

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: CC157/2018

(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED: YES/ NO
..... SIGNATURE	 DATE

In the matter between

THE STATE

And

NKOSINATHI GODFREY NGWENYA	Accused 1
ARON AUGUSTINE ARENDS	Accused 2
NOMKHOSI PRECIOUS KHOZA	Accused 3
ISAAC MSEBENZI MKHUMA	Accused 4
EMMANUEL LINDOKUHLE NGWANE	Accused 5
CATHERINE THANDO TENTEZA	Accused 6
JOSEPH MAMASELA	Accused 7
GERHARD VAN DER WALT	Accused 8

JUDGMENT

MOSOPA J

[1] At the close of the prosecution's case, the accused, who are all still legally represented by their legal representatives, brought applications for their discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977 ("CPA").

[2] For the sake of completeness, I find it prudent to state the provision of section 174, which provides that:

"If at the close of the case of 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."

[3] On a proper reading and interpretation of the above section, it is apparent that the court hearing applications of this nature is enjoined to exercise a discretion, to either grant or refuse the application for discharge, where the court is of the opinion that there is no evidence that the accused committed the offence he is charged with.

[4] In the matter of **S v Lubaxa [2002] 2 All SA 107 (A)**, the court, when dealing with the discretion to be exercised by the court, observed:

[9] The refusal to discharge an accused at the close of the prosecution's case entails the exercise of discretion and cannot be the subject of an appeal (Hiemstra Suid Afrikaanse Strafproses 5 de uitg deur Kriegler bl 825)...

[11] If in the opinion of the trial court, there is evidence upon which the accused might reasonably be convicted, its duty is straight forward – the accused may not be discharged and the trial must continue to its end. It is when the trial court is of the opinion that there is no evidence upon which the accused might reasonably be convicted that the difficulty arises. The section purports then to give the trial court a discretion – it may return a verdict of not guilty and discharge the accused there and

then or it may refuse to discharge the accused thereby placing him on his defence.”

[5] When the court is exercising such a discretion at the close of the prosecution’s case, the following must be considered in the context of giving effect to the wishes of society and the purpose of the Constitution:

- 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 that state’s case?

[6] If the answer to either question is yes, there should be no discharge and the accused should be placed on the defence (see ***S v Gqoza (2) 1994 (1) BCLR 10 (CK)*** and ***Lubaxa (supra)***). Failure to discharge where there is no evidence at the close of the prosecution’s case would amount to an irregularity which may vitiate a conviction. Section 35(3) of the Constitution guarantees every accused’s right to a fair trial which includes, amongst others, the right to be presumed innocent, to remain silent and not testify during proceedings. However, the right to be discharged at the end of the State’s case does not ordinarily arise from considerations relating to the onus of proof, the presumption of innocence, the right to silence or the right to testify, but originally from a consideration that is of more general application (see ***S v Agliotti 2011 (2) SACR 437 (GSJ)*** at 280 and ***S v Dewani [2014] ZAWCHHC 188***). In the matter of ***S v Dewani (supra)*** at para 15, the legal position regarding applications in terms of section 174 was summarised as follows:

- “a) An accused person 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;*
- b) In deciding whether the accused person is entitled to be discharged at the close of the state’s case, the court may take into account the credibility of the State witnesses, even if only to a limited extent;*

c) Where the evidence of the State witnesses implicating the accused is of such poor quality that it cannot be safely relied upon, and there is accordingly no credible evidence on record upon which a court, acting carefully, may convict at, an application for discharge should be granted.”

[7] All of the accused in this matter are arraigned before me on the following charges:

- 7.1. Count 1: Murder read with the provisions of section 51(1), 51(3) and 51(5), as well as Schedule 2 of the Criminal Law Amendment Act 105 of 1997; and
- 7.2. Count 2: Torture, in contravention of section 3 of the Prevention and Combatting of Torture of Persons Act 13 of 2013.

