

THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: CC 54 / 2021

In the matter between:

THE STATE

and

ZURENA SMIT

ACCUSED ONE (1)

DEREK SAIT

ACCUSED TWO (2)

Summary: Criminal Law - Murder – Common Purpose - Conspiracy to Commit Murder - Section 204 Witness - Evidence *Aliunde* - Fraud - Expert Handwriting Evidence - Admission of Record of Civil Proceedings – Probative Weight - Section 174 Discharge Application - Specified Charges - Two Accused - Multiple Charges – ‘Tsunami’ of *Prima Facie* Evidence - Discharge Refused.

Coram: Wille, J

Argument: 3 and 4 November 2025

Delivered: 6 November 2025

JUDGMENT [SECTION 174 DISCHARGE APPLICATION]

WILLE, J:

INTRODUCTION

[1] This application has its origins in a tragic and unfortunate criminal trial. Two accused persons face numerous charges as set out in the indictment. In summary, the charges relate to the alleged fraud, robbery with aggravating circumstances, intimidation, conspiracy to commit murder, premeditated murder and the possession of unlicensed firearms and ammunition. The indictment lists a total of 16 charges. Not all of the accused face all the charges.¹

[2] The core charges of murder and conspiracy to commit murder fall within the provisions of the minimum sentencing regime. The prosecution also alleges a common purpose to commit premeditated or pre-planned murder.²

[3] Both accused tendered a plea of not guilty to the charges preferred against them, and specific admissions were recorded, to which they offered no contest.³

¹ Some of these charges (if sustained) carry a prescribed sentence of life in imprisonment.

² This at the instance of Accused 1.

³ In terms of Section 220 of Act, 51 of 1977 (the "CPA").

[4] The accused's statements (admissions) were entered into the record and designated as formal exhibits.⁴

[5] In connection with the charges as formulated, the accused admitted:

- (a) that the deceased was correctly identified.
- (b) that the chain of evidence to the mortuary was untainted.
- (c) that the cause of death was correct.
- (d) that the post-mortem report (as amended) was correct.
- (e) that the scientific and ballistic evidence was correctly analysed and matched.
- (f) the accuracy and correctness of the photographic material.⁵

[6] Attached to these statements were additional reports and documents, also entered into the record and marked as exhibits. This was all by consent. In summary, the accused denied any and all involvement in the charges as preferred against them.⁶

[7] What they said, in essence, was that they had nothing to do with the murder of the deceased and that they also did not enter into any conspiracy to murder the

⁴ Exhibits B and C respectively.

⁵ The written material in support of these admissions formed part of the Exhibits B and C.

⁶ The formal reports were admitted for the truth of the content thereof.

deceased. Accused 1 also denied that she had anything to do with the forgery of any documents or *wills* relating to the estate of the deceased.⁷

THE DISCHARGE APPLICATION IN TERMS OF SECTION 174 OF THE CPA

[8] The legal representatives for the accused requested a discharge of their clients at the close of the prosecution's case with respect to certain specified charges in the indictment. The applicable legislation 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...'*⁸

[9] The accused are effectively asking this court to find them not guilty at this stage of the proceedings with respect to specific charges in the indictment. They seek a separation from the main charges in the indictment, specifically those for which they believe there is no evidence that the accused committed the acts as described in the indictment. Regarding Accused 1, these charges comprise counts 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 13. These counts deal with three counts of robbery with aggravating circumstances, intimidation, conspiracy to commit murder, murder, fraud, three counts of the unlawful possession of an unlicensed firearm and one count of the illegal possession of ammunition.⁹

⁷ The accused denied that they had anything to do with the murder of the deceased.

⁸ Section 174 of Act, 51 of 1977.

⁹ These are the specified offences in connection with Accused 1.

[10] Concerning Accused 2, he seeks a discharge only in respect of a single count of intimidation listed as count three in the indictment.¹⁰

[11] This discharge is sought in circumstances where the two accused before the court are facing multiple charges (as listed in the indictment), which include allegations of a conspiracy to commit murder and a common purpose to commit pre-planned or premeditated murder. Our jurisprudence dictates a different approach, and that different factors must be considered when dealing with multiple accused facing multiple charges.¹¹

[12] Applying section 174, the applicable legislation stipulates that the court ‘*may*’ discharge an accused person under certain circumstances. Even on a liberal approach to interpreting the ‘discretion’ afforded to a court in circumstances such as these, it is challenging to understand on what basis the accused hold the view that there is no evidence against them in connection with the specified offences set out in the indictment. One must also consider that the credibility of the witnesses (even if this was relevant in this case) is not an issue that falls to be taken into account by this court at this stage.¹²

[13] I say this for several reasons:

- (a) There is no final inalterable prejudice against the accused for the failure to discharge them after the closure of the case for the prosecution, taking into account the multiple charges listed in the indictment.

