

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MATHEUS FRANS TJAPA

Appellant

and

Respondent

THE STATE

Coram: SHIVUTE CJ, MAINGA JA and SMUTS JA

Heard: 5 July 2016

Delivered: 30 September 2016

APPEAL JUDGMENT

MAINGA JA (SHIVUTE CJ and SMUTS JA concurring):

[1] This is an appeal against the convictions and sentences on three counts of attempted murder and negligent discharge or handling of a firearm in contravention of s 38(1)(l) read with sections 1, 8, 10 and 39 of Act 7 of 1996.

[2] The appellant was arraigned in the High Court, Windhoek on seven counts. They are as follows:

1. Count 1 – robbery with aggravating circumstances as defined by s 1 of Act 51 of 1977;

2. Count 2 – attempted murder of Sadrack Jeremia Katjjuanjo;
3. Count 3 – attempted murder of Salatiel Mukohongo;
4. Count 4 – attempted murder of Gerhard Kakonda;
5. Count 5 – negligent discharge or handling of a firearm, thereby endangering the life or limb of other persons, namely Sadrack Jeremia Katjjuanjo and/or Salatiel Mukohongo and/or Gerhard Kakonda in contravention of s 38(1)(l) read with ss 1, 8, 10 and 39 of Act 7 of 1996;
6. Unlawful possession of an unlicensed firearm in contravention of s 2 read with ss 1, 8, 10, 38 and 39 of Act 7 of 1996; and
7. Unlawful possession of ammunition in contravention of s 33 read with ss 1, 8, 10, 38 and 39 of Act 7 of 1996.

[3] Appellant was convicted on all seven counts and he was sentenced as follows: Thirty (30) years on the robbery with aggravating circumstances, ten (10) years on each attempted murder, one (1) year each on the negligent discharge of a firearm, possession of a firearm and possession of ammunition which sentences were ordered to run concurrently with the sentence on the robbery with aggravating circumstances.

[4] The events that led to the arraignment of the appellant unfolded as follows: At about 19h00 on Saturday, 11 October 2008, the Woermann & Brock grocery store in Khomasdal, Windhoek, was in the process of closing business for the day. Three men, amongst whom the appellant, entered the shop, armed with firearms, wielded the said firearms and ordered all customers and personnel who were in the store to lie down. These men demanded that the personnel handover cash money in the tills and the safe. They threatened the people in the shop, forced into submission and assaulted Maria Shagama and/or Shali Ndapewa

Hamutegela and/or Christina Karises and/or Sheriene Cloete. Two of the three exited the shop first with bags of money. They got into a vehicle without registration numbers and drove away. The appellant was the last of the three to exit the shop. He also left the shop with bags of money. In an attempt to escape from the police and other members of the public who attempted to apprehend him, the appellant allegedly fired numerous shots with an unlicensed .22 revolver in the air and at Sadrack Jeremia Katjjuanjo, Salatiel Mukohongo and Gerhard Kakonda with intention to kill or attempt to do so. He neither was in lawful possession of the live bullets which he fired in an attempt to escape. He failed to escape and he was arrested about 400 metres from the shop in a storm water pipe. The .22 revolver was found in the vicinity from where he was removed in the storm water pipe and two spent cartridges were found in the chamber of the revolver and money was found stuffed in his clothes. A bag of money was also found not far from where he was removed in the storm water pipe.

[5] The appellant appeals with leave of this court.

[6] To appreciate the issues raised in the appeal, a summary of the evidence before the trial court on the counts appealed against is necessary.

[7] I turn to the summary of that evidence.

