REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING ON APPLICATION FOR LEAVE TO APPEAL

CASE NO: CC 3/2005

In the matter between:

THE STATE **APPLICANT**

and

PIO MARAPI TEEK **RESPONDENT**

Neutral citation: S v Teek (I 3/2005) [2017] NAHCMD 35 (15 February 2017)

Coram: **Masuku J**
Heard : 8 December 2016
Delivered : 15 February 2017

FLYNOTE : CRIMINAL LAW - S316 of the Criminal Procedure Act – Appeal in criminal cases – Test for leave to appeal - S174 – Discharge of accused at the close of the State's case – **LAW OF EVIDENCE-** Accused not electing to testify – whether a prima facie case becomes proof beyond a reasonable doubt if accused elects to say nothing in his defence.

SUMMARY : The respondent was charged with the common law crimes of abduction, kidnapping, rape, indecent assault and supplying intoxicating liquor

to persons under the age of eighteen tears. The High court acquitted him of the charges at the close of the State's case, a decision that was appealed by the applicant. The matter was remitted to this court by the Supreme Court for continuation and finalisation. At resumption, the respondent elected not to testify and this court, after considering the evidence at its disposal, acquitted and discharged him. This decision again, does not sit well with the applicant. The applicant alleges that in returning the not guilty verdict, the trial Judge erred notwithstanding the available evidence on the record in respect of the various charges. At issue before this court is whether the applicant has succeeded in showing on the balance that the trial court erred in acquitting the respondent and that a court of appeal, properly apprised of the relevant facts, may come to a different conclusion on the respondent's acquittal pronounced by the trial court.

Held – that on the facts, the applicant filed its application for leave with the time period set out in s 316 of the CPA.

Held – further that, the applicant has shown that it has prospects of success on appeal or that it showed that the appellate court may arrive at a different conclusion from that of the trial court.

Held – further that, if a *prima facie* case is established by the State, the accused runs the risk of being convicted if he offers no evidence, but it does not necessarily mean that if he fails to offer evidence the *prima facie* case will then become a case proved beyond reasonable doubt in every case. This may or may not take place, depending on the nature and quality of the evidence adduced.

Furthermore, it sometimes happens that a court, after refusing an application for discharge at the conclusion of the State's case, will acquit the accused where he closes his case without leading any evidence.

On the basis of the conclusion reached by the Supreme Court, i.e., that on the evidence before it, this court had ample evidence upon which to convict the respondent, this court found this was a matter that should be decided by the

Supreme Court itself. On this note, the application for leave to appeal was granted and no order was made as to costs.

ORDER

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1. The application for leave to appeal to the Supreme Court is granted.
2. There is no order as to costs.

RULING

MASUKU J;

Introduction

[1] Like in a game of tennis, where the tennis court is manned by two different players or sets of players, this case has served before this court and the Supreme Court. It has, like a tennis ball, been served, at the instance of the applicant herein, to the Supreme Court after, the respondent had been discharged on certain charges that shall be enumerated below. This was at the close of the case for the State.

[2] The Supreme Court, in its wisdom, granted the application for leave to appeal, which had been denied by this court. The Supreme Court accordingly 're-served' the matter, so to speak, to back to this court, having found that the respondent herein had a case to answer on some of the charges in respect of which he had been discharged by this court at the close of the case for the prosecution as stated above

[3] When the matter again served before this court, having been 'served' back by the Supreme Court, the respondent elected, as he was entitled to, not to lead any evidence in his defence but proceeded to close his case. After closing submissions were made, this court found him not guilty and acquitted him of the charges.

[4] Dissatisfied with this result, the applicant is now seeking this court's leave again to 'serve' this matter back to the Supreme Court, alleging that this court erred in acquitting the respondent for reasons to be dealt with below and judgment's findings and order dated 28 April 2009.[1] This application is vigorously opposed by the respondent.

Background

[5] This matter has a chequered history as will have been evident from the foregoing introductory remarks. The respondent, who was a judge of the Supreme Court, was arraigned before this court charged by the applicant on various main and alternative counts. These counts, which essentially involved two minor girl children aged 10 and 9 years respectively, were allegedly committed by the respondent between 28 and 29 January 2005, when he during the evening of the said date, picked up the said minors from Katutura, Windhoek, in his motor vehicle and took them to his residence in Brakwater. They spent the night at the respondent's residence and he returned them to their locality the following morning.

