



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

Case no: CC 09/2016

In the matter between:

THE STATE

and

DANNE RODNEY SHANINGUA

ACCUSED

Neutral citation: *S v Shaningua* (CC 09/2016) [2017] NAHCMD 224 (14 August 2017)

Coram: LIEBENBERG J

Heard: 10 – 13 April; 10 – 11 July 2017

Delivered: 14 August 2017

Flynote: Criminal Law – Murder and Defeating or obstructing the course of justice – Private defence and criminal incapacity raised – Requirements for private defence reiterated – No evidence led in support of accused's criminal incapacity during the shooting – Accused's inability to remember critical moments during the shooting incident negates his defence of private defence.

Criminal law – Accused after shooting incident did everything to avoid arrest or to have the vehicle involved in the incident traced. No evidence that he

destroyed or discarded evidence relevant to the investigations – Accused attempted to defeat or obstruct the course of justice.

Criminal procedure – State's failure to call certain witnesses listed – Witnesses made available to defence – Witnesses either unwilling or unable to give evidence – No adverse inference drawn against State's failure to call witnesses.

Summary: The accused was charged with murder and defeating or obstructing the course of justice. Deceased's car collided with accused's car, thereafter accused disembarking from his vehicle armed with a gun and firing the first two gun shots at deceased's vehicle front side and tyre. At trial accused pleaded not guilty and his defence is that he acted in self defence in that after the collision, when he disembarked from his vehicle to approach the deceased's car, deceased reversed his car, and at high speed drove towards him and it was in that moment when he fired at the deceased's vehicle as it would have bumped him. Accused further claimed that he was overwhelmed with fear and he cannot remember shooting at deceased's vehicle after it drove past him. Evidence showed that whilst deceased drove slowly past accused's car he fired several shots directly at the cabin of deceased car and also after it had past him. After the shooting incident accused went into hiding, removed the number plates and license disk of the car he was driving in and parked the car at someone else's residence. During submissions it was argued that the court should draw an adverse inference from the State's failure to call two witness listed on the State's list of witnesses who would have shed more light to the charges accused was facing.

Held, that there was no imminent danger or attack on the accused and he could therefore not have acted in private defence. On the accused's own version he shot at the deceased's vehicle after it had drove past him, by which time the unlawful attack on him had ceased as the attack was already something of the past. Except for the first shots fired at the tyre and into the front side of the vehicle, all the remaining shots were fired at an angle from

behind when the vehicle had already passed him and therefore posed no further threat – including the fatal shot. Accused's defence of having acted in private defence rejected.

Held further, accused's explanation that he shot at the deceased's car because he kept his finger on the trigger when he was moving out of harm's way and that he cannot remember shooting at the deceased's vehicle after it had drove past him, negates his defence of private defence.

Held further, that accused having lacked criminal capacity when firing shots because he was overwhelmed by fear is without merit as no clinical evidence was led in support thereof. Further, accused's evidence as to his state of mind during the firing of the shots falls short of evidence from which it could be inferred that he lacked criminal capacity.

Held further, when accused shot into the cabin and the rear of the deceased's vehicle after it had passed him, of which two bullets struck the deceased, the accused acted with intent in the form of *dolus eventualis*, in that he foresaw that firing shots into the cabin of the vehicle could kill a human being and reconciled himself to this possibility.

Held further, though accused tried to avoid his arrest and hide the vehicle involved in the incident, there is no evidence that the accused destroyed or discarded evidence relevant to the investigation, and thus the completed offence of defeating or obstructing the course of justice was not proved.

Held further, regarding the State's failure to call witnesses the court was not faced with the evidence of a single witness and the defense would have approached the Registrar in terms of the Criminal Procedure Act 51 of 1977 to secure the presence of a witness for the defence which it failed to do. There was no duty on the State to call these witnesses and as a results thereof the court cannot draw an adverse inference from its failure to do so.

ORDER

Count 1: Murder – Guilty, acting with intent in the form of *dolus eventualis*.

Count 2: Attempting to defeat or obstruct the course of justice – Guilty.

JUDGMENT

LIEBENBERG J:

[1] The accused is a 45 year old Namibian male who is indicted in count 1 with the offence of murder, and in count 2 with defeating or obstructing, or attempting to defeat or obstruct the course of justice. He pleaded not guilty on both counts and in respect of the murder charge, raised private defence as justification in his defence. As regards the remaining count, the accused elected not to give any plea explanation and required of the State to prove its case against him.

[2] The accused is legally represented by Mr *Makando* while Ms *Esterhuysen* appears for the State.

Introduction

[3] It is not in dispute that on the night of 8 August 2015 the deceased, Marko Kristian Uolevi Ronni, a Finnish National, was killed during a shooting incident when the accused fired several shots at him. The deceased at the time was driving in his vehicle, a silver Landrover Discovery, on Bell Street in Windhoek. It is also common cause that the accused was seated in the driver's seat of a VW Polo parked on the side of the road when the Discovery collided with the rear-end of the Polo. What happened thereafter is however in contention. The State called two eyewitnesses who claim to have witnessed the collision and shooting incidents namely, Ms Fenola Felix, a passenger in the accused's vehicle and Mr Alexander Paulus, a taxi driver who had been following the Discovery immediately prior to the accident.