George Raki Moatshe

[8] He was at the time a traffic officer in the employment of the City of Windhoek. On 11 October 2008, at about 19h00, he was on his way home. He resides in Khomasdal. As he drove past Woermann & Brock shop he was stopped by two persons who informed him that there was a robbery in the shop. He looked on his right hand side and could see that the door of the shop was not completely closed. The people inside were laying on the floor. He did not have his pistol on him. He parked on the left hand side near where a construction of flats was going on. Where he had parked there was also a white Toyota Corolla parked. It had no

registration plates. He called or summoned his colleagues for help. While he was there two men came out of the shop. He saw one with a bag, the kind of bag used in the bank to carry money. The two got into the Toyota Corolla. Before they left they shot at him and struck his vehicle; but he was not aware that his vehicle was struck. He wanted to chase the Toyota Corolla but someone informed him that there was still another person (robber) in the shop. Fearing for his life, he drove and parked a distance from the shop and observed from there. A person came out from the shop. He started shooting in the air. He left the shop in the southerly direction. He directed his colleagues the direction the person took.

Salatiel Mukohongo

[9] He was then employed by the City of Windhoek as a police officer. On 11 October 2008 he and Constable Katjjuanjo were on duty in Otjomuise and Khomasdal when they received a report of a robbery at Woermann & Brock, Khomasdal. They proceeded to the shop where they met Sergeant Moatshe. Sergeant Moatshe showed them the direction the person who turned out to be the appellant took. They went into that direction. They met lots of people who pointed out the appellant. They followed him up to when they were close to him about 9 – 10 metres. He was crossing Mahatma Gandhi Street into a riverbed. They told him to stop. In his own narration 'he just turned and he start shooting to us. As I am standing here I also wonder, I do not know how he miss me because he was too close to me, because when I was like . . . following him . . . people . . . were just saying is that one and they were like a lot . . . just when I am close to him he just turned then he start shooting.' They shot back at him. He went down the riverbed. They waited for assistance and when their colleagues arrived they searched for the appellant in the riverbed and found him in a storm water pipe. They found the revolver next to where he was found. In the chamber were two spent cartridges. They found money in his clothes. He was injured on the left foot. He could not recall how many shots the appellant fired; but they were more than three. In cross-examination he said the

shots by the appellant were directed at him. He does not know Katjiuanjo's reaction when the appellant fired at him and Katjiuanjo was allegedly with him. When he shot back at the appellant he could not strike him because at the time the appellant went down the riverbed and he does not know how the appellant sustained his injury.

Gerhard Kakonda

[10] He was then a Superintendent in the Traffic Department of the City of Windhoek. On 11 October 2003 he was informed by Sergeant Moatshe of the robbery at Woermann & Brock in Khomasdal. Sergeant Moatshe was shouting that someone had shot at him. When he arrived on the scene people were pointing in the direction of the playground, pointing at someone who was running and shooting. He gave a radio message asking for assistance from other units. He parked and pursued the suspect on foot. Near Engen Service Station he met some of their crime prevention personnel, that is, Katjiuanjo and others. They approached the appellant but he was running and shooting backwards at them. He could not say how far they were from him, but it was a reasonable distance and one could still see the person. When asked where the person was aiming his shots, he said the person had two white bags and he was pointing either at the bags and then he would shoot towards their direction. He was asked whether the appellant was shooting at his bags and his reply was in the affirmative and he made a demonstration which was not explained. He was further asked as to who was approaching the appellant. He said it was Katjiuanjo and another person whose name he had forgotten but he testified before him. In all probabilities, that person was Salatiel Mukohongo. He was further asked where he was when the appellant fired. His reply was that he was coming from the back of the shopping centre itself crossing and 'it is when I followed'. Counsel for the State repeated the question and his reply was that by that time when he had gone a distance away from the shop, from the public and then the police also merged, it is when the firing from inside (riverbed) started as well. These vague answers prompted counsel

from the State to ask him a leading question, namely, was he firing at the police officers and his answer was in the affirmative and he added in his own words, 'he was directing to us as police officers'. He further testified that they advanced towards him, trying to avoid being shot. At some point they went to lie next to the wall to take cover. Appellant then ran into the bushes and continued shooting but the place was surrounded. After sometime there was a 'slow shooting' from the riverbed. They then moved in and took him out. He also testified that the police officers were also shooting.

