CASE NO. CC 06/2003

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

versus

ELIA AVELINU	**ACCUSED NO.** 1
ANDAPO KRISTOF SHIGWEDHA	**ACCUSED NO.** 2
REINHOLD NAMBAHU	**ACCUSED NO. 3**
LIKIUS SHIIKUNDENI SHAFODINO	**ACCUSED NO. 4**
ELIFAS NDALUSHA	**ACCUSED NO. 5**
JASON MIIPALE NANGOMBE	**ACCUSED NO. 6**

CORAM: GIBSON, J.

Heard on: 2004.06.07-25; 2004.11.08; 2004.11.09 2004.11.10; 2004.11.15; 2004.12.09; 2005.01.20 2005.02.05; 2005.04.05-29; 2005.04.13 2005.06.14-30; 2005.07.15; 2005.11.22

Delivered on: 2005.11.22

JUDGMENT

GIBSON, J.: The six accused are charged on four counts of the indictment. The first count is of murder, namely, that on the 19th May 2002 at or near Peoples Inn Bar and Gambling House no. 2 in the Windhoek District the accused unlawfully and intentionally killed Andreas John Nghatanga, a male person.

Count 2 charges the accused with robbery in aggravating circumstances, in that on the said date and at the said Gambling House no. 2 in the district of Windhoek the accused unlawfully and with intent to force them into submission, assaulted and threatened to assault Markus Shifena Salom Walenga and other witnesses present by striking and pointing firearms at them and, unlawfully with intent to steal did steal N$44 000.00 and one shotgun, the property of or in the lawful possession of the said People's Inn Bar, Gambling House, no. 2 and or Martin Shifena and/or Salom Walenga and or Matheus Mundjamina. And that aggravating circumstances as defined in Section 1 of Act 57 of 1977 are present in that the accused and or an accomplice were, before/after or during the commission of the offence, wielding a firearm or any other dangerous weapon or inflicted or threatened to inflict grievous bodily harm.

Count 3 alleges robbery in aggravating circumstances, in that on the 19th May 2002 at or near Peoples Inn Bar, Gambling

House No. 2, in the district of Windhoek, the accused unlawfully, with intent to force him into submission, assaulted Andreas John Nghatanga by shooting him in the chest with intent to steal and took from him one makarov pistol no. 4785 and one cellphone the property of or in the lawful possession of the said Andreas John Nghatanga.

And that aggravating circumstances as defined in Section 1 of Act 51 of 1977 are present in that, accused 1 and or accomplices, before or after or during the commission of the offences was wielding a firearm or any other dangerous weapon, inflicted or threatened to inflict grievous bodily harm.

Count 4, charges all the accused with defeating or obstructing, or attempting to defeat or obstruct the course of justice, in that between the 19th of May 2002 and the 19th June 2002, at or near Windhoek wrongfully and unlawfully with ***intent*** to defeat or obstruct the course of justice, set the shotgun no. 01/09/1711 alight, that thereafter the accused buried its remains because they foresaw the possibility that the firearm might link them to the commission of the crimes set out above in counts one to three, and/or that the firearm might be used as evidence in a prosecution against them.

In the alternative to count four, it is alleged that between May 2002 to June 19th 2002 the accused did unlawfully, intentionally and maliciously damage a firearm, the shotgun mentioned above, the property of Matheus Munjaniva Salom Walenga by setting it alight and or burying the remains thereof, that the said shotgun was the property of or in the lawful possession of Matheus Mundjaniva and or Salom Walenga and or Martin Shifena. The accused persons pleaded not guilty, ie each in turn denied all the counts.

The summary of material facts in the State's case is that the five accused persons set up a plan together to go and rob the patrons of the Peoples Inn Bar/Gambling House no. 2 which is situated in Katutura, Windhoek, that it was also part of the plan to use firearms in the course of the robbery; that on the night of the 19th May 2002, the accused persons, some of whom

> were armed, entered the premises of the nightclub, and by using violence and threats of violence stole N$44 000.00 in cash and a shotgun. At the same time the accused persons also shot and killed the deceased and stole a makarov pistol and cellphone, that after the robbery the accused persons set

the shotgun on fire and buried its remains as they feared that it might link them to the commission of the crimes or might be used as evidence in the prosecution against them. By burying the said remains of the shotgun the accused persons thus damaged it.

