REPORTABLE

CASE NO.: SA 39/2008

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

ELIFAS NGHIPANDULWA **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM:	Chomba, AJA, Mtambanengwe, AJA, *et* Damaseb, AJA
Heard on:	29/06/2009
Delivered on:	26/10/2009

APPEAL JUDGMENT

DAMASEB, AJA:

[1] The appellant is represented by Mr Z Grobler while the respondent is represented by Mr A Muvirimi of the Prosecutor General's Office. The appellant was one of three accused who stood charged in the Regional Court, Windhoek, with aggravated robbery, negligent discharge of a firearm, and discharging a firearm in a

public place. He was accused 2 at the trial in the Regional Court ("the trial court") where it was alleged that he participated in the commission of the offences acting with common purpose with his co-accused. I will in this judgment refer to him as accused 2. The trial court convicted all three accused only of aggravated robbery committed with common purpose. Accused 2 who had a relevant previous conviction was sentenced to 20 years imprisonment.[1] The trio appealed to the High Court ("the Court *a quo*") which dismissed the appeals against both conviction and sentence. That Court also refused them leave to appeal to the Supreme Court. Accused 1 and 3 were equally unsuccessful in their petitions to the Chief Justice, but this Court granted accused 2 leave to appeal to it. The present appeal is therefore in consequence of the leave to appeal so granted accused 2.

[2] The facts are tolerably straightforward: On 9 December 2001, two Zimbawean nationals, Archibald Matangi and Morgan Matangi (father and son in reverse order) set about what turned out to be an ill-fated journey to Zimbabwe, commencing the trip from Soweto Township in Katutura. The journey was to take them by taxi from Soweto to Klein Windhoek and thence to Gobabis *en route* to Zimbabwe. They made it to Klein Windhoek alright and there were offered a lift to Gobabis by accused 1 who was in a Volks Wagen (VW) with accused 2 and 3. Accused 1 was the driver (and it appears owner) of the VW. He offered to transport the two Matangis to Gobabis for the fee of N$30 per person. The deal was struck and the father and son

[1] Accused 1 received 10 years while accused 3 received 20 years as he, like accused 2, had relevant previous convictions

boarded the VW. On the pretext of collecting more fee-paying passengers in a bigger vehicle which had to be fetched in Nubuamis, accused 1 drove in the general direction of Katutura. Somewhere along the way, he parked the VW under a tree in the bush as accused 3 said he needed to smoke dagga which he proceeded to look for; first inside the VW and then, accompanied by accused 1, in the boot of the VW. It was when these two accused persons went in the direction of the VW's boot that Archibald, suspicious of their intentions, followed them. Accused 3 then removed a firearm which was on the person of accused 1 and advanced with it towards Archibald. In legitimate self-defence, Archibald pounced on accused 3 and in the process accused 3 lost control of the firearm which was then grabbed by Morgan. Acting in concert, accused 1 and 3 later dispossessed Morgan of the firearm and, having chased after him about 150 meters from the VW , robbed Morgan of a substantial sum of cash – in the process discharging the firearm with the intention of frightening Morgan into submission. It is apparent therefore, that the actual robbery (and the shooting) happened near a road about 150 meters away from the VW in which accused 2 was sleeping. Accused 3, having committed the robbery (using the firearm belonging to accused 1), ran away leaving accused 1 and 2 at the scene. It is common cause that accused 2 was asleep in the VW when the robbery took place. Accused 2 then woke up and prevented the Matangis from removing their bags which they had placed in the boot when they boarded the VW in Klein Windhoek. Archibald somehow managed to find his way to the Katutura police station where he summoned the help of a police officer and returned to the scene with the officer. It was at the

scene of the crime that accused 1 and 2 were then arrested while they were still with Morgan. It appears these two accused remained there as the vehicle was still there after accused 3 ran away and the key to the VW had somehow disappeared.

[3] Both Matangis testified at the trial. Archibald testified that when they boarded the VW in Klein Windhoek accused 2 was asleep and remained in that state until after the robbery had been completed. That much is clear from the following exchange between accused 2 and Archibald when the former cross-examined the latter:

> "**Accused 2**: Now, what shows to you that I was half asleep?
>
> **Archibald**: You was just lying like somebody who is sleeping, closing your eyes.
>
> **Accused 2**: Just like I am sleeping?
>
> **Archibald**: Yes.
>
> **Accused 2**: Okay, now after you found me half asleep, did I then ever spoke either to you or to my co-accused 1 and 3 here?
>
> **Archibald**: No.
>
> **Accused 2:** Now is that what you want to imply that one can decide while you are sleeping?
>
> **Archibald:** <u>When accused 3 said he want to smoke 'ganja' you were asleep,</u> so it was me and my father and the accused no. 1 and accused no. 3.

