CASE NO.: CC 89/99

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

JONAS KADILA	ACCUSED **1**
SILAS NERO	ACCUSED **2**
JONAS NAKASHIMBWA	ACCUSED **3**

CORAM: HOFF, A.J.

Heard on: 1999.07.14-16

Delivered on: 1999.11.09

JUDGMENT:

HOFF, A.J.: The three accused persons were charged with the following crimes. Firstly murder, secondly theft of a fire-arm, alternatively contravening Section 2 of Act 7

of 1996, that is possession of fire-arm without a license, and thirdly defeating or obstructing the course of justice. All three accused pleaded not guilty to all counts. In their plea explanation accused persons denied having committed the offences. Accused no. 1 admitted that he attempted to sell a fire-arm to one Petrus Iipinge. All three of them explained that the deceased committed suicide by shooting himself in the head with a fire-arm. It is not disputed that the deceased Martin Shigwedha died on the 17th of October 1997 and that the course of death was blood loss from a bullet wound in the head. Petrus Iipinge testified that one Friday evening accused no. 1 and one Helmut Palasius woke him up and he was informed by accused no. 1, that he was selling a fire-arm for N$250 and that the fire-arm is licensed and the fire-arm was left with him, accused no. 1 promising to supply the license the next day. He never received this license and after a few days he learnt that accused no. 1 had been arrested. He visited the accused on one Saturday at the charge office to ask him about the documentation of the fire-arm and the accused then informed him that he should give the fire-arm to Helmut Palasius. When he approached Palasius afterwards Palasius refused to accept the fire-arm. According to this witness accused no. 1 told him that he that is accused no. 1 was the owner of the fire-arm when he was approached by accused no. 1 on the Friday evening. He also testified that he did not ask the accused where he got the revolver from.

Ronel Brand testified that a .38 special revolver was stolen from her house in Rundu on the 3rd of October 1997. It is not disputed that this fire-arm was the weapon which caused the death of deceased and which was subsequently found in the possession of Petrus Iipinge. Helmut Iipinge had testified that accused no. 1 approached him late one

Friday night during October 1997 and wanted to sell a fire-arm. He had no money and took accused no. 1 to the house of Petrus Iipinge. He confirmed that accused no. 1 wanted to sell the fire-arm and promised to supply Petrus Iipinge the next day with the necessary documents regarding the fire-arm. Sometime later he was approached by a police officer and accused no. 3 and he referred them to Iipinge. Iipinge handed the fire-arm to the police officers. The State also called some police officers as witnesses which I will just briefly summarised their testimony. Clarence Ndinda testified that on the 17th of October 1997 him being a police officer received information about a gunshot that went off and when he visited the scene he found that the deceased laying in the street and he was bleeding from his head. At that stage the deceased was still alive, he contacted the ambulance and other police officers. When the deceased was loaded on the ambulance, he was still alive. He could see wounds on both sides of the head of the deceased.

According to him he received the information about a gunshot about 21:15 that evening. Then Martin Indongo also a member of the Namibian police testified that he also arrived at the scene about 21:15 that evening where he found the deceased and other police officers. He made certain enquiries and met one Thomas Shivolo. The next day he went with one Tara to Walvis Bay where he found accused no. 2 at a certain house, sleeping. He later interrogated accused no. 2 who informed him that he was with accused no. 1 and accused no. 3 the previous evening when the deceased accidentally shot himself in the head. He, that is now the police officer returned with accused no. 2 to Swakopmund where accused no. 1 and accused no. 3 were pointed out by accused no. 2. Accused no's 1 and 3 were warned according to the judges rules and they denied that they were with

accused no. 2 and *with* the deceased, they were then also arrested. Werner Awarab also testified that he is a sergeant in the Namibian Police and was the investigating officer in this case and at some time he took a *warning statement* of accused no. 3 and later also recovered the revolver from Petrus Iipinge.

The next State witness called was Thomas Shivolo and he testified that the deceased was a *right handed, this* evidence was not disputed. Andreas Shiimi was the eye witness called by the State and he saw persons chasing each other and then heard a shot went off a person fell *down* and he went to tell his grandfather and thereafter the police arrived at the scene. He testified a shot went off, persons ran in different directions and one ran in a direction where he was and the other in the opposite direction after the *shot* was fired. Before they ran away someone picked up something from the ground and put it in the pocket. He could not identify the person who ran away because at that stage he had entered the house to tell his grandfather. According to him the person who past him was wearing a T-shirt.

