

1994/10/27

Teek J

CRIMINAL LAW

Murder; attempted murder and assault. Accused members of Nampol attached to Crime Prevention Unit along Zambezi river.

Special pleas of jurisdiction raised. (1) Court does not have jurisdiction to hear and adjudicate the murder count as the state could not prove beyond reasonable doubt where the deceased was killed.

Held that in respect of murder that in the light of the prosecution's failure to prove where the harmful effect or consequence was felt and murder being a result crime this Court had no jurisdiction in respect of the murder charge.

(2) This Court had no jurisdiction to hear and adjudicate the attempted murder count - Shots fired when complainant already within Zambia side. Submitted only to the Court had jurisdiction.

Held: Substantial, if not all elements of attempted murder occurred within Namibian borders, but effect felt in Zambia as the State of alarm occurred there. Therefore, this Court had jurisdiction to hear and adjudicate upon the charge of attempted murder, albeit concurrent.

Held in respect of an attempt to commit murder that the substantial elements thereof were completed within the Namibian boundaries notwithstanding that the harmful effects were felt across the border, this Court has jurisdiction albeit concurrent.

Held Accused acted recklessly by firing at or in the vicinity of the canoe in breach of the specific precautionary or safety instructions issued to them.

Accused relied on provisions of Section 49 of CPA 51/77

Held Accused fired recklessly at or in vicinity of canoe. Therefore attempted to kill the complainant. Actual intent was to effect an arrest of fleeing complainant. - indemnified by Section 49(1) possibly (2)

Alternative charge - negligent handling of firearm i.t.o. Section 39(1) (j) of Act 75/69 - Held: Acted lawfully in the execution of their duties thus did not negligently use or handle the firearms.

CASE NO. CC 64/94

IN THE HIGH COURT OF NAMIBIA

In the matter between

THE STATE

versus

1. POSTRICK MWINGA

2. RICHARD SIBIHO
3. BRIAN NYOKA SALUSHANDO
4. CLEMENT NCHINDO
5. BONIFACE SIMASIKU

CORAM: TEEK, J.

Heard on: 1994.10.11, 12, 13

Delivered on: 1994.10.27

JUDGMENT

TEEK, J.: The 5 accused, Postrick Mwinga 34 years; Richard Sibiho 35 years; Brian Nyoka Salushando 55 years; Clement Nchindo 42 years, and Boniface Simasiku 34 years, all male persons and of Namibian Nationality, were initially charged with 4 counts to wit one of murder in that on or about 9 July 1992 and at or near Katima Mulilo in the district of Eastern Caprivi the accused unlawfully and intentionally killed Mufalo Sikwibele, a male person; one of attempted murder, alternatively contravening section 39(1) (j) of Act 75 of 1969 (negligent handling of fire-arm) , in that in

respect of the main count, on or about 9 July 1992 and at or near Katima Mulilo in the district of Eastern Caprivi the accused unlawfully and intentionally attempted to kill Samutumwa Samutumwa by shooting at him with fire-arms, and in respect of the alternative count that the accused unlawfully did by the negligent use, handling or placement of fire-arms, injure another person or expose the life or limb of such person to wit Samutumwa Samutumwa to danger; and two counts of assault in that on or about 9 July 1992 and at or near Katima Mulilo in the district of Eastern Caprivi the accused did wrongfully and unlawfully assault Deric Musiba Lusitani in respect of count 3 and Cletius Namaya in respect of count 4 both male persons by beating them with an oar and hitting them with a rubber cane.

After the accused pleaded not guilty to all the charges Mr Heathcote who appeared for them raised a special plea of jurisdiction to the charge sheet as amplified by the State's Further Particulars in respect of count 1 in that "whereas the State does not know whether the bullets struck the deceased on the Namibian or Zambian side of the river and the allegation that the deceased died in Zambia, the High Court of Namibia does not have jurisdiction to hear and adjudicate the murder count and/or that the murder count does not disclose an offence." This point in limine was opposed by Miss Winson for the prosecution. Nonetheless, the point was upheld on the basis of the underlying principle that this Court has no extra-territorial jurisdiction conferred upon it either by statute or the common law to hear a murder case committed outside the

borders of Namibia or like in the instant matter where the prosecution cannot prove where the harmful effect or consequence was felt, i.e. where the bullet struck the deceased and the death occurred.

