SECTION 174 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977: DOES THE INTERESTS OF JUSTICE AND THE OUTCOME IN *S V DEWANI* HERALD THAT IT IS TIME TO EJECT THIS PROVISION FROM OUR LAW?

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DECLARATION

I, Aaliyah Chetty, hereby declare that this dissertation contains my own work except where specifically acknowledged. Further, I declare that I have obtained the necessary authorisation and consent to carry out this research.

I further declare that this research has not been previously accepted for any degree and is not being currently considered for any other degree at any other university.

Signed Chetty

Date 15/12/17

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ABSTRACT

Section 174 of the Criminal Procedure Act 51 of 1977 encompasses the right of an accused to be discharged from the offence he has allegedly committed where, at the close of the State's case, there is no evidence on which the court may draw the accused to the charge.

The section and its forerunners have dwelled in South African law for some time. In the first instance, the discharge provision was used as an instrument to prevent the jury from reaching perverse decisions. Nevertheless, despite the abolition of the jury system of adjudication in South Africa in 1969, there is no doubt that the section ensures that the accused's fair trial rights are fulfilled.

However, though discharge may seem like a straightforward task for a judge who, at the close of the State's case, has a sense of the strength of the allegations against the accused, it is far from this. Over the years, South African courts and scholars have grappled with the interpretation of the section, more especially with the words 'no evidence'. Furthermore, there have been countless debates on the standard of evidence and the role 'credibility' should play at the discharge stage of the proceedings. As a result, there is evidence, fairly recently from the outcome in *S v Dewani* [2014] JOL 32655 (WCC), which suggests that courts do not fully understand and appreciate the extent of their role in deciding to discharge an accused.

Thus, the aim of this dissertation is to critically analyse s 174 of the Criminal Procedure Act 51 of 1977 in respect of its interpretation, its history and its operation in another jurisdiction, and produce a meaningful interpretation which would restore purpose to the section in South Africa. Furthermore, the case of *S v Dewani* will be thoroughly analysed as it is a recent application of s 174 of the Criminal Procedure Act 51 of 1977.

CHAPTER 1
INTRODUCTION

1.1 Background and overview of s 174 of the Criminal Procedure Act 51 of 1977

In 1996, after an era of political movements and severe human rights breaches, South Africa formulated a world-class Constitution[1] second to none. Due to South Africa's rich history, the rights enshrined in our Constitution are paramount. The Constitution was formulated to accommodate the needs of every category of person in South Africa, including persons accused of committing crimes. The Constitution is the supreme law of the land, and hence all legislation must be articulated in accordance with it.[2]

Section 174 of the Criminal Procedure Act,[3] in a nutshell, is the discharge provision present in South African law that is available to an accused person. The section reads as follows:

> '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'.

In summary, if the accused feels that the State has not produced a sufficient case, on which he or she may be found guilty of the alleged crime, then the accused can apply to court, in terms of s 174 of the Act, to be discharged from the charge against him.[4]

It has been established that the words 'no evidence' is not interpreted to mean absolutely no evidence, but rather, 'no evidence upon which a reasonable man, acting carefully, might convict'.[5]

[1] The Constitution of the Republic of South Africa Act 108 of 1996 (hereafter referred to as 'the Constitution').
[2] Section 2 of the Constitution.
[3] Section 174 of the Criminal Procedure Act 51 of 1977 (here after referred to as 'the Act').
[4] *S v Heller* (2) 1964 1 SA 524 (W).
[5] *S v Dewani* [2014] JOL 32655 (WCC) para 7; *R v Shein* 1925 AD 6; *R 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).

Over the years it has become evident that the courts, as well as many legal writers have grappled with the interpretation and constitutionality of s 174 of the Act.[6] They have identified multiple shortcomings inherent in the way some courts have interpreted the section.[7]

The controversy surrounding s 174 of the Act arises primarily as a result of the insertion of the word 'may' in the section. This word inevitably leaves it to the court to exercise its discretion on whether or not to discharge the accused person.[8] Furthermore, the State becomes disadvantaged as a decision in terms of s 174 of the Act is not questionable on appeal.[9] However, where a court refuses to discharge an accused at the close of the State's case, then such a decision may be reviewable only where there is evidence of an irregularity in the course of the trial.[10]

In *S v Agliotti*[11] the court emphasised that s 174 of the Act empowers the court to judicially exercise its discretion to decide on discharging the accused at the close of the State's case, and it would be incorrect to give recommendations to the court on how to exercise such a discretion.

The court in *Agliotti* went on to say, '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 not to do so'.[12]

One of the key cases dealing with an interpretation of s 174 of the Act, and one which sparked much controversy, is *S v Shuping & others*[13]. In this case Hiemstra CJ attempted to formulate a two stage enquiry to serve as a guideline for courts when exercising their discretion on whether or not to confirm or reject an application for discharge.[14] According to *Shuping*, the first leg of the enquiry is 'whether there is enough evidence on which a reasonable man might convict on'. If the answer to this question is 'no' then the court deciding the application must

[6] G Gertsch 'Forensic Hara-kiri: The Dilemma of Discharge at the Close of the State's Case' (1993) 6 (3) *South African Journal of Criminal Justice* 272.
[7] Ibid.
[8] *R v Mkize & others* 1960 (1) SA 276 (N); *S v Mall & others* (1) 1960 (2) SA 340 (N) at 342.
[9] See *R v Lakatula & Others* 1919 AD 362; *R v Afrika* 1938 AD 566.
[10] *Ebrahim v Minister of Justice* 2000 (2) SACR 173 (W).
[11] *S v Agliotti 2011* (2) SACR 437 (GSJ) at 257.
[12] Ibid at 258.
[13] *Shuping* supra (note 5 above).
[14] A Skeen 'The Decision to Discharge an Accused at the Conclusion of the State Case: A Critical Analysis' (1985) 102 (2) *South African Law Journal* 290.

move on to the second enquiry, 'is there a reasonable possibility that the defence case might supplement the prosecution's case?'[15]

The inclusion of the word 'may' as well as the enquiry formulated in the *Shuping* case creates the notion that the courts have an absolute discretion in deciding to discharge an accused, even where the state has produced no compelling evidence against the accused.[16] Accordingly, the enquiry laid out in the *Shuping* case was soon criticized.[17]

The criticism was based on the notion that South African criminal law is founded principally on the Latin maxim 'he who alleges must prove'.[18] Therefore, there rests a duty on the State, as the alleger, to present satisfactory evidence to prove that the accused is guilty beyond reasonable doubt.[19]

Thus, the rejection of the enquiry in the *Shuping* case was consequently grounded solely on the second leg of the test.[20] The State as the alleger needs to tender convincing evidence which could draw the accused to the commission of the crime, if it does not, the court cannot expect the defence's case to strengthen the State's case.[21]

In the case of *S v Phuravhatha & others*,[22] du Toit AJ held, in the event of a reasonable possibility of the State's case being supplemented by the defence's case, this reason alone should entail an application for discharge being rejected. Such a situation is one of the factors that should be considered by the judge in deciding to discharge the accused.

Every accused person has the right to a fair trial as envisaged in s 35(3) of the Constitution and the second leg of the enquiry in the *Shuping* case breaches this right.[23] Therefore, where the

[15] *Shuping* supra (note 5 above) at 120 – 122 A.
[16] *R v Kritzinger* 1952 (2) SA 402 (W).
[17] See *S v Phuravhatha & others* 1992 (2) SACR 544 (V) at 551-2; *S v Qozo* 1994 (1) BCLR 10 (Ck); *S v Beckett* 1987 (4) SA 8 (C); *S v Amerika* 1990 (2) SACR 480 (C); *S v Heller* (2) 1964 (1) SA 524 (W). See also *R v Louw* 1918 AD 344; *R v Thielke* 1918 AD 373; *R v Machinini* (2) 1944 WLD 91.
[18] J Van de Berg *Bail a Practitioner's Guide* 3 ed (2012) 167.
[19] *S v Mathebula* 1997 (1) BCLR 123 (W).
[20] *Phuravhatha* supra (note 17 above).
[21] S Mbonani 'Discharge of the accused at the end of the prosecution case: a new direction?' (1999) 32 (2) *De Jure* 240.
[22] *Phuravhatha* supra (note 17 above).
[23] Mbonani op cit (note 21 above) 244; *Mathebula* supra (note 19 above).

State presents no compelling evidence, and the court subsequently refuses a discharge application by the accused, the accused's right to a fair trial is breached.[24]

The accused also has a right to be presumed innocent until found guilty.[25] Therefore, if a court rejects a discharge application believing that the State's case will be aided in some way by the defence's case then this will be prejudicial and a breach of the accused's right to be presumed innocent.[26] The State has the onus of proving the accused's guilt. As a result, by rejecting an application for discharge, where the State has failed to discharge the onus placed on it, the accused is then placed in a position to prove that he is innocent, which makes the right to be presumed innocent futile.[27]

Part of the right to a fair trial also includes that an accused is not to be compelled to give self-incriminating evidence.[28] In *S v Lubaxa*[29] it was stated that if, on the State's evidence, the only way the accused would be found guilty and convicted is if he incriminates himself during cross-examination then, under such circumstances, if the court fails to discharge the accused the court will be breaching his Constitutional rights.

However, where the state is unsuccessful in establishing a case against the accused because it has failed to prove a necessary element of the offence due to an inexperienced prosecutor, then such a failure can be corrected by the judge recalling a witness and asking him a single question.[30] If the court omits to do this and discharges the accused, this would amount to an improper exercise of judicial discretion.[31] Skeen further argues that:

> '…it is an improper exercise of a judicial discretion to put an accused on his defence where a prima facie case has not been established'.[32]

[24] Gertsch reasons that if the State presents an insufficient case, and then the court subsequently refuses a discharge application, to the detriment of the accused, then the accused is left with two options that could potentially breach his right to a fair trial: if the accused closes their case without tendering any evidence then the accused's silence could be held contrary to him, as it may warrant a conviction against the accused. Secondly, if the accused decides to testify, then he or his witnesses may reluctantly provide information during cross - examination to the detriment of his case.
[25] Section 35(3)(h) of the Constitution. See Gertsch op cit (note 6 above) 273.
[26] A Skeen 'A Bill of Rights and the Presumption of Innocence' (1993) 9 *SAJHR* 525, 535.
[27] Gertsch op cit (note 6 above) 275.
[28] Section 35(3)(j) of the Constitution.
[29] *Lubaxa* supra (note 5 above) para18.
[30] *S v Van den Berg* 1995 (4) BCLR 479 (Nm).
[31] Ibid.
[32] Skeen op cit (note 14 above) 287.

Amidst the commotion is the issue of whether the credibility of State's witnesses should be taken into consideration by the judge at the stage of deciding a discharge. In the case of *R v Dladla & others*[33] and *S v National Board of Executors Ltd*[34] it was stated that the court should not concern itself with credibility when considering a discharge. Conversely, in *S v Mpetha & others*[35] the court held that credibility should play only a 'limited role', and the State's evidence could be 'ignored if it is of such poor quality that no reasonable person could possibly accept it'.[36] This has appeared to be the more favourable view.[37]

Therefore, to sum up the legal position concisely, in the case of *S v Ndlangamandla & another*,[38] Willis J stated, that the right to be presumed innocent, the right to silence and the complementary right not to testify has three practical significances that impact s 174 of the Act, these include:

1) 'The court has a duty *mero motu* to raise the issue of the possibility of a discharge at the close of the State case if it appears to the court that there may be no evidence that the accused committed the offence;
2) Credibility, where it is of such poor quality that no reasonable person could possibly accept the evidence, should be taken into account at this stage;
3) The second leg of the test promulgated in *S v Shuping*, namely, that even if there is no evidence at the close of the prosecution case upon which a reasonable man may convict, a discharge should nonetheless be refused if there is a reasonable possibility that the defence evidence may supplement the State's case, should not apply'.[39]

Whilst South Africa indeed has an exceptional Constitution and superlative legislation guiding our judiciary to reach the best possible judgements, the confidence in our justice system is ever deteriorating. Time and time again South African citizens seem to feel that justice is not served.

A couple of years ago these feelings towards the South African justice system were revived after the judgement in the case of *S v Dewani*.[40] In this case, the court approved an application for discharge by the accused in complete disregard of the evidence presented by the State's

[33] *R v Dladla & others* (2) 1961 (3) SA 921 (D).
[34] *S v National Board of Executors Ltd & others* 1971 (3) SA 817 (D) at 819.
[35] *Mpetha* supra (note 5 above) at 265D-G.
[36] Ibid at 265D-G.
[37] *S v Swartz & another* 2001 (1) SACR 334 (W).
[38] *S v Ndlangamandla & another* 1999 (1) SACR 391 (W).
[39] E Du Toit … et al *Commentary on the Criminal Procedure Act* 2 ed (1987) 126.
[40] *Dewani* supra (note 5 above).

witnesses as such evidence was regarded as 'inconsistent', 'riddled with contradictions', and therefore, not credible.[41]

Section 174 of the Act becomes detrimental to the interests of justice where the prosecution presents a weak case. This is exactly what occurred in the case of *S v Dewani*. The *Dewani* case thus forms the basis for the criticism of s 174 of the Act and will be discussed in great detail in this dissertation.

Another prominent feature of s 174 of the Act is that, from an historical perspective of the section, the discharge provision was incorporated into South African law from English law when South Africa operated under the jury system of law.[42] Hoffmann and Zeffertt point out that s 174 of the Act 'owes its existence to rules which evolved in England to control juries, thus preventing them from reaching perverse verdicts'.[43] It is interesting that the provision still exists far beyond the abolishment of the jury system in South Africa.[44]

It becomes apparent that s 174 of the Act is definitely open to misapplication by our courts as a result of their unfettered discretion. The question that can be posed in this regard is does the accused's right to a fair trial outweigh the interests of justice?

1.2 Problem statement

With the above noted it becomes crucial to give prominence to the concerns with s 174 of the Act. Courts are given an unlimited discretion on whether or not to discharge the accused. Thus, the section if implemented incorrectly may lead to pertinacious decisions by South African courts. This was made very clear in the *Dewani* case.

Furthermore, when we look to the origins of the section we see that a discharge provision was merely inserted in South African law to control a panel of lay persons, the jury, to reach rational and correct decisions. The issue that then arises is, is there still a need for a discharge provision

[41] Ibid para 23.1.45.
[42] L H Hoffmann & D T Zeffertt *The South African Law' of Evidence* 3 ed (1981) 392.
[43] Ibid.
[44] Gertsch op cit (note 6 above) 276 – 282.

in our law since South Africa has done away with the jury system of law? This question forms a big part of the research and will be answered in this dissertation.

