REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: CC 26/2012

In the matter between:

THE STATE

and

ALOYIS DITSHABUE **ACCUSED**

Neutral citation: *State v Ditshabue* (CC 26/2012) [2013] NAHCMD 261 (20 September 2013)

Coram: CHEDA J
Heard: 6, 7, 8, 9 and 13 August 2013
Delivered: 20 September 2013

Flynote: Circumstantial evidence – Inference sought to be drawn must be consistent with proved facts – Proved facts should exclude every reasonable inference save for the one sought – Prima facie case - Cardinal principle - Need for the State to adduce evidence sufficient to establish a fact or raise a presumption which unless disproved or rebutted obliges the court to place accused on his defence.

Flynote: Witnesses' statements – Minor contradictions – Not necessarily affect credibility.

Summary: Accused was married to the deceased and were living next to each other at Gobabis. Their relationship turned sour. The deceased was stabbed to death, but nobody witnessed this incident. The deceased's daughter and her boyfriend discovered her death and found accused kneeling next to the body. Upon seeing this, accused stabbed himself with a homemade knife and he fell down. These two witnesses ran away. The Police attended to the scene of crime later.

Summary: In order to secure a conviction based on circumstantial evidence, the court should draw an inference. Before such an inference is drawn, the court must be satisfied that:

1) The inference sought to be drawn is consistent with all proved facts, if it is not, it cannot be drawn and
2) The proved facts should be such that they exclude every reasonable inference from them, save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.

A prima facie case arises where the State has adduced sufficient evidence which establishes a fact or raises a presumption which if not disproved or rebutted obliges the court to put accused on his defence.

Minor contradictions on the State witnesses do not necessarily affect credibility. The historical and educational background of witnesses should be seriously considered when evidence is placed before the court. Mere omission on the part of the category of these members of society does not necessarily indicate dishonesty.

ORDER

The Application in terms of section 174 is hereby dismissed and the accused should be placed on his defence.

RULING

CHEDA AJ [1] At the close of the State's case, the accused through his defence counsel, Mr Visser made an application for a discharge in terms of section 174 of the Criminal Procedure Act 1977 (No 51 of 1977) which reads 'If, at the close of the case of 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'. Accused was charged with 2 counts of murder. He pleaded guilty to the first count, which plea was accepted by the State and therefore no issue arises therefrom. With regard to count 2, he pleaded not guilty to the charge of murdering his girlfriend Arita Kambende. The State produced the following exhibits: Exhibit B: post mortem report 94/2008 by Dr E. Shangula in respect of Marcella Ditshabue; Exhibit C: post mortem report No. 38/2011 in respect of Alida Kambende, Exhibit D: Namibian Police Scene of Crime Unit report No 27/08; Exhibit E: Namibian Police photo plan of scene of crime unit Gobabis CR 57/7/2011, Exhibit F: Pre-trial memorandum for both counts dated 2 March 2009; Exhibit G: Reply to States Pre-Trial memorandum dated 2 March 2009, Exhibit H: Affidavit by Dr F Kwenda; Exhibit I: Accused's warning statement and Exhibit 1: A homemade knife.

[2] The State opened its case by calling Regina Arikumbi. She told the court that she is a resident of Corridor 20, Gobabis. Her evidence was that she knows the accused as he was married to her daughter, the now deceased. The accused and deceased were always quarrelling with each other. Accused was always following the deceased armed with dangerous weapons. She also told the court that at one

stage she saw accused following the deceased armed with two spears. She further told the court that on another occasion, the accused threatened to kill her, together with members of her family and all their livestock. She reported this incident to the Traditional Authorities who unfortunately did not timeously intervene and the deceased was subsequently killed. This witness is illiterate, therefore cannot read or write.

[3] The next witness was Fulgentia Kambende (hereinafter referred to as 'Fulgentia'). She knows the deceased as she was her mother and also knows accused as he was her mother's boyfriend. She told the court that accused and her mother were living together at Epako, although accused had his own tent while her mother was staying in her own shack. She was also staying there with her boyfriend Willem Walters (hereinafter referred to as 'Willem').