The State further alleges that in acting in this manner the accused persons acted in common purpose throughout.

It is a trite proposition generally, in criminal proceedings that the State bears the duty to prove the charges preferred against accused persons beyond reasonable doubt by leading sufficient evidence, whereas the accused may, if he so decides, lead evidence to substantiate his claim of innocence.

In this case the State relies on the doctrine of common purpose, namely that all the accused persons were present together at the scene of the crime, where a shot resulting in the death of a person was fired, and assaults and/or threats were perpetrated, that each of the accused was actively involved or was aware of the assaults and threats being made at the Peoples Inn Bar/Gambling House no. 2, and that each intended to make common purpose with the actual perpetrators, and that each participated in some form of association with the conduct of the others, and finally, that each accused had the intention or foresaw the possibility of someone being killed but went ahead and participated, reckless as to whether or not death would result.

I will begin with a summary of the evidence of Mrs Sakeus, girlfriend and

mother of the child of accused 2. She said she and accused 2 have known each other for three years but she had lived with him for two years. Mrs Sakeus said she knows accused 3 as a friend of accused 2 as he once resided with them. She said she also knows accused 1 as a friend ofaccused 2 and has known him for about a year and a half. She knows accused 5 and 6 as residents in the neighbourhood. They also sometimes visited them or sometimes patronised her shebeen/shop.

She said accused 2 and 3 were together at her home on the evening of the 18th and had sat with accused 5 and 6, who had joined them, all were just talking and not drinking. Sometime in the course of the evening the four were joined, but very briefly, by accused 1. He arrived in a blue VW Golf, a taxi, with a white stripe. She said she had seen him driving it about in the last three months. Ms Sakeus said she did not know accused 4 that well, although she had seen him about for about a year. Sometimes he also came to her shop then she saw him once again in prison, afterwards.

Later that day, at about midnight, accused 2 and all the others left. They told her that they were going to town and returned at about 5am. She said although she was still in bed and did not see them arrive, she knew it was accused 2 or 3 who had comefor nobody else could have ordered Barnabas to move in with her from the next room. Mrs Sakeus said she then heard noises like shuffling of feet, and a noise which seemed to resemble coins being dropped. It then went quiet and she realised they had left. She next heard them returning at about 7am. She asked where they had been and they told her that they had been for a drive near the river. She said she got up and went to her shop next door. Accused 2 and 3 remained behind. At some point accused 3 came to the

shop carrying "a man's handbag". He ordered some autumn harvest and paid N$ 17.00 for it, in $1 coins, which the accused took from a bank plastic bag. She also noticed that there were many more such plastic bags with coins in the "handba.g". Accused 3 then left. Sometime later accused 3 said he was going to Klein Windhoek to change some money.

Meanwhile her boyfriend, accused 2, asked her to make some breakfast for them. She was still making it when accused 3 returned and said it is getting too late, it is time we left. This was addressed to accused 2. This was the first time she learned that accused 2 and 3 were going to the north. She was surprised because it seemed to come out of the blue.

Later that evening, accused 6 arrived at the bar alone. He bought a drink and walked about, she told him that accused 2 and 3 had gone to the north.

Early on Monday, the 20th May, there was a knock at the door. She opened it and found the police outside. The police asked her where accused 2 and 3 were. She told them they went away but she did not know whereto. The police informed her that the two were suspected of murder, that this was a serious crime she should not shield them. She said she felt threatened and was frightened. The police arrested her and Barnabas and took them away. She was interrogated by Inspector Unandapo in the car alone.

The Inspector took the statement. She acknowledged the statement in Court as hers. She said everything she said in the statement was the truth concerning the events she had seen and heard on the night/morning of the 18th/ 19th May

2002. She said even though accused 2 had thrown her out of the house she still loved him and appreciated the financial support he gave her and the child. She also said apart from the clink of coins, that morning which Mrs Sakeus said she heard, she also heard accused persons talking and enquiring about the whereabouts of accused 1 from time to time.

