REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: SS 50/2009

DATE: 15/03/2011

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

MASONDO, SICELO Applicant

and

THE STATE Respondent

In re:

THE STATE

and

NKOSINATHI MTHEMBU Accused 1

SICELO MASONDO Accused 2

CHAMPION LEBOGANG MALATSI Accused 3

APPLICATION BY ACCUSED 2 FOR DISCHARGE IN TERMS OF SECTION 174 ACT 51 OF 1977 IN RESPECT OF COUNTS 8 AND 9

KGOMO, J:

[1] Accused 2 together with his two co-accused stand arraigned in this Court on nine (9) charges, namely one count of murder, six (6) counts of robbery with aggravating circumstances, one count of unlawful possession of firearm(s) and one count of unlawful possession of ammunition.

[2] The unlawful possession of firearms in Count 8 and Count 9 is unlawful possession of ammunition.

[3] These last two mentioned charges related to the confiscation by the police of an unlicensed firearm and ammunition at one Themba Dladla's residence on the night of 7 October 2008. The firearm was found hidden inside an operational DVD recorder.

[4] At the closure of the State's case accused 2 is now applying for his discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977, submitting that there is no *prima facie* case linking him to Counts 8 and 9.

[5] It is common cause that the State led evidence against accused 2 on these two counts through three (3) witnesses, namely, Themba Dladla Inspector Joubert and Inspector Erasmus.

[6] Accused 2's argument is that there is no evidence linking him to both counts, alternatively, that if there is evidence alluding to him having been in possession of a firearm and ammunition on the night of 7 October 2008, then it was of such a poor quality that it would be an injustice to expect him to remain standing in jeopardy or on trial on the two counts.

[7] Both counsels (for the State and accused 2) have favoured this Court with Heads of Argument for and against this application and I am indebted to both of them for the help they provided. The only unfortunate point is that the Heads reached me later than the agreed upon dates and I could thus not read them before *viva voce* arguments were advanced in court.

[8] For the record, the accused's Heads of Argument ought to have reached me by the end of the day on Wednesday 9 February 2011 but could only do so on Friday 11 February 2011 at around 15h30. The State's responses ought to have been in by Friday 11 February 2011 but could only be handed in today (Monday 14 February 2011) at 09h50, which is the date of arguments and same should have started at 10h00.

[9] After arguments and submissions I was consequently forced to stand the matter down until 15 February 2011 and at 09h45 for a ruling.

[10] The witness Themba Dladla was duly warned in terms of section 204 of the Criminal Procedure Act before he testified.

[11] It is further common cause that evidence relating to these charges was led in the trial-within-a-trial to determine the admissibility of pointing out made by accused 2. The material evidence was led on behalf of the State through Inspectors Joubert and Erasmus.

[12] According to Inspector Joubert, after arresting accused 1 and 3 in connection with this matter at Erasmia Police Station he followed information gleaned from accused 1 herein and drove to Themba Dladla's home at Diepsloot. He was a passenger in Inspector Erasmus's white Volkswagen Polo with accused 1 and 3 as the only other passengers. There were other police vehicles.

[13] They found Themba at home and he agreed to take them to accused 2's home. At accused 2's home they broke down the door to accused 2's shack and arrested him.

[14] During his arrest the police asked about the firearm and accused 2 told them it was at Themba's place. They drove back to Themba's home where in the presence of accused 2 Themba took out a 9 mm Norinco pistol with ammunition out of a DVD player which was still in good playing order.

[15] Inspector Erasmus corroborated Inspector Joubert's version hereon.

[16] Themba Dladla's evidence was that accused 2 came to his home on 29 September 2008 and asked him to keep a firearm for him. He ultimately agreed and a 9 mm Norinco pistol was secreted inside or at the back of a DVD player after the screws were loosened. After it was put there the back was only closed but the screws were not screwed back. The DVD continued working despite this foreign object inside it. Accused 2 promised to come and fetch it at a later stage. No time frame was discussed.

[17] On the early morning of 8 October 2008 the police arrived at his home looking for his sibling, one Thokozani. He allegedly told them he did not know where he was at that stage. The police then drove with him to accused 2's place where the latter was arrested. The issue of the firearm came up and according to this witness accused 2 told him (Themba) to give same to the police. He, accused 2 and the police then drove back to Themba's home where at accused 2's bidding he removed the Norinco pistol from the DVD player and handed it to the police.

[18] Themba's evidence was that the firearm was specifically handed over to two (2) black police officials but that there were also white policemen around.

[19] Cross-examination of this witness centred mostly on the fact that he and accused 2 were enemies because the latter had enticed or taken a girlfriend away from him. Themba denied this.

