CASE NO.: A. 01/2001

IN THE SUPREME COURT OF NAMIBIA

In the appeal of:

WOUTER OTTO KAREL LABUSCHAGNE APPELLANT

And

THE STATE

RESPONDENT

CORAM: Strydom, C.J.; O'Linn, A.J.A.; *et* Chomba, A.J.A.

HEARD ON: 2001/10/04

DELIVERED ON: 28/03/2002

APPEAL JUDGMENT

STRYDOM, C.J.: The appellant, as accused No. 1, together with his father, Jan Otto Karel Labuschagne (accused No. 2) and one Jacobus Abraham Myburgh, (accused No. 3) appeared before Mtambanengwe, J, on the following charges, namely:

1. Murder, in respect of the killing of Constable Johannes Tsamaseb;

2. Attempted murder in respect of Constable Nakanuku;

3. Contravening Section 28 (b) of Proclamation 17 of 1939, i.e. dealing in rough and uncut diamonds;

4. Attempted murder in respect of Warrant Officer Cecil George Routh; and

5. Attempted murder in respect of Dep./Comm. McKay.

Save for the first Count of murder, alternative charges were included in respect of all the other Counts. I will refer to these charges if it becomes necessary. The appellant pleaded not guilty to Counts 1,2,4 and 5 and guilty to Count 3. After a lengthy trial he was convicted on Counts 1, 3, 4 and 5 and was sentenced to a total of 25 years imprisonment. An application for leave to appeal was successful in regard to the convictions in respect of Counts 1, 4 and 5 but unsuccessful in regard to the sentences imposed on those Counts.

Ms. Zwiegelaar appeared for the appellant and Mr. Small for the respondent. I want to express my appreciation to Counsel for the full presentation of their cases to the Court especially where the Court is faced with a voluminous record.

A short summary setting out the background from which the above charges emanate, was given by the learned Judge *a quo* as follows:

"During February 1998 the police of the Protected Resources Unit (PRU) received information that the 3 accused were interested to buy rough or uncut diamonds. As a result a police operation or action was set up. The operation was to take place at Arebusch Lodge, Windhoek. Two adjacent rooms were booked at the Lodge one to be used by the would-be-sellers, the two police officers who were to conduct the fake sale with the three accused, and one to be used by the observation team. Constable Nakanuku and Constable Tsamaseb, the deceased, were the two police officers who were to act as the "sellers" while Warrant Officer (Sergeant then) Routh, Constables Nganjone and Namoloh were to be part of the observation team. The observation team was to listen in from the next room and was in telephone or radio contact with the selling team. At the initial stage of the action the informer, called William, who was with accused 3, and Tsamaseb were asked by accused 1 to leave the room where the sale was to take place, thus leaving Nakanuku and accused 1 alone. Then Nakanuku showed accused 1 the diamonds that were to be part of the transaction and after the latter had tested and weighed them he also left after telling Nakanuku that they would return after deciding what they would pay for the diamonds.

Subsequently, at the instance of the accused, the venue to conclude the deal was changed and it was decided it would take place outside on the open road. The road leading to nearby Windhoek Golf Course was chosen. Warrant Officer Routh said as a precaution to safeguard the transaction, now moved to an open place, that is outside the lodge, he called in aid, Chief

> Inspector McKay, the Commanding Officer of the Unit, that is the PRU, and it was then decided that Warrant Officer Prinsloo and Constable Minikasika would be standing on the other side of the Golf Course, Routh and McKay would stand at the Olympia side of the Lodge while Nganjone an Namoloh would go down on foot to the river bed where they would be close to Nakanuku and Tsamaseb.
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> A sketch plan of the area, part of Exhibit D, shows a road crossing the main Windhoek/Rehoboth Road, the road to South Africa, (I shall refer to that as the crossing henceforth). From Olympia towards the Golf Course; to the left is the Windhoek Truck Port, while the entrance to the Lodge is on the right after the crossing, and the road goes across a river-bed before turning to run North-South along the Golf Course. From the scene of where the deal was concluded to the riverbed the distance is indicated as 27.80 meters and is shown on the sketch as the distance from W – AB. From that scene to the cross-road is indicated as 300 meters, that is also shown on the photograph in Exhibit D, as Q to A."

It is clear that the sudden and unexpected change of the venue from Arebusch Lodge to the open road leading to the Golf Course caught the Police Officers, organizing the operation, by surprise. The result was that it became impossible to keep proper observation and to have other members nearby who could perform the arrest once a transaction was concluded. It was therefore left to Constables Tsamaseb (the deceased) and Nakanuku to improvise and to do the necessary. Because of the killing of the deceased, Nakanuku was the only witness for the State who could testify about what had happened at the venue where the diamond transaction was concluded and how it came about that the deceased was killed.