From a close study of some of the relevant authorities on this point, I am of the opinion that this Court "... may exercise jurisdiction where either the substantial elements of the offence or the harmful effect thereof occurred within its territorial boundaries" like in cases of attempted murder and murder respectively.

"Once it is appreciated that territorial jurisdiction over a 'result crime' does not depend on acts done by the offender in England but on consequences which he causes to occur in England, I see no ground for holding that an attempt to commit a crime which, if the attempt succeeded, would be justifiable in England, does not also fall within the jurisdiction of the English Courts, notwithstanding that the physical acts intended to produce the proscribed consequences in England were all of them done abroad." See S v Mharapara 1985(1) SALR 556 at 560 etc.

Surely the converse is also applicable where in respect of an attempt to commit murder the substantial elements thereof were completed within the Namibian boundaries notwithstanding that the harmful effects were felt across the border, this Court will have jurisdiction, albeit concurrent. Murder is a 'result crime' as opposed to theft

which is a continuous crime. To commit murder apart from the other essential elements one must manifest the intent into the deceased's death. Compare S v Mampa 1985(4) SA 633 at 637.

I was unable to find nor was I referred to any treaty between Namibia and Zambia conferring jurisdiction upon this Court to hear a murder charge committed across the Namibian Borders within Zambia, or in instances where there exists geographical limitation on where the described conduct of the offender takes

place or where its harmful consequences take effect. In the light of the enormous practical legal implications involved and problems encountered in cross-river-border crimes, especially murder as evident from this case and those which served before this Court in the past, I consider that it would require to be enacted by Parliament to confer jurisdiction, albeit concurrent on this Court in the interest of justice in so far as not to negate the objective of criminal law in protecting the public and punishing the wrong-doer(s) and so hopefully, prevent criminals from, literally getting away with murder in similar situations. In the absence of a Namibian Supreme Court decision or directives in this regard, I urge the Namibian Parliament to make use of its plenary power to empower this Court to hear and adjudicate upon, for example murder, etc committed in circumstances similar to those in this matter.

Miss Winson applied for leave to substitute count 1 with another one to wit, attempted murder in that on or about 9 July 1992 and at or near Katima Mulilo in the District of Eastern Caprivi, the accused unlawfully and intentionally attempted to kill Mufalo Sikwibele a male person, by shooting at him with fire-arms. This substitution was allowed as sought but on account of some oversight this charge was not put to the accused and they did not plead to it.

Miss Winson nevertheless submitted that a conviction of attempted murder was a competent verdict to a charge of murder and on the strength of that this Court may entertain the charge although it was not put to the accused and they did not plead to it. I do not agree with this submission. I ruled that this Court had no jurisdiction to hear and adjudicate upon the murder charge. The effect thereof was that the murder charge was quashed. Consequently there was no murder charge against the accused before me. The substituted charge of attempted murder was not put to the accused and they did not plead to it. The effect thereof was that the accused were not properly arraigned on this charge and consequently it was not part of the lis before me. It follows then that no competent verdict can follow from a charge which does not exist or which was not before the

Court. Therefore I cannot hear or adjudicate upon it, as it fell away. In any event my finding in respect of the attempted substituted charge of attempted murder does not have the effect that the accused are found not guilty and it is thus open to the prosecution to, as it were, re-charge the accused in a proper manner.

I now proceed to deal with the second count of attempted murder upon Samutumwa Samutumwa as well as the alternative charge.

The evidence led by the prosecution shows that the accused were members of Nampol and officers of a Crime Prevention Unit tasked to combat crime along the Zambezi river on the Namibian side.

The complainant, Samutumwa Samutumwa testified that on that particular day in question he ferried the two complainants in counts 3 and 4, Lusitani and Namaya respectively in his canoe illegally across the Zambezi river and off-loaded them on the Namibian bank.

