

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 45/2013

In the matter between:

THE STATE

APPLICANT

and

GOTLIEB NANGOLO

RESPONDENT

Neutral citation: *S v Nangolo* (CA 45/2013) [2013] NAHCMD 294 (18 October 2013)

Coram: GEIER J

Heard: 30 September 2013

Delivered: 18 October 2013

Flynote: Application for leave to appeal by the State against acquittal of accused on all charges -

Summary: The respondent had been acquitted on a count of murder and two further counts of attempted murder. Court finding that leave should be granted in respects of the counts one and two – the facts appear from the judgment

ORDER

Leave to appeal the acquittal of the respondent in respect of counts 1 and 2 and their respective alternative counts is hereby granted to the applicant.

JUDGMENT

GEIER J:

BACKGROUND

[1] The accused who had faced trial on a charge of murder and two charges of attempted murder, all coupled to the alternative charge of contravening section 31(1) (i) of the Arms and Ammunition Act, Act 7 of 1996, relating to the negligent handling of a fire arm, was acquitted on all charges by the Regional Court on 21 November 2011.

[2] The State launched an application for leave to appeal on 20 December 2011 against the entire decision of the regional magistrate.

[3] The grounds on which such leave was sought were set out in some 27 paragraphs.

[4] This application for leave to appeal was eventually set down for hearing on 30 September 2013.

[5] On that day Mr Wessels, who appeared on behalf of the respondent - (hereinafter referred to as the 'accused') - indicated that his client had elected not to lodge any written submissions in this regard and would thus leave the decision in the

hands of the court. Also State counsel elected not to make any representations in support of the application.

[6] I deem it unnecessary, at this stage, to consider the detailed grounds raised on behalf of the State in its application as it seems to me that already the analysis of the common cause factors underlying this case will provide the key to determining ultimately whether or not leave to appeal should be granted in this instance. I will accordingly depart from this premise.

THE SECTION 220 ADMISSIONS

[7] In terms of section 220 of the Criminal Procedure Act 1977, it was initially admitted by the accused that he was in possession of the firearm from which a shot was fired, that struck the deceased and that the deceased died as a consequence of the gunshot wound in the chest. The identity of the deceased was admitted – the accused also formally admitted that he had also fired various other shots one of which hit a friend of the accused.

THE DEFENCE PLEADED

[8] The defence that was placed on record in regard to the murder charge was that the shot – which admittedly hit the deceased – was fired accidentally and in circumstances where the deceased launched an unlawful attack on the accused together with certain other individuals.

[9] As far as counts 2 and 3 where concerned, accused denied that he ever had the intention to hit or attempt to kill any of the two complainants.

COMMON CAUSE EVENTS

[10] It was not in dispute further that the incident occurred in the early morning hours of the 1st of October 2006, after the accused and his friends with their red Toyota Corolla and another vehicle had car-chased the deceased and his friends in a Peugeot. The accused and his friends so gave chase on account of the accused's

cell phone having been stolen at Kamusele Bar in Katutura. The accused managed to force the Peugeot to a standstill by blocking its path.

[11] The evidence of all the state and defence witnesses thereafter diverges materially on certain crucial issues.

THE STATE EVIDENCE

[12] State witness Muunyango then went on to sketch a scenario in which the deceased pushed the accused after they had both disembarked from their respective vehicles and confronted each other – that the other passengers then also disembarked from the Peugeot when a third car came at the scene – that the accused then went to his vehicle and took out a firearm and started shooting – He shot in the direction of one Hafeni who fell down, but was not hit. Hafeni could thus escape – Mr Wessels indicated during cross examination of Mr Muunyango, that the accused admitted also firing one shot at one Kalola but missed – the accused asked where the people were that had assaulted him – at that stage Mr Muunyango stood behind the accused – while the accused was repeatedly asking – where are they – he, Muunyango, then moved towards the Peugeot and got inside – whilst he was inside, the accused shot the deceased – who was in a crouched position- ('not completely sitting flat on the ground, only his arm was resting on the ground') - the accused then came towards him, Muunyango, and shot him in the stomach while he was seated in the front seat of the Peugeot – Muunyango opened the door, disembarked – holding his stomach and was made to lie down by Kalola who had come back to the scene awaiting medical help.