[6] That the respondent took the children with him in his vehicle to his house as aforesaid and returned them to Katutura the following morning is common cause. It is what allegedly happened at the respondent's house during the girls' sojourn on the evening of the 28 January 2005 that is in dispute and accordingly forms the substratum of the charges preferred against him.

[1] *The State v Pio Marapi Teek* Case No. SA 44/2008.

[7] These minor girl children were referred, both in this and the Supreme Court as Trisha and Queen, respectively to conceal their true identity. I shall, for purposes of consistency also refer to them in those terms.

The charges

[8] The applicant alleges that in doing what the respondent did, he committed certain offences against Trisha and Queen and these included the following:

- the common law crimes of abduction, alternatively, kidnapping;
- contravening s. 2 (1) (a) of the Combating of Rape Act[2] by committing a sexual act, which includes the insertion of a finger into the virilia of a female person – a complainant under the age of 14 years;
- contravening s. 14 (a) of the Combating of Immoral Practices,[3] by committing or attempting to commit a sexual act with a child under the age of sixteen, who was more than three years younger than him;
- contravening the provisions of s. 14 (b) of the Immoral Practices Act (*supra*) by committing an indecent or immoral act with a child under the age of sixteen, who was more than three years younger than him;
- committing the common law crime of indecent assault;
- contravening s. 16 of the Immoral Practices Act by causing a female person to take intoxicating liquor with intent to stupefy her so as to thereby enable him to have unlawful coitus with her;
- contravening s. 71 (s) of the Liquor Act,[4] by supplying intoxicating liquor to persons under eighteen years.

[9] Probably on account of the respondent's prominent status and position in the Judiciary, the powers that be elected, correctly in my view, to have appointed a judge from without this jurisdiction to try the respondent and this was done in order to give the matter an air of independence and impartiality in

[2] Act No. 8 of 2000.
[3] Act No. 21 of 1980.
[4] Act No. 6 of 1998.

the minds of right-thinking members of the public which it richly deserved. In this regard, Mr. Justice Bosielo, a Judge from the Republic of South Africa, was appointed to preside over the trial from inception to the present stage where he, in his wisdom, found it proper and just to acquit the respondent on the charges preferred against him as aforesaid.

Grounds for application for leave to appeal

[10] As indicated above, Mr. Justice Bosielo acquitted the respondent of the charges at the close of the entire case, a decision that is criticised by the applicant. By notice dated 30 December 2012, the applicant applied for leave to appeal in respect of the identified charges on the following grounds:

(i) Two counts of kidnapping, being the alternative to the charge in counts 1 and 2;
(ii) One count of the contravention of s. 71 (s) of the Liquor Act,[5] i.e. supplying liquor to a person under the age of eighteen years (being an alternative to count 4;
(iii) One count of the contravention of s. 14(b) of Act 21 of 1980, as amended, i.e. committing or attempting to commit an immoral or indecent act with a child under the age of sixteen; Alternatively indecent assault (being count 6); and
(iv) One count of the contravention of s. 2(1) (a) of the Combating of Rape Act; alternatively contravention of s. 14(a) of Act 21 of 1980, as amended, namely, committing or attempting to commit a sexual act with a child under the age of sixteen; alternatively contravening the provisions of s. 14(1) (b) of Act 21 of 1980, as amended, namely, committing or attempting to commit an immoral or indecent act with a child under the age of sixteen, further alternatively, indecent assault, being count 8.

[11] In the amplification of the grounds in support of the application, the applicant alleges that in returning the not guilty verdict, the trial Judge erred notwithstanding the available evidence on the record in respect of the

[5] Act No. 6 of 1998.

alternative charges in count 1 and 2; the alternative count to count 4; count 6 and count 8. It is also alleged that the trial Judge erred in finding and holding that the applicant did not prove the respondent's guilt beyond reasonable doubt in respect of the alternative charges in count 1 and 2; the alternative to count 4; count 6 and count 8.

[12] It is further alleged, in support of the foregoing criticism that the learned trial Judge erred in disregarding the common cause facts or those that were not disputed in cross-examination or not contradicted at all, when he found and held that the applicant did not prove a case against the respondent beyond reasonable doubt in respect of the alternative charges in count 1 and 2, the alternative to counts 4, 6 and 8.

