

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case number: 2/2016

In the matter between:-

THE STATE

and

[T.....] [J.....] [M.....]

Accused 1

[M.....] [R.....] [M.....]

Accused 2

CORAM: OPPERMAN, AJ

HEARD ON: 18 February 2016

DELIVERED ON: 18 February 2016

JUDGEMENT:

SECTION 174 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977

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- [1] The charges against the accused are two counts of Housebreaking with the intent to contravene the provisions of section 3 of the Criminal Law Amendment Act 32/2007 (rape) and Rape and thirdly, Robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act 51/1977 (CPA).

[2] The State alleges that:

On the night of the 11th of November 2014 the two complainants, a mother and daughter, were asleep in their house. The accused unlawfully entered into the house armed with dangerous weapons. In the house the accused raped the complainants at least twice. After raping the complainants the accused robbed them of two cellphones, jewellery and a jacket.

[3] The accused pleaded not guilty on all the charges. They denied that the incident took place whatsoever. Accused 1, in addition, claimed an alibi. He disclosed the details of his alibi in his plea explanation. Accused 2 maintained that he and the daughter ([P.....]); one of the complainants, had an affair. The mother discovered them together in the house and chased him away with a threat of reporting him for rape. The cell phones were given to him by [P.....] to have it repaired. He returned it to them at a later stage and before he was arrested.

[4] The two complainants testified for the State. A friend that overheard a telephone conversation allegedly to be between accused 2 and [P.....], also testified. He was also one of a group of people that tried to arrest the said accused.

[5] At the close of the case for the prosecution, Mr. Nkhahle brought an application for both the accused's discharge in terms of section 174 of the Criminal Procedure Act, No. 51 of 1977 . The

basis of his application is the poor quality of the evidence of the State's witnesses. According to him the standard of the evidence culminates into no evidence on which a reasonable court can convict.

[6] Mrs. Giorgi, on behalf of the State, did not oppose the application in regard of accused 1. She argued that the evidence against accused 2 does not permit his discharge.

[7] Contemplation of the evidence specific to this case and the law on the discharge of an accused at the end of the State's case as it has developed over the decades, pre and post – constitution, illuminated some key issues that want discussion. These are:

7.1 The rule.

7.2 Perspective on the nature of the rule.

7.3 The test to be applied.

7.4 Evaluation of the quality of the evidence of the state witnesses.

7.5 The evaluation of identifying witnesses and alibi evidence in adjudicating the quality of the evidence of the state witnesses.

[8] Due to the difference in the evidence against the two accused their applications will be dealt with separately.

- [9] Section 174 of the CPA provides for the accused to be discharged:

“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.”

- [10] The evaluation of the evidence is different than at the end of the trial. It is a *sui generis* interlocutory procedure. This process has been typified as a question of law and not fact. For this reason assessors are prohibited from partaking in rulings in terms of section 174. The court must keep this important feature in mind when adjudicating an application.

- [11] The words ‘no evidence’ in the section have been interpreted to mean no evidence upon which a reasonable court acting carefully may convict. Again; the no-evidence test is *sui generis*. The test, contentious over the years, was codified in case law in Shuping 1983 (2) SA 119 (B):

“The first consideration is whether there is evidence on which a reasonable person may convict. If the answer is “yes”, a discharge should be refused. If the answer is “no”, it must be asked whether there is a reasonable possibility that the defence evidence might supplement the state’s case. “

- [12] This second leg of the test has occasioned some controversy until the Supreme Court of Appeal declared it unconstitutional in Lubaxa 2001 (2) SACR 703 (SCA).

“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.

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 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.

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.”

- [13] As it was clearly stated above there is not an onus in the usual sense of the law; and specifically not an onus on a *prima facie*

basis to be met by the State. During my tenure on the bench the majority of applications involved a reference by either the State or the Defence during address that the onus to be prima facie.

[14] 'Prima facie' is defined as that; if the party on whom lies the burden of proof goes as far as he reasonably can in producing evidence and that evidence calls for an answer, it is prima facie evidence. In the absence of an answer from the other side it becomes conclusive.

[15] This is not the position in criminal law during the adjudication of a section 174-application. In a criminal matter the accused has a right to silence and against self-incrimination. It often happens that the accused choses to close his/her case after refusal of a 174- application and is nonetheless acquitted. *Evidence at the close of the State case does not automatically becomes evidence beyond a reasonable doubt.* Here another test will be applied. It is not beyond a reasonable doubt and it is not on a balance of probabilities.