The State's case

[4] Ms Felix (Fenola) related to events earlier that day when she and her friends enjoyed themselves at a car wash/bar in Katutura and where she met the accused. Also in their company was the accused's brother Chris and a friend by the name of Indongo, a police officer. During the evening they decided to visit Joker's Sports Bar situated in Bell Street up to where she got a lift with the accused. As they had arrived first, the accused parked his car on the side of the road diagonally across the street of Joker's where they remained seated, waiting for the others to arrive. The next moment their vehicle was hit from behind and jerked forward, creating an opening of approximately two metres between the two vehicles.

[5] It seems necessary to summarise the subsequent events in some detail as narrated by Fenola. She said as the accused got out of the vehicle he immediately pulled out his firearm that was on his waist. Whilst still seated she looked back and as the accused was moving to the back of their vehicle, she assumed that he was going to the driver of the other vehicle (the Discovery) to discuss as to what had happened. She was unable to open the door on her side and decided to disembark on the driver's side. During this brief period her

attention was at embarking the vehicle and did not see what the accused was up to during this brief period. Once outside she saw the Discovery was slowly moving forward and by then was next to their vehicle whilst the accused was on the other side i.e. the driver's side of that vehicle when he started firing. She assumed he was aiming at the tyres of the vehicle. As the Discovery slowly passed the accused, he continued firing at it. In cross-examination she denied that the Discovery had first reversed before moving forward, neither that the engine revolutions were high or that it accelerated with screeching tyres. When put to the witness that the Discovery was driving straight at the accused, she disputed the assertion and said the vehicle had slightly turned right (into the lane for approaching traffic) and was not going to where the accused was, as he had already moved across to the opposite side of the road. She was adamant that the Discovery moved forward very slowly with the accused standing next to the vehicle on the driver's side when the shots were fired. After the first two shots she yelled at the accused not to shoot and to put the gun away. She saw a taxi passing them slowly and the driver looking back at them.

[6] When they got back in the vehicle the accused drove in the same direction and upon reaching the intersection with Lazarette Street, she saw the Discovery had stopped on the street but on the opposite side. The side window of the driver was shattered and the driver's upper body was stooped forward, leaning on the steering wheel. Upon seeing this she heard the accused exclaimed that he had killed the person. As she sustained an injury to the head, she asked to be taken to hospital from where they drove up to the Roman Catholic Hospital. Before disembarking the accused said they should first fetch another vehicle from home where after they could return. Although the accused denies going first to the hospital, Fenola's evidence on this point was never challenged. They proceeded to the accused's house in Hochland Park where he parked the vehicle and called his brother Chris who then left to check on the situation. With his return he made a report to the accused and departed. Fenola said the accused in the meantime removed both registration

plates of the Polo and took it inside the house. She spent the night at the accused's place as his brother had earlier refused to take her home. The next morning she took a taxi home and later in the day called the accused to say that she still needed to see a doctor.

[7] Later that day (Sunday) a friend by the name of Bossie (Toivo) called her and said she should not talk about what had happened the previous night and offered her N\$7 000 in return. She declined and undertook not to speak out. However, on Monday she contacted her friend Indongo, the police officer, and told him that she was involved, the reason being that she started feeling unsafe as there was a gun involved and therefore decided to report herself to the police. She was subsequently approached by the police to whom she narrated the events and where after she pointed out certain points at the scene of crime as depicted in the photo plan.

[8] Under cross-examination Fenola denied having consumed strong liquor on the night in question, or that she had been drunk. Though she initially testified that Indongo drove her home, she admitted in cross-examination that he allowed her to use his vehicle and that she went on her own and was back within the hour. Her explanation for having contradicted herself on this point is that she made a mistake. She further disputed allegations of her having taken drugs during her absence from the bar or having visibly been under the influence of any substance. As regards the accused's denial of them going to the hospital or him driving in circles before reaching the accused's home in Hochland Park, the witness was adamant that this is what happened. She further disputed that Bossie had given or offered her N\$1 500 for medical expenses.

[9] Mr Alexander Paulus on the night in question was a taxi driver and after he had dropped off a passenger (at Joker's Club) he turned around to go back

into town. He was driving behind a silver coloured Range Rover which followed a white VW Polo. I pause to observe that, despite the witness referring to this vehicle as a Range Rover, he later during his testimony confirmed that it was the Land Rover Discovery depicted in the photo plan, being that of the deceased. Whilst following the Polo the Discovery collided with the rear end of the Polo. On this point his evidence differs from that of Fenola and the accused, both saying the Polo was stationary at the time of the collision. He saw a male person alighting from the Polo with gun in hand and immediately started shooting at the right front wheel of the Discovery. He said the driver of the Polo within seconds got out and fired the first shot at the front wheel whilst the vehicle was still stationary. After the first shot, he raised the gun and fired directly into the car on the driver's side. Several shots were thereafter fired into the vehicle from where the person stood in the middle of the road, while the Discovery slowly drove past him. A lady got out of the Polo shouting in English that the person must stop shooting. According to the witness visibility was good as the area is lit up by street lights. Neither of the drivers was known to him.

[10] He continued driving and caught up with the Discovery which had stopped further down in Bell street after having crossed the intersection with Lazarette street. He saw the driver stooped forward with his head resting on the steering wheel whereupon he contacted the City Police. He remained at the vehicle until the police arrived. On Monday he returned to the scene with the police where he pointed out certain points as depicted in the photo plan.

