

SOUTH AFRICA / JUDGMENT

S v Nkuna (CC02/2023) [2024] ZAGPPHC 1050 (22 August 2024)

[2024] ZAGPPHC 1050**COURT**

North Gauteng High Court, Pretoria

BEFORE

PD. Phahlane

CASE / FILE NUMBER

CC02/2023

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Source record**REPUBLIC****OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****CASE****NO: CC02/2023****(1)****REPORTABLE: YES/NO****(2)****OF INTEREST TO OTHER JUDGES: YES/NO****(3)****REVISED: YES/NO****DATE:**

22-08-2024

SIGNATURE:

PD. PHAHLANE

In

the matter between:

THE

STATE

And

BUTANA

FRANS

NKUNA

ACCUSED

JUDGMENT

PHAHLANE, J

- [1] This is an application in terms of section 174 of the Criminal Procedure Act, Act 51 of 1977 (CPA) for a discharge of the accused.
- [2] The legal position in respect of section 174 applications is that if there is no possibility of a conviction besides having an accused person testifying and giving incriminating evidence, such accused is entitled to be discharged at the close of the State's case.
- [3] The question for determination at this stage is whether the State having closed its case, there is evidence on which a reasonable person might convict. Put differently, if the court is of the opinion that there is no evidence upon which a reasonable person might convict, the accused is entitled to a discharge. It is well established that "no evidence" does not mean no evidence at all, but rather no evidence on which a reasonable court, acting carefully, might convict.[1]
- [4] In this regard, section 174 of the CPA specifically provides that: "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".

- [5] On a proper reading and interpretation of the above section, it is apparent that the court hearing applications of this nature is enjoined to exercise a discretion, which must self-evidently be exercised judicially to either grant or refuse the application for a discharge, where the court is of the opinion that there is no evidence that the accused committed the offences, he is charged with.
- [6] One of the leading cases regarding section 174 applications is the matter of *S v Lubaxa*[2], where the Supreme Court of Appeal (SCA) per Nugent AJA, stated the following when dealing with the discretion to be exercised by the court:

"[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).

- [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”.

[7] When the court exercises such a discretion at the close of the prosecution’s case, the following must be considered in the context of giving effect to the wishes of society and the purpose of the Constitution:

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’s case?

[8] If the answer to either question is yes, there should be no discharge, and the accused should be placed on the defense. Failure to discharge where there is no evidence at the close of the prosecution’s case would amount to an irregularity which may vitiate a conviction.

[9] With this in mind, it is important to note that in every criminal trial, presiding officers have a duty, and are obliged to manage proceedings within the law governing criminal procedure in order to achieve a fair and just conclusion because section 35 of the Constitution[3] obliges all officers of the court to contribute to the proper administration of justice. Hence a presiding officer is obliged to discharge an accused before he testifies if the State has not made out a prima facie case for him to answer, whether such an accused is represented or not.

[10] The test applicable in the nature of this application is that the prosecution must establish a prima facie case against the accused, as opposed to the applicable test in criminal cases being that the State must prove its case beyond reasonable

doubt[4].

[11] Having said that, it is noteworthy to state that if an acquittal flows at the end of the State’s case, then the need to present evidence by the accused falls away. If however a discharge is refused, the accused still has the choice whether to testify or not because there is no obligation on him to testify. This is because in terms of Section 35(3)(h) of the Constitution: “Every accused person has a right to a fair trial, which includes the right to remain silent and not to testify during the proceedings”. Once the court rules that there is no prima facie case against the accused, there also cannot be any negative consequences as a result of the accused’s silence in this context.

[12] The legal principle in terms of section 174 was summarized by the SCA in *Maliga v The State*[5] as follows:

“[18]If at the end of the State’s case, the State has not made out a prima facie case, in other words, there is nothing for the accused to answer, the presiding officer must raise this question mero motu, especially in the absence of an application for discharge. It seems that this duty is not dependent on whether the accused is represented or not. See: R v Hepworth 1928 AD 265 at 277.

[19] Section 35(3) of the Constitution compels presiding officers and indeed all officers of the court to play a role during the course of a trial in order to achieve a fair and just outcome. As was said in Hepworth at 277 (supra) ‘a criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed’. A judge’s role is to see that justice is done”.