The summary of Mrs Sakeus evidence is supported in different aspects by a variety of witnesses. The claim that when accused 2 and others arrived at 5am she heard the sound of coins is undoubtedly consistent with the evidence of the owner of the Peoples Inn Gambling House no. 2 on the removal and theft of a large quantity of coins from the premises in the course of the robbery. Mr Munjaniva said that N$44 000.00 ± in $1 coins was stolen from his Bar/Gambling House that morning as well as the shotgun. The gun was perfect and in working order when he left that morning. He recognised the stump remaining as part of that shotgun when it was shown to him in Court. He looked at it and confirmed the serial numbers as correct.

A further two witnesses were called by the State they were Mr Petrus Hamupembe and Mr Amupembe. Both said that accused 1 was employed by them to drive their taxi, a blue VW Golf with a white stripe. They said that contrary to the agreement with accused 1, he did not surrender the taxi that night at the agreed time at 9pm, nor did he surrender the takings for the day.

There was further confirmation of Mrs Sakeus's evidence, about large amounts of coins, in the evidence of Stephanus Paulus. The witness told the Court that accused 1 owed him money for electricity. On the morning of the 19th of May 2002 at about 10am he (accused 1) paid his bill of $150 in cash and in $1

coins. He also gave her an extra $50 at about 10am. I will deal with the accused's explanations in turn, in due course. But my view is that it is not just a mere coincidence that accused 1 and 3 were found with large amounts of cash in $1 coins. Further support of the presence of $1 coins on accused is the evidence of Inspector Unandapo who said that on arrest, he found $400 on accused 2 and 3, in $1 coins and, in a bank bag.

The most telling evidence was not specifically challenged though a denial of the arrest at the particular place and premises was made. That evidence is that of the State witness Inspector Unandapo. This shows that accused 1 was arrested on 20th of May 2002 and was questioned by Inspector Unandapo on 21st of May 2002. After his rights were given, the accused 1 said he needed a lawyer but had no money. However he said he was willing to go ahead and tell what he knew. Inspector Unandapo said he took a statement from accused 1 in Oshiwambo and translated it to English. He then read it back afterwards and accused 1 signed it.

The inspector was criticised for not handing accused 1 to an independent Police Officer to take the statement. The Inspector said as accused 1 was cooperative and was confessing to the offence he decided to go ahead alone.

Having admitted the statement during the trial within a trial I have been invited to revisit that decision and reconsider the question of admissibility. I have done so, and find no good ground for revising the earlier ruling.

While it is not always desirable to do so, I do not think that there is anything inherently unjust in allowing the evidence to be admitted in circumstances

where the investigating officer takes down the statement, and, in this particular case where he also acted as an interpreter. When one is dealing with an accused person who is not a simple, illiterate villager, but one who is a sophisticated person, and one who couldn't be said to have been overwhelmed by the circumstances in which he found himself, the Court must be realistic and take those social, and economic conditions into effect in coming to the decision.

In this case the accused was warned of his rights very clearly and meticulously, there was no suggestion of any difficulty in understanding what the police officer was saying to the accused. This is particularly true in a case where the accused is aware that he is entitled to be legally represented by a lawyer but nevertheless decides to go ahead with full knowledge that he will be within his rights to stand his ground against proceeding further or just simply remain silent. In this particular case the request for legal assistance by each accused person in turn, during the interrogation stage seemed like a singsong.

Namibia is a developing country, resources are short and the police force is not always as well trained as it should be. So allowance, in my view, should be made for a situation where a calm environment is created for an accused person, in circumstances in which he is not overwhelmed or feels threatened. If the Police Officers presented with those circumstances decide to go ahead notwithstanding an earlier request for a lawyer's presence, they should feel it within their power to say - the accused has changed his mind. So we think it correct to have decided to proceed.

In any event, no reliance was placed in this trial on the particular statement,

Exhibit W, even though the accused was confessing.

Looking at all the admissible evidence which the State adduced against each accused, there is a great deal of evidence that puts accused no. 1 at various places which are material for considering whether or not he was involved before the robbery. That is sufficient circumstantial evidence in my view from which inferences can be drawn conclusively. In my view the evidence is reasonable in the circumstances, and puts accused 1 in the vicinity of the Gambling house/Peoples Inn at the time the robbery took place. I have come to this conclusion after weighing the evidence very carefully and after looking at what the accused's own account is and what the accused said he did.