[11] In cross-examination the witness disputed that the Discovery reversed before driving off, that the revs of the engine was high and it sped off with screeching tyres.

[12] Mr Joel Ngungu, a traffic officer of the City of Windhoek was summoned to the scene and called for an ambulance and members of Nampol to attend. The rear side window was shattered in order to gain access into the vehicle as the doors were locked. He later on went to the spot where the alleged shooting took place and interviewed a security guard on duty at Neo Paints as to what he had observed. It is common cause that when Mr Petrus Kahuadi, an Emergency Care Practitioner Intermediate arrived on the scene, that the deceased was no longer alive and declared dead.

[13] Chief Inspector Zachariah Amakali attended the scene that same night and observed several bullet holes in the body of the deceased's vehicle. There were holes in the window and door of the driver; the rear door and window on the right side; and one hole in the driver's seat as depicted in photo 16 of the photo plan. After the body was removed he proceeded to the place of the actual shooting where 9 spent cartridges were collected. The front wheel of the Discovery was flat and seized for purposes of investigation and from which a spent projectile was retrieved.

[14] The following day he was provided with the name of the accused and a lady who allegedly was with the suspect at the relevant time. He subsequently interviewed Fenola Felix and obtained a statement from her where after they proceeded to the accused's house in Hochland Park where neither the accused nor the Polo could be found.

[15] It is also common ground that Sergeant Nakangombe on the morning of Tuesday the 11th of August 2015 received information as to the whereabouts of the accused which led to his arrest at the house of an uncle of his situated in Windhoek North. It is not disputed that the accused decided to turn himself in.

[16] Warrant Officer Nghinamundova from the Serious Crime Unit in the Khomas Region is the investigating officer and his testimony mainly turns on the collection of evidence on the crime scene and that he attended the autopsy conducted by Dr Vasin. He also received a projectile retrieved from

the deceased's body from the pathologist. All these, together with the Glock pistol surrendered by the accused, were forwarded to the National Forensic Science Institute for forensic examination. The outcome showed that the spent cartridges (9) found at the scene were fired from the same pistol – this was not disputed evidence as the accused throughout admitted having fired the shots.

[17] When questioned subsequent to his arrest as to the whereabouts of the Polo vehicle he was driving on the night in question, he told the police that it was parked at a house in Khomasdal where his 16 year old son was living with his biological mother. The vehicle was found parked behind the house with the registration plates and licence disk removed from the car. The registration plates were found on the rear seat while the disc was in a storage compartment below the dashboard. The vehicle was not visible from the street and was parked with its rear end against the boundary wall. The scene was photographed and photos handed into evidence, depicting the circumstances under which the vehicle was found.

[18] Mr William Nambahu is a forensic expert on ballistics and formerly¹ attached to the National Forensic Science Institute of Namibia. He examined exhibits relating to the firearm, spent cartridges and projectiles forwarded in this case to the NFSI for forensic analysis and noted his findings in two reports handed into evidence.² Regarding the pistol with serial no BBA 098 the examination presented the following findings:

The firearm was in working condition and found to be self-loading and a semi-automatic pistol which required that the trigger mechanism must be released and pressed again before the next shot can be fired. Once the fired cartridge is ejected it will automatically reload from the magazine with a capacity of 16 rounds. The measure of force to the trigger mechanism

¹ He has retired in the meantime.

² Reports 1952/2015/R2 marked Exhibit 'O' and 1952/2015/R3 marked Exhibit 'P' respectively.

required to fire the pistol was found within normal range for the particular type of firearm.

[19] Regarding the 9 spent cartridges collected on the scene of crime, the examination revealed that all of them were fired from the pistol with serial no BBA 098. Two spent projectiles were not analysed as they were damaged and not suitable for examination.

[20] These findings are consistent with evidence presented about the accused being the owner of a Glock pistol with a corresponding serial number, and him having fired 9 shots on the scene where the spent cartridges were collected from.

[21] Mr Liswaniso, a forensic scientist attached to the NFSI, compiled a report³ comprising photos taken of the Discovery vehicle driven by the deceased and which were handed into evidence by agreement.⁴ As depicted in photograph 24 there are three bullet holes on the right hand side of the vehicle: one in the side window of the driver seat, one in the window of the passenger door immediately behind the driver's seat and one in the door pillar between the front and rear doors on the driver's side. With the use of probes the trajectory of the shot fired through the rear window was determined and found to have penetrated the driver's seat at an angle from behind and exiting on the front. As regards the latter bullet hole, Mr Nambahu concluded that this was the fatal shot that penetrated the deceased's back and chest. He concluded that these shots were fired at an angle from a distance where the person firing was not directly in line next to the vehicle, but stood more towards the back. Mr Nambahu further commented on other bullets fired into the vehicle as depicted in the photo plan compiled by Constable Sasele.⁵ In respect of photo 26 he deduced that the bullet hole on the right hand side of the front fender was equally caused by a shot fired from behind at an angle. Besides these four bullet holes fired into the cabin, more bullet holes were observed on the vehicle namely, one on the tailgate; one almost centre of the

³ Report 1952/2015/R1.

⁴ Exhibit 'K'.

⁵ Exhibit 'J'.

front bumper just below the registration plate, and one in the right front tyre. This means that seven out of nine shots fired by the accused struck the deceased's vehicle on three different sides (front, right and rear).