[8] In its endeavor to secure a conviction against the accused, in respect of count 1, the State places its reliance on the doctrine of common purpose, in that the accused acted with a common criminal intent when committing the charge that they are currently facing.

[9] All of the accused pleaded not guilty to all the charges proffered against them. All of the accused denied that they were involved in the killing of the deceased, either by act or omission, as well as denying that they tortured the deceased.

[10] The test applicable in the nature of this application is that the prosecution must establish a *prima facie* case against the accused as opposed to the applicable test in criminal cases being that the State must prove its case beyond reasonable doubt (see **S v Hepworth 1928 AD 265**).

[11] The State led the evidence of two eyewitnesses who resided with the deceased at house number [...]. Mr Steve Lumbure, who was the caretaker and Mr Nelson Emmanuel Ozor, who was a tenant together with the deceased in this matter, occupying adjacent rooms. Both witnesses observed

the scenes from different angles. Mr Lumbure initially heard the deceased screaming while he was outside the room where the alleged assault took place, and was later led into the room by Accused 4 and he saw the deceased's head covered with a plastic bag. Mr Ozor was in his room when he heard the deceased screaming but there was no stage during the alleged assault when he left his room. This led to the defence making an application for an inspection *in loco*, which was granted. Photographs of the related rooms were also taken and admitted as evidence. The position from which he was observing the scene, in my considered view, did not allow him to make a proper observation.

[12] The two eyewitnesses contradicted themselves in many aspects of their evidence and such contradictions are material, in my view, because they relate to the assault on the deceased.

[13] The State also led the evidence of Dr Moganedi William Marumo, a pathologist who conducted a postmortem examination of the deceased and compiled a report. He attended the scene of the crime mainly to establish a time of death and to conduct a preliminary examination of the circumstances surrounding the death of the deceased. At the scene he could not investigate the body, because the people gathered there were hostile and would not allow him to perform his functions.

[14] He found that there was no evidence of blunt force trauma and the deceased was not assaulted. Initially he stated that the cause of death is under investigation and later went on to state that the cause of death was asphyxia. However, his conclusions were not based solely on his observations but also on what Dr Perumal observed. The version obtained from the scene was that the deceased was suffocated with a plastic bag by the police.

[15] No histology results were received and Dr Marumo conceded that it was wrong to come to the conclusion that the cause of death was asphyxia in the absence of the histology report. The second postmortem report was conducted on the body of the deceased by Dr Perumal. He was never called

as a witness by the State but it was placed on record by Mr Fourie on behalf of the State that Dr Perumal conceded that in the absence of histology results, it is difficult to say with certainty that the cause of death was asphyxia.

[16] Dr Marumo further conceded that his conclusion, in the absence of vital organs of the deceased sent to testing of histology by Dr Perumal, was not correct.

[17] The issue of credibility in this kind of application plays a very limited role and the evidence ought to be ignored if it was of such a poor quality that no reasonable person could possibly accept it (*Agliotti supra* at 257).

[18] From the above, it is clear that the oral evidence of the eyewitnesses that the deceased was suffocated with a plastic bag by the accused cannot be supported by medical evidence. The fact that the deceased was assaulted by the accused can also not be supported by medical evidence, also compounded by the fact that the eyewitnesses contradicted themselves in important material aspects.

[19] The State did not present a *prima facie* case that requires the accused to answer to, was, in my considered view, correctly conceded by Mr Fourie on behalf of the State. The accused stand to be discharged in respect of both counts they have been charged with.

ORDER

[20] In light of the above, I make the following order:

1. The application in terms of section 174 in respect of all accused succeeds and the accused are discharged in terms of section 174 of the CPA.

**MJ MOSOPA
JUDGE OF THE HIGH
COURT, PRETORIA**

Appearances:

For the State: Adv A Fourie

For Accused 1, 2 and 5: Adv PM Ramashaba

For Accused 3, 4, 6, 7 and 8: Mr JW van Heerden

Date of Judgment: 18 January 2022