Accused 2: Now I further want you to tell this Court that from the time you got into the VW up to the time where you were robbed of your items, now were I sleeping all he time?

Archibald: Yes.

Accused 2: Now is there anything which can link me to this offence up to the time that you came there regarding this offence?

Archibald: No." (My underlining for emphasis)

[4] Morgan who corroborated Archibald's account of the conduct of accused 1 and 3 in the robbery also corroborated Archibald to the extent that accused 2 was asleep at all material times. Morgan testified as follows in his evidence in-chief:

"They said no we want to go and leave this one there, I think it's the second accused, they want to drop him because he is drunk and they want to drop him there. Then they drove. When we were now on our way they started asking us where are all those people at the hiking point, where are they going. Then I told them no, the people are going to the border. Then they said if we can get the combi, I think we can make money. Then "how much did you used to pay to the border". Then told them, no, we pay N$50-00 to the border. Then they said, no let us go and collect the combi. Then I asked them where is the combi. They said it is in Katutura then I said no, there is no problem. Then they drove back (intervention) …" (My underlining)

[5] When cross-examined by accused 2 Morgan confirmed that the former never spoke from the moment they boarded the VW and was asleep at all material times. He also confirmed that accused 2 never participated in the actual robbery.

[6] Both Archibald and Morgan testified that at some point after the robbery had been committed by accused 1 and 3 (while accused 2 was asleep) and after accused 3 had fled from the scene of crime, accused 2 – upon emerging from his sleep (which the trial Court aptly characterised as a ”drunken stupor”) - prevented the Matangis from removing their bags from the boot of the VW; that he demanded to know why the father and son had taken the gun (”our gun”); and that he assaulted them. Accused 2 had of course denied that he assaulted the Matangis or that he acted in furtherance of the robbery – maintaining that he acted in the way he did (i.e. telling Archibald not to remove the bags) in the belief that he and the co-accused were in fact the victims of criminal conduct by the Matangis.

[7] Accused 2 testified on his own behalf and said under oath that he and others had been drinking at a party at the home of accused 3 the night before 9 December 2001 and that he had a lot to drink. The next day he learned that accused 1 and 3 wanted to go to Gobabis with a vehicle belonging to accused 1. He testified that he met accused 1 for the first time at the home of accused 3 and did not know accused 1 before that. Accused 2 testified that he declined the invitation to accompany accused 3 to Gobabis as he had a lot to drink and was tired – clearly a euphemism that he was very drunk. (This evidence corroborates the evidence elicited by the State that accused 2 was very drunk). He asked instead to be taken home and in that way got into the VW. According to accused 2, while waiting in the VW for

accused 3 (who was then trying to trace his girlfriend) he fell asleep and only remembered waking up in the bush in a strange place amongst strangers to find that accused 1 and 3 were not present and that a strange man was removing things from the boot of the VW. Accused 2 testified that he then concluded that this stranger (which must have been Archibald) was removing bags from the VW and tried to stop him from doing so. He stated in very clear terms that he thought Archibald was stealing from the VW. When cross-examined accused 2 denied that he associated himself with the gun as alleged by the Matangis.

[8] Accused 1 did not testify in his own defence. In his testimony, accused 3 corroborated accused 2's version that he was taking him home as he was drunk. After describing how he was invited by accused 1 to accompany him to Gobabis, accused 3 testified:

> "[We] were supposed to drop accused no. 2 in Nubuamis…because that's where he to stays. Before he got into the VW he asked me if we cannot drop him there…So, when we came into the VW with my girlfriend we found accused no.2 sleeping. After we dropped my girlfriend Your Worship we just decided to drive to Gobabis …and accused no. 2 was also in the VW sleeping". (My underlining)

And then, after describing how they came to offer a lift to the Matangis who then boarded after paying the fee demanded by accused 1, accused 3 continued to testify thus:

"We turned and accused no. 1 asked me if we can just drop accused no. 2, then we can just drive straight to Gobabis from there, after dropping him." (My underlining)

[9] The trial Court reasoned in justification of its conviction of accused 2 that he was part of a *modus operandi* consisting of all the accused persons setting about offering lifts to Gobabis to the unsuspecting victims, loading them on the vehicle and then robbing them of their property. The learned magistrate specifically held that the three accused persons planned the robbery beforehand and that accused 2 was part of its planning and execution. The trial Court accepted the version of the Matangis that accused 2 was violent towards them and was satisfied that accused 2 knew that the father and son had taken possession of the firearm used in the robbery by accused 1 and 3 (presumably with accused 2's knowledge) and that it was that firearm that accused 2 wanted back from the Matangis.

