



REPORTABLE

CASE NO: SA 71 /2017

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

THE STATE

Appellant

and

FRANSISCUS DIMITRI NARIMAB

Respondent

Coram: MAINGA JA, SMUTS JA and HOFF JA

Heard: 8 April 2019

Delivered: 21 May 2019

Summary: Respondent (accused no 1) in a trial in the High Court (Main Division) applied for his discharge at the close of the State case. It was argued on his behalf that there is no evidence linking the respondent to the charges he and his co-accused are facing and that in terms of Art 12 (1)(d) of the Constitution of the Republic he enjoys a constitutional right to be presumed innocent until his guilt has been proven. It was further contended that an accused is entitled to a discharge at the close of State case if there is no possibility of a conviction other than if he

enters the witness box and incriminates himself/herself. It was further contended that on the evidence presented, no court would convict the respondent as the evidence of the deceased's cellphone on which the State relies for accused being an accomplice to the crimes is not sufficient. That respondent did not know that the cellphone belonged to the deceased as accused no 2 who came with the phone to him and both eventually sold the phone, is in the business of repairing cellphones and finally that the DNA evidence exonerated the respondent.

The question whether in an application for a discharge an accused should be discharged when there is no direct evidence implicating him/her in the commission of a crime but there is a possibility that his/her evidence might supplement the State's case or in the evidence of a co-accused is a subject of much judicial disharmony. The test formulated in *S v Shuping* 1983 (2) SA 119 (BSC) to the s 174 of the Criminal Procedure Act 51 of 1977 discharge, namely (i) is there evidence in which a reasonable man might convict, if not, (ii) is there a reasonable possibility that the defence evidence might supplement the State case, and if the answer to either question is yes, there should be no discharge and the accused should be placed on his defence was criticized in *S v Phuravhatha* 1992 (2) SACR 544(V) that court refusing to follow that test and holding that, that test condoned self-incrimination.

Held that notwithstanding the criticism above, this court is in agreement with the sentiments of Heath J in *S v Ggozo and another* (2) 1994 (1) BCLR 10 (CK) that those tests still should constitute useful guidelines considering an application for a discharge of an accused but then on the basis that each one of those guidelines is

only a factor to be taken into account and that the court exercising a discretion to discharge should see to it that justice is done which depends on the circumstances of each case.

Held that in this case on the evidence presented by the State it could not be said that there was no evidence, the bottom line for a discharge which the respondent could respond to. The evidence led was that respondent in the company of accused no 2 invited the deceased for a drink on that fateful day and collected her from her home. On their own versions they were the persons last seen with her. They are not accusing anybody else but in both their bail applications and the trial their evidence is characterised by counter accusations which of them was last in company of the deceased. That alone in the opinion of the court was sufficient to place them on their defences. But as for the respondent, accused no 2 implicated him in the commission of the crimes. In fact, in his instructions put to State witnesses and in his bail application, accused no 2 testified that he left deceased and respondent at respondent's house when he went to buy cigarettes. When he returned to that house the two were gone. In the bail application which is part of the trial record, he went on to say the cellphone they had sold was in the possession of the respondent, deceased and respondent having swapped cellphones the previous evening.

Held further that on the evidence presented the discharge of the respondent was premature, the appeal succeeds and the discharge of the respondent is set aside and he is to be placed on his defence.

APPEAL JUDGMENT

MAINGA JA (SMUTS JA and HOFF JA concurring):

Introduction

[1] The respondent (accused no 1 in the court below) with a co-accused (who is accused no 2) were charged with murder, rape on diverse occasions in contravention of s 2(1)(a) of the Combating of Rape Act 8 of 2000 read with s 94 of the Criminal Procedure Act 51 of 1977, rape in contravention of s 2(1)(a) of Act 8 of 2000; robbery with aggravating circumstances as defined in s 1 of Act 51 of 1977 and defeating or obstructing or attempting to defeat or obstruct the course of justice. They pleaded not guilty to the charges. The State led evidence of a number of witnesses before it closed its case. When the prosecution closed its case, Mr Siyomunji who appeared for the respondent applied for the discharge of the respondent on all five counts in terms of s 174 of the Criminal Procedure Act 51 of 1977. The application was granted, the trial court holding that there is no prima facie case established by the State against accused 1, proving any of the elements of common purpose.

