



CASE NO.: CC 09/2011

**IN THE NORTHERN DIVISION OF HIGH COURT OF NAMIBIA
HELD AT OSHAKATI**

In the matter between:

THE STATE

And

NDAWEDWA IMMANUEL SHUUDENI

ACCUSED

CORAM: TOMMASI J

Heard on: 11 – 16 & 18, 19-20 June & 02 July 2012

Delivered on: 03 July 2012

JUDGEMENT

TOMMASI J: [1] The accused herein was indicted for having unlawfully and intentionally killed Muyenga Hausiku (Hausiku) and Philip Angula (Angula) and attempted to kill Maria Eino Cuse (Maria) on 30 May 2009 at the farm Sihitikera, situated in the district of Rundu, by shooting them with a 308

rifle. The accused was further indicted for having possessed the said rifle which he had used to shoot at the three persons and ammunition to wit 4 live bullets in contravention with the provisions of section 2 and 33 of Act 7 of 1996 respectively. The accused pleaded not guilty to all the charges and gave no plea of explanation.

[2] It was not disputed by the accused that he shot Hausiku, Angula and Maria with a 308 rifle on 30 October 2009. It was further not disputed that Hausiku and Angula died as a result of the gunshot wounds they sustained and that Maria sustained a superficial flesh wound to her left elbow. The only issues in dispute were whether the accused had acted unlawfully and intentionally. The State therefore bore the onus to prove beyond reasonable doubt that the accused had acted unlawfully and intentionally.

[3] The State called three witnesses namely, Erastus Nankankwe (Erastus), Maria Eino Cuse (Maria) and Lazarus Jorman, also referred to as Nakushe (Lazarus) who were present on the farm on 30 October 2009.

[4] The evidence revealed that the accused was the foreman on the farm Sihitikera and lived there with his wife and children in a homestead consisting of two huts and one half built hut, which they referred to as the open hut.

Hausiku, who was married to Maria, and Lazarus were coworkers on the farm. They also resided on the farm. Angula and Erastus were living in the Northern part of the farm but were not employed by the owner of the farm.

Count 1 and 2 – Murder of Hausiku and Angula

[5] There were no eyewitnesses to the shooting of Hausiku and Angula. The accused is the only person who knows what happened at the time he shot and killed Hausiku and Angula. Erastus was the only State witness who was present immediately prior to the shooting.

[6] Erastus testified that he arrived at the homestead of the accused together with the late Angula at around 17H00. They found the accused, Hausiku and Lazarus under the open hut drinking beer. They joined the others drinking beer which they bought from the accused.

[7] At some stage after their arrival an argument erupted between Lazarus and Hausiku although he could not tell what the argument was about. It transpired during cross-examination that Hausiku and Lazarus were not arguing at the place they were drinking but some distance from there. Lazarus denies that such an argument took place. During cross-examination Erastus agreed that the accused had locked the gates and that someone (he could not

say with certainty who it was) opened the gates for the late Hausiku and Lazarus to re-enter the homestead of the accused. He confirmed during cross-examination that Lazarus's shirt was torn when he returned with Hausiku.

[8] He testified that upon the return of Hausiku and Lazarus, the accused was irked by something Angula had said. The accused then informed them that he was going to fetch a gun and that he was going to kill all the people in the hut. He thought the accused was joking. The accused got up and left. Lazarus informed Angula that they should leave after the accused mentioned that he will be fetching a fire-arm. He decided to run away and left Hausiku, Lazarus and Angula behind. He did not see Maria at this stage. He however confirmed that she was present but had left.

[9] As he was running away, he heard one gunshot being shot into the air. He also heard the accused calling Angula and Hausiku's name and asking them where they were. In between calling their names he would hear a gun shot. The accused also called his name but he did not reply for fear that he will be shot. He heard a total of four gunshots. The witness was unable to clarify how he could hear that one shot was fired into the air.