¹⁰ These are the specified offences in connection with Accused 2.

¹¹ It may be that this discretion is limited, which will be discussed later in this ruling.

¹² This is trite law and in accordance with our jurisprudence.

- (b) The accused may be acquitted upon finalising the proceedings and applying the test for a final judgment on the merits.
- (c) The 'complaints' raised by the accused may be grounds for appeal should any convictions be returned against them.
- (d) Thus, any discharge is manifestly premature.¹³

[14] Moreover, any application for a discharge in terms of this specified legislation is interlocutory by its very nature. This is also the case because, once the prosecution rests after presenting its case and establishes a *prima facie* case against the accused, the accused may still lead evidence and call witnesses, which could result in their acquittal.¹⁴

[15] The primary argument advanced by the accused is that there were shortcomings in the evidence, which raised the possibility that the allegations against them might be untrue. Thus, it is contended that the only possibility for their conviction would be if they elected to testify or call witnesses. To establish whether this is a genuine discharge application worthy of consideration, the contentions on behalf of the accused must consist of something other (or something more) than a premature analysis of the credibility of the prosecution's witnesses. Applying this jurisprudential test to the facts of this case, it cannot be said there was '*no evidence*' on which a reasonable man acting carefully might convict.¹⁵

¹³ This application is *in medias res*.

¹⁴ The test to be applied at the conclusion of the trial is a different and a discrete test.

¹⁵ *S v Mpetha* 1983 (4) SA 262 (C) at 266 H.

[16] Thus, I must indulge in the exercise of a limited judicial discretion. Guidelines for the exercise of this discretion (concerning this species of this discretion) have been eloquently illustrated as follows:

‘...It seems to me that the rule is clear, namely, that if at the close of the case for the Crown the evidence against the accused, or against one or more of the accused, is not such that a reasonable man might convict upon it, the Judge had a discretion whether or not to discharge. He is quite entitled to refuse to discharge if he considers that there is a possibility that the case for the Crown may be strengthened by evidence emerging during the course of the defence...’¹⁶

[17] Sometime after this, our jurisprudence was further seemingly ‘developed’ by formulating and suggesting a two-stage approach to be considered when evaluating the discharge of an accused person after the prosecution has closed the case. What was stated was the following:

‘...The position can be summed up as follows: At the close of the State case, when discharge is considered, the first question is: (i) is there evidence on which a reasonable man might convict; if not, (ii) is there a reasonable possibility that the defence evidence might supplement the State case? If the answer to either question is yes, there should be no discharge, and the accused should be placed on his defence...’¹⁷

[18] The real test is once the prosecution establishes *prima facie* evidence linking the accused to the commission of the alleged specified offences; credibility

¹⁶ R v Kritzinger 1952 (2) SA 401 (W) at 406-A.

¹⁷ S v Lubaxa 2001 (2) SACR 703 (SCA). (I do not agree with the second part of this formulation).

would only become a consideration once (and if) the evidence is of such poor quality that no reasonable person could accept it.¹⁸

[19] Following an objective analysis of the evidence in this case so far, no finding could reasonably be returned against the poor quality of the evidence presented by the prosecution. Thus, we are left with criticisms of the credibility of the allegations against the accused, to the limited extent that it is reasonably possible they may be innocent. This does not meet the threshold test for judicial discharge on the facts of this case, given the '*tsunami of prima facie evidence*' against the accused.¹⁹

[20] Furthermore, no irreparable prejudice would result if the trial were allowed to proceed to finality, as the accused may well be acquitted in the process. Put another way, if a conviction were to follow, the complaints raised may provide grounds for an appeal, but they are not grounds that this court must address in *medias res* for an application for discharge.²⁰

[21] In addition, the complaints raised may be connected with the accused's rights regarding an infringement of their right to a fair trial. These complaints must be viewed in the context that the trial process regarding the accused has not yet been completed. The position in our law concerning this issue has been eloquently formulated as follows:

¹⁸ S v Mpetha 1983 (4) SA 262 (C). (In my view this is the correct test).