[13] Accordingly, an accused is entitled to his discharge at the close of the State’s case if there is no possibility of a conviction at that stage, except if the accused enters the witness box and incriminates himself. However, this will indeed infringe upon his constitutional

rights to silence and the prohibition against self-incrimination, resulting in the trial being unfair. This was specifically stated by the court in Lubaxa[6] supra as follows:

“[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 on his self-incriminatory evidence”.

[14] On 16 April 2024, the accused was charged with two (2) counts, namely: Murder read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 (“the CLAA”) in respect of count 1 and count 2 is for defeating the administration of justice.

[15] The State called six (6) witnesses in support of its case, one of whom is Mr. Collen Mathunzi who is the star witness and the supposed eyewitness.

[16] The niece of the deceased, Ms. Dimakatso Mashilela Lesufi testified that on the 3rd of October 2020 around 3am, she was sleeping with the deceased when Mr. Collen Mthunzi arrived at her home, and the deceased went outside to meet him. According to her, Mr Mthunzi had apparently called the deceased beforehand. She heard the noises outside of the house, and she went outside to see what was happening and she saw two males in the company of the deceased, one of whom was Mr. Mathunzi, and they were quarrelling. She specifically stated that she did not see the other male person who was in the company of Mr. Mathunzi - and she went back into the house.

- [17] She explained that after a few minutes, the deceased returned to the house and five minutes thereafter, Mr. Mathunzi came back and knocked on the window of the deceased's room and requested water and alleged that his vehicle was overheating. The deceased woke up and took the jug to get some water, and thereafter went outside with Collen Mathunzi, and she never returned to the house.
- [18] She testified that around 8am when she called Mr. Mathunzi to find out where the deceased was, Mr. Mathunzi indicated that the deceased had returned to the house, but he later called back and told her that the deceased went to the shops, and he dropped the call. Around 12pm she called Mr. Mathunzi wanting to know what happened to her aunt, and Mr. Mathunzi said he would tell her what happened to the deceased, and he never did. She ended up going to the police to report and open a case of a missing person.
- [19] Mr. Mathunzi also took the witness stand and his evidence corroborated the evidence of Ms. Lesufi with regards to the following aspects: (1) that he indeed called the deceased first before going to her home; (2) that he requested water from the deceased indicating that his vehicle had a problem, and that the deceased came outside carrying a jug of water; (3) that he was with another male person when he went to the house of the deceased; and (4) that Ms. Lesufi saw them outside when they came to fetch the deceased.
- [20] Mr. Mathunzi testified that he had financial problems and also wanted to have more power in the industry as taxi driver, and a certain Ms. Sarah took him to the accused's house. He further testified that he had a consultation with the accused – and the accused told him that certain rituals had to be performed - and requested a fee of about R2500 in cash.
- [21] He explained that he did not have the money at the time, and he told the accused that he would return when he had the money, and they left. He testified that days later as he was driving his taxi, he saw the accused at Soshanguve Crossing and he approached him and explained to the accused that his situation has not changed, and the accused asked him if he would do anything that he instructs him to do -- if he really wanted to be helped -and he replied in the affirmative, meaning, he confirmed that he would do what the accused tells him to do.
- [22] He said the accused gave him R200 and instructed him to go to Marabastad to go and buy the beads (which he referred to as “dipheta”) and different colour candles which he should use when praying every day at 12 midnight.
- [23] He further testified that one evening around 23:55 when he was about to pray, the accused arrived at his house and knocked on his door and said he was there to pray with him. He alleged that the accused took out a bottle from his pocket and gave him a potion to drink and was leading the prayer – and said the words: “my lord lucifer, my provider, I do whatever you ask”, and he continued to pray. When he finished praying, the accused asked him if he has a friend, that is someone that was close to him - whom they can pray with, and he (Mr. Mathunzi) responded that they can request the woman he was having a relationship with –

Sebenzile Maphang, the deceased in this matter – to come and pray with them.

[24] According to him, the accused suggested that they should go and fetch the deceased at that very moment, and they left in his (Mr. Mathunzi) vehicle going to the deceased's place. Upon arrival there, the accused was standing by the gate while he went to knock for the deceased to open for him. He said he explained to the deceased that he was there to fetch her so that they could pray together, and the deceased agreed to go with him.

[25] He confirmed that the evidence of Ms. Lesufi that he came to fetch the deceased is correct, and further confirmed that the deceased brought him water because he asked for a jug of water. He stated that when he went outside with the deceased, the lady who was in the house saw him.

