

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

**RULING ON THE: APPLICATION FOR THE DISCHARGE OF THE ACCUSED
AT THE CLOSE OF THE PROSECUTION'S CASE IN TERMS OF SECTION
174 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977**

CASE NO.: CC 18/2018

In the matter between:

VICTOR ELIA

APPLICANT

and

THE STATE

RESPONDENT

Neutral citation: *Elia v S* (CC 18/2018) [2020] NAHCMD 214 (8 June 2010)

Coram: RAKOW, AJ

Heard on: 26 May 2020

Delivered on: 8 June 2020

Flynote: Criminal Law: Discharge of accused in terms of section 174 of the

Criminal Procedure Act 51 of 1977. Criminal Procedure – Trial – Discharge of accused at close of States case in terms of s 174 of Criminal Procedure Act 51 of 1977 – Approach by court and guidelines set out in *S v Nakale* and *S v Teek* followed.

Summary: The accused face three charges, one for murder, the second one for robbery and the third one for defeating the course of justice. All the charges relates to the death of one Iyaloo Ndapandula Hainghumbi during the period of 16 – 17 January 2017. The accused was the boyfriend of the deceased and was last seen the early afternoon on 16 January 2017. Her body was found on 17 January 2017 next to the B1 road between Windhoek and Okahandja. Although no one saw the deceased and the accused together their cell phone records recorded the same cell phone towers and sectors, making it a real possibility that they were in the vicinity of one another. The DNA evidence collected from the vehicle of the deceased indicates that there is a very high possibility that the deceased was the primary donator of this DNA and some of the samples were collected from areas where there was clearly blood marks. A prima facie case has been established that necessitates the accused to be placed on his defence.

Held: The application for the discharge of the applicant in terms of section 174 of the Act is dismissed.

ORDER

In the result I make the following order:

The application for the discharge of the applicant in terms of section 174 of the Criminal Procedure Act 51 or 1977 is dismissed.

JUDGMENT

RAKOW, AJ

[1] At the close of the State's case counsel for the accused person applied in terms of section 174 of the Criminal Procedure Act, 51 of 1977 (the Act) for the discharge of the accused on a count of murder, one count of robbery with aggravating circumstances and one count of defeating or obstructing or attempting to defeat or obstruct the course of justice

[2] The accused was charged with unlawfully and intentionally killing Iyaloo Ndapandula Hainghumbi during the period of 16 – 17 January 2017 at or near Windhoek in the district of Windhoek. He was further charged with count two, robbery with aggravating circumstances in that he forced the said Iyaloo Ndapandula Hainghumbi into submission by hitting her with an unknown object on the head and/or by beating and kicking her over her body and then unlawfully and intentionally stole from her a cellular telephone, a sim card, a handbag, a jacket and a pair of shoes.

[3] The third count the accused face, was one of defeating or obstructing or attempting to defeat or obstruct the course of justice in that during the period 16 – 20 January 2017 at or near Windhoek and/or Otjiwarongo and/or in an unknown district in Namibia, the accused dumped the body of Iyaloo Ndapandula Hainghumbi in a bushy area in the vicinity of the western bypass road, clean a motor vehicle with registration number N 22855 W and/or removed blood from inside this vehicle, or instructed others to do so and/or remove, destroy, set alight or otherwise dispose of a pair of shoes, hand bag, cellular telephone, sim card and a jacket or instructed others to do so and/or remove, destroy, set alight or otherwise disposed of a head rest which was inside the motor vehicle with registration number N 22855 W or instructed others to do so, whilst the accused perpetrated these acts he knew or foresaw the possibility that his conduct my

frustrate and/or interfere with the police investigations into the disappearance and/or death of the deceased and/or his conduct may conceal and/or destroy physical evidence of an assault on the Deceased and/or destroy physical evidence linking him to the disappearance and/or death of the deceased and his conduct may protect him from being prosecuted for a crime in connection with the disappearance and/or death of the deceased.

