IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case No: 372/2000

In the matter between:

MICHAEL LUBAXA Appellant

and

THE STATE Respondent

Coram: Harms, Scott, Mpati, JJA, Conradie and Nugent, AJJA

Heard: 31 August 2001

Delivered: 25 September 2001

Summary: Criminal procedure – discharge at close of prosecution case – when required - whether on facts appellant proved to be guilty.

J U D G M E N T

NUGENT, AJA:

[1] Near to the alluvial diamond deposits of the remote west coast is the small town of Port Nolloth. Almost directly east of Port Nolloth, in the arid interior of Namaqualand, is Steinkopf, situated on the main road linking Cape Town to Namibia. To the south along that road is Springbok, and beyond that Vanrhynsdorp.

[2] On the night of Friday 15 May 1998 a white minibus drew up in Sizamile, a township on the outskirts of Port Nolloth. There were seven men in the minibus amongst whom was the appellant. The minibus remained in Sizamile until the following night at about 8.00 pm when the men drove off in it together.

[3] At that time Mr Joaó Carlos Moutinho and his girlfriend, Ms Vivian Lotz, were alone in a house in Port Nolloth watching television. Moutinho was

a resident of Namibia but he frequently visited Port Nolloth for extended periods. His BMW motor vehicle was parked in a carport alongside the house. Shortly after 9.00 pm they were both shot dead by one or more of the seven men. Lotz was shot three times and Moutinho was shot seven times. All the shots might have been fired from the same pistol.

[4] The murderer or murderers drove off in Moutinho's motor vehicle towards Sizamile. There were five men in the vehicle as it approached the township. The other two men, meanwhile, had been waiting in the minibus in an open area alongside the road just outside Sizamile. As the motor vehicle approached them its lights were flashed, then it stopped, turned around, and drove for a short distance into the township. It then turned around again and sped off in the direction of Steinkopf. The minibus followed after it.

[5] Approximately midway between Port Nolloth and Steinkopf the motor vehicle was driven off the road and abandoned. The five occupants flagged down a passing motorist who drove them to Steinkopf. They explained to him that their bus had inadvertently passed them by. At Steinkopf they persuaded the motorist to drive them on to Springbok where they were left at the home of a certain Mr Dawid van Rooyen, who in turn drove them to Vanrhynsdorp. There they were reunited with their two companions who were waiting with the minibus at a petrol station.

[6] The bodies of Moutinho and Lotz were discovered in the house the following morning. Lotz was sprawled face-down on the floor of one of the bedrooms alongside a cupboard in which there was a safe. Moutinho was probably alongside the safe at the time that he was shot, but managed to make his way to the main bedroom before he succumbed, and his body was found

lying on the bed. On the wall, immediately above the bed, the word "cowboy" was scrawled in blood. Apart from the motor vehicle, various items of property belonging to Moutinho were stolen from the house, including money that had been in the safe.

[7] The appellant and six others were arrested and indicted in connection with the crimes. By the time the matter came to trial two of them (Mr Andile Nqwata and Mr Michael Vhara) had died. The remaining five were tried in the Cape of Good Hope High Court before N. Erasmus AJ and an assessor. One of the accused (the second accused) was acquitted of all the charges, and another (the first accused) was convicted only of theft of the motor vehicle. The appellant and the fourth and fifth accused were convicted of two counts of murder, robbery with aggravating circumstances, and theft. They were each sentenced to two terms of life imprisonment for the crimes of murder, twenty

years' imprisonment for robbery, and five years' imprisonment for theft (to run concurrently with the sentence for robbery). The trial court granted the appellant leave to appeal to this Court against the convictions and the sentences.

[8] The facts that I have outlined thus far all emerged, directly or by inference, from the prosecution evidence. When the prosecution closed its case all the accused applied to be discharged in terms of s174 of the Criminal Procedure Act 51 of 1977. The applications were refused. One of the grounds of appeal, and indeed the principal reason why leave to appeal was granted, is that the trial court is said to have misdirected itself by refusing to discharge the appellant at that stage of the trial.

