IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES**
Of Interest to other Judges:	**YES**
Circulate to Magistrates:	**YES**

Case number: 33/2016

In the matter between:

THE STATE

and

PETER FREDERIKSEN Accused

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 14 SEPTEMBER 2017

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[1] The accused, Mr Peter Frederiksen, a Danish national, is charged with 58 counts, including *inter alia* rape, child pornography, transgressions of the National Health Act, 61 of 2003 ("the Health Act"), fraud, transgressions of the Firearms Control Act, 60 of 2000 and conspiracy to commit murder. He pleaded not guilty to all charges. Counts 2, 3 and 4 were withdrawn by the State before pleading.

[2] The State has closed its case and it is now my responsibility to adjudicate an application in terms of s 174 of the Criminal Procedure Act, 51 of 1977 ('the CPA"). The accused seeks his discharge in respect of counts 8 to 17, to wit transgressions of s 58 of the Health Act, counts 18 – 27, to wit transgressions of s 55 of the Health Act, count 54, being conspiracy to commit murder and count 61, to wit transgression of s 18 of the Riotous Assemblies Act, 17 of 1956 ("the Riots Act").

[3] The starting point must be the wording of s 174 of the CPA and *S v Lubaxa* 2001 (4) SA 1251 (SCA), the *locus classicus* on applications of this nature. The relevant section reads as follows:

> **"Accused may be discharged at close of case for prosecution**
> 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."

[4] The following *dicta* in *Lubaxa* are relevant and I quote from paragraphs 10 and 19:

"[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.

[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.

[5] Counts 8 to 17 and 18 to 27 are related in that it is the State's case that transgressions of the Health Act occurred in respect of certain identified as well as unidentified female persons. The first group of counts relate to the removal by the accused of human tissue from

living persons, to wit the particular females mentioned, without their written consent and outside a hospital or an authorised institution over the period January 2010 to June 2015. Reliance is placed by the State on s 58 of the Health Act. The second group of counts, to wit 18 to 27, applies to the same individuals, some identified and others not, as is the case *supra.* Here, reliance is placed on s 55, read with s 56 of the Health Act, insofar as human tissue were removed from the female persons without their written consent and not done in accordance with the prescribed manner and procedures.

[6] Accused's [...], the Lesotho citizen, Ms A. M. M. (referred to throughout the hearing as "T.") was one of the alleged victims, but she sadly passed away on 21 October 2015, a month after accused's arrest. Three affidavits deposed to be her were admitted in terms of s 220 of the CPA, although the contents thereof are hearsay. The only other person who testified in this regard is the witness, Ms P M, whose identity is withheld insofar as she testified *in camera*. The procedure in terms whereof accused cut out (also referred to as harvested) the witness' clitoris was recorded on videotape. The recording was shown in court and handed in as exhibit. The accused's bedroom of his house in Langenhoven Park, Bloemfontein served as the "theatre".

[7] Accused admitted to cutting and/or piercing T.'s private parts on four occasions. His diaries confirm that he made notes of the various circumcisions, *inter alia* pertaining to a certain M. (who also passed away) and M. (who was unwilling to testify according to Ms Bester for the State). The human tissue were stored in accused's

freezer and eventually seized by the SAPS and subjected to DNA analysis. The different human tissue were separately packed and identified with the names of the "donors" and other relevant information. Ms PM hesitantly agreed to be circumcised for which she received payment in the amount of R2 500.00, although it is denied by accused that payment was made for that purpose. T.'s version (*ex facie* her statements) is that she was drugged by accused and/or under the influence of alcohol during the procedures on her and that she did not consent. This is denied by the accused. Bearing in mind the outcome of the s 174 application, it will serve no purpose to deal any further with the evidence.

