

CASE NO. CC
48/96

1996.07.04;

IN THE HIGH COURT OF NAMIBIA Delivered on: 1996.08.01

In the matter between

THE STATE

versus

ANDREAS TJIKUZU

CORAM: GIBSON, J.

Heard on: 1996.04.11;

1996.05.14; 1996.05.15;

1996.08.01

JUDGMENT

GIBSON, J.: The accused pleaded not guilty to the murder of Elias Manuel on 20th May, 1995 at post Ot jomunguindi. The evidence was to the effect that accused and his brother, Frederik Tjikuzu had handed over or taken into their custody, the deceased in the early hours of the morning, from a group of citizens who had exercised a citizens arrest in respect of the deceased on an allegation of theft of a tape recorder. The deceased appears to have been happy with that arrangement because it was said that he knew the accused's brother, Frederik Tjikuzu. The brothers took hold of the deceased by hand, he did not resist at all or make any attempts to flee at that stage. The accused and his brother escorted him in the direction of their home. Not long after that the deceased fell down and died. This was shortly after a shot was heard being fired.

It is common cause that the deceased was shot by accused with a pistol that he, accused, owned. The circumstances surrounding the shooting are only known to the accused who was momentarily left alone by his brother, Frederik with the deceased.

According to the State witnesses the events related to them by the accused on arrest vary according to each narration. Sergeant Gamiseb, taking him in chronological order, says that the accused told him that he fired a shot once into the air when the deceased got hit and fell down. He said the accused told him that he was sorry he did not realise that he had hit the deceased. Accused said he called to the deceased to get up and pulled him, not realising the extent of his injuries. It was only afterwards that he became aware that the deceased was seriously injured.

Sergeant Hekungua was the next officer who received an explanation from the accused. He said he was approached by two men including the accused's brother about an assault on the deceased. Thereafter Sergeant Gamiseb made his way to the scene and he followed after getting together a photographer. He said when he took over the accused from Sergeant Gamiseb the accused freely and voluntarily related what had happened to him. He told the accused he was arresting him and warned him. Subsequent to that warning he warned and cautioned the accused again and following that warning the accused briefly made a written statement which the sergeant took.

During the trial some cross-examination was made about the language spoken between the accused and the police officers. Both Sergeant Hekungua and Sergeant Gamiseb said they spoke to the accused in Otjiherero without any difficulty at all. They

all seemed comfortable in the language at the time and there was no reservation by the accused in the use of that language. He seemed to understand them well and he made himself quite clear in his answers.

Sergeant Gamiseb's evidence was that when the accused showed him the body of the deceased he never in fact gave any explanation about how the deceased was injured at that point. The accused had pointed out the deceased the sergeant asked to see the scene where the injury occurred, i.e. the shooting, the accused escorted him to the scene and made various indications. The sergeant said he never noted any footprints consistent with somebody running away on the spots pointed by the accused. Following that observation he returned to the body of the deceased with the accused and then inspected the body. He pointed out that there was a gunshot wound on the deceased. At that point the accused came out with the explanation of a shot in the air without giving the circumstances of the shooting.

Sergeant Hekungua was cross-examined about the taking of statement which is exhibited in Court. It was put to him that the accused refused to make a statement, that he said that he preferred to make a statement in the presence of his lawyers. Sergeant Hekungua denied that he ever said to the accused that such a course would complicate matters, or that he insisted on a statement being taken there and then. He said the accused made the statement freely and signed it afterwards after he read it to him. He agreed he read the statement to the accused in the English language to which he had translated it as he took it in Otjiherero from the accused. It was amply clear to him. The accused's version of the explanation given at that time was that

as he was escorting the deceased and as he was about to enter the yard of his home, the deceased tried to run away, he turned and tugged into the side of the accused's trousers to get at the pistol which the accused was wearing on his waistband. There was a struggle during which the pistol was fired. At the time the deceased had his arm twisted around the back of the accused. Sergeant Hekungua denied that the explanation above was ever given to him. He said the only explanation which the accused gave was one contained in the warned and cautioned statement in which he had related that the deceased had attempted to run away and he had fired.

The evidence of the police officers, Sergeant Gawiseb and Sergeant Hekungua was very short simple and straightforward. They gave their evidence in a calm and confident manner. They were very convincing in the answers they gave. It seemed to me that if Sergeant Gawiseb had wanted to incriminate the accused falsely he would not have related the accused's cooperation in showing the body and the scene of the shooting. One would have expected him to tell a fake story right from the outset in order to paint a false picture of the accused.

Similarly, Sergeant Hekungua was unshaken in the manner he gave his evidence. If Sergeant Hekungua had wanted to invent a false tale to incriminate the accused, he would have lied. I doubt that he would have told the Court that he only read the written statement in the English language after it was taken and translated from the Otjiherero language. It would have been easy for him to explain that he translated from the statement into the Otjiherero language as he went along, unless he was willing to tell the genuine account of what had transpired in his interview with the accused.