[13] It is also contended that he did not consider, alternatively, did not properly consider the evidence tendered by the State and which was common cause during the trial, showing that the respondent is beyond reasonable doubt guilty of two crimes of kidnapping. It is also contended in the alternative, that the trial Judge did not consider that it was common cause that the evidence tendered by the State showed that the respondent intentionally deprived the minor children of their liberty and/or movement and/or the custodians of their custody and was thus guilty of kidnapping.

[14] It is accordingly clear that the main question confronting this court is whether the applicant has succeeded in showing on the balance that the trial court erred in acquitting the respondent and that a court of appeal, properly apprised of the relevant facts, may come to a different conclusion on the respondent's acquittal pronounced by the trial court.

The law applicable to applications for leave to appeal

[15] The application for leave to appeal, is brought on the strength of the provisions of s. 316 A of the Act. The said provision reads as follows:

'(1) The Prosecutor-General or, if a body 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 the High 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 Supreme Court.

(2) The provisions of section 316 in respect of an application or appeal by any accused referred to in that section, shall apply *mutatis mutandis* with reference to an appeal in terms of subsection (1).'

[16] It bears mentioning that the provisions of s. 316 (2), mentioned above, deal among other things with the application by an accused person, for leave to appeal a decision or judgment of this court within a prescribed period of 14 days. In this regard, the provisions of s. 316 A (2) accordingly apply to the State as they do to an accused person, with necessary modifications and adaptations where applicable.

[17] The upshot of the foregoing is that where the State is dissatisfied with a judgment or order of this court in a criminal case, it may, as an accused person may also do, approach this court for leave to appeal to the Supreme Court within 14 days of the said order or judgment complained of. This is what the applicant seeks to do in the present matter.

[18] Before dealing with the merits or the demerits of the application serving before this court, there is an argument that was raised by the respondent *in limine.* It is accordingly necessary and prudent to commence dealing with it before deciding whether the applicant has mounted a case sufficient for the court to find that this court erred in acquitting the respondent on the charges complained of. I proceed to deal with that point of law presently.

Was application for leave to appeal filed out of time?

[19] In his heads of argument and also in his spirited address, the respondent argued that the application for leave was filed at a time that violates the provisions of s. 316. It was his argument that the trial was finalised on 16 December 2010 but that notwithstanding, the matter only comes to court at the end of 2016, almost some six years after the verdict was returned by this court. He contended further that the applicant did not explain the delay, which is on all accounts inordinate, considering that the matter was once enrolled, removed and re-enrolled at some stage.

[20] In her brief, but concise argument, Mrs. Nyoni argued that whatever else may have happened, including the matter only serving before the court at this time, her client filed the application for leave to appeal within the time limits prescribed in the Act and that her client cannot be called to account for the delay when it acted strictly in terms of the time limits imposed by the Legislature.

[21] I am constrained to agree with Mrs. Nyoni, in her arguments. It is plain that the judgment acquitting the respondent of the charges was delivered on 16 December 2010. What is also plain, and is not subject to any disputation, is that the application for leave dated 30 December 2010, was filed by the applicant and bears the stamp of the Registrar of this court of even date. This, in my view, indubitably shows that the applicant filed the application for leave within the time period set out in s. 316.

[22] It may well be true that the matter has delayed inordinately considering that the application is only being heard now after many years from the date of the respondent's acquittal. That delay does not, however, have a bearing on the filing of the application for leave to appeal. The applicant washes its hands of responsibility for or complicity in the delay and in this regard, has filed a letter in which it urged the Registrar of this court to set the matter down for hearing as a result of the matter not having been set down as had been anticipated on 29 July 2014. This cannot be gainsaid.

[23] If there be any delay in this matter, it is certainly not attributable to the applicant as I have endeavoured to show that the applicant filed its application

timeously. The delay which sees the matter only serving before this court after such a long time cannot be placed at the door of the applicant, considering that it did all that was in its power to have the matter heard, having filed the application for leave in good time as I have found above.

