



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case no: CC 82/2020

In the matter between:

THE STATE

and

CEBO SOBOYISE

ACCUSED 1

ZOLA GOLELA

ACCUSED 2

Heard: 27 January 2026

Delivered: 28 January 2026

Summary: Criminal Procedure: Section 174 applications at the end of the State's case. Multiple counts preferred against Accused. Insufficient or no direct evidence on the elements of the charges, as considered count by count entitles Accused to be discharged on those counts. Duties of Counsel in section 174 applications considered.

JUDGMENT ON SECTION 174 APPLICATIONS

Bhoopchand AJ:

[1] At the close of the State's case, both accused filed section 174 applications under the Criminal Procedure Act 51 of 1977. They are being tried for four separate crimes that took place between 4:30 p.m. on 26 November 2019 and the early hours of 27 November 2019. Accused 1 faces fourteen charges, while Accused 2 is charged with thirteen, including murder, robbery with aggravating circumstances, attempted murder, and possession of firearms. Additionally, Accused 1 is charged with possession of ammunition.

[2] The State closed its case on 27 January 2026. Counsel for the Accused were forewarned that the State's case was nearing its end, and the defence should proceed and prepared to advance any applications arising at the close of the State's case. A section 174 application is ordinarily made orally from the bar, and no prejudice arises from requiring Counsel to proceed in that manner. While considering the submissions made by the State as well as Counsel for the Accused, the Court realised that the State had led no direct evidence on counts 8,9,10,11 and 12. The parties were permitted to supplement their oral submissions prior to judgment being delivered on the section 174 applications.

[3] The State is required to present sufficient evidence against the accused to support a conviction at the conclusion of its case. If, upon the completion of the prosecution's presentation in any trial, the court determines that there is no

evidence indicating the accused committed the alleged offence or any related offence for which a conviction could be entered under the charge, it may render a verdict of not guilty. No evidence means no evidence on which a reasonable Court, acting carefully, might convict (*R v Shein* 1925 AD 6 (W), *S v Lubaxa* 2001 (2) SACR 703 (SCA)).

[4] A Court exercises a discretion at the close of the State's case on whether to discharge an accused person. A Court may assume that there was 'reasonable and probable' cause to believe that an accused person is guilty of an offence before a decision to prosecute is taken. The case against an accused person should cease when the evidence falls below the threshold even if there is a possibility that the case for the State may be augmented by evidence emerging during the defence (*S v Shuping and Others* 1983 (2) 119 (BSC) at 120)¹, *S v Mathebula* 1997 (1) SACR 10 (W) at 147 and *S v Lubaxa* (supra) at para 19).² That is not the case that this Court has to consider. A Court does not evaluate the evidence at the close of the State's case. Its task is to determine whether there is the presence or absence of facts that could lead to a conviction (*S v Cooper* [1974] 3 All SA 253 (T) at 266), *S v Lubaxa* (supra) . Both accused in their respective applications and relying on the established law and caselaw relating to section 174 applications, contend that the State has failed to discharge this onus and seek their discharge.

[5] Section 174 of the Criminal Procedure Act is a safety valve. It prevents an accused person from being forced to present a defence when the State has not produced any evidence on which a reasonable court might convict. It is not about whether the State has proved its case beyond reasonable doubt. It is not

¹ The second part of the Shuping test remains intact in cases involving multiple accused. This aspect is addressed in response to a submission on behalf of the State.

² Managay Reddi, Bhavna Ramji: Section 174 of the Criminal Procedure Act: Is it time for its abolition? De Jure, 51 Volume 2 2018 pp 251-270

about weighing credibility in a final sense. It is not about choosing between competing versions. It is simply about the threshold question of whether the State produced some evidence on each element of each charge that, if left unanswered, could possibly sustain a conviction. If the answer is yes, the application must fail. If the answer is no, the accused is entitled to be discharged on that count.

[6] It is worth repeating Counsel's duty to their client's as well as to the Court in section 174 applications. Counsel should bring a section 174 application in certain defined instances including when there is a complete evidentiary vacuum on an essential element, the State's case is so utterly lacking that even if believed, it cannot sustain a conviction, or if the State has failed to link the accused to a particular count. Section 174 can be granted count by count. If the State has evidence linking the accused to some counts but not others, a partial discharge is appropriate. Counsel should not bring a section 174 application in instances when there is *prima facie* evidence on the elements, the application is used as a tactical "fishing expedition", the evidence is circumstantial but coherent, or if the accused is clearly implicated but disputes the inference. If there is more than one inference possible from evidence that is largely circumstantial, the Court must consider at this stage whether a reasonable person might, not should, draw the inference sought to be drawn by the State (*S v Ostilly and Others* 1977 (2) SA 104 (D&CLD) at 107 A-C, *S v Cooper and Others* (supra) at 888-890).