1.3 Statement of purpose

The purpose of this study is therefore to illuminate the various issues surrounding the interpretation of s 174 of the Act and assess its current relevance in South African law, especially in light of the decision in *S v Dewani*.

1.4 Rationale

The arguments surrounding s 174 of the Act are quite scant, at times unclear and lacking in certain aspects, hence, leaving future writers on the topic uncertain of their position in the argument. Therefore, the objectives for undertaking this study is to eradicate the flaws innate in s 174 of the Act and recommend a purposeful interpretation of the section.

Furthermore, due to the fact that the *Dewani* case is such a recent judgement, that implements s 174 of the Act in such a controversial manner, not many legal writers have had the opportunity to scrutinise the section from the point of view of the court in that case.

1.5 Research questions

This study aims to enquire whether s 174 of the Criminal Procedure Act 51 of 1977 should remain in South African law despite its various controversies. In order to reach such a conclusion, certain key questions need to be answered:

i. Why was there a need for a discharge provision in South African law, ultimately leading to the enactment of s 174 of the Criminal Procedure Act 51 of 1977?

ii. How is ‘discharge’ dealt with in another jurisdiction?

iii. Looking at the case of *S v Dewani*, how is s 174 of the Criminal Procedure Act 51 of 1977 currently being implemented in South Africa?

iv. Taking into account all surrounding factors and the abovementioned questions, is s 174 of the Criminal Procedure Act 51 of 1977 still a necessary provision in South African law?

1.6 Research methodology

This study will comprise of a thorough desk-top literature study, using primary and secondary sources of data. The researcher bases the study principally on an analysis of s 174 of the Criminal Procedure Act 51 of 1977. Hence, the study will refer to case law, textbooks, journal articles and reliable internet sources that analyse, comment and criticise s 174 of the Act.

The primary case that the study will focus on is the *Dewani* case, a recent controversial case wherein s 174 of the Act was implemented.

Furthermore, this study will make use of comparative law, by comparing the South African law on discharge of an accused to similar legal provisions in another jurisdiction, that being the law on discharge of an accused in Canada.

Using this methodology, the researcher aims to evaluate section 174 of the Act and assess if such a discharge provision is essential in South Africa or if it should be discarded or amended to facilitate an improved justice system in South Africa.

1.7 Structure of the dissertation

This dissertation will consist of five chapters and will be set out as follows:

Chapter One: Introduction. This chapter will give the reader a detailed insight into the background of the research undertaken, the rationale on why the researcher decided to conduct such research and will provide a guideline on the questions that are going to be answered to enable the researcher to reach a final conclusion. This chapter also sets out the research methodology that will be undertaken.

Chapter Two: History of the discharge provision in South African law. This chapter aims to track the origins of the discharge provision in South African law and trace how such a provision has developed in our law. Basically the chapter aims to identify the need for such a provision in South African law in the first instance.

Chapter Three: Section 548(1) of the Canadian Criminal Code: Discharge after a preliminary inquiry. The purpose of this chapter is to look at another jurisdiction and its laws on discharge and compare it to s 174 of the Act. This chapter is also necessary in identifying any short-comings that might be present in South African law.

Chapter Four: A recent application of s 174 of the Criminal Procedure Act 51 of 1977: *S v Dewani*. Looking at the *Dewani* case, this chapter intends to expose how the courts have been applying the discharge provision, as well as the errors inherent in such application. This chapter will accentuate how such a provision is so easily susceptible to misuse by the judiciary.

Chapter Five: Conclusion: Assessing the current relevance of s 174 of the Criminal Procedure Act 51 of 1977. The final chapter will evaluate the above four chapters and conclude whether or not the discharge provision is indispensable or whether the section is in need of an amendment in order to remove its weaknesses. If it is established that the section is still relevant, recommendations will be made on ways in which the section should be interpreted so as to ensure consistency in its application.

CHAPTER TWO

HISTORY OF THE DISCHARGE PROVISION IN SOUTH AFRICAN LAW

2.1 Introduction

The purpose of s 174 of the Criminal Procedure Act 51 of 1977 is to ensure that an accused person does not have to answer, and thereby put up a defence, to a case where the prosecution has not laid out sufficient evidence to establish the accused may be guilty of the alleged crime.

In order to understand the operation of this provision to the fullest extent, one needs to enquire as to why a discharge procedure was necessary in the first place, and what its initial purpose was. Locating the origins of s 174 of the Act is also pivotal to assessing its current relevance in South African law.

Section 174 of the Act is not a new provision in South African law and in fact was a feature of all previous iterations of the Criminal Procedure Act. In 1917, a discharge provision was introduced to South African law from nineteenth century English law where it took the form of s 221(3) of Criminal Procedure and Evidence Act 31 of 1917.[45] Even when the Criminal Procedure Act 56 of 1955 was enacted, the same procedure found its place under s 157(3). The court in *S v Lubaxa*[46] further held:

> 'Section 174 of the Act repeats in all material respects the terms of its predecessors in the 1917 and 1955 Criminal Codes'.[47]

Looking at the lifespan of s 174 of the Act, one can only infer that such a provision must have a solid foundation in South African law to be in existence despite the various amendments to the Criminal Procedure Act.

As will be seen in this chapter, s 174 of the Act operates on principles and procedures that are shared with common law adversary trials. Furthermore, the section was inserted into South African law in order to ensure that juries were able to reach the fairest decisions. Accordingly,

[45] *R v Smith* 1912 AD 386.
[46] *Lubaxa* supra (note 5 above)
[47] Ibid para 10.

this raises the question of why such a procedure is so dear to South African Criminal law regardless of the shift taken by the South African legal system in 1969 with the abolishment of the jury system of adjudication?[48]

Before entering into any debate on the current relevance of s 174 of the Act, one needs to gain insight into the origin and background of the section in order to reveal its underlying purpose. This chapter will thus begin by looking at the nature of the adversarial criminal justice system and how its principles are entrenched in s 174 of the Act. Secondly, this chapter will focus on how the discharge procedure arose with the advent of juries, and lastly, it will look at the discharge provision in South Africa after the abolition of the jury.

2.2 Discharge and the adversarial criminal justice system

The 'procedural pause' in the litigation to assess the evidence, as envisaged by s 174 of the Act, forms part of both 'civil and criminal litigation in the Anglo – American legal systems', from which South Africa predominantly derives its procedure.[49] The essential question to be answered is how has this procedure, a break in the trial to assess the quality of evidence, come about? Aside from the argument that it would be a 'waste of time' as well as the court's resources to proceed with a clearly 'hopeless' matter,[50] this procedure emerges from a 'deeper structural basis'.[51]

As mentioned above, the discharge provision originates as a result of a number of principles and procedures demanded by common law adversarial trials.[52] The common features that form part of the common law adversarial trial as well as s 174 of the Act include: first, the fact that the prosecution is required to open with their case at the beginning of the trial.[53] In common law countries the accused has the privilege of viewing how the prosecution presents its case before deciding whether or not to tender evidence in rebuttal.[54]

[48] The jury system was abolished in South Africa by the Abolition of Juries Act 34 of 1969.
[49] TW Phillips 'The motion for acquittal a neglected safeguard' (1961) 70 *Yale LJ* 1150; R Steffen 'The prima facie case in non-jury trials' (1959) 27 *U Chi LR* 94.
[50] G Williams 'The application for a directed verdict' (1965) *Criminal LR* 346.
[51] Gertsch op cit (note 6 above) 274.
[52] Ibid.
[53] Hoffmann & Zeffertt op cit (note 42 above) 502. Also, Skeen op cit (note 14 above) 286.
[54] G Williams *The Proof of Guilt: A Study of the English Criminal Trial* 3 ed (1963) 82.

Second, is the accused's right to be presumed innocent until proven guilty.[55] Because this right forms the basis from which criminal proceedings operate, it can be argued that such a presumption of innocence can only be invalidated by the presentation of substantial and compelling evidence by the prosecution.[56] Furthermore, the standard of proof in a criminal trial, being 'proof beyond a reasonable doubt',[57] compels the State to present an evidentially solid case to overturn the right to be presumed innocent that the accused possesses.

The third feature of the adversarial legal system from which s 174 originates is the accused's right to remain silent[58] and the right against the provision of self-incriminating evidence.[59] Hence, once again, in order to uphold the accused's fair trial rights, the prosecution will have to adduce convincing evidence before the accused presents his case.

The last element that s 174 of the Act draws from the adversarial system of law is the 'general burden of proof' that rests on the prosecution, as the alleger of the crime, 'to prove its case without the assistance of the accused'.[60] In order to emphasise the above point it is useful to note a comment by Warren CJ in the case of *Miranda v Arizona*:

> '...our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labours, rather than by the cruel, simple expedient of compelling it from his own mouth'.[61]

From the above discussion of the features of the adversarial trial system, which is the system followed in South Africa, it can be gathered that this trial system favours the notion of a pause in the trial to assess the evidence presented by the prosecution.[62] This process serves as a mechanism to dismiss a matter where, on the evidence provided by the prosecution, there are no reasonable prospects of the accused being convicted of the alleged offence. The procedure for achieving this has been termed:

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[55] Section 35(3)(h) of the Constitution of the Republic of South Africa Act 108 of 1996.
[56] *R v Britz* 1949 (3) SA 293 (A) at 302.
[57] J Grant 'South African Criminal Law' (2014) available at https://sacriminallaw.net/tag/proof-beyond-a-reasonable-doubt/, accessed on 17 July 2017.
[58] Section 35(3)(h) of the Constitution of the Republic of South Africa Act 108 of 1996.
[59] Section 35(3)(j) of the Constitution of the Republic of South Africa Act 108 of 1996.
[60] Gertsch op cit (note 6 above) 275.
[61] *Miranda v Arizona* 384 US 436 (1965) at 460.
[62] Gertsch op cit (note 6 above) 275.

> 'an essential adversary hurdle within the common law trial. The hurdle exists because ... it is unfair to ask an opponent to answer a charge or claim where the evidence tendered by the proponent is incapable (however generously looked at) of making out that charge or claim'.[63]

From the principles of the 'adversary hurdle' arises the accused's right to be discharged, or otherwise his right to expect the court to test the 'sufficiency of the evidence' presented by the prosecution before he commences with his case.[64]

2.3 The history of the jury trial

A discharge provision was inserted into South African law directly from English law purely as a mechanism to guide the jury. However, although the jury system of adjudication is now abolished in South Africa, trial by jury is worthy of mention when engaging in any discussion on the origins of s 174 of the Act.

The jury system of adjudication[65] emerged in England and was imposed on its colonies around the 18th century and thereafter.[66] The emergence of the jury was primarily a result of mistrust in the judiciary in protecting the rights of the accused.[67] Hence, in essence, the jury was created as an instrument for protecting the accused against any 'unjustified convictions by a corrupt or executive-minded judiciary'.[68] Thus, the jury ensured that government's power, in the form of a judiciary, was controlled rather than subject to abuse.[69]

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[63] Williams op cit (note 54 above) 345.
[64] Gertsch op cit (note 6 above) 275.
[65] 'The history of the jury': 'The historical roots of the jury date to the eighth century A.D. Long before becoming an impartial body, during the reign of Charlemagne, juries interrogated prisoners. In the twelfth century, the Normans brought the jury to England, where its accusatory function remained: Citizens acting as jurors were required to come forward as witnesses and to give evidence before the monarch's judges. Not until the fourteenth century did jurors cease to be witnesses and begin to assume their modern role as triers of fact. This role was well established in British common law when settlers brought the tradition to America, and after the United States declared its independence, all state constitutions guaranteed the right of jury trial in criminal cases', available at http://legal-dictionary.thefreedictionary.com/jury, accessed on 31 July 2017.
[66] P Devlin *Trial by Jury* 3 ed (1966) 5-14; VP Hans & N Vidmar *Judging the Jury* (1986) 21-44; EG Henderson 'The background of the seventh amendment' (1966) 80 *Harvard LR* 289-335.
[67] Gertsch op cit (note 6 above) 276.
[68] Ibid.
[69] AW Alschuler 'The changing role of the jury in the nineteenth century' in EH Monkkonen (Ed.) *Crime and Justice in American History - Historical Articles on the Origins and Evolution of American Criminal Justice, vol 2: Courts and Criminal Procedure* (1991) 46.

The jury comprised of a group of lay persons who were given the authority to decide on certain aspects of a legal case that came before them, and to return a verdict.[70]

When the jury was introduced the court essentially became a 'split tribunal',[71] as the jury would determine questions of fact and the bench would determine questions of law.[72] Consequently, the judges were unable to determine questions of fact, and likewise, the jury was unable to decide on questions of law.[73] In this regard, 'questions of fact included the weighing up of the evidence, as well as making decisions based upon its credibility'.[74] By contrast, questions of law included 'relevance and admissibility of the evidence'.[75]

Due to the split tribunal determining different aspects of the trial, it was inevitable that when the distinction between law and fact was uncertain, 'tension' arose between the jury and the judiciary.[76]

However, another dilemma also arose. If the jury was blessed with the right to decide on the facts of the case then this would mean, according to Gertsch:

> '…it had the power to convict, preferably on the evidence, but also, perversely, against the evidence'.[77]

As a result, in essence the accused could possibly be jeopardised by the very system employed to uphold his rights.

