

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

Case no: CC 36/2008

In the matter between:

THE STATE

and

ARUMUGAM THAMBAPILAI	1ST ACCUSED
LINDA SHIPALANGA	2ND ACCUSED
MARTIN ERIKI	3RD ACCUSED
TIMOTEUS AMUTENYA SAKEUS	4TH ACCUSED
FESTUS SHINDUME	5TH ACCUSED
GEORGE HATUTALE	(deceased) 6TH ACCUSED
DAVID SHIKALE	(deceased) 7TH ACCUSED
ONESMUS SHEEHAMA	8TH ACCUSED
HILMA MARTIN	(at large) 9TH ACCUSED

Neutral citation: *The State v Thambapilai* (CC 36/2008) [2013] NAHCMD 160 (7 June 2013)

Coram: SIMPSON AJ

Heard: 22 – 26 April 2013

Delivered: 07 June 2013

ORDER

Application for discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977 is dismissed.

RULING

SIMPSON AJ:

[1] Initially there were 13 accused persons of which the state, after the plea was taken, stopped prosecution against accused 10, 11, 12, 13. As they pleaded not guilty, they are entitled to a verdict of not guilty so no case against them has been established.

[2] During the presentation of the state's case, accused 6 passed away, and as a result thereof, prosecution was also stopped. From the outset accused 7 was not part of the proceedings as he is deceased. Accused 9 was also not part of the proceedings, as she was at large even before the commencement of this trial.

[3] Therefore, the accused before court is accused 1, 2, 3, 4, 5 and 8. At the close of the state's case, an application in terms of s174 of the Criminal Procedure Act (51 of 1977) (hereinafter referred to as the Act) was brought before this court.

[4] The accused persons were charged, separately and/or jointly with various counts, ie fraud alternatively attempted theft, forgery and uttering, attempting to defeat the course of justice, theft by conversion.

[5] All the accused pleaded not guilty, whereafter several witnesses testified for the state. At the close of the state's case, the defended (accused) applied for the discharge in terms of section 174 of the Act. This application was opposed.

[6] It is submitted that the state had a burden of proving all the charges against all the accused, and it was intended that the state failed to establish a *prima facie*

case against all accused. Although acknowledging that credibility of witnesses at this stage play a limited role, it was argued that their credibility is a factor that has to be taken into consideration.

[7] From the outset it must be said that the test of a discharge under s174 differs from that the court is required to assess the evidence as a whole, including the probabilities of the particular case.

[8] When considering an application in terms of s174, the court has a judicial discretion whether to grant the application or not.

[9] This gives the court the power at the close of the state's case where it is clear that there cannot be a conviction, to discharge accused, on condition that the court is of the view that there is no evidence upon which a conviction can reasonably be based. The court therefore has to determine whether there is lack of evidence, and if so, whether a discharge should be granted. The court's discretion must be viewed subjected to Article 12 of the Namibian Constitution, which has not rendered the court's discretion incompetent or non-existent. The Constitution does not affect the court discretion when considering section 174 application.

[10] It must be expressly pointed out that Article 12(1)(f) of the constitution provides the protection against self incrimination to an accused for not being compelled to give evidence against himself.

[11] When an application is awarded, an accused is still left with an option of giving evidence or to remain silent.

[12] In *S v Mqayi*, an unreported case from the Ciskei High Court, White J, stated that the cornerstone of an open and democratic society, is a system of justice which is fair both to the accused, the prosecution and the administration of justice as a whole.

[13] If an accused is placed on his defence, neither he nor his co-accused is compelled to testify against him.

[14] An application for a discharge is governed by s174 of the Act, which states: "Accused may be discharged at close of case for prosecution – '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.'

[15] The words “no evidence” in s174 means no evidence upon which a reasonable court, acting carefully, may convict an accused. It is hereby referred to *S v Khanyapa*, 1979(1) SA 824 (A) at page 838F; *S v Nakale* 2006 (2) NR 455 (HC) at page 457; *S v Teek (S v Teek 2009(1) NR (SC)*.

[16] There are different views regarding the consideration of credibility at the close of the state’s case. In *S v Teek*, Brand AJA, on page 5 states “Somewhat more controversial is the question whether credibility of the state witnesses has any role to play when a discharge is sought under this section. But the generally accepted view both in Namibia and in South Africa, appears to be that, although credibility is a factor that can be considered at this stage, it plays a very limited role. If there is evidence supporting a charge, an application for a discharge can only be sustained if that evidence is of such poor quality that it cannot, in the opinion of the trial court, be accepted by any reasonable court. Put differently, the question remains: is there, having regard to the credibility of the witnesses, evidence of which a reasonable court may convict?”

[17] By applying these principles to the facts in this case before court, it could be determined whether the evidence adduced during the state’s case, is sufficient to put the accused on their defence.

[18] Regarding count 1, that is in respect of accused 1 and accused 2, the accused are charged with fraud, alternatively theft. It is alleged that the representation was made to the motor vehicle accident fund (MVAf) that accused 2 was unemployed, and had no source of income. Furthermore that the husband of accused 2 earned N\$ 3050.