[11] In cross-examination he testified that the appellant started shooting randomly at them when he joined Katjujanjo and Salatiel Mukohongo. He recalled two shots that were fired. He denied shooting at the appellant. When asked as to who was shooting he said Mukohongo was trying to shoot in the direction of the appellant. When the question was repeated he said he could hear gunshots from Mukohongo's firearm. He was asked whether he saw Mukohongo shooting which he denied. He was asked where he was when the appellant fired the very first shot. He said it was quite a distance and that he could not give the measurement but it was a distance. He was asked how he then knew that the shots were directed at them. His reply was that, 'when he (appellant) turned towards them, they would go down and a shot would be fired'. He was asked whether the shots were fired many times he said 'I say it is maybe two times that I observed' and that they took cover only once.

Shadrack Jermia Katjujanjo

[12] He was then in the employment of the City of Windhoek as a City Police Officer. On 11 October 2008 he and Mukohongo were doing patrol duties in Khomasdal when they received a report over the radio of a robbery at Woermann & Brock, Khomasdal. They went to the scene where they met Moatshe who directed them where the suspect (appellant) went. They followed the public and saw the appellant about 80 metres away. They followed him leaving the public behind. They followed him until they were close. While they followed him he was

shooting in the air. When they were about 60 metres from him, he turned and shot at them. They laid down. Mukohongo fired back but missed him. When the appellant started running he took the firearm from Mukohongo and shot the appellant in the right leg. He started crawling down the riverbed. He does not know how many shots he or Mukohongo, or the appellant fired. He did not see Kakonda anywhere. He does not know whether the appellant fired at anybody other than the two of them and yet he had his eyes fixed on the appellant at all times. When the appellant went down the riverbed he did not fire any shots. Openshaw removed him from the storm water pipe. He saw two empty cartridges in the revolver found on the appellant.

Percy Evelyn Openshaw

[13] He is employed at Crisis Response, a registered emergency medical rescue company. On 11 October 2008 he responded to a call from G4S for an armed robbery at Woerman & Brock that led him to Khomasdal. The control room guided him to M H Greeff School. At the school he heard gunshots a block or two away. He drove to where the gunshots emanated. On the scene there were lots of City Police, G4S and Namibian Police vehicles and there were lots of shots fired. City Police, G4S and Namibian Police were all shooting. He and colleagues calmed the scene and determined where they were directing the shooting. He learnt from the people on the scene that the appellant was last seen in the reeds in the riverbed. They surrounded the whole riverbed completely and five of them started to search the riverbed. He led everyone into the riverbed. He looked in the storm water pipe and saw an adult male lying in the pipe. They ordered him to come out but he made no reaction. He returned to his vehicle and fetched what he termed a snake hook used to catch snakes. He grabbed his leg with the snake hook and pulled him out of the pipe. The appellant was bleeding from the one foot, it appeared like a gunshot wound. He started treating the appellant and he called for an ambulance. The Namibian Police searched him and they found

lots of banknotes in his pants. They went back to search in case there were other suspects and they came across a carrybag full of money 20 - 23 metres in the reeds from the storm water pipe end. He checked the pipe again and found a .22 revolver where the appellant was removed. They did a proper search in the vicinity, there was no one other than the appellant.

[14] The appellant's defence is a denial of the State's case. He was in a bar at Wernhill gambling when people approached him and told him that he could find the vehicle he was looking for in Khomasdal. He had just arrived from the north (Owamboland) where he runs a liquor business and sells clothing. He took a taxi to Khomasdal. He did not know the name of the service station he had to go to, he was only told to go to the first service station. He was dropped at this one service station where he enquired about cars. He was told there was a garage nearby and that he could walk on foot. He walked to the said garage. As he was walking he saw people coming from the opposite direction and they were throwing stones at him. He thought for himself that Windhoek is inundated with 'chochies' and he had money on him. He put the money in his underwear and he fell into a ditch. These people continued throwing stones and he was struck on the forehead. He fell backwards. They continued pelting stones at him and that is when he entered the water drain pipe. While he was in the pipe lots of shots were fired. The police later arrived on the scene and he was removed from the pipe. He does not know how he was injured on his right foot. He denied being in possession of a firearm or ammunition. He denied firing any shots and denied the robbery.