Although the evidence of the appellant as to what had happened on this fateful day differs widely from that of Nakanuku and also the other State witnesses such as Routh and McKay, there are also many instances where the evidence overlaps and which can be regarded as common cause. It is

clear that the State and Defence were in agreement as to the persons who were present at the new venue on the road to the Golf Course. Those were the three accused persons and the two aforementioned Constables. It is also common cause that the appellant was together with accused No. 2, his father, in one car, and accused No. 3 was at the scene in his own car. An illegal diamond transaction took place whereby a number of rough and uncut diamonds were “sold” to the appellant and his co-accused and that these diamonds were handed to appellant and that money was in turn handed to Nakanuku. The evidence also showed that accused No. 3 was the first to leave the scene in his motor vehicle and that he returned the way they came, i.e. back to where this road intersects with the Windhoek/Rehoboth main road.

It is also not in dispute that the first shot was fired by the deceased and that thereafter various shots were fired by the appellant, four of which hit the deceased in his upper body and back. In this regard a written statement by the appellant was handed in, in which he admitted that he fired these shots and in which the identity of the deceased and the fact that he suffered no further injuries until a post mortem examination was performed on the body by Dr. Linda Liebenberg, was also admitted. It was also not disputed by the Defence that the deceased had succumbed to his wounds at the scene of the shooting.

It is common cause that the appellant and accused No. 2 then also left the scene, and after making a U-turn, returned the way they had come. Accused No. 2 was the driver of the car with the appellant sitting in the back of the car on the left side. At the crossing of this road with the

Windhoek/Rehoboth main road, shots were exchanged between the appellant and Routh and McKay where Routh was wounded. It later turned out that some of the shots fired by Routh hit the motor vehicle in which appellant and accused No. 2 tried to escape. One of these shots penetrated the cabin of the vehicle and the bullet was found embedded in one of the front seats. At this stage I must mention that the appellant was also wounded but it is disputed where and under what circumstances he was so hit.

The police did not succeed in stopping the vehicle of accused No. 2. Accused No. 2 was able to turn off the road before reaching the crossing whereafter they again joined the main road and sped southward in the direction of Rehoboth. McKay pursued them and it is common cause that at least on one occasion the appellant fired shots on the vehicle driven by McKay. During the chase both vehicles also passed other vehicles on the road. In this regard McKay testified that two of the vehicles were marked police vehicles. Appellant did not dispute this evidence but denied that he saw these vehicles. The evidence is further that at one stage appellant and his father turned around, back in the direction of Windhoek, and McKay, who was then following some distance behind their vehicle, also turned around and returned to Windhoek. The motor vehicle of accused No. 2, who was now following McKay, ran out of petrol. It seems that one of the shots fired by Routh hit and damaged the petrol tank and it was leaking. After following the main road for some distance they, i.e. appellant and accused No. 2, turned off on a gravel road where they soon ran out of petrol. The police, in the meantime, acquired the assistance of a helicopter and the appellant and his father were arrested. After the arrest, the police found

and confiscated two pistols, one belonging to the appellant and one belonging to accused No. 2, as well as rounds of ammunition.

These weapons, as well as weapons used by the police during the shoot-outs, were sent away for forensic testing. The police also collected spent cartridges at the various scenes and these, together with spent bullets retrieved from the body of the deceased, from Routh and the motor vehicle of accused No. 2, were also forensically tested and the evidence of the ballistic expert forms an important part of the State's case.

Returning now to the scene of the shooting, it was pointed out by the learned Judge *a quo* that up to the stage when the diamonds and money changed hands, there were not any material differences between the evidence of Nakanuku and the appellant. Nakanuku testified that after the transaction was concluded the deceased asked the appellant for his telephone number. Appellant complied by writing the number on a piece of paper and handing it to the deceased. Thereafter the deceased informed the parties that he and Nakanuku were police constables and that this was a police action. Accused No. 3 thereupon jumped into his motor vehicle and drove away. The witness said that at that stage he was standing in front of the vehicle and had to jump out of the way to avoid being run over. The deceased then fired a warning shot into the air whereafter the appellant started shooting at the deceased at very close range. The deceased moved back towards the riverbed and as he fell down he fired another shot, also into the air. It was the opinion of the witness that this shot was not deliberately fired but that it was more of a reflex action as by then the deceased was already fatally wounded.