[2] The State applied for leave to appeal to this court. That application was refused, the trial court holding that given its reasons for the ruling in the s 174 application, the State had no prospects of success on appeal. Thereafter the State successfully petitioned the Chief Justice for leave.

[3] The main ground of appeal is that the trial court misdirected itself when it relied on the opinion of the investigating officer that apart from being implicated by the co-accused there is no evidence against the respondent and failing to consider the various pieces of evidence implicating the respondent in the commission of the crimes resulting in discharging the respondent at that stage of the trial.

[4] Section 174 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.’

[5] The words ‘no evidence in the section have been understood or held to mean no evidence/insufficient evidence upon which a reasonable man acting carefully may convict.’¹

[6] The evidence on record which implicates the respondent is that on 28 March 2013 he invited and by inference from the evidence of Silvia Soabes and accused no 2’s instructions, collected the deceased from her home for a drink. Respondent was with accused no 2. The three later met up with respondent’s friend, one Baron Gariseb and his two female friends. The six then visited various drinking places. At some point Gariseb and his two female friends parted from the respondent, accused no 2 and the deceased. Most of this version is instructions respondent and accused no 2 gave to their legal representatives. Respondent at

¹ *S v Shuping and others* 1983 (2) SA 119 (BSC) at 120B; *S v Lubaxa* 2001 (2) SACR 703 SCA at 705J; *S v Teek* 2009 (1) NR 127 (SC) at 130I-J; *S v Nakale* 2006 (2) NR 455 HC at 457.

the time of his arrest chose to remain silent and chose not to disclose the basis of his defence in his plea of not guilty. But when Mr Siyomunji was cross examining the mother of the deceased Analise Uri-Khos, the court tried to dissuade him from putting respondent's instructions which were irrelevant to the witness' testimony, he indicated that he was divulging the whole instructions of the respondent which was also the basis of his defence.

[7] At the point when Baron Gariseb and his friends were leaving, the deceased also indicated that she wanted to go home but she did not have taxi money. Respondent indicated to her that he had money at home. The three then went to respondent's home. At home all three entered the house. At home he gave her a N\$35 to ride a taxi home. The three exited the house but respondent's brother called him back. While he was busy assisting his brother in the house, when he emerged from the house, the deceased and accused no 2 had disappeared. He tried to look for them, called their cellphones but were not responding. He even called Baron Gariseb enquiring about the two, which call Gariseb confirms. He returned home and watched videos with his brother and later went to sleep.

[8] Accused no 2's instructions to his lawyer on the point when they arrived at respondent's home contradicts that of respondent. His instructions are that when they arrived at respondent's home, he left to go buy cigarettes. When he returned, respondent and the deceased were not at home. He then went his way and it was the last time he had seen the deceased.

[9] On 29 March 2013 accused no 2 arrived at respondent's home between 09h00-10h00. According to respondent, he had blood on his t-shirt, a cut on his lip and an injury on one of his fingers. Respondent must have asked accused no 2 how he had sustained the injuries on him. Accused no 2 said that he had a fight with a gay person. Respondent further enquired from him as to what happened to the deceased. Accused no 2 informed him that she took a taxi home. Respondent's further instructions are that he last saw the deceased on 28 March 2013. Accused no 2 had a cellphone with him which he wanted to sell. Respondent accompanied accused no 2 to sell the cellphone. He did not know where accused no 2 got the phone. All he knows is that accused no 2 was in the business of repairing cellphones, which is disputed by Gariseb and accused no 2's mother. Accused's mother knew that he repaired computers. Respondent and accused no 2 admit that they sold the cellphone which cellphone is not in dispute that it belonged to the deceased. Immanuel Iyambo and his cousin Romario Goagoseb bought the cellphone from respondent and accused no 2. Respondent initiated the transaction at the price of N\$20. Accused no 2 reduced the price to N\$10. Goagoseb paid for the cellphone and accused no 2 received the money. Respondent directed the police to Iyambo and Goagoseb when the phone was retrieved. In fact the investigating officer W/o Mutilifa testified that respondent knew that the cellphone belonged to the deceased but what he did not know was why it was being sold which version he must have repeated when it was retrieved from Romario or Iyambo. When the deceased did not return, her aunt Silvia Soabes and deceased's mother started looking for her. Soabes got respondent's cellphone number from one Natasha. She called the respondent and enquired as to the whereabouts of the deceased. Respondent informed her that 'he put her on