[24] It is a cause for concern indeed that the application has been in the pipeline for an unreasonably long time, to the detriment of the respondent and the interests of justice in finalising cases without undue delay. Such delays must be deprecated as they reflect badly on the processes of this court. That notwithstanding, this does not, however, translate to the applicant not having filed its application for leave on time, and thus calling upon the court to non-suit the applicant therefor. I accordingly find that the respondent's point *in limine* is bad and ought to be dismissed as I hereby do.

The test for application for leave to appeal

[25] The test that has been adopted for the granting of an application for leave to appeal was stated in the following terms:[6]

'The person who applies for leave to appeal must satisfy the court that he has reasonable prospects of success on appeal. The test of a reasonable prospect of success has the effect that the court will refuse an application for leave in those cases where absolutely no chance of a successful appeal exists, or where the court is certain beyond reasonable doubt that appeal will fail (*R v Ngubane & Others* 1945 AD 185-186-7). On the other hand, the trial court need not be certain that the Supreme Court would come to another view. All that is necessary is that there should be a reasonable prospect that the appeal may succeed (*S v Ackermann en ander* 1973 (1) SA 765 (A) 767 G-H; *S v Smith* 2012 (1) SACR 567 (SCA) at 7) and the test of reasonable prospects applies to both questions of fact and of law (*R v Kuzwayo* 1949 (3) SA 761 (A) 765. A trial judge who grants leave ought not only to give reasons for his decision but should also indicate in respect of which aspects of the case this is done (*S v Sikosana* 1980 (4) SA 559 (A) 563A-E.'.

[6] Du Toit *et al,* Commentary on the Criminal Procedure Act, Vol. 2 , Revision 51 of 2013 at p31-15iew, is the fact that.

[26] Stripped to the bare bones, it can safely be said that such applications can be granted in cases where the court dealing with the application is satisfied that the applicant has shown that it has prospects of success on appeal or stated differently, where it can be shown that an appellate court may arrive at a different conclusion from that of the trial court.

[27] In *The Minister of Lands and Resettlement v Dirk Johannes Weidts and Another,*[7] this court, seized with a similar application, although in the context of a civil application, had this to say about the proper approach of the court to such applications:

'In other words, the trial court should not seek to preserve its own judgment by sticking to its guns as it were and at all costs. Put differently, the court must not be seen or perceived to be "married", as it were, to its judgment, as it is usually said, for better or for worse. It should approach the matter form (*sic*) an impartial position, with its mind being open to the fact that it may, on reflection and with the benefit of hindsight, have erred in its judgment, regard being had to the matters of law and/or fact raised by the appellant in the notice of appeal and to the fact that another court may come to a different conclusion on the matter.'

The chance of this court choosing to be 'married' to its judgment is somewhat dramatically reduced in the instant matter for the reason that I am not the trial judge as stated earlier. The temptation to protect one's views expressed in the judgment, are dramatically reduced. And I have to deal with the matter disabusing my mind of the predilections and approach the matter from an unbiased point of view and this is what I have set myself out to do and to the best of my ability.'

[28] In Du Toit *et al* (*supra*), the learned authors say the following about the proper approach to the issue:[8]

'A court should not approach an application for leave to appeal as an impertinent challenge to the judge concerned to justify his or her decision. The court should rather reflect dispassionately upon its decision and decide whether a higher court could reasonably come to another conclusion.'

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[7] (I 1852/2007) [2016] NAHCMD 7 (22 January 2016) at paras [35] and [36].
[8] *Ibid* at 31-15.

It should be noted in this regard that the standard to be applied is not one of inevitability, certainty or beyond reasonable doubt. It is whether the higher court may or could arrive at a decision different from that reached by the trial court and this, without more suffices to enable the court to exercise its discretion in this regard in favour of an applicant for leave to appeal.

[29] I am of the view that in this case, there is an element of detachedness from the judgment sought to be appealed against, like in the Minister of Land and Resettlement case cited above, for the reason that I am not the trial judge and the human reaction of seeking to protect, preserve and defend one's views from attack and criticism is absent in this case. The latter paragraph cited from the said judgment in para [26] above therefore applies with equal force in the instant case.

