

REPUBLIC OF NAMIBIA



**IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

Case No: CC 18/2019

In the matter between:

THE STATE

Versus

LIKIUS VALOMBOLA

Neutral citation: *S v Valombola* (CC 18/2019) [2021] NAHCMD 105 (10 March 2021)

Coram: CLAASEN, J

Heard: 23 June 2020, 24 June 2020, 25 June 2020, 06 July 2020, 07 July 2020,
08 July 2020, 16 July 2020, 26 October 2020, 10 February 2021

Delivered: 10 March 2021

Flynote: Application in terms of s 174 of the Criminal Procedure Act, 51 of 1977 – Discharge of accused at close of State case – Test – Whether there is prima facie evidence on which a reasonable court can convict – Court held that there is sufficient evidence on which a court acting reasonably may convict the accused on the charges – Application dismissed.

Summary: The accused in this case is indicted for murder and discharging a firearm in public. The accused pleaded not guilty to the charges. At end of prosecution's evidence, the accused applied for discharge, which was opposed by the State.

Held that the standard of proof at this juncture is that of a prima facie case and not proof beyond reasonable doubt.

Held that the State has established a prima facie case against the accused and he is placed on his defense on both counts.

ORDER

The application in terms of section 174 is hereby dismissed.

**RULING ON APPLICATION FOR THE DISCHARGE IN TERMS OF SECTION 174 OF
ACT 51 OF 1977**

CLAASEN J:

Introduction

[1] At the close of the State's case, Mr Namandje made an application on behalf of his client in terms of Section 174 of the Criminal Procedure Act 51 of 1977 (hereinafter the Act) for the discharge on the charges against him. This application was opposed by the State who is represented by Mrs Ndlovu.

[2] The accused person faces allegations that he wrongfully, unlawfully and intentionally shot Helao Kapembe Ndaba twice in his head with a firearm with the intention to kill him. Additionally that he discharged a firearm in public, contravening s 38(1)(o) of the Arms and Ammunition Act 7 of 1996.

[3] The accused pleaded not guilty to both counts. He also gave a plea explanation in terms of s 115 of the Act and it includes s 220 admissions. According to the plea explanation he was a passenger in his vehicle, at the time, driven by his son. They found a motor vehicle parked in their lane at Omuwapu Street, facing oncoming traffic. That vehicle obstructed them from driving. That prompted, first his son and thereafter himself, to request that the vehicle be moved out of the way. There were however persons who mocked them, followed them and aggressively knocked on his vehicle. As a result, he opened his window and fired two warning shots in the air. When the second warning shot was fired his son suddenly drove.

[4] He alludes to a possibility that the deceased may have been accidentally hit by a bullet from the warning shots he fired, but in the event that it is found to be the case, that he did not have intention to kill any person.

[5] The accused further made admissions in terms of s 220 of the Act that on 18th May 2018 he was an occupant in the front passenger seat of his vehicle which was driven by his son. He further admits that whilst on the front passenger seat, he discharged his firearm to wit a pistol 22 long ISSCC with serial number A 11910 on a public road, namely King Kauluma Street and Omuwapu Street.

[6] The State's summary of substantial facts is that on the night in question the accused, who was passenger in his vehicle, arrived at certain junction where another vehicle was stationary due to mechanical problems. The accused and or his son insisted that the vehicle move and when it did not the accused fired two shots in the direction of the deceased. The shots struck the deceased and he passed away as a result thereof.

[7] The prosecution presented evidence of 5 persons, Mr Peter Mukwilongo, Mr Gabriel Amadhila, Mr David Nakanyala, Mr Pineas Isaak and Ms Stefanie Khoeses, that claim to have been eye-witnesses on the night in question. The scene was attended to by 3 police officers namely, Mr Immanuel Shilamo, Mr Moses Shivolo and Mr Evan Berrand, who also testified. Dr Simasiku Kabanje who compiled the post-mortem and a forensic scientist Mr Kalipus Sem who compiled a ballistic report also testified.

Arguments on behalf of the accused

[8] Counsel for the applicant submitted detailed heads of argument which I endeavour to summarise. The central thread of the accused's heads of argument is that the evidence of the State is riddled with contradictions and that none of the officials armed with the task of conducting the forensic investigations did a proper job. In respect of the eye witnesses, counsel contends that almost every eye witness had a different version, as opposed to the accused who had a consistent version of the events that transpired that night right from the bail hearing until the trial.

[9] He criticized Mr Nakanyala for testifying that he saw 'something' in the accused hand as opposed to having certainty as to what it was and that he heard two gunshots but thereafter during cross-examination supplemented his version by explaining that he saw sparks from the accused's car.

[10] As far as Mr Mukwilongo's testimony was concerned, counsel characterised his conduct of pushing the deceased away from accused's car as peculiar in the circumstances. This witness was blasted for not being able to remember whether the gun that was pointed in their direction was in the accused's left or right hand. Counsel contends that this witness was outright untruthful for his account that he did not see the shooting but heard the shots.

