

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No: SS80/2023

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
11 JUNE 2024	[REDACTED]
DATE	SIGNATURE

In the matter between:

THE STATE

and

NTHOLE MONTLE

Accused 1

MOTLALENTOA NKWE

Accused 2

GERALD JOHANE

Accused 3

THOKWANE PALO

Accused 4

TSHELE LESALA

Accused 5

TEBOHO MALELEKA

Accused 6

TEFELO MAKGOTLA

Accused 7

RULING

STRYDOM, J

[1] This matter is on the roll today for ruling in terms of section 174.

Ruling

[2] This is the ruling in terms of section 174 of the Criminal Procedure Act for the discharge of the accused, on all or certain of the counts, at the close of the case for the prosecution. Section 174 of the CPA reads 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."

[3] Section 174 thus gives the Court the power to decide not to put the accused on their defences if there is no case for the accused to answer.

[4] It was pointed out in the case of *S v NV 2017 3NR700(HC)* at paragraph 27 that:

"There is no formula or test applicable to all circumstances when deciding whether or not to discharge; each case must be decided on its own merits in order to reach a just decision."

[5] On behalf of accused 1, 2, and 3, Mr. Mavatha applied for the discharge of the three accused on the four attempted murder counts, counts 5, 6, 7, and 8.

[6] As far as the murder counts 1, 2, 3, and 4 are concerned, the application for discharge was made on behalf of accused 2 and 3 on the basis that the State has failed to establish a *prima facie* case against these accused.

[7] On behalf of accused 4, 5, 6, and 7 Mr Maluleka applied for the discharge of the four accused on the murder counts 1, 2, 3, and 4 as well as the attempted murder counts 5, 6, 7, and 8.

[8] For purposes of considering these applications the Court must refer to the evidence bearing in mind that the State is relying on the doctrine of common purpose. For purposes of this application the reliability of the main witness for the State, Malefe Adelina Mosola, was challenged on the basis that her identification of the accused was suspect considering her eyesight problem.

[9] Ordinarily at the discharge stage the reliability of a witness would not be the issue to be decided but rather whether there is evidence upon which a

reasonable Court can convict. The test for reliability at the discharge stage may differ from the test at the end of the matter.

- [10] As far as the reliability of this witness is concerned, she has pointed out certain accused as part of the group that arrived at the dumpsite with firearms and started to shoot. As stated, the issue of reliability is an issue to consider at the end of the matter but will be referred to for purposes of this application to consider whether there is any evidence upon which a reasonable Court may convict.
- [11] Ms. Mosola testified that on the date of the incident her eyesight was well enough to identify the perpetrators and that her eyes only got damaged later because of her working environment. She said that her eyesight problems started only a week after her visit to the place known as the Mai-Mai where she identified accused 4 to 7.
- [12] She later, however, in her evidence conceded that her eyesight problem existed before the incident. She said that the accused were part of the Mai-Mai group and she was part of the Ketsing group.
- [13] She said that the Mai-Mai group was fighting for territory. She said that the people from the Mai-Mai are people she knew well. Her evidence is that on the 3rd of March 2022, the date of the incident, people came whom she knew since 2019 as people that also worked on the site. The incident occurred during daytime.
- [14] Two groups were formed when they approached the dumpsite. She knew some of the accused by their nicknames. Initially she mentioned the following accused who came to the dumpsite; Nthole, (later identified as accused 1), Libelo (accused 2), Thokwane (accused 4), Jumpers (accused 5), and Tefelo (accused 7). Excluded were accused 3 and 6. She also mentioned further names of people not part of the accused.
- [15] She identified accused 5 from the witness box which is plus-minus eight paces from the accused dock. When she was asked about accused 7, Tefelo, she said she wanted to go closer to the accused dock. She then pointed Tefelo as accused 7, Libelo as accused 2 and Thokwane as accused 4. She said accused 1 and 7 and other people, not before Court, surrounded them.

- [16] They had firearms and they fired shots. She then fled. Accused 1 and another person followed her as she was trying to hide her mother. She saw that accused 1 went to her mother with others and shot her in the face. The other group was chasing people on the other side with firearms, shooting. She said that eight people were shot, four passed away and four went to hospital.
- [17] She only knew the nickname of one of the other people that got shot. She said that she saw accused 1 after he was arrested and informed the police officer Mbatha, that he was one of the perpetrators.
- [18] As far as accused 2 is concerned, she again said he was one of the people who shot at the dumpsite. Later in her evidence she implicated accused 3 and stated he was present on the date of the incident and that he had a firearm and fired shots. She explained why she did not mention his name initially. The witness pointed accused 4 and 7 as perpetrators when they were arrested. She said that they were present at the dump site, and they were shooting.
- [19] It should be mentioned that the witness did not mention accused 3 in her statement to the police. She explained this by stating that she did not have his name at that stage. She again said Jumpers, that is accused 5, fired shots and testified that accused 7, Tefelo, said previously that her mother is standing at the burial line in the road.
- [20] She saw accused 2 whilst hiding in the bushes. He was shooting at other people on the other side. She agreed that she did not initially pointed out accused 6 in court but said his head was bending downwards. She then pointed him out in court.
- [21] The Court is satisfied that there is evidence that the seven accused were part of the group known as the Mai-Mai that went to the dumpsite where four people was shot and killed by the group and four people sustained gunshot wounds.
- [22] As far as the four murder counts were concerned, the identities of the four deceased were admitted and that they died on the 3rd of March 2022 at the dumpsite in Selby. Accordingly, there is evidence that these persons died as a result of the shooting described by the witness. She implicated the seven accused.

- [23] At this stage of the proceedings where there is no direct evidence as to the shooting of all the deceased, it is not for the Court to decide whether the only reasonable inference to be drawn from the proven facts are that the accused were responsible for the death of the four deceased. On a *prima facie* basis the evidence points to a conclusion that the accused acted in the furtherance of a common purpose.
- [24] For this reason, the discharge application pertaining to the four murder counts against all seven accused should be refused. As far as the attempted murder counts are concerned, there is no evidence or admission linking the identities of the four complainants to the names mentioned in the indictment. None of the complainants came to testify.
- [25] In my view, without such testimony, there is no evidence linking the seven accused to the attempted murder counts. The seven accused are accordingly discharged on counts 5, 6, 7, and 8.
- [26] It should be noted that no application was made pertaining to counts 9, 10, 11, 12, 13, 14, 15, and 16 and these counts remain intact. So, that concludes the judgment on the discharge application.




R STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Heard on: 30 May 2024

Delivered on: 11 June 2024

Appearances:

For the State: Mr. M. Maleleka

Instructed by : National Prosecuting Authority

For the 1st to 3rd Accused: Mr. A. Mavatha

Instructed by: Legal-Aid

For the 4th to 7th Accused: Mr. S. Maluleka

Instructed by: Legal-Aid (Judicare)