

REPUBLIC OF NAMIBIA

NOT REPORTABLE



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
APPEAL JUDGMENT**

CASE NO.: CA 64/2010

In the matter between:

SAMUEL EIXAB

APPELLANT

And

THE STATE

RESPONDENT

Neutral citation: *Eixab v State* (CA 64/2010) [2016] NAHCMD 64 (8 March 2016)

CORAM: SHIVUTE J AND SIBOLEKA J

Heard on: 18 January 2016

Delivered on: 8 March 2016

Flynote: Criminal Law – Common purpose exists where two or more persons act in concert to achieve a common goal. This can be deducted from the manner in which they conduct themselves during and after the commission of the crime.

Summary: The appellant and his two co-accused boarded a taxi driven by the deceased. He was ordered to drive in the direction of the dumpsite. The appellant sat in the front passenger seat, accused 2 behind the deceased and accused 3 behind the appellant. The appellant told the second accused to do what they usually do. He immediately held the deceased around the throat from behind while the appellant pulled the hand break, stabbed the deceased on the upper arm, and pulled the taxi off the road. The appellant pulled the deceased out of his taxi and together with the second accused they stabbed him several times and was left at the scene. The three drove away and dropped the appellant at the Okahandja hiking point and the two drove back to some places in town, picked up two boys and rode in the direction of Okahandja, but were arrested at the road block. The appellant was later arrested in Khorixas.

Held: No misdirection on both the facts and the law – the credible evidence in chief of accused 3, as well as material corroborative evidence of various prosecution witnesses; himself proved beyond reasonable doubt that the appellant and his two co-accused acted in common purpose during the attack and the taking away of the deceased's taxi.

Held: The appeal against conviction is dismissed.

ORDER

The appeal against conviction is dismissed.

APPEAL JUDGMENT

SIBOLEKA J, (SHIVUTE J concurring):

[1] The appellant and his two co-accused were charged in the Regional Court, Katutura for murder and robbery with aggravating circumstances. They pleaded not guilty, and after the trial they were all convicted and each sentenced to Sixteen (16) years imprisonment for murder and four (4) years imprisonment for robbery.

[2] The conviction has initially been challenged by appellant 1 and accused 2, but the latter has withdrawn his appeal.

[3] At the hearing of the matter the appellant appeared on his own, Mr Boesak for the second, and Mr Eixab for the respondent. The court appreciates counsels' arguments in this regard.

[4] The dissatisfaction of the appellant on his conviction may be summarized as follows:

AD CONVICTION

The learned Magistrate erred in the law and/or on the facts in convicting the Appellant on the evidence of a selfconfessed co-accused.

The Court *a quo* seriously misdirected herself in failing to approach the evidence of accused no 3 Josephat Boois with great caution, which was not corroborated by any evidence before the trial court.

Accused no. 3 Josephat Boois's evidence is inconsistent with the evidence of Mr Pienaar whom he called to testify. Furthermore his evidence is also inconsistent with the evidence of second accused who was together with Josephat Boois from the time they embarked in the vehicle of the deceased up to the place where the deceased was offloaded.

The Court *a quo* failed to evaluate the evidence and to account for all probabilities, improbabilities and inconsistencies of the evidence. Had she properly applied her mind she would have reached a different conclusion.

Accused no. 3 called Mr Kaventangwa as a witness whose evidence did not corroborate his evidence.

The Learned Magistrate erred in the law and/or on the facts alternatively misdirected herself in finding that appellant acted in common purpose. She applied the doctrine of common purpose wrongly. No evidence before the Court *a quo* suggesting that Appellant was at the scene of crime.

The Court *a quo* erred in rejecting the evidence of second Appellant who was with accused no. 3 at all times and accepting the evidence of a single witness Josephat Boois who made two different statements.

[4] The following evidence was placed before the trial Court on this matter:

[5] J J Strydom testified that he is a freelance cameraman. On the day of the incident he was alerted about a man covered with blood next to the road towards the rubbish dump. At the scene he saw that the deceased crawled from the bushes to where he found him laying on the shoulder of the road. The deceased was covered in blood, naked, he only had stockings on. He had a stab wound in the back and was unconscious. The deceased told him he is a driver of a black-blue colored taxi. He was attacked, beaten, his clothes, money and the taxi were all taken away. People who boarded his taxi attacked him. He called the police and ambulance. When these came he gave them a description of the deceased's taxi. At the scene the police radio announced the arrest of the suspects with the deceased's car at the roadblock. He went there and found a taxi of the description the deceased gave him. Inside the car and saw what appeared to be a blood stained driver's seat.