[4] It was further her evidence that on this fateful day, she was at home in the morning with her boyfriend, when the deceased and the accused arrived separately from work. She made tea for them but accused refused to drink. Later on the deceased also prepared a meal which she offered to all of them including accused, who once again refused to eat. It was also her evidence that accused was not talking to anybody on that day. At about 09h00, she, together with her boyfriend left for the market where they attended to their private businesses. They returned at about 10h00. Upon their return to her mother's dwelling, her boyfriend was in front and she was behind him, but, very close to him. Willem opened her mother's dwelling and when she tried to enter, he pushed her backwards thereby refusing her entry. She saw her mother lying on the floor and accused was kneeling next to her holding a knife, produced in court as Exhibit 1 (supra). At that stage her boyfriend asked the accused what he was doing but he did not respond. He, however, stabbed himself on the left side of the chest with the knife he was holding. Upon realizing this, they ran away to report to the police. It was further her evidence that the knife in question was the same one which they had hidden because accused had always threatened to stab her mother with.

[5] Willem, also gave evidence. He testified that he was staying in Gobabis and that Fulgentia is indeed his girlfriend. On the day in question, he was at this home when accused and deceased arrived in the morning separately from work. Accused

did not talk to anybody but greeted him. His girlfriend made tea which was offered to all of them but accused declined the offer. He however drank it. The deceased, who was his mother-in–law cooked a meal which everyone ate except accused who again refused. He was moody and was not talking to anybody. He together with his girlfriend then left for the market leaving accused and deceased behind. Accused was in his own tent while the deceased was in her shack. They left at about 09h00 and returned at about 10h00. When they returned, he was walking in front of his girlfriend Fulgentia.

[6] When they approached his mother-in-law's shack, he opened the curtain and observed that accused was kneeling down besides the deceased and was holding a knife which he was pointing towards his left chest. Willem then asked the accused what he was doing, but did not respond. Accused then stabbed himself on the left side of the chest and fell down. He further stated that on seeing this he prevented his girlfriend from seeing what was in the room by pushing her away. They then ran away to call the police. It was further his evidence that even if it was dark inside the shack, he could see clearly what was happening inside as the shack could still let in light. Asked how the accused was, he described him as being very serious. Asked why they ran away, he told the court that they were afraid.

[7] He also identified the knife, Exhibit 1 as the knife which accused was holding on the day in question. He also stated that it was the same knife which they had hidden from the accused. They later came back after the police had arrived and observed that deceased and accused were lying next to each other and the knife was in between them.

[8] Under cross-examination, he was asked about the time of his arrival at the house which he gave as 10h00, but, it was now recorded as 12h00 noon by the police. His only explanation was that the police must have changed or written it without him telling them. He however maintained that it was during the morning hours and not at 12h00. He was however surprised by the police actions with regards to the change of time. He was adamant about the identity of the knife. He was also adamant that his time was accurate. He further told the court that the police did not ask him about the time when he saw accused stabbing the deceased, but, about their arrival at the shack. It was Willem and Fulgentia's evidence that the

police made a mistake with regards to time because according to them, the recording police detail was asking them questions and they were answering. They did not relate the whole story.

[9] Mr Venter, counsel for the accused questioned Willem about his relationship with the deceased which he alleged was frosty as the deceased did not approve of his relationship with her daughter (Fulgentia Kambende). He however denied this assertion and maintained that their relationship was good and there was never any argument about it.

[10] He further denied that despite accused's suspicion that he may have stabbed the deceased, he did not stab her as he had gone to the market with his girlfriend when this incidence occurred. He accepted that he did not render help to either accused or deceased, because he was afraid. He also maintained his evidence that both accused and deceased always had arguments but continued to live together. He didn't know what the arguments were about.

