

HIGH COURT OF  
WINDHOEK



NAMIBIA MAIN DIVISION,

Case No: CC 4/2016

**THE STATE**

v

**WILHELM WIMPIE DERICK FEBRUARIE**

**Neutral citation** S v Februarie (CC 4/2016) [2018] NAHCMD 249 (21 August 2018)

**Coram:** SHIVUTE, J

**Heard:** 2-13 April 2018, 2-6 July 2018, 16-17 July 2018

**Delivered:** 21 August 2018

**APPLICATION IN TERMS OF S 174 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977.**

**Fly note:** Criminal Procedure – Application in terms of s 174 of Criminal Procedure Act – Statements put to witnesses do not refute state evidence – Value to be afforded to it – Its reliability – May be determined if tested through cross- examination.

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**ORDER**

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(a) There is a prima facie case to answer against the accused on both counts.

(b) Application is dismissed.

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**RULING IN TERMS OF S 174 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977**

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SHIVUTE J:

[1] The accused pleaded not guilty to an indictment containing two counts namely; murder and rape contravening s 2 (1) (a) read with ss 1-3, 5 and 6 of the Combating of Rape Act, 8 of 2000. Alternatively Crimen injuria.

Count 1: Murder

It is alleged that upon or about 21 June 2014 and at or near Windhoek in the district of Windhoek the accused did unlawfully and intentionally kill Dinah Diedericks, an adult female person.

Count 2: Rape – Contravening section 2 (1) (a) of Act 8 of 2000.

It is alleged that on or about 21 June 2014 and at or near Windhoek in the district of Windhoek the accused did unlawfully and intentionally commit a sexual act with Dinah Diedericks by inserting his penis and or other parts of his body and or an object into the vagina and/or anus and/or mouth of the complainant under the following coercive circumstances:

1. By application of physical force to the complainant ; and/or
2. By threats (verbally or through conduct of the application of physical force to the complainant; and/or
3. Where the complainant is affected by physical disability or helplessness or intoxicating liquor or sleep to such an extent that the complainant is rendered

incapable of understanding the nature of the sexual act or is deprived of the opportunity to communicate unwillingness to submit to or to commit the sexual act.

#### Alternative charge to count 2: Crimen Injuria

It is alleged that on or about 21 June 2014 and at or near Windhoek in the district of Windhoek the accused did unlawfully and intentionally injure, insult and impair the dignity of Dinah Diedericks by removing her underpants and trouser and exposing her private parts.

#### Introduction

[2] The accused and his girlfriend had an engagement party. The deceased and her friend, one Ms Ruppig attended. Apart from the above mentioned people there were other people who also attended the party. When the party came to an end, two of the witnesses accompanied by the accused escorted the deceased to her residence at no.3 Curie Street in Windhoek West as she was under the influence of alcohol. The accused had taken intoxicating liquor with him in order to go and drink with the deceased at her place. The two witnesses dropped the deceased and the accused at the deceased's residence and left the deceased in the company of the accused. The deceased was found dead later that night outside her house but on the premises. Her body was found naked.

[3] At the end of the state's case counsel for the accused person applied for a discharge in terms of s 174 of Act 51 of 1977. The state opposed the application.

[4] It was argued on behalf of the accused that there is no prima facie case established against the accused by the state. Counsel argued that there is no evidence linking the accused to the commission of the two offences. He argued that DNA evidence exonerated the accused person. Counsel levelled criticism against the

evidence of police officer Khoeseb that he is not a reliable witness when he testified that he observed a mark on one of the accused person's thumbs and he inferred that it was a bite mark. The witness said he made the observations in the presence of Sergeant Jarson and Inspector Kamusuvize. It transpired in cross-examination that officer Khoeseb lied to the Lower Court Magistrate that he had a statement from one Ms Ruppung that stated that the accused person almost raped her on the day the deceased was killed.

[5] Counsel again argued that police officer Kamusuvize testified that he noticed a small wound on the accused's finger. If it is true that injuries were observed on the accused as alleged by the police officers, those injuries were supposed to be indicated on the warning statement when the accused was being charged. Furthermore, state witness Bock the accused's girlfriend testified that she did not observe injuries on the accused. Again, no injuries were observed by police officer Jarson who was part of the investigating team.

[6] With regard to the cause of death, counsel argued that, the deceased died from manual strangulation according to doctor Kabanje. Furthermore, doctor Kabanje testified that no signs of semen was found on the rape kit.