[6] Jeffrey Scot testified he is the D/W/O Officer and the first investigator of the matter. On 10 December 2004 a freelance journalist, Strydom who spoke to the deceased and captured his dying moments reported an attack incident to him on the road near the dumping site. He drove there and found the lifeless body of a

naked deceased with knife stab wounds all over the body and was covered in blood. While at the scene accused 2 and accused 3 were arrested at the roadblock. He drove there and found the car and observed that its seats were full of blood. Accused 2 and accused 3's clothes as well as the money found on accused 3 were bloodstained.

[6.1] Accused 3 elected to do the pointing out. He went with Scot to the Okahandja Weigh Bridge nearby the road where bloodstained clothes he said belonged to the deceased were found laying on the ground. From there they went to the house of accused 2's aunt. At the back of the yard they found bloodstained clothes in the boot of an old car which they said they wore at the time of the incident. Two blood stained knives were retrieved during investigations. Later, the officer arrested the appellant in Khorixas with the help of the information provided to him by his co-accused.

[7] Getrude Kukuri corroborates D/W Officer Jeffrey Scot that her sister's son, accused 2 and the police came and took bloodstained clothes out of an old vehicle at the back of her house. Vincent Cornelius Eixab, who resides with her corroborates her evidence. According to Vincent it was in the afternoon while he was feeding chicken in the cage when accused 2 came with clothes in a plastic bag and walked behind the shack. When he re-emerged he had another trouser on and without the plastic bag.

[7.1] According to Vincent Eixab accused 2 came with another person in a dark blue car. In the evening the police came and retrieved the plastic bag. When clothes therein were taken out he saw they had blood spots on. In Court he recognized the photo of the car in which accused 2 and the driver were driving when they came to leave the clothes there.

[8] Eben Pienaar testified that accused 3 resided at their house some years ago. At some stage he came driving a blue car with accused 2 to collect his bag and

was going to Otjimbingwe.

[9] Johanna Undjem testified that she employed the deceased as a driver of her dark blue taxi N47989W. When she got her car back she noticed that the backseats were full of blood. This corroborates accused 3's evidence that the injured deceased was forced from the driver's seat to the rear seat between appellant and accused 2.

[10] Edmund Tjichala testified that on the day of the incident accused 3 came driving a dark blue Toyota Corolla with accused 2 saying it was a friend's car. They came to pick him and his friend Jurgen Uirab to go to Otjimbingwe to play soccer. They were pulled off at the roadblock. He was sitting at the back with Jurgen, and as he bent to tie up his shoelace he saw blood which accused 3 told him it was the meat they collected for a wedding.

[11] Jacob Shiparanga testified that he was a Scene of Crime officer who on 10 December 2004 went to the roadblock and took photos of people and items pointed to him by D/W/O Scot. He compiled a photo plan and handed it in Court as an exhibit.

[12] Derick Brune testified he left the police force in 2008. On 13 March 2007 he used W/O Beukes to interpret for him during the confession he took from accused 3.

[13] Samuel Eixab is the appellant. He testified that on 10 December 2004 he had N\$2000 on him. He boarded a taxi to the hiking point where he left for Okahandja. He only found his girlfriend in Khorixas and it is where he was arrested. He denied knowledge of the deceased's death. It is interesting to note that accused 2 did not cross-examine him. Accused 3 pertinently put to him the whole case related to how they got into the deceased's taxi, attacked, stabbed, searched his pockets, stripped him of his clothes and left him for the dead. He

denied all questions related to the alleged charges.

[14] Naftali Eixab accused 2's evidence does not place the appellant on the scene, and he also totally exonerates himself from any wrongdoing on this matter. However, he testified that he only found his cousin Vincent Cornelius Eixab at his aunt's house. It is in fact this Vincent who effectively connects him to the alleged offences. Vincent corroborates accused 3's evidence saying accused 2 left bloodstained clothes at that house and put on other clothes. Accused 2 testified that accused 3 killed the deceased and took away his taxi. He said he did not understand the language accused 3 and the deceased were talking.

[14.1] According to accused 2 when he came closer to separate accused 3 and the deceased he got hurt. Accused 3 wanted to stab him on the neck, but he blocked and struck him on his arm. He grabbed the knife and got cut (scratched) on the left hand. He ran 80 to 100 meters backward looking for help but to no avail. He looked back and saw that accused 3 was preventing the deceased from getting back into his car. Later accused 3 drove towards him and in a threatening manner told him to get into the vehicle and he complied.

[14.2] On the second accused's own request accused 3 took him to his aunt, Kukuri's house where he left some clothes. They loaded two boys at Damara Location. They threw off some clothes along Okahandja route, at the bridge. At the roadblock the car was pulled off, and they were arrested.

