



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BISHO)**

CASE NO.: CC 9/2024

In the matter between:

THE STATE

and

MONELISI SODIDI

ACCUSED 1

LINDOKUHLE NDLEBE

ACCUSED 2

SIPHOSETHU NKOMO

ACCUSED 3

MOSULI MGILANE

ACCUSED 4

APHELELE QONGO

ACCUSED 5

JUDGMENT ON SECTION 174 OF CPA

ZONO AJ:

Introduction

- [1] The accused persons in this matter were charged and arraigned for kidnapping, assault with intent to do grievous bodily harm and murder. The said offences are said to have taken place at or near Fort Hare University in Alice. It is said that the other or all of the accused persons were acting in concert and in the execution of a common purpose in committing those offences. Lubabalo Nguta was the victim in all the counts facing the accused persons.
- [2] All five accused persons pleaded not guilty to all the charges levelled against them. In terms of Section 115 of the Criminal Procedure Act 51 of 1977 (CPA), accused No 3 indicated that he had nothing whatsoever to do with all the offences as he was not present when the offences were committed. Accused No 1, No 2, No 4, and No 5 did not make their statements of defence. They stated that they are reserving their statements of defence. All the accused persons are legally represented herein. Mr Pakade represents accused No1 and No 4; Mr Mtshabe represents accused No 2 and No 5; and Mr Nombambela represents accused No 3.
- [3] Seven state witnesses were called to testify about the events of 07th October 2023, namely, Athule Khwatsha, Masibulele Weyi, Sihle Malunga, Xanti Dilanga, Doctor Sithandiwe Kunyuza, Masithembe Nofemela and Siyasanga Kondlo. After the evidence of these witnesses the state closed its case.
- [4] After the closure of the state's case all accused persons indicated their intention to apply for a discharge in terms of section 174 of Criminal Procedure Act 51 of 1977 (CPA). The applications were made on behalf of all the accused persons. The applications were opposed by the state.
- [5] Accused may be discharged at the close of case for prosecution. Section 174 of CPA provides:

“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.”

- [6] The key words in the text is “*No evidence that the accused committed the offence.*” The words “*no evidence*” in section 174 of CPA mean no evidence upon which a reasonable person might convict the accused¹. There should not be any possibility of a conviction unless accused testifies in a self-incriminating manner. Failure to discharge in those circumstances is a breach of the Constitutional guarantee of fairness. In *Lubaxa*² Nugent AJA (as he then was) had the following to say:

“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 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 upon his self-incriminatory evidence”.

- [7] At the close of the state case, when discharge is considered, the first question to be asked is:

(i) is there evidence on which a reasonable man might convict;

(ii) if the answer to question is yes, there should be no discharge and the accused should be placed on his defence.³ Credibility of State witness at this stage plays no major role, unless the evidence is beyond belief⁴. The evidence may be ignored if it is of such a poor quality that no reasonable person could possibly accept it.

¹ *S v Khayapa* 1979 (1) SA 842 (A) at 838 F

² *S v Lubaxa* 2002 (2) ALL SA 107 (A) Para 18

³ *S v Schuping* 1983 (2) SA 119B at 121A

⁴ *S v Mbetha* 1983 (4) SA 262 (C)., and many cases cited therein

- [8] Consequently the applicable test is that the prosecution must establish a *prima facie* case against the accused person. A proof beyond reasonable doubt, which is a test applicable at the end of the criminal case is not applicable⁵. 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 then in such case, he has produced *prima facie* proof, and in the absence of an answer from the other side, it becomes conclusive proof.⁶ In what follows I deal with the relevant parts of the evidence tendered by the prosecution with a view to establish if there is a case to answer.

Discussion and analysis

- [9] Athule Khatshwa testified in court for the state as follows:

Whilst at the tavern, Athule was approached by the Accused No 3 who claimed that the tekkies he was wearing were his (accused 3). They agreed to exchange cell phone numbers as he effectively stated that he would first had to contact the person from whom he got the tekkies to advise him that accused No 3 is claiming to be the owner thereof. The tekkies were apparently obtained from the deceased, Lubabalo Nguta.

- [10] On 07th October 2023 Accused No 3 came with accused No 1, No 2, and No 4 at Athule's room. Athule took the tekkies out of his wardrobe. Accused No 1, No 2, No 3 and No 4 requested Athule to take them to the person from whom the tekkies were obtained as they said that there were other missing items, like laptops they were looking for. The loadshedding had just started. They went to the deceased room.

- [11] On their arrival at deceased room accused No 1 and No 2 indicated their surprise to see that the person they were visiting (deceased) was the same person who was assaulted in the previous week. According to Athule the deceased was interrogated and such interrogation was accompanied by his

⁵ *S v Hepworth* 1928 AD 265

⁶ *Ex parte Minister of Justice: In re R v Jacobson and Levy* 1931 AD 466 at 478

assault. No weapon was used. They were demanding that the deceased must tell the truth about the missing items. Athule was then excused as it was clear that he had nothing to do with the stolen goods. There were other two gentlemen who arrived at the deceased room in addition to accused No 1 to No 4.