The next evidence was that of Dr Damaseb. He said following his examination of the body he concluded that the deceased had died of multiple injuries, secondary to high velocity injury associated with a bullet wound. Dr Damaseb said that he found the entrance and exit wounds both on the back. The entrance wound was lower down between the tenth and the eleventh rib, slightly off the centre line to the right. He said the bullet had traversed the right lung, crushed the thoracic vertebrae and exited between the fifth and the sixth thoracic vertebrae. The doctor was cross-examined at great length. He said that from his findings the deceased was shot at close range. He defined that statement. He said it was a distance of plus minus 5m to not beyond 10m. He was cross-examined about the position of the deceased. The doctor ruled out any possibility that the shot was fired at the deceased as the deceased was running away. He said that if that had been the case such a shot would have traversed the body diagonally, not in an upward direction on a 90 degree turn. The doctor was cross-examined and it was put to him that the shot had been fired during a struggle between the deceased and the accused as the deceased grabbed the accused's pistol, with his arm twisted behind the back. The doctor said in such an unnatural position it was impossible for the deceased to have fired the pistol. He was pressed about that point. He persisted in his answer but eventually conceded that a possibility might exist although it was highly improbable.

That concluded the material evidence. There were two other witnesses who gave evidence about arresting the deceased and subsequently handing the deceased over to the accused and his brother but none of their evidence was challenged and no issue

was raised on what they had to say. Also called, at my instance in terms of section 167 of the Criminal Procedure Act was the accused's brother, Mr Frederik Tjikuzu. But the witness's evidence did not take the matter far because he deposed to the fact that he was absent at the material time when the shot rang out. He said when he got to the spot the accused was holding the deceased by his arm.

The accused elected not to give evidence. The accused was alone with the deceased at the time, at the critical moment when the bullet went off. So only the accused could explain what led to the firing of the weapon. In the absence of a credible explanation the Court can only act on the basis of inferences to be drawn from the legally admissible evidence. Those inferences, it is trite, must be such that they are compulsory and conclusive and based on the evidence adduced,

they must be capable of being sustained or drawn from that evidence. The accused was given ample opportunity to explain what happened to Sergeant Gawiseb a few hours after the incident. When he was given that opportunity, although he elected to speak rather than remain silent he related events which were calculated to mislead the officer. When pointing out the wounds on the body of the deceased the accused merely talked of the point where the deceased was stabbed with a sharp object. That account may have been accurate in terms of the wound behind the ear which is unexplained and about which no questions were asked but the fact that the accused chose not to inform the sergeant about the shot he had fired tells against him. There is no doubt that following the shot the deceased collapsed, so no one could have been in doubt about the connection. It was not

until later when Sergeant Gawiseb pointed out to the accused the wound and pointed out that this was a gunshot wound, that the accused ventured an explanation. Again that explanation was totally unhelpful in that it really begged the question. Accused merely said he fired in the air and the deceased was hit and then fell down. He did not explain the circumstances surrounding the firing of the bullet, or why he came to release the bullet.

The reason for the firing emerged eventually, and, for the first time when Sergeant Hekungua had effected the arrest of accused and warned and cautioned him. That account was also contained in the warned and cautioned statement which is before the Court. To that account the accused then said deceased had tried to -run away as they approached his yard and then he had fired and the deceased had collapsed. In Court an explanation was given in terms of section 115 of the Act 31 of 1977, a story of a struggle for the weapon during which the bullet was released. I have already dealt with that explanation. This explanation however is totally discredited by other evidence. Apart from that it is noted that that explanation has emerged for the first time months after the event, obviously after considerable thought following the events, the explanation is flawed in an uncertain manner, in my view, by the evidence of Dr Damaseb which I have already canvassed, I will not refer to it again, _save just to emphasize that the doctor said it was highly probable that the deceased in the unnatural position in which his arms are said to have been, ~~He~~ have fired that gun causing the kind of injury on himself.

Another piece of evidence that discredited this explanation by the accused is that of Sergeant Gamiseb. He said he was very

familiar with the Star pistol, the weapon which was used in this case. He said to fire the trigger in this particular case and having in mind the weapon, you need considerable force to pull the trigger ~~as~~ that generally ~~if~~ ~~you~~ need both hands to release the firing mechanism. In my view, therefore, from this evidence and the doctor's findings, the accused's explanation of the firing of the weapon, the circumstances of the firing of the weapon, have been proved to be false. The very fact that the accused is shown to have put forward three different explanations as discussed, suggests undoubtedly that the accused was casting around for a convincing story to explain the circumstances on the firing of the weapon.

In my view therefore on the legally proved facts the following conclusions may be made. That the deceased was shot in the back, that the bullet was fired at very close range, plus minus 5m away up to 10m, from the trajectory of the bullet as found by the doctor, it was highly unlikely that that bullet was fired against the deceased as he ran away. The accused, it is admitted, owned the pistol or held the pistol, the pistol bore his name, so most probably the accused was very familiar with the particular weapon. He knew well its operational capacity. Thus by firing that pistol at such close range against the deceased, the accused must have appreciated that there was a very real likelihood of the deceased suffering serious injury or even death from a bullet emanating from the weapon but accused persisted, with reckless disregard of the eventuality of death resulting from the firing of that weapon.

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In my view therefore the accused is guilty of murder with constructive intent or dolus eventualis.

M) Dentlinger

ON BEHALF OF THE STATE:

ADV C DENTLINGER

ON BEHALF OF THE ACCUSED:

MR SHIKONGO Metcalfe

Instructed by:

& Shikongo