



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 01/2021

In the matter between:

THE STATE

and

ELLISTER BRUMMAGE

JUDGMENT BY: MATSHAYA, AJ

HEARD ON: 26, 25 AND 27 JANUARY 2022

DELIVERED ON: 27 JANUARY 2022

INTRODUCTION

- [1] It is important for judicial officers to always keep their eyes on the ball because should they lose focus that may lead to failure of justice. They must always

divorce themselves from emotions irrespective of the level of temptation and decide cases on the strength of the evidence presented during the trial.

- [2] The above sentiments are informed by the background of this case. This was a brutal murder of an unarmed man who had recently been through emotions of a self-confessed wife who was involved in acts of infidelity. Approximately 3 weeks after his wife had dumped her concubine (which happened to be the accused in this case), he was brutally attacked in front of his flat probably with a very hard object several times on his head and died moments later surviving his 5 year old son at the time, Fabiano. His death remains a mystery because no one can be held accountable for it. All that we know is that his wife had a sleepless night and had persistently phoned him to return home unbeknown to him that he was going to be murdered at the doorstep of his flat.
- [3] This is judgment on an application for the discharge of the accused in terms of **section 174 of the Criminal Procedure Act**¹. The accused is Mr Ellister Brummage a 27 year old male person according to the indictment. He appears before this court on a charge of premeditated murder as listed in **Part 1 of Schedule 2 of the Criminal Law Amendment Act**². The state alleges that on 6 September 2015 at or near Elangeni Flats, Willows, Bloemfontein, the accused did unlawfully and intentionally kill one Theo Samuel Benjamin Van Wyk hereinafter referred to as the deceased, an adult male person. Adv Liebenberg appeared for the state and the accused is legally represented by Mr Makhele.
- [4] He pleaded not guilty to the charges and the basis of his defence was a bare denial. Several exhibits were handed in by consent of the defence including but not limited to, the post mortem report and 2 photo albums depicting the murder scene.

EVIDENCE FOR THE STATE

- [5] Mr Marlon Dearham testified that he was the deceased's friend. During the early evening of 5 September 2015 they went on a drinking spree with the deceased and Marlon's brother in law by the name of Enslin Van Rooyen until

¹ Act 51 of 1977.

² Act 105 of 1997.

they dropped the deceased back at his flat during the early hours of the following morning at about 4h00. They left him at his flat after he had entered inside the remote controlled gate and said their goodbyes unbeknown to them that it was indeed farewell. Later during the day he learnt about the deceased's death.

- [6] The deceased's wife, Mrs Monice Noria Van Wyk testified as follows: She once had a love relationship with the accused during the subsistence of their marriage with the deceased from June until towards the end of July 2015. When she ended this extra-marital relationship with the accused, he (i.e., accused) did not want to accept same up to the extent of telling her that if he could not have her then no one would. He kept on making contact with her sometimes via *facebook*. Even during the evening preceding the fateful morning of the deceased's death she had earlier spoke to the accused on the phone at about 18h30. This was when she received a call from the accused and shared with him that they had a quarrel with the deceased pertaining to car keys up to the extent of deceased throwing them to the couch and accused told her that the b...h was going to die, referring to the deceased.
- [7] During the night of 5 September Monice had gone out for the night and returned to their flat just after 24h00 mid night, i.e., early hours of the 6th. She had a sleepless night and kept on phoning the deceased telling him to come home who eventually phoned her at 3h58 to open the gate of the complex for him. As she approached the door to exit, she realised that the deceased had already grabbed the outside door handle. In short, she then heard sounds outside which she described like those of a paint tin that was being beaten up.
- [8] When she came out of the flat, she saw the deceased lying near the drain. She called him to wake up but he could not. She could hear him snoring and initially thought that he was too drunk and may have fallen and injured himself. She then saw some blood on the deceased's face and thought that he might have been robbed. She searched him and found everything in his pockets still intact ranging from cellular phone, money and bank card.
- [9] She then went to call one of the neighbours, Mr Ricardo Koopman who came with his wife. They phoned the ambulance. Later, Ricardo told her that the

deceased had passed away. Ricardo also summonsed the police forensic department. Police arrived and interviewed Monice. She initially refused to give the police her statement at the advice of her attorney. On 15 September 2015 she took the police to Kimberley and pointed out the house where the accused stayed and that is how he was arrested. During cross examination she confirmed that she did not see anyone within the deceased's precinct in the complex.