The State also called the evidence of one witness Salom Walenga but conceded that this particular witness was not altogether perfect, that there were some contradictions in his evidence whereas in other areas he was shown to be reliable and, a trustworthy witness who had no axe to grind.

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I will first refer to the evidence of the witness Salom Walenga. Although the witness does not directly refer to accused 1, this witness's evidence is very crucial in this matter in that he describes the events that happened within the Peoples Inn Bar during the course of the robbery. That evidence shows, in my view, the fine coordination, the fine planning, the quick arrival and the quick get away of the robbers. Clearly accused 1 must have facilitated the plan and the execution of the offences by being available, by furnishing the means of getting there and getting away as quickly as possible. I will come back to the evidence of Salom Walenga later on.

Turning to accused l's own evidence. Accused 1 denied that he was present at all at the scene of the commission of the crime, but he did not and could not say what his movements were that evening other than to say that that night he slept at his home in Windhoek.

It is trite that the accused does not have to prove his innocence or his alibi. In my view though, where the evidence of witnesses puts an accused in various places and times that may be incriminatory against the accused, he would be naive not to try and get support for his assertion and rely merely on a bare denial.

The witnesses called by the State clearly put accused person in a situation and circumstances entitling the Court to draw certain inferences, which are adverse to him. Mrs Sakeus's evidence of his short drop-in on the group at her shebeen where the other accomplices were calls for an explanation. Her evidence also showed that from time to time she heard the name of accused 1 being mentioned or referred to thus making it more pressing for accused to explain himself. Mrs Sakeus knew the accused well. She did not appear to exaggerate what she had to say, and she was spontaneous and stood up well to cross-examination. Besides this evidence, Mr Engelbrecht who also did not know the accused 1 at all, placed the taxi, a blue Golf, at the scene. Further, Accused 1 should have explained why he broke the terms of the contract between him and Mr Petrus Hamupembe. In assessing the evidence, one cannot ignore the fact that accused did not challenge the claim of Mr Petrus Hamupembe that the accused had no permission to keep the VW Golf beyond 9pm, or for failing to account for the takings that day.

Besides this, accused 1 gave a shifting account of where he got the $1 coins in the sum of $150.00. First, he said it was the proceeds from his pool table, then

he said it was the proceeds from the taxi that he operated.

On assessing the accused's evidence and his explanation, the failure to challenge Mr Hamupembe's evidence makes it difficult not to come to the conclusion that accused 1 was indeed part and parcel of the robbery that night details of which are in Exhibit W, which is before the Court. I will not go into it. Other than to observe that he was present although he did not himself participate in the actual robbery. The evidence entitles the inference that he furnished the get away vehicle and subsequently participated and shared in the proceeds of the robbery in which at least two of the accused persons, who participated in the robbery, are said to have been armed at the time. Accused 1 must have been and, was fully aware that there was a crime to be committed with the use of weapons or a weapon to subdue the patrons of the Gambling bar. So much then for the summary of the case of accused 1.

In conclusion, I have no doubt that the State proved each of the four counts in the indictment beyond reasonable doubt.

I will turn for convenience, to accused no. 4 because this was the order of appearance by counsel.

The State's evidence was led through Inspector Unandapo, the investigating Officer. Inspector Unandapo said accused 4 surrendered himself to the police when the police were making enquiries. Inspector Unandapo told the Court that on the 30th of May he interviewed accused 4 and warned him of his rights. Accused 4 told him (the Inspector) that he wanted a legal practitioner to represent him but had no money, in the light of that he would proceed on his own.

The inspector said he spoke to accused 4 in Oshiwambo, that there was no difficulty with his communication. He took a statement from accused 4, and afterwards translated it into English, and read it back to the accused in Oshiwambo. He signed it and accused 4 also signed it.

In his evidence in Court, accused 4 denied the confession. He relied heavily for this attack on the fact that he did not have his lawyer.

As I have previously observed in dealing with accused 1, while it is better in the interests of fairness, not to have the investigating officer acting alone, and that the practice should not be encouraged, it is the rule that an officer belonging to another unit is co-opted into the investigations. The rule must be adhered to and respected as much as it is possible to do so. In an imperfect world it is unreasonable to expect perfection at all times. There must be circumstances where a statement may be taken by an investigating officer on his own when he (the officer) is satisfied that the accused is fully apprised of his rights, that having informed him of his rights, the accused makes no objection, and requests that the investigation may proceed.

