

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
RULING IN TERMS OF SECTION 174 OF ACT 51 OF 1977

Case no: CC 19/2013

In the matter between:

THE STATE

and

MARCUS THOMAS

FIRST

ACCUSED

KEVIN DONEL TOWNSEND

SECOND ACCUSED

Neutral citation: *S v Thomas* (CC 19/2013) [2023] NAHCMD 338
(19 June 2023)

Coram: **LIEBENBERG J**

Heard: **26 May; 9 June 2023**

Delivered: **19 June 2023**

Flynote: Criminal procedure – Application in terms of section 174 of the Criminal Procedure Act 51 of 1977 – Discharge of accused in terms of s 174 – Applicable test – Whether there is evidence on which a reasonable court acting carefully may convict – Principles restated – Approach to circumstantial evidence to be considered – Inferences may be drawn from proven facts in the end.

Summary: The accused persons, both citizens of the United States of America, are jointly charged with Murder; Robbery with aggravating circumstances; contraventions of sections 22(1), 2 and 33 of the Arms and Ammunition Act 7 of 1996; and Defeating or obstructing the course of justice. It is the state's contention that when the accused persons committed the alleged offences, they were, in respect of all the counts, acting with common purpose. At the close of the state's case both accused applied for their discharge in terms of s 174, stating that there was no *prima facie* evidence upon which a reasonable court, acting carefully, may convict. The application is opposed by the State.

Held: There is sufficient evidence from which the court, in the end, may draw inferences which justify the requirements laid down in *R v Blom*.

Held further: The approach to circumstantial evidence is not to consider it in piecemeal, but rather to allow a holistic approach at least as far as it concerns the individual charges brought against the accused persons.

Held that: When the evidence is considered in its totality, the state has made out a *prima facie* case against the accused persons which they should answer to.

ORDER

The applications in terms of s 174 of the Criminal Procedure Act 51 of 1977 for discharge by accused 1 and 2 on all charges, are dismissed.

**RULING ON APPLICATION FOR DISCHARGE IN TERMS OF SECTION
174 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977**

LIEBENBERG J:

Introduction

[1] The accused persons, being citizens of the United States of America, are jointly charged with Murder; Robbery with aggravating circumstances; contraventions of sections 22(1), 2 and 33 of the Arms and Ammunition Act 7 of 1996; and Defeating or obstructing the course of justice. It is the state's contention that, when the accused persons committed the alleged offences, they were acting with common purpose.

[2] On 11 November 2014, the accused persons pleaded not guilty to all charges preferred against them and elected not to disclose the bases of their respective defences. During the course of the state's case, which covered a period of more than eight years, the court was seized with multiple interlocutory applications and heard the testimonies of 49 witnesses. At the close of the state's case on 10 May 2023 the accused persons intimated that they intend bringing applications in terms of s 174 of the Criminal Procedure Act 51 of 1977 (the CPA) in which they seek their discharge on all counts. The state opposes the applications. It was agreed that counsel would file written submissions for the court's determination of the applications. I express my gratitude towards counsel for their diligence in this regard.

[3] Mr Kanyemba appears for accused 1, Mr Siyomunji for accused 2 and the state is represented by Ms Verhoef.

The law in section 174 applications

[4] It was submitted on behalf of the accused persons that the state has the burden of proving the allegations contained in the indictment but that it failed to establish a *prima facie* case against the accused as required by s 174 of the CPA.

[5] When considering an application like the present, the court has a judicial discretion whether to grant the application or not. This gives the court the power at the close of the case for the prosecution to discharge the accused if there is no possibility of a conviction, other than if the accused enters the witness-box and incriminates himself. The failure to order the discharge of the accused in those circumstances would constitute a breach of the right to a fair trial as guaranteed in Article 12 of the Constitution; when the conviction is exclusively based upon the accused's self-incriminatory evidence.