[22] Dr Vasin is the forensic pathologist who performed an autopsy on the body of Marko Kristian Volevi Ronni on the 12th of August 2015 and noted his findings in a report received into evidence.⁶ The following chief post-mortem findings were recorded:

- two distant range entry gunshot wounds;
- perforating gunshot injury to the [right] upper arm;
- penetrating gunshot injury to the chest;
- gunshot injuries to both lungs, pulmonary hilum and pulmonary artery;
- bilateral haemothorax;
- systemic visceral pallor;
- corroborating gunshot tears revealed on the clothing [in relation] to the projectiles' trajectories; and
- deformed pistol projectile lodged into the soft tissue on the upper left anterior chest.

[23] It was concluded that the cause of death was due to a gunshot wound to the chest, resulting in exsanguination (bleeding).

[24] There was a gunshot entry wound noted on the right mid aspect of the back with the trajectory of the projectile directed from the back frontwards and from the right to the left and slightly upwards. This was a penetrating injury to the chest with resultant injuries to both lungs and pulmonary artery. These injuries were fatal. The gunshot wound to the right upper arm entered on the outer aspect of the arm and exited on the inside of the upper arm. The immediate cause of death was due to massive internal bleeding, associated with extensive internal gunshot injury to the chest organs.

⁶ Exhibit 'Q'.

[25] When shown photos of the bullet holes fired into the vehicle driven by the deceased, Dr Vasin concluded that the bullet fired through the rear window that went through the driver's seat from behind and penetrated the chest, corresponded with the fatal injury. The hole in the side window of the driver, according to the doctor, corresponds with the bullet wound on the right upper arm of the deceased. The fatal gunshot wound would not have caused instant death and the person would have lived for a short period thereafter. This explains why the deceased was able to continue driving for a short period of time.

[26] Mr Ismael Goagoseb is the brother-in-law to the accused and although his testimony has no bearing on the murder charge, it may shed light on the particulars of the charge preferred in count 2. It must however at the outset be observed that this witness did not testify in an honest and forthright manner and, as a result thereof, the court should follow a cautious approach when assessing his evidence where uncorroborated. According to him the Polo vehicle in question was a gift to him from his sister (the accused's wife) in January 2015 and was registered in his name. He took possession of the vehicle and used it on a daily basis. As the accused experienced problems with his vehicle (pickup), he offered them the Polo to use when needed, particularly over weekends when he went away. One such instance was the weekend of 09 August 2015 when the accused used the vehicle over the weekend. On his return he realised that the accused had not returned the vehicle but he never enquired as to its whereabouts. He claims this to have been the position until the time of the hearing, two years later; neither did he approach the accused in that regard 'as he trusted him'. Objectively viewed, I find the explanation implausible.

The defence case

[27] Accused testified in his defence and regarding ownership of the Polo vehicle said he had bought it for his wife and, as far as he was concerned, it still belonged to her. He was however at odds to explain why the vehicle in the meantime had been transferred into the name of her brother, Ismael

Goagoseb, who clearly took possession of the vehicle and made full use of it as the owner would. I pause to observe that during the bail application the accused confirmed that the vehicle belonged to Ismael but has now come up with the explanation that he could have made a mistake as he was eager to get bail and mostly focussed on his freedom. To this end he clearly contradicted himself.

[28] Be that as it may, the said vehicle was brought to him at his request during the morning of 08 August 2015 and he had been using it to go to the car wash/bar later that day where he met up with his brother Chris and some friends. He confirmed meeting Fenola at the time. Contrary to Fenola's evidence she, according to him, drank whisky and not cider as she testified, thereby implying that it explained the joyful mood she was in. However, it was never put to Fenola in cross-examination that she drank whisky earlier that evening. In the absence of evidence that Fenola was under the influence before or during the shooting incident which might have affected her observation skills, nothing further turns on this part of the evidence. At some stage the accused was taken home to dress into something more comfortable and as he intended withdrawing money from the ATM at night – something he considered to be unsafe – he decided to take his firearm along and carried it in the holster on his waist.

[29] He confirmed that he and Fenola drove to Joker's Club where they arrived at around 23:30 and remained seated in the car whilst waiting for the others to arrive. According to him he would only drop her off at the club and did not intend joining the others as testified by Fenola. On this point his evidence is contradicted not only by Fenola, but also by defence witness Isak Indongo. Accused narrated how their vehicle was bumped in the rear by another vehicle whereupon he disembarked in order to see what had happened. Whilst still on his way to the other vehicle he heard the engine being revved, where after it first reversed and with screeching tyres then dashed forward charging at him. By that time he was about 1,5 metres from the said vehicle. He got frightened and shocked, pulled out his firearm and in an attempt to stop the approaching vehicle – as an act of self-defence – fired

at the tyres of the vehicle. By then he had moved more towards the other side of the road as he had to give way to avoid being run over. He explained that he had his finger on the trigger when he moved out of harms way and was so shocked that he did not realise that more shots were fired. This he only realised when there were no more rounds left in the magazine. The vehicle continued driving and because of the noise made by the shots fired, he did not hear anyone calling out at him.

