REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA

Case No: CA 68/2000

In the matter between:

THE STATE	**APPELLANT**
and	
ZACHARIA STEPHANUS	**FIRST RESPONDENT**
BERLINO MATROOS	**SECOND RESPONDENT**
WESLEY NANUHE	**THIRD RESPONDENT**
WILLY JOSOB	**FOURTH RESPONDENT**

Coram**:** Shivute, J *et* Mtambanengwe, J

Heard on: 27 May 2002

Delivered on: 19 March 2012

APPEAL JUDGMENT

SHIVUTE, J:

[1] This is an appeal in terms of section 310 of the Criminal Procedure Act, 51 of 1977 (the Act) against the discharge of the respondents pursuant to the provisions of section 174 of the Act. The respondents faced a charge of theft of jewelry from their employer valued at N$12 380.00. It is now axiomatic that the Prosecutor-General has the right to appeal against any decision given in favour of an accused person in a criminal case in a lower court. Section 310 of the Act confers such a right to the Prosecutor-General and in so far as it is relevant to the facts in issue reads as follows:

> **"Appeal from lower court by Prosecutor-General or other prosecutor.**
> (1) The Prosecutor-General or if a body or a person other than the Prosecutor-General or his or her representative, was the prosecutor in the proceedings, then such other prosecutor, may appeal against any decision given in favour of an accused in a criminal case in a lower court, including-
> (a) any resultant sentence imposed or order made by such court
> (b) any order made under section 85(2) by such court, to the High Court, provided that an application for leave to appeal has been granted by a single judge of that court in chambers."

[2] Leave to appeal was granted in chambers on 27 February 2001 and the appeal was subsequently heard on 21 May 2002. The appeal is predicated on the ground that the trial magistrate misdirected himself, alternatively erred in law or in fact by:

"1. Not considering every bit of evidence presented by the state and by not testing it against the essential elements of the crime of theft which the state has to prove, in particular the complainant's evidence of the loss he suffered, the warnings he issued in this regard to the respondents, the similarity of the jewelry found in Mr. Fetzer's shop, the positive identification of the four respondents as the persons who sold this jewelry to Mr. Fetzer on different occasions.

2. Not finding at the close of the case for the prosecution that there was a *prima facie* case against respondents and that there was evidence upon which a reasonable man acting carefully, may convict.

3. Taking into consideration that if he refuses a discharge the respondents might remain silent when put on their defence, and by finding that this would lead to them being found not guilty and therefore discharge should be granted.

4. Not considering that as there was evidence at the close of the case for the prosecution, the defence case might supplement the State's case.

5. Finding that the respondents were being implicated in order to lift Mr. Fetzer and Mr. Viljoen out of a mess, thus, finding that the evidence of two prosecution witnesses were of such poor quality and unreliable that no part thereof can possibly be believed;

6. Not finding that as there was evidence at the close of the case for the prosecution, he has no right and no power to discharge the respondents."

[3] The facts of the case may be summarized as follows:

Mr. Rudolf Abraham Johannes Viljoen owned a jewelry-manufacturing factory in Windhoek where the four respondents worked for more than a year prior to their arrest on the charge in question. On 27 September 1999, a tourist visited Mr. Viljoen's factory shop and informed him that he, the tourist, could obtain pieces of jewelry similar to the ones Mr. Viljoen was selling at a cheaper price elsewhere. Mr. Viljoen

expressed surprise because he was sure that his materials were uniquely made in his factory shop. For that reason he was curious to know who else was selling jewelry similar to his. The tourist directed him to a jewelry trading business owned by a Mr. Fetzer where Mr. Viljoen discovered, to his astonishment, that there were materials in Mr. Fetzer's shop that were made in Mr. Viljoen's factory. The evidence tendered in the trial court was that no jewelry transaction was ever concluded between the two jewelry traders. Mr. Viljoen immediately suspected his employees as the possible sources of his jewelry found in Mr. Fetzer's shop. Without much ado, Mr. Viljoen invited Mr. Fetzer to his factory so that the latter could "identify the persons who [had] sold the materials to him". The four respondents, together with another co-worker, were found on their desks making jewelry and Mr. Fetzer wasted no time in pointing at the respondents as the persons who had allegedly sold Mr. Viljoen's jewelry to him. Mr. Viljoen explained in evidence how he was able to identify his jewelry pieces and how these could have passed the factory undetected. When cross-examined on whether he had prior knowledge of the theft, he replied:

> "Ja, all the time you know every now and then there is something small missing I can't play policeman and look over every one's shoulders the whole day".