[6] It is now settled law that the term 'no evidence' in s 174 means no evidence upon which a reasonable court, acting carefully, may convict. (*S v Khanyapa* 1979 (1) SA 824 (A) at 838F; *S v Nakale* 2006 (2) NR 455 (HC) at 457, endorsed in *S v Teek* Case No. SA 44/2008 (SC) delivered on 28 April 2009 (unreported).

[7] At the outset, it must be understood that the test for discharge under s 174 differs from the test at the end of the trial where the Court is required to assess the evidence as a whole, including the probabilities.

[8] Regarding the credibility of state witnesses at this stage of the trial, Brand AJA in the *Teek* matter said the following at p.5:

'Somewhat more controversial is the question whether credibility of the State witnesses has any role to play when a discharge is sought under this section. But the generally accepted view, both in Namibia and in 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 (see eg *S v Mpetsha* 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?’

[9] With regards to evaluating the reasonable possibility that an accused may supplement the state evidence as a factor for consideration, Muller J in *Nakale* (at 464F-I) proposed the following factors for consideration by the court:

- ‘(a) the type of offence(s) allegedly committed;
- (b) if there is more than one accused and there is evidence by the State supporting an allegation of common purpose;
- (c) presumptions of law;
- (d) reliance on an alibi;
- (e) the manner in which the accused cross-examined State witnesses and statements made to them;
- (f) allegations or admissions made during pleading.

There may be other factors and it is not possible to provide a *numerus clausus* thereof.’

Submissions

[10] Mr Kanyemba submitted on behalf of accused 1 that, guided by established principles regarding the requirements laid down in s 174 of the CPA, no evidence has been adduced by the state against accused 1 upon which a reasonable court, acting carefully, may convict. Hence, the accused should be found not guilty and discharged on all charges. In respect of the murder charge, it is argued that the evidence presented did not establish a causal nexus between the accused and the commission of the crime or the crime scene; neither as regards items used during the commission of the crime. As with his co-accused, it was particularly emphasised that, during a police search conducted of the room occupied by the accused persons at African Sky guesthouse on the day of the murder, nothing was found which could link the accused to the murder or the crime scene; this much was conceded by the main investigating officer, Chief Inspector Ndikoma (Ndikoma).

[11] With regards to a lunch appointment the deceased had with two American friends at the time of the murder, counsel submitted that a reasonable court, acting carefully upon the proven positive facts before it, may reasonably infer that the persons the deceased were to meet with, are the accused persons before court. Counsel's further contention that accused 1 was indeed at the restaurant, but that the deceased never turned up, however, is a mere allegation or imputation made by the accused as there is no evidence before court to substantiate this claim. Accused 1 seems to be the only person able to lead evidence to this effect and, until such time, the contention is unsubstantiated and does not constitute evidence for consideration for purposes of this application.

[12] Regarding evidence about a 7.65mm firearm purchased by the accused persons, it was submitted that there is equally no nexus between the said arm and the actual murder committed with that firearm. This, counsel argued, is because there is no evidence showing that the said firearm was used during the commission of the murder, neither has the murder weapon been found to date. Thus, it was said, the deceased's death cannot be linked to the conduct of accused 1 regarding the buying of a firearm. On the same basis, it was argued that there is no evidence of theft of the property of the deceased or which establishes a causal link between the accused and the alleged robbery.

[13] Pertaining to the charges of importation of firearms, possession of firearms without a licence and possession of ammunition, counsel contends that the state has led no evidence regarding the importation of the two gun barrels. As for evidence regarding a silencer found inside a table leg which was imported, counsel argued that a silencer is not defined as an 'arm' as per the definition in the Act. I pause to observe that counsel's argument that, had there been any importation of illegal or suspicious items then such items would have been banned or subjected to investigation, is mere speculation in the absence of probative evidence to that effect. It is further submitted that, in the absence of *prima facie* evidence showing that accused 1 was found in possession of a firearm or ammunition, and such items not being before court as proof thereof, the allegations set out in the respective charges are unsubstantiated.