There was therefore a need to control the jury's power to 'convict'.[78] This need was fulfilled by the implementation of a 'procedural device' by the judiciary, which was meant to evade the

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[70] E Kahn 'Restore the jury or reform?' (1991) 108 *SALJ* 687, 'Reform? Aren't things bad enough already?' (1992) 109 *SALJ* 87: in terms of s 174 of the Act the court could return a 'verdict' of not guilty, this is the manner in which the jury decided upon the fact of a case before it. The jury would not deliver a reasoned judgment but, rather, would simply express it by pronouncing the accused guilty or not guilty. Such a declaration was the 'verdict' of the jury.
[71] Gertsch op cit (note 6 above) 276.
[72] 'Role of the Jury' available at www.citizensinformation.ie/en/justice/courtroom/jury.html, accessed on 31 July 2017.
[73] The maxim for this is: 'ad quaestionem facti non respondent iudices, ita ad quaestionem iuns non respondent iurat'. This maxium basically means that the judges will not decide questions of fact and the jury will not decide questions of law.
[74] Gertsch op cit (note 6 above) 277.
[75] Ibid. See also *Hal Tua Tau v PP* [1981] 3 All ER 14 at 19g.
[76] Gertsch op cit (note 6 above) 277.
[77] Ibid.
[78] Ibid.

jury in totality, and took the form of the 'submission of no case to answer'.[79] In light of this procedural device judges were entitled to remove a matter from the jury, either when the prosecution had tendered all evidence or when all the witnesses had testified, in the belief that the evidence adduced against the accused was unsubstantial or inadequate to return a verdict of guilty.[80] 'A perverse verdict, and a miscarriage of justice, would thereby be prevented'.[81]

However, the emergence of such a procedural device to bypass the jury did not come with ease and faced certain issues. These issues included what threshold of evidence needed to be presented by the prosecution in order for such evidence to be rendered sufficient to convict the accused, and, how that threshold would influence the role the judge and jury plays in deciding on the matter.[82]

In responding to the abovementioned issue on what constitutes sufficient evidence to convict, a distinction needs to be drawn between the quantum of evidence (sufficiency) and its quality (the weight and credibility of the evidence).[83] It must be emphasised that quantum and quality are not one and the same. From this distinction arises a quantitative and qualitative analysis of evidence.[84]

Judges were required to do a quantitative analysis of the evidence which entailed checking if there was at least some evidence that could establish each of the elements of the charge.[85] On the other hand, the jury was entrusted with the qualitative analysis of the evidence which required them to analyse the credibility of the evidence and see how effective it is in establishing the material facts of the case at hand.[86]

A quantitative and qualitative analysis of evidence is essential when determining what evidence is 'sufficient' as it creates boundaries for the judge and jury to act respectively.[87] The judge could rule on the matter and still ensure respect for the jury's function if 'sufficiency' of evidence were interpreted in a quantitative manner, that is, is there some evidence that pertains

[79] Ibid.
[80] Ibid.
[81] Ibid.
[82] Ibid.
[83] *R v Galbraith* [1981] 2 All ER 1060 at 1062f-g; R Cross & C Tapper Cross on Evidence 7 ed (1990) 173.
[84] Gertsch op cit (note 6 above) 277.
[85] Ibid 277 - 278.
[86] Ibid 278.
[87] Ibid.

to each element of the charge.[88] Alternatively, if the interpretation of 'sufficiency' were to include also an assessment of the quality of the prosecution's evidence, which would include looking at the weight the evidence would carry as well as how credible it will be, then this would mean that the judge would then be intruding into the jury's 'terrain'.[89]

Therefore the judge, in doing a quantitative analysis, would determine if the evidence was sufficient to sustain a conviction, thereafter, the jury would do a qualitative analysis and determine the weight and credibility of the evidence.[90] Consequently, if the judge found that the evidence was insufficient then he or she would submit that the accused had 'no case to answer'.[91] What essentially flows from this is that the evidence would not reach the jury stage whenever the judge submitted that the accused had no case to answer, and therefore the jury would be bypassed.[92]

Another reply to the aforementioned issue is that the matter should be immediately handed over to the jury if there was a 'scintilla of evidence' against the accused, that is, even if there was a jot of evidence to show the accused is guilty.[93] This was substantially a low standard of evidence to convict. Nevertheless, in the English case of *Metropolitan Railway Co. v Jackson*[94] the court dealt with this issue and held:

> 'whereas formerly it had been the practice for a Judge to direct that a case should go to the jury when there was a mere scintilla of evidence, nowadays the practice was that there should be evidence before the Court upon which a reasonable man might fairly convict; and that has always been understood to have been the law in this country'.

However, while the scintilla requirement had the effect of eliminating the jurisdictional dispute between the jury and judiciary, it did not deal with the foundational objective of preventing the jury from making perverse decisions.[95] Such a theory also failed to acknowledge the discharge

[88] Ibid.
[89] Alschuler op cit (note 69 above) 49. See also *R v Thielke* 1918 AD 373 at 379: 'The general principle is that the weight to be attached to evidence duly admitted is a matter for the decision of the jury alone…Jurymen are the sole arbiters on questions of fact'.
[90] Gertsch op cit (note 6 above) 278.
[91] Ibid.
[92] Ibid.
[93] *Ferrand v Bingley Township District Local Board* (8 T.L.R) at 71.
[94] *Metropolitan Raillway Co. v. Jackson* (1877) 3 App. Cas. 193.
[95] Gertsch op cit (note 6 above) 278.

rights of the accused, by ignoring the fact that the prosecution, in terms of the principles of an adversarial trial, was under a duty, as the alleger, to present an evidentially concrete case.[96]

When looking at the above responses to the issue, on what constitutes 'sufficient' evidence, and the respective roles played by the judge and the jury in deciding this, it is inevitable that they seek to protect the establishment of the jury and its function as a trier of fact as well as ensuring that the judiciary serves to prevent perverse convictions by the jury.[97] In a nutshell, the responses seek to ensure a fair balance of power is struck between the jury and the judiciary.

2.4 The abolition of the jury trial in South Africa

The 'device of by-passing the jury', when the prosecution presented an evidentially weak case, was then 'inherited' by South Africa,[98] when the 'trial by jury' still formed part of South African law.[99]

In fact even after the jury was abolished in South Africa, the discharge provision remained in South African law. This was a peculiar route that was taken as, evidently, one of the major reasons for the formation of a discharge procedure was to prevent the jury from making perverse convictions, and hence this was now rendered pointless as the jury was abolished.

As a result of the jury being abolished in South Africa, the jury's role as a trier of fact was then taken up by the judge or magistrate.[100] Consequently, the presiding officer became blessed with the power to determine questions of both law and fact. Therefore, from the commencement of the trial the judge or magistrate could deal with the common questions of 'relevance and admissibility of the evidence' as well as its 'factual aspects'.[101]

The judge or magistrate, with his fused powers, and having all of the evidence in front of him, is therefore in a position to assess the quality and quantum of evidence against the accused when faced with a discharge application. In this respect, Gertsch correctly points out:

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[96] Ibid.
[97] Ibid 279.
[98] Section 221(3) of the Criminal Procedure and Evidence Act 31 of 1917, as well as s 157(3) of the Criminal Procedure Act 56 of 1955.
[99] Gertsch op cit (note 6 above) 279.
[100] Ibid 280.
[101] Ibid.

> 'Why should it [the court, and hence the judge or magistrate] have to blinker itself from taking into account, for example, the effects wrought upon credibility by cross-examination of the state witnesses, or even from considering the consequences of contradictions within the prosecution's case as a whole?'[102]

Gertsch further states:

> '…if we begin with the premise that the application for discharge is a device to prevent the accused from having to reply to inadequate prosecution cases, any limitations thereafter on the scope of the judicial officer's examination of the evidence appear highly artificial'.[103]

The South African courts however took a completely different view on the merged powers now in the hands of a judge or magistrate. Up until recent times, South African courts have constantly been against the idea that the credibility of the prosecution's evidence should be considered when deciding on the merits of a discharge application.[104] The South African courts probably took this view as, before the demise of the jury, the jury had to determine the credibility of the prosecution's evidence. However, in light of this, South African courts have not provided any solid guidelines of what then constitutes an acceptable analysis of evidence when considering an application for discharge.

Hence, there are two major criticisms of the way in which s 174 of the Act is applied. First, it is evident by the responses of the South African courts that the effects of the trial by jury, along with its procedural and evidential rules, have not completely been abolished from the South African system of law.

Secondly, the perspective that was taken by our courts, that the credibility of the prosecution's evidence should not be considered when taking into account an application for discharge has been a matter for debate. It has been argued that the judge is capable enough to determine the weight of the evidence once the State has closed its case as he is during judgement, once the defence case is closed.[105]

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[102] Ibid.
[103] Ibid 280 - 281.
[104] *Dladla* supra (note 33 above) at 923F; *National Board of Executors* supra (n34) at 819; *Mpetha* supra (note 5 above) at 265D-G.
[105] R Pattenden 'The submission of no case-some recent developments' (1982) *Criminal LR* 558, 564.

As a result, it has been argued that the credibility of the prosecution's evidence should be fully taken into consideration by a judge or magistrate when deciding on an application for discharge at the end of the prosecution's case. Accordingly, the judge or magistrate deciding on such a matter would have to enquire whether, when viewed entirely, the prosecution adduced evidence against the accused that was 'reasonably believable'.[106] Gertsch states:

> 'Such a test would restore meaning to the accused's discharge right by firmly eliminating the confusing echoes of the jury system'.[107]

The same view was subsumed in various cases.[108] However in the case of *S v Mpetha*[109] it was argued that in deciding a discharge, at this stage of the proceedings, credibility should play a limited role. Further, the court held that such evidence will be disregarded if it were of 'such a poor quality that no reasonable person could possibly accept it'.[110] This is the more preferable view.[111]

Hence, only where the evidence tendered by the prosecution is unreasonably weak the court should uphold an application for discharge made by the accused at the end of the prosecution's case.

2.5 Conclusion

In analysing the background and origin of s 174 of the Act one can conclude that, initially, the purpose of the English influenced discharge provision in South African law, summarily, was to enable the judiciary to have some control over the jury and bypass the jury where the prosecution presented unsubstantial evidence on which to base a conviction. The jury was a composition of lay persons, and had been formed as a result of the need to ensure that the judiciary did not act arbitrarily when reaching decisions. However, the judiciary soon realised that there was the possibility that the jury could make perverse decisions. As a result, the discharge procedure was formulated as a tool to ensure that the jury would not breach the fair trial rights' of the accused as the very institution in place to protect the accused.

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[106] Gertsch op cit (note 6 above) 282.
[107] Ibid.
[108] *S v Nandha Gopal Naidoo* 1966 (1) PH H104 (w); *R v Nortje* 1961 (2) PH H166 (O); *S v Bouwer* 1964 (3) SA 800 (O); and *Mpetha* supra (note 5 above) at 265D – G.
[109] *Mpetha* supra (note 5 above)
[110] Ibid at 265D – G.
[111] *Agliotti* supra (note 11 above) at 261.

What then flowed from this, is the mechanism formulated to keep evidentially weak prosecution cases from the hands of the jury. Even after the abolition of the jury in South Africa, this mechanism remained in South African law despite the alterations to the court structure. Such a mechanism currently takes the form of s 174 of the Act.

Looking at these circumstances, the question that immediately arises is, since trial by jury has been abolished in South African law and there is no longer a need to caution against perverse verdicts by the jury, is it still essential to the South African legal system to retain the procedure for discharge of an accused at the end of the prosecution's case? This question will be answered in the chapters to come.

The following chapter will look at how the discharge procedure is implemented in Canada in order to assess whether, even though the jury system of adjudication has been abolished from South African law, it still has relevance in our law and is being properly executed.

CHAPTER THREE

SECTION 548(1) OF THE CANADIAN CRIMINAL CODE: DISCHARGE AFTER A PRELIMINARY INQUIRY

3.1. Introduction

'Discharge' is not a provision that is exclusive to South African law; many other countries have incorporated such provisions in their law. The questions that then emerge are do all countries view the discharge of an accused through the same spectrum, and, if not, is the South African provision on par with other countries?

Whilst most countries make provision in their law that allows the accused to be discharged from the offence allegedly committed, there is no universal provision for discharging an accused. In fact, countries have tailored their 'discharge' provisions in a manner that best suits their law. Furthermore, discharge is not limited to one stage of the criminal process and may be incorporated at different stages as will be seen.

In order to thoroughly evaluate s 174 of the Criminal Procedure Act and assess its significance in South African law, one needs to look at how such provision, or similar provision, is dealt with in other jurisdictions. In order to discover any shortcomings inherent in s 174 of the Act, the section must be compared to a similar provision in another jurisdiction, and evaluate how the provision operates there. In this regard the jurisdiction selected is Canada.

Canada is chosen since it has a Constitution that recognises rights in a substantially similar way to South Africa. Furthermore, both South Africa and Canada have mutual common law origins[112] and are commonwealth countries.[113] Consequently, it is compelling to compare s 174 of the Act with a jurisdiction that operates under a similar system of law to South Africa.

[112] JP Jansen Van Vuuren *A Legal Comparison between South African, Canadian and Australian Workmen's Compensation Law* (Unpublished LLM thesis, University of South Africa, 2003) 15.
[113] 'The Commonwealth' available at http://thecommonwealth.org/member-countries, accessed on 17 August 2017.

The purpose of this chapter is thus to provide a means of comparison between the Canadian provisions on discharge and the South African equivalent which will be done in a subsequent chapter.

This chapter will therefore comprise of an in depth analysis of the discharge of an accused in the law of Canada and a critical evaluation of the relevant discharge provisions.

3.2. Discharge of an accused in Canada

The Canadian Criminal Code[114] is an extensive piece of legislation providing guidance for every aspect of the criminal trial in Canada. In terms of this legislation an accused can be discharged at two stages of the criminal trial.

First, the accused may be discharged at the end of a preliminary inquiry in terms of s 548(1) of the Code, where if at the end of the Crown's case the judge is of the opinion that the Crown has not provided satisfactory evidence on which to connect the accused to the alleged charges, for a conviction.

Secondly, the accused can also be discharged in terms of s 730(1) of the Code, at the sentencing stage, after his guilt has been established, if it is in the interests of the accused and not contrary to public policy to discharge the accused.

For the purposes of this dissertation, only the former provision will be discussed as it centres on similar principles to those in s 174 of the Criminal Procedure Act, the principle being that the accused should not have to put up a defence to a seemingly hopeless State case.