[7] Certain of the aspects canvassed thus far requires brief elaboration. A complete evidentiary vacuum means that there is no evidence that the accused was present, there is no evidence linking the accused to the weapons, there is no evidence that the items recovered were stolen, and there is no evidence of intention where intention is an element. Section 174 can be granted count by

count and if the State has evidence linking the accused to some counts but not others, a partial discharge may be appropriate. Even if evidence is weak, contradictory or attacked under cross examination, as long as it exists, the threshold is met. As for an application being a fishing expedition, it should not be raised reflexively in the hope that a Court may be influenced to grant the application. It is not intended to preview the Court's thinking, to test the strength of the State's case or to force the Court into premature credibility findings. Section 174 is not the stage for resolving competing inferences. That falls within the realm of the defence case.

[8] Accused 1 was found with a firearm in his possession that was ballistically linked to three crime scenes. He was present in the vehicle seen at the crime scenes. Items stolen from at least one crime scene was found in the car. Accused 2 was the owner of the implicated vehicle. He was present in the vehicle with the stolen items. He possessed a firearm even though it was not linked ballistically to the crimes. His stolen car affidavit appears fabricated or at least highly suspect. Both accused were arrested together in the implicated vehicle that was tracked through the stolen iPhone. They were found with firearms shortly after the spree. There were stolen goods in the car which was spotted at all four scenes.

[9] This is not a no evidence case. It is a case of substantial circumstantial evidence. Counsel representing the accused have a duty to their clients as well as to the Court. As a matter of professional ethics, they must explain the purpose of the application, explain the risks, i.e., it may fail and the defence will have to proceed, ensure that the accused understand that the application is not a comment on guilt but a procedural mechanism. Counsel have a duty to act in their client's best interests, to ensure informed decision making, and a duty not to mislead the client about the strength of the State's case. Counsel have a duty

to the Court not to misrepresent or misconstrue the evidence, engage satisfactorily with the record, avoid frivolous applications, and respect the limited scope of the test. In amplification, Counsel may argue that the evidence is insufficient, but they may not ignore evidence that clearly exists, distort what witnesses said, or pretend that evidence was not led. Section 174 is not a rhetorical exercise. It requires a fair and accurate reflection of the State's case. Counsel should ask themselves whether an application is hopeless as part of their duty as officers of the Court and advise their clients accordingly. A section 174 application is not intended to elicit premature credibility findings, weigh probabilities or resolve factual disputes.

[10] The submission on behalf of accused 1 that the State has led no evidence to positively identify him as a perpetrator of any of the crimes and that there is thus no identification, misconceives the legal requirement. The State is not obliged to produce eyewitness identification. Identity may be established through circumstantial evidence. In this matter, the ballistic evidence linking the firearm found in Accused 1's possession to three crime scenes, the presence of both accused in the getaway vehicle shortly after the offences, the recovery of stolen items in that vehicle, and the technological tracking of the vehicle via the stolen iPhone constitute evidence on which a reasonable court might convict. Accused 1 criticised the non-specificity of the ballistics evidence, the evidence relating to the gun powder residue, cellphone evidence and the inferences relating to the pursuit of a common purpose. These are issues that should be reserved for argument at the end of this case.

[11] Counsel representing Accused 2 relied upon the criteria laid down in *S v Mgedezi and Others* 1989 (1) SA 687 (A) at 705I -706C, *S v Safatsa and Others* 1988 (1) SA 868 (A), as distilled, in a situation where the State cannot place an accused inside a crime scene but relies upon a common purpose for conviction.

The State must show circumstantial evidence of presence, association, knowledge, participation, and intention to make common cause. Accused 2 contends that the State has not discharged this onus. The enquiry at the section 174 stage is whether there is evidence on which a reasonable Court might find that Accused 2 associated himself with the other perpetrators that committed the crimes for which he is charged.

[12] Although there is no direct evidence that Accused 2 personally discharged a firearm or entered the premises during the commission of the offences, the circumstantial evidence against accused 2 is substantial. The evidence places him in the vehicle used at all crime scenes, in possession of stolen items shortly after the offences, and in association with Accused 1. The vehicle was tracked through the stolen iPhone, and the affidavit alleging that the vehicle was stolen appears to be fabricated. These facts constitute circumstantial evidence on which a reasonable court might find that Accused 2 associated himself with the perpetrators that committed the robberies and murders. At this stage, the court is not required to make credibility findings or resolve competing inferences. Accused 2 criticised the identification evidence and the flaws in the clothing identification parade.