[11] The next witness was Detective Sergeant Petrus Mbangula, a member of the Namibian Police Force who has been with the police for 9 years. It is his evidence that on the 11th of July 2011, he was stationed at Gobabis when he received a report of murder at about 12 noon. He, together with his colleagues went to the scene of the crime whereafter he discovered that deceased had stab wounds. He checked for any signs of life, but there was none. Accused was also lying on the ground next to the deceased but there was sign of life in him. Both accused and deceased were removed from the scene after photographs had been taken by other units of the police. He also observed that there was a knife between the accused and the deceased. Detective Sergeant Mbangula who was in charge of the investigations subsequently charged the accused with murder of Arita Kambende and thereafter informed the accused of his rights. The said proceedings were recorded in form Pol 17. It was further his evidence that accused did not tell him about an intruder who had come into the shack and stabbed both of them.

[12] Under cross-examination, Detective Mbangula conceded that he omitted to record where the knife was when he first arrived at the scene of the murder. This omission, he confessed was due to his inadequate training and lack of experience as

a Police Officer at the time. He, however, could not shed light as to the confusion with regards to time of the discovery of the murder and the arrival of the police.

[13] The next witness was Dr Simasiku Kabanje. He is a Forensic Medical Officer at Windhoek State Mortuary and has been in this position since 2008. He has been performing autopsies since 2003. This witness did not perform autopsies on either of the two bodies in relation to counts 1 and 2. He, however, explained and commented on the said post mortem reports being Exhibits B and C respectively. With regard to Exhibit B, which relates to count 1, he confirmed that the deceased died as a result of strangulation, while in count 2 the deceased died as a result of penetrating stab injuries to the left chest causing accumulation of air and blood hemithorax, causing death due to asphyxia. He went further and stated that this type of injury was very serious as it can result in loss of life if there is no medical intervention.

[14] Mr Visser submitted that the State's case is basically based on circumstantial evidence and since the State has failed to prove a *prima facie* case against the accused the latter should be acquitted. In furtherance of this application, he referred the court to the celebrated case of *R v Blom* 1939 AD 188 at 202-3[1], which laid down the requirements to be fulfilled by the State before a conviction based on circumstantial evidence can be secured. These requirements are:

1. Whether the inference sought to be drawn is consistent with all proven facts, because if not the inference cannot be drawn; and
2. Whether the proven facts are such that they exclude all other reasonable inferences from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.

It is his argument that there is no one who witnessed the stabbing of the deceased. This observation is correct. He further analysed the State's case as outlined herein under.

Fulgentia Kambende

[1] R v Blom 1939 Ad 188 at 202-3.

[15] It was his argument that:

1. She told the court that the incident occurred at 10h00 and the police arrived at the scene 12h00 noon. This is contrary to her statement to the police which she signed after it had been read to her. Wherein she stated that they discovered the death of the deceased at 12h00;

2. She could not have clearly seen what was happening in her mother's shack as her visibility was impaired by her boyfriend who was in front of her;

3. Neither her boyfriend nor herself gave assistance to the deceased or accused, but, chose to run away;

4. When the police arrived, she did not voluntarily go to the police, but, waited until the police asked for the witnesses or anybody who had information about the said incident to come forward; and

5. She said accused and deceased never quarreled at all.

Willem Walters

[16] With regard to this witness, he argued that:

1. It was impossible for him to see inside the room, bearing in mind that there were materials hanging on the opening/door;

2. He was between 1 and 2 metres from where the deceased and the accused were lying, this according to him was not adequate distance for anyone to have a clear view of what was happening in the shack;

3. He together with his girlfriend did not render assistance when they saw his mother-in-law lying on the ground in that state, but instead chose to run away and;

4. That it was suspicious that Willem could have known where the knife was before the police arrived at the scene of the crime.

Petrus Mbangula

[17] Counsel submitted that this was a poor witness despite the fact that he had 9 years experience in the police force. The witness' statements were not properly recorded, leading to a lot of vital information being omitted. Counsel further argued that Detective Sergeant Mbangula's experience resulted in poor investigation and that is why there were contradictions and inconsistencies in the witnesses' statements. He submitted that in view of the short comings in the evidence before the court, the State had failed to prove a *prima facie* case against the accused and as such, he was entitled to a discharge.