[8] Right from the start of the proceedings I had doubts whether accused could be convicted on these counts, even if all facts as relied upon by the State in the summary of substantial facts were proven. My view, which I articulated to the legal representatives in chambers, was and still is that the legislature failed to create criminal offences in respect of these transgressions. I shall elaborate *infra.*

[9] The Health Act provides "a framework for a structured uniform health system within the Republic, taking into account the obligations imposed by the Constitution and other laws on the national, provincial and local governments with regard to health services; and to provide for matters connected therewith". It appears from the preamble that the legislature intended to establish a suitable health system, bearing in mind the imbalances of the past and socio-economic injustices. The objects of the Act, as set out is s 3, are to regulate national health and to provide uniformity in respect of health services. This context must be

considered when the Health Act is interpreted and specifically ss 55 and 58 thereof.

[10] Section 55 of the Health Act reads as follows:

"55 Removal of tissue, blood, blood products or gametes from living persons

A person may not remove tissue, blood, a blood product or gametes from the body of another living person for the purpose referred to in section 56 unless it is done-

(a) with the written consent of the person from whom the tissue, blood, blood product or gametes are removed granted in the prescribed manner; and

(b) in accordance with prescribed conditions".

According to the indictment this section must be read with s 56 which provides that tissue, gametes, blood or blood products withdrawn from living persons may only be used for medical and dental purposes as may be prescribed.

Section 58 of the Health Act reads as follows:

"58 Removal and transplantation of human tissue in hospital or authorised institution

(1) A person may not remove tissue from a living person for transplantation in another living person or carry out the transplantation of such tissue except-

(a) in a hospital or an authorised institution; and

(b) on the written authority of-

(i) the medical practitioner in charge of clinical services in that hospital or authorised institution, or any other medical practitioner authorised by him or her; or

(ii) in the case where there is no medical practitioner in charge of the clinical services at that hospital or authorised institution, a medical practitioner

authorised thereto by the person in charge of the hospital or authorised institution.

(2) The medical practitioner contemplated in subsection (1) *(b)* may not participate in a transplant for which he or she has granted authorisation in terms of that subsection".

I accept that the legislature inserted legal and moral norms, but no criminal offences were created in either of the above sections, unlike for example in ss 53 and 60. However, criminal offences are created in s 89 as will appear from the quotation *infra,* but none thereof relate to transgressions of ss 55 and 58. Section 89 reads as follows:

"89 Offences and penalties

(1) A person is guilty of an offence if he or she-

(a) obstructs or hinders a health officer or an inspector who is performing a function or any other person rendering assistance or support to a health officer or an inspector under this Act;

(b) refuses to provide a health officer or an inspector with such information as that person is required to provide under this Act;

(c) knowingly gives false or misleading information to a health officer or an inspector;

(d) unlawfully prevents the owner of any premises or health establishment, or a person working for the owner, from entering the premises or health establishment in order to comply with a requirement of this Act;

(e) impersonates a health officer or an inspector;

(f) fails to comply with a compliance notice issued to him or her by a health officer or an inspector in terms of this Act;

(g) discloses any information acquired in the performance of any function in terms of this Act which relates to the financial or business affairs of any person, to any other person, except if-

(i) such other person requires that information in order to perform any function in terms of this Act;

(ii) the disclosure is ordered by a court of law; or

(iii) the disclosure is in compliance with the provisions of any law; or

(h) interferes with, hinders or obstructs the Ombud or any other person rendering assistance or support to the Ombud when he or she is performing or exercising a function or power under this Act.

(2) Any person convicted of an offence in terms of subsection (1) is liable on conviction to a fine or to imprisonment for a period not exceeding 10 years or to both a fine and such imprisonment".

[11] The Human Tissue Act, 65 of 1983 was repealed by the Health Act, some sections thereof earlier than others. For purposes hereof s 55 of the Health Act came into operation on 17 May 2010, s 58 on 1 March 2012 and s 89 on 2 September 2013. Unlike the Health Act, the repealed Human Tissue Act created offences and penalties in respect of the acquiring, using, supplying or removal of any tissue from the body of a living person for any purpose other than permitted in the Act. I refer to the repealed ss 23 and 34. For an unknown reason the legislature, supposedly being well aware of the offences created in the former Act, failed to create criminal offences in the Health Act for similar transgressions.