[9] The refusal to discharge an accused at the close of the prosecution's case entails the exercise of a discretion and cannot be the subject of an appeal (Hiemstra *Suid-Afrikaanse Strafproses* 5de uitg deur Kriegler bl 825). The

question that is raised in this appeal against the conviction, however, is whether s 35(3) of the Constitution, which guarantees to every accused person the right to a fair trial, has removed that discretion. If it has, and the trial court was bound as a matter of law to discharge the appellant in the interests of a fair trial, then the failure to do so would amount to an irregularity which may vitiate the conviction.

[10] Section 174 of the Act repeats in all material respects the terms of its predecessors in the 1917 and 1955 Criminal Codes. It permits a trial court to return a verdict of not guilty at the close of the case for the prosecution if the court is of the opinion that there is no evidence (meaning evidence upon which a reasonable person might convict: *S v Khanyapa* 1979 (1) SA 824 (A) at 838F-G) that the accused committed the offence with which he is charged, or an offence which is a competent verdict on that charge.

[11] If, in the opinion of the trial court, there is evidence upon which the accused might reasonably be convicted, its duty is straightforward - the accused may not be discharged and the trial must continue to its end. It is when the trial court is of the opinion that there is no evidence upon which the accused might reasonably be convicted that the difficulty arises. The section purports then to give the trial court a discretion - it may return a verdict of not guilty and discharge the accused there and then; or it may refuse to discharge the accused thereby placing him on his defence.

[12] The manner in which that discretion is to be exercised has always been controversial (see *R v Kritzinger and Others* 1952 (2) SA 401 (W); *R v Herholdt and Others (3)* 1956 (2) SA 722 (W); *R v Mall and Others (1)* 1960 (2) SA 340 (N); *S v Heller and Another (2)* 1964 (1) SA 524 (W) esp. 542G-H). In *S v Shuping and Others* 1983 (2) SA 119 (B) Hiemstra CJ reviewed

the differing approaches that had been taken by other courts until then and concluded that a trial court ought to act as follows (at 120H – 121I):

> "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".

[13] Although that formulation has probably been applied in countless subsequent cases it has not met with universal approval (e.g. *S v Phuravhatha and Others* 1992 (2) SACR 544 (V); Skeen: 'The Decision to Discharge an Accused at the Conclusion of the State Case: A Critical Analysis' 1985 (102) *SALJ* 286) and since the advent of the new constitutional order it has been said on various occasions that it is in conflict with the accused's right to a fair trial and cannot be sustained (e.g. *S v Mathebula and Another* 1997 (1) SACR 10

(W) but cf. *S v Makofane* 1998 (1) SACR 603 (T); *S v Jama and Another* 1998 (4) BCLR 485 (N); Schwikkard *Presumption of Innocence* 125 - 129; Schmidt *Bewysreg* 4de uitg 94 – 97; Du Toit et al: *Commentary on the Criminal Procedure Act* 22-32F 22-32I).

[14] The criticism of *Shuping's* case relates to the second leg of the enquiry, which permits an accused person to be placed on his defence, even when there is no case to answer, merely in the expectation that "the defence evidence" might supplement the prosecution's case. To place the accused on his defence in those circumstances has usually been said to conflict with the presumption of innocence (which is a concomitant of the burden of proof: per Kentridge J in *S v Zuma* 1995 (2) SA 642 (CC) at par 33), or to infringe the accused's right of silence and his freedom to refrain from testifying (e.g. *S v Mathebula, supra*, at 35c; Schwikkard, at 129; Schmidt, at 95).

[15] The prosecution's case is capable of being supplemented by "defence evidence" in either of two ways and it is important to distinguish them. The accused might enter the witness box and proceed to incriminate himself (that possibility arises typically, but not exclusively, when the accused is tried alone); or where there is more than one accused, he might be incriminated by a co-accused.