a cab, a green cab because they were carrying things which (was) very important which they could not take to Okalinge side because there is very dangerous'. This version contradicts respondent's instructions to his lawyer how the deceased and accused no 2 must have left respondent's house.

[10] Hester Sisamu, the mother of accused no 2 testified that, accused no 2 told her that he, respondent and one Speedo were seated at the crime scene taking drugs prior to the rape and murder of the deceased. Accused no 2 told Superintendent Oscar Simataa of City Police the whole version how he and respondent raped and killed the deceased. Accused no 2 must have raped her twice and respondent once. Accused no 2 told Sup. Simataa how the incident troubled him and eventually he informed his mother. During cross-examination of Sup. Simataa it was put to him by counsel for respondent whether he informed respondent about the version of accused no 2 and the Superintendent's reply was 'he (respondent) told me yes he was with him on that particular night but to everything what happen he cannot remember because he left them 23h00' Counsel's reaction to that response is 'and I can confirm to you that is in line with the instruction of accused no 1 that he has given so far.' If he left accused no 2 and deceased that is contrary to the instructions put to the other witnesses, which is that accused no 2 and deceased left respondent at their house while he was busy assisting his brother. Respondent further told the journalist Kongootui that he was not present when the crimes were committed, that he left accused no 2 and the deceased in the bar between 23h00 and midnight. But accused no 2 said he was present when deceased was raped and killed. If respondent left accused no 2 and the deceased in a bar would be another version contrary to the instructions.

[11] In the analysis of the evidence the trial court found that there is no direct or circumstantial evidence linking respondent to all the crimes but that in contrast there is evidence in the form of admissions made by accused no 2 that he raped and murdered the deceased. The trial court further found that the respondent and accused no 2 a day after deceased was killed, sold a Nokia cellphone with a scratched screen that belonged to the deceased and that only accused no 2 knew that it belonged to the deceased as he had taken it from her. The trial court rejected the submission by counsel for the State that respondent also knew that the cellphone belonged to the deceased. The court reasoned that the fact that respondent knew that the deceased owned a Nokia cellphone with a scratched screen was not sufficient as that knowledge alone does not necessarily make all Nokia cellphones with similar features, the property of the deceased, more so that he did not know the fate of the deceased at the time and he could not have known that the cellphone was a stolen object. The trial court further found that accused no 2 performed acts calculated to interfere with police investigation into the alleged offences.

[12] Further the trial court went on to say:

[15] In addition there is no evidence on record from which it may be inferred that when accused 1 accompanied accused 2 to sell the cellphone, he did so with the intention to assist accused 2 to escape a possible liability for robbery.

[16] Counsel further referred this court to the decision of *S v Neidel* (unreported CC 21/2006 delivered on 22 July 2003) where the court refused accused 1's application for discharge, in that matter, on the basis that the facts proved by the State at that stage raised a strong inference of

accessory after the fact on the part of accused 1. I hasten to point out that the facts in the Neidel's case are distinguishable from the facts in the present case, in that in Neidel's case there was evidence on record that accused 1 admitted to the police that he suspected the items brought to him for safekeeping, to be stolen items. The court, therefore, refused his application on the basis of that evidence. In the present case there is no evidence from which it could be inferred that accused 1 suspected or knew that the cellphone was sourced through robbery or theft.