[4] He explained that the nature of the casting process was that some pieces did not come out as processed materials and speculated that the respondents could have taken advantage of the mishaps during the casting process to steal the missing pieces from the "tree" where these unprocessed materials would normally attach after the casting process had been completed. Evidence presented before the trial court

was that several warnings were issued to the respondents for the missing pieces in the past.

[5] Mr. Fetzer testified that he was the owner of the souvenirs shop in Windhoek and had been in the business for six years at the time. He told the court that processed pieces which were sold to him included a pendant made from makalani nuts covered in silver from the back to front and a silver guinea fowl. Mr. Fetzer was insistent that he was convinced that the materials were not stolen after he was told by the respondents that they had made the materials themselves. Mr. Viljoen's evidence was, however, that the pieces of jewelry he found in Mr. Fetzer's shop was machine-manufactured and not hand-made. He was of the view that a person of Mr. Fetzer's experience could have easily detected this and determined that they were possibly stolen. The evidence of Mr. Fetzer further reveals that normal procedures were not followed when he had allegedly dealt with the respondents. Although he insisted that he had meticulously kept record of all the persons he had dealt with in the past, no documentation recording the transactions allegedly conducted with the respondents was available to the court at all. Mr. Fetzer explained that the documents relating to the transactions were kept in a box somewhere in his shop but these could not be traced. In the absence thereof, except for Mr Fetzer's say so, it is impossible to even prove firstly, that there was a sale, secondly, of the pieces before court and thirdly that it was indeed the respondents who sold these pieces. Under cross-examination, Mr. Fetzer stated that he had several dealings with the respondents which made it easier

for him to identify them although he could not remember their names or how much the pieces were sold for.

[6] Mr. Fetzer appeared to have contradicted himself when he testified that when he was approached by the respondents, they never told him where they came from while in the statement to the police he stated that the respondents had told him that they were from Karibib. This evidence appears to have been shaken further when he testified that it was possible that he had heard the respondent's place of origin from his sales persons and decided to include it in his statement.[1] The rest of Mr. Fetzer's evidence seems to be clouded in contradictions and inconsistencies. Mr. Fetzer's responses appeared to be hostile and he evaded answering certain questions put to him by counsel. Mr. Fetzer was clearly an accomplice whose evidence ought to be treated with caution.

[7] At the close of the State case, counsel for the respondents applied for their discharge. It was argued that the State had not proved a *prima facie* case against the respondents on the basis of which a reasonable court may convict. This argument was based on the evidence of identification of the respondents by Mr. Fetzer. Counsel for the respondents in the trial court submitted that it was fairly easy for Mr. Fetzer to identify the four respondents in the circumstances where there were only five persons on the factory floor. In counsel's own words:

[1] Record page 46-47.

> ”Mr. Fetzer walks through the factory, the accused person before Court are working, as Mr. Viljoen indicated, sitting down perhaps working, I mean he wouldn’t be able to have a proper look at their faces, because they were sitting. And I mean, nowhere did Mr. Fetzer indicate that he went down to look at their faces perhaps to identify these accused persons before court as the perpetrators who indeed sold these items to him.”[2]

[8] I am in agreement with the submission by counsel in effect that the evidence of identification was tenuous to say the least. In the case of *S v Ndikwetepo and Others,*[3] this Court following a long line of authorities, pointed out that the right procedure for identification would be through a properly held identification parade where the complainant would point out the suspect by putting his/her hand on the suspect’s shoulder. It is generally accepted that an identification of an accused person as the criminal is a matter notoriously fraught with error and our courts treat such evidence with caution. Muller, AJ (as he then was) in the *Ndikwetepo* matter pointed out at 250E-I that factors such as the witness’ previous acquaintance with an accused, accused’s clothing, specific features, opportunity for observation, time lapse between the incident and the trial should be properly investigated to reject any reasonable doubt as to the identity of the accused person. The court further pointed out that:

> “An identification parade is not only an effective investigative procedure, but also serves an important evidential purpose in that it can provide the prosecution with

[2] Record page 61.
[3] 1992 NR 232 at 234H.