¹⁹ This is not a ground for a discharge.

²⁰ These complaints may later manifest as grounds of appeal at a later stage (if at all).

‘...Once again, it is our respectful view that the applicant's reliance on the provisions of the Constitution with regard to his fair trial rights does not justify interference in criminal proceedings which are mid-stream, and more so where the applicant has failed to demonstrate any legal basis for the relief sought in this court...’²¹

[22] Many significant trial rights exist and find application in our criminal and procedural law. One of the most important ones is the presumption of innocence. A failure by the prosecution to mount sufficient evidence at the closure of its case gives an accused person an opportunity to escape having to defend themselves.²²

[23] It is trite that the threshold test of evidence presented and thus required by the prosecution at the closure of its case to avoid discharge is considerably lower than the standard that the prosecution has to meet to secure a conviction (if any). This threshold test, relating to the discharge of an accused after the prosecution has closed the case, has been consistently applied by our courts over many years. However, it is an exception to this test, which warrants caution, much like that of a chameleon.²³

[24] The exception in our procedural law is that a court may discharge an accused when the evidence presented by the prosecution is of such poor quality that no reasonable man acting carefully could convict based on it. This exception

²¹ Motikeng v Regional Magistrate Beaufort West and Another 2023 JDR 0119 (WCC) at [39].

²² This is not the case that has been presented.

²³ S v Lubaxa 2001 (2) SACR 703 (SCA).

may permit a limited probe into the ‘credibility’ of the evidence presented by the prosecution.²⁴

[25] In my view, this is where the difficulty lies, as this ‘credibility’ exercise does not strictly fall within the remit of a judicial officer at the stage when the prosecution has closed its case.²⁵

[26] Thus, this discharge device in our law is, in practical terms, merely a safeguard against conviction in the face of *spurious* evidence presented by the prosecution. However, harm may occur when this procedural mechanism is used as a device by an accused person to attempt to either:

- (a) impermissibly persuade a judicial officer to embark on premature credibility findings regarding the evidence presented by the prosecution and/or,
- (b) impermissibly gain a window into the judicial thought process of the judicial officer so that an accused person may tailor his or her defence case as the case against them advances.²⁶

[27] It is also not for this court, in *medias res*, to now evaluate the evidence presented by the prosecution, except in limited circumstances in the category of the discharge procedure, which I have styled as an exception to the standard method to be followed.²⁷

²⁴ S v Schwartz 2001 (1) SACR 334 (W).

²⁵ This is an area of some vigorous academic debate but not grounded in reality.

²⁶ This is precisely what the accused are attempting to do.

²⁷ This is what may occur ultimately in the appeal process (if pursued).

[28] Undoubtedly, we are dealing with out-and-out issues about credibility, which this court is best suited to decide on after hearing all the available evidence. Put another way, the accused will not suffer irreparable prejudice if the trial proceeds, as they may still be acquitted at the end of the trial. Besides, even if a conviction were to follow, the complaints they raise may constitute grounds of appeal depending on whether they elect to give evidence or exercise their right to silence.²⁸

[29] In my view, the accused are impermissibly attempting to utilise the discharge provisions as a mechanism or tool to gain insight into the strengths and weaknesses of the case for the prosecution to tailor their evidence from now on or to assist them with their decision on whether or not they should testify in their defence and call witnesses. This is not the purpose for which the discharge provisions were designed. A criminal trial is '*...not a game of catch-as-catch can...*'²⁹

[30] The core complaint by Accused 2 is that the intimidation charge against him (as currently formulated) relates to a time that has been incorrectly specified in the indictment, because he only commenced working on the farm at the end of December 2018.³⁰

[31] The evidence, however, demonstrates that the alleged intimidating messages were sent from a mobile phone registered in his name. At the end of the case and before judgment, the prosecution may request an amendment to the

²⁸ All their complaints, save for one, are credibility complaints.

²⁹ S v Boesak 2001 (1)SACR 1 (CC) at [26].

³⁰ This does not mean that Accused 2 was not involved concerning this charge.

indictment to reflect different or alternative dates to be inserted into the charge, thereby curing this complaint (if it still exists).³¹

[32] Thus, the application for the discharge of the accused in relation to the specified offences is refused.³²

E. D. WILLE
Cape Town

³¹ Section 86 (1) of the CPA.

³² The application is manifestly premature.