[11] In respect of the evidence of Ms Khoeses, counsel argued that there was a fabrication of evidence because on more than one occasion she replied that she cannot remember and also critiqued her for omissions in her witness statement.

[12] The quality of the investigations by the police was characterised as very poor. The reasons being, that the scene was not cordoned off and because only two out of the many witnesses were utilised in the demarcation of the points that formed the basis of the photo-plan and the sketch-plan. Furthermore in the forensic investigations, officials did not adhere to the rules relating to the handling of exhibits i.e. the chain of custody. The comparative analysis as to the weight of projectiles also featured. According to Mr Sem's evidence the weight of the piece of lead in the deceased's head,

exhibit 'C1' weighed 0.121 grams, whilst the fragment, exhibit 'C2' weighed 1.53 grams. However, the factory specifications on the ammunition box submitted the laboratory, gives the mass of a projectile as 2.59 grams. Furthermore, it was negligent of Mr Sem, not to have noted down observations during the post mortem examination and so was his failure to measure the perceived exit wound. In addition, there was no documented chain of custody upon handover of the exhibit bag from Mr Nyambe, who received the exhibit bag from the reception at the National Forensic Science Institute.

[13] The crux of the submissions by counsel is that on account of these serious shortcomings the State did not prove beyond reasonable doubt that the projectile which was compared to the live ammunition from the accused's fire-arm was the object found in the skull of the deceased and that eye witnesses' testimony cannot be relied upon because of the magnitude of the discrepancies therein. During oral arguments, counsel raised a hypothetical question of what if there was a second shooter on the scene that fired shots by using a gun with a silencer. Their argument is that it is futile to put the accused on his defence in an attempt to resuscitate the State's bleeding case. He cited *S v Lubaxa*:¹

'[18] I have no doubt that an accused person (whether or not he is represented) is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates himself. The failure to discharge an accused in those circumstances, if necessary *mero motu*, is in my view a breach of the rights that are guaranteed by the Constitution and will ordinarily vitiate a conviction based exclusively upon his self-incriminatory evidence.'

[14] The second basis was that if it is found that the shots fired by the accused caused the death of the deceased, then it was an accident because the accused had no intention to shoot and kill a person.

[15] In respect of the second charge, the argument was that the state failed to prove that there was no justification for a discharge of the fire-arm under the prevailing circumstances.

¹ *S v Lubaxa* (372/2000) [2001] ZASCA 100.

Arguments by State

[16] Council for the State, countered these arguments and advanced that from an analysis of the evidence presented by the state witnesses, the conclusion is that it cannot be said that there is no evidence on which a reasonable court, acting carefully may, convict.

[17] In particular, counsel stated that there is evidence that the deceased was at the scene where the accused fired two shots. That is evident from several sources. For starters, that is evident in his plea explanation and s 220 admission. Apart from that, there is the testimony of the eye witnesses who observed that the accused fired shots in the direction where people, including the deceased, were standing. She reminded the court that that there is no evidence about anyone else who discharged a firearm at the scene, at the time, thus Mr Namandje's hypothetical question cannot be sustained.

[18] Counsel also submitted that the medical report and the evidence from the medical doctor indicated that the wounds the deceased suffered were caused by two bullets.

[19] Another point that she advanced was that all the state witnesses on the scene, were in concurrence about the fact that the vehicle of the accused was not surrounded, nor was the accused in any imminent danger before the discharge of the fire-arm.

[20] As for the attack on credibility of the witnesses, counsel directed the court to the authorities of *S v Nakale and Others*² and *S v Teek*³ from where it emanates that credibility of the witnesses plays a very limited role at this juncture. She continues by stating that though there are some inconsistencies in the evidence of some of the eye witnesses, it was not a situation of it being of such poor quality that no reasonable court could accept it. These, she argues, cannot be said to show a very high degree of untrustworthiness that their credibility can be utterly destroyed and that no part of their material evidence can possibly be believed. Thus, the accused has a case to answer to.

² *S v Nakale and Others* 2006 (2) NR 455 (HC).

³ *S v Teek* 2009 (1) NR 127 (SC).

The law and application thereof

[21] Applications for discharge at the end of the State case is governed by s 174 of the Act which reads 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 may be convicted on the charge, it may return a verdict of not guilty.’

[22] It is trite that the words ‘no evidence’ means no evidence upon which a reasonable court, acting carefully, may convict.⁴ This overarching principle has been amplified in *S v Nakale and Others*⁵ wherein further guidelines were articulated. The State in particular relied on some of the latter considerations, such as that there is evidence on which a reasonable court may convict, that credibility plays a limited role at this junction and that the accused also placed evidential material before the court, which was not under oath, and which was denied by eyewitnesses.