After these shots were fired the appellant shouted to accused No. 2 to drive away. Before driving into a southerly direction, the appellant fired a shot at the witness over the roof of the motor vehicle. The motor vehicle drove a short distance and then made a U-turn and drove in the direction of the crossing. Nakanuku testified that the deceased, when he identified them as police officers, also took out his appointment certificate and showed this to the accused.

Warrant Officer Routh testified that he agreed with the deceased that the latter would alert the observation team after the transaction was concluded by activating the cell phone in his possession. This would in turn ring one of the phones in possession of the observation team. Routh said that he was standing with Chief Inspector McKay at a place some 174.5 metres to the eastern side of the crossing when they heard a shot. The two of them jumped into their respective vehicles and drove towards the crossing. The witness saw accused No. 3 approaching in his car at high speed. He stopped him by driving in front of the accused and by flashing his lights. Routh got out of his car with his pistol in his hand and he showed the accused his appointment certificate and told him that he was a police officer. He also explained to this accused that this was a police action and searched him. McKay, after asking the witness if everything was in order, drove further along the road in the direction of the Golf Course.

Whilst the witness was busy with accused No. 3 he saw the vehicle of accused No. 2 approaching. It passed the vehicle of McKay and Routh stepped out into the road. He saw that accused No. 2 was driving the

vehicle and appellant was sitting at the back passenger seat. Routh said that he still had his pistol in his hand and pointed it at the ground. He shouted “Police stop, stop!” and showed his appointment certificate by holding it shoulder high. He saw the appellant open the back door of the vehicle and the witness gained the impression that he wanted to run away. The witness continued to shout in Afrikaans that they were police officers and that they, i.e. the accused, had to stop. The vehicle was indeed stopped some 15 to 17 paces from Routh and he saw appellant put out his left foot on to the ground, bring up his left arm and start firing shots at him. He immediately dived behind his motor vehicle but was hit by one of the shots. He then saw appellant getting down in the backseat of the vehicle and the vehicle was driven past them and onto the Windhoek/Rehoboth trunk road. As the car passed him he fired various shots at it and at the tyres of the vehicle. McKay who, in the meantime, had turned his vehicle around, followed the accused in the direction of Rehoboth. Routh said he fired seven to nine shots at the vehicle of the accused as it went past him.

Chief Inspector McKay said that he was summoned to assist with the operation by Warrant Officer Routh. This witness described how accused No. 3 was stopped. He said that both Routh and he shouted “Police, police” and when he saw that Routh had the situation under control, he continued along the road to the Golf Course. Just before he entered the river he saw a green Toyota motor vehicle coming in his direction and he knew that it was the other accused persons. He tried to stop them but failed. He reversed back the way he had come. He saw Routh standing in the road with his left arm raised and holding his firearm. The witness further saw the appellant opening the left rear door and the witness thought he wanted to get rid of

the diamonds. McKay then swung his vehicle around so that it faced towards the crossing and stopped. The witness said he jumped out of his car with his firearm at the ready and he shouted “Police, police”. He said he could also hear Routh shouting “Police, police”. The next moment appellant got out of the car and while he was leaning on the door of the car he started shooting in the direction of Routh. McKay himself then started to shoot but after he had fired two shots his firearm jammed and he could not use it any longer. The vehicle, in which the appellant and accused No. 2 were, turned off the road to the right and took the main road to Rehoboth.

After ascertaining what the position in regard to Routh was, McKay pursued the appellant and accused No. 2. At one stage he passed the vehicle of the accused and saw two clearly marked police vehicles in front of him. They had blue lights and police registration numbers. The witness drove up beside the leading vehicle and tried to elicit their help but they did not understand what he wanted them to do. At this stage the car of appellant and accused No. 2 passed his vehicle and was now again leading in front. During the chase McKay contacted his station and asked for assistance as well as a helicopter. He continued the chase and at one stage he saw appellant leaning out of the left rear window with a firearm in his hand. The next moment the witness heard two shots. After some distance this was again repeated and on this occasion McKay said he heard about four or five shots.

In the vicinity of the farm Krumhuk, McKay saw the vehicle in front of him slow down and make a u-turn back in his direction. Because he did not have a weapon, the witness said that he also turned around and proceeded

back to Windhoek. The witness testified that at times during the chase he travelled at a speed of 160 kilometers per hour.

As was pointed out previously there are no material conflicts between the version of the State and the appellant concerning the illegal diamond transaction itself. At the chosen venue accused No. 3 and Nakanuku drove in a southerly direction in the car of the accused. Nakanuku was given the money, which he counted and was satisfied that the amount was correct. They then returned to where the appellant, accused No. 2 and the deceased were sitting in the car of accused No. 2. Appellant and the deceased were sitting in the back of the car. In the meantime appellant was given the diamonds, which were in a plastic bag, and tested them.

