

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**RULING: APPLICATION IN TERMS OF SECTION 174**

Case No: CC 12/2015

In the matter between:

**THE STATE**

and

**FRANSISCUS DIMITRY NARIMAB**

**ACCUSED 1**

**RUBEN FRITZ**

**ACCUSED 2**

**Neutral citation:** *S v Narimab* (CC 12/2015) [2017] NAHCM 77 (15 March 2017)

**Coram:** USIKU, AJ

**Heard on:** 30 January 2017, 20-21 February 2017, 23-24 February 2017, 27 February 2017, 0-02 March 2017, 06-08 March 2017, 10 March 2017

**Delivered:** 15 March 2017

**Flynote:** Criminal Procedure – Application for discharge in terms of section 174 of the Criminal Procedure Act – No evidence upon which a reasonable court may convict accused 1.

**Summary:** Accused 1 applying to be discharged in terms of section 174 of the Criminal Procedure Act at the close of the case for the prosecution – Court holding that there is no evidence on record upon which a reasonable court may convict accused 1 – Accused 1 therefore discharged.

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### ORDER

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The application for discharge is granted for accused 1. In the result the following verdict is returned for accused 1:

- a) Count 1 : Murder: Not guilty
- b) Count 2 : Rape: Not guilty
- c) Count 3 : Rape : Not guilty
- d) Count 4 : Robbery: Not guilty
- e) Count 5 : Defeating or obstructing or attempting to defeat or obstruct the course of justice: Not guilty

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### RULING

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USIKU, AJ:

#### INTRODUCTION

[1] At the end of the State's case, accused 1 applied for discharge in terms of section 174 of the Criminal Procedure Act ("the Act"). Counsel for accused 1 submitted that there is no evidence upon which a reasonable court may convict

accused 1, and therefore accused 1 should be discharged on all counts, in terms of Section 174 of the Act.

[2] The State opposes the application. Counsel for the State submitted that accused 1 should be placed on his defence on all charges.

[3] The main issue for determination at this stage is whether the State has adduced evidence against accused 1 upon which a reasonable court may convict.

### **EVIDENCE ADDUCED BY THE STATE LINKING ACCUSED 1 TO THE OFFENCES**

[4] It is common cause that the State adduced evidence of Hester Sisamu (the mother of accused 2) and Superintendent Simataa, who testified that accused 2 implicated accused 1 in the commission of the offences charged. Hester Sisamu testified that accused 2 had informed her that himself (accused 2); accused 1 and a certain Speedo were seated taking drugs, at the crime scene prior to the rape and murder of the deceased.<sup>1</sup> Superintendent Simataa testified that accused 2 admitted to him that he, (accused 2) and accused 1 raped and killed the deceased, together.<sup>2</sup>

[5] The State further adduced evidence that on the 29 March 2014, the day following the rape and murder incidents, accused 1 and accused 2 sold a cellphone, the property of the deceased, to witnesses Immanuel Iyambo and Romario Goagoseb for N\$10.00. The evidence adduced indicates that accused 2 knew at all material times that the cellphone belonged to the deceased, as he took it from the deceased.<sup>3</sup>

[6] It is also common cause that the version of accused 1 is that he denies knowing at the material time that the cellphone they sold on 29 March 2014, belonged to the deceased, and denied involvement in the commission of the offences charged.

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<sup>1</sup> Pages 301 to 302 of the record of proceedings.

<sup>2</sup> Pages 365 of the record of the proceedings.

<sup>3</sup> Page 392 of the record of the proceedings.

[7] Evidence from Warrant Officer Mutilifa, the Investigating Officer, in the matter was that apart from being implicated in the commission of the crimes by accused 2, there was nothing else that linked accused 1 to the commission of the offences in question.

[8] It is further common cause that accused 2's version before this court, as put to various witnesses, is that he disputes having made the admissions attributed to him in this matter, including admissions implicating accused 1.

## **THE OFFENCES**

[9] Accused 1 and accused 2 are both charged with:

- (a) Count 1: Murder
- (b) Count 2: Rape; on diverse occasions, read with the Combating of Rape Act 8 of 2000.
- (c) Count 3: Rape; read with the Combating of Rape Act 8 of 2000
- (d) Count 4: Robbery with aggravating circumstances
- (e) Count 5: Defeating or obstructing or attempting to defeat or obstruct the course of justice

[10] The two accused persons are charged with the above offences on the basis that they acted with common purpose.

