REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

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

DATE……4/8/2016 SIGNATURE:……

CASE NO: AA01/2016

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS LIMPOPO **APPELLANT**

and

BEN MARABA **FIRST RESPONDENT**

BOITUMELO TUMI TJALE **SECOND RESPONDENT**

WILLIAM NINA MOKWATLO **THIRD RESPONDENT**

JUDGMENT

MAKGOBA JP

[1] This is an appeal against the judgment of the High Court (Nair AJ) discharging or acquitting the accused at the close of the State Case in terms of Section 174 of the Criminal Procedure Act 51 of 1977 ("the Act").

[2] The three Respondents (hereinafter referred to as the Accused) were prosecuted in the Limpopo High Court on four counts namely:

1. Murder read with the provisions of section 51(1) of Act 105 of 1997.
2. Kidnapping
3. Contravening the provisions of section 3(1) read with section 1, 56(1), 57, 58, 59, 60 and 61 of the Criminal Amendment Act 32 of 2007-Rape.
4. Defeating or obstructing the ends of justice.

At the end of the State case the Accused applied for their

discharge in terms of section 174 of the Act. The Court a quo granted the discharge in respect of the first and third accused. The application was however refused in respect of the Second accused.

[3] All the accused had pleaded not guilty to all counts. The first and third accused did not disclose the basis of their defence in terms of section 115 of the Act but exercised their right to remain silent. The Second accused chose to disclose the basis of his defence.

[4] The plea explanation tendered by accused number two can be summarised as follows:

Accused number two was walking in the street together with the deceased named R. D. B. (also known as N.) in the early hours of 5 October 2013. While walking, a certain motor vehicle stopped on the roadside next to them. Accused number one disembarked from the said vehicle while holding a knife and ordered accused number two and the deceased to get into the vehicle. Out of fear, accused number two and the deceased boarded the vehicle and it drove off. Accused number one, accused number two and the deceased

occupied the backseat. In front seat, it was only the driver who was unknown to accused number two at the time.

After driving for some distance the motor vehicle stopped and accused number one ordered accused number two and the deceased to alight. The unknown driver joined accused number one and they both led accused number two and the deceased to an isolated spot where the deceased was stripped naked by accused number one. Thereafter accused number one, while holding the knife ordered accused number two to rape the deceased. Accused number two lay on top of the deceased who had been stripped naked by accused number one and was lying on the ground at the time. Accused number two then pretended to be raping her.

Accused number two was removed from the deceased by accused number one and accused number one and the driver took turns in lying on the deceased doing what was unknown to him. Thereafter accused number one ordered accused two to hold the deceased's hands at the back and also ordered the unknown driver to hold the deceased legs. Accused number one throttled the deceased and simultaneously stabbed the deceased on the cleavage. When the

deceased took her last gasp, accused number two fled the scene, leaving the deceased, the driver and accused number one behind.

[5] It emerged later on during the trial that the driver of the motor vehicle who was unknown to accused number two at the time of the incident was in fact accused number three.

[6] The State called four witnesses to testify. None of the witnesses' evidence implicated any of the three accused. However during the cross-examination of some of the state witnesses the legal representative for accused number two put the accused's version as outlined in his plea explanation to the witnesses. This then gave an indication that if accused number two were to testify in his defence his evidence will possibly implicate accused number one and three.

[7] It is common cause that at the close of the State case there was no *prima facie* evidence against any of the accused. Furthermore the plea explanation of accused number two was not recorded as formal admissions in terms of section 220 of the Act.

The Court *a quo* stated amongst others, in its reasons for the discharge of the two other accused that the plea explanation made by accused number two cannot be used against his co-accused because it was not recorded as formal admissions in terms of section 220 of Act.

[8] The following two legal questions arise in this appeal:

8.1. Whether the accused is entitled to a discharge in circumstances where there is no evidence at all against him, except incriminating plea explanation by his co-accused which was not recorded as formal admissions.

8.2. Whether the accused is entitled to a discharge in circumstances where there is no evidence at all against him but there is a reasonably possibility of the State case being supplemented during the course of the defence case.

