

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

CASE NO:37/2024

DPP REF NO:42/2024

In the matter between:

THE STATE

V

TANKI JAMES MAKHUBO

Neutral Citation:

Coram: Mahlatsi AJ

Heard: 15 November 2024

Delivered: 18 November 2024

Summary: Application for discharge in terms of s 174 of the Criminal Procedure Act 51 of 1977.

ORDER

1. The application in terms of section 174 of Act 51 of 1977 on count 1 and 2 stands to be denied.
2. The application in terms of section 174 of Act 51 of 1977 on count 3 is granted.

JUDGMENT

Mahlatsi AJ

[1] The accused is charged with three counts as follows:

Count one: MURDER READ WITH THE PROVISIONS OF SECTION 51(1) OF THE CRIMINAL LAW AMENDMENT ACT 105 OF 1997, AS AMENDED (the Act) ;

Count two: ATTEMPTED MURDER;

Count three: ATTEMPTED MURDER.

[2] The accused pleaded not guilty to count one to count three. Advocate Dlamini confirmed appearance for the accused and that the plea is in accordance with his instructions. The accused elected to remain silent and not disclose the basis of his defence.

[3] Advocate Strauss handed in the notice in terms of s 212B of the Criminal Procedure Act 51 of 1997 (the Act) as exhibit 'A', which sets out the facts which are not in dispute in these proceedings. He also handed in the accused's reply in terms of s 212B of the Act as exhibit 'B'.

[4] Advocate Dlamini indicated that he has no objection to the handing in of exhibit 'A' and 'B' as per his instruction from the Accused. Subsequently, the court accepted exhibit 'A' and 'B' into record.

[5] From the contents of exhibits 'A' and 'B', it is common cause that the deceased is Raisa Chris Raisa who met his demise on the 3 September 2023. Dr Mokhatla performed a post-mortem on the body of the deceased on 4 September 2023, recorded his findings on form PDR 290/2023 and indicated the cause of death as follows: 'Gunshot wound to the chest'. The correctness and findings of the report are not in dispute. Furthermore, the deceased did not sustain any further injuries from the scene until the post-mortem was performed.

[6] Ms Matla, the complainant in the second count, was examined by Dr Sello on the 3 September 2023 and he compiled a report based on a medico-legal examination (J88 form). The correctness and findings of the report are not in dispute.

[7] On 3 September 2023, Sgt Mkwana from the Local Criminal Record Centre attended the crime scene. He took photographs of the crime scene as well as of the deceased at the hospital whereafter he compiled a photo album and a key to the photographs consisting of photographs 1-26. The contents of the photographs are not in dispute.

[8] Of further relevance is that the accused was the driver of the white Ford Ranger with registration numbers KD 3[...], which he abandoned, and a holder of a firearm licence.

[9] What is at issue in this matter is the determining question: who fired shots which resulted in the two people seriously injured and one deceased?

[10] After hearing the witnesses by the State, an application for discharge was launched by the defence in terms of s 174 of the Act. The State opposed the application on counts 1 and 2 and conceded to count 3.

[11] The issue that requires determination at the end of the State's case is whether any evidence exists on which the court might convict the accused in relation to the remaining counts, such being murder on count 1 and attempted murder on count 2. In addressing this issue, the underlying principles governing considerations to be given by the court will be dealt with and applied to the facts of this case.

[12] The application for discharge at the end of the prosecution's case is regulated by s 174 of the Act which 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.'

[13] It is without doubt that the court is seized with the discretion to apply itself on the evidenced adduced on behalf of the prosecution to assess if the evidence is sufficient to support conviction of the accused. This is a fundamental imperative of

our criminal justice system which is now fully recognised by our new constitutional order.¹

[14] The approach to be adopted in this application was settled in our law. In *S v Lubaxa*,² the court held as follows:

‘[10] Section 174 of the Act repeats in all material respects the terms of its predecessor in 1917 and 1955 Criminal Codes. It permits a trial court to return a plea of not guilty at the close of the case for the prosecution if the court is of the opinion that there is no evidence (meaning evidence upon which a reasonable person might convict : *S v Khanyapa* 1979 (1) SA 894 (A) at 838F-G that the accused committed the offence with which he is charged, or an offence which is a competent verdict on that charge.’

In *S v Phuvharatha and Others*³ the court held as follows:

‘The presumption in favour of innocence, the fact that the *onus* rest on the State, as well as the dictates of justice in my view will normally require an exercise of discretion under section 174 in favour of an accused person where the State case is virtually and basically non-existent. Strengthening of a non-existent State case is physical impossibility.’⁴

[15] The credibility of the prosecution’s witnesses at the stage of s 174 application plays a limited role. However, if the relevant evidence adduced at the end of the State’s case is of such poor quality that no reasonable person could possibly accept it, the court can ignore such evidence.⁵

[16] In *S v Dewani*⁶ the court said the following in returning a verdict of not guilty on an application in terms of section 174 of the Act:

¹ *S v Kruger-De Lange* [2021] ZAGPPHC 545 para 5.