[14.3] During cross-examination accused 3 put his case to accused 2 related to how he saw him and appellant attacking the deceased and throwing him out of his taxi. In his answers accused 2 stated that it was in fact accused 3 who attacked the deceased, took his taxi, left blood stained clothes at Kukuri's house, and came out dressed in a trunkie, got into the driver's seat like that up to the bridge where he put on other clothes and gave him some to do the same. This is in total contrast to the evidence of his own cousin, Vincent.

[14.4] Here is how accused 2's evidence of what happened on the day of the incident is completely displaced by his own cousin, Vincent Eixab whom he correctly testified as the person he found at his aunt, Kukuri's house. According to Vincent it was accused 2 who came with clothes in a plastic bag, walked behind the shack and when he re-emerged he had put on another trouser and was without the plastic bag. When accused 2 cross-examined him he repeated what he testified in his evidence in chief. Vincent further stated that accused 2 was not wearing anything on top, and he had another trouser in his hands. According to Vincent the plastic bag was retrieved by the police that same day. The above fatal displacement of accused 2's evidence by his cousin dealt a heavy blow to the appellant's appeal against conviction:

[14.5] Accused 2 placed himself on the scene of crime. Kukuri and Vincent corroborates the evidence of D/W/O Scot and that of accused 3 that bloodstained clothes were retrieved from the boot of an old car in the back yard of her house.

[14.6] From the above it clearly shows that the account given by accused 2 relating to what happened at the scene at the time of the incident is false beyond reasonable doubt.

[15] Josephat Boois is accused 3. He testified that on Friday 10 December 2004 he went to church in the morning to excuse himself from Saturday funerals as he was planning to attend a wedding at Otjimbingwe. On his way back home at Malakadraai he met appellant and accused 2. The appellant told him he wants to see his girlfriend in Okahandja and attend the birthday party of her mother in Khorixas. The three boarded a taxi, and the appellant told the driver to take them to Rocky Crest. From Katutura Hospital they took the road to Jarman, behind Central Hospital entering Western bypass. In the taxi the appellant sat next to the deceased on the front passenger seat, accused 3 sat on the rear seat behind the appellant and accused 2 sat behind the deceased. As the taxi drove down from

the bridge the appellant said “just do the way we used to do, grab him”. Accused 2 grabbed the deceased on the throat from behind. The appellant pulled the handbrake and pulled the taxi off the road. He started stabbing the driver on his hands while accused 2 was holding the deceased on the throat. Later accused 2 pulled the deceased from the driver’s seat to the rear seat. The appellant got off, came to open accused 3’s rear door and forced him to drive the taxi to UNAM. He sat on the back seat and the deceased was now held between the appellant and accused 2 in the back seat.

[15.1] Before he reached UNAM, appellant told the deceased to make a U-turn, he complied and stopped. Accused 1 and accused 2 opened the rear doors and pulled the deceased out of the car. On the ground accused 2 continued to hold the deceased on the throat from behind while the appellant searched in his pockets and took out some money. The appellant was busy stabbing the deceased, and in the process he accidentally stabbed the accused 2 on the upper arm. He released the deceased, and stabbed him (accused 3) in his back saying it was because of him that the appellant injured him by mistake. Accused 3 stood next to the driver’s door and told the appellant and accused 2 not to stab the deceased anymore but rather to take whatever they wanted. Accused 2 instead told him to open the boot of the car and stop talking too much which he did.

[15.2] Meanwhile the deceased had been undressed, his bloodstained clothes and shoes were placed in a plastic paper and put in the boot of the taxi by accused 2. The appellant told accused 3 to drive to Okahandja hiking point, leaving the deceased laying two to three meters in the grass next to the road. They drove to the hiking point of Okahandja. Here the appellant took out his bag and put it on Gerson’s taxi. Accused 2 then came to sit in front with accused 3 and told him to drive to the house of his aunt Kukuri. From there they drove to accused 3’s residence where he collected his bag. Lastly they went to a certain house and picked up two boys as well as an elderly lady who got off at Dolam.

[15.3] They drove along the Brakwater road, before the bridge the second accused 2 said he was feeling cold. They stopped and accused 3 told him to get the blue and white T-shirt out of his bag and put it on. He opened the boot and accused 2 took out the deceased's clothes, threw them away leaving the shoes. They drove up to the roadblock where the police asked him to pull off the road and were arrested. The deceased's clothes were retrieved. They got the first appellant's voter's card at his residence, and he was later arrested in Khorixas. On how he knows appellant, accused 3 testified that they were playing soccer together, he has a mark on the head, front teeth are missing; and was shot in the leg.