[18] To buttress his argument, he referred the court to the case of *S v Leevi* (2009) NAHC 76 where the court dealt with the approach to be adopted when dealing with the question of a *prima facie* case. Mr Eixab on the other hand argued that the State has proved a p*rima facie* case against the accused which, therefore, entitled the court to put him on his defence. In support of his argument, he pointed out facts which require an explanation from the accused, namely his previous conduct and his activities on this fateful day. He further referred the court to the case of *R v Blom* (supra) which lays out the requirements for the establishment of circumstantial evidence. While he admitted that there were contradictions in the witnesses' statements, he referred the court to the decision of *S v Nghitewa* CC 24/2010, which deals with the approach where such contradictions arise. The fact that the conviction of the accused in this matter can only be grounded on circumstantial evidence admits of no doubt. There is nobody who witnessed the stabbing of the deceased to death. Accused is entitled to apply for a discharge at the end of the state case as provided for in section 174 of the Criminal Procedure Act 1977 (Act 51 of 1977) if he is of the view that based on the State's evidence thus far, there is no *prima facie* case against him.

[19] In dealing with the reliance of a conviction of an accused on the basis of circumstantial evidence, our courts have invariably adopted and religiously followed the two cardinal principles laid down in R v Blom 1939 AD 188 where at 202-203 the learned Judge, Watermeyer, JA (as he then was) stated that 'In reasoning by inference there are two cardinal rules of logic which cannot be ignored: (a) The

inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn; (b) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inference then, there must be a doubt whether the inference sought to be drawn is correct.'

[20] It is trite that in all criminal cases the state is saddled with a burden of proof of the accused's guilt beyond reasonable doubt and that onus does not shift, unless it is so removed by legislation. In its quest to do so, it is again burdened with the onerous task of making out a *prima facie* case against the accused at the end of its case. It is now a settled position of our law that where the state fails to place before the court, *prima facie* evidence at the close of its case and hopes to plug holes in its case by putting the accused in the witness box is not permissible. Where the State has failed to prove a *prima facie* case against the accused at the close of the State case, it cannot thereafter base its hope on accused's incriminating himself in his defence thereby, supplementing its own evidence by that of the accused. This point was aptly stated in the case of *S v Mathebula and Another* (1997) (1) SACR 10 (W) at 34J – 35D)[2] where Claassen J reasoned:

'*(The) duty to prove an accused's guilt rests fairly and squarely on the shoulders of the State. As I said previously, the accused need not assist the State in any way in discharging this onus. If the State cannot prove any evidence against the accused at the end of the State's case, why should the accused be detained any longer and not be afforded his Constitutional rights of being regarded as innocent and thus being acquitted and accorded his freedom? Can it be said that he was given a fair trial if, at the close of the State's case wherein no evidence was tendered to implicate him in the alleged crimes, the trial is then continued owing to the exercise of a discretion in the hope that some evidence implicating him might be forthcoming from the accused himself or his co-accused? To my mind such a discretionary power to continue the trial would fly in the face of the accused's right to freedom, his right to be presumed innocent and remain silent, not to testify and not to be a compellable witness. To my mind it would constitute a gross unfairness to take into consideration possible future evidence which may or may not be tendered against the accused either by himself or by other co-accused and for that reason decide not to set him free after the State had failed to prove any evidence against him*.'

[2] S v Mathebula and Another (1997 (1) SACR 10 (W) et 34 J – 35 D

[21] In order for the State to succeed in its opposition for an application for a discharge in terms of s 174 of the Criminal Procedure Act, it should have laid proven facts before the court which must use its judicial discretion in the determination of such application. It is indeed a discretion on the basis of the legislature's use of the word 'may' and not 'shall'.

