

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: CC 5/2021

In the matter between:

**THE STATE**

Versus

**ABRAHAM MAASDORP**

**Neutral citation:** *S v Maasdorp* (CC 5/2018) [2022] NAHCMD 473 (9 September 2022)

**Coram:** D USIKU, J

**Heard:** 4 August 2022

**Delivered:** 9 September 2022

**Flynote:** Criminal Procedure – Discharge of an accused at the close of the state CASE– The test is whether a reasonable court acting carefully may convict – Duty of court to protect an accused’s right against self-incrimination – Whether *prima facie*

case becomes proof beyond a reasonable doubt if accused elects to say nothing in his defence.

**Summary:** The accused faces charges of murder read with the Provisions of the Domestic Violence Act on the first. On the second count, accused is facing a charge of Defeating or obstructing or attempting to defeat or obstruct the course of justice.

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## **ORDER**

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The defence's application brought in terms of s 174 of the Criminal Procedure Act 51 of 1977 is hereby dismissed.

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## **RULING**

### **Application in terms of Section 174 of the Criminal Procedure Act 51 of 1977**

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D USIKU J:

[1] At the close of the State's case, the defence brought an application for a discharge of the accused, asserting that the state did not lead sufficient evidence upon which a reasonable court acting carefully, may convict the accused on the preferred charges. The State is opposing the application for such a discharge.

[2] Mr Lilungwe appeared for the state whilst Mr Siyomunji represented the accused.

[3] As indicated, the charges preferred against the accused are a count of murder read with the provisions of the Domestic Violence Act and a count of Defeating or obstructing or attempting to defeat or obstruct the course of justice.

[4] In their summary of Substantial Facts in terms of s 144(a) of the CPA, it reads as follows:

‘At the time of her death the deceased and the accused were involved in a domestic relationship as they had an actual or perceived intimate or romantic relationship and/or they stayed together in a relationship in the nature of the marriage.

During the late night hours of Friday 2 August 2019 or the early morning hours of Saturday 3 August 2019, the accused was enjoying himself at a local bar in Epukiro in the district of Gobabis. When the deceased and a friend arrived at this bar the accused requested the deceased to accompany him back home. However, the deceased insisted to remain at the bar and refused to accompany the accused. Upon learning this refusal, the accused stabbed the deceased in her breast with a knife. The deceased died on 13 August 2019 in the Katutura state hospital due to injuries caused by the penetrating stab wound to her heart. During the time period after the stabbing of the deceased and his arrest the accused disposed of or hid or discarded the knife he used to stab the deceased with an intention to defeat or obstruct the course of justice as set out in count 2 of the indictment.’

[5] It is important to note that the accused pleaded not guilty to all the charges preferred against him and offered no plea explanation. The state led evidence of 11 (eleven) state witnesses. I shall briefly return to this when assessing the application for discharge of the accused by the defence at the closure of the state’s case.

[6] Section 174 of the CPA application pending before this court provides;

‘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.’

[7] There is no doubt that the words “no evidence” has on numerous occasions been interpreted in several cases such as *S v Nakale and others*<sup>1</sup> where it was held that “No evidence” means no evidence upon which a reasonable court acting carefully may convict. That interpretation was further endorsed by the Supreme Court in *S v Teek*<sup>2</sup>.

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<sup>1</sup> *S v Nakale and others* 2006 2 NR 455 (HC).

<sup>2</sup> *S v Teek* 2007 1 NR 127 (SC).

[8] The importance of s 174 was discussed in the matter of *S v Katanga*<sup>3</sup>, where the court held the following: 'Section 174 is crucial in our criminal justice system as it reminds courts that, the main purpose of the CPA is to strive for orderly and fair criminal justice. This section obliges courts, at the closure of the state case, to assess the evidence led thus far and determine if it is of such nature that a reasonable court acting carefully may convict on the charge or any other offence. The court is under strict obligation to observe and protect the accused's right against self-incrimination, which is inclusive of the right to remain silent coupled with the right to be presumed innocent....'