[12] Section 35(3) of our Constitution stipulates as follows:

"(3) Every accused person has a right to a fair trial, which includes the right-

(l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;

(m) …….

(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing…" (emphasis added)

[13] **In** *Cool Ideas v Hubbard* 2014 (4) SA 474 (CC) the principles applicable to statutory interpretation were summarised as follows:

"[28] A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised; and

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in *(a)*."

[14] In *Director of Public Prosecutions, Western Cape v Prins and Others* 2012 (2) SACR 183 (SCA) the principle of legality was considered and I quote:

"The principle of legality

[6] I have already outlined the importance of this case from the perspective of the right of all people, but in particular women and children, who are the most vulnerable and the most affected, to be protected against sexual violence. But that alone cannot be decisive of this appeal. The reason is that the decision by the high court flows from a constitutional principle that is equally fundamental, namely the principle of legality. The power of the state to prosecute people and the power of courts to try, convict and sentence offenders are public powers of the greatest importance. In the history of the struggle for basic human rights the abuse of the criminal process by governments to suppress dissent and stifle the views of those opposed to the regime in power is notorious. One can trace this in the history of many countries, but our own experience suffices to underline the fact that abuse of power, including abuse of the criminal process, lies at the heart of tyranny and oppression. In the light of that history our Constitution demands that the 'Legislature and Executive in every sphere are

constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law'. The courts, as the guardians of the Constitution, are likewise constrained…

[8] The two maxims (the court referred to *nullum crimen sine lege* and *nulla poena sine lege*) are, within their respective spheres, reflections of the principle of legality. In *S v Dodo*, Ackermann J summed up their effect, insofar as the imposition of sentences for crimes is concerned, as follows:

'(T)he nature and range of any punishment, whether determinate or indeterminate, has to be founded in the common or statute law; the principle of legality *nulla poena sine lege* requires this.'

In other words, the imposition of a sentence by a court must have its justification in either the common law or statute. In the absence of a provision that empowers the court to impose a sentence it is powerless to do so. This is not a new principle created by the Constitution.

The courts' sentencing powers

[10] Conduct is criminal either under the common law or by statute. In the latter case it is usual for the legislature both to define the criminal conduct and to specify the penalty or range of penalties that may be imposed by courts trying the statutory offence. Where that occurs the powers of the court in regard to sentence are, generally speaking, clear,
although problems can arise……

[15] …. One can readily see that, when a court is confronted with the question whether a statutory provision prohibiting particular conduct is a crime, the failure of the legislature to attach a penalty to non-compliance is an important factor in determining whether a crime was constituted thereby. This was the determining factor in this court in *R v Zinn*, where it was held that a *Besluit* by the Transvaal Volksraad, prohibiting the use or occupation of land in townships by 'coloured' people, did not, in the absence of a criminal penalty, create a criminal offence. Greenberg JA, who gave the judgment of the court, carefully refrained from

deciding whether, in the absence of both an express statement of criminality and a penalty, it was permissible for a court to construe a legislative prohibition on particular conduct as creating a crime by necessary implication.

[16] That issue arose in the controversial decision in *R v Forlee* supra [1917 TPD 52], which concerned a statute that prohibited the sale of opium, save by a pharmacist under a prescription, but did not say that such a sale was a crime, nor provided for a penalty for making such a sale. Mason J pointed out that the sale of opium in such circumstances had always been a crime and that the possession of opium, other than by a pharmacist or under a prescription, was said specifically to be a crime. He concluded that the absence of a penalty did not mean that the sale of opium was not an offence punishable by the courts within their ordinary powers. I agree with Greenberg JA in *Zinn*'s case, supra, that:

'The final conclusion, in *Rex v Forlee (supra*), that the enactment constituted an offence was based on the broad ground that the Act in question (viz., the sale of opium) was expressly prohibited in the public interest and with the evident intention of constituting an offence.'