[23] Before I consider the validity of the arguments, I pause at an issue that momentarily flared up between the parties, namely the standard of proof that the State needs to meet at this juncture. The oral argument of counsel for the accused gave the impression that the standard of proof required at the stage of discharge is the same than at the end of trial, i.e. proof beyond reasonable doubt. This was also supported by the reliance in the heads of argument on *Phetoe v S*⁶ that:

‘The state is required, when it tries a person for allegedly committing an offence, to prove the guilt of the accused person beyond reasonable doubt. This high standard of proof – universally required in civilised systems of criminal justice - is a core component of the fundamental right that every person enjoys under the Constitution and under the common law prior to 1994.’

⁴ *S v Nakale and Others* 2006 (2) NR 455 (HC).

⁵ *Ibid* at para 26

⁶ *Phetoe v S* 2018 (1) SACR 593 (SCA).

[24] The state counsel had a different stance, namely that the threshold standard at the point of an application of this nature is that of 'prima facie proof' and not that of 'beyond reasonable doubt' which applies at the end of all the evidence presented in a trial.

[25] In contemplation of the proposition that the same standard of proof, i.e. beyond reasonable doubt applies in both a discharge application and at the end of trial, counsel for the accused did not refer me to any authority in our own jurisdiction, nor has I come across that in my pursuit of the issue. In *Matroos v S*,⁷ a relatively recent appeal judgment that turned on whether the court a quo correctly applied the test, the appeal court confirmed the standard of proof at the close of the state's case. The *Matroos* matter held at para 13 that:

'Our law, as set out in the leading cases of *S v Teek*⁸ and *S v Nakale and Others*⁹ provides that, evidence required at the closure of the State's case may not conclusively prove the guilt of the respondent, as at this stage, all that the State is required to establish is prima facie evidence on which a reasonable court, acting carefully, might convict and not will convict.'

[26] In view of this, I respectfully disagree with counsel for the accused as to the standard of proof required at the stage of an application in respect of s 174 of the Act.

[27] I move to the role of credibility of the State's witnesses. The main thrust of the application was premised on the notion that the evidence was incurably bad and thus the application turns on the issue of credibility, in particular lack thereof in the State's evidence. The parties were on the opposite sides of the spectrum as to the role of credibility at this juncture.

[28] It is prudent to be mindful that the *Nakale* matter advanced credibility of the witnesses as one of the factors amongst an array of relevant criteria for consideration during an application of this nature. Subsequently the question was considered in *S v Teek*¹⁰ and it was held that:

⁷ *Matroos v S* (HC-MD-CRI-APP-SLA-2018/00071) [2019] NAHCMD 255 (20 September 2019).

⁸ *S v Teek* 2009 (1) NR 127 (SC).

⁹ *S v Nakale and Others* 2006 (2) NR 455 (HC).

¹⁰ *S v Teek* 2009 (1) NR 127 (SC).

'...the generally accepted view, both in Namibia and in South Africa, appears to be that, although credibility is a factor that can be considered at this stage, it plays a very limited role. If there is evidence supporting a charge, an application for discharge can only be sustained if that evidence is of such poor quality that it cannot, in the opinion of the trial court, be accepted by any reasonable court (see eg *S v Mpetha* 1983 (4) SA 262 (C) at 265; *S v Nakale* supra at 458). Put differently, the question remains: is there, having regard to the credibility of the witnesses, evidence upon which a reasonable court may convict?'

[29] It leaves no doubt as to the limited role of credibility, unless the quality of the State's evidence constitutes a doomed case in all respects. I thus proceed to the question of whether the State's evidence was so incurably weak and riddled with contradictions that it is a totally hopeless case.

[30] Much has been said by counsel for the accused about the contradictions and the State concedes that there are some discrepancies. Suffice it to say that not all contradictions are material and necessarily result in an utter destruction of the credibility of a witness. Rather a court must have regard to the nature and reason thereof. It has been held in *S v Auala*¹¹ at para 30:

'It is not uncommon that witnesses, when testifying, differ from one another in minor respects, instead of relating identical versions to the court. There can be various reasons explaining this phenomenon and it does not necessarily mean that deliberate lies were told to the court. Contradictions per se do not lead to the rejection of a witness' evidence, as it may simply be indicative of an error.'

[31] At this stage I refrain from making any particular credibility findings about the testimony of the state witnesses, in view of position that credibility of witnesses plays a limited role, and it would be premature.

[32] Moreover, the accused relies on self-defense, thus implying that his action of discharging the shots where necessary to avert the danger that he faced at that moment. A court acting carefully cannot ignore that thus far there is nothing under oath as to the version postulated by the defense, while there is evidence from the State that

¹¹ *S v Auala* (No 1) 2008 (1) NR 223

there was no imminent danger and these were not warning shots in the air. Notwithstanding discrepancies amongst the eye witnesses, there are also similarities that supports the state's case. Furthermore, a consideration of the evidence must also account for any competent verdict that the accused may be convicted of.

[33] For these reasons, this court is of the view that the State has established a prima facie case against the accused and the accused is placed on his defence on both counts.

C Claasen

Judge

APPEARANCES:

COUNCIL FOR THE ACCUSED:

Mr Namandje

Sisa Namandje & Co. Inc

THE STATE:

Mrs Ndlovo

Office of the Prosecutor-General

Windhoek