[14] With regards to the charge of defeating or obstructing the course of justice, counsel submits that there is no evidence showing that accused 1 stole the notebook from Ndikoma's office for purposes of destroying it. Furthermore, neither is there evidence establishing the destruction of evidence by accused 1, in that the witness, Joshua Hecht (Hecht), was unsure as to what exactly he saw accused 1 burning out in the cell. To this end, it was said, the elements of the offence had not been proven.

[15] Mr Siyomunji, on behalf of accused 2, submitted that the evidence tendered by state witnesses does not implicate his client in the commission of the charges preferred against him. With regards to the murder charge, counsel primarily focused on the evidence of Inspector Ndokosho (Ndokosho) and Ndikoma, which covered the crime scene and a search conducted of room 5 at African Sky guesthouse on 7 January 2011. He argued that the purpose of visiting the place where the accused persons were booked in was to search for the firearm, spent cartridge, the deceased's wallet and cell-phone, as well as the phone from which the last contact with the deceased was made. These items would have established a link between the accused persons and the murder scene. It was submitted that, as none of these items were found with the accused, no such link or connection could be made with either of the accused. It was further submitted that the police investigation did not reveal why the body of the deceased was found in Gusinde Street in Eros, while he had a lunch appointment at Jenny's Place situated in Klein-Windhoek. I pause to observe that counsel's submission that Gusinde Street is situated in a different residential area (Eros) is incorrect, as it still falls within the area of Klein-Windhoek.

[16] With regards to the testimonies of Deputy Commissioner De Klerk and Ndikoma about finding two gun barrels and a silencer among the personal belongings of the accused persons on 9 January 2011, it was submitted that there is evidence before court proving that none of these parts could be linked to the murder. Furthermore, that Ndikoma conceded that he was wrong when he initially said that accused 2, according to the MTC printouts, was in the area of Gusinde Street on the day of the murder.

[17] In support of the application, accused 2 further relies on the evidence of Ndikoma and De Klerk about a report made by a certain Maria Maseko from the guesthouse, about accused 2 having been in his room (at the guesthouse) at around 13h00 on 7 January 2011 when the murder took place. It should however be pointed out that this person (Maria Maseko) never testified in court, which renders her evidence to be hearsay, for reason that the truth of the report has not been established.

[18] Regarding the charges relating to the importation of firearms without a permit, the possession of a firearm without a licence and the unlawful possession of ammunition, counsel submits that evidence linking accused 2 to any of these offences is lacking, thus rendering the charges unmeritorious.

[19] In respect of the charge of defeating or obstructing the course of justice it was submitted that the testimony of state witness Hecht about evidence that was destroyed by accused 1, relates solely to accused 1 and does not implicate accused 2.

[20] With regards to evidence about the accused persons having bought a firearm as testified by state witnesses, it was submitted that the said firearm was never found and, in the absence of evidence of a connection between the projectile retrieved from the deceased's body and the said firearm bought by the accused, there is accordingly no link to the murder. Neither would the court be able to make such inference from the proved facts, it was said. Reference was also made to the different descriptions given by the witnesses of the firearm.

[21] Counsel further submitted that there was no evidence proving the allegation that there was a prior agreement and premeditated plan to act with common purpose between the accused to murder the deceased. It was said that the bail agreement (bond) which secured the release of accused 2 from prison in the United States of America (USA) was between accused 1 and the mother of accused 2 and did not involve him (except for his release). Apart from establishing that accused 2 travelled with accused 1 from the USA to Namibia, accused 2 cannot be linked to Helsinki Finland from where a parcel was dispatched and collected by accused 1 at the Hosea Kutako International Airport

(HKIA), Windhoek. Neither are the personal particulars of accused 2 reflected in any of the accompanying documents to wit, the air waybill.