We live in a world where crime is prevalent and has become very complex and, the criminals have become very sophisticated and

That statement was admitted as Exhibit X. Inspector Unandapo said sometime later, on the 17th of June, he got a message that accused 4 wished to see him. He booked him out of the cells.

Accused 4 then told him that the first statement he gave to the officer was not

the truth so he now wished to give a true account.

While giving his evidence, the Inspector said he wished to make a point of correction, that, namely, Accused 4 said, the statement did not contain everything, he now wished to tell the truth. The second statement is Exhibit Y.

Inspector Unandapo was cross-examined and criticised for acting not only as an investigator but as his own interpreter, and for taking down the statement. He was asked as before, why he did not involve another officer an independent officer in the investigations at that stage. Inspector Unandapo said he did not feel it necessary as the accused had been so cooperative.

determined. Thus the Court must not always shut its eyes to the environment in which it operates; even though striving to abide by the rule of law. Therefore I see no reason why, in appropriate circumstances, a statement taken from an accused person in those circumstances is not permitted and accepted as admissible in criminal proceedings.

I now weigh the evidence as a whole against accused 4 and consider whether the case has been established and proved beyond reasonable doubt. Inspector Unandapo appeared to want to qualify the evidence he gave about what accused 4 told him to justify the reason for his wish to make a second statement namely that he wanted to tell the truth. But it would seem that the inspector did not quite establish what he was setting out to do, to quote from the exact passage in the transcript, at page 981 in the record, line 10,

"Answer My Lady accused 4 came to me and told me that the first statement he gave was not a true story. He is now willing to confess or to tell me the true

story. Question: To which statement did accused 4 refer. Answer, his statement of the 30th of May. He said to me that the contents in it are not true", then went on, after a question,..." My Lady point of correction, the contents in this statement what he told me was not enough there was some information pending". (Counsel attempted to clarify), and said,... "some information", Answer: "that he was still, he omitted some information so he was willing now to tell me the truth and/or to add the truth to the other statement which he said it was not true."

It seems to me looking at that passage, that the attempt by accused 4 to withdraw his earlier answer on the ground that the first statement was false, did not succeed. Hence, the inspector's attempt fell short of what he wanted to do to complete an incomplete statement.

It is clear from the words used in that passage that all that accused 4 was saying was that the earlier statement was false and wished to withdraw it. In the result the presence of the second statement has resulted in contradictory evidence in the

State's case as put forward against accused 4. Whether or not, the accused's attempt was due to pressure that accused 4 received from his other inmates and whom he may have incriminated in the first statement, is not clear. Suffice to say, as the State has sought to put forward two versions of the statements and which cancel each other out, the question, which one to accept becomes difficult. Apart from that, in the State's case this particular accused person, accused (4), is the least mentioned, least known to Ms Sakeus. At one point Ms Sakeus said she didn't know his face as she had seen him only in prison. Later, she appeared to say she had seen him from time to time in the bar in the past

year, so even this witness could not give certainty to her claims.

Apart from anything else, accused 4 turned up of his own accord to surrender to the police. If accused 4 had had a lot to hide, and was fully involved in the criminal activities conducted that night, it is unlikely that he would have come forward to face the wrath of the law of his own accord.

Given this state of evidence against this accused 4, I am not convinced beyond reasonable doubt that the State succeeded in showing his complicity and involvement in the crime. The evidence that he was seen at the scene, of what the State refers to as the planning stage, at the Bar is not, in my view, enough to entitle this Court to infer that, thereafter the accused 4 joined the other accused persons in the criminal activities that ensued elsewhere.

In the event, I would find that the State has not discharged the burden of proof to such a sufficient degree which is expected in a criminal trial.

I will now look at the cases of accused 5 and 6, leaving out accused 2 and 3 to come last, because their case was most valiantly fought by their Counsel, and the evidence is considerably longer than in the other two cases.

I now turn to the evidence involving accused 5 and 6. The State relied on the evidence from a number of witnesses. Ms Sakeus's evidence, which I have already referred to extensively, is very central and crucial in these proceedings.