[16] It has been said that in the former case the remedy of the accused is in his own hands because "all he has to do is to close his case" and that if he chooses to give incriminating evidence he has only himself to blame (*R v Mkize and Others* 1960 (1) SA 276 (N) at 281G-H) but I think that is too simplistic an approach to the position in which an accused person finds himself, and ignores the reality of most criminal trials in this country. To properly make the decision to close his case the accused needs first to make an accurate

assessment of the weight of the evidence for if he miscalculates on that score he has no second chance. Then he needs to be sufficiently familiar with the nature of the burden of proof to appreciate that he is not at risk if he fails to testify. There must be very few criminal defendants in this country (most of whom are unrepresented at their trials) who are up to the task.

[17] In a number of cases, some of which were decided before the Constitution came into force, it has been held that it is the duty of a trial court in those circumstances *mero motu* to discharge an unrepresented accused (*S v Peta* 1982 (4) SA 863 (O); *S v Zulu* 1990 (1) SA 655 (T); *S v Amerika* 1990 (2) SACR 480 (C); *S v Mashele* 1990 (1) SACR 678 (T); cf *S v Makofane* 1998 (1) SACR 603 (T) which is more qualified). The rationale for those decisions was little more than the profound sense of injustice that is evoked by the spectacle of an accused bringing about his own conviction solely through his

unfamiliarity with legal procedure. More recently it was said in this Court that if there is such a duty it extends also to an accused who is represented (*S v Legote and Another* 2001 (2) SACR 179 (SCA) and that must indeed be so.

[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.

[19] The right to be discharged at that stage of the trial does not necessarily arise, in my view, from considerations relating to the burden of proof (or its

concomitant, the presumption of innocence) or the right of silence or the right not to testify, but arguably from a consideration that is of more general application. Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common law principle that there should be "reasonable and probable" cause to believe that the accused is guilty of an offence before a prosecution is initiated (*Beckenstrater v Rottcher and Theunissen* 1955(1) SA 129 (A) at 135C-E), and the constitutional protection afforded to dignity and personal freedom (s 10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold. That will pre-eminently be so where the prosecution has exhausted the evidence and a

conviction is no longer possible except by self-incrimination. A fair trial, in my view, would at that stage be stopped, for it threatens thereafter to infringe other constitutional rights protected by s 10 and s 12.

[20] The same considerations do not necessarily arise, however, where the prosecution's case against one accused might be supplemented by the evidence of a co-accused. The prosecution is ordinarily entitled to rely upon the evidence of an accomplice and it is not self-evident why it should necessarily be precluded from doing so merely because it has chosen to prosecute more than one person jointly. While it is true that the caution that is required to be exercised when evaluating the evidence of an accomplice might at times render it futile to continue such a trial (Skeen, *supra*, at 293) that need not always be the case.

[21] Whether, or in what circumstances, a trial court should discharge an accused who might be incriminated by a co-accused, is not a question that can be answered in the abstract, for the circumstances in which the question arises are varied. While there might be cases in which it would be unfair not to do so, one can envisage circumstances in which to do so would compromise the proper administration of justice. What is entailed by a fair trial must necessarily be determined by the particular circumstances. In the present case those circumstances do not exist, for the reasons that follow, and I do not think it is appropriate to deal with the problem.

[22] The learned judge *a quo* appears to have relied upon *Shuping's* case to guide him in reaching his decision but the manner in which it was applied is not altogether clear. The learned judge must have been of the opinion that there was no evidence upon which the appellant might reasonably be convicted (a

finding to which I will return) for he then purported to exercise a discretion against discharging him. As to the grounds upon which he exercised that discretion the learned judge said no more than the following:

> " … by die uitoefening van hierdie diskresie moet die Hof bepaal of op die totaliteit van die getuienis aan die einde van die saak reg behoort te geskied. Ek het derhalwe my diskresie uitgeoefen en ontslag vir al die beskuldigdes geweier … "

[23] What the learned judge might have had in mind is nevertheless not of any moment because he ought not to have concluded that he was called upon to exercise a discretion in the first place. Clearly there was evidence upon which a court might reasonably have convicted the appellant (and all his co-accused) and the appellant was for that reason not entitled to be discharged.