[10] This approach to the evidence (and the consequential inference of guilt in respect of accused 2 flowing therefrom) apparently found favour with the Court *a quo* when it upheld accused 2's conviction for aggravated robbery acting in common purpose with accused 1 and 3. The Court *a quo* came to the following conclusion in respect of accused 2:

"However it is clear that the second appellant knew much more of what was happening around him while he appeared to be sleeping than he was willing to admit in his testimony. The record reflects that when the second appellant woke up he immediately wanted to know where the gun ("our gun") was and he physically

prevented Archibald from leaving the scene with their luggage. Whether he was carrying a half brick and empty beer bottle, or hurled these at Morgan and missed, is neither here nor there. It suffices that when Morgan came to the rescue of Archibald, the second appellant told him to leave the bags alone until he explained why he took "our gun" as the second appellant put it. For this reason I take the view that the conduct of the first and third appellants was also correctly imputed to the second appellant. See also *S v Mgedezi and Others* 1989 (1) SA 687 at 607)." (My underlining for emphasis)

[11] In drawing the inference that accused 2 was complicit in common purpose with accused 1 and 3, both the trial court and the Court *a quo* appear to have been swayed by the fact that accused 2 associated himself with the gun at some point by demanding back "our gun", held back the bags belonging to the two victims; and assaulted them. Mr Muvirimi relies substantially on this circumstance in support of the conviction. Although the trial court for its part found that there was a prior agreement between accused 2 and his co-accused to commit the armed robbery, Mr Muvirimi suggests in his heads of argument (relying on *S v Mgedezi* 1989 (1) SA 687 (A) at 705 I-J and 706 A-B [2]) that the trial court was entitled to convict accused 2 based on the doctrine of common purpose even where there is no evidence of prior agreement between him and the co-accused. Curiously, Mr Muvirimi also relies on those very same facts and circumstances for the inference that accused 2 knew about the robbery prior to its commission. He also suggests, rather courageously,

[2] In the absence of a prior agreement to commit a crime, a conviction based on common purpose is only justified if (a) the accused was present at the scene of the crime , (b) he was aware of the commission of the crime , (c) intended to make common cause with those who were actually committing the crime ,(d) and manifested his sharing of a common purpose with the perpetrators of the crime by himself performing some act or association with the conduct of the perpetrators with (e) the requisite mens rea to commit the crime.

that accused 2 pretended to be asleep as part of the scheme to rob the Matangis and was fully aware throughout that a robbery was underway.

[12] Contrary to Mr Grobler's suggestion otherwise, the Matangis were very impressive, if fair witnesses. In my view they made no unfair accusations against accused 2. Although I prefer the version of the Matangis that accused 2 was aggressive towards them and in fact demanded the gun ("our gun") back from them - nothing should turn on this because, even if accused 2 lied on this aspect, it does not automatically follow that his account that he had not knowingly participated in the robbery and did not associate himself therewith after it had been committed, is not reasonably possibly true[3]. Because a man tells lies at his trial he is not necessarily guilty. It is judicially recognised that innocent people do tell lies at times because they think that telling the truth might put them in trouble[4]. The present appears to me to be such a case. Or, to put it differently, a Court properly directing itself cannot be satisfied beyond reasonable doubt that it is not the case.

[13] Accused 2 had made it clear under oath that when he emerged from his "drunken stupor", the person he saw around the VW was Archibald who was a complete stranger to him and who was then removing bags from the VW. As he put it under oath:

[3] False testimony by an accused is a factor in favour of the State's case, but excessive weight should not be given to it*: S v M* 2006 (1) SACR 135 and also *S v Engelbrecht* 1993 NR 154 to the effect that false evidence by the accused is not decisive of guilt.

