrongfully, unlawfully and intentionally caused Chris Van Wyk to commit a sexual under coercive circumstances with Trudy Cloete, by intimidating her with his presence, and thereby allowing the said Van Wyk to insert his penis into the vagina of the complainant.

Count 6 (accused 1 and 2)

It is alleged that the accused persons wrongfully, unlawfully and maliciously assaulted Trudy Cloete with intent to do the said Cloete grievous bodily harm, by hitting her in her face which resulted in certain wounds, bruises or injuries.

Count 7 (accused 1 and 2)

It is alleged that the said accused did wrongfully and unlawfully stole a cell phone, the property or in the lawful possession of Trudy Cloete.

[3] At the commencement of the trial, the state withdrew count 8 which was in respect of accused 2 only. Both accused persons tendered not guilty pleas and opted to remain silent on their respective charges.

Arguments on behalf of the accused 1

[4] Mr. Siyomunji on behalf of accused 1, submitted detailed written heads of argument. In that he provided an overview of evidence of the witnesses and referred the court to *S v Lubaxa*.¹

[18] I have no doubt that an accused person (whether or not he is represented) is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates himself. The failure to discharge an accused in those circumstances, if necessary *mero motu*, is in my view a breach of the rights that are guaranteed by the Constitution and will ordinarily vitiate a conviction based exclusively upon his self-incriminatory evidence.

[19] The right to be discharged at that stage of the trial does not necessarily arise, in my view, from considerations relating to the burden of proof (or its concomitant, the presumption of innocence) or the right of silence or the right not to testify, but arguably from a consideration that is of more general application. Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common law principle that there should be "reasonable and probable" cause to believe that the accused is guilty of an offence

¹ *S v Lubaxa* (372/2000) [2001] ZASCA 100

before a prosecution is initiated (*Beckenstrater v Rottcher and Theunissen* 1955(1) SA 129 (A) at 135C-E), and the constitutional protection afforded to dignity and personal freedom (s 10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold. That will pre-eminently be so where the prosecution has exhausted the evidence and a conviction is no longer possible except by self-incrimination. A fair trial, in my view, would at that stage be stopped, for it threatens thereafter to infringe other constitutional rights protected by s 10 and s 12.'

[5] The basis of his argument is that, though accused 1 was at the scene, it is not established that he raped the complainant or had sexual intercourse with her. A fatal drawback, according to him, is that there is no evidence by the complainant to confirm the incidents. He makes the same argument in respect of the charge of assault with the intent to do grievous bodily harm as well as the theft charge.

[6] The conclusion that he came to was that the State failed to show on a balance of probabilities that accused 1 is guilty of any of the charges against him and since there is not enough evidence against accused one, on any of the charges, the court should return a verdict of not guilty.

[7] In respect of accused 2, Mr Dube submitted that accused 2's name was barely mentioned. He accentuated the fact that the person who would have been a material witness in this regard, is not able to come to court on account of being mentally indisposed. In addition, he pointed to the negligible manner in which the rape kits and other forensic investigations were done, which means even if it was done, it will lack a proper chain of custody.

[8] At the end of the day he argued the State presented nothing to link accused 2 to counts 4,5,6,7. The evidence, he submitted, was so inadequate in respect of accused 2 that one wonders why he was even arrested. On that basis accused 2 must be discharged at this juncture.

Arguments by State

[9] Council for the State, Mr Lisulo countered Mr Siomunji's arguments by saying that there is sufficient evidence to satisfy a *prima facie* case against accused 1. He points to the evidence of the two police officers, Rebecca Petrus and Andreas Kwedi who drove to the scene after Mr Toivo Njalo summoned them to the scene. He submits that the testimony given by the three witnesses provided corroboration in so far as testifying that accused 1 was seen on top of the complainant, she was naked, that she hit accused 1 and held him on his leg, which is how accused 1 was arrested. It is Mr Lisulo's view that the testimonies of the three witness do not materially differ on the point of what accused 1 was wearing or not wearing at the material time.

[10] Mr. Lisulo urged the Court to have regard to the circumstantial evidence, in the absence of direct evidence from the complainant who passed away before she could testify. He referred the court to *S v Teek*² and *S v Nakale and Others*³ regarding the weight that attaches to the credibility of witness during an application of this nature.

[11] With regard to the version that was advanced by accused 1, during cross-examination he posed the rhetorical question, if this was consensual sex, why would the complainant assault the accused person? That he say the accused will have to come and explain. If it was a dance performed on the body of the complainant, a probability that counsel offered as an option to one of the state witnesses during cross-examination, then accused 1 must come and explain. Accused 1 must also come and explain how the complainant got the injuries.

[12] With regards to accused 2 Mr Lisulo explained the predicament of the State, namely that the witness in this regard now suffers from a mental incapacity and therefore cannot be called as a witness. At the end of the day he conceded there is no evidence on which a reasonable court acting carefully could convict accused 2 and made a similar concession in respect of count 7.

² *S v Teek* 2009 (1) NR 127 (SC)

³ *S v Nakale and Others* 2006 (2) NR 455 (HC)

The law and application to the facts

[13] I turn to the foundation of the application. Section 174 of the Criminal Procedure Act⁴ reads as follows:

‘ Accused may be discharged at close of case for prosecution....

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.’

[14] In the Namibian context, the courts have interpreted the words ‘no *evidence*’ as no evidence upon which a reasonable court, acting carefully, may convict.⁵ It is also evident that each case must be decided on its own merits whether to discharge or not.