[22] Based on the above stated considerations, counsel concluded that there exists no possibility that a reasonable court, acting carefully, will convict accused 2 on any of the charges. Hence, he is entitled to a discharge under s 174 of the CPA.

[23] Ms Verhoef represents the state and gave a brief summary of the evidence presented thus far which, in her view, establishes a *prima facie* case against the accused persons. For purposes of this application, I do not intend summarising the evidence or repeat the summary relied on by the state when opposing the application and will merely consider those facts considered decisive in determining the issue at hand.

[24] Based on the evidence presented through the testimonies of state witnesses and other forms of evidence¹ admitted into evidence, the following facts are for consideration: On 27 December 2010 the accused persons, being USA nationals, arrived in Namibia via HKIA and have been in each other's company until the time of their arrest on 7 January 2011 at African Sky guesthouse where they shared a room. During this period they interacted with several state witnesses for different reasons and, in the course of the interaction, the accused persons acted in unison. The accused obtained SIM cards from a local service provider (MTC) which, according to call registers admitted into evidence, were used to contact persons they had either met during this period or managed to establish contact with, including the deceased. As borne out by the testimony of witness Henri Olivier (Henri), the accused leaned on him to obtain the number of the deceased which he was able to assist them with. The accused expressed their desire to meet up with the deceased as they claimed to be friends. The call registers confirm telephonic contact between the deceased's number and one of the SIM cards (the -4153 number) acquired by the accused persons. It further established that the last communication between this number and the deceased was shortly before he was murdered. Though not disputed that accused 1 used this number to contact the deceased, the actual cell-phone

¹ Documentary and real evidence.

and SIM card used could not be traced or found with the accused during a police search of their room later that same day. A cell-phone with SIM card (the -4154 number) was found in possession of the accused but, according to the evidence, there was no contact between this number and the deceased. According to Henri he was contacted by accused 2 from this number when enquiries were made into the whereabouts of the deceased.

[25] Also not in dispute, is the evidence of witness Donny Kock pertaining to a rental agreement entered into between him and accused 1 (whilst in the company of accused 2) on 28 December 2010, for the use of a Volkswagen Golf motor vehicle. This vehicle was still in their possession at the time of their arrest. Still on the same day, the accused persons travelled to HKIA where accused 1 claimed and collected a parcel from a cargo company that was sent from Finland. According to the waybill it was 'furniture spares' which, when opened on the instruction of a customs official, revealed a table leg with a smaller black pipe inside. These items were seized on 9 January 2011 during a search conducted by investigating officers De Klerk and Ndikoma at the guesthouse which later, upon closer scrutiny, revealed a firearm silencer. Documentation found in possession of the accused persons during the search reflect that these items were dispatched by accused 1 from Finland to Namibia, with the forwarding address being the accommodation establishment² where they first stayed after their arrival in Windhoek.

[26] The evidence of several witnesses was led to the effect that the accused persons already on 1 January 2011 met up with state witnesses for purposes of buying a Glock pistol on the black-market. Witnesses Muliokela, Hendriks and Kavari all link accused 2 to exhibits 1 and 2, being two gun barrels shown to them during these meetings, whilst accused 2 explained the purpose and effect of the barrels to them. Before taking the barrels from a black plastic bag, accused 2 had put on a pair of black gloves with red stripes. When unable to find the specified pistol the accused persons were in search of, the witnesses testified as to how they instead managed to find a 7.65mm pistol, plus live rounds which were sold to the accused persons on 3 January 2011. Accused 1 could not pay the full purchase price during the handover but on the afternoon of

² Cardboard Box backpackers.

7 January 2011, the day of the murder, the accused persons met with Muliokela and paid the outstanding amount in full.

[27] Although this firearm could not be traced during the police investigation, two gun barrels and a pair of black gloves were discovered in a briefcase in the room of the accused persons which the witnesses identified as being similar to what they had earlier seen with accused 2. During the post-mortem examination conducted on the body of the deceased who died of a single gunshot in the head, a spent projectile of 7.65mm caliber was retrieved from the body. There is no evidence to show from which firearm it was fired.