[4] *R v Gani* 1958(1) SA 102(A) , *Maharaj v Parandaya* 1939 NPD 239

> '' So when I woke up …from my sleep I just found myself in an open space in the car…Now I was alone in the car, I was now wondering where are my co-accused persons, my friends with whom I was in the car. I got off from the car, so on my left side of the car …outside the car I found a strange man…whom I never saw in my life before. So I approached him and I asked … where are the people with whom I was in the car. This person responded in English, so he was aggressive and he just said I just want my bag…So, I was now surprised how he came there… To me it looks like this person was trying to steal… So I told him okay leave those bags so that these people with whom I was in the car can come. (My underlining for emphasis)

[14] Accused 2 also testified that he later met accused 1 who, when he asked him what was going on, said that it was only a misunderstanding which would be cleared up when the police came. This undisputed evidence shows that accused 2 was not aware that the Matangis had been the victims of an armed robbery at the hands of accused 1 and 3; that he believed (mistakenly as it happens) that they were in fact the villains and that Archibald did not tell him that his associates had just robbed them. Even if, therefore, accused 2 lied on the aspect of the gun, or acted aggressively towards the Matangis, that is not consistent only with guilt. The State bore the *onus* to prove beyond reasonable doubt that when accused 2 did these things he did so well-knowing that the Matangis had been the victims of a robbery at the hands of accused 1 and 3 and that in so acting he was acting in furtherance of the robbery. When it is said that an accused is presumed to be innocent until proven guilty, what is really meant is that the burden of proving his guilt is on the prosecution. This requires a clear conviction of guilt and not merely a suspicion, however strong

that suspicion. A mere fanciful doubt where it is not in the least likely to be true, would not prevent conviction. As I understand the law, a Court of law is not entitled to draw an inference of guilt from a set of facts, if the same facts are capable of an inference inconsistent with guilt, or are consistent with an inference that the accused's version is reasonably possibly true. In that event, the State would have failed to discharge the burden of proof beyond reasonable doubt and the accused would be entitled to his acquittal.

[15] I find it significant that counsel for the State submitted at the trial that the presiding magistrate could (in the alternative) convict accused 2 of assault with intent to cause grievous bodily harm. It must have been apparent to counsel for the State that the evidence raised a reasonable doubt that accused 2 might be innocent of the crime of aggravated robbery. To counsel's submission, the trial court commented:

> ''Although the State Prosecutor in his address was prepared to accept that if accused no. 2 is not convicted of armed robbery, at least he must be convicted of the crime of assault with intent to do grievous bodily harm in that he threw a brick or a stone at the second State witness Mr Morgan, but the Court is of another opinion and I am not prepared to accept the concession by the prosecutor in this regard. The prosecutor is also of the opinion that the Court must accept the evidence of the two State witnesses. Being that so, it is clear to the Court that the three accused persons acted in concert, they worked together. The Court finds it as a fact that the three of them worked with common purpose to rob the two complainants. It is the experience of the Court that robbers and also many other criminals have what we name a *modus operandi*, they have a way in which they operate, and in the mind of the Court the

> *modus operandi* of the three accused persons before the Court was to go to that scene … where the people are gathering to take a hike to Zimbabwe to rob them. They decided to do so and they planned to do so.'' (My underlining for emphasis)

The trial court then proceeded to find that accused 2 was aware of the pistol which was in the possession of accused 1 because that is the first thing he challenged the Matangis about when he got out of the vehicle.

[16] It is a cardinal rule of our criminal adjudicatory process that every item of relevant evidence led at the trial and every inference naturally and reasonably arising therefrom must be weighed in the scale in deciding the outcome of a case; and no single item of evidence or inference must be considered in isolation in the process. As was put by Nugent, J (as he then was) in *S v Van der Meyden*[5]1999 (1) SACR 447 at 449J – 450A-B:

> "The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the Court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored." [My underlining for emphasis]

[5] Quoted with approval in *S v Aswegen* 2001 (2) SACR 97 (SCA) at 101 D-E

[17] As an appeal court we are entitled to interfere if we are satisfied that the trial court's evaluation of the evidence was clearly wrong having regard to the totality of the evidence on the record.[6] I have come to the conclusion that the trial court's evaluation of the evidence is clearly wrong. That Court failed to place the following evidence and inferences in the scale in favour of accused 2: He had not met accused 1 before the 9th of December. Accused 1 (then a stranger to accused 2) was in possession of the firearm at the time it was used in the robbery. There is no evidence accused 2 was aware that accused 1 had a gun on his person when they met at the home of accused 3. When accused 1, 3 and the latter's girlfriend got into the VW, accused 2 was already asleep. Accused 1 was the owner of the VW. Accused 2 declined the invitation by accused 3 to accompany them to Gobabis. If there was a prior plan ("*modus operandi*" as the trial court called it) to go to Klein Windhoek and offer lifts to strangers in order to rob them, there is not a scintilla of evidence to show accused 2 was aware (let alone part) of it. He asked instead to be taken home – a fact that is inconsistent with the finding that he was part of a *modus operandi* to go to Klein Windhoek to lure hikers into the car and then robbing them. Accused 2 was still asleep when the Matangis boarded in Klein Windhoek. He never participated in any discussion that led to the Matangis boarding the VW. After they loaded the Matangis in Klein Windhoek, accused 1 and 3 were on their way to drop accused 2 (then still sleeping) at home when they executed the robbery. After the robbery had been committed by accused 1 and 3, accused 2 who was

[6] S v Hadebe and Others 1998 (1) SACR 422 (SCA) at 426 c-e

asleep when it happened, was informed by accused 1 (upon his asking what the matter was) that it was only a misunderstanding which would be cleared up when the police arrived.