Appellant testified that he could see that the deceased was not at ease. He was looking around and was asking why accused No. 3 and Nakanuku took so long to return. At the return of the latter accused No. 3, Nakanuku and the deceased got out of the respective cars. Nakanuku and deceased were standing behind the car of accused No. 2. Appellant said that he became restless and he could not understand why Nakanuku and the deceased did not leave in the car of accused No. 3. He then decided to get out of his car and ask them why they were not driving off. When he got out of the car the deceased was standing beside him. Appellant then felt the deceased put his hand in his shirt pocket where he kept a diary and in which there was also an empty plastic bag. He said he pushed the hand of the deceased away. The latter then saw the plastic bag containing the diamonds, in the left hand of the appellant and tried to take it. Appellant said he had to twist his hand out of that of the deceased and the deceased then moved

backwards in the direction of the riverbed, about six metres away. At this stage appellant was standing towards the back of the vehicle. He then turned in the direction of accused No. 3 and asked why they did not drive off. Appellant then heard the deceased whistling at his back and when he turned around to face him he whistled again and looked towards the river. Appellant realized that the deceased was calling someone. He then turned towards accused No. 2, who was still behind the steering wheel and said to him, “Father here is a robbery coming”. Appellant testified that he was slightly bent down and was talking into the car, seemingly through the open back door. At this stage his back was turned on the deceased. He said he saw the vehicle of accused No. 3 pull away and he then heard two shots and he felt a burning sensation on his right side. Appellant said he turned around slowly and when his side was facing this person he took out his pistol, took off the safety catch, and quickly fired two shots at this person, seemingly the deceased. He said when he turned around the deceased was standing with his pistol in his hand and it was pointed towards him. He, on two further occasions, fired two shots each at the deceased. He estimated that the first two shots were fired when the deceased was six metres away from him. The next two shots were fired when the deceased was about fifteen metres away and the last two at about twenty-seven metres away from him. Appellant said that he did not get the impression that any of the shots had hit the deceased. The deceased, in turn, had fired some six shots.

When they drove off after the shooting, appellant said they were going in a southerly direction on a part of the road which was unknown to him, and he told accused No. 2 to turn around to go back in the direction from which

they had come. On their way to the crossing appellant partially loaded the magazine of his pistol and also armed himself with the pistol, which was in the boot of the car, belonging to accused No. 2,. As they drove out of the dip, formed by the riverbed, appellant saw three motor vehicles parked off the road to the left of the crossing. One of these was the vehicle of accused No. 3 and he also saw the accused standing next to his vehicle. The other two vehicles were a Ford Sapphire and a pick-up truck. Two coloured men were standing next to these vehicles and, as they approached, these two men moved onto the road and the appellant saw that they had firearms and that these firearms were pointed at them. He shouted to his father to turn to the right off the road and he positioned himself by partially leaning out of the car's window whilst he held the pistol in both hands. Appellant said that immediately when the car started to turn, shots were fired at them and he then returned the fire. He fired four shots in quick succession at the persons who were both firing simultaneously. Accused No. 2 managed to turn to the right and when they joined the Windhoek/Rehoboth main road again, they drove in the direction of Rehoboth.

The appellant described how he subsequently took cover inside the car and said that he was sitting in the position as depicted in photograph 21, Exhibit "D". He further denied that it was at this second shooting that he was wounded by the bullet which had entered the cabin of the car as shown on this photograph as point BL 5. Appellant also denied that Routh showed his appointment certificate or that he heard anybody shouting that they were police and that they should stop.

As to the further course of events, which took place when McKay pursued the vehicle of accused No. 2, there is not much in dispute except that the appellant said that he only, at one point, fired two shots at the vehicle of McKay in an attempt to immobilize the vehicle and to stop the chase. As was pointed out by the Court *a quo* ballistic evidence in the form of spent cartridges was found at the one spot indicated by McKay, but could not be found at the second spot indicated by McKay. The appellant further denied that he observed, during this chase, any vehicles which were police vehicles although, at the same time, he said that he knew what a police vehicle looked like.

Neither accused No. 2 nor accused No. 3 gave evidence under oath. The appellant however called his mother, Mrs. Labuschagne, who *inter alia*, testified that she received a phone call from the appellant late on the afternoon of the 25th February, in which he told her that they were involved in an armed robbery and in a shooting. In regard to accused No. 3, his application for discharge on Counts 1, 2, 4 and 5, at the end of the States case, was successful. Not so the application of accused No. 2. However, in addition to his plea of guilty on Count 3, this accused was also only convicted as an accessory after the fact to the crime of murder on Count 1. He was found not guilty in respect of the Counts dealing with attempted murder in regard to Routh and McKay. All the accused, including the appellant, were found not guilty and were discharged in regard to the charge of attempted murder relating to Constable Nakanuku, i.e. Count 2.