> evidence which is of far more persuasive value than an identification in court, i.e. the so-called 'dock identification'."[4]

[9] The approach adopted in the so-called identification of the respondents does not conduce to a fair procedure in the investigation of crime. Mr. Viljoen had a duty to inform the police of his findings and suspicion so that a proper investigation, which would have included a proper identification parade, could be done. Instead, something akin to "dock identification" was done coupled with an easy task to identify four out of five people as suspects. Applying the principles laid down in the *Ndikwetepo-case* above, Mr. Fetzer could not identify any feature on any of the respondents which made it possible for him to identify them. Furthermore, considering the evidence before court that these transactions normally take a few minutes and Mr. Fetzer had many customers, it would have been a daunting task that after close to 2 years, he would still be in a position to adequately and with precision identify the respondents and to further link them to these specific pieces of jewelry. It is therefore my considered opinion that the evidence by Mr. Fetzer was of such poor quality that no reasonable court might convict on it. Nowhere in the evidence of Mr. Fetzer can it be indicated that the elements of the charge have been proved or that the respondents, if their identity can be confirmed with certainty, indeed committed the crime. On the other hand, the evidence of Mr. Viljoen is based on mere suspicion and the proof with regard to the identity of the respondents is dependent on the evidence of Mr. Fetzer which is of such a poor quality that I think that the trial court was justified

[4]Quoting from *Du Toit et Commentary on the Criminal Procedure Act* 3/6 -3/12

in rejecting it. If the evidence of Mr. Fetzer is to be rejected, there would be nothing left of the State case as regards the crucial issue of identification of the respondents.

[10] Section 174 of the Act 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.”

[11] It was stated in the South African case of *S v Shuping*[5] at 120B-C that ”no evidence” means “insufficient evidence” on which a reasonable person may convict. The generally accepted view, both in Namibia and in South Africa, is that although credibility of a witness is a factor that can be considered at the close of the State’s case, 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, be accepted by any reasonable court.[6] The approach adopted by an appeal court under section 174 in an appeal by the State against an acquittal is the same as in appeals by a convicted person against his conviction.[7] The elements of the crime of theft includes an act of appropriation; in respect of a certain kind of property; which is committed unlawfully and with an intention to permanently deprive the lawful owner thereof.[8] The State needs to prove

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[5] 1983 (2) SA 119 (P) at 121A
[6] *S v Mphetha and Others* 1983 (4) SA 262 (C) at 265
[7] *S v Shikunga and Another* 1997 NR 156 at 180F-G
[8] CR Snyman *Criminal Law* (3rd Ed) p. 445

these elements beyond a reasonable doubt to sustain a conviction. The magistrate in the court *a quo* ruled that the inconsistencies in the evidence led by the State as a whole created doubt and that there was no *prima facie* case to put the respondents on their defence. The trial court concluded *inter alia* as follows:

> "There is a whole cloud of suspicion, whole cloud of people being pinned down in order to lift another out of a mess. Now, if this Court has that problem, doubts in my mind and therefore begged and put the accused on their defence and the accused decide to remain silent, which evidence therefore is going to corroborate or iron out the doubts that I have in my mind? The *prima facie* case on its own should be able to invite a conviction. And if it is unable to invite such a conviction we are relying on speculation that the defence may bring up this version in order to support the State's case. We are still cheating ourselves because the defence has got a variety of rights how to go about processing their case before court. Having doubts and the things I have mentioned, this court believes that still the State has not put up a *prima facie* case against the accused. The only evidence before this Court seems to be that of witch-hunting and I am not satisfied that there is indeed a *prima facie* case established…"

[12] A vast number of authorities indicate that an s. 174 discharge is a matter sorely in the discretion of the presiding officer, which discretion is to be exercised judicially. The magistrate in the court *a quo* as evident from the above quotation discharged the respondents *inter alia* on the basis that the respondents had a variety of rights on how to go about presenting their case, e.g. they may exercise their right to remain silent when put on their defence and that it would therefore be mere speculation to expect the defence to bring up evidence supportive of the State's case. The appellant, however, argued that the magistrate erred by not considering that the defence case

might supplement the State's case. The argument by the appellant is based on the decision in the *Shuping* case at 121A where the position was set out as follows:

> "(a) is there evidence on which a reasonable man might convict? If not;
>
> (b) is there a reasonable possibility that the defence evidence might supplement the State's case? If the answer is yes, there should be no discharge and the accused should be placed on his defence."