[30] On his way back to his car he saw a taxi passing him which, according to him, had not been on the scene at the time of the shooting. He found Fenola standing outside the car on the driver's side. Nothing was said between the two of them and after they got back into their vehicle, he drove off going straight to his other home situated in Hochland Park. Unlike Fenola he did not see the Discovery again and neither did he first drive to the hospital as she testified. He explained the reason as to why he directly went to that house saying, it was because it was closest and he was anxious and in shock. He reversed into the yard and parked the car with the rear end up against the garage where he remained seated until his brother Chris arrived. He only told Chris that he was involved in an accident but not the shooting as he did not want to talk about it. Chris then left but returned shortly thereafter. The accused is unable to say why. According to him, when Chris offered to take Fenola home after complaining of her not feeling well, she declined the offer and went inside the house where she lied down in the lounge. The accused disputes having sent Chris back to the scene or having removed the registration plates from the vehicle as testified by Fenola. He explained that he was simply not capable of doing so because of the state of shock he was in.

[31] In the morning (Sunday) after Fenola took a taxi home the accused locked himself inside the house for some 'quiet time and to meditate' as he was not well. Later that afternoon he decided to drive to his uncle to inform him as to what had happened the previous night but found his uncle ill and in bed. This upset him even more and from there he drove directly to the house of his former girlfriend (the mother of his son Christian Brinkmann) in

Khomasdal, where he left the Polo parked outside and told Christian to park it inside the yard. He denies having told him about the accident or shooting incident and disputes having asked him to remove the registration plates of the vehicle or the licence disk. According to the accused the boy must have removed it on his own and for reasons unknown to the accused. Accused thereafter called his friend Ben Biva to fetch him and take him back to the house in Hochland Park where he again locked himself inside the house.

[32] The accused said he had told no one about the incident of Saturday night until the following Tuesday, three days after the incident. He approached his uncle and told him that he was involved in a shooting incident and requested him to accompany the accused to the police station. His brother Chris was contacted and arrangements were made to bring the police to where they were at the uncle's house. He was subsequently arrested and taken into custody. He confirmed having led the police to the house where the car was parked but denies having tried to hide the vehicle. He is however unable to explain why he parked the vehicle at the particular house in Khomasdal, except for saying that he was not himself at the time. As to why he did not return the vehicle to his brother-in-law Ismael, he said there was no space at his place as his pickup was parked there. Bearing in mind that the vehicle was usually parked at Ismael's place during the week, the accused's explanation on this score seems to have a hollow ring to it. He was unable to explain why he did not return with the car and park it at his house in Hochland Park, except for saying that he was in shock.

[33] In cross-examination the accused disputed Fenola's evidence regarding him pulling out his firearm the moment he stepped out of the vehicle and said that at that stage she was still inside the vehicle and could therefore not have observed what was going on outside. It was however explained by Fenola that she had looked back to see where the accused was going and her evidence to this effect was never challenged. It had also not been put to Fenola that they never passed the Discovery vehicle on the way (as testified by the accused), and would therefore not have been in the position to make

observations on bullet holes on the side of the vehicle, or the driver leaning onto the steering wheel.

[34] In the same vein, the presence of Alexander Paulus (taxi driver) on the scene of the shooting was never challenged during his testimony, yet the accused during cross-examination said he was not present and therefore could not have witnessed the shooting incident.

[35] Bearing in mind the conflicting evidence between the version of the accused and that of Fenola and Paulus on material aspects of their evidence, it is settled law that 'when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character' (*President of the RSA v South African Rugby Football Union* at 37A-B).⁷ Neither Fenola nor Paulus were questioned on the conflicting evidence and where the accused would subsequently give evidence materially different from what these witnesses testified, the defence was under a duty to put the facts of his version to them under cross-examination, at least as far as he intended relying on same to discredit these witnesses. Failure to do so, in the absence of a reasonable explanation, may lead to the drawing of the inference that the accused's evidence is recently fabricated.

[36] Had the accused been correct that neither of these witnesses was in a position to make observations on the Discovery vehicle subsequent to the shooting (Fenola) or witnessed the shooting incident (Paulus), and that their evidence to that end was fabricated, it would imply that Paulus had no reason to contact the City Police shortly after the incident and make a full report of what had brought about death to the driver of the Discovery. Furthermore, how would Fenola have been able to describe the position of the said vehicle and the position the deceased was in – evidence that was corroborated by

⁷ 2000(1) SA 1 (CC).

witnesses who attended the scene that night – if they never drove past the Discovery on their way home? These were two independent witnesses, each giving their statements to the police well before the accused's arrest and in circumstances where they had no reason to collude with one another or the police. The explanation proffered by the accused on this aspect of his evidence not only stands alone, but is in conflict with the corroborated evidence of several independent witnesses testifying for the State. Therefore, in view of reliable evidence to the contrary, the accused's explanation on this score seems highly improbable.

[37] The evidence of two further witnesses testifying for the defence does not relate to the shooting incident but is evidently aimed at discrediting State witness Fenola, more particularly regarding her behaviour earlier that evening and the alleged offering of money afterwards to buy her silence as regards the events of that night.