[24] The evidence presented by the prosecution, which I summarised earlier, justified an inference, in the absence of an alternative explanation, that all the

accused associated in a common purpose to commit the crimes. Their arrival together in Port Nolloth, their continued association until the following night, their departure together shortly before the crimes were committed, their departure together after the crimes were committed, and their rendezvous at Vanrhynsdorp, without any sign of disassociation by any of them, all point to collaboration in a plan to rob and murder the deceased. There was nothing in the evidence that was inconsistent with that construction, nor did the evidence suggest that there might be another. If anything was lacking in the evidence at that stage it was an innocent explanation. I do not think the appellant can be said to have been denied a fair trial in the circumstances by being placed on his defence and the appeal on that ground must accordingly fail, but for the reasons that follow that is not decisive of this appeal.

[25] An account was indeed forthcoming from the evidence of the appellant and two of his co-accused. The salient features of that account emerged from the evidence of the first accused. What emerged is that Moutinho was an illegal dealer in diamonds. He had often in the past purchased diamonds from the fourth accused, who once worked at a diamond mine on the west coast, where he mastered the art of pilfering diamonds. He regularly sold his pilfered diamonds to Moutinho and at times introduced him to other sellers. Accused four was known in Namaqualand by a name which was spelt “Karboy” in the record, but which might just as well have been spelt “Cowboy” (the word that was written in blood on the wall above Mr Moutinho’s bed) bearing in mind how that word would sound when pronounced in an accent common in this country. At the time the fourth accused was unemployed and living on the Cape peninsula, which is also where all the other accused lived.

[26] The first accused was a taxi driver by occupation. On an occasion he was approached by the deceased accused, Nqwata, who said that he had diamonds to sell and sought the assistance of the first accused to find a buyer. The first accused had no knowledge of such matters but thought that the second accused might be able to assist and he introduced him to Nqwata. The second accused in turn took them to meet the fourth accused. The fourth accused telephoned Moutinho, and upon establishing that he was interested in purchasing the diamonds, told the others that they would have to travel to Port Nolloth to transact the sale. The first accused agreed to drive them to Port Nolloth for a fee which was to be paid once the transaction had been concluded. Vhara was a friend of the first accused who often accompanied him on long trips and the first accused invited him along. The first accused coincidentally met up with the appellant who decided to go along for the ride.

The fifth accused was introduced by Nqwata, and the party of seven left for Port Nolloth.

[27] They arrived in Sizamile as I have described and spent the remainder of that night and the following day in inconsequential activities. The fourth accused contacted Moutinho and arranged that they would visit him at his house in order to transact the sale. Moutinho told him not to arrive by vehicle for fear that it might attract the attention of the police. There is some conflict in the evidence of the accused as to the manner in which they left Sizamile that night, and what they did immediately thereafter, but at some stage two of them (Vhara and the second accused) remained with the minibus while the other five proceeded on foot to Moutinho's house. At that stage, at least, their intention was only to sell the diamonds.

[28] That explanation for the visit to Moutinho's house might sound somewhat suspect, particularly in view of what occurred thereafter, but the trial court found that it might reasonably be true and that must necessarily be the starting point for assessing the remaining evidence.

[29] There is conflicting evidence as to what occurred after the five men arrived outside the house. According to the first accused, the fourth accused announced that only those who were directly involved in the transaction should enter the house, and accordingly he (the first accused) remained outside while the other four proceeded towards the entrance of the house. His evidence that he (the first accused) remained outside the house was supported by the fourth and fifth accused. However the appellant said that he too remained outside the house with the first accused, and in that respect his evidence was supported by the fifth accused, but not by the first and fourth accused.