In her address to us, Counsel for the appellant mainly attacked the evidence of Nakanuku and the findings by the Court *a quo* based on the evidence of

this witness. However, Counsel conceded, at the outset, that the learned Judge correctly accepted that Nakanuku was a single witness in regard to the killing of the deceased. Counsel also accepted that the learned Judge applied the principles concerning single witnesses and that he approached this evidence with caution. He correctly pointed out a number of instances where Nakanuku's evidence was unsatisfactory. The learned Judge further analysed the evidence and correctly summarized the discrepancies between Nakanuku's evidence and the contents of his witness statements. All this notwithstanding, it seems that Ms. Zwiegelaar was of the opinion that the Court should have rejected this evidence *in toto*.

Before dealing with this criticism by Counsel, there are two aspects that must not be overlooked. The first is that the Court *a quo* clearly believed the two State witnesses McKay and Routh, and if the Court did not misdirect itself in this regard, this is an important factor which must play a role in the overall evaluation of all the evidence, including that of the appellant and may also reflect on what had happened at the scene where the deceased was killed. The second aspect is that if the evidence of Nakanuku is rejected in part, or even all of it, it does not follow that the Court had to accept the version of the appellant. That depends on whether there is a reasonable possibility that the version may be true. This in turn depends on all the evidence and the probabilities emerging there from.

Ms. Zwiegelaar strongly criticized the evidence of Nakanuku. The first issue related to the question whether, and how, if at all, the deceased and Nakanuku identified themselves to the appellant and other accused as police officers. The second issue was what signal was agreed to inform

those officers not present at the scene that the illegal transaction was concluded and that they should approach. There is no doubt that in regard to both these issues the evidence of Nakanuku is suspect. The witness made a police statement soon after the incident occurred. In this statement he clearly ruled out the possibility that the deceased, when he identified them to the appellant, made use of his appointment certificate to do so. He further stated that it was a pre-arranged signal that the deceased would alert the other officers that a transaction was concluded by firing a shot in the air. However when the witness testified he first of all stated that the deceased had his appointment certificate with him and in fact showed it to the appellant and other accused when he arrested them. In regard to the pre-arranged signal he testified that it was agreed that the deceased would activate the dial of his cell phone to alert Routh and the others that a transaction was completed. He now stated that a shot was fired by the deceased in the air in an attempt to stop accused No. 3, who was getting into his car to leave the scene.

The Court *a quo* did not accept Nakanuku's evidence concerning the use of the appointment certificate by the deceased. Apart from the conflict between his evidence in Court and the statement made by him there were other reasons why the Court rejected this evidence. No appointment certificate was subsequently found on the person of the deceased. An appointment certificate was found, on later investigation, in the desk of the deceased at his office. To get over this hurdle, Nakanuku testified that the deceased had two certificates. He said it happened when the deceased lost his certificate and applied and was given another one. Subsequently he again found the lost certificate and was thus in possession of two

certificates. McKay conceded during his evidence that this was a possibility but he could not remember that he in fact issued a second certificate to the deceased. Routh also did not want to commit himself in this regard. The criticism levelled at the two officers by Ms. Zwiegelaar that by their evidence they did not want to exclude such possibility is in my opinion without substance. It seems to me that it is also highly improbable that the deceased would have had an appointment certificate in his possession. He knew that he would be in direct contact with the buyers and if he was searched and found in possession of an appointment certificate it would compromise the whole operation. However, Nakanuku's evidence that the deceased had two appointment certificates may well be true but on the evidence the Court *a quo* correctly found that the deceased did not have a certificate on his person at the time when he arrested the appellant and other accused.

It was convenient to deal with the issue concerning the appointment certificate in isolation and without reference to the other evidence of what had happened at the scene where the deceased was shot. In regard to the evidence of Nakanuku the Court *a quo* only accepted his evidence in so far as other credible evidence or the probabilities supported it. In order to evaluate this finding by the Court and to determine whether the Court misdirected itself it is, in my opinion, necessary to look at all the evidence and that includes the evidence put before the Court by the appellant and his witnesses. In this regard the starting point, as was also pointed out by the Court *a quo*, is that it was admitted by the appellant that he shot and killed the deceased, as was found by Dr. Liebenberg in her post mortem examination.