3.3 Section 548(1) of the Canadian Criminal Code

Discharge in Canada is found in s 548(1), under Part XVIII of the Code, and is possible outcome of a preliminary inquiry, in which the Crown has to establish a case against the accused. A preliminary inquiry may only be conducted for indictable offences.[115] The ultimate

[114] Criminal Code R.S.C., 1985, c. C-46 (hereafter referred to as the 'Code').
[115] 'Robbery, murder, aggravated assault, trafficking in cocaine are all examples of Indictable offences. Canadian criminal law considers these types of crimes as the most serious. The above examples of indictable

purpose of the preliminary enquiry is to ascertain whether the Crown has provided sufficient evidence against the accused before the Justice can commit the matter to trial at a higher court.[116]

Therefore, although a preliminary inquiry may seem like a trial, it essentially is not, in the sense that only the Crown is required to present evidence, susceptible to cross-examination, and not the accused. Although, the accused is not precluded from putting up a defence at the inquiry.[117]

The procedure for a preliminary inquiry involves a request on record, which is made either by the Crown or the defence, for a preliminary enquiry.[118] If the Crown or defence fails to make such a request then such failure will result to the assumption that the parties have waived the right to the inquiry and a date for trial will be set.[119] Where there are multiple accused, and one accused makes a request for a preliminary inquiry, every accused must move to the inquiry, except where a severance application is successful.[120]

Section 548(1) of the Code accordingly deals with the order of an accused to stand trial at the end of the preliminary inquiry and reads as follows:

> '(1) when all the evidence has been taken by the justice, he shall
>
> (a) if in his opinion there is sufficient evidence to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction, order the accused to stand trial; or
>
> (b) discharge the accused, if in his opinion on the whole of the evidence no sufficient case is made out to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction'.

offence would entitle an accused person to a preliminary hearing. These indictable offences also give the person facing charges the right to have a trial by jury should that be their choice. Murder cases are all mandatory jury trials unless the Crown Attorney consents to a trial by judge alone': 'The Preliminary Hearing' available at https://www.weisberg.ca/faq-preliminary-hearing/, accessed on 18 August 2017.

[116] *R v O'Connor* (1995) 191 NR 1 (SCC) at 134.

[117] Section 454(3) of the Code.

[118] Section 536(3) of the Code.

[119] Section 536 (4.3) of the Code.

[120] Section 536 (4.2) of the Code.

In the case of *Skogman v The Queen*[121] the court held that the overall purpose of a preliminary inquiry is:

> '…to protect the accused from a needless, and indeed, improper, exposure to public trial where the enforcement agency is not in possession of evidence to warrant the continuation of the process'.[122]

Silver also comments on this procedural device and states:

> 'Ironically, the principle argument advanced in favour of eliminating the grand jury inquiry, which Supreme Court of Canada Justice Gwynne called in the 1891 debate "more ludicrous than real," was the existence of the preliminary inquiry as the true procedural safeguard against the power of the State'.[123]

Therefore, where the Crown's evidence is too weak to establish a case against the accused, the accused will be discharged from the charges he faces.

Conducting a preliminary inquiry prior to trial serves to balance the interests of both the accused and the State. The State, as the alleger, is by no means jeopardised in having to make out a case against the accused. Likewise, the accused should not have to respond to an unsubstantial, frivolous prosecution case. However, there are advantages and disadvantages with holding a preliminary inquiry. These will be discussed in due course.

Furthermore, certain issues arise in the implementation of s 548(1). These issues predominantly arise in instances where the Crown's evidence against the accused is weak and does not make out a case against the accused, and, the accused is subsequently committed to trial instead of being discharged. Under these circumstances the accused's constitutionally protected rights may be infringed. Another issue is how much, or, what evidence is the Crown supposed to adduce to bypass the accused being discharged? Lastly, does the judge need to delve into the credibility of the Crown's evidence at this stage?

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[121] *Skogman v The Queen* [1984] 2 SCR 93.
[122] Ibid at 105.
[123] L Silver 'Does the Stinert Decision Signal the End of the Preliminary Inquiry?' (2015) available at https://ablawg.ca/2015/04/17/does-the-stinert-decision-signal-the-end-of-the-preliminary-inquiry/, accessed on 17 August 2017.

Therefore, this chapter will commence by looking closely at the interpretation of the section and then discuss the advantages and disadvantages of the preliminary inquiry.

3.3.1 The accused's right to be presumed innocent until found guilty

Section 548(1) is similar to the South African discharge provision, the difference being in the stages of the criminal process at which discharge is considered. In South Africa discharge is considered during trial after the State has presented all its evidence, whereas, in Canada discharge may be considered prior to trial and again at the end of the trial.

The notion on which s 548(1) of the Code is fundamentally created, akin to the purpose of s 174 of the Criminal Procedure Act, is to protect the rights of an individual faced with a criminal charge.

In the case of *Dubois v R,*[124] Lamer J referred to s (11)(d) of the Canadian Charter of Rights and Freedoms[125] which guarantees every accused person certain rights and states that every accused person has the right:

> '…to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal'.

Section 11(d) of the Charter of Rights and Freedom is a pivotal right in the Canadian Constitution, as well as, the criminal justice system at large. It is a right that needs to be consistently maintained at every stage of the proceedings, starting from the initial detention of the accused, to the trial and through to the sentencing stage.[126]

Lamer J held that this right that the accused is gifted with requires the Crown, in the presentation of its evidence, to make out a case pointing to the accused's guilt, before the defence is to respond.[127] Lamer J further stated, that this protection is afforded to the accused,

[124] *Dubois v R* (1985) 23 DLR (4th) 503.
[125] Schedule B of the Constitution of Canada 1982.
[126] A Presumption of Innocence is a Fundamental Principle in Canadian Law available at https://www.kruselaw.ca/blogpost/a-presumption-of-innocence-is-a-fundamental-principal-in-canadian-law, accessed on 17 August 2017.
[127] *Dubois* supra (note 123 above).

not in the light that he does not need to testify, but rather, because the prosecution must prove its allegations before any expectation that the accused will put up a defence.[128]

In the case of *R v Oakes*[129] the court held the right to be presumed innocent entails that:

> '(i) an accused must be proved guilty beyond a reasonable doubt, (ii) the prosecution must bear the onus of proof and (iii) criminal prosecutions must be carried out in accordance with lawful procedures and principles of fairness'.

Therefore where the court remits the accused to trial on insufficient evidence, the court is in effect breaching the accused's right to a fair trial.

3.3.2 Evidence at the stage of the preliminary inquiry

In respect of s 548(1), the Court must inevitably determine whether there is any admissible evidence in terms of which, a reasonable jury, 'properly instructed', could find the accused guilty.[130]

Therefore, where the prosecution adduces evidence that establishes every single element of the offence with which the accused is charged, then the court must direct the accused to stand trial.[131] 'Exculpatory evidence will not result in a discharge of the charges'.[132] This is evidence that is favourable to the accused's case which may negate the accused's guilt. It is only when both the prosecution and defence have presented their case that such evidence may properly be determined.

Additionally, where the evidence presented is merely circumstantial, the court must then employ a 'limited weighing' of all the evidence in order to establish whether a 'reasonable jury', which is 'properly instructed', could find the accused guilty on the circumstantial

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[128] Ibid.
[129] *R v Oakes* (1986) 26 DLR (4th) 200.
[130] *R v Arcuri* [2001] 2 SCR 828 2001 SCC; *United States of America v Shephard* [1977] 2 SCR 1067; *Mezzo v R* [1986] 1 SCR 802; *Dubois v The Queen* [1986] 1 SCR 366; *R v Charemski* [1998] 1 SCR 679; *R v Monteleone* [1987] 2 SCR 154.
[131] 'A Presumption of Innocence is a Fundamental Principle in Canadian Law' available at https://www.kruselaw.ca/blogpost/a-presumption-of-innocence-is-a-fundamental-principal-in-canadian-law, accessed on 17 August 2017.
[132] 'Preliminary Inquiry Evidence' available at http://criminalnotebook.ca/index.php?title=Preliminary_Inquiry_Evidence&mobileaction=toggle_view_mobile, accessed on 17 August 2017.

evidence.[133] This is the test to be applied in testing the Crown's evidence. Such a deduction comprises of a consideration of whether there is a reasonable likelihood that an inference may be drawn from the evidence that points to the possible guilt of the accused.[134]

3.3.3 The credibility of the Crown's evidence

Thus far it has been argued that in order for the court to discharge the accused person, and thus, disqualify him from standing trial, the court must be of the view that the Crown's case is evidentiary insufficient. And this is also so, in order to uphold the accused's right to be presumed innocent until found guilty. In establishing whether the Crown has produced 'sufficient' evidence, the issue that arises, an issue common to s 174 of the Act, is if the credibility of the Crown's witnesses should be considered at the preliminary inquiry, and, if so, the extent of which credibility should be taken into account.

Campbell CJ could not have dealt with the issue of credibility any better in the case of *Perry v The King*[135] where he held:

> 'On the conclusion of the evidence for the respondent, counsel for the appellant has moved that the appeal be allowed, as no prima facie case of guilt had been proved against the appellant. No authorities were cited to indicate just what cogency of proof is required to establish a prima facie case at that stage, and I have not run across any case in which the point was settled. I presume, therefore, that, in order to put the accused on his defence, a Judge or Magistrate sitting alone need find only such evidence as would entitle the Crown, in a jury case, to have the facts left to the decision of the jury. In other words, the criterion would be whether the evidence is such as a jury might, in the absence of contradiction or explanation, reasonably and properly convict upon. This view is supported by the wording of the Code, s. 726, which provides that the Justice shall consider the whole matter after hearing what each party has to say and the witnesses and evidence adduced. The Justice or Judge, therefore, apparently does not exercise the function of a jury until both sides have completed their case; and the question of proof beyond reasonable doubt does not arise at this stage'.[136]

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[133] 'Preliminary Inquiry Evidence' available at http://criminalnotebook.ca/index.php?title=Preliminary_Inquiry_Evidence&mobileaction=toggle_view_mobile, accessed on 17 August 2017.
[134] 'Preliminary Inquiry Evidence' available at http://criminalnotebook.ca/index.php?title=Preliminary_Inquiry_Evidence&mobileaction=toggle_view_mobile, accessed on 17 August 2017.
[135] *Perry v The King* 82 Can CC 240.
[136] Ibid at 242.

Keeping the issue of credibility in mind, in the case of *Metropolitan Railway Co. v Jackson*,[137] Lord Cairns stated that the judge and jury have distinct duties. The Judge has the duty to see, from the evidence, whether any facts have been established from which a reasonable inference may be drawn that the accused was negligent. By contrast, the jury's duty is to establish, from those facts given to them, whether 'negligence ought to be inferred'.[138] Lord Cairns holds further that, the maintenance of this distinction is essential in the administration of justice.

In the case of *Woolmington v Director of Public Prosecutions*[139] the judge, Viscount Sankey, LC, held that it is only at the close of the defence case, that is, once all evidence has been tendered by both the Crown and the defence that a verdict of guilt or innocence can properly be pronounced.[140]

Therefore, to sum up the above positions, the judge, at the preliminary stage, should only concern himself with the facts from which an inference may be drawn of the accused's guilt. All that is needed is a mere connection. The Crown does not have to prove that the accused is guilty beyond a reasonable doubt at this stage of the proceedings.

Therefore, too much emphasis should not be placed on how credible the Crown's evidence is at the preliminary stage. Credibility is not the issue at this stage. The issue is purely one of whether there is any evidence which infers that the accused may have committed the crime. This is all that is required in deciding whether discharge should ensue.

3.3.4 Advantages of a preliminary inquiry for the defence

Apart from not having to answer and thereby put up a defence to a pointless case, preliminary inquiries provide the defence with various additional advantages.

First, the preliminary inquiry is a 'means of discovery'.[141] At the inquiry the 'nature and strength' of the Crown's case can be ascertained by the defence.[142] Connections are drawn

[137] *Metropolitan Railway Co.* supra (note 94 above).
[138] Ibid at 197.
[139] *Woolmington v Director of Public Prosecutions* [1935] AC 462.
[140] Ibid at 481.
[141] SE Halyk 'The Preliminary Inquiry in Canada' (1968) 10 *Crim LQ* 186.
[142] Ibid.

between the offence committed and the accused.[143] Hence, the accused becomes cognisant of the exact case he needs to meet should the matter advance to trial.[144]

With this discovery feature inherent in the preliminary inquiry, the defence will usually elect that a preliminary inquiry be conducted so as to obtain, to the fullest extent, disclosure of the evidence against the accused.[145] With the further opportunity to cross-examine the Crown's witnesses, the defence is free to 'exhaust all the knowledge of each witness on the particular aspect of the case for which each is called'.[146] Moreover, the defence will have the ability to refine and tie down the evidence presented by each witness, thus, if their testimony varies later on at trail, such variance would prove to be 'fatal' in respect of that witnesses credibility.[147]

However, it is uncertain as to whether the Crown is obliged to reveal all the proof in its possession at the preliminary inquiry.[148] It is clear from judicial decisions, that the Crown must put forward all the evidence in its possession, whether for or against the accused, at trial, conversely, no such pronouncements are made with regard to the preliminary inquiry.[149]

Nonetheless, there are cases in which the court had asked the Crown to produce witness statements during the preliminary inquiry.[150] Thereby, implying that the court has the authority to order the Crown to present certain evidence. However, this finding is open to doubt as the extent of evidence that the Crown should adduce during the preliminary inquiry is still unclear.[151]

As there is no definitive obligation on the Crown to produce all its evidence, the defence can elicit the names of other witnesses during cross-examination and then 'call' those witnesses as 'witnesses for the defence'.[152] In this manner, the defence is able to obtain the greatest disclosure at the inquiry.[153] This approach was given approval in the case of *R v Mishko.*[154]

[143] Ibid.
[144] Ibid.
[145] Ibid.
[146] Ibid.
[147] Ibid.
[148] Ibid 187.
[149] Ibid.
[150] *R v Sommervill & Kaylich* [1963] 2 CCC 178.
[151] Halyk op cit (note 141 above) 189.
[152] Ibid 190
[153] Ibid.
[154] *R v Mishko* [1946] 3 DLR 220 (HCJ).

During the preliminary inquiry in this case, which involved a bank robbery, the Crown called only two witnesses. The defence, during cross-examination, discovered that there were actually six witnesses in the bank at the time the incident occurred and 'elicited' their details.[155] The defence thereafter sought to call the remaining witnesses in an attempt to obtain full disclosure of the Crown's case. The Crown objected, holding that they were not defence witnesses and the defence could not attain disclosure of their case in this manner. The magistrate upheld the Crown's contentions. However, on review, the court held that the defence was not precluded from acting the way they did.

Secondly, the preliminary inquiry serves as an 'early opportunity' for the defence to prove the accused's innocence.[156] At the preliminary inquiry, the accused has the right, if he desires to utilise it, of giving evidence himself and to call witnesses at the preliminary inquiry.[157] Therefore, where the accused feels that he can prove he is innocent in terms of the allegations against him, he can exercise his right to testify and call witnesses to clear any misconceptions, thereby dispensing with the case early.[158]

3.3.5 Advantages of a preliminary inquiry for the prosecution

One might question why the prosecution would want to request for a preliminary inquiry after which the accused is susceptible to discharge. However, as will be seen, a preliminary inquiry may prove to be more advantageous to the prosecution than to the defence.