[9] In **S v.Mjoli 1981(3) SA 1233(A)** it was held that even though an admission by an accused during explanation of plea is not evidence, it is still probative material.

Hiemstra CJ in **S v. Mokgatla 1977-9 BSC 79 85E** remarked as follows in relation to admissions not recorded in terms of section 220 of the Act.

"*Like in the case of any extra-judicial statement, the accused may be cross-examined on it. Serious conflicts between his evidence under oath and his explanation of plea can destroy his credibility provided the conflicts have been properly put to him. The view that everything in the explanation of plea which is not an admission in terms of section 220, must be totally ignored, cannot be supported. It is part of the evidential material like any statement made by the accused which may be proved against him in evidence, whether inculpatory or exculpatory or neutral. Its value for the prosecution depends upon the circumstances. This is in accordance with the general law of evidence, and there is nothing in the Act which takes the explanation of plea out of this general class"*

[10] In **S v. Phuravhathu 1992(2) SACR 544 (V) at 554 A-B** it was held that a trial Court cannot close its eyes to a plea explanation given by an accused in terms of section 115 …when considering an application for the discharge of the accused under section 174. It was held further in that case that the contents of the accused's plea explanation in terms of section 115 of Act 51 of 1977 may also be taken into account in considering whether there is a real and

reasonable prospects of the State case being strengthened by the defence evidence.

[11] In my view the Court *a quo* erred in disregarding the plea explanation of accused number two in this matter. The plea explanation, whether recorded as formal admission or not, is an evidential material and it should therefore have been taken into account when considering the application in terms of section 174 of the Act. The Court *a quo* committed an error of law by simply ignoring same.

[12] Mr Sebelebele, Counsel for the Appellant conceded that there was no evidence at all, implicating the first and third accused.

He argued however, that there was evidential material in the form of accused number two's plea explanation and his version put to State witnesses during cross-examination which ought to have been taken into account when considering the application for discharge. I agree. The question was not whether there was a *prima facie* evidence against accused number one and three or not. The question was whether there was a reasonable possibility

of the State case being supplemented during the course of the defence case or not.

[13] Section 174 of the Act provides that “If at the close of the case for the prosecution at any trial the Court is of the opinion that there is not 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”.

The word ‘**may’** was used by the legislature to mean that the Judge or Magistrate has a discretion either to grant or refuse the application. The section gives the Court a discretion, which must be exercised judicially, in deciding whether to discharge an accused at the conclusion of the State case.

[14] In **S v. Shupping and Others 1983(2) SA 119 (B)** the Court laid down the following principle:

> *“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 of the question is yes, there should be no discharge and the accused should be placed on his defence".

[15] Where more than one accused are charged with the same offence the Court may refuse to discharge one of them if it is in the interests of justice to do so.

See: **S v. Agliotti 2011(2) SACR 437(GSJ) at [257]**

The case of **S v. Lubaxa 2001(2) SACR 703 (SCA)** is authority for the principle that it is unfair and in fact unconstitutional to refuse a discharge of the accused at the close of the State case with the hope that he will be implicated during the defence case. However in the same case it was said (per Nugent AJA, as he then was) that it was advisable to draw a distinction between cases where there was a single accused who might be obliged to enter the witness box and then incriminate himself, and cases where there were multiple accused who might incriminate their fellow accused. In the latter case, it was held that the trial would not necessarily be unfair if the application for discharge were refused on the basis

that the State's evidence may be supplemented by the evidence of a co-accused.

[16] The dictum is **S v. Shupping and Others**, supra, was followed and with approval in **S v. Hudson and Others 1998(2) SACR 359 (W)**. The following principles were laid down:

That section 174 of the Act afforded a judicial officer a discretion to discharge an accused or to refuse to do so. The discretion had to be exercised judicially and not capriciously, and the first consideration was whether there was evidence on which a reasonable man might convict. That even if there was no evidence at the close of the State case on which a reasonable man might convict the accused, a factor which it was permissible to take into account, in granting or refusing an application for discharge, was whether there was a reasonable possibility that the defence evidence might supplement the State case.