Routh testified that as a result of the change of venue by the accused, it was now impossible to have observers in place that would have been able to effect an arrest. The finding by the Court *a quo* that the deceased indeed identified them as police officers to the appellant and other accused, was heavily criticized by Ms. Zwiegelaar. She correctly pointed out the discrepancies contained in the evidence of the witness Nakanuku. On the other hand the deceased knew that it was their task to effect the arrest. How on earth would he be able to do so without informing the appellant that they were police? That was the only way in which the deceased could exert his authority and could hope to achieve an arrest, especially where he could not be sure when the other police officers would be able to get to them and render assistance if necessary. Added to the probabilities, is the fact that the appellant's evidence around the shooting of the deceased is riddled with improbability to a high degree and is further in conflict with objective factual evidence, as I shall later try to show. There is furthermore the strange conduct of accused No. 3 who drove away in great haste leaving the two "sellers" who, according to appellant, was driving around with him, stranded in the bush. In this regard, it was pointed out by Mr. Small that the appellant had stated under cross-examination that the shot or shots were only fired after Accused No. 3 started to pull away. This action by accused No. 3, which was never explained by him, supports the evidence of Nakanuku in this regard, namely that accused No. 3 tried to get away after it became clear that this was a police operation. In the light of all the evidence I am satisfied that the finding of the Court *a quo* was correct.

In regard to the second issue, namely the signal to be given by the deceased to the other police officers, Ms. Zwiegelaar submitted that the Court *a quo* misdirected itself by finding that there was corroboration for the evidence of Nakanuku that the agreed signal was the activating of the dial of the cell phone by the deceased. I agree with Counsel. In the light of Nakanuku's statement that he was informed by the deceased that the agreed signal was the firing of a shot the fact that when he gave evidence he now tailored his evidence to co-incide with that of the other witnesses does not constitute corroboration of his evidence. However this does not take the matter any further in the light of all the other findings by the Court *a quo.* The Court was entitled, as it did, to accept the evidence of Routh and McKay that that was indeed the agreed signal. No cogent reasons were put forward by counsel and in my opinion the Court was correct to accept this evidence. Ms. Zwiegelaar seems to suggest that on all the evidence the firing of a shot in the air was indeed the signal agreed to by the police officers. However this does not seem to me to take the matter any further. In any event it does also not fit in with the evidence of the appellant. According to him he did not react because a shot was fired into the air. He reacted because of his suspicion that a robbery was coming and because this was confirmed by the deceased firing at him and wounding him.

The Court *a quo* after a thorough and careful analysis of all the evidence rejected the version of the appellant and found that there was not a reasonable possibility that such evidence may be true. I am not persuaded that the learned Judge misdirected itself in this regard. It is a truism, as was pointed out by Mr. Small, that the trial Court has certain advantages by seeing and hearing the witnesses, which a Court of Appeal does not have.

(See R v Dhlumayo and Another, 1948 (2) SA 677 (A) on pages 705 and 706; Ostriches Namibia (Pty) Ltd v African Black Ostriches (Pty) Ltd, 1996 NR 139(HC) at 151G-152A). A Court of appeal will only interfere with the findings of the trial Judge where there is a misdirection on fact, where the reasons for its finding is shown by the record to be unsatisfactory or, though satisfactory, it is shown that the learned Judge overlooked other facts or probabilities. Furthermore the misdirection must be shown to be material and not every misdirection will enable the Court of appeal to disregard the findings of the trial Court. (See in this regard the Dhlumayo –case, *supra*, at page 701 to 703.)

In regard to what had happened at the shooting and killing of the deceased, the learned trial Judge came to the conclusion that not only was the version of the appellant inherently so improbable that it was false and could be rejected, it was also in conflict with the objective factual evidence and the evidence of Nakanuku where such evidence was supported by other cogent evidence. A few examples would suffice and would support the correctness of the Court's findings in this regard. The appellant testified that after he alighted from the car to find out why accused No. 3 and the two "sellers" did not leave, the deceased tried to retrieve the packet of diamonds and in the end the appellant had to wrestle to free his hand from the grip of the deceased. This scenario sketched by the appellant was not only improbable but also highly unlikely. The whole purpose of the operation was to enter into a transaction with the accused whereby diamonds would be placed in their possession so that those who later come to the scene may observe the diamonds in the possession of the buyer and would be able to testify to that extent. For this purpose the last place where those involved in the

operation would want the diamonds to be is in the hands of those who set the trap because that could jeopardize a successful prosecution. As was pointed out by Mr. Small this incident was also not put to the witness Nakanuku. Although an explanation was tendered by Counsel, which was accepted by the Court, it seems strange that the appellant would have forgotten about the incident until he gave evidence. The Court *a quo* correctly rejected this evidence.