[15] In *Elia v S*⁶ it was held that the inquiry was not, and has never been whether the evidence was cogent, plausible or constituted proof of guilt beyond a reasonable doubt. Furthermore in *S v Teek*⁷ the generally accepted view was re-affirmed that, although credibility is considered during s 174 applications, it plays a limited role.

[16] Against this framework I turn to the evidence that I regard as material to determine the issue on the respective counts. The first witness Mr Toivo Ndjalo testified that on the relevant night, as he was walking to his house he noticed four men and a girl at an open space. The men were pulling the girl in different directions and she screamed that the men should leave her alone. That picture induced him to report it to the police. Upon their return to the scene, according to him, he saw accused 1 on top the lady busy having sex. The lady noticed them and grabbed and held accused 1 on his leg. The other three men ran away. The lady was naked and accused 1 were not wearing clothes either.

[17] Evidence was also presented by the two police officers that responded to Mr Njajo’s request to rush to the scene. Police Officer Rebecca Petrus stated that upon

⁴ Criminal Procedure Act 51 of 1977 as amended

⁵ *S v Teek* 2009 (1) NR 127 (SC). See also *S v Nakale* 2006 (2) NR 455 (HC) at 457.

⁶ *Elia v S* (CC 18/2018) [2020] NAHCMD 214 (8 June 2010).

⁷ *S v Teek* 2009 (1) NR 127 (SC). See also *S v Nakale* 2006 (2) NR 455 (HC) at 457.

arrival at the scene she saw 4 boys as the headlights were switched on. Some were sitting holding the lady, who was lying naked on the ground, by her arms, while the fourth one was on top of the lady, making movements with his lower abdomen.

[18] She stated that the lady, upon noticing them, held the boy and hit him with a stone. As the boy moved and stood up she noticed he was putting on his T-shirt and the zipper on his trouser was open. This boy was identified as accused 1.

[19] Once at the station, she and the victim had a brief conversation wherein the victim told her that sex occurred.

[20] Andreas Kwedhi is the second Police Officer that drove to the scene. He indicated that at the scene once the lights were switched on, he saw four guys sitting and one on top of a lady making movements. As for what he saw, he said that he saw the boy having sex with her and clarified the position to have been between the private parts. Furthermore, upon enquiry accused 1 told him that it was his girlfriend though the lady said something different, namely that the young men are not known to her.

[21] Ultimately the question in respect of each charge is whether the evidence presented constitutes a prima facie case?

[22] It is not in dispute that there was no evidence on which this court could rely to place accused 2 on his defence.

[23] The position in respect of accused 1 is slightly different. I start with the count of assault with the intent to do grievous bodily harm. None of the three witnesses that arrived on the scene observed illicit behaviour by accused 1 on this count there is no issue that the lady had bruises and injuries. The problem is that it cannot be specifically imputed to accused one, as there was three other men that fled from the scene. As for the theft charge there was no evidence whatsoever on that charge.

[24] As for the statutory rape charges, the court heard evidence from the State and the court became privy to the version postulated by the defence. In short that version is that accused 1 and the complainant agreed earlier to have sex in the toilet which could not materialise and they went home. As they walked they fell prey to four men who attacked them. Furthermore Officer Kwedhi testified that accused 1 told the police officer that the lady was his girlfriend. It is in this regard that the State's rhetorical question as regards to the lady that assaulted accused 1 on the scene, become relevant and is in need of an answer.

[25] Both the version of the State and the version of accused 1 placed accused 1 on the scene. The gist of the three State witness's evidence referred to above was that accused 1 was seen laying on top of the lady, making movements, that was construed as sexual activity. In respect of a description of the location of the movements between the respective bodies, the witnesses described it as having occurred between the stomach and pelvic area and not close to the mouth of the complainant. The latter act is the subject matter of count 1.

[26] Despite the vigorous cross-examination by counsel for accused 1, the essence of the testimony by these 3 witness on pertinent elements on count 2 has not been displaced. Nor was the evidence of such poor quality that it does not constitute a prima facie case on count 2. In *S v Amakali Leevi*⁸ Liebenberg AJ as he then was said:

'the evidence given by the State witnesses at this stage has not been refuted. Whereas the defense up to now has merely disputed the evidence adduced by the state and did not lead any evidence that refutes such evidence, there is no evidence to gainsay the state's version.'

[27] Weighing all the evidence presented by the State I conclude that there is sufficient evidence in respect of count 2 and accused 1 is placed on his defence on that count. On all other counts the application is successful.

⁸ *S v Amakali Leevi* Case no 38/2008 delivered on 20/7/2009.

[28] In the result, I make the following order

Count 1 in respect of accused 1: Application for discharge is granted.

Count 2 in respect of accused 1: Application for discharge is refused.

Count 3 in respect of accused 1: Application for discharge is granted.

Count 4 in respect of accused 2: Application for discharge is granted.

Count 5 in respect of accused 2: Application for discharge is granted.

Count 6 in respect of accused 1 and 2: Application for discharge is granted.

Count 7 in respect of accused 1 and 2: Application for discharge is granted.

C CLAASEN

Judge

APPEARENCES

THE STATE:

D Lisulo
Of Office of the Prosecutor-General,
Windhoek

ACCUSED 1:

M. Siyomunji
Of Siyomunji Law Chambers, Windhoek

ACCUSED 2:

ID Titus
Instructed by Directorate of Legal Aid