[9] The courts are further allowed to exercise their discretion judiciously when it is apparent that there is no evidence against the accused person upon which the court might convict. In such cases the court will have the duty to invoke the provisions of s 174 whether an accused is legally represented or not. Whether to discharge an accused at the close of the state's case or not is a decision that falls within the trial court and such a discretion must be exercised judicially.

[10] It is a basic principle of our law that a person ought not to be prosecuted in the absence of minimum of evidence upon which he or she might be convicted, merely in the expectation that at some stage he or she might incriminate himself. Thus Article 12 (F) of the Namibian Constitution provides:

'No persons shall be compelled to give testimony against themselves or their spouses....

It therefore follows that if one has to be prosecuted, there ought to be some evidence upon which a reasonable court acting carefully may convict. It has also been restated that at this stage the witness's credibility plays a very limited role. In the case of *Mpetha and others*<sup>4</sup>, the court held that, if a witness gives evidence which is relevant to the charges being considered by the court then that evidence can only be ignored if it is of such poor quality that no reasonable person could possibly accept it... Before credibility can play a role at all, it is very high degree of untrustworthiness that has to be shown.'

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<sup>3</sup> *S v Katanga* (CC 23/2018) [2019] NAHCMD 402 (10 October 2019)

<sup>4</sup> *S v Mpetha and others* 1983 (4) SA 262 C.

[11] The court when considering an application for a discharge in terms of S 174, it must assess the evidence and determine whether there is no possibility of conviction without the accused testifying and providing incriminating evidence.

[12] In *casu*, evidence led through state witnesses can be summarised as follows:

Angelika Britz

She testified that she never attended school and she does not know how to read or write. She knew the accused person by the name Abraham, though she did not know his surname. She could not recall the month and the year, but she recall what transpired. On a date she could not recall, she and the deceased went out in the evening to search for their uncle at a bar. They did not find him. They decided to go and stand at the entrance to the bar. As she pleaded with the deceased to go back home, the latter refused. In the meantime accused approached them and asked the deceased to accompany him home but she again refused. Accused took out a knife from his socks and stabbed the deceased on the breast. She was able to observe the stabbing because of the light from the bar.

[13] After the accused stabbed the deceased on the breast, he asked her to assist the deceased by taking her home but she refused. The deceased after being stabbed by the accused went to seat down. At the time, accused appeared to be under the influence of alcohol. Ms Britz confirmed that at the time of the stabbing, the accused and the deceased were in a romantic relationship and resided in the same house. She denied that the deceased was stabbed whilst intervening in a fight. There was no fight at the bar. There were also no other witnesses who witnessed the stabbing. She left the bar and reported the stabbing incident to the deceased's family at home whereafter she went to sleep. None of the family members went to assist the deceased that night. They went to sleep.

[14] With regard to the accused's instructions that he never met the witness on that evening, Ms Britz maintained that they met, and denied that accused met the deceased at the bar alone. The deceased was stabbed by the accused in her

presence. Ms Britz left the deceased in the accused's company and the following morning she took her to the clinic.

[15] When the witness was confronted why she did not report the stabbing incident to the people at the bar, she explained that she chose to alert the deceased's family because their house was not far away from the bar, where the stabbing took place.

[16] The following morning Ms Britz did not see the need to report the incident to the police because the deceased did not want, also due to the distance to the police station. She was not aware that a police report was required.

#### Ms Dina Langman

[17] She confirmed that she was approached by Ms Britz who informed them about the deceased having been stabbed. At the time, she was in bed and could not do anything. The following morning she went to the deceased's room and found the deceased and the accused still in bed. When she asked the deceased how she was feeling, the deceased stood up and showed her her breast. The deceased informed her that she was stabbed by the accused with a knife. She also showed her the knife. The deceased's bra had blood on it, as well as the jacket she wore at the time. Whilst the deceased was showing her the knife, accused took it and placed it under the pillow. She did not know why accused hid the knife.