The first advantage of a preliminary hearing for the prosecution is in terms of s 619 of the Code. All the evidence presented in the inquiry is recorded[159] and s 619 of the Code stipulates that if a witness at the inquiry dies before trial, becomes ill, or insane, is not able to travel, is not in the country, or declines to be sworn, the evidence from the inquiry may be read into the trial.

Section 619 of the Code thus protects the prosecution in cases where witnesses disappear before or during the trial.

[155] Halyk op cit (note 141 above) 190.
[156] Ibid 191.
[157] Section 454 (3) of the Code.
[158] Halyk op cit (note 141 above) 191.
[159] Section 453 (1)(b) of the Code.

Another advantage for the prosecution is that the preliminary inquiry provides the prosecution with the chance to 'bind the witnesses over to testify at trial and thus keeps witnesses within control'.[160]

Furthermore, in terms of s 461 of the Code, where an accused has to proceed to trial, the magistrate may call any witness whose evidence is material to the trial, and if such a witness declines, he may be imprisoned.

Thirdly, a preliminary inquiry is a means of convincing witnesses with material knowledge of the offence to testify.[161] This is done by subpoenaing witnesses who are believed to have information relevant to the crime to the preliminary inquiry.[162] If they do not attend they may be punished by the court.[163]

Fourthly, the preliminary inquiry is a superb mechanism for testing the complaints alleged by the witnesses for the prosecution.[164] The true motives of witnesses can be ascertained, thereby preventing prosecutions founded on 'misinformation, prejudice and malicious motives'.[165]

Fifthly, circumstances may arise where the prosecution is induced to arrest a person suspected of the offence, but at that particular point the prosecution does not have the evidence to establish that the suspect is guilty beyond reasonable doubt.[166] Thus, with the aid of the preliminary inquiry, the court will have authority over the accused while the prosecution has the time to collect the evidence for trial that will establish a solid case against the accused.[167] This is a means of buying time.

Lastly, another advantage is that a preliminary inquiry is a procedure that can be utilised to satisfy public pressures by initiating criminal proceedings in controversial cases that draw on public attention, but where evidence is still lacking.[168]

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[160] Halyk op cit (note 141 above) 198.
[161] Ibid 199.
[162] Section 457 (2) of the Code.
[163] Ibid.
[164] Halyk op cit (note 141 above) 200.
[165] Ibid.
[166] Ibid.
[167] Ibid 200 – 201.
[168] Ibid 201.

3.3.6 Disadvantages of a preliminary inquiry

One of the most acknowledged disadvantages to an accused that comes with choosing to hold a preliminary inquiry is that the accused becomes at risk to encounter 'prejudice to a fair trial' as a consequence of reports by the press on the inquiry.[169] In certain circumstances such reports may be so daunting on the accused that it affects his ability to go before an 'unprejudiced jury'.[170] Furthermore, there is increased risk of the possibility of such prejudice as, at the preliminary inquiry, only the prosecution's case is revealed.[171] It is noteworthy to add, that there can be no restriction placed on the press in this regard due to the notion of a free press.

Another major disadvantage to the accused is, if he decides to testify at the preliminary hearing, then such evidence may be read into the trial.[172] The cross-examination or 'fishing' by the Crown of this evidence at the inquiry may cause the accused to respond badly, and such responses will be read during the trial.[173] Additionally, the accused could be disadvantaged by incriminating testimonies from witnesses at the preliminary inquiry.[174] The evidence may show, by inference, that the accused is connected to the crime, and, even worse, this may be read at the trial. The defence will be unable to attack the witness's credibility at this stage.[175]

The most significant disadvantage of holding a preliminary inquiry is the expense and delay caused by what is in essence a 'double hearing'.[176] It is obvious however, in cases where the accused is discharged, and the Crown avoids proceeding against him again on the same charges, that the Crown as well as the accused avoid the cost of a public trial.[177]

Conversely, delay is inevitably a disadvantage to an accused who is innocent and to an accused who is well aware that the prosecution has charged him with the offence without all the necessary evidence on which to convict him.[178] In such an instance the delay would be in favour of the prosecution's case.

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[169] Ibid 203.
[170] Ibid.
[171] Ibid 211.
[172] Ibid 213.
[173] Ibid.
[174] Ibid 214.
[175] Ibid.
[176] Ibid.
[177] Ibid.
[178] Ibid 215.

In addition, an accused has much scope to establish a maximum delay of the criminal proceedings in Canada. On his first appearance for election, he may ask the court for, and will generally be allowed, a remand of a week or two to see his counsel or on any other reasonable grounds.[179] When the accused returns to court for election, and decides to elect for a preliminary inquiry the matter will, in most instances, adjourn for a month or so.[180] Thereafter, there is a high possibility of the court further adjourning before the preliminary inquiry actually takes place and he is sent to trial.[181] The whole process become tedious.

Lastly, the prosecution has the probability of being disadvantaged by a preliminary inquiry as a result of perjury and by the accused forming an alibi.[182] During the preliminary inquiry the prosecution's witnesses are persuaded by both the prosecution and defence to testify on all they know about the offence. As a result, the accused is able to extract the precise facts surrounding the offence, such as 'times and dates'.[183] Thus, the accused forming an alibi is highly probable. Hence, the preliminary inquiry has the ability to deter the Crown's case in the event of the accused electing to testify during the inquiry, or further if the matter goes to trial.

In Canada, some security is given against the above situation arising. The protection emerges out of the rules laid out by the Supreme Court of Canada[184] where the court held that if an alibi is not set at an early point of the proceedings, prior to or at the inquiry, then observation of this very fact by the trial judge will definitely weaken the truth of the alibi.[185]

3.4 Conclusion

Under the Canadian legal provisions, a preliminary inquiry prior to conducting a trial protects the accused's rights which are guaranteed to every accused in the Canadian Constitution. Committing an accused to trial where the Crown's case is insufficient to make out a case against the accused would be a gross indignity to the accused. The evidence tendered by the Crown need not prove guilt beyond reasonable doubt. Lastly, credibility of the Crown's witnesses is not a matter of concern at the inquiry and should be reserved for trial.

[179] Ibid.
[180] Ibid.
[181] Ibid.
[182] Ibid.
[183] Halyk op cit (note 141 above) 220.
[184] *Russell v The King* 67 CCC 28 [1936] 4 DLR 744 (SCC).
[185] Ibid.

The preliminary inquiry in Canadian Criminal law seems logical. However, as can be seen from the above, a preliminary inquiry may be selected for ulterior purposes. It may be used as a mechanism of discovery, as a device to secure and control witnesses, as a means for testing the motives of the Crown's witnesses and as a tactic for delay. These ancillary purposes are not forbidden. However, they detract from the primary purpose of a preliminary inquiry, thereby making the inquiry subject to doubt. It must be stressed that the primary purpose of the inquiry is to see if any inference of guilt may be drawn from the Crown's evidence so that the matter may proceed to trial.

It is inevitable that the effectiveness and efficiency of the preliminary inquiry therefore becomes questionable. There has thus been debate in Canada about whether the inquiry should be removed from Canadian law.[186]

In the case of *R v Darby*[187] the court concluded the following with regard to the preliminary inquiry

> '…the preliminary hearing or preliminary inquiry has been turned into a nightmarish experience for any provincial court judge. Rules with respect to relevancy have been widened beyond recognition. Cross-examination at a preliminary inquiry now seems to have no limits. Attempts by provincial court judges to limit cross-examination have been perceived by some superior courts as a breach of the accused's right to fundamental justice, a breach of his or her ability to be able to make full answer and defence…The present state of the preliminary inquiry is akin to a rudderless ship on choppy waters. The preliminary hearing has been turned into a free-for-all, a living hell for victims of crime and witnesses who are called to take part in this archaic ritual'.[188]

The above quote leads one to believe that the underlying purpose of the preliminary inquiry has been overtaken by all the ancillary motives for which the procedure is being used. If such a provision were to remain in Canadian Criminal law then the foundational values for the inquiry need to be re-established.

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[186] L Silver 'Does the Stinert Decision Signal the End of the Preliminary Inquiry?' (2015). Available at https://ablawg.ca/2015/04/17/does-the-stinert-decision-signal-the-end-of-the-preliminary-inquiry/, accessed on 18 August 2017.
[187] *R v Darby* [1994] BCJ No. 814 (Prov. Ct.).
[188] Ibid para 9-10.

CHAPTER 4
A RECENT APPLICATION OF SECTION 174 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977: *S V DEWANI*

4.1 Introduction

After tracing the origins of the discharge provision and looking at the provision from a Canadian perspective, it is now apposite to look at a fairly recent application for discharge in South Africa. It can be argued that since 2014 no conversation on s 174 of the Criminal Procedure Act 51 of 1977 can ever proceed without a discussion of the case of *S v Dewani*.[189]

The *Dewani* case renders the judicial pronouncements by South African courts on the interpretation and application of s 174 of the Act futile. The court in *Dewani* had failed to properly consider the test for discharge and the issue of credibility. Thus, the case a typical example of the potential danger that accompanies s 174 of the Act because of the courts' almost unfettered discretion in respect of discharging an accused person.

This chapter will therefore comprise of a thorough analysis of the case of *S v Dewani* and evaluates the trial court's decision in discharging the accused.

4.2 A brief overview of the case of *S v Dewani*

Shrien Dewani, a British businessman, was suspected of entering into a conspiracy in which his newlywed Swedish wife, Anni Dewani, was killed while they were honeymooning in Cape Town.[190]

On their arrival at Cape Town International Airport on 12 November 2010, the couple secured the taxi services of one Zola Tongo, a taxi driver by profession, who became their tour guide for the rest of their trip.[191] Tongo thereafter dropped the couple at Cape Grace Hotel where the

[189] *Dewani* supra (note 5 above).
[190] 'Honeymoon murder: Timeline of events for Shrien Dewani' available at http://www.bbc.com/news/uk-england-bristol-13226067, accessed on 24 November 2017.
[191] 'Honeymoon killing 'by arrangement'' available at https://www.iol.co.za/capetimes/news/honeymoon-killing-by-arrangement-1666456, accessed on 24 November 2017.

accused allegedly inquired whether Tongo knew of any hitman, as he sought to plan a hit on his 'business partner'.[192]

The incident that occurred on 13 November 2010, in which Tongo's Volkswagen Sharan was hijacked by Mziwamadoda Qwabe and Xolile Mngeni in Gugulethu, Cape Town, inexorably formed part of a greater conspiracy to kill Anni Dewani.[193] The couple was hijacked at gunpoint, after which Tongo, and then, Dewani were told to exit the vehicle (unharmed) a short drive later.[194] Mrs Dewani's body was subsequently found lifeless on the back seat of the vehicle on 14 November 2010, after being shot in the neck.[195]

Arrests were made only days after the crime as a result of Qwabe, Mngeni and Monde Mbolombo's admissions to the robbery/kidnapping that preceded Mrs Dewani's death.[196] Due to receive the sentence of life imprisonment, Qwabe and Mblombo claimed that this was no ordinary hijacking, rather, it was a premeditated murder ignited by the deceased's husband.[197]

Initially Tongo played victim to the hijacking, but faced with compelling evidence 'implicating him in the crime' and his fellow conspirator's change of heart to implicate Dewani, he too argued 'that the husband was the instigator'.[198]

As a result Dewani, the accused, was charged with the following criminal offences:

a) 'Conspiracy to commit the offences of kidnapping, robbery with aggravating circumstances and murder (count 1);
b) Kidnapping (count 2);
c) Robbery with aggravating circumstances (count 3);
d) Murder (count 4); and

[192] *Dewani* supra (note 5 above) para 23.1.53.
[193] 'Murder of Anni Dewani' available at https://en.wikipedia.org/wiki/Murder_of_Anni_Dewani, accessed on 24 November 2017.
[194] 'Honeymoon murder: Timeline of events for Shrien Dewani' available at http://www.bbc.com/news/uk-england-bristol-13226067, accessed on 24 November 2017.
[195] Honeymoon murder: Timeline of events for Shrien Dewani' available at http://www.bbc.com/news/uk-england-bristol-13226067, accessed on 24 November 2017.
[196] 'Murder of Anni Dewani' available at https://en.wikipedia.org/wiki/Murder_of_Anni_Dewani, accessed on 24 November 2017.
[197] 'Murder of Anni Dewani' available at https://en.wikipedia.org/wiki/Murder_of_Anni_Dewani, accessed on 24 November 2017.
[198] S Morris 'Dewani murder case: How grieving husband became suspect' available at https://www.theguardian.com/world/2011/feb/17/dewani-murder-doubts-raised-police, accessed on 24 November 2017.

e) Obstructing the administration of justice (count 5).'[199]

Qwabe and Tongo were offered a reduced sentence in exchange for pleading guilty to the crimes. In addition, they were also required to testify on behalf of the State, against the accused, and in respect of any other criminal litigation that may pertain to the crime.[200] The plea bargains were entered into in terms of s 105A[201] of the Criminal Procedure Act.[202] Mbolombo, on the other hand, was granted immunity from being prosecuted in accordance with s 204[203] of the Criminal Procedure Act[204] similarly in exchange for a testimony against the accused and in respect of any other litigation that might be forthcoming.[205]

It is evident why Tongo was a key witness for the State, as he was the only witness who could link the accused to this conspiracy.[206] He was the only person who directly interacted with the

[199] *Dewani* supra (note 5 above) para 2.
[200] S Morris 'Dewani murder case: How grieving husband became suspect' available at https://www.theguardian.com/world/2011/feb/17/dewani-murder-doubts-raised-police, accessed on 24 November 2017.
[201] Section 105A(1)(a): 'A prosecutor authorised thereto in writing by the National Director of Public Prosecutions and an accused who is legally represented may, before the accused pleads to the charge brought against him or her, negotiate and enter into an agreement in respect of-
(i) a plea of guilty by the accused to the offence charged or to an offence of which he or she may be convicted on the charge'.
[202] Act 51 of 1977.
[203] Section 204(1): 'Whenever the prosecutor at criminal proceedings informs the court that any person called as a witness on behalf of the prosecution will be required by the prosecution to answer questions which may incriminate such witness with regard to an offence specified by the prosecutor -
a) the court, if satisfied that such witness is otherwise a competent witness for the prosecution, shall inform such witness -
(i) that he is obliged to give evidence at the proceedings in question;
(ii) that questions may be put to him which may incriminate him with regard to the offence specified by the prosecutor;
(iii) that he will be obliged to answer any question put to him, whether by the prosecution, the accused or the court, notwithstanding that the answer may incriminate him with regard to the offence so specified or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified;
(iv) that if he answers frankly and honestly all questions put to him, he shall be discharged from prosecution with regard to the offence so specified and with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and
b) such witness shall thereupon give evidence and answer any question put to him, whether by the prosecution, the accused or the court, notwithstanding that the reply thereto may incriminate him with regard to the offence so specified by the prosecutor or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified'.
[204] Act 51 of 1977.
[205] 'Murder of Anni Dewani' available at https://en.wikipedia.org/wiki/Murder_of_Anni_Dewani, accessed on 24 November 2017.
[206] *Dewani* supra (note 5 above) para 16.

accused. Thus, Tongo's testimony needed to be corroborated by the testimonies of Qwabe and Mbolomo as well as other State evidence.[207]

After revealing manifold contradictions in, and among, the testimonies presented by the State's witnesses, the court upheld the application for discharge made by the defence at the end of the State's case, and the accused was consequently found not guilty of the charges.[208]

4.3 The legal position summarised

In chapter one the legal arguments surrounding the application of s 174 of the Act were discussed in some depth. Drawing on prior judgments, the legal position may be summed up as follows:

a) The accused has a right to be discharged if, at the close of the State's case, there is no possibility of convicting the accused other than if the accused testifies and incriminates himself;[209]

b) The court, in determining whether or not to discharge the accused at the close of the State's case, may consider the credibility of the witnesses for the State, 'even if only to a limited extent';[210] and

c) The State's evidence may be ignored if it were of 'such poor quality that no reasonable person could possibly accept it',[211] 'and there is accordingly no credible evidence on record upon which a reasonable man, acting carefully, may convict'.[212] In such an instance the accused should be discharged.