[38] Isak Indongo, and Toivo Mbangula (Bossie) since that afternoon were enjoying themselves in drinking in the company of others at the bar adjacent to the car wash when joined by Fenola and the accused. Both witnesses in some detail elaborated on the fact that Fenola did not only drink ciders as she said, but had also taken whisky. Isak testified about Fenola having used his vehicle to go home and suspected her to have bought drugs on the way. Both witnesses, on their own admission, were drunk and unable to extend their drinking spree at Jokers Bar as planned. Their evidence albeit speculative of nature, should therefore be approached with some caution. This notwithstanding, there is no clear evidence that Fenola had been under the influence of either alcohol or drugs prior to or during the incident that occurred thereafter. In view thereof, little weight, if any, should be accorded to the evidence of the two defence witnesses pertaining to events of the afternoon and early evening. It is evident that the testimonies of the two defence witnesses have no direct bearing on the charges the accused is facing.

[39] Regarding their contact with Fenola and the alleged offering of money the following day, it should be noted that, although such conduct in itself

would be criminal, the accused had not been indicted in count 2 on a charge based on those allegations. It is therefore in my view unnecessary to consider the veracity or otherwise of the contradicting evidence given by Fenola and the defence witnesses in that regard.

The State's failure to call witnesses

[40] During his submissions defence counsel argued that the court should draw an adverse inference from the State's failure to call two witnesses listed as State witnesses namely, Christian Brinkmann and Faustinus Ndara. It was argued that the importance of hearing these witnesses, lies in the evidence they were to give which, as regards Brinkmann, would have shed light as to who removed the registration plates and licence disc from the accused's vehicle, as the accused asserted it to have been done by the witness. Furthermore, as regards the witness Ndara, he worked as security guard in the area where the shooting took place and a statement was taken from him during the investigation. No reason was given by the prosecutor why these witnesses were not called by the State and were made available to the defence.

[41] Mr *Makando* submitted that the defence intended calling both witnesses but declined doing so due to their unavailability. Ndara was apparently willing to give evidence but only when remunerated, while Brinkman, being the 18 year old son of the accused, unexpectedly disappeared and broke all contact with his family. In terms of s 179 of the Criminal Procedure Act 51 of 1977 the defence could have approached the registrar to have these witnesses subpoenaed and where the accused has shown that he was unable to pay the necessary costs and fees applicable, and the witnesses being material for his defence (as alleged in this instance), he would have been exempted from covering the costs and have the witnesses subpoenaed. The defence however did not follow this route and decided not to call the said witnesses.

[42] It has been held in a long line of cases that failure to call an available witness who can support a party's case can lead to a negative inference - see

Elgin Fireclays Ltd v Webb and *S v Teixeira*.⁸ From a reading of the cases it is evident that the court will only draw an adverse inference from a party's failure to call a witness if the witness is *available* and where the possibility existed that the evidence of the witness would create contradictions which could impair the evidence of the *single* witness.

[43] In the present instance the witnesses were not available, or not caused to be available; neither has the court been faced with the evidence of a single witness. As regards the shooting incident there were two eyewitnesses, whilst evidence relating to the parking of the vehicle was part of the accused's testimony, not that of the State. Accordingly, it is my considered opinion that there was no duty on the State to call either of the witnesses and in the circumstances I decline to draw any adverse inference from its failure to do so.

Private defence

[44] In respect of the attack, it is required that the attack must be unlawful upon a legal interest which had commenced or was imminent, while the defensive act must be directed against the attacker and necessary to avert the attack. It is further required that the means used must be necessary in the circumstances.⁹ Private defence is not a means of exercising vengeance or retaliation and there would be no defensive act where the unlawful attack had already passed. A further requirement for a defensive act is that the attacked person must be aware of the fact that he or she is acting in private defence, meaning, that the attacked person subjectively genuinely believed that he or she was acting in self-defence. A person therefore cannot accidentally act in self-defence as it requires an act of will. The onus is on the State to prove beyond reasonable doubt that the requirements for self-defence did not exist, or that the bounds of self-defence had been exceeded.

⁸ 1947 (4) SA 744 (A) at 750; 1980 (3) SA 755 (A) at 763D - 764B.

⁹ *S v Naftali* 1992 NR 299 (HC).

[45] Mr *Makando* submitted that the unlawful attack on the accused commenced when the deceased revved the engine of his vehicle and sped directly at the accused which necessitated him to draw his weapon and shoot at the approaching vehicle while trying to get out of harm's way. That he reasonably believed that the vehicle was driving at him and continued to threaten his life. It was further submitted that the accused was overwhelmed by fear and that the State failed to adduce evidence that could allay such fear, hence, the accused could not resist or refrain from firing at the vehicle.¹⁰ Counsel's submission and authority referred to seems to suggest that the accused at the time of the shooting lacked criminal capacity and should therefore be acquitted on the murder charge.

[46] It should be noted that at no stage during the pre-trial stages or the trial itself did the accused plead non-pathological criminal incapacity in defence to the murder charge; neither was any evidence adduced that could possibly support counsel's contention that the accused was so overwhelmed by fear that he lacked criminal capacity when firing his firearm.

[47] It is trite law that the burden is on the State to prove beyond reasonable doubt that the accused had the required criminal capacity when he committed the murder i.e. that he acted voluntary. In order to prove that the act was voluntary, the State is entitled to rely on the presumption 'that every man has sufficient mental capacity to be responsible for his crimes: and that if the defence wish to displace that presumption they must give some evidence from which the contrary may reasonably be inferred.'¹¹ The presumption of mental capacity is only provisional as the legal burden remains on the State to prove the elements of the crime, but until it is displaced, it enables the prosecution to discharge the ultimate burden of proving that the act was voluntary. The defence has a duty to lead evidence, usually medical evidence, from which it may reasonably be inferred that the act the accused stands charged with, was involuntary.