[18] Having observed the deceased's injuries she asked her to prepare herself so that she could take her to a clinic. Accused intervened and informed her to leave their story because she did not know about it. Accused appeared angry and ordered her to leave their room. She left the room whereafter she went to ask someone to take the deceased to the clinic whilst she left for work.

[19] Ms Dina Langman further testified that she saw the knife when it was placed under the pillow. She saw the knife again at their house in a passage whereafter she related the story to one security guard. The security guard requested her to keep the knife because the police may need it. She then kept the knife in her grandmother's house in a bag.

[20] After the deceased was taken to hospital, accused remained at their house. Accused persistently asked her for the knife but she could no longer find it. With the assistance of the police, a search for the knife was conducted but it could still not be found. She did not know what happened to the knife thereafter.

[21] When confronted why she did not come to the assistance of the deceased during the night of the incident, she maintained that it was late in the night. She had nowhere to seek help and was in fear. She only managed to go to the deceased the following morning. She did not confront the accused why he stabbed the deceased because she was scared of him. The only question she asked the deceased was how the deceased was feeling. She did not go to report the incident to the police due to the fact that she did not know how the incident started. She also had not known what to relate to the police. Neither did she tell the deceased to go and report herself, because accused was with the deceased at that point in time.

[22] Whilst the witness conceded that she had hidden the knife, she could not find it where she had hidden it. Accused persistently asked for the knife. The knife was never found.

[23] On the question that she did not care about the deceased's wellbeing, the witness maintained that she informed her aunties to take the deceased to the clinic. She denied to have made up the story about the stabbing and the hiding of the knife.

[24] Nothing really turn on the evidence of Petrus Erastus who confirmed to have bought a knife from the accused during 2019. Mr Erastus could not with certainty testify that the knife he bought from the accused was the same knife Ms Angelika Britz and Ms Dina Langman testified about. They both made reference to a table knife.

[25] Dr Rahicha Peters' testimony relates to the fact that the deceased was transferred from the Gobabis hospital on the 9<sup>th</sup> of August 2019 with a history of an ectopic pregnancy. She confirmed that the deceased was pregnant. The deceased had abdominal pain and was bleeding from her vagina. An operation was done and

the deceased was generally fine after the laparoscopy procedure. As a result, the deceased suffered from low HP due to blood loss.

[26] Blood transfusion was done, before the deceased was taken to theatre and she constantly complained of abdominal pain. It was found out that the deceased had a bulky uterus which suggested an incomplete miscarriage. After the operation the deceased was taken to acute care and had high blood pressure.

[27] After the deceased's death, it was not clear what caused the death of the deceased and various theories were suggested to be the causes. As a result, it was sought that a post-mortem examination be conducted on the deceased's body.

[28] Dr Leena Ashipala conducted a post-mortem examination on the body of the deceased. Her findings were that the cause of death was a result of a penetrating stab wound on the left nipple of the chest. She observed a small stab wound with smooth edges which was stitched as shown on Exhibit "G", photo 5 with circulated surgical stitches. Blood clots accumulation can be seen on photo 7 in exhibit "G" indicating small penetrating stab wound on the heart, which did not go through completely.

[29] According to the doctor's findings, the bleeding came about as a result of trauma possibly caused by a sharp object. Blood was found in the chest which suggest that the object used punctured the heart muscles which led to bleeding internally. Thus the blood started to accumulate. She further explained that due to the fact that the injury was inflicted on the breast, which contain fat tissues, one could not easily detect that it went through. Thus one would experience pain in the chest area only. The wound might be considered as superficial, whereby it is treated by stitching only. One is therefore left to go without noticing that the wound is leaking from the inside. The doctor maintained that the deceased was penetrated with a sharp object which damaged certain tissues thereby causing internal bleeding.

[30] The doctor's findings are consistent with Ms Martha Ishuna who attended to the deceased on 3 August 2019. The deceased informed Martha Ishuna that she was stabbed with a knife on the left breast on 2 August 2019.