[18] It is hardly surprising that accused 2 did not leave the scene of crime and was found at the scene by the police. Had he been part of a robbery, I do not think he would have remained at the scene of crime. If, as is suggested, accused 2 only pretended to be asleep and was aware throughout of the robbery, it is inconceivable that he would have remained at the scene of the crime while accused 3 ran away. Such conduct is inconsistent with guilt. The same cannot be said of accused 1. It is obvious from the evidence that the key of the VW belonging to accused 1 could not be found. He was therefore unable to drive the car away; and even if he had run away, the car was an item of potent physical evidence which linked him to the crime and by reference to which his identity could be established with ease. His presence at the scene of crime after the robbery can therefore not be equated with that of accused 2. Could on these facts and inferences, the trial Court, properly directing itself, have found that accused 2 was party to a pre-planned *modus operandi* to offer lifts to people and to rob them? I think not.

[19] Looking at the evidence in its totality, accused 2's version (and the inference it raises) that he did not participate in robbing the Matangis; and that he honestly but mistakenly believed that the Matangis meant him and his co-accused harm at the

time he emerged from his ”drunken stupor”, is reasonably possibly true. His violent behaviour towards the Matangis and his demanding back ”our gun” upon waking up (and also his false denial that he did so) must not be taken in isolation but must be seen against the backdrop of him waking up and seeing people he had not met before removing bags from the vehicle in which he was being conveyed. It is so probable that when he woke up from his sleep accused 2 heard an argument over a gun between accused 1 and the Matangis and decided to side with accused 1 in demanding back “our gun”. In view of his explanation that he woke up and saw strangers removing bags from the car, it is a possibility that ought to have been put to the Matangis because, on the facts of this case, such an inference is not fanciful. Sight should not be lost of the fact that accused 2 was not legally represented and that, as a result, his case was not presented with appropriate forensic finesse.

[20] On the facts as I have set out, the trial court, if it had directed itself properly, should have found that the State had failed to prove the guilt of accused 2 beyond reasonable doubt and should have acquitted him of aggravated robbery. It is unclear to me on what evidence the trial Court based its finding that accused 2 was part of the planning of the robbery and a ‘’*modus operandi*". What is abundantly clear to me is that the trial court completely disregarded the evidence of the Matangis[7] and that of accused 3[8] - evidence which is clearly exculpatory of accused 2 and points to the possibility that he might be innocent.

[7] Paragraphs 3, 4 and 5 supra
[8] Paragraph 8 supra

[21] I have serious reservations about the Court *a quo's* conclusion that accused 2's cross-examination of the Matangis and his own testimony "dwelt on peripheral issues and left intact" the evidence of the prosecution that "while the robbery was in progress the second appellant stayed in the VW but emerged therefrom in time to prevent Archibald from removing his and Morgan's bag from the VW and, in the process, uttered words to the effect that the gun used in the robbery either belonged to him or to the first or third appellants." On the contrary, through his cross-examination of State witnesses, accused 2 challenged the State's case that his stopping the Matangis from removing the bags from the boot of the VW was knowingly in furtherance of the robbery perpetrated by accused 1 and 3.

[22] Accused 2 who was legally unrepresented, and received no assistance whatsoever from the presiding magistrate when he conducted his cross-examination, remarkably succeeded in raising a reasonable doubt that his conduct towards the Matangis after the robbery had been committed was done with the necessary *mens rea* to commit robbery in common purpose with accused 1 and 3.

[23] For the reasons I have given, I have come to the conclusion that the appeal must succeed and therefore make the following order:

The judgment and order of the Court *a quo* are set aside and there is

substituted the following order: "The appeal of appellant Eliphas Nghipandulwa succeeds and the conviction and sentence against him are set aside".

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DAMASEB, AJA

I agree

_____
CHOMBA, AJA

COUNSEL ON BEHALF OF THE APPELLANT:	Mr Z J Grobler
Instructed by:	Legal Aid
ON BEHALF OF THE RESPONDENT:	Mr A Muvirimi
Instructed by:	Prosecutor-General