According to the statement of the *police* by the witness he saw a person chasing the other one, that is the deceased, but hearing his testimony he said he saw two persons chasing the deceased and he explained by stating that when the statement was made to the police he only counted the one who ran *past* him and not the one who ran in the direction *of the dunes. According* to the statement the street was well lit. During cross-examination it was also put to the witness that none of the accused persons wore *white takkies.* According to the witness the person who ran past him was *wearing white* takkies. It was

further put to him that he could not have seen people came running or chasing one another because as he explained there were other houses which obstructed his view.

The next witness called by the State was medical doctor Raynard Matheis and he testified that he is a qualified medical doctor with about 20 years experience as medical practitioner, district surgeon and also experienced in the field of medical legal work. He carried out the post-mortem on the deceased and found the cause of death was blood loss from the bullet wound in the head. According to him the entrance wound was the left side of the head and the exit wound on the right side of the head. According to him if the barrel of the fire-arm was put against the skin one will get as he termed it a blow up of the wound margins and also bruising which in this case he did not see. If the muzzle was further away, less than a metre from the wound, one should see powder particles around the entrance wound. This was also not mentioned in his report. He excluded the possibility of a contact wound and said that it was highly unlikely that the wound could have been self inflicted although technically possible but the person would have been in an awful position in order to *inflict* such a wound on himself. He testified that if a person is right handed he would have had to take his hand to the other side of his head in order to inflict the wound and turned his hand around and then shoot himself in that manner. The path of the bullet through the head was horizontal. He further testified that the person who sustained such a wound would die within 10 to 15 minutes due to blood loss.

During cross-examination it was intimated that according to the different sizes of the wounds indicated on the sketch of the postmortem report, the exit wound should have

been the entrance wound and vise versa. According to the witness he described that he had observed on the skin of the head of the deceased and he adhered to his testimony-in-chief namely that the entrance wound was on the left side of the head of the deceased. Although the witness was cross-examined to some length by Ms Hamutenya who appeared on behalf of the accused persons his testimony remained unshaken. Evidence of this witness is accepted by the Court as reliable and trustworthy. The evidence of the three accused persons were that they were standing at the spot where the deceased died together with the deceased. The deceased then lit a dagga cigarette and smoked it. They had testified the deceased then spun the cylinder or the chamber of the revolver after he had inserted a bullet into it. A shot rang out and then the deceased fell to the ground. They all testified that he had used his right hand and pointed the fire-arm to the right side of his head. According to accused no. 1 before the shot went off accused no. 3 asked the deceased whether it is true that the deceased had left with accused no. 1 was meant to be sold to which the deceased replied in the affirmative, lifted his shirt and took out a fire-arm. Accused no. 3 wanted to look at the fire-arm and whilst holding it in, he that is accused no. 1 told accused no. 3 not to point it in his direction as there might be a bullet inside it to which the deceased answered there was none. The deceased then took the revolver from accused no. 3, put in a bullet into the revolver closed it and point it towards his head. Shortly thereafter a shot went off and deceased fell to the ground. He, that is accused no. 1 then picked up the fire-arm and they left. During cross-examination the accused was confronted with what he had said during the Section 119 proceedings in the Lower Court they had indicated that the discussion regarding the fact that accused no. 2 was suppose to have sold a fire-arm occurred at an earlier stage that is before they came

to the spot where the deceased died. This was denied by accused no. 1 as not having been said by him. He also denied having said to the magistrate that it was accused no. 3 who picked up the fire-arm. Accused no. 1 said that he picked up the fire-arm because he was shocked. He could not explain why he did not leave the fire-arm there where it was. He said that the reason why he took the fire-arm was that he lost control. He also stated that he did not take it to the police station because he did not know whether if a person had shot himself with a fire-arm it should be taken to the police station. During cross-examination he stated that during the same day he decided to sell the fire-arm when he met Helmut Palasius because he heard that the deceased intended to sell the fire-arm. The accused was unconvincing in his answer when asked on whose behalf he intended to sell the fire-arm and what he intended to do with the money.