On his way back and while on the Zambian side of the river he heard persons calling him back, shouting "Come back, come back," whereupon shots were fired upon the canoe. The complainant was at that stage with his friend Mufalo Sikwibele, the deceased in the murder charge which was quashed. Upon hearing the shots the two of them took cover by lying down in the canoe. The canoe was hit by bullets and his friend Sikwibele was hit on the forehead and died as a result thereof. According to the witness some of the bullets hit the river bank on the Zambian side which caused the people to flee for cover. The complainant is in some respects corroborated by Cletius Namaya, complainant in count 4.

The witness' brother, Obby Samutumwa testified that on the day and time in question he was standing on the riverbank on the Zambian side when he saw a group of persons on the riverbank on the Namibian side. He observed how one group of these persons beat the two persons taken across by his brother and the other group shooting at his brother's canoe. According to him the

shots were fired when the canoe was on the Zambian side of the river.

Sergeant Smith of Nampol was the Commander of the Crime Prevention Unit to which the accused belonged. He told the Court that on the day in question the accused were on border patrol along the Zambezi river. According to him the accused had specific instructions not to shoot warning shots in the air for fear of hitting people on the other side of the river or to shoot in the vicinity of a canoe or boat, also for fear of ricochetting bullets hitting the person(s) therein, but to shoot in the water in their immediate vicinity.

According to Inspector Kaundu who was also a Commander of the accused and the investigating officer, D/W/O Mulimina, both of Nampol, the accused after initial denials, admitted to them that accused 2 to 5 fired but could not tell who fired at the canoe.

According to Inspector Kaundu all four magazines issued to the four accused on that particular day had some rounds in them missing. This corroborates the fact that accused no. 2 to 5 indeed fired with their rifles on the day in question. In the light of this and on the conspectus of the evidence only one reasonable inference can be drawn namely that the four accused fired with their rifles at the river at or in the vicinity of the canoe as described by the eye witnesses. This conclusion is strengthened by the fact that one or more bullets hit the boat of which one hit and killed the person, Sikwibele, who was in the canoe with Samutumwa Samutumwa.

The State witnesses made a good impression on me and gave their evidence in a frank and candid manner. I have no perceivable reason to doubt the veracity of their story and none was pointed out to me. I therefore accept their versions as the truth of what transpired at the riverbank and at the police station as testified to by all the witnesses respectively. The discrepancies in their evidence especially between Obby Samutumwa and Namaya as to what the accused did at the time of

the assault and shooting at the riverbank is not material and of no consequence.

I now proceed to consider the question whether or not the accused are guilty of the crimes charged in respect of the second count, and if so on what basis.

It leaves no doubt in my mind that the accused's actual intention was to effect an arrest of the persons who were illegally crossing the border in the canoe and not to kill them. But that is not the end of the matter. The accused are charged on the basis that they acted with a common purpose.

The evidence has shown that in their pursuit to effect an arrest the accused were all present at the river; four of them no's 2 to 5 opened fire with their rifles at or in the vicinity of the canoe containing the complainant Samutumwa Samutumwa, contrary to specific safeguarding instructions and thus made common purpose by actually firing in the manner they did and so associated themselves with the unlawful conduct of being reckless as to whether or not their actions may have fatal consequences.

However, the position of accused no. 1 is different. Though he was the leader of the accused he was not armed and thus did not participate in the actual shooting. There is no evidence that he associated himself with the reckless shooting by giving the order to open fire. The fact that he lied about the shooting to his superiors is non constat with his guilt in respect of the shooting. It can be seen as an attempt to protect his fellow officers.

In

the circumstances it cannot be said that he formed common purpose with those who opened fire at the time or ex post facto.

Under the common law, the four accused who opened fire can be held liable for attempted murder even if the complainant was uninjured. By firing at or in the vicinity of the canoe in breach of the specific precautionary or safety instructions issued to them the accused did an act in furtherance of the legal intent, namely that of recklessness. All the substantial elements of the crime of attempted murder were completed on the Namibian side. In the circumstances the prosecution succeeded beyond reasonable doubt in proving that the four accused acted recklessly and thus attempted to kill the complainant.

Compare Burchell and Hunt, SA Criminal Law and Procedure, 1983 Vol 1 p.456.