[10] He testified that he got lost but eventually found his way to Hausiku's house. He left the farm and went to sleep elsewhere and only returned the next day. He did not observe any fight or any quarrel between Hausiku and the deceased, nor did he hear Hausiku threatening to kill the accused or saw Hausiku with a bow and arrow. He denied that Hausiku left the scene at the stage prior to the shooting. He frankly admitted that he had consumed too many beers that evening that he was drunk and that all those present were drunk including the accused.

[11] The State called Lazarus Jorman. He testified that he was sitting under a tree with the late Hausiku on that day and they were drinking beers from midday to sunset. He testified that Maria came to sit with them from time to time. They purchased beer from the accused who was inside his homestead. He testified that he did not know Angula or Erastus and he did not see them at the farm or inside the homestead of the accused that day. He left Hausiku around sunset and went to sit under a tree close to his homestead and continued drinking beer which he bought from the accused. He could not see what was happening inside the homestead of the accused from where he was sitting neither did he see Hausiku and other people drinking although he continued to enter the homestead of the accused to buy beer. He testified that he did not quarrel with Hausiku although he recalled that Hausiku came to his hut to ask him if he took his tobacco. He later heard two gunshots and the

accused came to inform him that he had killed Hausiku. He went with the accused and accompanied him to report the matter to the police. He however stopped on the way due to the fact that he was unable to continue the walk. The accused did not inform him what had transpired.

[12] The members of the Criminal Investigation Unit together with other members of Serious Crime Unit visited the farm and they testified that they found the two bodies of the deceased. The body of Hausiku was found under the open hut and Angula's body was found some distance near the water pump. Sergeant Kavara testified that he made the following observations: Hausiku had a bullet wound on his right chest and Angula on his left chest; in both cases the bullet entered in front and exited the back of their bodies. (These findings were confirmed by the post mortem report); blood stains in the sands leading from the place they found the body of Angula up to the open hut; a dead dog in the court yard of the accused which also appeared to have been shot; a gunshot wound on the left elbow of Maria Cuse; and three spent cartridges and one live bullet on the ground approximately 6 steps from where the body of Hausiku was found. He concluded, based on his observations that Angula was shot under the open hut but died approximately 30 steps from the point where he was shot. He further concluded that the point where they found the spent cartridges was the place the accused was standing at the time

he fired the shots. He did not observe any bow and arrow in the vicinity of Hausiku's body.

[13] The accused, at the pre-trial stage disputed that he acted unlawfully when he killed Hausiku. In his reply to the pre-trial memorandum of the State the following was stated:

"I was acting in self defence, as the deceased threatened to murder me with the traditional bow and arrows."

He disputed that he intentionally killed Angula and it was formulated as follow:

"I was aiming at Muyenga Hausiku and I was not even aware of the presence of Philips Angula as it was dark."

The accused pleaded guilty to two counts of murder and one count of attempted murder in the district court in terms of section 119 of the Criminal Procedure Act 51 of 1977 and gave the following explanation:

"Why I am saying I am not guilty is because there was someone (Lazarus) went to sleep and then a certain Hausiku came and then they started fighting there. And after the fight between Lazarus and Hausiku stopped, he came back and I locked him outside because he was drunk, because every time he was drunk he fought with people. Then he was struggling with the gate and a boy opened the gate for him and he came to me and asked me what did I say. I am not disputing that I shot all the people but I did not do it intentionally it was caused by Hausiku and I did not want to shoot him. He threatened that he would go home and get his traditional bows and arrows to come and shoot me, I shot one bullet in the air and the second one I shot at the deceased it was just one bullet which struck the two. (sic)"

The record of these proceedings was handed in by agreements.

[14] The accused when he arrived at the police informed Sergeant Meriam Paulus that he committed a crime on the farm. She testified that the accused

made the following statement to her. He had a quarrel with Hausiku who refused to take N\$50.00 of his salary which the accused had offered him. Hausiku insulted and threatened to kill him. Hausiku shot two arrows in his direction. When Hausiku was about to shoot the third arrow, he started running. Hausiku chased him around the house and he entered his house to fetch the rifle. The accused fired one shot at Hausiku who died on the spot and the same bullet killed another man whose identity was not known to him. This version differed from the one that was put to the witnesses.

