REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case No: CC 17/2012

THE STATE

versus

KEVIN ADAMS
JEANETTA KATRINA JULIUS

Neutral citation: *S v Adams and Another* (CC 17/2012) [2014] NAHCMD 90 (19 March 2014)

Coram: SHIVUTE, J

Heard: **21 January to 7 February2014**

Delivered: **19 March 2014**

Fly note: **Criminal Procedure – Trial – Application in terms of S174 – Test to be applied – Whether there is evidence on which a Reasonable court may convict – No specific formula or test that is applicable to all cases – Each case must be considered on its own merit.**

Summary: **Criminal Procedure – Trial – Application in terms of s174 – The test to be applied by the Court is whether there is evidence on which a reasonable court acting carefully may convict – There is no specific formula or test that is applicable to all cases when deciding whether or not to discharge – Each case must be considered on its own merit.**

ORDER

There is a prima facie case against accused 2 and she is placed on her defence.

JUDGMENT ON APPLICATION IN TERMS OF S 174 ACT 51 OF 1977

SHIVUTE J:

[1] The two accused persons in this matter are facing one count of murder and one count of defeating or obstructing or attempting to defeat the course of justice.

Count 1: Murder

It is alleged that during the period 4-5 March 2008 at Keetmanshoop the accused persons unlawfully and intentionally killed Henry Thomas Julius, a male person.

Count 2: Defeating or obstructing or attempting to defeat or obstruct the course of justice.

It is alleged that during the period 4-5 March 2008 and at or near Keetmanshoop in the district of Keetmanshoop the accused did unlawfully and with intent to defeat or obstruct the course of justice:

1. Hid clothes, namely a tracksuit with blood stains inside their bedding;
2. Prevented the police from tracing accused 1 by hiding him inside a house and locking this house from the outside. These the acts were perpetrated whilst the accused persons knew or foresaw the possibility that:

(a) Their conduct may frustrate or interfere with police investigations into the disappearance and/ or death of the deceased; and/or

(b) Their conduct may conceal the death and/or may destroy the physical evidence of an assault perpetrated on the deceased; and/or

(c) Their conduct may protect them and/or one of them from being prosecuted for a crime in connection with the assault, disappearance and /or death of the deceased.

Wherefore the accused persons are guilty of the crime of defeating or obstructing or attempting to defeat or obstruct the course of justice. The State alleged that at all material times the two accused persons acted with a common purpose.

[2] Each accused person pleaded not guilty to each count. However, the following admissions were made in terms of s 220 of the Criminal Procedure Act 51 of 1977:

In respect of 1st accused:

1. The identity of the deceased as Henry Thomas Julius;
2. The admissibility and contents of the report on the post-mortem examination on the deceased's body and the cause of death;
3. That the deceased's body did not sustain any further injuries or wounds during the transportation to the mortuary until the post-mortem was performed.

4. The admissibility and contents of the proceedings in Keetmanshoop Magistrate's Court case No. 228/2008 including the proceedings in terms of s119 of Act 51 of 1977
5. The admissibility and contents of the map of the area, sketch plan and keys thereto of Noordhoek compiled by Warrant Officer Kruger.
6. The admissibility and contents of the photo plan and key to the plan compiled by Officer Goaseb;
7. The admissibility and contents of the National Forensic Institute application form for scientific examination with laboratory reference number 600/08;
8. The admissibility and contents of the photo plan and report compiled by Maryn Swart;
9. The admissibility and contents of the photo plan and report compiled by Steen Hartsen;
10. That between 4 and 5 March 2008 he was in the company of the deceased outside Oshakati Lion Bar, Keetmanshoop;
11. The admissibility and contents of his warning statement;
12. The admissibility and contents of the report on the medical examination (J88) and annexure done on him by Dr A Shainker;
13. The admissibility and contents of the photo plan and notes of the pointing out by himself by Inspector Gray.
14. That on 5 March 2008 he was found by members of the Namibian Police under the bed in the bedroom of his residence, No 58/21 Klip Street, Kronlein, Keetmanshoop;
15. That he was in a romantic relationship with accused 2 at the time of the deceased's death;
16. That he was the owner of the tracksuits, two pair of tekkies, blue shorts and a pair of socks confiscated from his residence at the time of his arrest;
17. That the blood sample BA/A043294 was drawn from him by Doctor Maksyl Verkusa and sealed with seal number BA/A043295; and