[15] The thrust of the attack on the attempted murder convictions is founded on the contention that the trial court erred:

1. When it convicted the appellant on the said charges, when there was no evidence whatsoever that the appellant intended to kill anyone.
2. In finding that more than 3 shots were fired, when only two spent cartridges were found in the chamber of the revolver.

3. When regard is had to the elements of the offences, by finding the appellant guilty of negligent discharge as well as handling of a firearm based on the same facts or evidence.

[16] The State supports the convictions and sentences imposed on the attempted murders. But counsel for the respondent concedes that the appellant's conviction on count 5, negligent discharge or handling of the .22 revolver should be set aside, as that charge relates to the same shooting incidents in the three counts of attempted murder and the same complainants. I agree; it is a concession wisely taken. The finding that the appellant had intention to commit the attempted murders excluded the element of having acted negligently and *vice versa* which is the argument for the appellant, that a finding of negligence in count 5 excluded a finding on the same evidence that the appellant had *dolus* to commit attempted murder.

[17] In support of the convictions, counsel for the respondent argued that Kakonda, Mukohongo and Katjujanjo testified that appellant fired shots with a .22 revolver directed at them with intent to kill them, which intention was established on the evidence. Counsel relies on the South African cases of *R v Sofianos* 1945 AD 809 at 812, *R v Huebsch* 1953 (2) SA 561 AD, at 567-568A; *S v Toubie* 2004 (1) SACR 530 W at 548-550; *S v Ngcamu & another* 2011 (1) SACR, para 19-20. It was urged that the presence of two spent cartridges in the chamber of the revolver does not exclude the possibility that appellant fired more than two shots. For this contention counsel relies on the evidence of Openshaw who testified that a revolver does not eject spent cartridges, they remain in the chamber until the chamber is opened and spent cartridges removed. It is further argued on this point that the appellant had the revolver at all times, Openshaw did not look for spent cartridges and when Openshaw arrived on the scene there were gunshots which could be more than thirty and thus appellant who was not followed immediately in the riverbed had the opportunity to remove all the spent

cartridges and load the last two bullets whose spent cartridges were found in the chamber. Appellant falsely denied possessing the .22 revolver and falsely denied firing any shots, so counsel argued, and that if he fired shots at the police with a lesser intent or not at the police officers but warning shots in the air or next to them and only 2 shots, it was for the appellant to say so.

[18] I accept that appellant lied when he denied possessing a firearm and firing any shot but there is no evidence, given the two spent cartridges found in the chamber of the .22 revolver, that he fired more than two shots. It was argued that Openshaw did not look for spent cartridges. But the same Openshaw testified that the riverbed was completely surrounded. He further testified that after they had removed the appellant from the pipe they went back to search in case there were other suspects. It was during that search that they came across a carrybag full of money 20 - 23 metres in the reeds from the storm water pipe end. He further testified that he checked the pipe again and found the .22 revolver where the appellant was removed. He further testified that they did a diligent search in the vicinity and there was no one other than the appellant. I do not want to speculate about the nature of the terrain but the possibility is that in the search of possible suspects they could have stumbled on any discarded spent cartridges. In any case it was for the investigating officer given the allegation of many shots fired and only two spent cartridges found in the chamber to have done a thorough investigation of any spent cartridges in the vicinity. It is the prosecution that had to prove that appellant fired more than two shots and not the appellant.