[15] The accused was interviewed by Sergeant Haimbili. He informed him that he had an argument with the others at the farm and he decided to shoot the two of them namely Hausiku and Angula with the 308 rifle. The accused further informed him that whenever they were drunk they would threaten him with bows and arrows. He stated that he was fed-up with their threats and decided to end their lives before they end his.

[16] The admissibility of these statements was not disputed and the police testified that they had properly warned the accused and advised him of the constitutional rights.

[17] Counsel for the defense argued that the State witnesses contradicted themselves as to the sequence of events. The main contradiction between the evidence of Lazarus and Erastus related to whether Lazarus was present shortly before the accused went to fetch the fire-arm and whether there was an argument between Lazarus and Hausiku. Maria confirms that Lazarus was present at the homestead at the time she left. Lazarus's version that he did not see Angula and Erastus and that he was not present in their company under the open hut that evening is not credible as the undisputed evidence places Angula at the scene. This witness appeared to have been reluctant to place himself near the scene of the crime and fail to fully take this Court into his confidence. His evidence therefore was of little assistance to this Court. A further discrepancy relate to the time of arrival of Erastus in my view this discrepancy is not material.

[18] Although Erastus admitted being drunk, he could recall sufficient detail of what transpired that evening. Erastus's evidence in respect of the number of shots that was fired, was however not reliable. From the spent cartridges found one can safely infer that the accused had fired three shots. Despite the defects in the evidence of Erastus, I am satisfied that he was a credible witness with no apparent bias in respect of the accused. From the evidence presented by the State the Court may conclude that the accused expressed an intention to shoot and kill the persons present under the open hut, he in fact shot and

killed two persons in the vicinity of the open hut. In addition hereto the accused had admitted to sergeant Haimbili that he got “*fed up*” with being threatened and decided to end their lives before they end his. Erastus was adamant that none of the persons present was armed and that Hausiku did not leave the open hut to fetch his bow and arrow. No bow and arrow was found by the police in the vicinity of Hausiku’s body. There was credible evidence that the accused was aware of the presence of Angula under the open hut. Maria testified that she was the first one shot and this negates the plea explanation given in the district court by the accused when he stated that he shot one warning shot in the air.

[19] The evidence of Erastus stands uncontroverted. The accused opted to exercise his constitutional right to remain silent. In *S v AUALA 2010 (1) NR 175 (SC)* Matabanengwe AJA at page 181 I -182 A, cited with approval the following passage in *S v Boesak 2001 (1) SA 912 (CC) (2001 (1) SACR 1; 2001 (1) BCLR 36):at 923 E- F*

“The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence.”

[20] The evidence presented by the state was sufficient to call upon the accused to answer and his silence under these circumstances is a factor this Court has to take into consideration. The *extra curial* statement made to sergeant Haimbili although he was put to the witness that he did not make such a statement, called upon the accused to refute that he made such a statement under oath.

[21] The various statements made by the accused cannot simply be ignored. In *S v Shikunga and Another 1997 NR 156 (SC)* the Court held that that an extra-curial statement of an accused, once adduced in evidence, had to be viewed and evaluated in its entirety, inclusive of assertions and explanations favourable to the maker. However, the fact that such a statement was not made under oath, detracted very much from the weight to be given to those portions which favoured the author. His exculpatory explanations and excuses might well strike a false note, and had to be treated with a measure of distrust. The accused's exculpatory statement that he did not know that Angula was present is not supported by the evidence adduced by the state.