The approach of the court was that an inference of an intention to criminalise the prohibited conduct could be drawn from the language of the statute even though there was no clear statement to that effect.

[17] The decision in *R v Forlee* has been the subject of considerable academic, and some judicial, criticism on the basis that to hold that a statute creates a crime by necessary implication infringes the principle of legality. However, it is unnecessary to decide whether the criticism is justified, because that question does not arise in the present case. …. Before turning to address that issue I will briefly indicate why it is clear that the Act creates criminal offences in chs 2, 3 and 4 thereof." (footnotes omitted and emphasis added) There is no doubt that *Prins* is distinguishable from the facts *in casu.* There, punishment was not prescribed, but criminal offences were created, which is clearly not the situation here. The SCA decided not to consider the correctness of the *Forlee* judgment. In my respectful opinion that judgment is contrary to the principle of legality and

clearly wrong, but in any event, cannot be regarded as the law in light of our constitutional dispensation and s 35(3)(l) of the Constitution in particular.

[15] In *Masiya v DPP, Pretoria and Another* 2007 (2) SACR 435 (CC) the court developed the common law definition of rape by extending it to non-consensual anal penetration of females. Snyman C R, *Criminal Law* 5th ed at p 46 criticised the judgment severely as, according to him, it undermines the principle of legality. He even referred thereto as "a fly in the ointment". Notwithstanding Snyman's criticism it is apparent that the Constitutional Court accepted that it would be unfair to allow the extension of the crime to have retrospective application. Consequently Mr Masiya, who was convicted in the High Court of rape on the basis of the anal penetration of a female, succeeded with his appeal and the conviction was replaced with a conviction of indecent assault. The court concluded as follows:

"[51] .....The question is whether when developing the common law it is possible to do so prospectively only. In my view, it is. In this case, if the definition of rape were to be developed retrospectively it would offend the constitutional principle of legality as I have demonstrated above. On the other hand, if we were to accept that the principle of legality is a bar to the development of the common law, the Courts could never develop the common law of crimes at all. In my view, such a conclusion would undermine the principles of our Constitution which require the courts to ensure that the common law is infused with the spirit, purport and objects of the Constitution. The impasse can be avoided by accepting that in these circumstances it is appropriate to develop the law prospectively only. I accept that it is only in rare cases that it will be appropriate to develop the common law with prospective effect only, as the Law

Lords suggested in the *Brockhill Prison* decision (*supra*). However, in my view this is one of those cases where fairness to an accused requires that the development not apply to him, but only to those cases which arise after judgment in this matter has been handed down.

[52] One of the central tenets underlying the common-law understanding of legality is that of foreseeability - that the rules of criminal law are clear and precise so that an individual may easily behave in a manner that avoids committing crimes……

[54] Section 35(3)*(l)* of the Constitution confirms a long-standing principle of the common law that provides that accused persons may not be convicted of offences where the conduct for which they are charged did not constitute an offence at the time it was committed. Although at first blush this provision might not seem to be implicated by finding Mr Masiya guilty of rape in this case, because the act he committed did constitute an offence both under national law and international law at the time he committed it, in my view, the jurisprudence of this Court would suggest otherwise.

[55] In the first case in which the Court addressed s 35(3)*(l)* and its counterpart in respect of sentence, s 35(3)*(n)*, *Veldman v Director of Public Prosecutions, Witwatersrand Local Division,* the Court held that the principle of legality is central to the rule of law under our Constitution. That case concerned the question of whether, where the sentencing jurisdiction of a court had been increased after an accused had pleaded, the accused could be sentenced in terms of the increased jurisdiction. The Court held it could not. The Court observed that once an accused has pleaded, the constitutionally enshrined principle of legality requires that the sentencing jurisdiction of a court cannot be varied to the detriment of the accused, even where it was clear that the increased sentence was a permissible sentence for the charge involved. The Court held that:

'To retrospectively apply a new law, such as s 92(1)*(a)*, during the course of the trial, and thereby to expose an accused person to a more severe sentence, undermines the rule of law and violates an accused person's right to a fair trial under s 35(3) of the Constitution.'