18. That the blood found on his blue shorts was the blood of the deceased.

In respect of the 2nd accused:

1. She admitted the identity of the deceased;
2. She admitted the admissibility and contents of the post-mortem examination on the deceased and the cause of death;
3. She admitted that the deceased's body did not sustain any further injuries or wounds during the transportation to the mortuary and whilst at the mortuary.
4. She admitted the admissibility and contents of the case record in Keetmanshoop Magistrate's Court case Number 228/08 including the proceedings in terms of s 119 of Act 51 of 1977.
5. She admitted the contents of the map of the area, sketch plan and keys thereto of Noordhoek compiled by Warrant Officer Kruger.
6. She admitted the contents of the photo plan compiled by Officer Goaseb;
7. She admitted the contents of the photo plan compiled by Sergeant Goliath;
8. She admitted the contents of the National Forensic Institute application form for scientific examination with laboratory reference number 600/08;
9. She admitted the contents of the photo plan and report by Maryn Swart;
10. The contents of the report by Steen Hartsen were admitted;
11. It was admitted that between 4 and 5 March 2008, she was in the company of the deceased outside Oshakati Lion Bar in Keetmanshoop;
12. She admitted the contents of the warning statement (A3);
13. It was admitted that she was legally married to the deceased at the time of his death;
14. She admitted that she was separated from the deceased prior to his death and that the deceased obtained a protection order in terms of the Combating of Domestic Violence Act 4 of 2003 against her on 23 June 2006;

15. The contents of the Protection Order were admitted;
16. She admitted that she shared a residence with Accused 1 at the time of the deceased's death;
17. She admitted that she was involved in a romantic relationship with Accused 1 at the time of the deceased's death, and
18. She confirmed that the statement of admissions was read back to her by her lawyer and that it reflects her instructions to him.

[3] At the close of the State case Mr Siyomunji made an application for a discharge in terms of s 174 in respect of the 2nd accused. Mr Nyambe on behalf of the State opposed the application.

[4] Both counsel made submissions in support of justifying the grant or refusal of the application by referring me to principles regarding applications in terms of s 174 of the Act, which principles I have considered.

[5] Section 174 of the Act provides as follows:

> '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/she may be convicted on the charge, it may return a verdict of not guilty.'

[6] Section 174 requires the State to adduce sufficient evidence before the court to justify the court to call on the accused person to the witness stand to testify in his or her defence. If at the close of the State case there is no evidence on which a reasonable court acting carefully may convict then the accused is entitled to an acquittal.

[7] Section 174 gives the discretion to the court not to put the accused on his defence if there is no case for the accused to answer. There is no formula or test that remains applicable to all circumstances when deciding whether or not to discharge. Each case must be decided on its own merits in order to reach a just decision. (*S v Ningisa and Others,* unreported judgment of this Court delivered on 14 October 2003).

[8] The criterion to be used by the court in exercising its discretion whether to discharge or not is whether there is no evidence on which a reasonable court, acting carefully, my convict. Credibility of witnesses plays only a very limited role at this stage. It is a consideration whether there is reasonable possibility that the defence evidence may supplement the State evidence. The court may also take into account the admissions made by the accused person; the manner of questioning and putting statements to witnesses during cross-examination and the rights of the accused person as entrenched in the Constitution should always be kept in mind. (*S v Nakale and Others* 2006 (2) NR 455 (HC) at 466).

[9] Counsel for accused 2 in justifying his application argued that where the prosecution has exhausted the evidence and a conviction is no longer possible except by self incrimination, a fair trial demands that proceedings should be stopped for it threatens to infringe the accused's constitutional rights.

[10] Counsel further argued that no witness gave relevant evidence in respect of each count in connection with accused 2. Accused 2 was not positively identified as the person seen with the deceased in the vicinity of the bridge before the deceased's death.

[11] It was again counsel's argument that accused 2 admitted that she was separated from the deceased but still married to him at the time of his death. She further admitted that she was in a romantic relationship with accused 1 during that time. She again admitted that she was in the company of accused 1 and the deceased between the night of 4 March spilling over to the morning of 5 March 2008. She left accused 1 and the deceased and went home to sleep. She also admitted that her marriage to the deceased was troubled and that there was a protection order against her at some point of the marriage. Both she and the deceased have moved on with their lives and got other partners.