[10] Mr Ricardo Koopman testified and confirmed Monice's testimony in as far as it relates to him.

[11] The state intended to lead evidence of admissions that were allegedly made by the accused at Kimberley during the time of his arrest and others that he allegedly made on his warning statement but the defence objected. This culminated to a trial within a trial so as to determine their admissibility after which I ruled them inadmissible subsequent to the state's concession.

[12] The state case was then closed. Mr Makhele moved an application for the discharge of the accused. In a nutshell, he submitted that the state has failed to prove a *prima facie* case against the accused. Ms Liebenberg conceded to the application even though she did not say it in so many words. I am grateful for their meaningful submissions particularly those of Ms Liebenberg which demonstrated that she is an officer of the court who abides by her oath of office. This demonstrated beyond reasonable doubt that her ethical standards are beyond reproach and that she is here to prosecute and not persecute. This is conduct that has since become infrequent lately in some other courts.

THE ISSUES

[13] Both the state and the defence are in agreement that the accused must be discharged since there is no evidence linking him to the commission of the offence. In the interests of judicial accountability, coupled with the seriousness of the offence, I deemed it prudent to prepare a written judgment.

THE LAW

[14] **Section 174 of the Criminal Procedure Act**³ provides as 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”.

[15] To put the above statutory provision into context, it becomes necessary to explore our jurisprudence in order to adopt the correct approach. In the case of **S v Mpetha and Others**⁴, it was held that in a section 174 application credibility plays only a very limited role and the evidence ignored only if it is of such poor quality that no reasonable man, acting carefully could possibly accept it. The same view was shared with approval by the Witwatersrand Division in the case of **State v Swartz and Another**⁵.

[16] Further, **Traverso DJP** (as she then was) summarized the legal position pertaining to section 174 applications as follows in paragraph 15 of **State v Dewani**⁶:

- “[15] (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 an 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 safely be relied upon, and there is accordingly no credible evidence on record upon which a court, acting carefully, may convict, an application for discharge should be granted.”*

[17] Lastly, the **Supreme Court of Appeal** approached the matter from a constitutional perspective in the case of **S v Lubaxa**⁷ where Nugent AJA (as he then was), writing for the unanimous bench, stated the following:

“[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

³ Supra.

⁴ 1983 (4) SA 262 (C) at 263H.

⁵ 2001 (1) SACR 334.

⁶ Case No. CC15/2014 ZAWCHC, delivered on 8 December 2014.

⁷ 2001 (2) SACR 703, paragraphs 18 and 19 where Nugent AJA.

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 on his self-incriminatory evidence.

[19] *The right to be discharged at that stage of 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 principle 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 and 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."*

ANALYSIS

[18] As already alluded to earlier, the test at this stage is whether there is a *prima facie* case against the accused or not whether on the main count or the competent verdicts.

[19] Mr Makhele and Ms Liebenberg correctly submitted that the only witness who was closest to linking the accused was the deceased's wife Monice, when she testified about the following:

19.1 That when she decided to end her love relationship with the accused, he (ie, the accused) vowed that if he could not have her then no one else could; and

19.2 That during the evening preceding the morning of the deceased's death, when she had a telephonic conversation with the accused telling him about their quarrel with the deceased about car keys, the accused told her that this b...h (*sic*) was going to die that night.

[20] Other than the above, there is nothing that links him to the commission of this offence. In my view, it would be too far- fetched in the extremes to associate him with this murder without more.

[21] Furthermore, refusing this application would by implication, have the undesirable effect of exposing the accused to the risk of testifying and end up incriminating himself to the detriment of his constitutionally protected rights as enunciated in the **Lubaxa**⁸ case cited earlier.

CONCLUSION

[22] In the absence of a prima facie case that links the accused to the commission of this offence, the logical consequence is that he must be acquitted of the charges.

VERDICT

[23] The accused is discharged of the crime of murder in terms of **section 174 of the Criminal Procedure Act**⁹.

MM MATSHAYA, AJ

APPEARANCES:

On behalf of the State:

Instructed by:

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BLOEMFONTEIN

On behalf of the Defence:

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⁸ Supra.

⁹ Supra.

BLOEMFONTEIN