[13] The State witness Hafeni Kaulumbwa sketched the event as follows – After the two vehicles had come to a standstill the deceased disembarked and went to question the accused – who then started to push each other – he and the others also got out of the car to find out what was going on and as they approached, the accused went to his car and came back with a pistol and apparently aimed the first

shot at him – He fall back on his back and thought that he had been hit, but was not – He heard his friends say Hafeni is shot – he then ran away while doing so he heard more shots – He could not say how many shots – when he returned to the scene he could see that Cleofas was comforted by Quiet and that the deceased lay near the car.

[14] Mr Kalola confirmed that the accused and the deceased disembarked from their vehicles and that an argument ensued – that he and the others got out when a third vehicle arrived from which three people disembarked – that the accused went to his car to fetch the firearm – when he came back he started to shoot – he first aimed at Hafeni –who fell down – and the accused walked around asking where are they – the deceased asked what did we do to you and after replying he went around the car to the deceased and shot him – the deceased at the time being in a seated position. The accused then moved in Kalola’s direction who ran. He heard a shot being fired – He went to hide next to a pole – when he returned to the scene the accused had left – later he saw the accused coming back to the scene in his vehicle – driving slowly, looking around and then driving off again.

[15] From this brief analysis of the evidence of the State witnesses, it appears that they all agree that there was some or other altercation between the deceased and the accused and that the accused went to fetch his pistol and started to shoot - in the end result the deceased lay fatally shot. Mr Muuyango was shot in the stomach while sitting in the Peugeot and while Mr Kaulumbwa thought that he was shot at – It is clear from their evidence that the accused was the aggressor, who had fetched his pistol after the altercation between him and the deceased and who started to shoot while not under attack – after which he left the scene.

THE ACCUSED’S VERSION

[16] The accused tells a different tale. He stated that after the chase and after the Toyota and the Peugeot had collided, four people got out of the Peugeot, they approached his car, opened the door, pulled him out and started to beat him – His

friend Michael Angula who was with him was nowhere to be seen – He managed to break loose by leaving his attackers with his T-Shirt – He ran to his vehicle took his firearm and shot twice into the air – they, his attackers, seemed not to notice, and kept on coming at him. One of them tried to take the firearm from him – as that person grabbed the firearm a shot went off, striking that person – He testified that the deceased was 1 meter from him when the shot went off – He also stated that the firearm was some 60cm from the body when the shot went off. The accused then demonstrated his position: this was described for the record that his arm was extended in front of his body and that the firearm was more or less 50cm's from the body of the deceased.

[17] The accused then went on to state that the deceased came to grab the phone..(?) and that the distance was not big – The deceased fell and one of the persons managed to “grab off” his necklace. One of the persons ran to the car – After this person fell down the accused fired another shot for them to move away – He fired one shot in the air but it struck his friend – Michael Indongo.

[18] When asked why he fired this shot, he answered by saying that the group was still coming towards him – but he also states that when he fired the shot “one of the gentleman went into the car and he said that he was going to fetch a firearm in the Peugeot – He opened the door and bent down as if he was taking it from under the seat and that is when I shot him – I fired at him, before he could also fire – and because I knew he was going to fetch a firearm. He explained further that the window broke as a result of the shot and that the door was slightly open.

[19] He then asked a friend who also had arrived in the other car to take Michael Indongo to the hospital.

[20] He then left the scene and went home in order to go to the hospital.

[21] He went to the Khomas Clinic where he obtained a medical report which indicated that he had a mark on his face. This report was handed in and marked as Exhibit 'D'.

[22] Under cross examination, the accused denied that he would have known that there would be same sort of fight when he decided to pursue the people he thought had stolen his phone.

[23] He confirmed that he was pulled from his car and was beaten – He explained graphically that he was kicked and that they did all sorts of things to him – that he ended up on the tarred road and they all stepped on him – He confirmed that all four men kicked him and that all of them beat him with fists in his face, stomach, ribs and so on.

[24] When asked by Ms Husselmann : *'How would you describe these blows – where they very hard or was it just like being beaten by a girl?'* - he replied : *' I was seriously beaten up because I could feel the pain.'* – 'When your friends Johnny and Michael arrived they did not come to your assistance when these people continued to beat you?' – 'That is correct' -

[25] The accused then reiterated that he was able to free himself by getting out of the T-shirt and when to fetch the pistol. He then fired two shots into the air despite this his assailants' still came for him. While the deceased was trying to grab the firearm a shot went off. In the process another shot went off. He then explained that despite the deceased already lying in the road the rest still stormed at him – He then stated that he fired a shot in the air – when questioned again he said "I would not say I fired the shot in the air – but I actually did not foresee that it will strike anybody" – He then said he intentionally fired another shot but did not foresee it would strike anybody. He confirmed also that nobody tried to stop him from firing shots.

