

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION,

HELD AT OSHAKATI

RULING ON SECTION 174 APPLICATION

Case No: CC 6/2022

In the matter between:

LOIDE NDUYAPUNYE NAFIKA

APPLICANT

v

THE STATE

RESPONDENT

Neutral citation: *Nafika v S* (CC 6/2022) [2023] NAHCNLD 72 (2 August 2023)

Coram: SALIONGA, J

Heard: 14 July 2023

Delivered: 2 August 2023

Flynote: Application in terms of s 174 of the Criminal Procedure Act, 51 of 1977—Application for discharge of accused at close of State case—Charges—Murder read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003—Test considered and applied—The evidence led is not so poor that a court acting carefully

may not convict the accused in the charge or any other offence —Application dismissed.

Summary: The accused in this case is indicted for murder read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003. The accused pleaded not guilty to the charge and submitted a statement in terms of section 115 of the Criminal Procedure Act, Act 51 of 1977. From the evidence led it is not in dispute that accused was pregnant and she gave birth to a baby on the 29th December 2020 and died the same day. The possibility of a conviction on a competent verdict will also play a role in reaching a conclusion. The circumstantial evidence presented together with the admissions made by the accused, are sufficient evidence calling for the accused to answer to. The test considered and applied is whether the evidence presented by the State was of such poor quality that a reasonable Court acting carefully might not convict on the charge or any other charge.

The Court held that the evidence led is not so poor to the extent that a court acting carefully may not convict the accused on the charge or any other offence.

The court further held that the application for the discharge in terms of section 174 should be dismissed.

ORDER

1. The application in terms of section 174 is hereby dismissed.

RULING

SALIONGA J:

Introduction

[1] The accused is indicted before this Court on three counts namely Count 1: Murder read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003, count 2: Defeating or obstructing the course of justice and count 3: Contravening section 132(1) (h) read with sections 1 and 132 (2) (b) of the Water Resources Management Act 24 of 2004 - Polluting a Water Resource.

[2] The brief facts per the indictment are that on the 29th December 2020 at Eenghango village in the district of Eenhana, the accused gave birth to a baby, she then killed her baby and threw the body in a well which was located at the same village she was residing. She then left Eenghango village on the 31st of December 2020 and informed Ndapandula Ngelapiti Lukolo that she gave birth on 31st of December 2020 and the baby died and that she had already buried this baby.

[3] The accused, represented by counsel, pleaded not guilty on three counts and tendered a detailed plea explanation from which admissions in terms of section 220 were recorded as per Exhibit E. In summary, the explanation is that the accused gave birth on her own at home after she had gone into the field to answer nature's call. While there she started to feel severe abdominal pains and she could not make it back to the homestead. Sadly her baby was stillborn and she decided to place the body in a pit in order to conceal the birth of her stillborn. The date of birth, death, and domestic relationship were admitted by the accused.

[4] Various documents were admitted as evidence by agreement and reference in this ruling will be made to them when necessary.

[5] The evidence from the State witnesses is that Ndapandula Ngelapiti Lukolo and the accused were friends and classmates in 2020. Accused asked her to come and stay

at her place before Christmas in December 2020 because she could not afford to pay rent and wanted to be closer to her doctor at Onandjokwe State hospital. She arrived on 29th December 2020 and Ndapandula went to get her. In the middle of the night while sleeping, Ndapandula awoke only to find that accused was not in the room they shared that night. She went searching for her with no avail. She came back and found the accused at the bricks inside the house. When enquiring where she had been, accused told her that she was in the field relieving herself. At no stage did accused mentioned that she had given birth and buried or dumped the baby.

[6] The next day 30th December 2020 accused informed the witness that she will be going to see her doctor on the 31st December at Onandjokwe hospital. The accused left on the 31st of December and later that day she informed the witness that she gave birth to a baby girl in the hospital who died because there was water and fat in her lungs. It was Ndapandula's evidence that on the 31st of December 2020 in the afternoon, the accused told her that she was hungry and the witness should prepare food for her the next day, 1st January 2021. That when she took the food for her she did not find her as her phone was off. On the 3rd January 2021 when Ndapandula asked her about the burial of her baby, the accused told her that they had already buried and this time she said it was a baby boy.

[7] Doctor Kandjimi is a medical doctor who conducts post-mortems at Engela hospital. He testified that on 16th January 2021 he examined the body of a black female newborn baby identified to him by W/O Kankondi as that of B/O Lonia Nafika who died on 3rd January 2021 as informed. He was unable to determine if the child was alive at birth and the cause of death as the body was decomposed. He could also not determine the gender of the baby. He however testified on the viability of a fetus of 28 weeks onwards to have a chance of survival as a baby born at this stage can survive outside the womb without assistance. When presented with the accused's version, he informed the court that it was improbable or unlikely that the accused would spontaneously give birth in the manner she described in exhibit E because there will be signs that she is going into labor prior to delivery. The doctor further said that those signs take hours as

the cervix has to gradually open and ripen to allow for the birth of the baby hence the accused would have known that she is going into labour.