[30] The accounts given by the fourth and fifth accused of what occurred inside the house bear little resemblance to one another. Both said that they and Nqwata (the fourth accused also included the appellant) were admitted to the house by Moutinho and were introduced to him by the fourth accused. They proceeded to the sitting room, where they sat down, and Nqwata produced the diamonds. After examining the diamonds Moutinho enquired what the price was, to which Nqwata responded that he wanted R100 000. Moutinho said that he was not prepared to pay more than R60 000 and some discussion then ensued. From that point on the evidence of the fourth and fifth accused diverges considerably, both from that of the other as well as from reality.

[31] The fourth accused said that Nqwata and the fifth accused suddenly drew firearms and confronted Moutinho. When he (the fourth accused) attempted to intervene the appellant pressed a firearm to his head. He was

then tied up while the other three robbed and murdered the deceased. He was then forced into Moutinho's motor vehicle. The fifth accused, on the other hand, said that it was Nqwata alone who robbed and murdered the deceased, and that he and the fourth accused were forced to lie on the floor while this was taking place. The evidence of both the fourth and fifth accused was rejected by the trial court, and for good reason - the explanations given by both of them were far-fetched.

[32] The trial court found that although the evidence of the first accused was not altogether satisfactory, and in some respects his evidence was untrue, it was nevertheless reasonably possible that at the time the men arrived at the house they shared no common purpose to commit murder and robbery: it was also reasonably possible that the first accused remained outside the house. On those grounds the first accused was not convicted of murder and robbery but

only of theft (insofar as he associated himself with the others after the vehicle had been stolen.) On similar grounds the second accused was not convicted at all.

[33] With regard to the appellant, the trial court found that he was present in the house when the crimes were committed, and it inferred from "al die voorafgaande omstandighede en feite wat gevolg het tot die moordtoneel" that the appellant associated himself with the events that occurred inside the house. Precisely what facts and circumstances the trial court had in mind was left unexplained. It is difficult to see what preceding facts and circumstances could have established a common purpose that was shared by the appellant but not by the first and second accused. However it is not necessary to consider that aspect of the finding because in my view the trial court erred in any event in

finding that the appellant was present in the house. [34] On that issue the reasoning of the trial court was expressed as follows:

> "Indien al die getuienis in geheel evalueer word, is ons tevrede dat beskuldigde 1 se weergawe redelik moontlik waar is in soverre sy aanwesigheid ten tyde van die pleging van die moord aanbetref. *Dit volg uit hoofde van hierdie feitebevinding* dat ons bo redelike twyfel oortuig is dat beskuldigdes 1, 3, 4 en 5 en Andile na die moordhuis was op 16 Mei 1998. Beskuldigde 1 het buite gewag terwyl die ander die woning genader het. Beskuldigdes 3, 4, 5 en Andile het die woning binnegegaan … " [my emphasis].

[35] That reasoning is manifestly unsound. Accepting that the evidence of the first accused might reasonably be true what follows is not that the appellant *was* in the house, but only that he *might have been* in the house, and the evidence of the first accused provided no basis for finding as a fact that he was. The only other evidence that the appellant was in the house emanated from the fourth accused and could not be relied upon at all. What the trial court was left

with, then, was only evidence that the appellant was possibly in the house. In the absence of a prior common purpose (a finding which the trial court disavowed) that evidence was insufficient to convict the appellant of murder or robbery.

[36] As for the remaining charge of theft (which is a continuing offence) on his own account the appellant actively associated with those who were committing the offence by entering the vehicle when he could not but have known that the vehicle had been stolen. On that charge he was correctly convicted. It was not suggested in argument that any grounds exist for interfering with the sentence of five years' imprisonment that was imposed on that charge.

Accordingly

(a) the appeal against the convictions on charges 1 and 2 (murder) and charge 3 (robbery) is upheld and the convictions and sentences imposed on them are set aside.

(b) The appeal against the conviction and sentence on charge 4 (theft) is dismissed.

_____
NUGENT, AJA

Harms JA)
Scott JA)
Mpati JA)
Conradie AJA) concur