[13] The *Shuping's* case has been under scrutiny over the years by the courts in order to determine the correct approach to follow with regard to s. 174 discharge applications. The initial approach set out in the case of *S v Campbell and Others*[9] and *S v Rittmann*[10] was to consider whether there is no evidence upon which a reasonable court, acting carefully, may convict. Lack of evidence would then lead the court to apply the second leg which appears to have brought about controversies within our legal system. The above mentioned cases considered a reasonable possibility of supplementation by the accused of State's case as sufficient enough to refuse to discharge an accused at the end of the State's case.

[14] How*ever, it w*as pointed out in the South African case of *S v Phuravhatha and Others*[11] that where no State case had been made out, it cannot be supplemented or strengthened by the defence case. The possibility that the defence case ma*y supplement the State'*s cas*e is a factor t*hat needs to be considered, but other factors,

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[9] 1990 NR 310 (HC)
[10] 1994 NR 384 (HC)
[11] 1992(2) SACR 544 (V) at 550H-551A-C.

such as the interests of the accused which may override it, need also consideration. Each case should be decided on its own facts and circumstances taking into account the number of accused persons and the type of crime alleged to have been committed. In support, Mtambanengwe, J in *S v Paulus and 12 Others,* unreported judgment of this Court, delivered on 3 November 2000, stated at para [4] that *Shuping* is an example of the futility of attempting to formulate a test meant to apply to all situations and further pointed out that each case should be decided upon its own facts and circumstances. The Court in that case further agreed with the view expressed in the *Phuravhatha* matter that the reasonable possibility of general supplementation of an inadequate or poor state case is a factor, amongst others, which may be considered. The conclusion drawn is that the second leg of *Shuping* is not good law and the State, which bears the onus to prove an accused's guilt, cannot expect any assistance from an accused to discharge its onus. If the State has therefore failed to establish *a prima facie* case against the respondents, they are entitled to a discharge. Another issue that had to be considered by the courts was whether the accused's fundamental rights which are entrenched in the constitution, e.g. the right of an accused to be presumed innocent and his right to remain silent, as well as his right not to be compelled to testify would override the test laid down in *Shuping*, especially the second leg propounded therein. This issue has been decided in the South African case of *S v Mathembula and Another*[12] to the effect that the fundamental rights enshrined in that country's constitution have been given a higher force, curtailing the court's discretion in terms of s. 174. This is because (a) the duty

[12] 1997 (1) SACR 10 (W) at 34J-35A-H.

to prove the guilt of the accused rests with the State and the accused need in no way assist the State in this task and (b) it cannot be said that the accused was given a fair trial if at the end of the State case there is no evidence to implicate him in the alleged crimes, but nevertheless the trial is continued due to the exercise of a discretion in the hope that some evidence implicating him may be forthcoming from the accused or co-accused.

[15] The current position of our courts appears therefore to be that the constitutional rights should not be offended when an application brought in terms of s. 174 is considered. The constitution is the supreme law of the country and Article 12 requires that an accused be given a fair trial and fairness is an issue which is decided upon the facts of each case. The correct view at this point would therefore be as stated in the case of *S v Lubaxa*[13] where the court held that the poor quality of the evidence would be tantamount to expecting the accused to go into the witness box and make out a case against him or herself. This would be a serious injustice and a violation of the accused's fundamental right to a fair trial. There must therefore be a reasonable and probable cause to believe that the accused is guilty even before the prosecution is initiated and a conviction should not be brought about when an accused enters the witness box and incriminates himself or herself or his/her co-accused.

[13] 2001 (4) SA 1251, at Para [18] and [19].

[16] The trial court may have been forthright in its views about the strength of the State case at the stage when it was called upon to decide whether or not the respondents should be put on their defence. It seems to me though that it was right in its ultimate conclusion that the State had not established a *prima facie* case against the respondents and that they were entitled in the circumstances to be discharged. It follows that the appeal ought to be dismissed.

[17] In the result the following order is made:

The appeal is dismissed.

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SHIVUTE, J

I agree.

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MTAMBANEGWE, J

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