[26] Interestingly enough when Michael Indongo's statement was put to him to the effect that Indongo tried to take the firearm away from him, he said that could not recall this.

[27] In regard to the shooting of Kleophas Muuyango, the following aspects emerged during cross examination – which was conducted with reference to the photo plan - Exhibit B – Photo 18. The accused confirmed firstly that the fatal shooting had occurred to the right of the vehicle (the Peugeot), viewed from the back. He confirmed again that he saw the person who had said he was going to fetch a firearm was running and getting into the left hand passenger side of the Peugeot – he followed him – he never saw a firearm in his hand but he saw him with an object. He confirmed that the door of the Peugeot was only slightly open – 30cm – He then stated that the person bent down and while in the process of moving the accused fired a shot.

CAN ANOTHER COURT COME TO A DIFFERENT FINDING IN RESPECT OF THE ACQUITTAL OF THE ACCUSED ON THE CHARGE OF MURDER¹

[28] Two central issues arise from the evidence in this regard.

[29] The first issue relates to the question of the attack allegedly perpetrated by the deceased, the two complainants in counts 2 and 3 and another male. The second issue arises out of the medical and photographic evidence in relation to the shooting.

THE PROBABILITIES OF THE ALLEGED ATTACK

[30] It is clear that the State witnesses painted a scenario in which the accused was the aggressor.

¹See for instance *S v Mujiwa* 2007(1) NR 34 (HC) at p. 40 D

[31] This scenario, viewed objectively, is not entirely improbable – after all the accused’s cellphone had been stolen – he followed the deceased and his group to their car, the Peugeot, parked outside Kamusele Bar, where he tried to stop them – when this did not work, and they drove off, he chased them in his vehicle, the red Toyota Corolla, together with Michael Angula, while his other two friends took up the chase in the third vehicle. The accused was so determined to stop the perceived thieves that he first rammed the Peugeot with his vehicle and then brought it to a standstill by cutting across its path – He then got out and had an altercation with the deceased - verbal and/or by pushing each other - according to the state witnesses. He then went to fetch his firearm.

[32] In strange juxtaposition to this fairly logical account - on the accused’s version - and after the car chase and having managed to stop the escapees - he now simply left it at that by just (passively?) remaining in the car until the deceased and his friends arrived to drag him out of his vehicle, then throwing him onto the tar and starting to beat him up viciously until he was able to escape leaving his t-shirt and chain/necklace?. One would think that the accused’s version is highly unlikely. Why would he suddenly turn from the aggressive person giving chase to a helpless, passive victim?

[33] Interestingly enough the investigators did not find the accused’s T-shirt and necklace at the scene.

[34] The question arises why such evidence was not found and why, if the accused had removed these items, he did not say so and present these items in court? In the circumstances it becomes more than likely that these allegations are simply untrue and that the T-shirt and the necklace story was merely brought up to bolster the self - defence version of the accused. Obviously there would have been no need to extract himself from the alleged attack by ‘leaving his shirt and necklace’ if the accused had been the aggressor as described by the state witnesses, which

would explain why these items were not found on the scene to which the accused only returned by driving past without alighting?

THE IMPACT OF EXHIBIT 'D'

[35] Importantly also the medical report - Exhibit "D" - only recording a swollen mark near the left eye of the accused – impacts negatively on the accused's version of necessity. This piece of medical evidence – neutral evidence - is clearly in direct conflict with – and does not corroborate the allegations relating to the vicious assault by four men on a helpless victim, lying on the ground/tar, beating their victim for some time – not like a 'girl' - but seriously and viciously - inflicting pain - by 'kicking and beating him with fists in his face, stomach, ribs and so on'.