According to him he would have gone to ascertain who the family members of the deceased were and would have given the money to them. He however stated that the family members of deceased were at that stage unknown to him. Accused no. 1 also explained that he decided to sell the fire-arm because he was afraid but was unable to tell the Court why he was afraid. It was put to accused no. 1 that his counsel never disputed the testimony of Petrus Iipinge when he testified that accused no. 1 had told him that the fire-arm belonged to him and the counsel also did not dispute evidence of Iipinge which was to the effect that when Iipinge had visited accused no. 1 in the cells he, that is accused no. 1 refused to receive the fire-arm and requested Iipinge to give it back to Helmut Palasius. According to accused no. 1 he himself decided on the price of the fire-arm namely N$250 when he sold it to Iipinge. Accused no. 1 was also confronted with

the fact that the evidence of Sergeant Awarab was to the effect that when he and accused no. 2 were arrested by Awarab that he denied being with accused no. 2 the previous evening. It was also pointed out to the accused that he did not inform the police officers where the fire-arm was when he was confronted with the killing of the deceased and according to him the reason was because the police never specifically ask him where the fire-arm was but only wanted to know why he had killed the deceased. This is not a very convincing explanation. During re-examination of accused no. 1 Ms Hamutenya who appeared on behalf of the three accused informed the Court that the reason why certain statements were not put to the State witnesses was because she did not receive the second page of the Section 119 proceedings in the magistrate's court. Thus the second page of the proceedings however only relates to the stage at which deceased allegedly said that accused no. 2 did not sell the fire-arm and the question whether accused no. 1 informed the magistrate that it was accused no. 3 who picked up the fire-arm but does not explain why some aspects of the testimony of witnesses were not denied.

Ms Sauls who appeared on behalf of the State pointed out that the second page of the Section 119 proceedings was slowly read into the record during cross-examination of accused no. 1 that counsel for defence was present when this was done and that no objection was made at that stage. Accused no. 2 did not deny that he was arrested the next day in Walvis Bay having left Swakopmund the evening after the deceased had died. According to him his two companions ran away after the deceased had shot himself. During cross-examination accused no. 2 denied having seen the fire-arm in the hand of accused no. 3 and also said that he could not remember that accused no. 1 in fact told

accused no. 3 not to point the fire-arm at him as it might contain a bullet. According to him all four of them were standing very close to one another before those shot went off. He then demonstrated the positions of the different persons as reflected in Exhibit O, but couldn't inform the Court that accused no. 3 had the fire-arm in his hand nor that accused no. 1 had warned him not to point the fire-arm towards himself. A number of answers during cross-examination of accused no. 2 can in my mind only be described as evasive. The accused was confronted during cross-examination that the only sentence which appears on the second page of the proceedings in terms of Section 119 which he denied having said was that the deceased had shown the fire-arm to him at the house and that the magistrate also recorded that accused no. 1 had said something to the same effect. Accused no. 2 denied that he had said this and also denied that he had said during the Section 119 proceedings that accused no. 1 asked where the fire-arm was and that he that is accused no. 3 picked up the fire-arm. He was also confronted with the failure by counsel during the testimony of Sergeant Awarab to deny that one Tara gave him the money to travel to Walvis Bay as testified by Sergeant Awarab if he that is accused no. 2 in fact received the money from someone else namely Thomas Shirombu. To this accused no. 2 replied that he in fact gave such instructions. Thomas Shirombu was the one who supplied him with the money to travel. It is not disputed that accused no. 2 tried to assist the deceased by selling the fire-arm. Accused no. 2 insisted however that the deceased shot himself and that the doctor was wrong when he testified that the entrance wound was on the left hand side of the head. Accused no. 2 demonstrated in Court that the tip of the barrel of the revolver was about 3 inches from the right hand side of the head of deceased when the deceased shot himself. He said that the reason why he left for

Walvis Bay was that he was frightened and he only intended to inform the police office the next day about the shooting incident but was unfortunately arrested before he could do so. This explanation was again not very convincing. He however said that he informed the people at home that the deceased had shot himself although he was still in a state of shock. The accused gave conflicting answers as to why he failed to inform the police that evening of the shooting incident instead of fleeing to Walvis Bay.