[19] This brings me to the question whether appellant fired direct shots at the three police officers as it was argued. This question should be approached on the basis of the evidence which had been adduced on behalf of the State. Moatshe testified that when appellant exited the shop, he started shooting in the air. Katjiuanjo testified that he and Mukohongo pursued the appellant until they were close to him. He was shooting in the air. It was only when they

were 60 metres from him that he turned and shot at them. Mukohongo testified that they were 9 - 10 metres when he shot at them. In cross-examination he stated that shot(s) were directed at him. He actually wondered why appellant missed him as he was too close to him. He does not know the reaction of Katjiuanjo when appellant shot at him (Mukohongo). Kakonda puts the shooting by appellant at a reasonable distance, where in my opinion, there was no risk to their lives. He testified that when he arrived on the scene, the public on the scene pointed in the direction of a playground, they pointed at someone who was running and shooting. Near Engen Service Station they approached the appellant who was running and shooting backwards at them. When asked how far the person was, he could not say the distance but said it was a reasonable distance but they could still see the person. When asked where the person was aiming his shots, he said he would aim at the container bags he had and then he would shoot towards their direction. He was asked in relation to the shots where was he, he said a distance from the shop, away from the public. In cross-examination he said the appellant started shooting randomly when he got to Katjiuanjo and Mukohongo. Both Katjiuanjo and Mukohongo deny seeing Kakonda. He was pertinently asked how far he was when the appellant fired the first shot, he said it was quite a distance, he could not give the measurement. The testimony that the appellant fired at them was as a result of a leading question by counsel for the State as I have indicated above. He further said when the appellant entered the riverbed he continued shooting from there but the place was surrounded. This evidence (shooting from the riverbed) is not corroborated by Katjiuanjo and Mukohongo the two officers he says were the ones who approached the appellant.

[20] In *Huebsch*, Shreiner JA at 567F-G referred to *Rex v Sofianos* where at 812 Watermeyer CJ said:

‘In the present case the complainant was shot in the stomach and if the accused intended to shoot complainant there he was doing an act which was likely to kill and

which he knew was likely to kill and it followed that in those circumstances he was guilty of assault with intent to murder. There is no evidence which suggests that accused fired at the complainant with the limited intention of injuring him but not killing him.'

The learned Judge continued to say:

'Although the question with which I have been dealing was not apparently considered in *Safianos*' case, the statement shows that in order to support a conviction for attempted murder there need not be a purpose to kill proved as an actual fact. The language of the statement differs slightly from that which was used in *Valachia*'s case, *loc. cit.*, and discussed in *Rex v Thibani*, 1949 (4) SA 720 at p 729 (AD). But both convey the notion of an appreciation that there is some risk to life involved in the action contemplated, coupled with recklessness as to whether or not the risk is fulfilled in death.'

[21] In *Ngcamu*, also relied on by counsel for the respondent, the two appellants were convicted in a Regional Court on one count of robbery with aggravating circumstances, two counts of attempted murder and two counts of unlawful possession of firearms. Appellants appealed to the High Court which confirmed the convictions except that of unlawful possession of firearms. The brief facts are that Dinga Mabuza and Tobias Mhlongo employed by Coin Security, a cash-in-transit company, were robbed at BP Filling station and garage in Clare Estate. Their assailants ran to a silver-grey Honda Ballade which was parked on the edge of the garage forecourt with its doors open. As the Honda Ballade moved away, Mabuza gave chase. As he continued the chase, one or more persons in the Honda fired shots at him. Mabuza returned fire, shattering the Honda's rear window causing the driver of the Honda to turn and look behind, towards Mabuza. Mabuza recognised the driver as the

appellant, whom he knew well. The chase was so close as 8 - 10 metres from the Honda that Mabuza could see that an 'ND' registration plate was stuck on the original registration plate of the Honda.

The Supreme Court of Appeal in regard to the convictions of attempted murder in paras 19-20 stated:

[19] I also do not have any difficulty with the conviction on the charge of attempted murder in respect of Mabuza. Shots were fired at him from the getaway vehicle in order to discourage him from pursuing the Honda Ballade. It matters not that he was in an armoured vehicle and that he did not believe that he was at risk of injury or death from this gunfire, as the bullets could not penetrate the armoured vehicle. The shooter had the requisite criminal intent, even if they were attempting the impossible.