[4] The accused pleaded not guilty on all three the counts and declined to provide a plea explanation. The state called a number of witnesses that either were with the deceased prior to her disappearance or at some stage involved with the investigation of her death. The State called about 28 witnesses who testified about the movements of the deceased the time before her death and then afterwards regarding the investigation that was done.

[5] A number of witnesses testified that the deceased spent the weekend of the 13 – 15 January 2017 with one Paavo Kondjela Mbweshe who was apparently the new boyfriend of the deceased. There is also evidence that shows that the accused and the deceased had a relationship prior this for three to four years. The deceased left Paavo Mbweshe at the Hakahana service station after her sister and friend brought a USB stick there that she wished to send with Paavo Mbweshe to a cousin in Swakopmund. From further evidence it then seems that he returned to Swakopmund as his cell phone picked up cell phone towers in Swakopmund and the brother of the deceased also met him there at their workplace later that week.

[6] The deceased left her house Monday morning 16 January 2017 and went with her friend to school, IUM and later to Wernhill shopping mall. From there she was set to meet someone but the witness could not remember who. The deceased was again seen by Johannes Nghitikwa at the Hochland Spar between 14h00 and 15h00. This was the last time any of the witnesses saw her alive. Hianghikiwa Emilia Kleopas testified that she received text message to call the deceased between 14h00 and 15h00. She tried to, but the call did not go

through. She then received a call from the deceased from an unknown number. Her number is 0812006631.

[7] From the evidence of Mark Plaatjie, who works MTC and testified regarding the transactions to and from the phones of the deceased and accused and the investigating officer, it transpired that the device that was used during this call, is the phone that was found with the accused as the serial numbers from the call register and the actual serial number of the phone match up. Mark Plaatjie further testified that when one look at the cell phone towers and sectors which was used by the cell phones of the deceased and accused during the afternoon and evening of 16 January 2017, it is highly likely that the accused and deceased were in the same vicinity.

[8] The body of the deceased was found during the morning of 17 January 2017 next to the B1 road between Windhoek and Okahandja. Various police officers, mortuary personnel and personnel from the National Forensic Institute of Namibia testified regarding the removal of the body and the collecting and testing of various samples. A post mortem was done and found that the deceased died of blunt force trauma to the head.

[9] Mareen Swart testified that she is employed at the National Forensic Science Institute as a chief forensic scientist, the head of the genetics section. In the case before court, she attended a vehicle examination and issued reports on both the vehicle examination and the DNA collected. This includes the DNA analysis of all the exhibits that was submitted in the current matter. She received a request from a police officer to come and see whether there are any latent bloodstains in the specific vehicle and she attended the vehicle examination accordingly. She applied Blue Star Forensic to the vehicle N 22855 W to reveal possible latent bloodstains which may have been cleaned or be invisible to the naked eye. The test identifies haemoglobin which is a metallic protein in your blood that carries oxygen. When haemoglobin is present it allows for peroxides activity to give florescence when you spray this chemical onto

possible latent bloodstains. It shows as a blueish colour that you can see with the naked eye.

[10] She then took two swabs each from these areas that lighten up to test for DNA. Some of the areas were identified with the naked eye. There was a clear deposit of a reddish trace on the lower part of the seat on the left hand side of the seat, near to the wheel arch. There were also possible bloodstains on the wheel arch inside the passenger area which was visible to the naked eye and swabs were also collected there. It also seemed to her if the vehicle might have been washed or that there was a flow of blood, the blood was not clear defined blood splatter in most instances but seemed as if it was rubbed.

[11] She, Ms Lukas and Ms Nakalemo worked with the samples that were taken but she did the DNA analysis. She compared the female profile from the sample she had of the deceased DNA as well as the sample she had from the accused DNA with the various DNA samples that was collected from the clothes that was previously examined as well as the swabs she took from the vehicle. Some of the samples only yielded a partial profile which is of limited forensic significance as it did not have enough DNA evidence to reach a conclusive finding. Some samples however yielded enough DNA evidence and yielded a complete female profile and the deceased cannot be excluded as a possible contributor to the said profile.