[28] Among the items seized by the police during a search of the room on 9 January 2011, were several cell-phones, a street map of the area where the murder was committed and a note book. The notebook contained notes about firearms with specific features like threaded barrels and where it could be obtained. Names were also recorded, such as those of the deceased's parents and telephone numbers of their business situated in town. This notebook inexplicably disappeared from the main investigator's desk after a visit to his office by the two accused and made its way to the cell of accused 1 where it was subsequently found at the bed of accused 1 in the Windhoek Correctional Facility. The evidence of a fellow detainee (Hecht) is that accused 1 tore pages from the notebook and set it alight. When the notebook was retrieved, pages with the notes, as mentioned, were missing. All was not lost as copies of the content of the notebook were made before its disappearance. Accused 1 disputed any involvement in the taking of the notebook from the investigator's office and the partial destruction thereof.

[29] As pointed out by state counsel, both the accused elected to remain silent when afforded the opportunity to disclose the bases of their defence. Notwithstanding, during the testimonies of some of the state witnesses, instructions from the accused persons were put to the witnesses for comment which, in some instances, were contradictory. One such instance concerns evidence about the accused persons having denied any knowledge of a cell-phone which used the -4153 number, whilst later claiming that accused 1 contacted the deceased from the very same number. As mentioned, the phone

with this number disappeared without any mention made of its whereabouts. With regards to the finding of the two firearm barrels and a silencer in possession of the accused persons, any knowledge thereof was also disputed and made out to have been planted there by the police to implicate them in the murder.

[30] The purpose for the accused persons' coming to Namibia was only disclosed during cross-examination of state witnesses in the form of instructions given by the respective accused. Whilst accused 2 admitted having met with witness Muliokela, but denies having requested a gun from him, it was said that he came to Namibia to visit people he knew, without mentioning names. It is thus not in dispute that Muliokela had met with the accused persons who, until then, were unknown to him.

[31] To the witness Ndikoma it was put during cross-examination, as an instruction from accused 1, that the accused persons and the deceased knew one another, which explains the lunch appointment. It should be noted that the evidence thus far established that the lunch appointment was between the deceased and both the accused. Also that the deceased was to meet two Americans who were friends of a mutual friend, Natali Muscat, living in the USA, but that they were not known to the deceased. During the cross-examination of the deceased's sister, Bianca Heckmaier, it was further put to her by counsel for accused 1 that he and the deceased were known to each other in a business capacity prior to December 2010 and, that the purpose of his coming to Namibia was a continuation of their deliberations. It was further alleged that 'they' (both the accused) arrived at the restaurant, but the deceased was not there. This assertion, however, contradicts the position of accused 2 who claims not to have accompanied accused 1 to the lunch appointment. At no time until that stage of the trial was the alleged business connection between the deceased and accused 1 mentioned. Neither was it stated to have been the reason for the accused linking up with the deceased by phone. The accused's silence in this regard remains a mystery. The deceased's family was also not aware of any such dealings. It further begs the question why the deceased would have portrayed the accused persons as strangers to his family, unknown to him and

whom he was only to meet over lunch if he and accused were doing business? It is not in dispute that the last telephonic contact the deceased had was with a phone used by the accused.

[32] When considering the applications made by the accused persons in view of the facts briefly summarised above, there appears to be sufficient evidence before court from which a court, at the end of the trial, may draw inferences which satisfy the requirements laid down in *R v Blom*³. The state's case is primarily based on circumstantial evidence in respect of some of the charges, whilst there is direct evidence linking the two accused to others. Though mindful of the fact that only the evidence of state witnesses is before court, the approach to circumstantial evidence is not to consider it in piecemeal, but rather to follow a holistic approach, at least as far as it concerns the individual charges brought against the accused. These charges, to a certain extent, are intertwined and directly or indirectly linked to the murder charge. In this instance, there is no direct evidence linking the accused persons to the murder. Neither could the firearm barrels and silencer found in possession of the accused persons be linked to the murder. It is further alleged that the accused, in respect of each offence charged, acted with common purpose. The doctrine of common purpose may be relied on where the facts show that the accused joined forces to attain a certain goal by unlawful means.