[17] In addition, in Neidel's case the court dismissed accused 4's application for discharge on the basis that accused 2 who implicated accused 4 in the commission of the offence, testified in court during a trial-within-a-trial, repeating the allegations implicating accused 4. In other words accused 2 in Neidel's case had maintained during the trial his version implicating accused 4. In contrast, in the present case, accused 2, from his version as put to witnesses by his Counsel, denies, during trial having made the admissions attributed to him implicating accused 1. The facts in the Neidel's case are, therefore, distinguishable from, and are not applicable to, the present case.

[18] Suffices it to say that there is no prima facie case established by the State against accused 1, proving any of the elements of common purpose referred to above. For example there is no evidence adduced by the State that:

- (a) places accused 1 at the scene of crime;
- (b) established that accused 1 was aware that a crime was being committed or had been committed; and
- (c) further, no evidence that accused 1 was found in possession of any item that could link him to the commission of the crimes in question.'

[13] I have no quarrel with the findings of the trial court, but my difficulty though is that, that court was selective in its analysis of the evidence. The trial court found that respondent accompanied accused no 2 to sell the cellphone but omits to consider the evidence of the buyers that it was the respondent who

initiated the selling price of the cellphone at N\$20. The question is, how could he initiate the selling price of someone else's property. There is no evidence that accused no 2 requested respondent to set the price. Accused no 2 told Sup. Oscar Simataa that he and respondent robbed the deceased of the cellphone. They removed the sim card and discarded it in the vicinity of Shandumbala. On the question by Mr Silungwe for accused no 2 on the questions arising from the court's questions Sup. Simataa responded:

'Yes my Lord because whatever he (accused no 2) was saying he was referring to his friend (respondent) as well that is why I said they, so they took the cellphone . . . that is what he informed me that they took so I believe he also took part in the taking of the cellphone.'

[14] During cross-examination by counsel for the respondent, w/o Mutilifa testified that respondent knew that the cellphone belonged to the deceased. When pressed or it was put to her that respondent's instructions were that he did not know, her reply was that, 'he knew because he mentioned that he knew that the cellphone is for the deceased.' When pressed further whether she made a statement to the effect that respondent knew that the cellphone belonged to the deceased. W/O Mutilifa's reply was that, '. . . I can recall that it is in one statement that he knew that . . . the cellphone is for the deceased but he did not know . . . why is the cellphone going to be sold.' Counsel for the respondent pressed further that he went through statements of witnesses who already testified and those that had still to testify but there was no mention of the fact that he knew that the cellphone belonged to the deceased. The reply was that, 'you even the day when

we went to . . . Romario the one who sold [bought] the cellphone he mention in [the] presence [of] Sup. Simataa that he knew that the cellphone is for the deceased.'

[15] In para 12 above the trial court, in discharging respondent in the s 174 application appears to have taken into consideration the fact that accused no 2 had not repeated the allegations he made against respondent of his involvement in the commission of the crimes which he had related to some State witnesses but that accused no 2 from his version as put to witnesses by his counsel, denies during trial having made the admissions attributed to him implicating respondent. It is not clear whether the trial court accepted accused no 2's instructions to his counsel as put to the witnesses exculpating himself from the commission of the crimes as evidence. Even if we were to accept that the trial court did accept accused no 2's instructions as evidence, the trial court omitted to consider one of accused no 2's instructions to his counsel that, once they (respondent, accused no 2 and deceased) arrived at respondent's house where deceased was allegedly given taxi money by respondent, accused no 2 left to go buy cigarettes and left respondent and deceased at respondent's house and it was the last time he saw the deceased. When he returned the two were not at the house. He then went his ways. That instruction shifts at least the mere knowledge of what happened to the deceased to the respondent. In fact accused no 2 repeated that version in the bail application and I elaborate more on the point in para 24 infra.