[7] Concerning DNA evidence, counsel argued that although the deceased's DNA was found on the accused's jacket as testified to by Ms Swart a forensic scientist, such DNA could have come about through interaction such as greeting and hugging. Furthermore, counsel argued that no DNA was found on the rape kit or on the deceased's clothing as well as on the plastic bag.

[8] On the other hand, counsel for the state argued that there is evidence from the witnesses who dropped off the deceased and the accused at her place that the deceased was left in the company of the accused. Cellphone records of the accused also placed the accused in the area of the deceased person's residence at the material and relevant times of the fateful night. The circumstances in which deceased's body

was found suggests and or points towards a sexual assault by the accused person. The deceased's body was found in a semi-naked state. Counsel argued further that although the accused put a version to witnesses through cross-examination as to how the blood of the deceased could have landed on his jacket or how DNA of the deceased was found on his jacket, the evidence of the state has not been refuted and no evidence presented to gainsay it. Both counsel referred me to several authorities regarding the application in issue.

#### Applicable law

[9] When deciding whether or not to discharge in terms of s 174 it is not easy to provide a test that remains applicable to all circumstances. In order to reach a just and fair decision each case must be decided on its own merits.

[10] The court has a discretion to discharge at the end of the case or not; the criterion to be followed at this stage is whether there is no evidence on which a reasonable court acting carefully, may convict. Credibility of witnesses plays a very limited role at this stage. It is a consideration whether there is a reasonable possibility that the defence may supplement the state's evidence. Certain factors may have an impact, whether the accused may provide evidence to substitute that of the state, like the type of the offence alleged; the manner of questioning and putting statements to a witness during cross-examination and allegations or admissions during pleading. The right of the accused as entrenched in the Namibian Constitution should always be kept in mind. See *S v Nakale and Others 2006 (2) NR* at 455.

[11] I will consider the application in the light of the aforementioned principles.

[12] There is no eye witness in this matter. However, what is common cause is that the accused was the last person seen in the company of the deceased after they were dropped by Tropa and Fredericks. The deceased's DNA was found on the accused's jacket. The accused through cross-examination suggested that the deceased and her

friend Ms Ruppig had an altercation and he separated them. He also suggested that during the altercation the deceased was bleeding from the nose. However, witness Wilfriede Fredericks and Tropa testified that they did not observe any altercation between the deceased and her friend neither did they observe the deceased bleeding from the nose. Again, when the accused was left with the deceased it was put to witnesses that the deceased had lost her home keys and the accused remained because he was concerned about the deceased's safety. However, later on the deceased told the accused to leave and the accused left the deceased in the yard.

[13] Although there is no evidence proving rape, there is evidence from Ms Diederiks and Van Wyk who testified that when they arrived home between 23h00 – 24h00 they found the deceased's body lying naked but it was covered with a jacket. Her head was wrapped in a plastic bag. Ms Bock also confirmed that her mother's body was lying naked. There is an alternative count of *crimen injuria*.

[14] The state had led direct evidence incriminating the accused. Although the accused gave instruction suggesting how the deceased's DNA came on his jacket and the reasons why he left the deceased alone, if he was so concerned about her safety, the value to be afforded to what he said and its reliability may only be determined if it is tested through cross-examination.

[15] Another point of consideration is whether the court's discretion in terms of s 174 to discharge or not is affected by Article 12(f) of the Constitution of Namibia which affords protection to an accused in a criminal trial not to be compelled to give evidence against himself. Fundamental rights to an accused person enshrined in the Namibian Constitution do not affect the discretion to be exercised by the court in terms of s 174. *See S v Nakale and Others supra*.

[16] Counsel for the accused levelled criticisms concerning reliability and credibility of state witnesses. The value to be afforded to evidence adduced, the reliability and

credibility of witnesses may only be determined once the court is in the position to consider the evidence as a whole.

[17] The evidence adduced by the state is not of such poor quality that no reasonable court may convict. I am satisfied that the state has established a case to answer against the accused on both counts. The accused will therefore be placed on his defence.

[18] In the premises the following order is made:

(a) There is a prima facie case to answer against the accused on both counts.

(b) Application is dismissed.

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NN Shivute  
Judge

## APPEARANCES:

FOR THE STATE:

S. Kanyemba

Office of the Prosecutor-General, Windhoek

FOR THE ACCUSED:

M. Siyomunji

Instructed by Directorate of Legal Aid, Windhoek