Ms Sakeus said that accused 5 and 6 joined accused 2 and 3 at her shebeen that evening first. She said, there was a lot of talking and no drinking at all. If I may comment, that evidence makes the lack of activity rather curious, as it

shows in my opinion, a group of persons in earnest discussion about a transaction of some moment; why else would you go to a shebeen and just sit around and not talk or drink when you normally would participate in drinking. Be that as it may, Ms Sakeus said she had known accused 5, at that time, for a year and a half, accused 6, about a year.

The witness Salom Walenga said he knew accused 5 very well. He said accused 5 frequented the People's Bar where he, Salom Walinga, worked. Sometimes he (accused 5) came with his girlfriend, Foibe. This part of Mr Walinga's evidence was not challenged. Indeed accused 5 agreed that he frequently visited the Bar and, he and Salom Walinga bought each other beer from time to time. Accused 5 claimed however that he was not there on the night of the incident, that he was out of town. He said that Salom Walinga was merely confused in saying that he (accused 5) was at the Bar that day. He said the confusion arose because of the frequency of his visits, that the witness was mistaking the one day for another. Salom Walinga was however adamant that accused 5 spent the whole day there apart from a break sometime during the morning. Walenga said accused 5 returned in the afternoon, that when he returned he was accompanied by his girlfriend, Foibe.

Salom Walinga had no reason to mention accused's presence at the Bar during the daytime. He can only have mentioned it because it occurred that day, thus it could not be said that Salom Walinga made the claim to implicate accused 5. Surely if Walinga had wanted to implicate and incriminate the accused in the commission of these crimes, there was nothing to stop him going the whole way by putting accused 5 at the scene of the crime during the course of the robbery in the evening. The fact that he does not do so shows that this witness

was reliable and trustworthy about accused 5.

Further, Salom Walinga was not alone in putting accused 5 at the Bar or in Windhoek that day. Further he was corroborated in the evidence by Ms Sakeus. I have already referred to her evidence, as far as accused 5 is concerned. Ms Sakeus is not likely to have been confused about the actual date when she last saw accused 5, as she was arrested a couple of days later after the police called at her home in the early hours of the following morning. On being questioned, she had a chance to reflect upon the events that had transpired a mere matter of hours before. She was not being asked to look back over a week or more about what had transpired on the night of the 18th.

It is from that evidence that I find that accused 5 was clearly lying about his alibi in which he denied that he was in Windhoek at all that day.

Thus, it follows that the evidence of his girlfriend Foibe, before the Court is not correct.

Helen Ingono (Foibe) told the Court that accused 5 left for Walvis Bay on the 10th of May 2004 and she left on the 16th of May to go to Owamboland.

Ms Ingono's evidence was unfortunately rendered of little value by the fact that she had been allowed to sit in court during Court proceedings for a good deal of the time, over the many months in which the trial lasted. Apart from her obvious bias in favour of accused 5, by trying to support her boyfriend, little weight is bound to be attached to her evidence as she had listened to the discussions in court. She was thus aware of the issues and some of the evidence which had been given.

With regard to accused 5 and his whereabouts on the 18th, when asked, he said he couldn't remember where he was, and explained that he is a salesman, he sells perfumes and travels a lot. I accept that a travelling salesman of that nature might not know exactly where he was selling his merchandise in a town or city. However one would expect that such salesmen would know or remember whether he was in Windhoek or at the coast, in Walvis Bay or Swakopmund.

In my view accused 5 was deliberately evading facing up to the truth about his movements on the night of the 18th of May 2002.

In support of the case that he was assaulted by Inspector Unandapo and Sergeant Ndikoma, accused 5 pointed to the medical evidence which is before the Court. He said that he sustained a swelling in his testicles, which was much smaller now than at that time in the days or weeks immediately after the assault. He said he had difficulty even wearing his jockey underpants and had taken to wearing boxer shorts.

Further evidence was led, ie of Nurse Phillemon. Doctor Fortch was called by the Court. Reliance was placed by accused 5 on that evidence as it confirmed the presence of a swelling in the testicles.