[16] In the statements or conversations he made with some of the State witnesses he implicates respondent in the murder, rape and robbery of the

cellphone. Respondent in the company of accused no 2 collected the deceased from her home. He admits he invited the deceased for a drink that fateful evening. He informed Soabes the deceased's aunt that he put her in a green cab home because they were carrying things which were very important which they could not take to Okalinge side because it was a dangerous environment and yet he told Sup. Simataa that he left accused no 2 and deceased at 23h00 and further told journalist Kangootui that he left accused no 2 and deceased in the bar between 23h00 and midnight. Even if I were to accept that the evidence about putting the deceased in a cab, respondent got from accused no 2, there is no evidence that accused no 2 told respondent that deceased took a green cab or that they were carrying important things which they could not go with to Okalinge as it was a dangerous environment. Soabes was adamant that, that is what respondent informed her after she made enquiries of the whereabouts of the deceased. The cross-examination did not detract from her evidence on that point or any of her version. It must be remembered that it was respondent who invited and collected the deceased from her home. Soabes testified that deceased was not the kind of person who would go out with strangers. It appears that she related more to respondent than accused no 2. It is unlikely that on that evidence that she would have ventured to go with accused no 2 alone where she was found dead. And it is very unlikely that respondent would have left her with accused no 2. The probabilities, given the calls he made to her phone that evening, are that he had an eye for her. The circumstances I sketch above including respondent's muteness from the time of his arrest up to his plea and trial in the High Court on the fate of the deceased except for saying he was not present, would in my opinion amount to minimum evidence to place him on his defence.

[17] A court has a discretion, judicially exercised² to refuse to discharge an accused at the end of the State's case. The exercise of that discretion depends upon whether there is evidence linking the accused to the charges against him or her. Challenging at times in the exercise of the discretion is the nature of the evidence before court. There is a disharmony of views in our courts and elsewhere (particularly South Africa) on the question whether an application for a discharge of an accused should be dismissed in cases where there is no direct state evidence of his/her involvement, but there exists a reasonable possibility that he/she might be so implicated by either himself/herself when put on his/her defence or in the evidence of a co-accused.³

[18] In the case of *S v Shuping and others*⁴ Hiemstra CJ crafted the test to the s 174 discharge as follows:

'At the close of the State case, when discharge is considered, the first question is: (i) Is there evidence on which a reasonable man might convict; if not (ii) is there a reasonable possibility that the defence evidence might supplement the State case? If the answer to either question is yes, there should be no discharge and the accused should be placed on his defence.'

[19] The learned Chief Justice went on to hold that:

² *S v Teek*, supra at 132B-C.

³ *S v Kapika and others* (2) 1997 NR 290 HC at 291I-J, *S v Tsotetsi and others* (2) 2003 (2) SACR 638 WLD at 641H-646A-D, *S v Phuravhatha* 1992 (2) SACR 544 (V) at 551G-552A-D.

⁴ See footnote 1 at 120H-121A.

‘Where the case has to go on against at least one or more of several accused, it is often unwise to discharge the other at that stage. They might be incriminated by those against whom the case continues, and it could appear that the discharge was premature, and therefore amount to a failure of justice. However, when the trial is a long and costly one, and nothing has been proved against some accused it could be unfair to compel them to sit out the whole trial. There the court must exercise its discretion.’⁵

[20] In *S v Phuravhatha*,⁶ Du Toit AJ made observations on Hiemstra CJ’s test and his holding above, particularly the second enquiry as follows:

‘I would also want to indicate that I furthermore do not agree with respect with the bald statement in the second leg of the question as put in *S v Shuping and Others* . . . , namely that the reasonable possibility of defence supplementation of the State case should lead to a refusal to discharge the applicant. The reasonable possibility of general supplementation of an inadequate or poor State case at the stage of the closing of the State case is but only one relevant factor present during the consideration of an application for a discharge under s 174 of Act 51 of 1977. It is also a factor which can be, and in my view often is, overridden by other relevant considerations, one of which must be the interests of the accused. Considerations of fairness towards the accused are relevant and equally important.

Furthermore, the interests of the community can in my view not condone a procedure of prosecution and trial by possible self-implication or possible co-accused implication, and the community would normally expect of the State or the prosecution to bring citizens to court on *prima facie* cases. It is after all expected of the prosecution to consider carefully whether there is reasonable and probable cause for prosecution, ie whether a *prima facie* case is present.’

‘However, in my view, a trial court may in suitable cases decide that the reasonable possibility of supplementation of the State case during the defence case does not bar it from discharging an accused person after the

⁵ At 122A-B.