[26] They boarded his vehicle, and the deceased was seated in the front passenger seat, and the accused was seated on the back seat behind the deceased. They drove off and along the way, when he looked at the back, he saw the accused holding a stick with his hand outstretched and pointing at the head of the deceased, and the deceased was at this stage dozing off and sleeping.

[27] Mr. Mathunzi testified that upon arrival at his place, they got out of the vehicle – and as he was about to open the door for the deceased, the accused said he should open the house door. According to him, the deceased appeared to be very drowsy at the time. He said the accused was holding the deceased, and as they entered the house, he saw the accused striking the deceased three to four times with a hammer behind the head and the deceased fell to the ground. Mr. Mathunzi said the hammer belonged to him, and it is the hammer that he was using earlier that day to fix his vehicle with.

[28] He testified that the accused told him at that moment that it was time to make a sacrifice with the deceased. They both took off the deceased's clothes and thereafter the accused took out a knife from the drawer in the kitchen cupboard and they started chopping the body parts of the deceased. They started with the arms, cutting from the shoulder, and they also cut off her legs. He said as they were doing this, the accused was calling out the name of lucifer, and

thereafter they drank the blood of the deceased.

[29] Mr. Mathunzi said the accused told him that they should keep that as their secret, and the accused took out a small bag out of his pocket and put the arms of the deceased in it and told him to put the remaining body parts in a blanket and instructed him to clean the house and he did – by mopping off the blood on the floor.

- [30] He said the accused left the house and he took the remaining body parts and went to burn them near a river in the bush, and thereafter went to a place where he threw them, trying to conceal them. He went back home and cleaned the place once again to get rid of any traces of blood, – smoked dagga and went to sleep. He testified that he never saw the accused again after this incident.
- [31] He testified that six or seven days after the incident, the police came to his home being in the company of Ms. Lesufi and he was then arrested. He was detained at the police cells and the next day, the police started asking him questions trying to find out what exactly happened, and he told them what happened. He said the police took him to the accused house because he told them who had killed the deceased, and the accused was then arrested and taken into custody.
- [32] Mr. Mathunzi also took the police to the place where he hid the deceased's body. All this happened on a weekend, and they were both locked in the police cells. On Monday, they made their appearance in court and the accused was then released, but he was remanded into custody and taken to Kgosi-Mampuru Correctional Centre. He stated that it was the accused who suggested that the deceased should be killed.
- [33] The investigating officer, Sergeant Simali testified that he took a statement from Mr Mathonzi after he was convicted and sentenced and when asked why he had to take another statement when he already had two statements from him, and he responded that he wasn't going to take a statement from Mr Mathonzi if he knew that he was going to implicate the accused. He then changed and said when he took a statement of Mr Mathunzi, he did not know if he was going to add information or reduce information or say something different from what is already contained in his other two other statements, (ie. The warning statement and s105A statement). He further stated that the only reason why he took a statement from Mathunzi is that he wanted to make a comparison with the statement he took earlier.
- [34] When confronted about the discrepancies in the statements of Mr Mathunzi, he said there was a language barrier, and when it was put to him that that cannot be correct because Mr Mathunzi was assisted by an interpreter, he changed his version and said he was not in court and does not know if he was assisted by an interpreter.
- [35] Sergeant Simali testified that Mr Mathunzi informed him that the accused used a spade to push the body of the deceased deep into bush, and when it was put to him that Mathunzi never said anything about that in his evidence, and neither is it written anywhere in his statements, he responded that he does not know why Mathunzi did not say that to the court. It was then put to him that that was new evidence coming from him and he could not answer but said that the hammer and the spade were recovered before Mathunzi could appear in court.

[36] Sergeant Simali confirmed under cross-examination that to date, nothing has been found at the house of the accused, and there was no evidence linking him to the offence at the time, and that even though that was the case, he decided to oppose bail of the accused because that was the decision taken by the prosecutor.

36.1 He further confirmed that there was not enough evidence to proceed with the case against the accused but went with the theory that the version of Mr Mathunzi that he was with the accused on the day of the incident, is the correct one.

[37] Another twist in the case of the State was the evidence given by Colonel Philemon Mamadimo Mokgetle. This relates to the fact that Mr Mathunzi told him that when they arrived at the deceased place on the day of the incident, Mr Mathunzi asked for water to put in his vehicle, and the deceased gave him water which he then poured in the vehicle – and the accused took a bottle of cold-drink and gave it to the deceased to drink and Mr Mathunzi also told him that the deceased fainted immediately after consuming the cold drink.