[56] The strong view of legality adopted in *Veldman (supra*) suggests that it would be unfair to convict Mr Masiya of an offence in circumstances where the conduct in question did not constitute the offence at the time of the commission. I conclude so despite the fact that his conduct is a crime that evokes exceptionally strong emotions from many quarters of society. However, a development that is necessary to clarify the law should not be to the detriment of the accused person concerned unless he was aware of the nature of the criminality of his act. In this case, it can hardly be said that Mr Masiya was indeed aware, foresaw or ought reasonably to have foreseen that his act might constitute rape as the magistrate appears to suggest. The parameters of the trial were known to all parties before the Court and the trial was prosecuted, pleaded and defended on those bases. It follows therefore that he cannot and should not bear adverse consequences of the ambiguity created by the law as at the time of conviction.

[57] The evidence adduced at the trial established that Mr Masiya was guilty of indecent assault. To convict him of rape would be in violation of his right as envisaged in s 35(3)*(l)* of the Constitution. I conclude therefore that the developed definition should not apply to Mr Masiya."

[16] *Masiya's* judgment is instructive insofar as it explains the powers of courts to extend common law crimes. *In casu* we have a totally different scenario insofar as statutory provisions have to be interpreted in line with the established principles *inter alia* enunciated in *Cool Idea supra*. If I consider the clear and unambiguous language of the legislature together with the context in which the Health Act was drafted and eventually promulgated, as well as the background circumstances, I have no doubt that I cannot interpret the Act to the extent that criminal offences have been created for transgressing the provisions of ss 55 and 58. This court cannot venture into the arena of the legislature by creating criminal offences merely because it might be of the view that a

casus omissus has occurred. The legislature must consider this judgment and decide how to approach this thorny issue. Ms Bester, an experienced and senior member of the DPP's office in Bloemfontein, conceded that the State cannot obtain convictions in respect of the particular counts. Consequently, the accused's application in respect of counts 8 to 27 should succeed.

[17] The next issue is the application for discharge in respect of count 54, the conspiracy charge. Mr Bruwer made a valiant effort in relying on *S v Basson* 2007 (1) SACR 566 (CC) to persuade me to discharge the accused. He emphasised that many of the activities relating to the conspiracy took place in Lesotho and also the killing itself. I do not agree. It is necessary to consider the relevant principles set out in *Basson* and therefore I intend to quote several passages before coming to a conclusion. Before I do this, it is apposite to mention that the State alleges in the indictment that on or about 17 September to 20 October 2015 and at or near Bloemfontein the accused unlawfully and intentionally conspired with Mohlatsi Moqeti and others to commit an offence, to wit to kill A. M. M., a female person. It is common cause that this person is T., the accused's [...]. It is also common cause that she died of gun wounds in Lesotho on 21 October 2015.

[18] The State relies on the contravention of s 18(2) of the Riotous Assemblies Act, 17 of 1956 which reads as follows:

> "**18 Attempt, conspiracy and inducing another person to commit offence**
> (1) .....

(2) Any person who-

(a) conspires with any other person to aid or procure the commission of or to commit; or

(b) incites, instigates, commands, or procures any other person to commit,

any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable."

[19] Mr Moqeti, a Lesotho citizen, is at present a sentenced prisoner. He was warned as a s 204 witness. He is a single witness, a co-perpetrator and some of his evidence is hearsay although this was admitted by the accused to be admissible. On his version he and accused colluded whilst in Grootvlei Correctional Centre and when they were both awaiting trial. Accused denies any collusion or conspiracy. Accused was arrested on 17 September 2015 and he found Moqeti there, a paraplegic in a wheel chair. On 6 October 2015 Moqeti was released on bail, whilst accused remained incarcerated.