⁶ See footnote 3 *S v Phuravhatha* and others.

closing of the State case if other considerations, including the interest of the accused, warrant the discharge of the accused. Insofar as *S v Shuping and Others* may create the impression that the existence at the end of the State case of a reasonable possibility of supplementation of an inadequate State case during defence evidence should lead to a refusal to discharge, I am unable to follow it.'

[21] At page 552F-H he said:

'In my view the discretion afforded a trial court by section 174 of Act 51 of 1977 should remain untrammelled. Even where there is the presence of a reasonable possibility of strengthening or supplementation of the State case during the defence case, the discretion exists and the court is not duty bound to turn down the application for a discharge and to require of the accused or the applicant to go on his defence. The trial court, is of course, legally entitled to decide that the presence of a real and reasonable possibility of implicating evidence emerging during the defence case and creating a factual basis upon which the reasonable trial court, acting carefully, may convict the accused weighs heavily and even weighs decisively against the discharge under section 174. This may especially be so in the absence of other compelling grounds favourable to a discharge. But, and this is where I disagree, with respect, with Hiemstra CJ in *S v Shuping (supra)*, even a positive finding in this regard does not bring about any duty to dismiss an application for the discharge of the accused. The word "should" in the second leg of his test is too wide. It is also not justified by the wording of section 174 itself.'

[22] In as much as I agree with the learned acting judge that there are other considerations at the s 174 discharge application, namely the accused's and community's interests, but the court ruling that holds the possibility of supplementation of the State's case, is never made in vacuum, it is mostly influenced by factors, like the plea explanation, what transpires in cross-

examination together with the State evidence or where there are more than one accused he might be incriminated by a co-accused. There must be reason to believe that the accused might supplement the State's case.⁷ After all where an accused chooses to testify in place of closing his case, and gives incriminating evidence against himself he has only himself to blame.⁸ In any case where there is no evidence at all against an accused or evidence of a poor quality it is the duty of the presiding officer to discharge the accused and failure to do so amounts to an irregularity and 'will ordinarily vitiate a conviction based exclusively upon his self-incriminatory evidence.'⁹ In *S v Ggozo and another*,¹⁰ Heath J amongst other authorities, referred to the extraction above from the Phuravhatha matter, the Canadian case of *Regina v Oakes*¹¹ and made the following observation, which I agree with.

'To revert then to the tests laid down in South Africa and in Ciskei I am of the view that those tests still should constitute useful guidelines in considering an application for discharge of an accused but then on the basis that each one of those guidelines is only a factor to be taken into account. In the end the Court must exercise its discretion in order to see to it that justice is done and that will particularly, and almost always, depend on the particular circumstances in the case. It should then also in the way those principles are applied, be taken into account that they should be interpreted and applied against the background of the protection of the rights of everybody in the community in order to satisfy the requirements and the aims of the Constitution.'

⁷ See *S v Shuping and another* at 120H, *S v Lubaxa* 2001 (2) SALR 703 SCA at 706K-707A.

⁸ *S v Lubaxa* at 707B.

⁹ *Ibid* at 707F-G.

¹⁰ 1994 (1) BLLR 10 (CK) at 16B-C.

¹¹ (1986) 26 DLR (4th).

[23] Mr Siyomunji, for the respondent in his heads of argument, argues that there is no evidence linking the respondent to the four charges, he and co-accused are facing and that in terms of Art 12(1)(d) of the Constitution of the Republic, he enjoys a constitutional right to be presumed innocent until his guilt has been proven and makes reference to *S v Lubaxa* above. He further contends that an accused is entitled to a discharge at the close of the State case if there is no possibility of a conviction other than if he enters the witness box and incriminates himself/herself. He further contends that on the evidence presented in this case, no court would convict the respondent as the evidence of the cellphone which respondent and his co-accused sold was not sufficient as respondent thought it belonged to his co-accused and did not know that it belonged to the deceased. He further contends that the evidence of Hester Sisamu and Sup. Simataa that accused no 2 told them that he was with the respondent when he raped and murdered the deceased, accused no 2 denied in his instructions to the witnesses who testified for the State. That accused no 2's version is that he stumbled upon the deceased's body when he went to hide drugs and that he left the deceased in the respondent's company which he denied in his instructions and finally that the DNA evidence totally exonerates the respondent.