The shooting incident whereby appellant alleged that the deceased shot and wounded him is another instance mentioned by the Court *a quo.* What struck one first is that there was seemingly no reason for this strange conduct of the deceased. Appellant was standing outside the vehicle and there was no indication that, at least at that stage, they wanted to escape from the scene. According to the appellant he slowly turned around and then saw the deceased standing some six metres away from him. Appellant then fired two shots in quick succession at the deceased who kept falling back and kept answering his fire. The evidence by the appellant that the deceased was some six metres away from him when he fired his first shots at the deceased was not supported by the evidence of Dr. Liebenberg and the ballistics expert, Superintendent Visser. I can mention that the expertise of these two witnesses was not in dispute.

Dr. Liebenberg described the wounds on the body of the deceased and also marked them as follows on a diagram handed in by her:

I. Shot wound from left arm through the chest.

II. Shot wound from the front, through the right chest.

III. Shot wound from the back into the left side of chest; and

IV. Shot wound from the back, through back muscles right.

On examination the doctor found that the first three wounds were serious and could each cause death. At the entrance to wound II, marked IIA, the doctor found round the edges of the wound soot tattooing and she testified that the shot fired in this instance was less than 1 metre form the body of the deceased. This evidence was further supported by Superintendent Visser who examined the shirt of the deceased which was handed in as Exhibit 8. He examined it optically as well as chemically and found gun propellant residue around the entrance holes marked IIA (i.e. the middle of the chest, front) and entrance hole IIIA (i.e. the left backside). According to the witness the presence of gun propellant residue on the shirt of the deceased is an indication that the shots were fired less than 70 cm from the shirt. Both witnesses also fully explained and justified their findings.

This evidence is irreconcilable with appellant's evidence that the deceased was some six metres away from him when he fired at the deceased. The appellant tried to explain away this conflict and put forward various suggestions. It was put to Visser that Nakanuku, when he tried to assist the deceased, contaminated the shirt. Another suggestion was that the gun propellant residue came from the shots fired by the deceased himself. Visser denied these possibilities, and explained why. Lastly the appellant, when he gave evidence, was of the opinion that his use of hollow point bullets could have carried forward the gun propellant that was found on the shirt of the deceased. This latter theory was never put to Visser and was only mentioned by the appellant during his re-examination.

The appellant testified that it was at this first scene that he was shot and wounded by the deceased. Dr. Liebenberg, who examined the appellant after the shooting, described the wound as a linear abrasion. The wound is depicted on photograph 21 in Exhibit “D”. At this stage it is necessary to proceed to what had happened at the crossing when the appellant and accused No. 2 approached the police. In this regard appellant testified as they came nearer the police, seemingly McKay and Routh, moved into the road with weapons in their hands. Appellant said that they were the first to start shooting and he only answered their fire by leaning out of the left rear window discharging shots in their direction. Both McKay and Routh denied this and stated that as the vehicle approached them it stopped and the appellant opened the left back door, where he was seated, put his one foot on the ground, and started to fire in their direction before the car again pulled away to the right and went onto the main road to Rehoboth. They denied that they opened fire and said that it was appellant who started shooting. This seems to be supported by the evidence of Visser who found that all the shots which hit the car were fired from the rear.

Subsequently Superintendent Visser examined the motor vehicle of accused No. 2. and found that the vehicle was struck by five 9mm bullets fired from the rear of which only one penetrated the cabin of the vehicle. Visser also found that another bullet, again fired from the rear, struck the left side of the vehicle but did also not penetrate the cabin of the car. These shots were all fired from the weapon of Routh. Photographs 17 to 21 indicate where the vehicle was hit and the trajectory of the various bullets. BL 5 on these photographs shows the trajectory of the bullet that entered the cabin

and also shows a demonstration by appellant how he was seated in the back of the car. When cross-examined, Visser agreed that if the appellant sat, as was demonstrated by him, he could not have sustained the wound. Visser however said that if the appellant had sat more to the right and had bent a little bit more forward the wound could have been caused by the bullet BL5. The demonstration by the appellant of how he was seated seems to me to be of little consequence. It is clear from Visser's evidence that not a great deal was required to change the position so as to fit in with BL5. Given the circumstances it would be surprising if the appellant would be able subsequently to exclude such a possibility or to insist that his demonstration of how he was seated could not be incorrect.

To go back now to the scene of the first shooting. According to the appellant he was standing at the backdoor of the car with his back turned towards the deceased when the shot was fired. How this bullet, which only struck him a glancing blow on his right side, and then continued further, could ever miss the car completely remains a mystery and a proposition which the Court *a quo* did not accept.