[12] Accused No 4 seemed very dangerous and merciless and accused No 2 strangled the deceased. However, accused No 4 was using his bare hands to assault the deceased. Accused No 1 and No 3 requested other accused persons to stop beating the deceased with a view to give him a chance to speak as they wanted to know the whereabouts of other items.

[13] Masibulele Weyi testified. He was part of the people who went to Athule's room and thereafter to deceased's room. Of importance, on their arrival at the deceased room accused No 1, No 2 and No 4 assaulted the deceased with hands. He was taken to Ayona. When he was taken to Ayona the deceased was held with his hands by Masibulele, Accused No 2 and shakes. At Ayona the room was small; therefore, only accused No 1 and No 2 went inside with the deceased. When they were entering the room the deceased was not held or supported.

[14] As they were coming out of the room accused No 1 and No 2 were angry and shouting, saying that he was misleading them and he was lying. Accused No 2 put a hand on his back. The deceased made mention of Jabavu. Masibulele, accused No 1, No 2 and No 4 took him to Jabavu. As the deceased did not want to go to Jabavu, they dragged him. At Jabavu accused No 1, No 2 and No 4 continued to assault the deceased as they had nothing in their possession. They thereafter took him out of the door. Masibulele went back to his residence.

[15] Sihle Malunga testified. Nothing much was said by Sihle, except to introduce accused No 5 into the scene. Accused No 5 wanted to push the deceased as others were talking to the deceased as if they were talking to the child. At times they were patting him on his shoulder.

- [16] Xanti Dilanga testified. He was a Section 204 witness. Xanti and his roommate met accused No 5 as they were following the noise that was coming from down stairs. They knocked at D16 and accused No 4 opened for them. They saw a youngman sitting on a half broken chair and that he was swollen. It was difficult to identify the person sitting on a half broken chair because he was so much swollen on the front part of the face; the other eye was almost closed whilst the other one was not so much damaged. It was the deceased who was sitting on a half broken chair. Present in the room was accused No 1, No 2, No 3 and No 4 together with another guy and his girlfriend.
- [17] Xanti testified that accused No 1, No 2 and No 4 were assaulting the deceased with hands, fists and feet(kicking) on the upper body. According to him accused No 5 joined them and assaulted the deceased. They assaulted the deceased as they were asking the whereabouts of their stolen goods. Xanti slapped the deceased as he said he (Xanti) knows the stolen items. The deceased seemed to be collapsing and Xanti often put his head up. Iron rod or a pipe that is used to hang the towels was brought and all accused persons gave each other chances to assault the deceased. Accused No 5 came with a plastic bag and he put it on deceased face (suffocate). They stopped assaulting him when he said that the stolen items were with one Diago.
- [18] Xanti assisted the deceased to stand as he (deceased) was unable to stand on his own as they were going to Diago's place. Xanti did not know where they met accused No 3, he just assaulted the deceased without having asked anything. He picked the broomstick and assaulted the deceased. Accused no 5 did the same until the broomstick was broken.
- [19] When they were going out of Diago's room accused No 3 and No 5 were assaulting the deceased. They were also dragging him on the stairs. The deceased was extremely weak at that time. Accused No 5 often poured water over the deceased stating that he wanted him to be active, he was using five litre bucket. Accused No 3 and Nkanyiso joined to pour water on the

deceased. The deceased was on the ground helplessly assaulted (kicked) by Accused No 1, No 2, No 3 and No 4 as accused No 5 was pouring water on the deceased.

[20] The deceased was lifted by other students to his residence. Xanti and Diago were ahead of them as Diago wanted to show Xanti his room. The others were left in the open space. Xanti saw the deceased again when he was on the ground lying motionlessly with few people standing a distance away from him. Xanti and Diago assumed that the deceased was dead. They changed their direction. At that time accused No 1, No 2 and No 4 were walking away from the deceased motionless body, towards the main gate.

[21] As stated above, Dr Kunyuza testified in this court as a Medical Practitioner who examined the body of the deceased. Post Mortem report was admitted as an exhibit. It is demonstrably clear that the deceased sustained multiple serious injuries on different parts of his body. The deceased death was recordedly caused by “**blunt trauma to the head**”.

Count 1- Kidnapping

[22] It is crystally clear from the evidence that the deceased was not only confined in places, spaces or rooms against his will at the instance of the accused persons, he (the deceased) was forcefully taken from one place to the other by or at the instance of the accused persons. The deceased was forced to go (eg to Diago’s room) even when he was visibly weak and physically unable to stand on his own. That demonstrates that he was kept and always has been in the control of the accused persons. In those circumstances the deceased did not exercise his freedom of movement.