[22] In *casu* the following facts have been proved by the State that:

1) The accused and deceased had a love relationship;
2) Regina Arikumbi who is the mother of the deceased told the court that accused had threatened to kill her together with her livestock;
3) That at one point Regina Arikumbi saw accused armed with two spears/assegais looking and/or following the deceased, an incident which she later reported to the Traditional Authorities;
4) Both Fulgentia Kambende (deceased's daughter) and Willem Walters (her boyfriend) observed that deceased and accused were not in good talking terms for a week;
5) That on this fateful day accused was not talking to anybody, he was moody to an extent that:
    a) he refused to drink tea which had been made by Fulgentia Kambende at the request of the deceased and
    b) that he also refused to share in the food which had been prepared by the deceased.
6) Fulgentia Kambende also told the court that the accused was kneeling down and holding a knife, which is the same knife they had hidden because accused was always threatening to cut or stab her mother with it;
7) That both Fulgentia Kambende and Willem Walters left for the market leaving the deceased in her shack and accused also in his tent. Upon their return the deceased was lying dead, with accused kneeling next to her holding a knife, which knife he latter stabbed himself with; and
8) That accused did not seek assistance from anybody in view of the supposedly stabbing of the deceased and himself by an intruder.

[23] Mr Visser further argued that the State witnesses were not credible as they contradicted themselves in many ways than one. He highlighted the issue of the time

Fulgentia and Walters allegedly arrived at the scene of the murder. He also raised an issue about their failure to attend to the deceased and accused when they witnessed the stabbing. On this point, Mr Eixab argued that the question of credibility at this stage of proceedings is not an issue. The question of credibility at this stage of proceedings in as much as it is a relevant factor, it has a limited application.

[24] This point was considered in *S v Mpetha and Others*[3] where Williamson J dismissed this principle and adopted the long held approach and quoted with approval in the decision in *R v Nortje*[4] and *S v Bouwer*[5] In that case the learned Judge stated at p 265D – F

'*In my view the cases of Nortjé, Bouwer and Naidoo correctly held that credibility is a factor that can be considered at this stage. However, it must be remembered that it is only a very limited role that can be played by credibility at this stage of the proceedings. If a witness gives evidence which is relevant to the charges being considered by the court then that evidence can only be ignored if it is of such poor quality that no reasonable person could possibly accept it. This would really only be in the most exceptional case where the credibility of a witness is so utterly destroyed that no part of his material evidence can possibly be believed. Before credibility can play a role at all it is a very high degree of untrustworthiness that has to be shown'* (my emphasis).

[25] In my view, what the court should bear in mind is that the State at every stage has the onus of proving its case beyond reasonable doubt. The court should therefore always guard against the pitfall of putting the accused in the witness box where the State case is based on a high degree of untrustworthiness. This therefore stands to reason that in the absence of proven facts, the court should discharge the accused to avoid a situation where the accused will be placed on his defence only to hope for a possibility of curing the defect in the state case, (see *S v Phuravhetha and Others).*[6]

[26] The operation of this legal principle is designed to ensure that the accused receives a fair trial, See also *S v Mathebula & Another*[7] (Supra). The court therefore

[3] S v Mpetha and Others 1983 (4) SA 262.
[4] R v Nortje 1961 (2) PH H 166.
[5] S v Bouwer 1964 (3) SA 800 (O).
[6] S v Phuravhetha and Others 1992 (2) SACR 544 (V).
[7] S v Mathebula & Another.

has a discretion at the close of the State case either to discharge the accused or place him on his defence which discretion must be applied judiciously. Mr Visser has argued that the State witnesses have contradicted themselves and the Investigation Officer also admitted to have made errors. In *S v Nghitewa* CC 24/2010, Liebenberg J at P 13 (26) state: '*It is trite, that contradictions in the evidence of witnesses, per se do not lead to the rejection of a witness's evidence, as it may simply be indicative of an error, as was pointed out in S v Mkohle 1990 (1) SACR 95 (A) where the appeal court approved and applied the dicta in S v Oosthuisen 1982 (3) SA 571B-C and 576G – H where it was said: "Plainly it is not every error made by a witness which affects his credibility. In each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witnesses' evidence*.'