Miss Zwiegelaar also attacked the finding of the Court *a quo* that the appellant full well knew that he was dealing with the police. If this finding is correct, then it follows in my opinion that there is not room for a finding that the appellant acted in putative private defence. This was further made clear by answers given by the appellant in cross-examination when he stated that this was not a situation where he was informed that the two "sellers" were police and that he did not believe them. His evidence was therefore that at no stage was he informed by anybody that this was a

police operation and that he was dealing with police officers that were attempting to effect an arrest. I have already referred to the inherent improbability of this. However, that apart, the learned trial Judge accepted the evidence of Routh and McKay that at the crossing both of them shouted to the appellant and accused No. 2 that they were police. Routh also testified that he showed his appointment certificate when the car of accused No. 2 approached them. Ms. Zwiegelaar criticized this evidence of Routh mainly on the basis that the witness did not make any mention of his appointment certificate in his police statement. However Routh's evidence that he, minutes before, showed his certificate to accused No. 3 when the latter approached them in his car, was not gainsaid by anybody. Routh readily conceded that at a distance one would perhaps not be able to recognize a piece of paper as an appointment certificate but on the other hand one would hardly expect robbers intent on robbing the accused to hold up a piece of paper. However, both officers testified that they shouted that they were policemen. It does not end there. McKay testified that on the road to Rehoboth they passed two police vehicles, one with police registration number and the other with a blue light on top. Appellant's evidence in this regard is somewhat confused, either he did not see these vehicles or he denied that there were these vehicles on the road. Whatever the position, it is unbelievable that the appellant, or for that matter accused No. 2, missed all these opportunities especially in the light of the evidence of the appellant that when they approached the crossing they wanted to turn left, towards Windhoek, in order to report the attempted robbery to the police. The Court *a quo* correctly rejected the appellant's persistent denial of these facts.

Apart from the instances to which I have already referred there was also the acceptance by the trial Judge of Nakanuku's evidence that the deceased only fired two shots and that the deceased was in close proximity to the appellant when the latter fired the first shots at him. In contrast to the evidence of Nakanuku, the appellant testified that the deceased fired six shots. However only two spent cartridges were found, which were fired from the firearm in the possession of the deceased. Ms. Zwiegelaar submitted that this evidence was not conclusive and that it was possible that there were other spent cartridges fired by deceased, which were not found by the police when they subsequently searched the scene. Everything is of course possible but the fact remains that Nakanuku's statement, which was made a day after the incident, contained this information which was supported by what was actually found by the police on the scene. I agree with Mr. Small that it is also highly improbable that four other spent cartridges would go astray or that at least some could not be found by the police. Nakanuku's evidence as to the position of the parties prior to the shooting also found support in the medical evidence as well as the evidence of Superintendent Visser in regard to the gun propellant residue found on the shirt of the deceased which indicated that they were in close proximity when appellant fired the shots. That is again in contrast to the evidence of the appellant that at that time the deceased was some six metres away from him.

In regard to the evidence of Mrs. Labuschagne the Court *a quo* found that she only repeated what was told to her by the appellant and that her evidence did not take the matter any further. I agree.

An attack was also launched against the conviction of the appellant on Count 5, i.e. the attempted murder charge involving Dep./Comm. McKay. However, I agree with the Court *a quo* that to shoot at a motor vehicle travelling at high speed in an attempt to immobilize it by puncturing a tyre is an action which is fraught with danger. The bursting of a tyre is an occurrence which is feared by most drivers of motor vehicles as it so often ends in fatality. Under the circumstances, the Court's conviction of the appellant on the basis of *dolus eventualis* seems to me to be fully justified.

On the evidence I am satisfied that the Court *a quo* correctly accepted the evidence of McKay and Routh. The acceptance of their evidence in my opinion clearly shows that the appellant acted as he did in order to avoid being arrested. This, so it seems to me, also lends support to the evidence of Nakanuku and the probabilities that he fired on the deceased to achieve this object. He knew that it was a police operation, because he was told so by the deceased.

For the above reasons, I have come to the conclusion that there is no basis on which this Court can interfere with the findings and convictions of the Court *a quo* and it follows therefore that the appeal cannot succeed. Lastly I want to make mention of the police plan and photographs contained in Exhibit D. The plan as well as the photographs is the work of Sgt. Raymond Blaauw. This work was done in a professional and effective way and was of great assistance to this Court.

In the result, the appeal is dismissed.

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STRYDOM, C.J.

I agree.

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O’LINN, A.J.A.

I agree.

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CHOMBA, A.J.A.

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