Mr Heathcote submitted that in the event of a finding that the accused acted recklessly and therefore attempted to kill the complainant then the accused rely on the provisions of section 49 of the Criminal Procedure Act 51/77, which provides as follows:

"49(1) If any person authorised under this Act to arrest or to assist in arresting another, attempts to arrest such person and such person -

6. resists this attempt and cannot be arrested without the application of force; or

7. flees when it is clear that an attempt to arrest him is being made, or resists such attempt and flees,

the person so authorized may, in order to effect the arrest, use such force as may in the circumstances be reasonably necessary to overcome the resistance or to prevent the person concerned from fleeing.

(2) Where the person concerned is to be arrested for an offence referred to in Schedule 1 or is to be arrested on the ground that he is reasonably suspected of having committed such an offence, and the person authorized under this Act to arrest or to assist in arresting him cannot arrest him or prevent

him from fleeing by other means than by killing him, the killing shall be deemed to be justifiable homicide."

The defence in terms of section 49 was neither raised by the accused at the beginning of nor during the trial, but during counsel's argument. In the premises, Miss Winson submitted that the accused could not rely on the indemnity provided by this section. I cannot agree with this submission, because in my opinion, such an approach would be a simplistic or formalistic view of the protection afforded by section 49.

In instances where the accused fails, to raise self defence, but the evidence led proves that the accused acted in legitimate self-defence or justifiable homicide, surely the Court is entitled to bring out a finding in favour of the accused. The failure of an accused person to raise a defence when he may fairly be expected to do so must not be confused with non-discharge of the onus. I can hardly imagine the Court doing otherwise, because the accused failed to raise the defence at or during the trial. The Court cannot ignore the facts led if these prove that the accused are indemnified by the provisions of section 49. Such a failure on the part of the Court would amount to a travesty of justice.

The burden of proof rests on the accused to show on a balance of probabilities that they are protected by section 49 of the Act. See Rex v Britz 1949(3) SA 293(A).

This to my mind, does not mean that the accused must testify or lead evidence to discharge this onus. This burden can be discharged by the evidence led by the prosecution. The evidence led by the prosecution in casu provides ample proof in favour of the accused that: The complainant committed a crime in the presence of the accused by illegally crossing the border between Namibia and Zambia ferrying persons in his canoe to Namibia, and when the accused called him back to effect an arrest he fled across the border into Zambia whereupon the accused opened fire as they were entitled to effect an arrest by virtue of the

nature of their duties. Moreover, the accused did not act on a suspicion that the accused have committed a crime.

Compare Macu v Du Toit and Another 1983(4) SA 626(A) at 632H and 637D; and section 40(1)(a) and (b) of Act 51/77.

By virtue of the sentences imposed in the magistrates' Courts as evident from the review matters which come before this Court, the crime of illegal crossing the border into Namibia falls under schedule 1 of the Criminal Procedure Act no 51/77, as one "the punishment where for may be a period of imprisonment exceeding six months without the option of a fine." Section 10(3) of the Immigration Control Act No 7/93 stipulates that a person who illegally enters Namibia shall "on conviction be liable to a fine not exceeding R20 000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment ..."

In the premises, I am satisfied that not only did the prosecution prove beyond reasonable doubt that the accused's conduct was reckless by firing at or in the vicinity of the canoe and therefore attempted to kill the complainant, but also proved that the accused's actual intent was to effect an arrest of the fleeing complainant. It appears on a review of all the evidence that the accused bona fide believed that the law of the land permitted them to do what they did, and are therefore entitled to an acquittal.

Compare S v Banet 1973(4) SALR 430 (RA) and S v De Blom 1977 (3) SA 513(A) .

In the circumstances the four accused are indemnified by section 49(1) and possibly (2) thereof and in the light of such immunity they cannot be convicted of attempted murder as charged.

Compare S v Nel and Another 1980(4) SA 28(E) at 34 - 35.

The accused are in the alternative charged with the negligent handling of a fire-arm in terms of section 39(1)(j) of Act 75 of 1969 which reads as follows:

"Any person who fails to safeguard or to take reasonable steps to safeguard an arm in his lawful possession when such arm is not carried on his person or is not under his direct control; shall be guilty of an offence."