[207] M Reddi and B Ramji *Section 174 of the Criminal Procedure Act: Is it time for its abolition?* (Unpublished manuscript, 2017) 13.
[208] *Dewani* supra (note 5 above) para 27.1 – 27.2.
[209] *Lubaxa* supra (note 5 above).
[210] *Mpetha* supra (note 5 above) at 265D-G.
[211] Ibid.
[212] *Ndlangamandla* supra (note 38 above).

4.4 The contradictions exposed in the State's evidence during cross-examination

Judge Traverso, DJP described the evidence of the key witness, Tongo, as evidence 'riddled with contradictions'.[213] When challenged with these contradictions during cross-examination, Tongo maintained that he had 'made a mistake' or that 'as time went by' his memory improved regarding the fateful night.[214]

The judge identified numerous variations between Tongo's statement, affidavit and his evidence in chief about how the events had played out. The most significant discrepancies will be discussed below. An attempt will be made to place these inconsistencies in context with the way in which the sequel of events unfolded.

First, Tongo testified that on arriving at the Cape Grace Hotel on 12 November 2010, the accused had indicated to him that he had a job for him and he told him what that job was after he checked in at the hotel.[215] However, the version Tongo put forward in his affidavit was seemingly at odds with his testimony. In his affidavit, Tongo stated that the 'job offer' was made and discussed before the accused went to the reception to check in.[216]

Upon realising that the job was to kill someone, Tongo indicated to the accused that he did not partake in such business but stated that he may know somebody who was associated with such jobs – Mbolombo.[217] Judge Traverso stated that it is by chance that Mbolomlo almost instantly grabbed the offer to kill somebody and phoned Qwabe for assistance.[218]

The next material contradiction that the judge relied on concerned the identity of the victim. Tongo identified the victim as a 'client' of the accused in his plea agreement.[219] By contrast, during his testimony he described the victim to be the 'business partner' of the accused.[220] He went so far as to say that the woman he picked up on the day the incident took place was not the same woman that accompanied the accused from the airport.[221] However, in his statement

[213] *Dewani* supra (note 5 above) para 23.1.45.
[214] Ibid para 23.1.46.
[215] Ibid para 23.1.47.
[216] Ibid para 23.1.47- 23.1.48.
[217] Ibid para 23.1.48.
[218] Ibid para 23.1.49.
[219] Ibid para 23.1.53.
[220] Ibid.
[221] Ibid.

Tongo alleged that the 'same lady' he picked up from the airport got into his car on the Saturday the incident was planned.[222] When faced with these contradictions he was quick to blame the Lieutenant who wrote down his statement.[223]

Additionally, Tongo stated in both his affidavit and plea explanation that the accused inquired if he had known of any place where he, the accused, could exchange his dollars for rands, without having to 'produce his passport'.[224] Tongo believed that this would be the same money used to pay the hitmen.[225] However, during 'cross examination it transpired that the accused never indicated that he did not want to produce his passport'.[226] Tongo argued that he said this in the mistaken belief 'that the accused did not want to produce his passport'.[227] Judge Traverso stated that these 'extras' were thrown in in an attempt to implicate the accused.[228]

Upon a closer consideration of the testimony of Tongo, with regard to taking the accused to the 'money changer', Judge Traverso exposed more discrepancies. Tongo testified that on the Saturday morning that he was going to take the accused to change his dollars, the accused called him in a state of panic confirming their arrangements.[229] However, CCTV footage showed the accused and deceased enjoying breakfast before they lounged at the hotel pool.[230] Evidence, in the form of a text message, further revealed that Tongo contacted the accused first to confirm their arrangements for that morning, and the accused replied saying, 'okay, give me 10 minutes'.[231] Judge Traverso claimed that this indicated no rush on the part of the accused whatsoever.[232]

Tongo also specified that on return to the Cape Grace Hotel, from the 'money changer', the accused told him that the murder should be staged as a hijacking, after which Tongo and the accused should be dropped off and the woman must thereafter be killed.[233] Nevertheless, the CCTV footage showed the Volkswagen Sharan had returned to the hotel, but the car 'hardly

[222] Ibid.
[223] Ibid.
[224] Ibid para 23.1.54.
[225] Ibid.
[226] Ibid.
[227] Ibid.
[228] Ibid.
[229] Ibid para 23.1.68.
[230] Ibid.
[231] Ibid para 23.1.54.
[232] Ibid para 23.1.68.
[233] Ibid para 23.1.70.

stopped' when the accused jumped out and entered the hotel.[234] Caught out with this, Tongo changed his story to the conversation being conducted on the ride back to the hotel, calling this irregularity a 'mistake'.[235]

Turning to the hours preceding the incident, Judge Traverso indicated that Tongo's reasoning on engaging the child locks of the rear doors was unlikely.[236] Tongo explained that he did this as he was unaware of the precise side on which the deceased would sit.[237] The judge indicated that this explanation by Tongo was unbelievable in the light of how the conspiracy was going to be carried out – Tongo was going to be dropped off first followed by the accused.[238] Tongo also made no mention of engaging the child locks in his affidavit, but mentioned it in his testimony after being exposed on CCTV footage.[239]

Furthermore, from Tongo's evidence it was clear that the hijacking was to take place at an agreed spot in Gugulethu.[240] Nevertheless, after fetching the accused and deceased, Tongo disclosed that upon realising that Qwabe and Mngeni were not at the scheduled spot in Gugulethu, he recommended that the couple go to Somerset West.[241] However, the deceased already had a reservation at a restaurant at Somerset West which was made at the hotel.[242] This latter fact made Tongo's statement that he had recommended the couple go to Somerset West unbelievable. To this the judge suggested that 'this was indeed a strange co-incidence'.[243]

Upon closer analysis of the actual hijacking, during cross-examination it was exposed that there existed a further inconsistency with respect to where Tongo was sitting after the hijacking. It can be inferred from the accused's plea explanation that Tongo was in the front passenger seat, as the accused stated that one of the hijackers jumped in the back seat next to him with a firearm in his hand.[244] Tongo's affidavit reflected the exact scenario that Dewani described. However,

[234] Ibid.
[235] Ibid.
[236] Ibid para 23.1.77.
[237] Ibid.
[238] Ibid.
[239] Ibid.
[240] Ibid para 23.1.76.
[241] Ibid.
[242] Ibid.
[243] Ibid.
[244] Ibid para 23.1.89.

during his testimony he stated that this setting was not true, as he was 'forced to the rear seat' with the deceased and accused and he did not have a firearm.[245]

In his testimony about his place in the car, it was evident that Tongo had placed himself in a dilemma where he was in the back seat of the car where he had enabled the child locks. He was thus required to explain how he had exited the vehicle, because in his affidavit he mentioned 'the driver (Mr Qwabe) put his firearm to my head and ordered me out of the vehicle'.[246] Yet again he attributed this statement to a mistake.[247]

Nevertheless, Tongo testified that the armed men had requested they all put their heads down, and asked him to exit the car behind the Gugulethu police barracks.[248] Tongo stated that he then went into the police station and reported the matter, but made a false statement,[249] after which the police escorted him to the Cape Grace Hotel where the accused was already in the company of the police.[250]

CCTV footage showed that the accused and Tongo had conversed on the terrace of the hotel after the hijacking.[251] Tongo contended that during that time the accused continuously asked him whether he was 'okay', and whether the 'job' was completed.[252] No mention of this conversation was made in Tongo's affidavit.[253]

CCTV footage also showed that Tongo had received an envelope from the accused in the hotel conference room on Tuesday, 16 November 2010.[254] Tongo held that the accused had asked to meet him at the hotel to pay him the R5000 as previously promised.[255] Tongo specified that he had not mentioned this scenario in his affidavit as 'it would have increased his participation in the offence'.[256]

[245] Ibid.
[246] Ibid para 23.1.90.
[247] Ibid.
[248] Ibid para 23.1.29.
[249] Ibid.
[250] Ibid para 23.1.30.
[251] Ibid para 23.1.91.
[252] Ibid.
[253] Ibid.
[254] Ibid para 23.1.94.
[255] Ibid.
[256] Ibid.

In summing up these contradictions it is inevitable that there were various inconsistencies in Tongo's evidence, inconsistencies that had the ability to weaken the State's case, and which did to a vast extent. However, it must be noted that the inconsistencies in Tongo's evidence could be as a result of genuine mistakes and forgetfulness given the space in time from when the incident had occurred to when the trial actually commenced.

4.5 Contradictions between State witnesses

Judge Traverso stated that the testimonies of Qwabe and Mbolombo contradicted Tongo's statements 'in just about every aspect of their interactions'.[257]

To keep matters clear and uncomplicated the inconsistencies in Tongo's evidence and the inconsistencies among the witnesses' evidence have been separated. In discussing the contradictions between the State's witnesses, only those that the judge considered material in relation to Tongo's evidence will be discussed here.

First, On Friday, 12 November 2010, after leaving the Dewanis at Cape Grace Hotel, Tongo testified that he went to see Mbolombo at work. He told Mbolombo that he needed to speak to him and asked him if he knew of any hitmen.[258] Mbolombo thereafter called Qwabe and expressed to him that he has a man with him by the name of Zola Tongo who was in search of a hitman.[259] At that time Qwabe was in the presence of Mgneni.[260] Tongo testified that Qwabe asked Mbolombo how much was involved and he replied saying that the accused was going to pay them R15 000.[261] However, this statement was inconsistent with Qwabe's. Qwabe testified that Tongo enquired how much it would cost for the hit and, upon consulting with Mngeni, he said he will do it for R15 000.[262]

Secondly, during this same conversation, Tongo affirmed in his evidence that the accused was willing to pay the hitmen in dollars. Mbolombo passed this message on to Qwabe, whereupon Qwabe stated that they did not 'want to be paid in dollars but in rands'.[263] There is disparity

[257] Ibid para 23.1.62.
[258] Ibid.
[259] Ibid.
[260] Ibid para 23.1.67.
[261] Ibid.
[262] Ibid para 24.1.2.
[263] Ibid para 23.1.11.

between Tongo's evidence and Qwabe's in this respect. Qwabe indicated that he did not remember the discussion with Mbolombo referring to dollars.[264]

Lastly, Mbolombo testified that when Tongo had told him that there was someone who had to be killed he did not ask who the person to be killed is.[265] However, Tongo testified that he told Mbolombo that Dewani wanted his 'business partner' to be killed, and she would be arriving the next day.[266]

4.6 The court's ruling

Judge Traverso stressed that the test to be applied when deciding whether to discharge the accused is to ask if a 'reasonable court, acting carefully, might convict' the accused on the evidence presented by the State.[267]

The judge claimed that what was sought from Tongos's evidence was corroboration that implicated the accused.[268] She also conceded that there are indisputably fragments of Tongo's evidence that implicated the accused but nevertheless declared that:

> '…his evidence is of such a poor quality that one simply does not know where the lies end and the truth begins or vice versa. A court should not under those circumstances cherry pick certain parts of his evidence which can possibly be accepted and others which should be rejected. Reliable corroboration is required in such circumstances'.[269]

The prosecution attempted to persuade the court that such corroboration existed by virtue of circumstantial evidence, in the form of the interactions between Tongo and the accused on the CCTV footage. However, the judge refused to take this into consideration, holding that it did not implicate the accused.[270] The judge then concluded:

> 'Regrettably, there are many unanswered questions about what exactly happened on the fateful night. I realise that there is a strong public opinion that the accused should be placed on his defence. I have taken note of that. I have also taken note of the plight of the Hindochas. I have

[264] Ibid para 23.1.65.
[265] Ibid para 23.1.64.
[266] Ibid.
[267] Ibid para 23.1.106.
[268] Ibid para 24.7.
[269] Ibid para 23.1.107.
[270] Ibid para 24.7.

> however taken an oath of office to uphold the rule of law and to administer justice without fear, favour or prejudice. That I cannot do if I permit public opinion to influence my application of the law. If any court permitted public opinion, which has no legal basis to influence their judgments, it will lead to anarchy'.[271]

Judge Traverso emphasised that she was blessed with the judicial discretion to decide to discharge the accused,[272] and ultimately concluded that she did not find that the State had adduced sufficient evidence 'upon which a reasonable court, acting carefully, might convict' the accused.[273] The judge then repeated the principle from the case of S *v Lubuxa*,[274] and argued that the only compelling reason for rejecting the application for discharge by the defence, would be the hope that the accused will incriminate himself in the presentation his evidence, and this was a principle that is clearly frowned upon.[275]

In these circumstances the court ordered that the application for discharge made by the defence in terms of s 174 of the Act be granted, and the accused be found not guilty of the charges.[276]

4.7 An evaluation of the judgement

In evaluating the case of *S v Dewani* two glaring aspects of the judgment need to be addressed and scrutinised. These include: the role of the judge at the discharge stage; and what amounts to corroboration of evidence in terms of s 174 of the Act.

