REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION

CASE NO.: CC 26/2018

In the matter between:

ANDRE MADJIEDT **APPLICANT**

versus

THE STATE **RESPONDENT**

Neutral Citation: *S v Madjiedt* (CC 26/2018) [2022] NAHCMD 55 (16 February 2022)

Coram: Claasen J
Heard: **14 February 2022**
Delivered: **16 February 2022**

Flynote: Criminal Law – Criminal Procedure – Application for discharge at the end of state's case – Section 174 of the CPA – Test whether there is *prima facie* evidence on which a court may convict. Application is granted in respect of count 3 and its alternative charge as well as count 8. The application is refused in respect of counts 2, 4, 5 and 6.

Summary: The applicant is charged with three counts of rape in contravention of the Combating of Rape Act, 8 of 2009 (CORA), three counts of trafficking in contravention of the Prevention of Organized Crime Act 29 of 2004 (POCA), and two counts of assault by threat. He applied to be discharged on counts 2,3,4,5,6 and 8.

Held that there is no evidence in respect of count 3 and its alternative as well as count 8 and therefor discharge is granted.

Held further that there is *prima facie* evidence on counts 2, 4, 5 and 6 and the application in respect of those charges is refused.

ORDER

---

1. The application in terms of s 174 of the CPA is granted in respect of count 3 and its alternative charge as well as count 8.

2. The application in terms of s 174 of the CPA is refused in respect of counts 2, 4, 5 and 6.

JUDGMENT

APPLICATION IN TERMS OF S 174 OF ACT 51 OF 1977.

CLAASEN J

[1] The applicant is charged with three counts of rape in contravention of the Combating of Rape Act, 8 of 2009 (CORA), three counts of trafficking in contravention of the Prevention of Organized Crime Act 29 of 2004 (POCA), and two counts of assault by threat. The rape charges came with alternative charges of incest and a further alternative charge of committing a sexual act in contravention of the Combating of Immoral Practices Act, 21 of 1980 (CIPA) in respect of count 1. The time periods of the charges are spread out over several years, ranging from the year 2009 until the year 2013 and were allegedly committed within the context of a father daughter domestic set-up, whilst the daughter who is the complainant was a minor.

[2] At the end of the state's case the applicant applied to be discharged on all of the charges, with the exception of two of the counts. The responded opposed the application.

[3] Section 174 of the Criminal Procedure Act 51 of 1977 (the CPA) provides that the court, at the end of the state's case, may return a verdict of not guilty if it is of the opinion that there is no evidence on which a court, acting carefully, may convict. At this stage, credibility plays a limited role, unless the evidence is incurably poor.[1]

[4] I do not intend to venture in depth into the evidence, safe to refer briefly to what is relevant for this application. It is common cause that at some stage during 2009 the complainant had gone to live with the applicant, who at that stage was employed in Angola. This was by mutual arrangement between the complainant's mother and the applicant. During certain time intervals the complainant and applicant returned to Namibia.

[5] Count 1, count 3 and count 7 comprise of rape and alternative charges. Discharge was not sought in respect of counts 1 and 7. The sexual assault, alternatively incest in respect of count 3 was averred to have occurred in Windhoek during the month of December 2010. In considering the evidence of the complainant, it is apparent that she was unable to recall specific details in respect of this count. As such, the concession by counsel for the respondent on this charge and its alternative, was properly made.

[6] Count 2, count 4 and count 6 refer to the trafficking charges allegedly perpetuated during January 2010, January 2011 and January 2012 respectively. Discharge was sought on all three of these charges. Counsel for the applicant submitted that a charge of trafficking can only be *prima facie* sustained if there was proof that the transfer and transport of the victim was unlawful and intentional and secondly, that it was for sexual exploitation. He referred to the elements of trafficking as stated in in *S v*

[1] *S v Nakale* (2006) NR 455 (HC) at 457; *S v Teek* 2009 (1) NR 127 (SC) at 130I-131H.