THE FATAL SHOOTING

[36] Also the closer analysis of the accused's version of the shooting exposes the improbability of his version. The following anomalies emerge:

a) The accused alleges that he fired a total of 5 shots: 2 warning shots – the third hitting the deceased – a further warning shot hitting his friend Michael Angula for no reason - and the 5th shot hitting Mr Muunyango, seated inside the Peugeot. After a search of the scene however only 3 cartridges were found: 3 cartridges accurately account for the three hits, on all three victims. It becomes improbable that five shots were fired.

b) He further testified that after the he had managed to free himself from the attackers the deceased kept on coming towards him and tried to take the firearm away from him – Initially he testified in chief that the deceased actually managed to grab the firearm and that is when the fatal shot went off – When questioned on how far away he was from the deceased, he then changed the distance three times – from 1 meter, to 60cm to 50cm. He did also not persist with the allegation that the deceased managed to get hold of the firearm.

[37] Why would he do this – Objectively speaking it seems unlikely that the deceased was 1 meter away – holding the pistol when the shot went off – Realising that he would have had to adapt his version he shortened the distance to make his version more likely so that it would also fit the forensic evidence regarding the residue which was found on the deceased, indicating that the shot must have been fired from close distance.

[38] Importantly he also demonstrated how he was standing at the time – the record reflects that the accused demonstrated that he had his arm extended in front of his body and that the firearm was then therefore more or less 50cm from the body of the deceased when he pulled the trigger. It is unknown how long the arm of the accused is? If one assumes that the accused's extended arm could measure anything from 80cm's upwards. To this a few centimeters have to be added – say 20 to 25 cm's - to account for the length of the firearm - as well as the distance of the deceased's body from the firearm, trying to get hold of the firearm, let's say another 50cm to a meter, the picture changes dramatically. We also know that on his version the deceased was in all probability coming forward to get hold of the firearm – so the moving scene would impact on the distances. It emerges that the accused's account is simply not accurate or correct.

THE IMPACT OF THE PHOTOGRAPHIC EVIDENCE

[39] No evidence was given in regard to the position of the deceased at the time that the shot went off – All we know is that the deceased was trying to grab the pistol and on the first version of the accused actually managed to grab it – In order to do so he must have faced the accused surely who admittedly had his arm extended in front of his body – It is unlikely that the deceased would have tried to do this by facing sideways.

[40] The pictures of the deceased reflecting the entrance and exit wounds on his body - in photos 12, 29, 30, 31 - however show that the deceased must have been at a 90° angle to the shooter i.e. he must have been in a side-ways position in relation to the accused when he was shot. This scenario seems highly unlikely if one considers the version of the accused according to which he fatally shot the deceased who must have been coming forward to snatch the firearm from him and who had managed to get hold of the pistol that the accused held extended in front of the body on the initial version.

[41] If one takes into account the other version of the accused – in which the deceased had not yet managed to get hold of the firearm and was merely coming forward to grab the pistol - the accused's version becomes even more improbable as in such a situation it becomes even more inexplicable that the deceased was shot sideways and not from the front.

[42] The improbability of the accused's version becomes even greater if one considers the trajectory and angle of the entrance and exit wounds on the body of the deceased.

[43] It appears from photo 29 that the entrance wound on the right hand side of the deceased is located a couple of centimeters above the right nipple, just below the right shoulder. The exit wound, as reflected on photos 30 and 31, is however a few centimeters below the left nipple of the deceased. This indicates that the shot must have been fired from a higher position in a downward direction. The accused's version does not - and cannot - account for this.

[44] Importantly enough the evidence of the state witnesses Muunyango and Kalola provides an explanation for this phenomenon. They testified that the deceased was on the ground, either partly seated or only crouching with his hand and arm and knee on the ground when he was shot from a short distance.

[45] This evidence is thus corroborated by the photographic evidence reflecting the actual injuries inflicted on the deceased, which makes it fairly clear that the deceased was in all likelihood shot by a standing accused while in a lower (crouching) position. Also the residue found as a result of having been shot from a short distance befits this version.

[46] All these aspects are in my view destructive of the accused's version of the events. These aspects also go a long way to demonstrate that the accused's version cannot reasonably possibly be true. On the other hand there is the material corroboration of important aspects of the evidence tendered on behalf of the State afforded by the abovementioned objective factors and objective evidence.

[47] In such premises I must come to the conclusion that it is possible that another court may reasonably come to a different conclusion in regard to the merits of the acquittal of the accused on the main count of murder.

CAN ANOTHER COURT COME TO ANOTHER FINDING IN REGARD TO THE ACQUITTAL OF THE ACCUSED ON COUNTS TWO AND THREE

[48] In this regard the victim Muunyango testified that he was shot whilst sitting inside the green Peugeot. After the accused had shot the deceased he walked around, stopped on the left hand side of the car and shot Muunyango through the closed window of the car in the stomach.