4.7.1 The role of the judge at the discharge stage

The argument that may be put forward in assessing the court's reasoning in *Dewani* is that the judge had misconstrued the test for discharge that has been developed by South African courts over decades, and as a result a miscarriage of justice has occurred.[277] This is so because looking at the evidence, in the manner that one should view it at the stage of the discharge application assessment, the State had in fact made out a prima facie case against the accused, yet, the

[271] Ibid.
[272] Ibid para 24.8.
[273] Ibid para 24.9.
[274] *Lubaxa* supra (note 5 above).
[275] *Dewani* supra (note 5 above) para 24.9.
[276] Ibid para 27.1 – 27.2.
[277] Reddi and Ramji op cit (note 207 above) 2.

accused was acquitted without presenting his defence.[278] During his testimony Tongo indicated that on certain occasions he had met with the accused in which the accused had specified his plans to murder his wife.[279] In accordance with Tongo's testimony, the State produced evidence in the form of CCTV footage which confirmed 'that meetings took place between the two at the times and in the places alleged by Tongo'.[280] In this sense a prima facie case materialised which was sufficient for a rejection of the discharge application.

The judge seemed to have misunderstood what is required of her when assessing the evidence at the stage when the State closes its case, and, when both the State and defence close their case.[281] Judge Traverso should have set aside the inquiry into the credibility of the State's evidence for the end of the trial. 'The judge's role in assessing a section 174 application is not to assess credibility'.[282]

Furthermore, s 174 of the Act requires the court to comprehend the difference between cases in which the evidence the State produces gives the defence no case to answer and a case in which the evidence of the State proves the necessary elements of the offence for a reasonable person to convict.[283] It is submitted that the court in *Dewani* had failed to establish this distinction as satisfactory evidence existed which the court ignored.

After all, it must be emphasised that 'the standard which the State's evidence must meet at the close of its case, in order to avoid the accused being discharged, is lower than the standard that it must meet to secure the accused's conviction'.[284] The principle in Canada, is that all the court should look for at the stage of discharge is whether a reasonable inference may be drawn from the State's evidence that the accused may be guilty of the crime.[285] Similarly, in South Africa, the judge does not have to inquire whether the State has proved its case beyond a reasonable doubt at this point in the trial.

[278] Ibid.
[279] Ibid 13.
[280] Ibid.
[281] Ibid 14.
[282] Ibid 16.
[283] Ibid 10.
[284] *Lubaxa* supra (note 5 above).
[285]http://criminalnotebook.ca/index.php?title=Preliminary_Inquiry_Evidence&mobileaction=toggle_view_mobile, accessed on 17 August 2017.

Another point that needs to be highlighted is that when the court determines a discharge application in terms of s 174 of the Act, the credibility of the State's witnesses play only a limited role.[286] The court is entitled to disregard the State's evidence and discharge the accused where the evidence is of 'such poor quality' that no reasonable man could convict the accused on it.[287] This is another issue that South African courts fail to understand, and an issue that arose again in *Dewani*. The court was so concerned about the credibility of Tongo's evidence and the detail involved, that the bigger picture had faded. Spotting every discrepancy in Tongo's evidence should not be done when determining a discharge, rather, the court should have looked for every link that could have drawn the accused to the conspiracy. Thus, the court concerned itself too much with 'weighing up' the evidence. In this regard Reddi and Ramji submit that:

> '…this is neither within their remit nor competence at the stage of the close of the State's case'.[288]

4.7.2 Corroboration

The judge had emphasised that what the State needed to prove in order to avoid the accused being discharged was a corroboration of Tongo's evidence.[289] It is 'common cause that the only person who could implicate the accused was Tongo (who was an accomplice witness)'.[290] This is so as Tongo directly interacted with the accused.

The court in Dewani made reference to the case of *S v Gentle*[291] which states the following with regards to corroboration:[292]

> 'It must be emphasised immediately that by corroboration is meant other evidence which supports the evidence of the complainant, and which render the evidence of the accused less probable, on the issues in dispute'.[293]

[286] *Mpetha* supra (note 5 above) at 265D – G.
[287] Ibid.
[288] Reddi and Ramji op cit (note 207 above) 12.
[289] Ibid 13.
[290] *Dewani* supra (note 5 above) para 23.1.
[291] *S v Gentle* 2005 (1) SACR 420 (SCA).
[292] *Dewani* supra (note 5 above) para 19.
[293] *Gentle* supra (note 291 above) at 430.

During his testimony, Tongo had discussed and described the various meetings that he had had with the accused which concerned the accused's strategy to kill the deceased. In accordance, the State presented certain CCTV footage to corroborate Tongo's evidence which showed:

a) On Friday, 12 November 2010, Tongo and the accused had met in the parking lot outside the Cape Grace Hotel;[294]

b) On Saturday morning, 13 November 2010, the accused was fetched from the Cape Grace Hotel by Tongo;[295]

c) The accused returning to the Cape Grace Hotel with Tongo later on that Saturday morning;[296]

d) On the evening of Saturday, 13 November 2010, Tongo fetched the accused and the deceased from the Cape Grace Hotel;[297]

e) 'The accused talking to Tongo after the incident on Sunday, 14 November 2010';[298]

f) 'The accused paying Tongo R1 000,00 in the communications room on Tuesday, 16 November 2010'.[299]

In this regard the judge stated that the CCTV footage does:

> '…not provide any corroboration for the version of Tongo where it differs from that of the accused set out in his plea explanation, as none of these events are in issue. It is what was said during those events that is in issue and for that there is only the version of Tongo'.[300]

[294] *Dewani* supra (note 5 above) para 21.
[295] Ibid.
[296] Ibid.
[297] Ibid.
[298] Ibid.
[299] Ibid.
[300] Ibid.

However, despite this compelling evidence, which could tie the accused to the crime, the court found that the CCTV footage was not in line with the standard required for corroboration.[301] This is a pure misdirection on the facts on the part of the judge.[302]

Although the CCTV footage could obviously not confirm what was discussed during the meetings between Tongo and the accused, it is unclear on what other grounds it failed to corroborate Tongo's testimony.[303] The CCTV footage serves as evidence to prove the probability of Tongo's version of what really occurred.

The judge held the same with regard to the evidence of the telephone conversations. She stated that the evidence did not reveal what was said during the conversations but merely reveals that the conversations took place between Tongo and the accused.[304] Should this not be a cause for suspicion in her mind?

Therefore, it is absurd that the court declined to put the accused on his defence merely because he was so careful not to expose himself as the mastermind behind the crime.[305] It can be argued that the CCTV footage and telephone communications amounted to sufficient circumstantial evidence to put the accused to his defence.

The testimony delivered by the accomplice witness, Tongo, was indisputably corroborated by the CCTV footage and therefore the least the court could have done would be to ask for an 'innocent explanation' from the accused of what had occurred during the conversations captured with Tongo.[306] It is therefore submitted that discharging the accused under these circumstances amounts to a miscarriage of justice.

To add salt to the wounds, the court found that there were components of the State's evidence that implicated the accused.[307] The discovery of such implications together with the

[301] Reddi and Ramji op cit (note 207 above) 13.
[302] Ibid.
[303] Ibid.
[304] *Dewani* supra (note 5 above) para 22.
[305] Reddi and Ramji op cit (note 207 above) 13.
[306] Ibid 14.
[307] *Dewani* supra (note 5 above) para 23.1.107.

corroboration of Tongo's evidence by the CCTV footage was all the court should have concerned itself with as it amounted to sufficient evidence at the stage of discharge.[308]

Therefore, although the court highlighted the rule that the State's evidence could be ignored if it were of such poor quality that no reasonable person could possibly accept it, the court's interpretation of this rule in the analysis of the State's evidence was incomprehensible.[309] Reddi and Ramji make the following statement with which the author strongly agrees:

> 'Had the court applied the test correctly, it would have found: (i) evidence existed in this case in the form of an accomplice whose evidence, taken at its highest, was not so far-fetched or inadequate that a reasonable person would not believe it; (ii) there was corroboration of this evidence in terms of the legal requirements; and (iii) the evidence tended to show a conspiracy agreement between the accused and Tongo. This is what the State needed to show, perhaps not for conviction – but to avoid discharge'.[310]

However, their conclusion is contrary to what the court actually did. The court conducted a thorough enquiry into the facts, evaluated the State's evidence and subsequently discharged the accused.

It is submitted that the approach the court should have taken in deciding whether to discharge the accused, is that that was taken by the court in *Masondo v S*[311] where Kgomo J stated that:

> 'The gist of the matter herein is that as opposed to situations where there is no evidence on record, in this case there is indeed evidence led against him which, if found to be cogent and credible, may amount to a prima facie case against him. I must make it clear that I am not saying the accused's guilt on these two counts have been proved beyond reasonable doubt. I am saying the evidence led, when juxtaposed to the forensic evidence and the evidence of pointing out which has already been accepted against accused 2 is such that it calls for reply'.[312]

It is agreed with the prosecution in *Dewani* that the testimony of the accomplice witness does not have to be:

[308] Reddi and Ramji op cit (note 207 above) 14.
[309] Ibid 14 – 15.
[310] Ibid 15.
[311] *Masondo v S* In re: *S v Mthembu and Others* (2011 (2) SACR 286 (GSJ))
[312] Ibid para 44.

> '…wholly consistent and wholly reliable or even wholly truthful – the ultimate test, after cautiously considering accomplices' evidence is whether the court is satisfied beyond reasonable doubt that in its essential features the story he tells is true'.[313]

The 'evidence was not of such poor quality' that the court could simply 'draw a proverbial line through it'.[314]

After the judge reached an unsatisfactory conclusion, it was unfortunate that the State could not even appeal the matter. The State could only appeal the case on a question of law.[315] None of the above issues deal with a question of law, but rather questions of fact.

4.8 Conclusion

Though s 174 of the Act is useful in ensuring that the fair trial rights' of the accused are upheld, the *Dewani* case is a classic example of how the section could result in a miscarriage of justice due to the court's unencumbered discretion in deciding to discharge an accused.

It was also unfortunate that the court in *Dewani* completely overlooked public opinion in reaching its judgment.[316] However, it must be borne in the mind of judges that public uproar will generally flow from controversial decisions where a wealthy or famous accused is involved, as in the case of *Dewani*. Both the victim and public will have an interest in a matter where the State has adduced evidence which requires a reply from the accused.[317] Nonetheless, the interests of the victim, the public and the accused must be balanced, failing which, 'there is a risk of victim/public dissatisfaction with the process'.[318]

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[313] *Dewani* supra (note 5 above) para 23.1.104. See also S. *v. Francis* 1991 (1) SACR 198 (A).
[314] *Dewani* supra (note 5 above) para 23.1.106.
[315] Section 310(1) of the Act (Appeal from the lower court by the prosecutor): 'When a lower court has in criminal proceedings given a decision in favour of the accused on any question of law, including an order made under section 85 (2), the attorney-general or, if a body or a person other than the attorney-general or his representative, was the prosecutor in the proceedings, then such other prosecutor may require the judicial officer concerned to state a case for the consideration of the provincial or local division having jurisdiction, setting forth the question of law and his decision thereon and, if evidence has been heard, his findings of fact, in so far as they are material to the question of law'. See also *Lakatula* supra (note 9 above); *Afrika* supra (note 9 above).
[316] *Dewani* supra (note 5 above) para 24.7.
[317] Reddi and Ramji op cit (note 207 above) 21.
[318] Ibid 21.

Furthermore, the court in *Dewani* entirely overlooked the victim's interests. This was probably because the court was so concerned with the credibility of the State's witnesses' and the accused's rights. Such a failure may lead the public to perceive that justice is not being served. 'The courts need public support and institutional legitimacy to function fairly and efficiently'.[319]

In addition, the court seems to have deviated from the boundaries of the test for discharge and concerned itself with issues unnecessary to the discharge stage. Looking at the nature of the evidence presented by the State, there is no doubt that it could have been used to connect the accused to the conspiracy, but it was ignored in totality due to certain inconsistencies and contradictions; aspects of evidence that should not be looked into in such great detail at the discharge stage. As a result, an accused who rightly should have been put on his defence has been acquitted leaving many South African citizens, as well as, the victim's family disappointed in the South African justice system.

The following chapter will focus on an evaluation of how the South African courts have been applying s 174 of the Act and will conclude on whether the provision should remain in South African law or be amended.

[319] D Erasmus 'Discharge of the accused at the close of the case for the prosecution: Public opinion and the right to a fair trial in terms of the accusatorial system of criminal procedure' (2015) available at http://www.litnet.co.za/discharge-of-the-accused-at-the-close-of-the-case-for-the-prosecution-public-opinion-and-the-right-to-a-fair-trial-in-terms-of-the-accusatorial-system-of-criminal-procedure/, accessed on 12 December 2017.

CHAPTER 5
CONCLUSION: ASSESSING THE CURRENT RELEVANCE OF SECTION 174 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977

5.1 Introduction

The preceding chapters have discussed the legal arguments surrounding the application of s 174 of the Criminal Procedure Act 51 of 1977, the history of the section, the operation of the discharge provision in Canada and, finally, have analysed the most contentious application of the section in the case of *S v Dewani*.

The primary concern of this final chapter is to discuss whether the circumstances surrounding s 174 of the Act justify its expulsion from the Criminal Procedure Act 51 of 1977, and hence from South African criminal procedure.

5.2 The issues surrounding s 174 of the Criminal Procedure Act 51 of 1977

Although s 174 of the Act is indeed a frontline weapon amongst the fair trial rights' ammunition of an accused, it is fraught with difficulties in respect of both its purpose and practice.[320]

It must be borne in the mind that the test for discharge is whether, on the evidence at the close of the prosecution's case, a reasonable man, acting carefully, might convict.[321] This test has been acknowledged in various judgments and is by no means in issue.

However, the argument that may be warranted, is that the test for discharge is either applied too critically or uncritically, never correctly. Support for part of this finding is contained in Gertsch's argument:

> 'Often unjustly ineffective in its operation, and based in part on a fiction concerning its origins, the discharge procedure at the close of the prosecution's case has suffered from a state of neglect in which its superficially simple provisions have been applied rather uncritically by our courts, to the detriment of the of the accused's procedural rights'.[322]

[320] Gertsch op cit (note 6 above) 272; Reddi and Ramji op cit (note 207 above) 3.
[321] *Dewani* supra (note 5 above) para 7; *Shein* supra (note 5 above); *Herholdt* supra (note 5 above); *Mpetha* supra (note 5 above); *Shuping* supra (note 5 above); *Lubaxa* supra (note 5 above).
[322] Gertsch op cit (note 6 above) 272.

