REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING ON A SECTION 174 OF ACT 51 OF 1977 APPLICATION

Case Title:	**Case No:**
The State v Azaan Madisa and Another	CC 08/2022
Ruling on s 174 of Act 51 of 1977 application	**Division of Court:** Main Division
Heard before: Mr Justice Liebenberg	**Delivered on:** 6 March 2023
Neutral citation: *S v Madisa* (CC 08/2022) [2023] NAHCMD 93 (6 March 2023)	
The order: The application by accused 2 for discharge on counts 1 and 2 in terms of s 174 of the CPA is dismissed.	
Reasons for decision:	

LIEBENBERG J

[1] At the close of the state's case, accused 2 applied for discharge in terms of s 174 of the Criminal Procedure Act 51 of 1977 (the CPA) on counts 1 (murder) and 2 (robbery with aggravating circumstances). The state opposes the application.

[2] Ms Klazen represents accused 2 while Mr Muhongo appears for the state. I am indebted to counsel for their comprehensive and well-reasoned submissions which

assisted the court in deciding the application at hand.

[3] The law applicable to s 174 applications is well established in this jurisdiction and need not be rehashed.[1] It is common cause that at the close of the state's case in the present instance, there is no direct evidence implicating either of the accused persons in the commission of the offences charged in counts 1 and 2. It is further not in dispute that the deceased was in the company of accused 1 at her flat when she died. Accused 1 is the only person privy to the circumstances which led to her death and that is documented in a statement prepared by her counsel in terms of s 115 of the CPA. Accused 2, similarly, gave a plea explanation in a s 115 statement, setting out the basis of his defence on counts 1 and 2. Both accused, however, pleaded guilty to count 3, a charge of defeating or obstructing the course of justice. Section 112 (2) statements were drawn and handed up in respect of each accused, but the state declined the pleas as tendered.

[4] For reasons that would become apparent later, I deem it necessary to first reflect on the admissions made by both accused as regards count 3, before deciding the application for discharge brought by accused 2. In summary, the accused persons admit to the following: During a physical altercation between the deceased and accused 1, the deceased fell over the bed in the flat whereafter accused 1 detected that she was no longer alive. She then called her brother, accused 2, who arrived at her flat and after hearing from accused 1 what had happened, he suggested that the police be contacted. Fearing for her arrest, accused 1 persuaded accused 2 not to involve the police but rather to assist her to get rid of the body. He agreed and after they loaded the body onto a pickup, they drove to a spot on the side of town where they buried the body in a shallow grave. In addition, accused 1 admitted that when they returned to her flat, she noticed the deceased's cell phone, scarf, watch and sandals lying in the flat. She collected these items and discarded them into the large rubbish bin outside, to erase any possible link between her and the deceased.

[5] It is against this background that argument was advanced for and against the proposition that accused no 2 may be convicted of murder as an accessory after the fact.

[1] *S v Nakale* 2006 (2) NR 455 (HC) at 457; *S v Teek* 2009 (1) NR 127 (SC).

In the authoritative work of CR Snyman Criminal Law (Sixth edition) at 271 the definition of an accessory after the fact is stated thus:

> 'A person is an accessory after the fact to the commission of a crime if, after the completion of a crime, he unlawfully and intentionally engages in conduct intended to enable the perpetrator of, or the accomplice in, the crime to evade liability for his crime, or to facilitate such a person's evasion of liability.'

[6] When applying the above stated definition to the facts at hand, sight should not be lost of the fact that, at this stage of the trial the court had not yet ruled that a crime was committed. It is only after all evidence has been presented that the court would be required to decide the question of culpability as regards accused 1 on the murder charge. However, what is apparent from the admissions made by accused 1 is that she subjectively believed that her actions towards the deceased were culpable, therefore fearing her arrest. This she had conveyed to accused 2 who, thereafter, changed his mind from involving the police to getting rid of the body. His subsequent actions clearly demonstrate that he subjectively believed that accused 1 committed a crime and he agreed to facilitate her evasion of liability. When the admissions made by accused 2 are considered in light of his own subjective belief of a crime having been committed – irrespective what that crime might have been - it would appear to me that the conduct of accused 2 falls squarely within the above stated definition of an accessory after the fact. When further read with the provisions of s 257 of the CPA, the application for discharge on count 1 by accused 2 must fail.

[7] With regards to the charge of robbery contained in count 2, there is no admission or statement by either accused that falls within the ambit of the definition of robbery. It is only accused 1 who gave a statement in which she explains her actions as regards the personal belongings of the deceased. Although these admissions fall far short from satisfying the elements of the offence of robbery, it may, once found to be reliable, constitute theft, a competent verdict on a charge of robbery (s 260(d) of the CPA). Though accused 1 did not implicate accused 2 in the disposal of the deceased's personal belongings, it is common cause that he accompanied accused 1 back to her flat. This

was the time accused 1 decided to get rid of the deceased's belongings which suggests that he was present. Whether he then unlawfully and intentionally associated himself with theft of the deceased's property and participated or furthered the commission thereof, cannot be inferred from the admissions made by accused 1.

[8] However, when applying the criteria as stated in *S v Nakale* (supra), one of the factors for consideration is allegations and admissions made by the accused during pleading. Where the accused persons in this instance face the same charges and have made admissions, from which the court may draw inferences such as the accused having acted with common purpose (relating to a competent verdict on the charge of robbery), then a trial court should be slow in discharging one co- accused under these circumstances. Accused 1 did not bring an application for discharge and intimated that she would testify in her defence. There is thus the possibility that her evidence may supplement the state's case.

[9] After due consideration of the facts, as well as the submissions made by both sides, I have come to the conclusion that the application for discharge by accused 2 falls to be dismissed on both counts 1 and 2.

[10] In the result, the application by accused 2 for discharge on counts 1 and 2 in terms of s 174 of the CPA is dismissed.

NOTE TO THE PARTIES **The reason(s) hereby provided should be lodged together with any Petition made to the Chief Justice of the Supreme Court**	**J C LIEBENBERG** **JUDGE**