[31] She examined the deceased on the left breast and observed a cut wound which was open. At the time the deceased only wore a t-shirt and a jacket and Martha Ishuna saw the mark on both clothing in the form of a hole in the area of the breast. The deceased had no bra on at the time.

[32] Ms Ishuna testified that she examined the wound to determine its depth and saw blood on the deceased's t-shirt. She described the wound as a small wound. The deceased received two stitches and was given an injection for tetanus as well as betadine ointment.

[33] On 6 August 2019 the deceased returned for dressing. All vital signs were found to be normal upon examination.

[34] On 7 August 2019 the deceased did not show up at the clinic but returned on 8 August 2019. She complained of chest pain whilst breathing in, as well as lower abdominal pain. She had low blood pressure. When Ms Ishuna confronted the deceased whether she was pregnant, she denied. A pregnancy test was done and came out positive.

[35] The deceased was referred to the Gobabis state hospital where she was admitted.

[36] Ms Ishuna further testified that lower abdominal pain could be normal for a pregnant woman but not the pain in the chest which caused breathing problems. She however was not able to say with certainty what caused the difficulty in breathing, though suggesting that it could be as a result of trauma to the chest. Also suggesting that it could have been post reactions as a result of the wound, even when it had already healed.

[37] Ms Mina van Wyk corroborated Dina Langman's evidence about a report by Angelika Britz concerning the deceased having been stabbed. She could however not do anything that evening because she was sick and unable to assist the deceased. The following morning, 3 August 2019, she did not get up but informed

Angelika and one Johanna to escort the deceased to the clinic. This court can take judicial notice of the date of the stabbing from the evidence of Martha Ishuna who attended to the deceased on 3 August 2019. The stabbing occurred on the previous date, being 2 August 2019.

[38] Ms Mina van Wyk also testified that she personally asked the deceased how she was feeling and the latter responded that she was stabbed by the accused. When she confronted the deceased why accused stabbed her, the deceased told her that she could not explain because she feared that accused would kill her. She advised the deceased to go and report the matter to the police but the deceased again refused because she feared to be killed by accused. At the time she was not aware that she could as well report the case to the police. She could not say for how long the deceased and the accused have been involved in their relationship.

[39] Mr Matheus Anton, a security guard at the Sending Plaas Health centre at the time, testified that he was on duty on 3 August 2019. The deceased arrived at the clinic accompanied by Angelika. After greetings, he asked them how he could assist them. The deceased informed him that she was stabbed by the accused, her man. He observed some little blood dripping from the wound. The blood could be observed from the jacket the deceased was wearing. He directed deceased and Angelika to the waiting area whereafter he went to call the nurse who was on standby duties. The deceased was attended to.

[40] On 7 August 2019, Mr Anton was off duty. On 8 August 2019 he visited the clinic in order to collect some documents he had left. Whilst on his way back home, he met Dina Langman. After they greeted each other, she informed him about the knife she claimed was used in the stabbing of the deceased. Dina requested him to inform the police because she knew where the knife was. She described the knife used in the stabbing as a table knife which had been sharpened.

[41] Mr Anton related the information about the knife to the police. According to him, he met the deceased on 4 August 2019. She complained about pain in her chest. The accused was also present. Because the deceased could not walk, she requested him to carry her to the health centre. He lifted the deceased up and

carried her towards the clinic. They stopped for a while because the deceased was complaining about the pain. The accused thereafter carried the deceased until they reached the yard of the health centre. The deceased was again attended to by a nurse.

[42] On 29 August 2019, Mr Anton was informed about the death of the deceased whereafter he notified the deceased's family and the police.

[43] Mr Anton maintained that when the deceased arrived at the clinic she was accompanied by Angelika Britz and she told him that she was stabbed by her man, Abraham, the accused before court. He maintained further that a lady who accompanied the deceased to the clinic was Maide, whose real names are Angelika Britz. Angelika Britz confirmed in cross-examination that she accompanied the deceased to the clinic on 3 August 2019, thereby corroborating Mr Anton's evidence.