[20] In his defence accused 2 reiterated that when the firearm was retrieved from Themba's home he was not in the room where it was found.

[21] Inspector Erasmus's version on this aspect is that they decided to return to Themba's home to retrieve the firearm because when he interviewed accused 2 at his home he stated to him that the firearm was at Themba's place.

[22] Accused 2's story was also that he did not lead the police to Themba's home. However, when counsel for the defence for accused 2 questioned Inspector Erasmus he put it to him as follows:

> "*… Sir, when you left Erasmia Police Station heading for Diepsloot, you were not looking for Accused 2 at the time. You only started looking for him after meeting Themba.*"

[23] Adv Dikolomela proceeded immediately to ask the following follow-up question when Inspector Erasmus responded by saying Inspector Joubert would know that and that he heard that Sicelo (accused 2) was the wanted person:

> "*You only started looking for Accused 2 after Themba said both of them were involved in the handling of an unlicensed firearm …*"

To which Inspector Erasmus said the interview with accused 2 took place inside his room and he was standing some distance at the threshold or mainly outside and did not hear the contents of the interview.

[24] The State strongly argued for the dismissal of this application for discharge in terms of section 174 while the accused submitted that the probabilities of people who were not friends and who had a bone to crunch over a woman would not trust each other with the safekeeping of an unlicensed firearm. State counsel further argued hereon that the issue of probabilities did not belong to the stage of section 174 application but at the end of the trial.

[25] Section 174 of the Criminal Procedure Act reads as follows:

> "***174. Accused may be discharged at the close of the case for the prosecution****.*
>
> *If at the close of the case for the prosecution at any trial, the court is of the opinion that <u>there is no evidence</u> 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.*" (my underlining)

[26] The words "*no evidence*" in the section have been interpreted to mean:

"*… no evidence upon which a reasonable court or man acting carefully may convict.*"

Compare: *S v Khanyapa* 1979 (1) SA 824 (A) at 838.

S v Mpetha 1983 (4) SA 262 (C) at 263H.

S v Swartz and Another 2001 (1) SACR 334 (W).

[27] It is common cause that where an accused is charged with multiple charges, the court may discharge him on one or more of those charges if there is no evidence on them at the close of the State case.

See: *S v Manekwane* 1996 (2) SACR 264 (O).

[28] However, where more than one accused are charged with the same offence(s) the court may discharge him on one or more of those charges if there is no evidence connecting him or referring to him or if it is in the interests of justice to do so.

[29] Similarly, where the only evidence or evidential material on record against an accused person at the end of the State case is an informal admission made by the accused while pleading not guilty, such does not amount to evidence and the court may, *mero motu* or upon application by such accused, discharge him in terms of section 174.

See: *S v Mashele* 1990 (1) SACR 678 (T).

[30] In our case the accused did not disclose the basis of his defence and as such the issue of admissions during the pleading stage does not arise.

[31] Another aspect raised in the arguments is whether the credibility of witnesses should play a part at this stage of the proceedings. The defence (accused 2) submitted that credibility definitely plays a part. On behalf of the State it was submitted and argued that although credibility may play a part, at this stage its role should be a limited one.

[32] In *S v Mpetha (supra)* it was held that credibility would play a very limited role and evidence led ignored only if it is of such a poor quality that no reasonable person could possibly accept it.

[33] There was a difference of opinions in several other judgments of various courts about this aspect: In *S v Kritzinger* 1952 (2) SA 401 (W) as well as in *S v National Board of Executors Ltd and Others* 1971 (3) SA 817 (1) at 819 and *S v Dladla and Others (2)* 1961 (3) SA 921 (D) the courts ruled that even where the evidence at the end of the State case was not such that a reasonable person might convict, the court was still entirely justified to refuse to discharge an accused if it is of the view that there is a possibility that the case for the State may be strengthened by the defence case. The above view was crystalised in *S v Shuping and Others* 1983 (2) SA 119 (B).

[34] On the other end of the spectrum in *S v Mall* 1952 (2) SA 401 (W) it was held that it is wrong to place an accused on his defence in circumstances

similar to those sketched out in *Kritzinger, National Director of Executors, Dladla* and *Shuping* and thereby expose him or her to the risk of incrimination on his own or by a co-accused.

[35] In *S v Lubaxa* 2001 (4) SA 1251 (SCA) the Supreme Court of Appeal held among others that where there is a single accused and there is, at the close of the case for the prosecution no possibility of a conviction unless the accused testifies in a self-incriminatory manner, the failure to discharge (if need be, *mero motu* by the court) is a breach of the constitutional guarantee of fairness which will usually lead to the setting aside of the conviction (if it eventually ensues) which would have been based solely on the self-incriminatory evidence.