37.1 This evidence contradicts the evidence which Mr Mathunzi gave in court, as it was reflected when he kept changing his version as he went along with his evidence.

[38] The last witness for the State, Sergeant Albertus Stephanis is a member of the K9 search and rescue unit in Roodepoort. He testified that he took part in the search and was present when the body of the deceased was found. He said he knows the accused because the accused is the one who showed them the open field where the body of the deceased was found and is the one who also took them to the house where the first search was conducted.

[39] When it was put to him under cross-examination that his statement is incorrect because the accused was never present when the body of the deceased was recovered, he was adamant and insisted that the accused is the one who took them there. He also insisted that the name of the accused is Collen Mathunzi even when he was corrected and told that

the accused is Mr Nkuna. He said he remembers the accused face because he took them to where the body was recovered.

[40] Just like the other two members of the police services that I referred to earlier, he also came up with evidence which none of the witnesses testified about, especially the star witness Mr Mathonzi, by stating that they found the body without the head.

[41] If one has regard to the evidence of Mr Mathunzi, and the many contradictions and versions he gave, the only inference that can be drawn by this court is that Mr Mathunzi is not a reliable witness. It is quite astonishing that Mr Mathunzi would go to the deceased's house at 3am and call the deceased outside in those early hours of the morning,

- wake her up, argue with her, and take her away

- and he is the only one who knows what happened to the deceased and the only one who went to dispose of the body of the deceased in an attempt to defeat the administration of justice, and the only one who knew where the body of the deceased was, and then try to shift the blame to the accused.
- [42] One wonders why Mr Mathunzi would ask the deceased for some water to put in his vehicle, claiming that it was overheating and then throw it away and drives off – because when asked under cross-examination if he put the water in the vehicle after requesting same from the deceased, he responded that he threw it away and entered into his vehicle and they left. He could not explain why he asked for water only to throw it away.
- [43] Having considered the evidence before me, and in light of the circumstances of this case, it is undeniable that there is no evidence before this court that links the accused to any of the offences or charges proffered against him by the State. Neither is there evidence that identifies or places him at the place of residence of Ms. Lesufi where the deceased was fetched by Mr. Mathunzi.
- [44] Mr Motala appearing for the accused submitted, and correctly so, that the accused should be discharge because the State failed to make a prima facie case against the accused. Further that the court cannot rely on the evidence of Mr Mathunzi because of the improbabilities and the many contradictions in his evidence and stated that Mr Mathunzi had a motive for lying in court.
- [45] He submitted that that the quality of Mr Mathunzi's evidence was poor and cannot be relied upon. He further submitted that the court should look at his demeanour and the fact that in most instances, Mr Mathunzi did not want to answer questions.
- [46] The State on the other hand, acknowledged and conceded that there are many discrepancies and contradictions in the evidence of Mr Mathunzi. It submitted that the issue of credibility should not be considered during the application for a discharge and that the application on behalf of the accused should be dismissed.
- [47] The issue of credibility in this kind of application plays a limited role and the evidence ought to be ignored if it is of such a poor quality that no reasonable person could possibly accept it[7].
- [48] From the above, it is clear that the oral evidence of Mr Mathunzi leaves nothing to be desired. His evidence was full of contradictions and in many instances when faced with tough questions under cross-examination, he either refused to answer questions or became aggressive towards the defense counsel or became argumentative. Sometimes he would refuse to answer questions and stated that he will only answer questions when asked by the court.