[20] It is not my intention to summarise the evidence of Moqeti in any detail, but it is deemed necessary to mention the following, bearing in mind Mr Bruwer's attack. The two role players exchanged cell phone numbers when they met at the Magistrates' Court cells. Hereafter a discussion took place at the hospital section of Grootvlei. Accused stated that his [...], a witness, caused his detention and that he was looking for people to kill this witness. Accused explained that his employees at his Bloemfontein and Lesotho businesses would be able to assist Moqeti and accused

would arrange with them for meetings to be set up once Moqeti is out on bail. Accused agreed to pay Moqeti R120 000.00 for completing the task of killing the [...]. Meshack, accused manager at Impala Arms in Maseru, Lesotho, would point out the accused's [...] and residential address to the hitman/men. He was also the person that would be responsible for payment in accordance with accused's instructions. After his release on bail, accused kept on calling Moqeti as he was anxious that the task be completed. As agreed R10 000.00 was paid as a deposit to Moqeti's contact in Lesotho, one Paul, of which Moqeti received R2 000.00. Paul informed Moqeti that accused's [...] was shot four times and that she succumbed. Accused arranged payment of the balance which was done by Meshack. Paul and Moqeti met in Ladybrand after the killing and Moqeti received his portion of the agreed sum, to wit R30 000.00. Apparently, one Selome accompanied Paul when T. was shot and killed.

[21] In *Basson supra* the Constitutional Court upheld an appeal by the State against the order of Hartzenberg J in the High Court, squashing six counts in respect of conspiracy on the basis that the acts to be undertaken in accordance with the conspiracy would be executed outside the borders of South Africa. The court found at para [207] that one of the purposes of s 18(2) of the Riots Act was to fill a gap in the common law and to make conspiracy an offence. It continues at para [209] as follows:

"[209] A criminal conspiracy is an offence whether it is implemented or not. It follows that the failure of a conspiracy is not relevant to the conspirators' guilt. The judgment [of Hartzenberg J which the Constitutional Court set

aside] must therefore be understood as meaning that s 18(2) applies to conspiracies to commit crimes, which if committed, would be justiciable in South Africa". The paragraph must be seen in proper perspective. The Constitutional Court found at para [247] that the High Court erred in squashing the particular counts on the grounds that they did not disclose an offence.

It is an accepted principle that our courts do not exercise jurisdiction, as a general proposition, over persons who commit crimes in other countries. However, conspiracy is a distinct crime and must be distinguished from the envisaged crime. As stated in *Basson* at para [245]:

"The conspiracy with which the respondent was charged was entered into in South Africa. [the envisaged crimes were to be committed in South West Africa, now Namibia, London, Mozambique and Swaziland] If, as we have held, it falls within s 18(2) of the Riotous Assemblies Act it constituted an offence whether or not the contemplated crimes were carried out or not."

[22] I am of the view that it will have grave consequences for South Africa's international standing if we allow our citizens and others to conspire in South Africa to commit crimes in neighbouring or other countries without sanction. As stated in *Basson* at para [238]:

"We were not referred to a decided case in South Africa which has held that s 18(2) of the Riotous Assemblies Act requires the crimes to be committed in terms of the conspiracy to be justiciable in South Africa…The mere fact that it [the common law of England] is more favourable to an accused person is, in our view, insufficient to call for an interpretation of s 18(2) which is

inconsistent with the realities of a modern state, where international criminal conspiracies organized and directed from one country often involve criminal acts to be committed in other countries, and the proceeds of the crime to be laundered elsewhere."

[23] On the available evidence the actual conspiracy agreement was entered into between accused and Moqeti at Grootvlei Correctional Centre, Bloemfontein. The envisaged crime and the target were clearly identified as well as the payment to be made. These two parties did not have to agree about the exact manner in which the envisaged crime was to be committed. They were not merely negotiating, but entered into a clear and unambiguous agreement. The mere fact that Moqeti needed to make further arrangements for the execution of the victim does not detract from the fact that a successful conspiracy was concluded. Obviously, these findings are made on the evidence presented by the State which is sufficient for a reasonable court to convict upon. The accused must be put on his defence. Whether a crime has been committed or not will depend on an evaluation of the totality of the evidence at the end of the case.