[12] For the above mentioned arguments counsel urged the court to discharge accused 2 in terms of s174.

[13] On the other hand, counsel for the State argued that accused 2 should be placed on her defence because the State has alleged common purpose and it laid a basis for that. There have been formal admissions made by accused 2 that on the night when the incident happened she was together with the deceased until the early hours of the following day. Accused 1 and 2 were seen at Oshakati Lion Bar in the company of the deceased. There is evidence from a State witness who saw the two accused persons leaving in the company of the deceased. Counsel argued that because of this, the basis of common purpose has been established.

[14] Concerning accused 2's alibi that came through cross-examination by counsel for accused 2, that accused 2 left the deceased with accused 1 and went home to sleep, counsel argued that even if the accused's defence is based on an alibi the onus of proof remains on the State. The court has to be satisfied that it is reasonably possibly true that the accused was not there at the time of the incident. If this evidence came as a result of accused's plea or during cross-examination of State witnesses, the possibility that it may be accepted by the court is when the accused testifies. Counsel relied on *S v Nakale & Others supra* for this proposition.

Counsel argued further that because of the above principle, for the court to establish whether her defence of alibi is reasonably possibly true the accused has to be placed on her defence since the issue arose during cross-examination.

[15] Furthermore, counsel submitted that accused 2 admitted to have been in the company of the deceased with accused 1 the night of 4th going over to the early the morning of 5th March 2008. Accused 2 also made an admission that she was staying in the same house with accused 1 where he was found by the police hiding under the bed. There is evidence before court that accused 1 was found locked in the house although there are two versions with regard to how the doors could be locked. One version is that both doors could only be locked from outside. Another version is that only one door could be locked from inside. The crux of the matter is that accused 1 was found locked in the house. It cannot be concluded at this stage that there is only one inference to be drawn.

[16] Counsel argued further that the court should not discharge accused 2 because even if it is not proved that accused 2 murdered the deceased, she may be convicted on a competent verdict of being an accessory to the fact of an offence or as an accomplice. The second accused is the one who led the police to the place where accused 1 was found hiding under the bed. She had the key to the house that was found locked. Upon searching the house, clothing with bloodstains were recovered. Counsel submitted that the State led evidence proving that accused 2 can be convicted as an accessory to murder or an accomplice as well on the second count of defeating or obstructing the course of justice or an attempt thereof. Therefore he urged the court to dismiss the accused's application.

[17] Having summarised both counsel's arguments concerning the application, I now propose to consider the application without reciting the facts placed by both counsel on record in the light of the guiding principles as set out in *S v Nakale and Others supra*.

The State led evidence that the deceased was in the company of accused 1 and 2 at Oshakati Lion Bar late in the evening of 4th March to the early hours of 5th March 2008 and they were seen leaving the bar together. Later on the deceased was found dead. Although counsel for accused 2 put to State witnesses that accused 2 left the deceased with accused 1 and went home to sleep, whether her alibi could reasonably possibly true and the weight to be attached to her instructions to counsel may only be determined if they are tested through cross-examination.

[18] Furthermore, there is evidence that accused 2 led the police to the house which she was sharing with accused 1. Accused 1 was found hiding under the bed and was arrested. The house was locked and the key was in possession of accused 2.

[19] The question to be decided is whether the evidence adduced by the State is of such poor quality that no reasonable court may possibly convict. I have

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considered the evidence placed before me, the arguments advanced by both counsel as well as the guiding principles as stated in the Nakale case and the interpretation of s174 and related them to the facts of the case before me. I have come to the inescapable conclusion that the evidence produced by the State is not of such poor quality that a reasonable court acting carefully might not convict. The application for the discharge of accused 2 is therefore refused. I am satisfied that the State has established a *prima facie* case against her on both counts.

[20] In the premises the following order is made.

There is a prima facie case made against accused 2 and she is placed on her defence.

N N Shivute
Judge

APPEARANCES

STATE	:	Mr Nyambe Office of the Prosecutor-General
ACCUSED:		Mr Siyomunji Instructed by Directorate of Legal Aid