[23] Kidnapping consists in unlawfully and intentionally depriving a person of his freedom of movement and/ or if such person is child his custodians of their control over him. The crime of kidnapping is committed by depriving a person

of liberty of movement .⁷ It is unimaginable that the deceased could exercise his freedom of movement when his movements were physically controlled and restrained by the accused persons. It could not conceivably be suggested that the accused persons, when they were handling the deceased, coincidentally intended him to exercise his freedom of movement.⁸ The evidence before this court *prima facie* complies with definition of kidnapping.

- [24] During argument in this court no argument was specifically directed to this count of kidnapping. General submissions were made, mainly focused and directed to the count of murder. Counsel for the accused persons did not suggest during argument that the deceased was not entirely in the control of the accused persons. I say this mindful of accused No 3 plea explanation of Alibi. I am of the opinion that there is *prima facie* case establishing an offence of kidnapping; therefore, the accused persons must be placed on their defence in respect of this count or charge.

Count 2- Assault with intent to do grievous bodily harm

- [25] Assault consists in unlawfully and intentionally: (a) applying force to the person of another directly or indirectly; or (b) threatening another with immediate personal violence in circumstances which lead the threatened person to believe that the other intends and has power to carry out the threat.⁹
- [26] *Prima facie* evidence exists that the accused persons were not only present at the scene when the deceased was assaulted, they actually perpetrated the crime of assault with intent to do grievous bodily harm. There is *prima facie* evidence that accused persons applied force to the deceased.
- [27] Not only open hands were used to perpetrate the crime of assault with intent to do grievous bodily harm, but also fists, booted feet, broom stick and iron

⁷ LAWSA Vol 6 Page 268, , Page 271, Para 272 and 275

⁸ LAWSA Vol 6 Page 273 Para 276

⁹ LAWSA Vol 6 Page 248, Para 247

rod or pipe used to hang the towels were used. The assault and blows were directed at the upper body of the deceased. The conduct of accused persons *prima facie* complies with the definition of assault.

- [28] In addition to the factual witnesses, the state called the evidence of Dr Kunyuza, Medical Practitioner who examined the deceased body. Multiple injuries were found on the body of the deceased. Post-mortem report records serious injuries that were found on the body of the deceased. No argument was meaningfully advanced against the charge of assault with intent to do grievous bodily harm. Most, if not all arrows were directed at the charge of murder. I am not oblivious about accused No 3 plea statement. Multiple tramline bruises are consistent with the use of broomstick, pipe or iron rod. This charge has *prima facie* been established; therefore, the accused persons must be placed on their defence.

Count 3- Murder

- [29] Murder is the unlawful and intentional causing of death of another human being. The essential elements of the crime are thus (a) the killing (b) of another human being, which is (c) unlawful and (d) intentional.¹⁰
- [30] Before the assault was meted out to the deceased, the following are the facts *prima facie* established:

The deceased was in his room and was able to do things on his own, and was not dead. It is only when the deceased was in the control of the accused persons that his physical strength depleted and became weak. He became weak at the happenstance of the assault being severely meted out to him by and at the instance of the accused persons. When the deceased was taken to Diago's room, he was weak and all accused persons were with him. Even though the deceased was visibly weak, the accused persons continued to assault him. They took turns to assault him with the iron rod or pipe used to

¹⁰ LAWSA Vol 6, Page 241, Para 237

hang towels. Open hands, clenched fists, booted feet, broomstick, iron rod or pipe used to hang the towels were all used to assault the deceased.

- [31] Clenched fists and booted feet were conceded to be consistent with blunt trauma. The broomstick, pipe and iron rod are, too consistent with blunt trauma. All of them are capable of causing the death as they are categorised as blunt objects. Any of the above can cause person's death. There is accordingly *prima facie* evidence of murder against the accused persons. Dr Kunyuza and the Post Mortem reveals that deceased death was caused by **blunt trauma to the head.**

Conclusion

- [32] This court was invited to make credibility findings against the evidence of the state witnesses. This invitation was made contrary to the concessions having been made that at this stage credibility of state witnesses plays a limited role. I am declining the invitation. I cannot reject the evidence of the state witnesses unless I decide to find that their evidence is not creditworthy. That will be premature. In the circumstances an application in terms of section 174 of CPA cannot succeed.
- [33] I have no doubt in my mind that the evidence presented by the state calls for an answer. Put differently, the state has established a *prima facie* case against the accused persons. It is undoubtedly an evidence upon which this court can convict.

Order

- [34] In the result I make the following order:

[34.1] **An application for a discharge in terms of Section 174 of CPA is hereby refused.**

A.S ZONO
ACTING JUDGE OF THE HIGH COURT

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