[15.4] During cross-examination accused 3 said that if there was any conflict between him and the appellant, the latter would have testified about it, but there is nothing. He only testified about what happened at the time of the robbery of the deceased.

[15.5] Accused 3 cannot read or understand English, however what he testified in his evidence in chief is what he stated in his confession. During cross-examination by the prosecution accused 3 confirmed that photo 9 shows a stab wound on the right arm of accused 2 accidentally inflicted on him by the appellant when the latter missed the deceased. Photo 6 shows the bloodstained back part of accused 3's trouser acquired when the appellant forced him to sit on the bloodstained driver's seat.

[16] Gerson Kavetangwa testified that he transports people between Windhoek and Okahandja. He knows the appellant well from the time he was staying with his brother. On a date he cannot recall during the year between 15h00 and 16h00 at Okahandja hiking point the appellant had a bag when he approached him for a lift to Okahandja. Gerson still wanted four passengers but the appellant said he would pay for the empty seats. The appellant's conduct clearly shows

that he was in a hurry to leave Windhoek because of what had happened. He dropped him off at Job's house where Elozane and Lavinia are also residing.

[17] The appellant repeatedly asked the trial Court to view accused 3 as a liar and therefore reject all his evidence. One of the main reasons for this request was because he testified that accused 2 was his brother while that was not the case. According to accused 3 the manner in which the families and relatives of the appellant and accused 2 related to each other and interacted with one another made him conclude that they were brothers. In my view the explanation of accused 3 is well placed seeing that the appellant and accused 2 also share the same surname "Eixab". It is my further view that accused 3 could have been correct because that issue was discussed outside the Court. A person came out to accused 2's mother and informed her about the allegations being made in Court during the trial that the two were brothers. It was after this discussion that accused 2's mother told them that accused 1 and accused 2 were not brothers.

[18] The trial Court in my view correctly convicted the appellant and his two co-accused on this matter:

[18.1] If the appellant was not at the murder and robbery scene why would his evidence corroborate that of accused 3 on the following material aspects:

After the incident the appellant got a lift to see his girlfriend in Okahandja from where he would proceed to attend the birthday party of her mother in Khorixas. This corroboration clearly shows that they were together on the day of the incident. There is no way accused 3 would have known the appellant's movements and whereabouts so accurately that when the police acted thereon they found him without any difficulties. The appellant's own sister, Justina Ngitamwa whom he called to testify in support of his case stated that she did not know that the appellant was in Okahandja. She learnt about it only when he called from there asking his father to put aside N\$200 for his lift back to Windhoek. There is also corroboration of accused 3's evidence by other

prosecution witnesses as well as exhibits handed in Court to form part of the evidence.

[18.2] After offloading the appellant, accused 2 and accused 3 drove back to some places in town. They made a turn at accused 3's residence where the State witness Eben Pienaar saw them in a blue car. This is what accused 3 also testified. The State witnesses Edmund Shishala and Jurgen Uirab found and saw bloodstains in the car at the time accused 2 and accused 3 gave them a lift. This has been corroborated by accused 3's evidence. According to accused 3 there was blood on the driver's seat left by the deceased the time he was pulled out of it to sit between the appellant and accused 2 in the back seat. Photo No. 6 Point F clearly corroborates bloodstains visible on the back of accused 3's trouser on the day of their arrest at the Windhoek – Okahandja roadblock.

[19] In its reasons for conviction the trial Court found that accused 2 and accused 3 had lied about the presence of blood in the deceased's taxi they were driving. That conduct was then in my view correctly ruled to be an indication that they all acted in common purpose during the attack of the deceased and the taking away of his taxi and other belongings.

[19.1] Accused 3 is not a single witness on this matter. The conviction was based on all the evidence placed before the trial Court. This includes the evidence of the appellant and accused 2 on aspects where they materially corroborated him as already pointed out.

[19.2] In *S v Haikele and Others*¹ common purpose was defined as a purpose shared by two or more persons who act in concert towards the accomplishment of a common aim.

[20] It is my considered view that when regard is had to all the evidence placed

¹S v Haikele and Others 1992 NR 54 (HC) -68.

before the trial Court on this matter, all the three accused were correctly convicted on the counts of murder and robbery with aggravating circumstances.

[21] In the result the appeal against conviction and sentence is dismissed.

A M SIBOLEKA
Judge

N N SHIVUTE
Judge

APPEARANCES

1ST APPELLANT : In person

2ND APPELLANT : Mr Boesak
Instructed by Directorate of Legal Aid

RESPONDENT : Mr Eixab
Office of the Prosecutor-General, Windhoek