[24] Yes, the DNA evidence does not implicate the respondent but it is not the only evidence against the respondent. One of accused no 2's instructions is that he last saw the deceased when he left her in the company of the respondent, the version he testified to in the formal bail application. We accept that Mr Siyomunji did not represent the respondent in the bail application. The evidence of accused no 2 in the bail application when led by his legal representative is that Melody, the

deceased, wanted to call someone to borrow money that evening but her battery was running low. She removed her simcard and put it in respondent's cellphone or swapped simcards. He was asked directly as to where he got the phone. His reply was that, 'I saw the phone the next morning at my co-accused (respondent).' He was asked again, as to 'where did the phone come from', his reply was 'it came from my co-accused.' When asked further, he said, 'he (respondent) said she has his phone. The deceased has his phone and he ended up with hers after they switched . . . sim-cards.'

[25] On this point Nugent AJA in *S v Lubaxa* said the following:

[19] The right to be discharged at that stage of the trial does not necessarily arise, in my view, from considerations relating to the burden of proof (or its concomitant, the presumption of innocence) or the right of silence or the right not to testify, but arguably from a consideration that is of more general application. Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common law principles that there should be 'reasonable and probable' cause to believe that the accused is guilty of an offence before a prosecution is initiated (*Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) at 135C-E), and the constitutional protection afforded to dignity and personal freedom (s 10 s 12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold. That will pre-eminently be so where the prosecution has exhausted the evidence and a conviction is no longer possible except by self-incrimination. A fair trial, in my view, would at that stage be stopped, for it threatens thereafter to infringe other constitutional rights protected by s 10 and s 12.

[20] The same considerations do not necessarily arise, however, where the prosecution's case against one accused might be supplemented by the evidence of a co-accused. The prosecution is ordinarily entitled to rely upon the evidence of an accomplice and it is not self-evident why it should necessarily be precluded from doing so merely because it has chosen to prosecute more than one person jointly. While it is true that the caution that is required to be exercised when evaluating the evidence of an accomplice might at times render it futile to continue such a trial (*Skeen (op cit* at 293)) that need not always be the case.

[21] Whether, or in what circumstances, a trial court should discharge an accused who might be incriminated by a co-accused, is not a question that can be answered in the abstract, for the circumstances in which the question arises are varied. While there might be cases in which it would be unfair not to do so, one can envisage circumstances in which to do so would compromise the proper administration of justice. What is entailed by a fair trial must necessarily be determined by the particular circumstances.' (The underlining is mine).

[26] It must be remembered that respondent invited the deceased that evening and collected her from her home. Respondent and accused no 2 were the persons from their own version last seen with her. They are not implicating or suspecting anybody else. She was found dead in the location of Shandumbala where then, they both resided. The trial court found that one of them (accused no 2) made admissions linking him to the crimes. They both admitted to have sold the deceased's cellphone. As the magistrate who presided over their bail applications correctly observed, 'concerning the strength of the case, the applications for both applicants are characterized by counter accusations which each applicant to have been the last in company of the deceased.' In my opinion that alone is sufficient to have placed them on their defences.

[27] We unfortunately find ourselves for the decision we take in a situation where we cannot refer to all other factors as this might influence the trial court. It suffices to say, on the evidence on record one cannot say there is no evidence to which the respondent should reply. The discharge of respondent is premature and should be reversed.

[28] Accordingly I make the following order.

1. The appeal succeeds.
2. The order discharging respondent in terms of s 174 application is set aside and respondent should be put on his defence.
3. The matter is remitted to the trial court for further steps consistent with this judgment.

MAINGA JA

SMUTS JA

HOFF JA

APPEARANCES:

Appellant:

E N Ndlovu

Of the Office of the Prosecutor-General

Respondent:

M Siyomunji

Instructed by the Directorate of
Legal Aid