[20] What troubles me, however, is the conviction of attempted murder charge in respect of Mhlongo (count 2). There was no evidence that the robbers fired any shots at him. In his evidence Mhlongo repeatedly stated that the shots from the Honda Ballade were not directed at him, but at Mabuza who was driving the armoured vehicle. When questions were put to counsel for the State, as to the basis upon which the appellant was convicted on this count, she was driven to concede, correctly in my view, that the conviction thereon was not sustainable. Accordingly, the appellant's appeal against the conviction on this count is good and the conviction thereon falls to be set aside. (the underlining is mine).

[22] In *Toubie* a full bench of the WLD set aside two convictions of attempted murder of Thoni and Dhlamini and yet the two security officers were the ones who were in hot pursuit of the robbers. As they pursued the robbers, one of the robbers had produced two firearms and started shooting continuously. Thoni returned the fire and struck one of the assailants who fell down.

Farber AJ who wrote the judgment for the court stated:

‘There is nothing in either the evidence of Thoni . . . or Dhlamini . . . which even remotely suggests that any of the shots discharged were directed at them. Thoni in his evidence stated that a shot was directed at Dhlamini, but in the absence of any corroboration thereof from Dhlamini, the trial court ought to have had doubt in the matter.’

[23] In my opinion the authorities relied on by counsel for the respondent do not support the respondent's case, to the contrary they support the appellant's case. Whether there was an attempt the enquiry is factual, relating to the particular circumstances of this case in which the following factors, amongst others, would play a part: whether at the stage it is alleged that appellant fired or directed the shot(s) at the police officers he had made up his mind to commit the crime, the degree of proximity or remoteness which that arrested conduct bore to what would have been the final act required for the commission of the crime and generally, considerations of practical common sense. See *S v Du Plessis* 1981 (3) SA 382 AD at 399H-340A. The evidence adduced on behalf of the State reveals inconsistencies and contradictions which cast doubt on whether at the relevant time the appellant had intention to injure or murder the three police officers. Even, if I were to accept that the appellant fired in the direction of the police officers, it appears that Kakonda on his own version, was at a distance, his life was not at risk and there could have been no attempt to murder him. Both Moatshe and Katjjuanjo testified that the appellant fired shots in the air, when he exited the shop and when Katjjuanjo and Mukohongo pursued him. That evidence, given the two spent cartridges found in the chamber, tends to show that at the time it is alleged that appellant turned and fired at Katjjuanjo and Mukohongo, he had spent the ammunition that there was. Stated differently, there were no live bullets in the revolver and the appellant's alleged turning and firing at the two officers was a mere gesture, to scare the officers from following him and

it could not have endangered the lives of the officers or anyone else. In actual fact Mukohongo in cross-examination testified that appellant aimed at him or directed the shot at him, excluding Katjuanjo from any alleged risk of life. He further testified that he does not know the reaction of Katjuanjo when that shot was fired. He does not know how appellant received his injury. In other words he did not see Katjuanjo shooting the appellant in the right foot and yet Katjuanjo testified that when Mukohongo fired at the appellant and missed, he took the firearm from him and shot the appellant in the right leg. At most, that evidence of Mukohongo reveals an offence of pointing a firearm and nothing more.

[24] The conclusion that the chamber contained no live ammunition, in my opinion, is in substantial accord with the evidence of Mukohongo where he said he does not know why appellant had missed him as he was so close to him. On that evidence appellant could only miss him on four scenarios, namely, if he was a bad shooter, he did not intend to injure him, he was a distance away from the police officers as per the evidence of Kakonda or there were no live ammunition in the chamber and the latter on the circumstances of this case, is the more likely and plausible. Therefore, an intention to kill any of the three officers was simply not established on the evidence. The appellant's conviction on counts 2, 3 and 4 must consequently be set aside but that on count 5 should be retained, as he was properly convicted on that count.

[25] In the result, I propose orders in the following terms.

1. The appeal succeeds.
2. The convictions and sentences on counts 2, 3 and 4 are set aside.
3. The conviction and sentence on count 5 are confirmed.

SHIVUTE CJ

SMUTS JA

APPEARANCES:

M Ntinda

Appellant:

Instructed by the Director Legal Aid

Respondent:

A T Verhoef

For the State