Whilst this might have occurred in the past, the opposite application now occurs, as in the *Dewani* judgment. Judges are too critically applying s 174 of the Act to the detriment of the prosecution's case and ultimately the interests of justice.

Therefore, to succinctly sum up the issues surrounding the application of s 174 of the Act: first, is the issue of the accused's fair trial rights that accompanies the section where the prosecution's case is weak and a discharge application is subsequently refused by the court, secondly, there is a need for clarity on the test for discharge, and whether credibility should encompass this test, and third, is the issue of the extent of the court's unrestricted discretionary powers when ruling on an application for discharge.[323]

The result of all these issues leads to s 174 of the Act being applied in an inconsistent manner, and thus, negating the very purpose of the section, hence, defeating the ends of justice.

There is no doubt, that if the court dismisses an application for discharge foreseeing that the evidence of the defence might supplement and strengthen the prosecution's case,[324] a variety of the accused's fair trial rights will be infringed.[325] However, the two-tier test in *S v Shuping*[326] is no longer in dispute as the second leg of the inquiry[327] was declared unconstitutional.[328]

Among the abovementioned issues, the issue of the credibility of the prosecution's evidence seems to be most daunting, as was recently evident in the *Dewani* case. South African judges appear to have misconstrued their roles at the moment the prosecution closes its case and an application for discharge is made and, the stage at which both the prosecution and defence have closed their cases at the end of the trial.[329] They seem to see it as their duty to thoroughly weigh up the evidence against the accused at the discharge stage as they would at the end of the trial when both the State and defence have closed their cases. In some instances, it would seem that the judges have not grasped that there is an inevitable shift in their roles when examining the

[323] Ibid. See also Skeen op cit (note 14 above) 286 - 287.
[324] *Shuping* supra (note 5 above).
[325] *Lubaxa* supra (note 5 above).
[326] *Shuping* supra (note 5 above).
[327] '…is there a reasonable possibility that the defence case might supplement the prosecution's case?'
[328] *Lubaxa* supra (note 5 above).
[329] Reddi and Ramji op cit (note 207 above) 14.

prosecution's evidence at the close of the prosecution's case and at the end, after the defence has closed its case.[330]

When the prosecution closes its case, the conventional principle that needs to be remembered from the case of *S v Mpetha*,[331] is that the court should conduct a very 'limited probe' into the credibility of the prosecution's witnesses. However, there could be certain instances where the court could totally ignore the State's evidence and discharge the accused, where the prosecution's evidence was of 'such poor quality that no reasonable man could possibly accept it'.[332] In this regard Williamson J held:

> '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'.[333]

All the court should concern itself with at the point of discharge is whether there is any evidence, 'taken at its highest', on which a reasonable court would convict.[334] The court does not need to conduct an intensive inquiry into whether the prosecution had proved its case beyond a reasonable doubt when assessing the prosecution's evidence at the discharge stage.[335] This would seem too high a watermark for testing the evidence at this stage of the trial. Consequently, the verdict of guilt is reserved for the end of the trial, once the defence has closed its case. Accordingly, the writer agrees with Skeen's remarks that:

> 'Where the uncontradicted evidence for the State is circumstantial and more than one reasonable inference may be drawn, then a discharge should not be granted'.[336]

Furthermore, in Canada, when the court conducts the preliminary inquiry, in terms of s 548(1) of the Canadian Criminal Code, to evaluate whether the Crown has provided sufficient evidence before committing the matter to trial, the court does not inquire whether the Crown has proved its case beyond a reasonable doubt.[337] All that needs to be established for a trial to follow is whether, on the evidence, an inference may be drawn that the accused may be

[330] Ibid.
[331] *Mpetha* supra (note 5 above).
[332] Ibid at 265D-G.
[333] Ibid
[334] *Agliotti* supra (note 11 above).
[335] Reddi and Ramji op cit (note 207 above) 1.
[336] Skeen op cit (note 14 above) 288.
[337] *Perry* supra (note 135 above) at 242.

guilty.[338] It is only once the Crown and defence have closed their cases that the accused's guilt or lack thereof can properly be pronounced by weighing up the evidence of both the Crown and defence and conducting a thorough inquiry into credibility.[339]

Had the court in *S v Dewani* conducted this very restricted inquiry it would have found that there was evidence in the form of CCTV and telephone records that provided a sufficient link between the accused and the conspiracy in which Anni Dewani was murdered.[340] Such circumstantial evidence required the court to refuse the application for discharge commensurate with Skeen's remark.[341] Therefore, the accused deserved to be put to his defence. However, in light of the very limited guidelines the court is given in respect of the application of s 174 of the Act, at the end of the day, as a result of the discretion the court is blessed with, the court 'may' do as it pleases. Such discretion may be problematic, and has been.

In addition, it is unfortunate that the 's 174 process has no regard for a victim's rights, and also the interest of the public in a full and fair trial being held'.[342] This was also evident in the case of *S v Dewani* where the court completely refused to acknowledge the interests of the victim or take public opinion into consideration and was very direct about this.[343] In this respect Reddi and Ramji state:

> 'The suggestion is not that the victim's interests be taken into account for the purposes of assessing guilt or innocence, or even at the stage of an appeal against a conviction. Nor is the suggestion that the victim's rights should trump the entrenched constitutional rights of an accused. However, the disregard of a victim's interest in a full trial and the reduction of public interest to mere opinion, without further substantiation, does not do justice to the full scope of the criminal justice system'.[344]

[338] *Metropolitan Raillway Co.* supra (note 94 above) at 197.
[339] *Woolmington* supra (note 139 above) at 481.
[340] Reddi and Ramji op cit (note 207 above) 13 – 14.
[341] Skeen op cit (note 14 above) 288.
[342] Reddi and Ramji op cit (note 207 above) 20.
[343] *Dewani* supra (note 5 above) para 24.7: 'I realise that there is a strong public opinion that the accused should be placed on his defence. I have taken note of that. I have also taken note of the plight of the Hindochas. I have however taken an oath of office to uphold the rule of law and to administer justice without fear, favour or prejudice. That I cannot do if I permit public opinion to influence my application of the law. If any court permitted public opinion, which has no legal basis to influence their judgments, it will lead to anarchy. I am obliged to follow the established legal principles regarding a discharge at the close of the State case'.
[344] Reddi and Ramji op cit (note 207 above) 22.

Therefore, it is submitted that the victim's interest should be a factor, inter alia, that is weighed up by the court when considering a discharge application.

5.3 The current relevance of s 174 of the Criminal Procedure Act 51 of 1977

In stating all the issues associated with s 174 of the Act, it becomes necessary to then assess the provision's current relevance in South African law.

With the abolishment of the jury system of adjudication in South Africa in 1969,[345] the discharge procedure has lost its historical relevance which was to ensure that the jury did not reach 'perverse' decisions.[346] In spite of this drastic change in circumstances, it does not necessarily mean that the discharge procedure has lost its value too.[347] Hence, the crucial question that needs to be considered is whether the discharge procedure remains relevant even though the jury system has been abolished?[348] In answering this question there are various factors that need to be taken into account.

The first factor that needs to be considered is that the discharge procedure is efficient and resourceful in that, when properly applied, it 'cuts off the tail of a superfluous process'.[349] Furthermore, it would be a waste of time, pointless and a waste of court resources to commence with 'an obviously hopeless case'[350] when, on the evidence, a conviction is unlikely. Consequently, a primary feature of s 174 of the Act is to 'save time and effort, (and) not to complicate the court's task'.[351]

Viewed from a constitutional perspective, s 174 of the Act protects various fair trial rights that are 'gifted' to the accused.[352] These include the right against self-incrimination,[353] in instances where the prosecution does not present sufficient evidence to establish a prima facie case against the accused, and the accused's right to be presumed innocent until found guilty.[354]

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[345] The Abolition of Juries Act 34 of 1969.
[346] Hoffmann & Zeffertt op cit (note 42 above) 392.
[347] Reddi and Ramji op cit (note 207 above) 17.
[348] Ibid.
[349] *Masondo* supra (note 311 above) para 38.
[350] Williams op cit (note 54 above) at 346; *S v Naidoo* (1966) (1) PH H 104 (W).
[351] A Kruger *Hiemstra's Criminal Procedure* (2008) 22.
[352] Reddi and Ramji op cit (note 207 above) 18.
[353] Section 35(3)(j) of the Constitution.
[354] Section 35(3)(h) of the Constitution.

Moreover, where a discharge is refused where the prosecution has presented 'sufficient evidence to establish a prima facie case against the accused, such an accused would be at risk of conviction if they do not produce satisfactory evidence in rebuttal'.[355] In this regard Reddi and Ramji state:

> 'A likely upshot is that, in the face of such circumstances, the accused may have to give up their right to remain silent. However, the fact that an accused has to make an election is not a breach of the right to silence, since if the right were to be so interpreted, this would sound the death knell of the very nature of an adversarial criminal justice system'.[356]

Therefore, from the above it can be concluded that the discharge procedure is still relevant in South African law and still has value.[357] Its primary function has merely shifted from one that ensures the jury does not reach perverse verdicts to one that guarantees that South African trials are efficient and upholds the fair trial rights' of the accused.

5.4 Conclusion

Despite the abolition of the jury system of adjudication, for which the procedure was primarily formulated, the discharge procedure still has worth for the various reasons mentioned above.

In conducting research into s 174 of the Act it soon became apparent that it is not the section itself that is problematic but, rather, its application is where issues arise as a result of the court's wide discretion when deciding to discharge an accused. The harm or injustice that results from s 174 of the Act is as a result of judges, as triers of fact, 'acting inappropriately' when considering whether to discharge the accused.[358]

Therefore, it is necessary to highlight the parameters of the test for discharge in terms of s 174 of the Act to restore its true purpose of eliminating frivolous matters and ensuring the accused's fair trial rights are protected from unwarranted prosecutions.

[355] Reddi and Ramji op cit (note 207 above) 19.
[356] Ibid. See also *Osman v Attorney-General, Transvaal* 1998 (4) SA 1224 (CC) para 22; *Boesak v S* 2001 (1) SA 912 (CC) para 24.
[357] Reddi and Ramji op cit (note 207 above) 19.
[358] Ibid 23.

Various scholars have indicated that courts have a constitutional duty to discharge the accused if, at the close of the prosecution's case, the prosecution had not presented sufficient evidence to give the accused a case to answer.[359] Likewise, under such circumstances, there arises a constitutional right for the accused to be discharged. Consequently, as mentioned on many occasions, courts are no longer justified in refusing to discharge an accused on the basis that the prosecution's case may be supplemented by the defence's case, if the defence elects to testify.[360] Preferably, what is needed is a balance between the State trying to 'combat crime and the right of accused persons to be protected from their own ignorance, from the excessive zeal of prosecutors to secure convictions and from executive-minded courts'.[361]

Whilst this is true, the recent past has seen judges discharging the accused where they are of the opinion that the witnesses for the prosecution are dishonest and 'unreliable' and, thus, not credible.[362] Not many scholars have made recommendations on s 174 of the Act on this issue. Nevertheless, as mentioned above, intensive inquiries into the credibility of prosecution witnesses are unwarranted at the discharge stage. For this reason, 'the credibility inquiry must therefore be abandoned'.[363] The need for this is clearly evidenced by the outcome in the case of *S v Dewani*. The credibility of the prosecution's witnesses only becomes a matter of consideration once the defence has closed its case at the end of the trial.

Moreover, even Canadian jurisprudence dictates that intensive probes into credibility are unnecessary, rather, the prosecution's evidence should be 'taken at its highest'.[364] 'The requirement that the State evidence be taken at its highest, will provide the necessary limited space for a court to discard completely unbelievable witness testimony'.[365]

In order to restore purpose to s 174 of the Act it is recommended that, when faced with a decision to discharge an accused, the judge must ask whether the evidence presented by the prosecution, taken at its highest, is sufficient to found a conviction. Any circumstantial evidence will suffice.[366] Secondly, once it is established that there is evidence that could link

[359] Mbonani op cit (note 21 above) 246.
[360] Skeen op cit (note 14 above) 294.
[361] Gertsch op cit (note 6 above) 291.
[362] Reddi and Ramji op cit (note 207 above) 23.
[363] Ibid.
[364] Ibid.
[365] Ibid.
[366] Ibid 24.

the accused to the charge, the judge must spare the assessment and weighing up of that evidence for the end of the trial, unless the evidence is highly unbelievable.[367] If the judge does not do this then 'he places the State in a position where it is required to meet an unduly high, if not impossible, burden without the other side testifying'.[368]

Essentially, what is required of the judge at the application for discharge stage is to thoroughly understand and differentiate his role at this stage, from that at the end of the trial. What is essential is an appreciation by 'judges of their shifting functions at different stages of a criminal trial'.[369] If judges can do this, and exercise their discretion accordingly, it would restore meaning to s 174 of the Act and prevent high-profile defence teams from utilising loopholes and abusing the justice system. This is what the interests of justice and the outcome of *S v Dewani* require.

In conclusion it is suggested that it is unnecessary for s 174 of the Act be ejected from the Criminal Procedure Act. The discharge procedure has value when applied in the manner recommended above. In conducting this research it became clear that s 174 of the Act is capable of being revived to being purposeful again. However, the same cannot be said for s 548(1) of the Canadian Criminal Code which is far more problematic. The preliminary inquiry in Canada is elected more for ancillary purposes than the purpose for which the inquiry was created – to determine whether there is evidential merit to the Crown's case before commencing with a trial.

With that said, it may be necessary to amend the section so as to ensure a minimal probe into credibility and to limit judicial discretion in a sense.

Word Count: 19 139

[367] Ibid.
[368] Ibid.
[369] Ibid.

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30 June 2017

Ms Aaliyah Chetty (213511189)
School of Law
Howard College Campus

Dear Ms Chetty,

Protocol reference number: HSS/0964/017M
Project title: Section 174 of the Criminal Procedure Act 51 of 1977: Does the interests of justice and the outcome in S v Dewani herald that it is time to eject this provision from out law?

Approval Notification – No Risk / Exempt Application

In response to your application received on 27 June 2017, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has been granted **FULL APPROVAL.**

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment/modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully

.....
Dr Shamila Naidoo (Deputy Chair)

/ms

Cc Supervisor: Professor Managay Reddi
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