Application of the law to the facts

[30] This case is, however, unusual. I say so for the reason that when the matter was remitted to this court, the Supreme Court having found that this court erred in returning a discharge at the close of the case for the prosecution, it made certain observations and findings which led it to conclude that this court had erred and had wrongly assessed some of the evidence in some cases or had accordingly arrived at wrong conclusions, which resulted in the discharge, which discretion the Supreme Court found was incorrectly exercised.

[31] At para [30], the Supreme Court, having analysed the evidence and having had regard to the judgment of this court at the s. 174 (4) stage, stated the following:

'For these reasons I believe that, on the evidence before the trial Court, there is ample room for the conviction of the respondent on all the charges against him, save perhaps for the crime of abduction, to which I shall return. Moreover, I cannot avoid the inference that in the circumstances the Court' *a quo's* opinion to the contrary was so unreasonable that it could not have properly applied its mind to the

matter. As to the charge of abduction, there is no direct evidence that the respondent intended to have sexual intercourse with the two girls, which is an essential element of the crime. In fact, as pointed out by the respondent's counsel in argument, there are indications that he may not have intended to do so. On the other hand, as I see it, a discharge of the respondent solely on the charge of abduction alone will have very little, if any, effect on the further proceedings. Sitting as a court of first instance, I would therefore, in the exercise of my discretion, have refused a discharge on the charge of abduction as well. Since the Court *a quo* had failed to exercise its discretion on this aspect, we must do so in its stead on all the charges, including abduction. I therefore propose to set aside the discharge and acquittal of the respondent on counts 1, 2. 3. 4. 6 and 8, in respect of both the main and the alternative charges.'

[32] The Supreme Court, accordingly upheld the applicant's appeal and set aside the discharge and acquittal of the respondent in relation to counts 1,2,3,4,6 and 8 in respect of the main and the alternative counts. It pertinently referred the matter back to this court for continuation and finalisation before the same trial Judge. Lastly, the Supreme Court set aside the costs order that had been awarded in the respondent's favour by this court in relation to the application for leave to appeal.

[33] When the matter came back to the trial Judge, having been remitted by the Supreme Court, as stated above, it is not disputed that the respondent elected not to tender any evidence, whether sworn or unsworn. Furthermore, he chose not to call any witnesses to testify on his behalf. He merely closed his case thus leaving the issues which the Supreme Court found in its judgment on the s. 174 (4) application, in relation to the live counts, needed him to answer unanswered.

[34] In his judgment,[9] Mr. Justice Bosielo expressed what I perceived to be his displeasure at the effect of the Supreme Court judgment on what he detected to be the deleterious effect it had on his judicial discretion as the trial Judge. He understood the effect of the Supreme Court judgment to be that he had no option but to convict the respondent on the charges outlined in the judgment of the Supreme Court. What I will refer to as his 'lamentations' in

[9] *State v Teek* Case No. CC3/2005 at p. 9.

this regard, are well documented in his judgment and I shall quote merely a few of them in this judgment.

[35] I must warn that the said judgment appears to have many typographical errors, suggesting that it was transcribed. The transcriber appears to have typed what they heard, resulting in atrocious spelling mistakes, which unduly cast the learned trial Judge's spelling in a bad light. At p.9, the learned Judge opens his lamentations in the following language:

> 'I take this opportunity to try my best to explain the respective roles of this Court sitting as a trial Court, *vis a vis* (*sic*) Appeal Court. This I do specifically to dispel any possible confusion that might be there. I wish to state categorically at (*sic*) the onset, that the Appeal Court was not called upon to decide whether the guilt of the Accused had been proved beyond reasonable doubt or not. That remains the sole function of this Court. This, it will do after it has considered and evaluated all the evidence that was adduced before it. All that the Appeal Court was required to do, was to determine of (*sic*) this Court erred in finding at the close of the State's case that there was no evidence that in which a Court acting carefully might and not should convict the Accused on the charges preferred against him or any other competent charges . . . It is unfortunate if not regrettable in my view that in its Judgment, the Appeal Court made pronouncements which are likely to be misconstrued and may create an erroneous impression that the guilt of the Accused has already been determined and therefore is a fight accompli (*sic*). To illustrate this point, I quote what Brandt AJA stated at paragraph 30 of the Judgment referred to above: . . . '(I have already quoted the passage complained of earlier in this judgment at para …).