[16] *It is a sui generis test that must be applied with judicial discretion on the specific facts and circumstances of each case. The test is, simplistically put and in my view, a combination of the first leg of the Shuping-case, the dictum in the Lubaxa-case and the principles of a fair trial in terms of terms of the Constitution of the Republic of South Africa, 1996.*

[17] In **S v Lavhengwa** 1996 (2) SACR 453 (W) the view was expressed that the processes under section 174 translate into a statutorily granted capacity to depart discretionally, in certain specific and limited circumstances, from the usual course. This, to cut off the tail of a superfluous process. Such a capacity does not detract from either the right to silence or the protection against self-incrimination. If an acquittal flows at the end of the State case the opportunity or need to present evidence by the defence falls away. If discharge is refused, the accused still has the choice whether to testify or not. There is no obligation on him to testify.

[18] The preferred process of law and the compass on which this matter will be adjudicated is to be found in **Gqozo** (2) 1994 (1) BCLR 10 (Ck). Heath J indicated that in considering the provisions of section 174 the following would probably be the considerations that would give effect to the wishes of society and the purpose of The Constitution.

- “1. An innocent person must as far as possible never be convicted of a crime.
2. The conviction of a guilty person must be obtained with the best possible endeavors. The prosecution representing the community must fulfill their duties within the framework of the law and the available facts.
3. The right to remain silent and the satisfaction of the responsibility which is on the State must be satisfied as far as possible.
4. The rights of the accused are very important.

5. The right of the community to see that justice is done is equally important.
6. To achieve these goals instruments should be used in such a way that justice is done to everybody.”

[19] The instruments to be applied are those in the law depicted as above. Some further dicta developed on specific issues such as the credibility and quality of evidence, circumstantial evidence, multiple accused, identification and alibis.

[20] There is some disagreement as to whether the credibility of state witnesses should be taken into account in deciding whether to grant a discharge. In **Diadla** (2) 1961 (3) SA 921 (D) and **National Board of Executors Ltd** 1971 (3) SA 817 (D), it was held that credibility is not a matter to be taken into account when considering a discharge, but one to be considered at the conclusion of the case. However, credibility was considered a relevant factor in **Nandha Gopal Naidoo** 1966 (1) PH H104 (W); **Nortje** 1961 (2) PH H166 (O); **Bouwer** 1964 (3) SA 800 (O) and **Mpetha** 1983 (4) SA 262 (C).

In **Mpetha** at 265D-G, for example, Williamson J held that credibility would play only a very limited role and the evidence should be ignored only if it was of such poor quality that no reasonable person could possibly accept it. This view is preferable, in that it would prevent hopeless cases, with the attendant expense, anxiety and frustration to an accused, from continuing. This sentiment was also echoed and expanded on in

S v Agliotti 2011 (2) SACR 437 (GSJ) and **S v Dewani** (CC15/2014) [2014] ZAWCHC 188 (8 December 2014).

Accused 1

[21] The quality of the evidence against Accused 1 is not in dispute; Mrs. Giorgi, on behalf of the State, conceded that the only identifying witness was unreliable on this point. The circumstances and detail of identification are vague and confusing. Crucial, is that there is no evidence on which the arrest of the first accused was based. The identification process was botched in that the police pointed to the accused in the charge office where he sat cuffed and under arrest and inquired from the complainant whether he was the perpetrator.

[22] I do remind myself of the circumstances of the case and the possible tension the witnesses were and are under. But, their testimony is the only instrument with which the court can adjudicate the evidence; if it is lacking it cannot be rescued in any way. A further burden on the evidence of the witness is the caution with which the evidence of identifying witnesses must be regarded. The witness might be subjectively honest and credible but the evidence itself can lack trustworthiness. Corroboration for the evidence of both witnesses is lacking on this dispute.

[23] The opposite is present in the defence and detail of the alibi of the accused that was presented during the plea proceedings and in cross examination. It is trite that the onus is on the State to disprove an allegation of alibi. There was no evidence on this issue forthcoming in the State's case.

[24] It will be unconstitutional to put the accused on his defence in light of the poor quality of the evidence against him. I do not have any option but to grant the application of accused 1.

Accused 2

[25] The nature of the evidence against accused 2 is completely different. To begin with, his own version places him on the scene. He admits sexual intercourse, but claims it to be with the consent of the complainant; [P.....]. The defence disclosed in plea and cross examination is still in the wind and of little value. It must be given substance by way of evidence under oath and be tested under cross examination. In all fairness, there is also little possibility given the defence of the accused, that he will advance the State's case if he enters the witness box. Further, the complainant that stands steadfast in her denial of the version of the accused, is corroborated by the mother and their friend. Corroboration that is lacking in a mere plea explanation and statements in cross examination. Lastly, the version of the accused still lacks detail and is vague and general.

[26] The application must therefore be denied for accused 2.

ORDER

1. The application for discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977 by accused 1 is granted and on Counts 1, 2 & 3.
2. The application for discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977 by accused 2 is denied and on Counts 1, 2 & 3.

M. OPPERMAN, AJ

On behalf of the state: Adv S Giorgi
Instructed by:
Director: Public Prosecutions
BLOEMFONTEIN

On behalf of the accused: Adv. J Nkhahle
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