

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

EX TEMPORE JUDGMENT

PRACTICE DIRECTIVE 61

Case Title: <i>Ibalelo Eman Musukubili v The State</i>	Case No: CC 03/2023
Heard before: Damaseb JP	Division of Court: Main Division
	Heard on: 19 February 2023 Delivered on: 19 February 2024
Neutral citation: <i>Musukubili v S</i> (CC 03/2023) [2024] NAHCMD 68 (19 February 2024)	
The order: The application in terms of s 174 of the Criminal Procedure Act 51 of 1977 is refused.	
Reasons for order:	
DAMASEB JP: [1] I am dealing with an application in terms of s 174 of the Criminal Procedure Act 51 of 1977 for the discharge of an accused at the end of the State's case. The issue that arises is whether the State failed at this stage of the proceedings to produce <i>prima facie</i> evidence	

which, unless the accused is placed on his defence, will justify him being convicted. Has the State produced *prima facie* evidence as to the crimes that have been charged? The victim named in the indictment was killed. There is no suggestion that she committed suicide. Somebody killed her and it was the most vicious assault that was perpetrated on her. The accused person was the last person to have been seen with the deceased, at the time she was alive, by people that know her. Her close relatives had seen her with the accused at the time that he exhibited some violence towards her and left with her and that was the last time that they saw the deceased.

[2] The accused gave an *alibi* defence with the most imprecise particulars. I, again at this stage of the proceedings, sympathise with the State's dilemma to call and rebut evidence concerning the *alibi* witness – whose identity, I repeat, was given with the most imprecise particulars. All they know is that it is a James Mushe. Whether there are other people who know James Mushe apart from him (the accused) from whom enquiries could be made – that is not established. I am not satisfied that the allegation can be made that the State has not done reasonable enquires to establish who this James Mushe is.

[3] I also have evidence before me at this stage, led into evidence with the agreement of the accused, about very serious injuries to his right hand given in his plea explanation and through questions put to witnesses for the State, the allegation is made that, amongst others the deceased had assaulted him with a stone. At this stage of the proceedings there is a very strong likelihood – given the severity of the injuries to the hand – that those were sustained during the assault on the deceased.

[4] Accused's counsel elicited evidence from one of the cousins of the deceased that on the fateful day when the deceased cried out for help saying that somebody was killing her, the deceased was with the accused – this evidence was elicited by accused's counsel through cross examination. If that evidence remains uncontradicted, it certainly undermines the *alibi* defence of the accused.

[5] There is also evidence to the effect that shoe-prints resembling shoes which are

ordinarily worn by the accused – as testified to by people that know the accused – were seen soon after the death of the deceased, both at the scene of the crime and at the room that he shared with the deceased. His suggestion is that the shoes produced by the investigating officer were not his – in other words he is suggesting fabrication. Therefore, there is *prima facie* evidence that the shoes produced by the investigating officer are the ones that made the prints that were seen both at the scene of the crime and in the room he shared with the deceased. If it is established – and the State has clearly suggested that the shoes were received from him and no other person – that those shoes belong to the accused, then there is a direct link between the shoe prints at the scene of crime and those prints found at the room he shared with the deceased. There is *prima facie* evidence linking the accused to those shoes. The accused's version is that his father also knows that those shoes do not belong to him.

[6] There is no suggestion that after the alleged assault on him by the deceased, the accused went to see a doctor or went to the police. The injuries that are described in the medical reports are very severe. The accused's version is that he went on a drinking spree on the night that he was assaulted by the deceased. Is it probable? That a person who has been so severely injured, would instead of either going to the police or the hospital would rather go on a drinking binge instead of his wounds being attended to. There is *prima facie* evidence to suggest that there is guilty knowledge here.

[7] By the time the drinking was taking place, on his own version, he left the deceased alive – what would have prevented him from reporting that to the police to let the police know that his girlfriend had occasioned the injuries to him and more so that he does not seek medical attention. That points to a guilty mind. As properly suggested by Mr Pienaar for the State, he should have known – on his own version – that the deceased was still alive, as he said he left her alive when he departed from the drinking place. When he found out about the missing items from the house, why did he not report his property as stolen to the police? That also points to some guilty knowledge.

[8] At this stage of the proceedings, I am not satisfied that the State has failed to produce

prima facie evidence that would justify the accused not to be placed on his defence.

Order

[9] The application in terms of s 174 of the Criminal Procedure Act 51 of 1977 is refused and the accused is placed on his own defence.

Judge(s) signature:	Comments:
DAMASEB JP	None
Counsel:	
APPLICANT	RESPONDENT
S Muhinda Of the Directorate of Legal Aid, Katima Mulilo	J Pienaar Of the Office of the Prosecutor-General, Rundu