² *S v Lubaxa* [2001] ZASCA 100; [2000] 2 All SA 107 (A).

³ *S v Phuvharatha and Others* 1992 (2) SACR 544 (V).

⁴ *Ibid* at 550A-B.

⁵ *S v Mpetha and Others* 1983 (4) SA 262 (C) at 265D-F.

⁶ *S v Dewani* [2014] ZAWCHC 188.

[15] To therefore summarise the legal position regarding applications in terms of section 174:

- (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 incriminate himself;
- (b) In deciding whether an accused person is entitled to be discharged at the close of the State's case, the court may consider 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 a 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] I now deal with the evidence to prove each of the counts and whether the evidence is of such a nature and quality that the application in terms of s 174 of the Act should be refused.

[18] I intend in dealing first with count 3, that of attempted murder. On that charge, the complainant testified that he was in the company of his friends on their way from Rise and Shine Pub in Phuthaditjhaba. When they were about to leave, they heard gunshots and, in a panicked manner, started running away. Amidst this confusion, the complainant got hit and fell. He was shot in his back, just above the buttocks. His friends lifted him up and carried him to Manapo Hospital for treatment. He was discharged few hours from the hospital. He does not know who shot at him, neither does he know the accused; he saw him for the first time in court.

[19] As I have stated earlier (in para 10 *supra*), the State conceded that there was insufficient evidence to oppose the application on count 3. The quality of the State witness' evidence on who shot the complainant on count 3 is not *prima facie* proof that the accused is the one who shot him. There is no possibility that the accused may be convicted on the State witness' evidence, except if the accused implicates himself. It would be unconstitutional to put the accused to his defence in light of the

insufficient evidence against him. I do not have any other option than to grant the application in respect of count 3.

[20] The nature of the evidence against the accused on counts 1 and 2 is completely different. As a point of departure, his own version places him at the scene. For example, the witnesses for the State were told that the accused was involved in a fight with the deceased and others. In addition, he had a firearm with him during the confrontation.

[21] I am mindful of the fact that what has been said from the plea explanation and in cross-examination is not *per se* evidence. It must be given substance under oath and be tested under cross-examination. Furthermore, the evidence on counts 1 and 2 overlaps in that the complainant on count 2 testified about what befell her and the allegations on count 1.

[22] Ms Matla testified that on the 3 September 2023, she was fetched by the deceased from the car wash. Together, they made their way to Rise and Shine Pub in Phuthaditjhaba to collect the deceased's friend, Mr Mono. Mr Mono is the third State witness.

[23] Both Ms Matla and Mr Mono testified that the deceased was the driver of his vehicle. Ms Matla was seated in the front seat and Mr Mono seated in the back seat. When they were about to drive away from Rise and Shine Pub, a Ford Ranger driven by the accused, blocked the road. The deceased went to speak with the accused, in order to give them the right of way. After some time, the deceased returned to his vehicle, but the accused rammed the Ford Ranger in to the vehicle driven by the deceased, damaging it on the right side. This prompted the deceased to confront the accused which resulted in the accused shooting the deceased.

[24] Both Ms Matla and Mr Mono, at different occasions, went out of the deceased vehicle to assist the deceased. Mr Mono was the first to go out, followed by Ms Matla but she sought shelter after realising that she was also being attacked by the accused. She turned away, she was attacked from behind and sustained injuries as noted in the J88.

[25] Furthermore, I am also mindful of the circumstances of the case and the possible tension the witnesses were and are under. Both the State witnesses were steadfast in their denial of the accused's version. The accused's version still lacks detail and is vague and general.

[26] Having noted the authorities cited above, the principles involved in this application have been elucidated. Considering the nature of the evidence of the two witnesses mentioned above together with the other State witnesses, I conclude that there is evidence upon which a reasonable person acting carefully might convict.

Order:

[27] In the result, the following order is made:

1 The application in terms of s 174 of Act 51 of 1977 on counts 1 and 2 stands to be denied.

2 The application in terms of s 174 of Act 51 of 1977 on count 3 is granted.

MAHLATSI AJ

Appearances:

For the State:

Adv. M Strauss

Instructed by:

DPP – Bloemfontein

For the Accused:

Adv. F Dlamini

Instructed by:

Wesi Attorneys
Bloemfontein