- [49] When he felt like it, he would insist on speaking in a different language than the one he had been using, which necessitated different interpreters to be on standby just to accommodate him.
- [50] On many occasions, he had to be called to order and reminded several times that he has to respect the court and the defense counsel. Not only was his demeanor untoward, but he gave the State the run around.
- [51] It is on record that Mr. Mathunzi told the court from the onset that he is willing to testify on condition that this court can guarantee his discharge from the sentence he is currently serving in respect of this case before the court. The State struggled to get him to testify, and the matter had to be postponed on four occasions while he told the court that he is not ready to testify because he is not in the right frame of mind because he is in custody. On one occasion, he refused to testify and said he feels tired and requested a postponement for a week.
- [52] I am mindful of the fact that Mr Mathunzi was a single witness who made it clear from the beginning that the accused is responsible for the offences that occurred on 3 October 2020 and that he is not responsible, trying to shift blame on the accused.
- [53] Having said that, the court is alive of the cautionary rule that applies to evidence of a single witness. The State submitted in its heads of argument that Mr Mathunzi is a single witness who was also an accomplice and referred to section 208 of the CPA.
- [54] I do not agree with this submission because nothing places the accused at the scene where the deceased was fetched or shows his involvement in any of the actions taken by Mr Mathunzi. This will become clearer as I explain hereunder, what the cross-examination has revealed.
- [55] It is clear from the evidence of this witness that he wanted to exonerate himself and put the blame on the accused. The discrepancies, improbabilities and contradictions in his evidence is something which the court cannot turn a blind eye to.
- [56] Although I indicated that the credibility of a witness plays a limited role during the applications in terms of s174, the evidence of Mr Mathunzi cannot be safely relied upon and it is not credible to the extent that the court can rely on. In this regard, the principle was succinctly summarized by the court in the matter of *S v Dewani*[8] as follows:

“(a) An accused person 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.

- (b) In deciding whether the accused person is entitled to be discharged at the close of the State's case, the court may take into account the credibility of the State witnesses, even if only to a limited extent.

(c) Where the evidence of the State witnesses implicating the accused is of such poor quality that it cannot be safely relied upon, and there is accordingly no credible evidence on record upon which a court, acting carefully, may convict, an application for discharge should be granted.” (emphasis added)

[57] The evidence of Mr Mathunzi during cross-examination revealed the following aspects, which in my view, are a confirmation that at this stage of the proceedings, it cannot be said that the accused was involved in the commission of the offences for which he is being charged with.

1. He is the one who fetched the deceased from her home and was seen by Ms Lesufi. He confirmed that Ms Lesufi saw him that evening and also confirmed the evidence of Ms Lesufi that he called the deceased before fetching her from her home. On the same token, the evidence of Lesufi was that – when she made the last call to Mr Mathunzi – he told her that he knows where the deceased was.
2. The vehicle that was used to fetch and transport the deceased from her home to his place of residence belongs to him.
3. The hammer that was used to strike the deceased with belongs to him and it was in his toolbox. He testified that he was using this hammer to fix his vehicle with during the day.
4. The knife that was used to cut off the body parts of the deceased belongs to him because it was taken from one of his drawers. This evidence contradicted his other version that the accused took out the knife from his pocket, and when confronted about this new version, he chose not to answer any questions put to him.
5. The deceased was killed in his own house and her body was dismembered there.
6. He personally cleaned the blood of the deceased, and the accused was not present.
7. When he was arrested, he told the police that he was with the accused and took them to the house of the accused. A search was conducted using sniffer dogs and nothing was found.
8. When he disposed of the body of the deceased, the accused was not present. He alone, covered and wrapped the body of the deceased with his own blanket from his house and went to dump the body next to the river in the weeds and set it alight.
9. He did not get any instructions from the accused that he should get rid of the body or burn it. He did all this by himself.
10. He told the police that he will show them where he hid the body of the deceased because he personally placed the body there. In this regard, he ended up doing what is normally referred to as a pointing out.
11. The accused was not present when he did a pointing out.

12. He testified that the accused did not demand money or promise him any money for the body parts or for killing the deceased.
13. He initially testified in chief that just before the deceased was dismembered, the accused said it was time to do a sacrifice, but when asked under cross-examination if the accused told him that they should sacrifice the deceased or anyone for that matter, he said “No, the accused did not tell me about any sacrifice, but he only said we have to pray because prayer will bring me luck and prosperity”.

· The issue regarding making a sacrifice is contained in a statement he made to the police eight days after the incident, and when asked about what he told the police back then, he responded as follows: “I never said the accused said we will need a sacrifice. Maybe I was confused. We did not talk about a sacrifice, and I did not talk to the police about the sacrifice”.

· when asked by the defence if his statement was incorrect, he responded in the affirmative and said he made a mistake. He was then reminded about what he initially said when he testified in chief, and

he said he is surprised that he said that.