Koch[2] that an accused can only be convicted of trafficking if there is proof of (a) recruitment, transportation, transfer, harboring or receiving the complainant(s) and (b) for the purpose of sexual exploitation. The essence of his argument was that there was nothing sinister or illegitimate about the purpose for which the complainant had gone to Angola because she had gone to further her education and even had a small business for a while. If or in the event that a sexual act may have occurred, that is a separate occurrence that is neither here nor there. According to him the state had not presented *prima facie* proof of 'unlawful transportation' nor 'intent of sexual exploitation' thus, his client ought to be discharged on the trafficking charges.

[7] Counsel for the respondent argued to the contrary. He urged the court to consider the evidence in its totality. He stated that though there was consent between the parents for the child to go to Angola, that permission did not cater for him to have sexual intercourse with the child. He emphasized that the mother and the child harbored under the impression that it was for the welfare of the child that she was going to her father. In addition, counsel for the respondent argued that it is only the applicant himself who can attest to his 'true intent' as to why he agreed for the child to go and stay with him in Angola. Finally, he stated that in any event the intention of the applicant is evident in the testimony by the complainant that during the time of the first sexual assault at Jakkalsputz the father, who had purchased sneakers of N$ 1000 for the complainant, told her words to the effect that 'nothing is for free'. This, counsel for the respondent argued, is indicative of the intention of the applicant before the complainant travelled with him to Angola.

[8] There is no doubt about the elements of the offense of trafficking as set in the *Koch*[3] matter. I have considered the arguments of counsel for the applicant and do not subscribe to his notion that because the reason for the transfer occurred with the consent of the complainant's mother, the unlawfulness of the offense is obviated. The court is of the view that the state has presented *prima facie* evidence of acts as well as an exploitative purpose, being that of sexual assault. Thus, at this juncture, this court is not inclined to grant discharge on counts 2, 4 and 6.

---

[2] *S v Koch* (CC20/2017) [2018] NAHCMD 290 (18 September 2018) at para 17.
[3] (ibid.).

[9] Count 5 and count 8 refer to allegations that the applicant threated to kill the complainant, which ostensibly occurred during June 2011 and January 2013 respectively. The evidence presented for count 8 was given by the cousin of the complainant Ms Shandray Strauss. She testified that in January 2013 the applicant came to her residence, showed her a gun and told her that he wants to shoot the complainant. The complainant was not present at this time. Thus, the requirement of fear being instilled in the complainant contemporaneous with the utterance of the threat is not fulfilled. Counsel for the respondent belatedly conceded this.

[10] Counsel for the applicant attacked count 5 on the premise that there was no evidence that the applicant threatened the complainant during June 2011, as averred in the charge. The complainant's mother attested of a certain incident wherein the applicant uttered threatening words, but that incident occurred in December 2012.

[11] In answer to the issue in respect of count 5, Counsel for the respondent referred the court to s 92(2)(a) of the CPA which affords 3 months before or after the day stated in the charge. He submitted that not all is lost as they can still utilize the provisions in the CPA that facilitate an amendment of charge or rely on s 88 of the CPA to the effect that the defect is cured by the evidence. Whilst s 92(2)(a) of the CPA will not assist the state herein as the intervals do not fall within the parameters of that provision, the same cannot be said of the latter provisions. Thus, at this juncture it will not be prudent to shut the door on account of this argument by counsel for the respondent.

[12] For these reasons the application for discharge in terms of s 174 of the CPA is granted in respect of count 3 and its alternative charge as well as count 8. The application is refused in respect of counts 2, 4, 5 and 6.

_____

CLAASEN C

JUDGE

APPEARANCES:

FOR THE APPLICANT:	J Muchali Jermaine Muchali Attorneys
FOR THE RESPONDENT:	P KUMALO Office of the Prosecutor-General, Windhoek