[13] The State opposed the applications. The State Prosecutor conceded that no individual witness identified Accused 1 as an assailant. The States case relied entirely upon circumstantial evidence. The State identified further evidence beyond that which the Court has alluded to that links Accused 1 to the crimes. These include the evidence that a firearm was discharged inside the liquor store. The cartridge was collected and linked to the Walther model semi-automatic pistol found on Accused 1's person. Accused 1's cellphone was activated during the time of this robbery and in the vicinity of the crime scene. A cartridge was collected inside the store at the Idahoff crime scene. The

cartridge was linked to the firearm found on Accused 1. Accused 1's cellphone activated a cellphone tower in the vicinity of the crime scene. The iPhone taken at the store was tracked and led to the arrest of Accused 1. In the case involving the shooting of two brothers in Delft, the cartridges retrieved from the scene linked the firearm found on Accused 1's person. Accused 1's cellphone activated a tower near the crime scene. There was gunshot residue found on Accused 1's right hand. In the case involving the fatal shooting of a police officer, the motor vehicle in which Accused 1 was arrested was described at the crime scene. The police officer was robbed of a cellphone, positively identified as his, was found in the motor vehicle occupied by Accused 1. The State contended that the evidence called for an answer from Accused 1. He is presented with an opportunity to present his case in defence.

[14] The State identified further details of the evidence beyond that which the Court has alluded to that links Accused 2 to the crimes. Accused 2 admitted to being the owner of the motor vehicle that was seen at the crime scenes. It was put on behalf of Accused 2 that his vehicle was stolen on the day that the crimes occurred and he reported the theft of the vehicle to the police. The authenticity of the affidavit allegedly made at the Philippi police station regarding the stolen vehicle was raised in evidence. The clothing worn by Accused 2 and eventually retrieved from him after his arrest, matched those seen on one of the suspects in the video footage relating to the liquor store robbery. Accused 2 had a firearm on his person when he was arrested. The items stolen at the Idahoff superette were found in Accused 2's vehicle and the iPhone taken at that scene was used to track its movement and the arrest of Accused 2. Accused 2 sat in the driver's seat of his vehicle when he was arrested. The colour of an item of his clothing was identified by an eyewitness who testified about the shooting of the police officer. The State conceded that the clothing identification parade conducted by

the investigating officer was flawed and placed little if no reliance on it. The threshold as far as the State's case is concerned in section 174 is therefore met.

[15] Although counsel did not address the application on a count-by-count basis, the court is obliged to consider each charge individually. The first three counts of robbery with aggravating circumstances relate to the liquor store robbery. The clothing evidence as seen on the video footage and the ballistics evidence links the Accused to these counts either individually or in pursuit of a common purpose. Counts 4 and 5 relate to the fatal shooting of the Zakala brothers in Delft. The ballistics evidence links the Accused to these counts either individually or in pursuit of a common purpose. Count 6 concerned the theft of the cellphone of the police officer who was fatally shot. The cellphone was found in the vehicle occupied by the Accused when they were arrested. Count 7 relates to the murder of the police officer in Delft. There is ballistics evidence that links the presence of a third firearm and a third person to this count as well as to the liquor store robbery. The cellphone evidence places Accused 1 near the crime scene. Counts 8,9,10 and 11 concern the robbery at the Idahoff superette. No direct evidence was led by the State on these counts as none of the complainants were called as witnesses. Count 12 is one of attempted murder and the State has failed on this count as well to lead any direct evidence on this count. All elements relating to each count was not covered by the evidence. Both Accused stand to be discharged from each of these counts at the end of the State's case. The appropriate order will include this provision.

[16] Count 13 concerns the possession of a prohibited firearm. The serial number had been filed off. The firearm was found in the vehicle occupied by the Accused. Count 14 relates to the possession of ammunition which was found in the vehicle occupied by the Accused when arrested.

[17] In the circumstances, the evidence led by the State that links Accused1 and Accused 2 is substantial. The Court is satisfied that the State has led evidence on which a reasonable court might convict on each count except counts 8,9,10,11, and 12. The applications as raised generally or as the Court has considered on each count except for those where the Accused will be discharged, in the respective applications must therefore fail.

ORDER

1. Accused 1's section 174 application under the Criminal Procedure Act 51 of 1977 concerning counts 8,9,10,11, and 12 is granted and he is discharged on these counts.
2. Accused 1's section 174 application under the Criminal Procedure Act 51 of 1977 concerning the remainder of the counts preferred against him is dismissed,
3. Accused 2's section 174 application under the Criminal Procedure Act 51 of 1977 concerning counts 8,9,10,11, and 12 is granted and he is discharged on these counts.
4. Accused 2's section 174 application under the Criminal Procedure Act 51 of 1977 concerning the remainder of the counts preferred against him is dismissed,
5. The Accused are put on their defence.

BHOOPCHAND AJ

Acting judge

High Court

Western Cape Division

Judgment was handed down on 28 January 2026

State Prosecutor: Advocate Rudolph
Accused 1 represented by Advocate Vundla
Accused 2 represented by Advocate Kunju