I have ruled in respect of the main count of attempted murder that although the accused acted recklessly in firing at or in the vicinity of the canoe they were indemnified by section 49 of the Criminal Procedure Act. This in effect means that they acted lawfully. In essence, this finding disposed of the alternative count as well. Therefore the handling of the firearms must ipso facto have been lawful.

The evidence has established the fact that the accused properly fired with the intention to effect an arrest of the fleeing complainant. In the circumstances the accused did not act negligently when they opened fire. They acted lawfully in the execution of their duties to prevent crime along the Zambezi river and can therefore not be convicted of the negligent use or handling of firearms.

Finally in respect of this count, I would briefly like to deal with Mr Heathcote submission that even if it was found that the prosecution succeeded in proving the crime of attempted murder, then this Court had no jurisdiction to hear and adjudicate upon this charge because, when the accused opened fire the complainant was already within the Zambian side. According to Mr Heathcote only the Zambian Court has jurisdiction and supported his submission with reference to S v Mharapara supra at 662D-H wherein Lord Diplock and Lord Keith of Kinkel's approach in Treacy v Director of Public Prosecutions (1991)(1) ALL ER 110(HL) were quoted and discussed at pp.916H-J and 937J - 938A and 939L - 940B:

"Once it is appreciated that territorial jurisdiction over a 'result crime' does not depend on acts done by the offender in England but on consequences which he causes to occur in England, I see no ground for holding that an attempt to commit a crime which, if the attempt succeeded, would be justifiable in England, does not also fall within the jurisdiction of the

English Courts, notwithstanding that the physical acts intended to produce the proscribed consequences in England where all of them done abroad."

Lord Keith of Kinkel observed at p.937j-938a:

"English criminal law has consistently adopted the approach, in cases involving a foreign element, that, where an act done abroad has resulted in harmful consequences in England, the actor may be tried by an English Court."

He continued at p.939h-940b:

"In my opinion it is not the present law of England that an offence is committed if no effect of an act done abroad is felt there, even though it was the intention that it should be. Thus if a person on the Scottish bank of the Tweed, where it forms the border between Scotland and England, were to fire a rifle at someone on the English bank with intent to kill him, and actually did so, he would be guilty of murder under English law. If he fired with similar intent but missed his intended victim, he would be guilty of attempted murder under English law, because the presence of the bullet in England would be an intended effect of his act. But if he pressed the trigger and his weapon misfired, he would be guilty of no offence under the law of England, provided at least that the intended victim was unaware of the attempt, since no effect would have been felt there. If, however, the intended victim were aware of the rifle being pointed at him, and was thus put into a state of alarm, an effect would have been felt in England and a crime would have been committed there. The result may seem illogical, and there would appear to be nothing contrary to international comity in holding that an act done abroad intended to result in damage in England, but which for some reason independent of the actor's volition had no effect there, was justifiable in England. But if that were to be the law, I consider that it would require to be enacted by Parliament."

A careful reading and study of these passages brought me to the conclusion that so far as an inchoate crime is concerned, for example attempted murder, unlike a result crime e.g. murder, the Court in whose jurisdiction the substantial elements of the attempt took place or were completed may have concurrent jurisdiction.

In the case in casu the mens rea i.e. in the form of the legal intent and the actus reus i.e. the actual firing occurred within the Namibian borders. That means that the substantial, if not all the elements of the crime of the attempt to kill occurred within the Namibian borders. The fact that the complainant who was within the Zambian boundaries was aware of the attempt against his life and thus put under a state of alarm also gives the Zambian Courts jurisdiction to hear and adjudicate upon the crime against the accused since the effect has been felt there. Therefore, I am of the opinion that this Court has jurisdiction to hear and adjudicate upon the charge of attempted murder and can assume jurisdiction ; albeit concurrent.

I finally now turn to deal with counts 3 and 4, those of assault. In the absence of complainant, Lusitani in respect of count 3, only the evidence of complainant Namaya in respect of count 4 was led.

Namaya testified that on the morning of 9 July 1992 he and Lusitani left for the Zambezi river for a wash. There they met some one who took them across to Zambia for a visit as they were never there before. After their day's sojourn into Zambia they decided that afternoon to return to Namibia and they were brought back in a canoe. There can be no doubt that the person who brought them back was Samutumwa Samutumwa. After the two complainants were off-loaded on the Namibian side, Namaya saw the accused shouting at the occupants of the canoe "come back, come back" and thereafter four of the accused opened fire at the canoe.