[27] The shortcomings of police officers in investigating cases in this country, have always been known and these courts have given a sympathetic ear to witnesses who unfortunately find themselves in such unfortunate situations, see *Hanekom v S* (unreported) CA 68/1999[8]; *Aloysius Jaar v S* (unreported) CC 43/2007[9] and *Simon Nakale Mukete v S* (unreported) CA 146/2003[10]. In Jaar's case, Mainga J (as he then was) at page 12-13 stated 'A court should be careful in discrediting a witness because his evidence in chief slightly differs from the statement a witness should have told the police, especially in this country where it is a notorious fact that the majority of the police officers who are tasked with the duties to take statements from prospective witnesses and accused persons are hardly conversant in the English language and more so that police officers who take down statements are never called and confronted with the contradictions that an accused or witness may have raised in cross-examination.' This soft approach, in my view is in line with the need to dispense justice in a pragrammatic manner which is in line with the need for participatory justice for all Namibians. In coming to this conclusion, the leaned Judge in Nghitewa's case, quoted with approval the need for a participatory approach by all citizens as highlighted in S v Oosthuizen (Supra). The contradictions must be considered in light of their importance and their impact on the parts of other witnesses' evidences.

[8] Hanekom v S (unreported) CA 68/1999.
[9] Aloysius Jaar v S (unreported) CC 43/2007.
[10] Simon Nakale Mukete v S (unreported) CA 146/2003.

[28] In *casu* the contradictions relate to the time factor, which with all respect should not be evaluated in isolation, but, should be considered in totality with other evidence led so far. The evidence led so far cannot be said to be totally unreliable to an extent that it excuses the accused from explaining proven facts before the court. In my opinion, it cannot be said that the evidence placed before the court is of a high degree of untrustworthiness. On the basis of the time-honoured principles laid down in Blom's case (supra) the question that should be asked is whether there is so far evidence before the court which a reasonable court acting carefully can place accused on his defence without aiding the State in its quest to prove its case beyond reasonable doubt. In addition, thereto, whether there can be only one reasonable inference which can be drawn with regards to accused's unexplained involvement in this offence. There are proven facts that accused was closely connected with this incident, this is the only reasonable inference which is unavoidable at this stage. In my view the State has proved certain facts which, in the absence of an explanation by the accused, the only inference by a reasonable court acting carefully cannot avoid. Mr Visser also argued that the accused was not properly warned and/or adviced of his constitutional rights in particular his rights to remain silence. This according to the defence, led to such a curt response to the Investigating Officer. There is a plethora of case authorities which support the legal position of insulating illegally obtained statements from those made in consequence of a proper legal procedure. However, there is another school of thought as stated in *Key v Attorney-General, Cape Provincial Division and Another* [11] at 196B Where Kriegler J remarked 'At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted.'

[29] The determination of proof of a *prima facie* case is based on facts. P*rima facie* evidence is what appears at first sight or on its face. It is evidence before the court, which is sufficient to prove the case in the absence of substantial contradictory evidence shown at the trial. In other words it is evidence sufficient to establish a fact or raise a presumption unless it is disproved or rebutted. In light of the evidence led so far from the witness, taken in totality renders the question of illegality or otherwise of accused's warning statement insignificant. The facts to be proved by the State in rebutting an application of this nature should not be considered in isolation, but, in

[11] Key v Attorney-General, Cape Provincial Division and Another 1996 (4) SA 187 (CC).

totality with all the evidence led. In conclusion, I entertain no doubt in my mind that the only inference that can be drawn at this stage, having regards to the need for reasonableness and care is that the State has made a good case to cause the accused to be placed on his defence.

Accordingly the application is dismissed and the accused should be placed on his defence.

M Cheda

Acting Judge

APPEARANCES

STATE:	J E Exab Of the Office of the Prosecutor General Windhoek
ACCUSED:	W H Visser Instructed by Stern & Barnard Windhoek