Now accused no. 3 during his testimony also indicated that the deceased held the pistol about 1 inch from his head when he shot himself. The tip of the muzzle of the revolver was about 1 inch from his head. After the deceased fell to the ground he i.e. accused no. 3 went home alone and the next day accused no. 2 pointed them (that is now himself and accused no. 1) out to the police as the persons who were with him the previous evening. Accused testified that he was beaten up by the police and that he was injured above the eye, above his ear and in the ear itself. This however he denied during cross-examination namely that he said that he was injured above his ear. Accused no. 3 also stated during cross-examination that he did not see accused no. 1 for a week after the arrest and did not know whether accused no. 1 changed his blood stained clothes as he that is now accused no. 1 had also been beaten by the police whether he changed it with clean clothes, but when pressed on this point he admitted that he in fact saw accused no. 1 three days after the arrest at the Court self. Accused no. 3 testified that he was beaten up by police but could not provide any prove that he been examined by a doctor neither did he lay any charges with the police neither was it recorded in Court proceedings that he had been beaten up. Accused no. 3 during cross-examination twice drew different positions on

paper of persons prior to the shot being fired which positions differed from the position indicated by accused no. 2 and accused no. 3 also differed from accused no. 2 regarding some of the distances between these persons at the scene of the shooting incident.

During cross-examination accused no. 3 stated that he went straight home after the shooting incident and denied that he in his warning statement said that after the shooting incident he met with accused no. 1 at Tuatite bottle store where they discussed the shooting incident and thereafter he went to sleep. He was also confronted with the fact that Sergeant Awarab who took down his warning statement was never confronted with the version that he and accused no. 1 did not meet at Tuatite bottle store that evening after the shooting incident. According to accused no. 3 he was the first to leave the scene and did not see anybody following him and heard no footsteps of anyone following him. This is contradicted by accused no. 2 who said that accused no's 1 and 3 ran in the same direction one following the other one. Accused no. 3 also could not explain why he himself ran away from the scene. It also appears that during cross-examination of accused no. 3 he contradicted himself and gave evasive answers regarding what happened in Court and specifically the question surrounding the whereabouts of the revolver and why he chose not to inform the magistrate's court where the pistol was even though he had been ask a direct question in this regard. He also said that although he knew where the pistol was he did not inform the police about it because although he realised that the police would like to know where it was he did not tell them because they did not ask him to tell them. He later contradicted himself when he said that the police did ask about the fire-arm and he then told them that it had been picked up by accused no. 1. The accused

later tried to explain his conflicting answers by alleging that he was deaf in the one ear. That is trite law that the State has the onus of proving the commission of a crime beyond reasonable doubt and that accused has no onus to prove his innocence. The State however need not prove the commission of the offence beyond all doubt. Regarding the charge of murder it is not disputed that the deceased one Martin Shigwedha died on the 17th of October 1997 and that prior to the firing of the fatal shot he had been in the company of the three accused persons. The State called one eye witness who testified that the deceased had been chased by two other persons and was thereafter shot at close range. According to him the person who fired the shot picked up something after the deceased had fallen to the ground and the pursuers of the deceased then ran away. According to the testimony of accused no's 1 and 3 they indeed ran away after the shot had been fired and that it was indeed accused no. 1 who picked up the revolver prior to them running away in different directions.

The eye witness called by the State who had witnessed the incident observed the scenario in the street which had sufficient lighting, he was close enough to observe actions of persons although he could not identify those persons. He however could not quite clearly explain from what distance he could see the deceased being chased as it appears that at some stage his view must have been obstructed by other houses but from where he was positioned it is clear that he could observe the scene prior to the fatal shot been fired and according to him the deceased had been chased and thereafter had been shot. The witness Andreas Shiimi also did not know anyone of the persons involved in the incident and he had therefore no interest in the case and no reason to fabricate his testimony. I further

believe that he also did not make a *bona fide* mistake when he said that the deceased had been chased. It is further trite law that even where the Court accepts the evidence of the State the Court will only convict where the evidence of accused person is demonstrably false or inherently so improbable as to be rejected as false. The Court must also not only apply its mind to the merits and demerits to the State and defence witnesses but also to the probabilities of the case. The evidence of the accused persons corroborated each other on the point that they all testified that the deceased shot himself but their testimonies have been showed not to withstand the test of cross-examination. They were evasive witnesses gave conflicting statements during the evidence and also contradicted one another.