Further that an important consideration in determining whether there was a reasonable possibility that the defence evidence might supplement the State case was the content of any admissible confession of a co-accused of the applicant for discharge. Although such confession was not admissible against the applicant for discharge, it might, however, become admissible if the

confessing co-accused should elect to testify and repeat its content under Oath. Thus, where such confession contained an indication that the co-accused would possibly implicate the applicant for discharge the Court could form an impression of how the trial might unfold. In such circumstances the Court would fail in its duty to weigh also the interests of the State and of the community if it simply granted a discharge.

See also: **S v. Mondlane 1987(4) SA 70(T) at 71G-72B**

S v. Makofane 1998(1) SACR 603(T)

[17] In **S v. Tusani and Others 2002(2) SACR 468(TK)** the trial Court refused a discharge in circumstances where there was no evidence at all, incriminating two accused persons. The only evidence was a confession made by an accused in which he implicated two of his co-accused. Although a confession of one accused is not admissible against the other accused persons, the Court found that there was a reasonable possibility that the defence case may supplement the State case. It was concluded that there was a reasonable possibility that the maker of a

confession might supplement the State case should he elect to testify in his defence case.

[18] In **S v. Nkosi and Another 2011(2) SACR 482 (SCA)** there was no evidence upon which the Court might reasonably have convicted the Appellant at the close of the State case. Neither was there any reasonable basis for an expectation that his co-accused might incriminate him. The trial Court refused to acquit the accused. In criticizing the trial Court for such refusal the Supreme Court of Appeal, per Maya JA said the following:

> "*The co-accused had given no plea explanation and no indication whatsoever during his cross-examination of the State witnesses that he might do so. It had not emerged that the co-accused had been at the scene of the crime until the late stage of the State case. Even then, there had been no hint that he might augment the State case given the very terse and vague cross-examination of the witnesses who placed him on the scene"*

[19] The **Nkosi** case, supra, is in direct contrast to and is distinguishable from the present case in that –

(a) In the present case accused number two made a plea explanation in which he incriminated his co-accused.

(b) Accused number two's cross-examination of State witnesses placed his co-accused on the scene,

(c) Accused number two gave more than a mere hint, in fact explained fully, how accused number one and three took part in the commission of the offences.

[20] In granting a discharge in respect of accused number one and three the Court *a quo* made a remark that there was no guarantee that accused number two might even testify so as to incriminate his co-accused. I agree with Counsel for the State's submission that the Court *a quo* misdirected itself in this regard. Whether accused number two decides to testify or not is completely irrelevant for purposes of considering an application for a discharge. His evidence becomes relevant only at the end of the case when his credibility as a witness is taken into account and whether his evidence factually and indeed supplemented the State case or not.

[21] In *casu* the Court *a quo* should have found that there was indeed a reasonable possibility that the State case might be supplemented during the course of the defence case. A decision to discharge the first and third accused has compromised the proper administration of justice because there was clearly a reasonable possibility that the defence evidence of accused number two would supplement the State case.

Even though there was no *prima facie* evidence implicating accused number one and three at the close of the State case, it was very apparent that the State's case was going to be supplemented during the course of the defence case by the evidence of accused number two. In the circumstances the application for discharge should have been refused.

[22] In the result the appeal is upheld and the following order is accordingly granted:

1. The discharge / acquittal of accused number one and accused number three in terms of section 174 of Act 51 of 1977 is set aside.

2. The trial in respect of all the accused, i.e. accused number one, two and three shall start *de novo* before a different Judge.

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E. M MAKGOBA JP
JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE

I agree

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G.C MULLER J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE

I agree

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M.G PHATUDI J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE

APPEARANCES

For the Appellant	**:**	**M. Sebelebele**
(State)	**:**	**Director of Public Prosecutions**
For 1st & 3rd Respondent	**:**	**K.E Kgatle** **Legal Aid South Africa**
For 2nd Respondent	**:**	**M .M. Mahapa** **Mahapa Attorneys**
Heard on	**:**	**29 July 2016**
Judgment delivered on	**:**	**4 August 2016**