[22] Both Maria and Erastus testified that Angula was in company of Haufiku sitting under the open hut. Both testified that accused was also present. Erastus testified that Angula was present at the time accused left to fetch the rifle. The accused in his reply to the State's pre-trial memorandum stated that

he was aiming to shoot Hausiku. It is interesting to note that the word “*aim*” was used despite the fact that the accused in the same document also stated that it was dark. A reasonable conclusion would be that the accused fired three shots and aimed that in the direction where Hausiku and Angula were seated. The accused stated in the district court that he fired two shots one in the air and one at Hausiku which also killed Angula. The objective evidence informs this Court that he fired 3 shots. This exculpatory statements by the accused given the contradictions, strikes a false note and the Court accordingly attached no weight to these admissions. The explanations by the accused that he acted in self defense also conflicts from one statement to the other. During proceedings in terms of section 119 the accused stated that Hausiku would kill him with a bow and arrow and in his reply to the State’s pre-trial memorandum and in questions put to witnesses reflect that the accused was not only threatened but that Hausiku was actually in possession of the bow and arrow.

[23] Erastus testified that the accused was drunk at the time and that his speech was not in order. The accused at no time raised intoxication as a defence and it is therefore not necessary for me to deal with this issue save to say that the accused had sufficient presence of mind to appreciate that he had committed a crime and to report same directly after the shooting.

[24] Given the evidence adduced and the accused's failure to testify, this Court can only conclude that the accused fired three shots in the direction where Hausiku and Angula were sitting with the direct intention to kill them. I am satisfied that the State proved beyond reasonable doubt that the accused did not act in self defence and that he had direct intention to kill Angula and Hausiku.

Attempted Murder – Maria Eino Cuse

[25] The key and only witness to this offence was Maria. She testified that she was drinking with Hausiku, Lazarus, the accused and his wife under the open hut inside the homestead of the accused from morning to the evening. According to her Erastus and Angula joined them around midday. I already indicated that the time of the arrival of Erastus and Maria is not material to the issue at hand. Maria testified that she only left the hut when it was dark to fetch money to buy more beers. Counsel for the accused pointed out that there was discrepancy in the evidence in chief and under cross-examination whether she went on own or whether she was sent by Hausiku. This however has no bearing on the issue whether or not Maria was shot by the accused.

[26] Maria further testified that she left the late Hausiku, Erastus, Angula and Lazarus sitting under the hut. When she returned to the homestead of the

accused she approached him in order to give him the money for beers. When she was approximately one meter from the accused he shot her. She fell down, got up and ran back to her homestead. She testified in chief that she only heard one gunshot which was fired at her but during cross-examination she confirmed her statement to the police that the accused shot three times. She testified that she saw the accused although it was dark but conceded during cross-examination that she could not see whether the accused was having a firearm. She further conceded that she was unable to say whether the accused could see her; that she was confused at the time she was shot; and that she was drunk at the time she went to collect the money. Despite these unsatisfactory aspects, it was sufficiently proven that three shots were fired. Her evidence that she was shot in close proximity of the open hut was not disputed. It was further not disputed that the first shot was the one which struck her.

[27] Maria correctly conceded that she could not tell whether the accused saw her. The accused is the only person who could say whether he could see her or not. It is highly improbable that the accused would not have been able to see a person who was as close as one step away from him. The Court would be justified to conclude, in the absence of evidence by the accused, that he saw a person and despite the fact that he was aiming to shoot Hausiku. He nevertheless proceeded to shoot. He reasonably foresaw the possibility that he

might kill the person who was approaching him and reconciled himself to the ensuing result.

[28] I am satisfied that the State proved beyond reasonable doubt that the accused had intent to kill Maria (in the form of *dolus eventualis*) and miraculously did not succeed to do so. The fact that she sustained a flesh wound is immaterial given the weapon used and the close proximity to her.

Contravention of section 2 and 33 of the Arms and Amunition Act,

[29] The State called the owner of the farm to give evidence in respect of the firearm and five live bullets which she had stored on the premises at the farm. She testified that she had employed the accused as a foreman and gave him the keys to her house where the fire-arm and ammunition was kept in order for him to remove it in case of an emergency. She testified that she had never given the accused permission to use the fire-arm in her absence. The police recovered three spent cartridges and one live bullet on the ground within the homestead of the accused and the fire-arm in the sleeping room of the accused. The accused in his reply to the State's pre-trial memorandum denied unlawfulness as the rifle and ammunition were placed in his care and under his control by his employer.