I must confess that these remarks by the Appeal Court cost *(sic)* serious consternation. To my mind, this statement unfortunately creates an impression wittingly or unwittingly that the Appeal Court was leaving me as a trial Court with little or no discretion at all but to convict the Accused. The statements seem to suggest that I cannot arrive at any other findings, to convict the Accused. I found this statement not only troublesome, but inimical too, if not subversive, of my right and duty as a judicial officer, to be allowed to decide the guilt of the Accused, the guilt and/otherwise of the Accused impartially based on the evidence adduced before me and independently of

any influence direct or indirect from any quarter. Regrettably, this statement precipitated me into a serious cockamamie *(sic)* because it militates against very basic tenets of Justice, which is impartiality and independence of Judges. In my view there is no greater threat to Justice than judicial officers who lack independence and impartiality. Manifestly I was assailed by a strong sense of unease and a very strong feeling that my impartiality had been severely compromised.'

[36] I am unfortunately inappropriately placed to comment on the correctness or otherwise of the learned trial Judge's feelings and lamentations regarding the Supreme Court's approach to the issues and the order that it made vis-à-vis the learned Judge's independence and impartiality which he felt had been severely compromised, if not taken away altogether. What I will attempt to do is to closely consider the law applicable to such applications at this stage and cannot, unfortunately altogether close my eyes to the observations of the Supreme Court, it being the final arbiter in these matters and from which this court, should, generally speaking take a cue.

Does a *prima facie* case become proof beyond reasonable doubt if the accused elects to say nothing in his or her defence?

[37] In the light of the events in this matter, including the findings of the Supreme Court and the trial Judge's lamentations, I implored the parties to address the court on what the effect of the accused electing, upon advice, not to tender evidence when the court has found that there is a *prima facie* case that demands an answer from him. I am of the view that returning an answer to this all-important question may well give a clue regarding the proper course to adopt in this matter.

[38] In his article entitled, 'The Decision to Discharge An Accused at the Close of the State's Case: A Critical Analysis,[10] the learned author states the following:

[10] A St. Q Skeen, 102 South African Law Journal 286 1985 at 287.

'If a prima facie case is established, the accused runs the risk of being convicted if he offers no evidence, but it does not necessarily mean that if he fails to offer evidence the prima facie case will then become a case proved beyond reasonable doubt. This may or may not take place. It sometimes happens that a court, after refusing an application for discharge at the conclusion of the State case, will acquit the accused where he closes his case without leading any evidence. In other words, what a reasonable man might do does not equate with what a reasonable man ought to do.'

[39] The learned author, from my analysis, seems to suggest that whether a *prima facie* case becomes proof beyond reasonable doubt if the accused elects not to lead evidence when the court has found in favour of the State at the close of the case for the prosecution, depends on the peculiar circumstances of the case. There may well be cases where the court may find him guilty in the event there is a case screaming for an answer, which he or she does not give. There may well be cases where the accused's election not to adduce evidence and not to call witnesses in his favour, may be suicidal, throwing the accused irreversibly in a pool of a certitude of guilt.

[40] It would appear to me that the above position finds support in other judgments as I will demonstrate below. In *S v Auala,*[11] where Mtambanengwe AJA said the following, citing with approval the remarks of Langa DP:

'The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence.'

[41] On the other hand, in *S v Katari,*[12] this court held as follows on this very issue:

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[11] 2010 (1) NR 175 (SC).
[12] 2006 (2) NR 205 (HC).

'When the State has established a prima facie case against an accused which remains uncontradicted, the court may, unless the accused's silence is reasonably explicable on other grounds, in appropriate circumstances conclude that the prima facie case has become conclusive of his or her guilt.'

[42] In *S v Nkombani*[13] Holmes J.A. had the following to say at F-G:

'Where it is sought to establish by inference the commission of an offence by an accused, or his subjective state of mind, various considerations may have a bearing on the extent to which his failure to testify or his giving of a false *alibi,* can be taken into account against him; . . . But a different situation arises where there is direct evidence of the commission of the offence. In such a case the failure to testify or the giving of a false *alibi* – whatever the reason therefor – *ipso facto* tends to strengthen the direct evidence, since there is no testimony to gainsay it and therefore less occasion or material for doubting it.'