[36] In this case we are not dealing with a single accused. There are three of them.

[37] In terms of section 174 there is no obligation on the court to discharge an accused. There is a competence to do so. The court is called upon to act judicially, with sound judgment and in the interests of justice. A judicial officer may be advised not to place too much stress or emphasis on the say-so or decisions of other judges in previous cases *per se*. The facts and circumstances of each case should dictate what route to follow and the judge should be led to an equitable, proper and/or just end result by the specific circumstances and evidence inherent or led in the case as coloured and/or informed by recognised rules, practices, laws and procedures.

[38] It was held in *S v Lavhengwa* 1996 (2) SACR 453 (W) that processes under section 174 translate into a statutorily granted capacity to depart discretionarily in certain specific and limited circumstances from the usual course a case should take: It is meant to cut off the tail off a superfluous process. Such a capacity does not detract from either the right to silence or the protection against self-incrimination. If an acquittal flows at the end of the State case, the opportunity or need to present evidence by the defence on the charge(s) in issue falls away. If discharge is refused the accused still has the choice whether to testify or close his case on the charge(s) in issue. There is no obligation on him to do either. Once the court rules that there is no *prima facie* case against an accused, there also cannot be any negative consequences as a result of the accused's silence in this context.

Compare: *S v Chogagudza* 1996 (3) BCLR 429 (ZC).

[39] There is no need to lay down rigid or fixed rules in advance for an infinite variety of factual situations which may or may not arise. It is thus also unwise to attempt to banish issues of credibility in the assessment of issues during section 174 proceedings or confine judicial discretion to "*musts*" or "*must nots*".

[40] That is the reason why in later decisions of the courts, notably, *S v Mathebula and Another* 1997 (1) SACR 10 (WLD) at 35e; *S v Ndlangamandla and Another* 1999 (1) SACR 391 (W) and *S v Motlhabane and Others* 1995 (2) SCR 528 (B) the general consensus was that where

there is no evidence upon which a court acting carefully and properly exercising its discretion may or might convict, then a discharge may follow, *mero motu* or on application.

[41] In this application it is common cause that evidence was led in court for the State and for the defence. Consequently, we are not dealing with a situation where no evidence was led. Both the State and the defence made use of their right of cross-examination and attacked the versions of their adversaries. At the end of the day, there are two versions before this Court on the issues relating to Counts 8 and 9.

[42] The defence is asking this Court to resort to the probabilities at this stage while the State argued that this is an aspect that should be left for final closing arguments.

[43] What is of concern to this Court relating to accused 2 and Themba Dladla is why the police did not demand the firearm directly from Themba when they arrived at his home. Furthermore, if Themba did not lead them to accused 2's home, why did they drive directly to it after picking up Themba. What made the police decide to go and collect the firearm from Themba's home after accused 2 was arrested? According to Inspector Joubert it was the interview with accused 2 in the presence of Themba that led them back to the latter's home where the firearm was produced.

[44] The gist of the matter herein is that as opposed to situations where there is no evidence on record against accused 2 relating to Counts 8 and 9,

in this case there is indeed evidence led against him which, if found to be cogent and credible, may amount to *prima facie* case against him. I must make it clear that I am not saying the accused's guilt on these two counts have been proved beyond a reasonable doubt. I am saying the evidence led, when juxtaposed to the forensic evidence and the evidence of pointing out which has already been accepted against accused 2 is such that it calls for a reply.

[45] The evidence further, is such that it will have to be evaluated holistically, taking all probabilities and surrounding circumstances into account.

[46] Such a stage where probabilities come into reckoning in my view and finding has not yet been reached. That stage belongs at the end of the trial. The accused has every right to close his case on these counts if he believes the evidence thereon is of such a poor quality that a reasonable court, acting carefully, cannot convict thereon.

[47] Under those circumstances this Court would then evaluate the totality of the evidence led, that is, the entire State case and the entire defence case and then apply the probabilities and preponderances inherent therein or emanating therefrom.

[48] I should mention here that in arriving at the decision and finding herein I have taken into account the demeanours and credibilities of all the State witnesses and accused 2.

[49] As a consequence it is my considered view and finding that accused 2 cannot be granted a discharge in terms of section 174 in respect of Counts 8 and 9 at this stage.

[50] The application for discharge in terms of section 174 by accused 2 is therefore refused and dismissed.

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N F KGOMO
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

FOR THE STATE	:	ADV D BARNARD
FOR ACCUSED 2	:	ADV T L DIKOLOMELA
DATE OF APPLICATION	:	14 FEBRUARY 2011
DATE OF RULING	:	15 FEBRUARY 2011