¹⁰ *South African Criminal Law and Procedure* (2nd ed.), Vol 1 by Burchell and Hunt at 274.

¹¹ An excerpt from the speech of Lord Denning referred to in *Bratty v Attorney-General for Northern Ireland* (1961) 3 All ER 523 at 534

[48] The State, in discharging the onus of proving that the accused had the required criminal capacity at the relevant time, is assisted by the natural inference that a sane person who engages in conduct which would ordinarily give rise to criminal liability, does so consciously and voluntarily. The accused would therefore be required to lay a proper foundation to, at least, create a reasonable doubt for consideration that the accused lacked the requisite criminal intent, capacity or ability to act. Medical evidence or otherwise in support of such defence must be carefully scrutinised and, only after having considered all the facts of the case, the court will decide the question of the accused's criminal capacity.

[49] In this instance no medical or other expert evidence was presented in support of the accused's contention that he temporarily lacked criminal capacity due to him having been overcome by fear. The accused's testimony as regards the time when he fired the shots at the deceased's vehicle was vague and contradicting in the sense that he said he was unaware of the shots being fired i.e. involuntary, opposed to him having kept his finger on the trigger and fired whilst trying to get away from the approaching vehicle. This was the only evidence adduced on the accused's state of mind at the relevant time and, in my view, falls significantly short from establishing evidence from which it may be inferred that the accused had acted involuntarily when he fired at the deceased's vehicle. Accordingly, I find the submission without merit.

[50] I turn next to decide the question whether the accused's actions were necessitated by the circumstances.

[51] The accused's evidence relating to him having acted in self-defence is contradicted by Fenola and Paulus, both stating that the accused had already pulled out his firearm as he alighted from the vehicle, and not only thereafter as he claims. They further disputed that there was an unlawful attack on the accused and that the deceased charged down on the accused with his vehicle. Both described how the accused immediately started shooting at the Discovery the moment he stepped out of his vehicle. There had been no reversing, revving of the engine or screeching of tyres as testified by the

accused. Generally it is accepted that a person may only act in private defence if it is not reasonably possible to avert the unlawful attack in any other way.¹² An important aspect of their evidence is that at no stage was the accused's life in any danger as the vehicle passed him on the side. When asked why he did not simply move out of the way of the approaching vehicle, he said everything happened in a split second and that he was overcome by fear. This notwithstanding, he managed to move across to the other side of the road with relative ease ahead of the fast approaching vehicle, and did not elaborate on any of the alternative options open to him. Both witnesses saw the accused continuously firing shots at the Discovery which, according to them, slowly drove past him. Both said the first shots were fired either in the direction of the tyres or down into the ground, whilst those fired subsequently were aimed directly at the cabin of the vehicle. They corroborate one another in material respects and at no stage had been discredited. Their respective versions are further strengthened by proof of bullet holes in the body of the deceased's vehicle of which two shots were fired from a position directly in front of the vehicle into the right tyre, and below the front registration plate. Four more shots were fired into the right side of the vehicle of which one was fatal and another hitting the deceased's right arm. It has duly been established that these shots were fired from the right hand side of the vehicle and slightly from behind. Presumably the last shot was fired into the tailgate of the vehicle.

[52] Though the two bullet holes in the tyre and front side of the vehicle would be supportive of the accused's testimony that he started firing at the approaching vehicle, it equally confirms the version of the two State witnesses who said that the first shots were fired while he was still walking towards the Discovery. The fatal shot, however, was fired from the side and not the front of the vehicle.

[53] The accused's version, on the contrary, is muddled regarding the firing of further shots and the only thing he seems to remember is that he had his finger on the trigger. Though stating that he is unable to clearly recall what

¹² *Burchell and Hunt* at 327.

had happened as he was overcome by fear, he denied having fired any shots after the Discovery drove past him. His evidence however stands in sharp contrast with the undisputed evidence of bullet holes found on the side and rear of the deceased's vehicle showing otherwise.

[54] The gravamen of the accused's testimony regarding shots fired into the vehicle is that he did not intentionally fire shots into the cabin, but that it happened because he kept his finger on the trigger when moving out of harm's way. This explanation suggests an involuntary act on his part when scrambling to get out of the way. The accused's inability to remember what happened at the critical moment, however, does not mean to say that his actions were therefore involuntary. Involuntary conduct by the accused at the time of the shooting would obviously negate his defence of having acted in self-defence, as he is required to have been aware that he was acting in self-defence when firing these shots, particularly the fatal shot.

[55] Another requirement of the defensive act which, on the accused's own version is lacking, is that the attack should not have been something of the past. Except for the first shots fired at the tyre and into the front of the vehicle, all remaining shots were fired when the vehicle had already passed him and therefore posed no further threat – including the fatal shot. The accused was clearly unable to come up with a satisfactory explanation justifying his firing of these shots and at best said it was caused by an involuntary firing of the firearm.