14. Mr Mathunzi told Colonel Mokgetle during the interview that he wanted to make an admission, but Colonel Mokgetle realized that the admission amounted to a confession, - and he organised captain Senoamadi from a different police station to take the confession statement. Mr Mathunzi then made a confession freely and voluntarily without any threat or promise from the police, which he later tried to distance himself from by contradicting the contents thereof – stating that he does not remember what he told the police.
15. Application to use previous consistence statement in terms of Section 235 of CPA read with section 3(1)(c) of the Law of Evidence Amendment Act was made by the defence. The statement relates to a Plea and Sentence Agreement made by Mr Mathunzi in terms of section 105A of the CPA.

· Having considered the submissions made by the defence and having

regard to the fact that the State had no objection that the statement be referred to, I was of the view that there would be no prejudice to Mr Mathunzi.

· The court also took into account that it has the inherent jurisdiction to develop its own jurisprudence, and consequently granted the application in the interest of justice.

16. It is common cause that Mr Mathunzi appeared before another court and entered into a plea bargain agreement and was sentenced. He testified before this court that he was legally represented in those proceedings and confirmed to that court that his statement and his guilty plea is done without any undue influence and was doing it freely and voluntarily.

· He somehow developed amnesia when cross-examined by Mr Motala and said he does not remember some of the contents of his plea agreement which were contradictory to his evidence before this court.

· When cross-examination became tough for him, he put a blame on his lawyer who was representing him during those proceedings and said that the lawyer threatened him that if he does not agree to sentence suggested and bargained for in the agreement, he will be given life imprisonment.

17. One other interesting point about Mr Mathunzi is that he told Sergeant Raphagadi who also interviewed him that when the deceased got into his vehicle, she was given a drink that was spiked with drugs and she dozed off, as opposed to his evidence before this court that the accused pointed the deceased with a stick and she fell asleep.

· One of the stories or different versions that Mr Mathunzi told

Sergeant Raphagadi is that – he was approached by the accused who told him that he wanted some body parts of an African woman and will pay him for that and will also give him medicine and a snake to make him to be a stronger traditional healer. This version completely differs from what he told the court when he testified that he is the one who approached the accused, and the accused said he should pray every day at 12 midnight.

· The court is mindful of the fact that the accused was unknown to Mr Mathunzi because he specifically stated that he did not know the accused and he was taken to him by Ms Sarah.

· The evidence of Mr Mathunzi does not only contradict his statements

admitted as exhibits before this court, but it also contradicts the evidence of the three police officers who gave different versions

from each other in respect of their interviews with him.

18. It was interesting to note that when asked by Mr Motala – which evidence should the court accept as the truth since he has five different versions and he is disputing his viva voce evidence, he responded by saying: “I was confused, maybe I was traumatized”.

19. I also take note that Mr Mathunzi also tried to put blame on the police whom he has interacted with, and those who took down his statements by stating that he does not know why the police have noted wrong things in his statements.

20. In essence, he disputed everything, including most parts of his viva voce evidence.

[58] In light of the evidence presented before this court, I am of the view that the State failed to establish and present a prima facie case that requires the accused to answer to, and it is my considered view that there is no evidence upon which a reasonable person might convict. Accordingly, the accused stands to be discharged on both counts he has been charged with.

[59] In the circumstances, I make the following order:

1. The application in terms of section 174 succeeds, and the accused is discharged in terms of section 174 of the CPA.

PD. PHAHLANE

JUDGE OF THE HIGH COURT

APPEARANCES For the State : Adv. Lalane Instructed by : Director of Public Prosecutions,
Pretoria For the Accused : Mr Motala Instructed by : Motala Attorneys Heard : 15 August 2024

Judgment

Delivered : 22 August 2024

- [1] R v Shein 1925 AD 6; Rex v Herholdt & Others 1956(2) SA 722 (W); S v Mpetha & Others 1983(4) SA 262; S v Shuping & Others 1983(2) SA 119 (B); S v Lubaxa 2001(2) SACR 703 (SCA)
- [2] 2001 (2) SACR 703 (SCA).
- [3] Act 108 of 1996.
- [4] S v Hepworth 1928 AD 265.
- [5] (543/13) [2014] ZASCA 161; 2015
- (2) SACR 202 (SCA) (01 October 2014).
- [6] At para 18.
- [7] S v Agliotti 2011
- (2) SACR 437 (GSJ) at 280.
- [8] [2014] ZAWCHHC 188) at para 15.

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CASE PAGE <https://chat.esheria.ai/case-law/south-africa/s-v-nkuna-unknown-topic-agpphc-2024--6a3ea5203b1caa91298170e9>

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