[8] The other evidence of the remaining two State witnesses adds no real value to the case. Leticia Nhifikwa only confirmed that accused was at their house on the 29th December 2020 and that her daughter Ndapandula screamed in the middle of the night saying she could not find the accused. They later came to find her at the bricks. The evidence of the other witness also confirmed that accused came at their house on the 1st January 2021 and she was just normal and happy and nothing more. She did not even know if the accused was pregnant either.

[9] At the close of the prosecution's case, the accused, brought application for discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977 ('CPA'). It was submitted that the accused gave a detailed explanation of what happened. Therefore the State in order to succeed in its case must first disprove that defence in proving the accused's guilty beyond doubt. Mr. Shipila for the accused submitted that the State did not lead evidence that the baby was alive at birth or that accused threw him into a well arguing that none of the witnesses that testified could dispute that the baby born to the accused on 29th December 2020 was still born. The evidence of Doctor Kandjimi could not assist the court as the body that was examined was decomposed. None of the witness saw the baby alive nor heard him crying. Therefore Mr. Shipila in making reference to several case law submitted that the statement of the accused remains uncontroverted, undisputed and the accused should be discharged.

[10] Ms Khama for the State equally referred this court to case law it has to consider in determining the section 174 application. She submitted that it cannot be gainsaid that the evidence of the accused cannot supplement that of the State's case at this stage hence the Court may place the accused on her defence given the fact that the circumstances of the deceased's death are within her personal knowledge. She further submitted that the cause and manner of death are not elements of the offence of murder and it cannot be said that the State has not established a *prima-facie* case

because the cause of death is undetermined. It may be premature to discharge the accused at this stage without affording her the opportunity to give her version and the state the opportunity to cross-examine her on her version.

[11] Section 174 of the Criminal Procedure Act ¹ reads:

‘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.’

[12] Guided by the principles in *S v Nakale*² and *Others* and *S v Teek*³, Liebenberg J in *S v Lameck*⁴ summarized the test to be applied as follows.

‘The applicable test in an application in terms of s 174 of the CPA is that the court, at the close of the state case, may return a verdict of not guilty if it is of the opinion that there is no evidence upon which a reasonable court, acting carefully, may convict. The credibility of state witnesses is a factor that could be taken into consideration but at this stage, plays a very limited role. Only if the evidence is of such poor quality that it cannot be accepted by a reasonable court, would it support an application for discharge at this early stage of the trial.’

[13] It is a basic principle of our law that a person ought not to be prosecuted in the absence of minimum evidence upon which he or she might be convicted, merely in the expectation that at some stage he or she might incriminate himself or supplement the State’s case. Thus Article 12 (1) (F) of the *Namibian Constitution*⁵ provides:

‘No persons shall be compelled to give testimony against themselves or their spouses....’

It therefore follows that if one has to be prosecuted, there ought to be some evidence upon which a reasonable court acting carefully may convict. This court has also restated that at this stage of the proceedings the witness’s credibility plays a very limited role. Therefore, in the case of *Mpetha and others*⁶, the court held that: ‘if a witness gives

¹ Act 51 of 1977.

² 2006 (2) NR 455 (HC) at 457.

³ 2009 (1) NR 127 (SC) at 130 I-131 B.

⁴ *S v Lameck* (CC11/2010) [2019] NAHCMD 347 (18 September 2019).

⁵ Namibian Constitution as amended.

⁶ *S v Mpetha and others* 1983 (4) SA 262 C.

evidence which is relevant to the charges being considered by the court then that evidence can only be ignored if it is of such poor quality that no reasonable person could possibly accept it....'

[14] Although the evidence presented by the State was strenuously denied by the accused during cross-examination of the witnesses, there is no evidence before the Court gainsaying their versions. I agree and endorse what my brother Liebenberg AJ in *S v Amakali Leevi*⁷ as he was then 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.'

[15] In exercising the discretion whether to grant or refuse the application, the court should consider the interests of the accused and his rights to a fair trial keeping in mind that the accused has an absolute right to remain silent and not to testify in his defense. Finally the possibility of a conviction on a competent verdict will also play a role in reaching a conclusion. The circumstances in each case will be different and each should be decided on its own merits⁸.

[16] From the evidence led it is not in dispute that accused was pregnant and she gave birth to a baby on the 29th December 2020 who died the same day. The circumstances surrounding the birth and death of the baby are unknown as the accused was the only person present at the birth. That she disposed of the body of the child a fact which she admitted. When applying the above principles to the matter at hand I respectfully disagree with the submission by defence that accused be discharged at the end of the State case. The evidence presented together with the admissions made by the accused are sufficient to call for an answer. It cannot be said that the evidence presented by the State was of such poor quality that a reasonable Court acting carefully might not convict on the charge or on any other charge.

⁷ Case no 38/2008 delivered on 20/7/2009.

⁸ *S v Nakale and Others* (supra) at 466 para 26.

[17] In the premises and for the above reasons, it is ordered that:

1. The application for discharge in terms of section 174 is dismissed.

J T SALIONGA

Judge

APPEARANCES

THE APPLICANT: L P Shipila
Of Directorate of Legal Aid

RESPONDENT: D T Khama
Of Office of the Prosecutor General, Oshakati