[30] Section 8 of the Arms and Ammunition Act 7 of 1996 provides for certain circumstances where a person is permitted to possess a firearm with the consent of license holder. Section 8(1) (b) reads as follow:

“ Any person other than a person under the age of 18 years or a disqualified person may, with the prior consent of the holder of a licence to possess an arm, whether or not such consent was granted in pursuance of an agreement of lease, and for such period as such holder may permit, have such arm in his or her possession for his or her lawful personal protection or benefit, including the hunting of game or for the purpose of keeping custody of the arm, without holding any licence, provided-

(b) such person has the arm in his or her possession in the immediate vicinity of the licence holder or while on any land belonging to or lawfully occupied by the licence holder.”[my emphasis]

[31] The owner of the farm had employed the accused in his capacity as the foreman and had given him the keys to her house. This may be construed that the license holder had given the accused consent for the sole purpose of keeping custody of the fire-arm. Attached to the consent were two conditions namely that the accused was not to use the fire-arm in the owners absence and that he may remove it if there was an emergency. This evidence was not challenged. There was no evidence that there was an emergency which would have made it necessary for the accused to have removed the fire-arm from the owner’s hut. If therefore, it is found that the accused had removed the firearm from where it was stored by the owner contrary to the conditions set by the owner, there cannot be valid consent.

[32] The next issue for consideration was whether the accused had removed the fire-arm and ammunition from where he was supposed to have kept it in safe custody. The fire-arm was retrieved from the sleeping hut of the accused. During cross-examination of Erastus it was pertinently put to him that accused went into his sleeping room and came out of his sleeping room with the rifle and ammunition in order to protect his family from the threat posed by Hausiku. There is thus sufficient evidence to conclude that the accused had removed the firearm from the sleeping hut of the owner and had kept it in his sleeping room contrary to the express instructions by the owner. The accused in the face of the evidence presented by the state failed to answer. There was therefore no valid consent from the license holder.

[33] The accused, having placed the fire-arm in his sleeping room had physical control over it and it is evident that the accused had the intention to exercise control over the firearm. The accused was therefore in possession of the firearm which possession was unlawful.

[34] Both counsel submitted that it would be required of the State to prove that intent in the form of *dolus eventualis* is required for the offence. In *S v MASEKA* 1991 NR 249 (HC) O Linn J as he then was, without deciding the issue was of the view that form of *mens rea* required would be *dolus* and not *culpa* for a person to be convicted of this offence. The accused was aware that

the owner of a fire-arm requires a license to possess a firearm. This was evident from the fact that his defense counsel put it to the owner that the accused requested a copy of her license. He was furthermore the foreman on the farm who was entrusted with the safekeeping of the fire-arm and given strict instructions under what circumstances it should be removed and used. The state placed sufficient evidence before the court to conclude that the accused under the prevailing circumstance foresaw that he would be keeping the fire-arm unlawfully and that he, despite his knowledge of this fact removed it without obtaining valid consent from the owner. The accused was equally called upon to answer as to what his subjective mindset was at the time he decided to remove the fire-arm from the hut of the owner when he placed the firearm in his room. This he failed to do. In the absence of his testimony accused, the evidence of the State becomes conclusive.

[35] I am satisfied that the State has proven that the accused had possessed the firearm in contravention of section 2 of Act 7 of 1996. The fire-arm and the ammunition were kept together and the reasoning for the possession of the firearm equally applies to the possession of the ammunition. Having concluded that the accused was not in lawful possession of the firearm which was proven capable of firing the bullets, (the State handed the ballistics report into evidence by agreement) it follows that the accused is also guilty of having contravened section 33 of Act 7 of 1996.

In the result the accused is found guilty on all five counts.

Tommasi J