After the shooting the accused turned to the two complainants Lusitani and Namaya and assaulted them with an oar. It seems that accused no. 1 did most of the beating while the rest held the complainants. The witness however said that some of the accused assaulted them while the others held them down. The complainants were beaten all over the body, but not on their heads. When the oar with which they were assaulted broke, the complainants were then taken to the police station where the

accused decided to whip the complainants instead of laying charges of illegal border crossing. Here at the police station again, it seems that accused no. 1 played a major role in the beating. Namaya testified that the rest of the accused held the complainants' hands and feet while accused no. 1 lashed each complainant five cuts with a black rubber cane on the buttocks. Apart from sore and swollen buttocks the complainants did not sustain any wounds or injuries. The reason for the assaults appear to be the illegal border crossing.

As mentioned before, the State witnesses made a good impression on me, especially Namaya. He was honest and gave his evidence in a frank manner. His story and the manner in which he related it has quite a ring of truth about it. Moreover, he is to some extent corroborated by Obby Samutumwa, who testified that he saw one group of the accused assaulting the two complainants while the other group fired at his brother's canoe.

The discrepancy between these two witnesses namely that according to Namaya, four of the accused fired at the canoe and all five assaulted them and that of Obby namely that one group assaulted the complainants and the other fired at the canoe is of no consequence, especially when regard is had that Obby was far off on the other side of the river. Moreover, the events or what was happening on the scene kept on changing and it is quite possible that different things happened at different intervals, the one witness observing some and not others. And that does not make them liars or render their evidence false as to reject it.

The accused were indicted on common assault in respect of these charges. Miss Winson submitted that a conviction of assault with the intent to do grievous bodily harm would be a competent one, if I understood her correctly.

The accused pleaded not guilty to the charges of common assault. The prosecution did not withdraw the common assault charges against the accused, nor were they charged with assault with the intent to do grievous bodily harm. What Miss Winson submitted amounts to the Court substituting a lesser charge with a more

serious one. The accused were arraigned for and pleaded to common assault and not assault with the intent to do grievous bodily harm. This Court is not competent to now find the accused guilty of assault with the intent to do grievous bodily harm. If the Court were to do that such a finding would be an irregularity plainly prejudicial to the accused. The offence of assault with intent to do grievous bodily harm is a different crime altogether and if the prosecution wanted to charge the accused therewith, then the prosecution was entitled, before the accused pleaded, to have withdrawn the common assault charges and charged them with assault with intent to do grievous bodily harm.

See R v Mnyekwa 1947(4) SA 433(OD), R v Marodiso 1948(1) SA 594(OD) and Hiemstra, Suid-Afrikaanse Strafproseereg, IV ed. at 213 .

Although Lusitani, complainant in count 3 did not testify I am satisfied that Namaya, complainant in count 4 was a competent eye witness to the assault upon Lusitani by the accused. And on that basis the accused should also be convicted of assault in respect of count 3.

The accused as police officers were not entitled to direct any corporal punishment upon the complainants. The decision by the accused to rather give the accused five cuts and the subsequent thrashing was unlawful and in conflict with article 8 of the Namibian Constitution, which reads

"(1) The dignity of all persons shall be inviolable.

(2) (a) In any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.

(b) No persons shall be subjected to torture or cruel, inhuman or degrading treatment or punishment."

See also Attorney-General, Namibia, ex parte: In re-Corporal Punishment by Organs of the-State 1991(3) p.76 (NMSC) .

I am satisfied that the prosecution has succeeded beyond reasonable doubt in proving that the accused formed common purpose when they jointly decided to give each complainant 5 cuts and also assaulting them in the manner they did first at the riverbank and thereafter at the police station.

In the result the accused are:

1. Discharged in respect of count 1;
2. found not guilty in respect of the main and alternative charge in respect of count 2; but 3. found guilty of common assault in respect of counts 3 and 4.

P. Teek

TEEK, JUDGE