To establish common purpose, evidence must be led against accused 1 that he:

- (a) was present at the scene where crime was committed,
- (b) was aware that crime was being committed,
- (c) intended to make common cause with the actual perpetrator,
- (d) manifested his sharing of common purpose with the perpetrator by performing some act of association with the conduct of the perpetrator; and
- (e) must have had the required mens rea.<sup>4</sup>

## **ANALYSIS**

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<sup>4</sup> *S v Gurirab and Others 2008(1) NR 316 SC cited in S v Mutilifa (unreported)(CC 03/2012) [2013] NAHCMD 45(16 July 2014) para [12]*

[11] As can be concluded from the outline of the evidence placed before court, above, there is no direct or circumstantial evidence linking accused 1 to Murder, Rape, Robbery or Defeating or obstructing or attempting to defeat or obstruct the course of justice. In contrast, there is evidence in the form of admissions made by accused 2 that he raped and murdered the deceased. There is also evidence that the next day he together with accused 1, sold the cellphone of the deceased, which according to the evidence , accused 2 knew belonged to the deceased, as he had taken it from the deceased. In addition there is further evidence that accused 2 performed acts calculated to interfere with police investigations into the alleged offences.

[12] Counsel for the State submitted that the application for discharge by accused 1 be denied, as accused 1 could be convicted of a competent verdict on the Robbery charge, as accessory after the fact. If I understand Counsel's argument well, her contention on that aspect is based on the premise that accused 1 knew that the cellphone belonged to the deceased and such knowledge is to be inferred from the testimony of accused 1 during Bail Application Proceedings (Exhibit "C"), when accused 1 informed the court that he knew that the deceased owned a Nokia cellphone before she died, which had a scratched screen. On that basis, so Counsel argued, accused 1, therefore knew that what he and accused 2 were selling was stolen cellphone, as the deceased had been killed by that time.

[13] Snyman<sup>5</sup> states that a person is guilty of being an accessory after the fact to the commission of a crime if:

*"after the completion of the crime he unlawfully and intentionally engages in conduct intended to enable the perpetrator to evade liability for his offence, or to facilitate such a person's evasion of liability."*

[14] Counsel's contention that there is evidence that accused 1 was at least an accessory after the fact, is not founded on evidence. Knowledge that deceased owned a Nokia with a scratched screen, does not necessarily make all Nokia cellphones with similar features, the property of the deceased. There is no evidence before court that accused 1 was aware of the fate of the deceased at that time. And

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<sup>5</sup> Snyman CR, *Criminal Law, Third Edition, Butterworths at page 263*

furthermore, no evidence was adduced contradicting his version that he did not know and/or could not have known that the cellphone was a stolen object.

[15] In addition there is no evidence on record from which it may be inferred that when accused 1 accompanied accused 2 to sell the cellphone, he did so with the intention to assist accused 2 to escape a possible liability for robbery.

[16] Counsel further referred this court to the decision of *Sv Neidel*<sup>6</sup> where the court refused accused 1's application for discharge, in that matter, on the basis that the facts proved by the State at that stage raised a strong inference of accessory after the fact on the part of accused 1. I hasten to point out that the facts in the *Neidel's* case are distinguishable from the facts in the present case, in that in *Neidel's* case there was evidence on record that accused 1 admitted to the police that he suspected the items brought to him for safekeeping, to be stolen items. The court, therefore, refused his application on the basis of that evidence. In the present case there is no evidence from which it could be inferred that accused 1 suspected or knew that the cellphone was sourced through robbery or theft.

[17] In addition, in *Neidel's* case the court dismissed accused 4's application for discharge on the basis that accused 2 who implicated accused 4 in the commission of the offence, testified in court during a trial-within-a-trial, repeating the allegations implicating accused 4. In other words accused 2 in *Neidel's* case had maintained during the trial his version implicating accused 4. In contrast, in the present case, accused 2, from his version as put to witnesses by his Counsel, denies, during trial having made the admissions attributed to him implicating accused 1. The facts in the *Neidel's* case are, therefore, distinguishable from, and are not applicable to, the present case.

[18] Suffices it to say that there is no prima facie case established by the State against accused 1, proving any of the elements of common purpose referred to above. For example there is no evidence adduced by the State that:

- (a) places accused 1 at the scene of crime,
- (b) establishes that accused 1 was aware that a crime was being committed or had been committed, and

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<sup>6</sup> *Sv Neidel and Others (Unreported) (CC 21/2006) delivered on 22 July 2008*

(c) further, no evidence that accused 1 was found in possession of any item that could link him to the commission of the crimes in question.

## CONCLUSION

[19] In the premises the application in terms of Section 174 of the Act, falls to be granted, and accused 1 is discharged on all counts.

[20] In the result the following order is hereby made in respect of accused 1:

- a) Count 1 : Murder: Not guilty
- b) Count 2 : Rape: Not guilty
- c) Count 3 : Rape : Not guilty
- d) Count 4 : Robbery: Not guilty
- e) Count 5 : Defeating or obstructing or attempting to defeat or obstruct the course of justice: Not guilty

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B Usiku  
Acting Judge

## APPEARANCES

STATE:

Mrs Ndlovu  
Office of the Prosecutor General

APPLICANT:

Mr. Siyomunji  
Instructed by Directorate of Legal Aid