[24] Count 61 relates to a contravention of s 18(a) of the Prevention and Combatting of Corrupt Activities Act, 12 of 2004 in that the accused unlawfully and intentionally influenced the testimony of a State witness, Numbi, by paying her an amount of R2 000.00 to testify in his favour. Mr Bruwer submitted that the count is confusing insofar as it is uncertain whether reliance is placed on subs (a) or (b). He also pointed out that Numbi did not testify and that the court is therefore not in a position to find whether she was in fact influenced as alleged or not. After the State closed its case, Ms Bester made

available to the defence all witnesses on the list that were not called to testify. Numbi is one of them. The accused may testify in this regard and may call Numbi as well.

[25] Section 18(a) and (b) of Act 12 of 2004 reads as follows:

> **18 Offences of unacceptable conduct relating to witnesses**
> Any person who, directly or indirectly, intimidates or uses physical force, or improperly persuades or coerces another person with the intent to-
> *(a)* influence, delay or prevent the testimony of that person or another person as a witness in a trial, hearing or other proceedings before any court, judicial officer, committee, commission or any officer authorised by law to hear evidence or take testimony; or
> *(b)* cause or induce any person to-
>
> (i) testify in a particular way or fashion or in an untruthful manner in a trial, hearing or other proceedings before any court, judicial officer, committee, commission or officer authorised by law to hear evidence or take testimony;
>
> (ii) withhold testimony or to withhold a record, document, police docket or other object at such trial, hearing or proceedings;
>
> (iii) give or withhold information relating to any aspect at any such trial, hearing or proceedings;
>
> (iv) alter, destroy, mutilate, or conceal a record, document, police docket or other object with the intent to impair the availability of such record, document, police docket or other object for use at such trial, hearing or proceedings;
>
> (v) give or withhold information relating to or contained in a police docket;
>
> (vi) evade legal process summoning that person to appear as a witness or to produce any record, document, police docket or other object at such trial, hearing or proceedings; or
>
> (vii) be absent from such trial, hearing or other proceedings,
>
> is guilty of the offence of unacceptable conduct relating to a witness.

[26] Count 61 is not elegantly worded, but evidence has been led by the State to indicate that the accused did in fact arrange for the payment of Numbi. Mr Reggie Ngubeni, the accused's manager at Impala Arms, Bloemfontein, was instructed to make payment to Numbi. However, this did not materialize as there was insufficient money. Mr Ngubeni testified that he phoned the accused's previous counsel from the offices of W/O Steyn to ascertain whether he had paid the R2 000.00 to Numbi as instructed by the accused. This advocate confirmed that he had acted accordingly. Mr Ngubeni testified that accused had informed him that Numbi would assist him with the case against him and that she would provide him with accommodation in Lesotho after his release. Ms P M also testified about the instructions from accused that an amount of R2 000.00 should be paid over to Numbi in order that she "will come to be on his side" as her evidence was interpreted. We also know that Ms Dimpho Molise, T.'s sister, was contacted by accused several times in the weeks preceding the trial, requesting her not to attend the hearing. I am therefore of the opinion that sufficient evidence was placed before the court to dismiss the application for discharge on this count.

[27] **ORDERS:**

Where for the following orders are made:

1. Accused's application in terms of s 174 of Act 51 of 1977 for his discharge on counts 8 to 27 is granted and accused is acquitted on these counts.
2. Accused's application for his discharge in respect of counts 54 and 61 is dismissed and he is put to his defence.

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JP DAFFUE, J

On behalf of State: Adv A Bester
Instructed by: Director of Public Prosecutions

On behalf of accused: Mr M Bruwer
Bloemfontein