Furthermore their evidence is not consistent with the testimony of an objective fact, that is, the testimony of the medical doctor who can be regarded as an expert to the fact that firstly the entrance wound was found on the left side of the head of the deceased and by implication the deceased could not have inflicted the fatal wound himself, and secondly the distance the tip of the muzzle was away from the head of the deceased indicated that it was further then 1 metre away from the head when the shot was fired and not at very close range as the accused persons would like the Court to believe. It is also the opinion of this Court that the accused persons tried to hide their involvement to the death of the deceased by spreading the word that the deceased committing suicide or that his death was accidental.

The evidence of Andreas Shiimi supported by the medical evidence have the effect that the deceased could not have fired the fatal shot. The Court has now to consider the role each accused played which resulted in the death of the deceased. The Court is in this case left in the dark as to what the motive for the killing of the deceased was. It is clear that the conduct of only one person caused the death of the deceased. The State argued that all three accused should be convicted of this charged on the basis of common purpose where the conduct of one participant or the actus raous of one participant is imputed to others if the act is done in pursued of a common design. Each participant however must be proved to have had the necessary *mens rea* that is in the form of *dolus directus* or *dolus eventualis.* It is also not necessary for the State to prove a causal connection between the acts of each participant and the death of deceased and further it is not necessary to prove that the accused foresaw the precise manner of the death. See in this regard *S* v *Safatsa* 1988 (1) SA 868 AD. In *S v Ndesi* 1989 (1) SA 687 AD requirements were listed for liability in terms of the doctrine of common purpose. Firstly, the accused must have been present on the scene where the violence was been committed. Secondly, he must have been aware of the assault on the victim. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of the common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of others. And fifthly, he must have had the requisite *mens rea* so in respect of the killing of the deceased. He must have intended the victim to be killed or must have foreseen the possibility of the victim being killed and performed his own act of association with recklessness as whether not the death was to ensue. Presence of an

accused persons only required where there was no prior agreement to kill. It has been stated in *S v Jama* 1989 (3) SA 427 AD that the requirements set out in Safatsa and Ndesi cannot be established merely by proof of the accused's presence at the scene of the assault on the deceased. It has been stated by Snyman in his work Criminal Law that active association with a common purpose presupposes some kind of overt or objectively ascertainable contact by the particular accused indicating a common course with the person or persons actually committing the murder. It is not clear to this Court under what circumstances accused no. 1 came in the possession of the fire-arm and what happened prior to the deceased being chased. There is no proof of any prior agreement to have the deceased killed. Even though all three accused persons placed themselves on the scene of the crime one must still have regard to the question of *mens rea* and the other requirements mentioned in the *S v Ndesi.* Regarding accused no. 2 and accused no. 3 I'm not satisfied that the need or the requirement set out in the Ndesi case especially the fifth requirement relating to the question *of mens rea* as stated in that decision. I'm satisfied that in the light of all the evidence placed before this Court that it has been shown beyond a reasonable doubt that it could only have been accused no. 1 who had pulled the trigger of the revolver and caused the fatal injury to the deceased and that when he did this he had the required *mens rea* in the form of *dolus directus.* The question which should now be considered is what degree if any accused no's 2 and 3 participated regarding count 1 since they did not participate in the actual commission of the crime. In *S* v *Jonathan* 1987 (1) SA 633 AD the crime of accessory after the fact was considered. Section 257 of the Criminal Procedure Act makes provision that an accused may be convicted as an accessory after the fact if the evidence proves the commission of such an offence. An