[56] The accused's evidence about these shots having been fired involuntary or accidentally, considered against the ballistic expert's evidence that, in order to fire that specific firearm the trigger has to be pulled and released between shots, is simply not true. The grouping of the three shots fired into the side of the vehicle seems to me indicative of shots aimed at the target; also in respect of the single bullet hole fired from behind into the tailgate of the vehicle. On the accused's own evidence there is simply no logical explanation that could possibly explain how these shots were fired when acting in self-defence.

[57] What is evident from the evidence of the witnesses Fenola and Paulus is that the accused upon disembarking the vehicle, drew his firearm and almost immediately started shooting at the tyres of the Discovery. This started even before he had reached the other driver to talk to him. It does not appear to me farfetched to say that the reason why the deceased tried to leave the scene was because he saw the accused approaching, gun in hand and firing in his direction. The two eyewitnesses were perfectly positioned to have seen the Discovery reversing before it sped off with screeching tyres, had it at all happened. I am unable to think of any reason why they would have denied this ever happening if it was indeed the case. It would rather appear that the accused deliberately fabricated and attributed such conduct to the deceased in order to give more credence to his version of having suddenly come under attack, justifying his otherwise unlawful actions.

[58] For the above reasons I am satisfied that the State has proved beyond reasonable doubt that the accused did not act in self-defence when he fired several shots into the deceased's vehicle whilst and after it had passed him, inclusive of the fatal shot. I have therefore come to the conclusion that the defence raised by the accused is nothing more than an afterthought and is accordingly rejected as false beyond reasonable doubt.

[59] I am further satisfied that it has been proved beyond reasonable doubt that the accused acted with intent when he unlawfully fired several shots into the cabin of the deceased's vehicle, killing him in the process.

[60] It does not appear to me that the accused had acted with intent to kill when firing the first shots downwards and at the wheels of the deceased's vehicle. However, when the vehicle drove off he raised his arm and fired several shots directly into the cabin and rear of the vehicle of which two bullets struck the deceased. Though the evidence falls short from establishing intent in the form of *dolus directus*, it undoubtedly proves that he subjectively foresaw the possibility of killing a human being by firing several shots into the

cabin of the vehicle and reconciled himself to this possibility (*dolus eventualis*).

Accused's subsequent conduct

[61] Though the accused strenuously denied having become aware of any injury caused to the deceased subsequent to the shooting, his follow-up behaviour tends to show otherwise. As stated above, Fenola said that when driving past the deceased's stationary vehicle, she saw bullet holes in the side windows and the driver's upper body leaning forward with his head resting on the steering wheel, whereupon the accused exclaimed that he had killed the person. Taking into account that Fenola could make these observations – which turned out to be correct as per those witnesses who visited the scene – there is no reason why the accused could not have made the same observations, which would explain his immediate reaction as testified by Fenola. This is manifested in the accused's subsequent behaviour which, in the circumstances, can only be described as irrational.

[62] On the accused's version he was a victim of an incident where there was a collision with his vehicle and where after he was nearly killed. As might be expected of someone in his position, the logical thing to have done in those circumstances was to report it to the police, moreover where he had to use his firearm to defend himself against an unlawful attack. This the accused did not do, saying he just wanted to get away and did not deem it necessary to go to the police. No logical explanation was advanced as to why he did not drop Fenola off before going to his uninhabited house in Hochland Park besides it being closest. According to her the accused said they should switch vehicles where after he would take her to the hospital; this he never did. The fact that he parked the damaged vehicle with the rear end out of sight from the street; that he did not return home to his family and wanted to isolate himself; had switched off his cell phone to avoid outside contact and, on Fenola's evidence, removed the registration plates and licence disc, is rather indicative of someone with a guilty mind; a person who has something to hide and not the behaviour of a person being anxious and in shock. Add thereto

him having moved the vehicle the next day to the house of his former girlfriend where it was later found by the police, again parked with the damaged side out of sight and without the registration plates and licence disk displayed.

[63] On his own evidence, these events remained unexplained and his inability to give any logical explanation for such strange behaviour, in my view, can only be described as out of the ordinary for someone who was not guilty of any wrongdoing and who had nothing to hide, as the accused claims. Neither would there have been any reason to muster courage before going to the police in order to find out what had happened to the Discovery so that he could 'make peace with [him]self'.

[64] Despite the accused's evidence to the contrary and his explanation of having been in shock when he so acted, the only reasonable inference to draw from the proved facts is that the accused, from the outset, appreciated the wrongfulness of his actions and until he decided to turn himself in after three days, did everything possible to avoid his arrest or to have the vehicle he had been driving traced. To this end there can be no doubt that his conduct, as set out above, was aimed at frustrating and interfering with police investigations into the accident and death of the deceased, and cannot be attributed to him having acted whilst in shock, an excuse that, in my view, can safely be rejected as false.

[65] Whereas there is no evidence that the accused destroyed or discarded evidence relevant to the investigation, the completed offence of defeating or obstructing the course of justice had not been proved. Although the accused cooperated by handing over the firearm used in the commission of the offence and directed the police to where the Polo vehicle was parked, there was until then, a clear attempt on his part to defeat or obstruct the ends of justice. The accused accordingly stands to be convicted for attempting to do so.

[66] In the result, it is ordered:

Count 1: Murder – Guilty, acting with intent in the form of *dolus eventualis*.

Count 2: Attempting to defeat or obstruct the course of justice – Guilty.

JC LIEBENBERG
JUDGE

APPEARANCES

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ACCUSED

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