[19] Evidence was led by the state to that effect. It is also pointed out that the MVAf acted under this representation.

[20] It is indeed so that during cross-examination, witnesses were deviating from their evidence in chief and were also inconsistent. However, the inconsistencies were not of such a nature that would demolish the state’s case in its entirety.

[21] It is indeed so that the claims were mainly dealt with by the personnel of accused no1 at his office, but coming from the superiority of accused no 1, it is to be believed that it is on instruction of accused no 1.

[22] Regarding counts 2,3,4,5,6, in respect of accused 1 and accused 3, it is alleged by the state that the representations were made to MVAf as result that MVAf ought to suffer a potential of NS 202 875,00. Evidence was led by the state as to how affidavits came into existence, and apparently how false information

contained in such affidavits. The state led evidence of witnesses to the effect that they never made these affidavits.

[23] As a result of such representation, the MVAF acted thereto.

[24] Regarding counts 7 and 8, it is alleged that accused 1 assisted the complainant in claiming for compensation from the MVAF. A certain amount was paid by the MVAF, but not all the money was given/handed over to the complainant. It is indeed so that the complainant is illiterate and was not aware of money that was not given to her. However, the question remains, what happened to this money? Several witnesses testified to this effect how the complainant came to the office of accused 1, up to the stage where the money was deposited. It is clear that there are allot of inconsistencies and irregularities in the evidence adduced by the state, but as already stated, at this stage credibility does not determine whether a *prima facie* case was established or not.

[25] Respecting count 8, evidence was led as to how the complainant was told as to the receiving of money. Even this evidence is questionable regarding credibility. However the law is clear that credibility only comes into play if the evidence is of such poor quality that a court must disregard such evidence.

[26] I am of the opinion, that in this instance, evidence was placed before court by the state as to these events, regardless the manner in which this evidence was scrutinized during cross-examination.

[27] In respect of count 9, it is clear from the evidence that on face value, the accused attempted to misrepresent to the MVAF as to injuries sustained and the status of the accused, ie why would they submit a photograph to the MVAF if the missing arm has nothing to do with the accident.

[28] Although the defence, during cross-examination, showed to this court as to how the misunderstanding could have occurred, it is not established as a fact, as these so called misunderstanding are instructions put to the witnesses.

[29] In count 10 it is alleged by the state that accused 1 made misrepresentations to the MVAF, by submitting statements to the Fund which was not true. Evidence was adduced by the state that such statements were not made by the deponents and the contents thereto was not the correct state of affairs.

[30] Although, during cross-examination, there were discrepancies, the fact remain that the MVAF acted on these statements and stood to suffer potential loss due to such representations.

[31] In respect of count 11, evidence was adduced that an affidavit of Otto Petrus, was never signed by Otto Petrus. It is therefore clear that the said document was forged.

[32] Counts 12,13,14,15, relates to same claim of Erastus Shindume. This claim was attended to by the office of accused 1, whereby Ndinela Nangha was assisted by the office by accused no 1. It is clear from the evidence that the said Ndinela Nangha died on 19/2/2001, being the claimant. The state also presented evidence that accused 1 proceeded preparing the claim although the claimant already died. Affidavits were drafted in the name of Ndinela Nangha, after she died. Such affidavits were submitted to the MVAF, whereby latter acted thereto.

[33] According to the evidence led by the state, accused 5 assisted, in that he informed his aunt, Hilma Kristiaan that she is required at the office of accused no1. Furthermore, evidence was led by the state that the money that was paid out by the MVAF, was for a specific purpose, but did not serve its purpose.

[34] During this trial, accused 6, whose involvements was also pointed out, passed away. Nevertheless, the MVAF acted on such false information.

[35] Regarding count 16, it is clear that the proceedings were stopped by the prosecution against several of the accused, but not against accused 1 and accused 8. It is also clear from the evidence that accused 8 did not in itself defraud the MVAF. However evidence was led that the information provided by accused 8, in the line of duty, was incorrect. The office of accused no1 then prepared the claim. The MVAF then acted on such false information. This false information led to the processing of the claim by the Fund.

[36] It is clear from the evidence led by the state, although the evidence does not follow in sequence, although there are allot of irregularities, although there are various discrepancies, the court is of the opinion that the state presented a case of *prima facie* case.

[37] In the result I make the following order:

The application in terms of Section 174 is therefore dismissed.

Simpson

Acting

APPEARANCES

STATE: E Marondedze
Office of the Prosecutor-General

FIRST ACCUSED: Mr L Botes
Instructed by Shikongo law Chambers,
Windhoek

SECOND and FIFTH ACCUSED: Mr Kamanya
Instructed by Directorate of Legal Aid,
Windhoek

THIRD ACCUSED Mr Neves
Instructed by Directorate of Legal Aid,
Windhoek

FOURTH ACCUSED Mr Basson
Instructed by Directorate of Legal Aid,
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EIGHTH ACCUSED Mr Shikongo
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