[33] When applying the principles stated above to the evidence presented during the state's case, it is my considered view that the state has made out a *prima facie* case against the accused persons which they should answer to. In coming to this conclusion, the following evidence (but not limited to) is taken into account:

(a) Evidence proving that the accused persons arrived from the USA in each other's company for divergent reasons as set out by them. As for accused 1, who claims to have had business dealings with the deceased, the evidence shows that he, at the time of their arrival, had no means of making direct contact with the deceased for purposes of continuing their deliberations

³ *R v Blom* 1939 AD 188.

and had to rely on the assistance of a stranger (Henri), to get hold of the deceased's contact details.

(b) The evidence further discloses proof that accused 1 dispatched from Finland and brought into Namibia a silencer for a firearm, later found in the possession of the accused persons where they stayed at a guesthouse in town. In addition, two firearm barrels were found in their possession for which neither of the accused claimed ownership and thus remained unexplained. Both the accused distanced themselves from the firearm barrels and silencer, but this does not explain why these firearm parts were found in their possession and what it was intended for. Moreover, where its possession (as far as it concerns the barrels), would constitute a criminal offence. In circumstances where the accused, shortly after their arrival, showed interest in the unlawful acquiring of a specific firearm (Glock pistol), to which the barrels and silencer could be fitted, it could be reasoned that they planned on using the firearm.

(c) There is direct corroborated evidence that when such firearm could not be obtained, the accused persons settled for and bought a 7.65mm pistol plus ammunition off the street, a deal which was clearly illegal. It has further been established that the deceased was shot and killed with the same caliber firearm. The firearm sold to the accused persons could not be traced during the police investigation and its disappearance remains unexplained; something which only the accused could possibly account for.

(d) It is not in dispute that a lunch meeting with the accused persons was set up by the deceased and that the last contact between them was by means of a cell-phone used by accused 1 shortly before the deceased was killed. The phone used during this contact could equally not be traced and its disappearance remains unexplained.

(e) It is further not in dispute that the personal belongings of the deceased, like his cell-phone and wallet, have been unlawfully removed from his person when murdered. Such conduct would constitute robbery and likely to have been committed by the same person(s) responsible for the murder.

(f) As for a notebook found in possession of the accused persons and seized as evidence by the police, entries made in that book were such that it *prima facie* links up with the parents and place of business of the deceased and contains information regarding firearms and/or accessories. The evidence presented shows that the notebook was unlawfully removed from the custody of the investigating officer and made its way to the Windhoek Correctional Facility where it was later discovered under the control of accused 1. There is further direct evidence that accused 1 was seen tearing pages from the notebook which were destroyed. When the notebook was retrieved, pages were indeed found to have been torn out from the book.

[34] After due consideration of the evidence and facts adduced during the state's case, the court is convinced that there is evidence on which a reasonable court, acting carefully, may convict on the charges preferred against the accused persons.

[35] In the result, the applications in terms of s 174 of the Criminal Procedure Act 51 of 1977 for discharge by accused 1 and 2 on all charges, are dismissed.

JC LIEBENBERG
JUDGE

APPEARANCES:

STATE: A Verhoef
Of the Office of the Prosecutor-General,
Oshakati.

ACCUSED 1: S Kanyemba
Of Salomon Kanyemba Incorporated,
Instructed by Directorate: Legal Aid,
Windhoek.

ACCUSED 2: M Siyomunji
Siyomunji Law Chambers,
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