[49] The accused on the other hand heard Muunyango saying he was going to fetch a firearm and that he noticed Muunyango running to the car, opening the car door and bending down as if he was taking out a firearm from under the seat - that is when he shot him – He then explained that Muuyango was in the process of standing up – the accused then said : “ *I fired at him because I knew that or I thought he was going to fetch a firearm, so I had to fire before he could fire.*” He then conceded that he could have hit Muuyango through the window.

[50] This was his evidence in chief, as elicited by Mr Wessels, who represented the accused at the trial in the Regional Court.

[51] During cross- examination by Ms Husselman for the State, the accused reiterated that he saw this complainant running to the left passenger's side of the car/ the Peugeot. When asked whether he actually saw a gun in Muunyango's hand he startlingly said for the first time "*I saw him with an object in the hand but I could not say if that was the firearm or not*".

[52] The question immediately arises why - and if this would have been the accused's instructions to his legal practitioner – this evidence – important evidence on a defence of necessity - was not led in chief?

[53] This omission was however not explained and not pursued in cross examination.

[54] The accused however confirmed that the door of the Peugeot was only slightly open, some 30cms, as depicted on photo 19.

[55] The accused confirmed that he shot Muunyango who was actually bending down and who was in the process of moving upwards in order to stand straight and that is when he fired the shot.

[56] It does not take much to fathom the total improbability of this version.

[57] The accused admitted shooting Mr Muunyango through the left hand front window of the Peugeot and not from behind through the 30cm opening - the door of the Peugeot must therefore have partly blocked the accused's view. From such a position – and where his view must have been partly blocked by the car door - the accused could simply not have seen any object in Muunyango's hand who 'was bending down in a vehicle and who was only starting to come up'.

[58] In any event the entire scenario as sketched by the accused is also improbable. A person under attack running to a vehicle opening the door to extract a firearm - in haste – somewhere in the vehicle – would surely not just open the door by some 30cms as depicted on Photo 19. On that scenario one would have expected Muunyango to pull open the door widely to frantically rummage for a firearm. Also the location of the shot in the stomach is not quite in line with the accused's version. After all Muunyango was bending down and was only in the process of coming up when he was shot in the stomach through the window and not the car door which must have shielded Muunyango's stomach for some time in the process. It would seem as if the accused adapted his version of the events so as to bring it in line with what is depicted on Photo 19.

[59] On the other hand and given the location of Muunyango's wound - a stomach wound - Muunyango's evidence that he sat in the car when he was shot coupled with the fact that the shot did not damage the car door – cannot just simply be rejected outright as his version is corroborated by neutral evidence in this regard –

[60] If one then takes the totality of the events into account, where there are good prospects that the defence of necessity may be rejected in respect of the main count, it does not take much to understand that such finding will also impact consequentially on the defence raised in respect of the other counts. Also the further factors enumerated above in regard to counts two and three above would additionally strengthen a conclusion regarding the improbability of the accused's version on this score.

[61] Impacting on this is also the clear lie and/or fabrication in regard to the object which the accused allegedly saw in Muunyango's hand - a central/crucial aspect relating to Mr Muunyango's shooting which he failed to testify about in chief.

[62] It is with reference to all these factors that I can only conclude that also in regard to count 2 another court may come to a different conclusion than the learned regional magistrate in the court a quo.

COUNT 3

[63] I have already indicated above that no corroboration of the accused's allegation, that five shots were fired, was found. – We know for certain that 3 cartridges were found and that at least 3 shots were fired from the accused's firearm hitting 3 victims – The inferences to be drawn from these hard facts leave very little room for a conviction in respect of count 3. While I accept that Mr Hafeni Kaulumbwa might have harbored the impression that one of these shots was also fired at him I cannot say that the accused's acquittal on the evidence was such that leave should be granted in respect of this count.

[64] If one then in the final equation considers the grounds in which the State sought leave to appeal in this instance, it appears that the above findings are at least covered by the grounds set out in paragraphs 1(v), (vi), (vii), (viii), (xii), and (xiii) of the application.

[65] In the result the application must partly succeed and I grant leave to appeal against the acquittal of the accused in respect of counts 1 and 2 and their respective alternative counts.

H GEIER
Judge

APPEARANCES

APPLICANT:

I Husselman,
Instructed by the Office of the
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RESPONDENT:

JH Wessels
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