accessory after the fact is a person who with the aim of defeating or obstructing the course of justice helps another who has already committed a crime in order to evade liability for his deed. In the case of *S v Jonathan* it has been decided that a false statement, depending on the circumstances, be regarded as an act with the aim of protecting the perpetrator. See also in this regard *S v Walumu Rugen and another* 1985 (2) SA 437. In the case of *S v Jonathan* the accused persons try to hide the commission of the offence by making false statements during the plea explanation and by persisting in those versions during cross-examination. The effect of their conduct was to protect the murderer. It also appeared from the evidence in the Jonathan case that at some time prior to the trial that there must have existed an understanding between the accused persons to hide the commission of the murder *in casu.* The position regarding accused no's 2 and 3 can be regarded as similar to those in the Jonathan case. It appears that after commission of the offence by accused no. 1 he met accused no. 3 at Tuatite bottle store where the shooting incident had been discussed. And it is also significant that accused no. 2 the next morning when he was arrested in Walvis Bay gave the same version as accused no's 1 and 3 subsequently gave to the police namely that the deceased accidentally shot himself. They persisted in this version during the Section 119 proceedings in the Magistrate's Court as well as in their testimonies-in-chief in this Court and during cross-examination.

In my view this was done intentionally with the aim of obscuring the true identity of the perpetrator. I have already found that in the light of the objective reliable facts in the form of the medical evidence such a version as presented by the accused persons is

inconsistent with the medical evidence and was rejected by myself as not reasonably true in the circumstances and found to be false statements. I'm therefore of the view that accused no's 2 and 3 on the evidence before me committed the offence of accessories after the fact to the crime of murder.

Regarding the crime of theft and the alternative charge of possession of a fire-arm without a license the evidence before the Court which was not disputed was that the fire-arm which had been used in the killing of the deceased was stolen about two weeks prior to the killing and this fire-arm was stolen from the house of the complainant Ronel Brand in Rundu. Both accused no. 2 and the deceased were in Rundu when the revolver had been stolen. The deceased possessed this fire-arm and accused no. 1 subsequent to the killing of the deceased sold it to someone else. It was also not denied that accused no. 2 assisted in the selling of the fire-arm. No one had any license to lawfully possessed the fire-arm. I'm of the opinion that in the light of the conduct of the two accused persons (that is accused no's 1 and 2) that they knew that the revolver was a stolen one and that they qualify at least as accomplices to the crime of theft in that both of them committed acts of association by unlawfully and intentionally furthering the crime committed by another person. I'm of the view that the fact that accused no. 3 at one stage held the fire-arm in his hand and could subsequently tell the police where the fire-arm could be found does not prove commission of the offence of theft or that of the alternative count. The third count is stated that the accused persons unlawfully and with the intent to defeat to obstruct the course of justice, so, and or placed in the possession Petrus Binge, a fire-arm of which Martin Ramtila Shigwedha had been shot and killed at Swakopmund on the 17'

October 1997 and which had been stolen from Martin Ramtila Shigwedha on the said date.

The evidence presented, establishes that accused no. 1 tried to dispose of the fire-arm and my conclusion is that this was done in order to erase any link between himself and the killing of the deceased and in this way tried to defeat or obstruct the course of justice.

The evidence was that the murder weapon was found and that accused no. 1 had been unsuccessful in his efforts to obscure this involvement in the killing of the deceased. It can therefore not be perceived that his conduct indeed defeated or obstructed the course or the administration of justice. I am of the opinion that the evidence only establishes and attempt.

Accused no. 1 is accordingly found guilty of the following crimes:

1. Murder
2. Theft of a fire-arm, and

3. attempting to defeat or obstruct the course of justice.

Accused no. 2 is found guilty of the following offences:

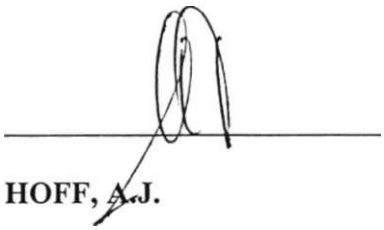
1. Murder, but as in accessory after the fact.
2. Theft of a fire-arm.

Accused no. 3 is found guilty of the following offence:

1. Murder, but as an accessory after the fact.

Accused no. 3 is found not guilty of the crimes of theft of a fire-arm and found not guilty on the alternative crime of possession of a fire-arm without a license in contravention of Section 2 of Act 7, 1996.

Accused no. 3 is also found not guilty to the charge of defeating or obstructing the course of justice.



HOFF, A.J.

ON BEHALF OF THE APPLICANT	**MS S A SAULS**
Instructed by:	**Office of the Prosecutor-General**
ON BEHALF OF DEFENCE	**MS HAMUTENYA**
Instructed by:	**Directorate of Legal Aid**