[12] Jacob Katara Quill testified he overheard phone conversations between the accused and his brother when they were detained in one cell in 2017. During these conversations the accused asked his brother to purchase paraffin and to burn certain items. The accused also told this witness that he saw the deceased on the day that she died. Quill informed Hafeni Hainghumbi, the brother of the deceased at a later stage of the conversations that he overheard.

[13] At the close of the State's case, the legal counsel for the defendant brought an application in terms of section 174 of the Act. He argued that there is not enough evidence presented against the accused to show that he committed

the offences referred to in the charges and therefore the court must return a verdict of not guilty at this stage. The State did not successfully discharge the *onus* that rested on it.

[14] Council for the State argued that there was enough evidence available to prove a *prima facie* case against the accused. From the evidence it is clear that the accused tried to get hold of the deceased throughout the week-end in question. The phone records of the deceased and the accused place them in the same vicinity from the time that she and Elizabeth Pineas parted ways. The call to Emilia Kleopas from the phone of the accused further shows that despite the fact that the accused told the police that the last time he saw the deceased was on 13 January 2017 that they were indeed together on 16 January 2017. Then there is also the evidence about the fact that the accused contacted his brother to buy paraffin and burn items when he was initially arrested.

[15] Section 174 of the Act makes plain that the court, at the close of the case for the State, has discretion to return a verdict of not guilty if it is of the opinion that there is no evidence that the accused committed the offence charged, or can be convicted on any of the competent verdicts finding application. No evidence has been interpreted to mean no evidence which a reasonable man acting carefully may convict¹ and in our Namibian Courts in *S v Nakale*² the words '*no evidence*' was interpreted to mean no evidence upon which a reasonable court acting carefully may convict (also see *S v Teek*³). This approves the reasoning in an earlier case, in *R v Herhold and Others*⁴ at page 722-H where the following was stated regarding the application before Court:

'It has repeatedly been held in our Courts that the test to be applied in an application of the present nature is not, whether there is evidence upon which a reasonable man should convict, but, whether the evidence by the prosecution is such

1 *R v Shein* 1925 AD 6.

2 2006 (2) NR 455 (HC) at 457.

3 2009 (1) NR 127 (SC).

4 *R v Herholdt and Others* (3) 1956(2) SA 722-H.

that a reasonable man, acting carefully, might properly convict. If there is such evidence then an application of this nature is not to be sustained.’

[16] 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).

[17] The inquiry was not, and has never been whether the evidence was cogent, plausible or constituted proof of guilt beyond a reasonable doubt. The court in *Teek* (supra) also re-affirmed the generally accepted view that, although credibility is a factor that may be considered during the s 174 application, it plays a very limited role. It is only if the evidence is of such poor quality that, in the court’s opinion, no reasonable court could accept it as reliable, that the application for discharge will succeed. In *Kariseb v S*⁵ January J held that

‘(t)his would really only be in the most exceptional case where the credibility of a witness is so utterly destroyed that no part of his material evidence can possibly be believed.’

[18] Despite the contradictions in the evidence of the State witnesses it cannot be said that the evidence does not support any of the charges the accused is facing. The weight accorded to the evidence would *inter alia* depend on whether or not it is rebutted by other evidence. In *S v Amakali Leevi*⁶ Liebenberg AJ as he was then said that:

‘the evidence given by the State witnesses at this stage has not been refuted. Whereas the defense up to now has merely disputed the evidence adduced by the state and did not lead any evidence that refutes such evidence, there is no evidence to gainsay the state’s version.’

5 (CC 04/2012) [2019] NAHCNLD 86 (5 September 2019).

6 Case no 38/2008 delivered on 20/7/2009.

[19] Weighing all the evidence presented in the State's case I therefore find that the state did present a case to the court that should be answered to and that they made out a *prima facie* case against the accused.

[20] In conclusion and for the above reasons, it is ordered:

In respect of the accused the application in terms of s 174 of the Criminal Procedure Act 51 of 1977 is dismissed.

E RAKOW
Acting Judge

APPEARANCES:

For the Applicant:

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For the Respondent:

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