[43] I am of the considered view that the cases referred to above accurately reflect and confirm the position stated in the article quoted above. The bottom line is that cases vary and the nature and quality of the evidence led may well differ. Depending on the nature and strength thereof, the court has to make its decision, based on the peculiarities of the case whether the decision by the accused not to testify in that case results in the *prima facie* case, due to some legal metamorphosis, so to speak, becoming proof beyond reasonable doubt.

[44] In the instant case, the applicant relied on most of the cases cited above and urged the court to find that in the light of the evidence led by the prosecution, which required an answer, the respondent's failure to tender an explanation rendered the *prima facie* case one of proof beyond reasonable doubt.

[45] For his part, the respondent attacked the propriety of the approach of the Supreme Court in its judgment regarding the correctness of the discharge of the respondent at the close of the case for the State. It was his view that the Supreme Court incorrectly exercised its powers by constraining the

[13] 1963 (4) SA 877 (AD) at 893.

learned trial Judge to convict him at all costs. He accordingly made common cause with the learned trial Judge's lamentations I have referred to earlier.

[46] He further argued that the evidence adduced by the State was unreliable, contradictory and in other instances concocted to ensure that a certitude of guilt was returned against him at all costs, and as it were by all means, both fair and foul. Furthermore, he argued that the police lied under oath and further suppressed certain information and that evidence that was favourable to his case was not pursued or presented to the court by them.

[47] Whatever the merits or demerits of the contentions by the respondent, considered together with the attack on the propriety of the approach to the issues and the order subsequently issued by the Supreme Court, is this court in a proper place to depart from what appear to have been findings of the Supreme Court on the nature of the evidence led during the State's case and its strength and quality and hence the need for the respondent to give an answer?

[48] I am of the considered opinion that the views I may hold about the judgment of the Supreme Court and the findings that Court made are neither here nor there. This is not the ordinary type of case where an accused appears before the trial court and his or her application in terms of s. 174 (4) is dealt with and the trial court is at large to proceed with the matter as it sees fit, having regard to its ruling on the s. 174 (4) application.

[49] In the instant case, the correctness of the decision on the s. 174 (4) application, as recorded above, was appealed to the Supreme Court with that court's leave, this court having refused to grant such leave. As a result, the Supreme Court had regard to all the evidence that was led against the respondent up to that stage. In rendering its decision, it considered the nature, quality and consistency of that evidence and contemporaneously considered this court's reasons for discharging the respondent. It's finding on the correctness of the application to discharge, the Supreme Court is unequivocal – the respondent has a case to answer and that there was sufficient basis to convict the respondent on the evidence led up to that point.

[50] It was on the basis of the foregoing that the Supreme Court stated, as quoted earlier, that, 'There is ample room for conviction of the respondent on all the charges against him, save perhaps for the crime of abduction, to which I shall return . . .'[14] It is a historical fact that the Supreme Court also found that the respondent had a case to answer even on the abduction charge as well.[15]

[51] In the circumstances, I am of the view that this is a matter that should be decided by the Supreme Court itself. I am not in a position to comment, as I have previously stated, on the correctness or otherwise of the findings and order of the Supreme Court, nor its implications on the continuation of the trial before Bosielo J as he found it. If there are any grey areas or contentious aspects to the said judgment, the correct forum to address that issue is the Supreme Court itself.

[52] If Mr. Justice Bosielo was correct in his understanding of the constricted space for the finalisation of the trial as a result of the order and findings of the Supreme Court, I am of the considered view that the proper forum where that can be ventilated and fully answered is at the Supreme Court, where the applicant, in any event, wishes the matter to be directed for final determination.

[54] In the premises, I am of the considered view that the application for leave to appeal ought to be granted as prayed.

Costs

[55] I am of the view that in the totality of the circumstances of this case and despite this court finding in the applicant's favour, it would be odious on the part of the court to order the respondent to pay the costs, unsuccessful as his opposition may have been. As will be evident, his opposition was not unreasonable or frivolous and had the facts been different, another result may well have been returned.

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[14] The State v Teek SA 44/2008 (*supra*) at p19 para [30]

[15] *Ibid* at p20 para 30.

Order

[56] I accordingly issue the following order:

56.1 The application for leave to appeal to the Supreme Court of Namibia is granted.

56.2 There shall be no order as to costs.

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TS Masuku,

Judge