[44] Mr Brian Kandoni a police officer at Gobabis testified that he is the Investigating Officer in this case. He knew the accused after he arrested him on the charges of murder and obstructing or defeating or attempting to defeat or obstruct the course of justice.

[45] On 29 August 2019, he received information about a stabbing incident. The deceased was taken to the local clinic on 3 August 2019 and attended to by a nurse. Upon follow up, more information was received, that the victim was at the clinic and related her story of having been stabbed by her man. The accused's name was mentioned. Because Mr Brian Kandoni knew the accused at the time and also knew that the accused and the deceased were not legally married.

[46] In the meantime, the deceased was admitted to the Gobabis hospital and later on transferred to Katutura state hospital where she died on 13 August 2019. During the course of the investigations, the instrument used in the commission of the crime was said to have been hidden by the deceased's sister. The knife was however not traced.

[47] Further information was received about the alleged knife having been sold to one Petrus Erastus. However, the knife recovered from Petrus Erastus could not fit the description of the knife Dina Langman had given to the police. Erastus Petrus maintained it was the knife he bought from the accused. That knife was handed in as Exhibit "1" before court. It has now turned out that the knife which police recovered from Erastus Petrus could not have been the knife allegedly used in the commission of the offence. To date the knife has not been recovered.

[48] During the investigation, it was also found out that there was an eye witness to the stabbing, one Angelika Britz and there was no other fight having taken place on 2 August 2019 as claimed by the accused. It also emerged through the trial that indeed the deceased was stabbed whilst stopping a fight, accused who was the deceased's boyfriend could have reported the case to the police. He did not report a case.

[49] Furthermore, Ms Ishuna's evidence to a certain extent corroborate Dr Ashipala's evidence on her findings that the deceased died as a result of a stab wound to the chest. Earlier on the deceased had complained of chest pain whilst breathing to which Ms Ishuna testified about. She went further to indicate that it could not have been associated with the deceased having tested positive to pregnancy. There might have been some few flaws in the evidence of state witnesses, but the court has to be mindful of a minor role that credibility plays at this stage of the proceedings.

[50] In my view, having regard to the totality of the evidence presented, it cannot be said that the state's case is very poor when regard is had, more specifically to the evidence of an eye witness, Ms Angelika Britz, which speaks volumes of what transpired during the night of 2 August 2019, and thereafter.

[51] In the analysis of the evidence at present, it is only to determine if there is evidence led on which a reasonable court acting carefully may convict (not must). There is other evidence led, which appear to be placing the accused on the actual crime scene on 2 August 2019 which accused has so far not disputed. When

confronted with circumstantial evidence, our courts have endorsed the two cardinal principles laid down in *R v Blom*<sup>5</sup> where it was said that;

‘In reasoning by inferences there are two cardinal rules of logic which cannot be ignored (a) The inference sought to be drawn must be consistent with all the proven facts. If it is not, the inference cannot be drawn; (b) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inference then, there must be a doubt whether the inference sought to be drawn are correct.’

[52] At this stage the state is only required to establish a *prima facie* case against the accused on which a reasonable court, acting carefully, may convict.

[53] Accused has been placed on the crime scene through the evidence of an eye witness, Angelika Britz. Post-mortem examination conducted on the body of the deceased indicates the cause of death to have been as a result of a penetrating stab wound to the left side of the chest. An incident report was immediately made by an eye witness to the deceased’s family after the fact. When all this evidence is considered in totality and not in isolation, I am of the view that a reasonable court acting carefully may convict the accused on the charges preferred against him. In the premise, an application for a discharge in terms of s 174 cannot be granted.

[53] In the result the following order is made:

The defence’s application brought in terms of s 174 of the Criminal Procedure Act 51 of 1977 is hereby dismissed.

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D N USIKU  
Judge

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<sup>5</sup> *R v Blom* 1939 AD 188 at 202-203.

APPEARANCES

STATE: Mr. B. Lilungwe  
Office of the Prosecutor-General

ACCUSED: Mr. M. Siyomunji  
(Siyomunji Legal Practitioners)