The major difficulty with that evidence, in my view, was that accused 5 was only seen by Nurse Philemon almost four months after the events which he claimed had caused that injury. It is common cause that accused 5 was seen on the 10th of September 2002. Doctor Fortch only examined him at the request of the Court with his consent, during these proceedings. Thus the matter of when, how or where the accused sustained the injury is left in doubt, and

leaves the evidence of the accused on its own, regarding the circumstances and place where he suffered that injury, if it was an injury.

Ms Ingono (Foibe) supported the accused's claim about that injury inasmuch as she said accused 5 complained to her when she visited him in custody. He told her, she said, that he had been assaulted and kicked by the police and suffered a bruise in his testicles. He requested her to buy him some Panado and she bought two packets and gave them to him.

The evidence of Nurse Phillemon and Doctor Fortch showed that that type of swelling or haematoma may be caused or may result from many other causes. Both gave instances to the Court. The evidence thus renders the accused's account, already weakened by the delay in which it was independently and objectively verified, medically, even more doubtful, in my view, to the extent that the Court would find it difficult to say that there might possibly be some truth in his claim.

Further, the State's evidence is that after accused 5 was interrogated by Inspector Unandapo, he was taken to Chief Inspector Becker to make a confession.

When cross-examination ensued, Counsel for accused 5 tackled Inspector Unandapo and put to the Inspector that...,"could you have surrendered accused 5 within 10 minutes of the cessation of your interrogation for instance?" Counsel dwelt on this 10 minute point. The Court wondered whether it was part of accused's case that he was taken to Inspector Becker almost immediately afterwards. However, it became apparent that Counsel was doing

no more than fishing as, later on in the proceedings Counsel put it in terms, to Inspector Unandapo that accused was taken to Inspector Becker much later, namely about 7 hours afterwards.

However, inspector Unandapo, however said he simply didn't know and couldn't remember whether he took the accused to the Inspector immediately afterwards or whether the accused had had to wait, in which case he would have been sitting in the corridor which is part of his office. He was adamant that he never, at any time, assaulted accused 5. He denied also that Sergeant Ndikoma had also assaulted him with fists or kicked him in the testicles after the accused was felled down by a fist blow. He denied that the swelling resulted from such blow.

If the accused had been assaulted in the manner he claims to have been I doubt that he would have been able to stand up straight, able to walk. Yet, apparently he walked with little difficulty and, normally, to get to the Inspector's office to have his confession taken. I doubt too whether in that state and condition he would have been able to dictate 6 pages of the account, or, on his new version, to remember the contents which were dictated to him by Inspector Unandapo. If accused had been so severely beaten, one would have expected signs of injury or, unease, at the time the confession was taken. Inspector Becker said that there were no signs of injury on the accused, that a video recording which he had taken shows a normal, comfortable individual sitting comfortably without any signs of distress.

Counsel for accused 5 submitted that accused may have put on a brave face because of the presence of cameras, that he may have thought that the Namibia Broadcasting Corporation was filming the process so he would not want to

appear otherwise than his cheerful and normal self. I note Counsel's ingenuity in this explanation, I doubt that the accused would have entertained those thoughts at the time, if only for the sake of the television cameras, if he, indeed had been in such pain.

Inspector Becker said he was very careful when he interrogated the accused to ensure that he understood and was fully aware of his rights. He said he even went beyond the contents of the pro-forma which is used on such occasions when explaining the accused's rights. He said in this case he did so, particularly, in view of the claims of assault that accused was making against the investigating officer. The Inspector said, having given him his rights, and warned him that he need not go ahead with giving the statement the accused elected to do so.

I have read and looked at the long statement, as Exhibit R. I am impressed by its contents and its detail. The sequential arrangements of the events reflect a calm and collected mind, able to focus on what he was saying. The statement fills in a lot of gaps in the movements of accused 5 and his accomplices. It couldn't possibly have been an invention or something he had had to cram into his head in the course of being severely assaulted.

Accused also said that he had another source for the contents of the document, ie what he had read in the newspapers. When he was asked about details, the newspaper was produced. The article referred to only mentioned a robbery, the killing and the sum of money involved. Those few points can hardly have occupied 6 handwritten pages of a statement.

Having regard to all the evidence led, I have no doubt whatsoever that the State has proved completely accused 5's participation in the commission of the crimes on the night of the 18th of May 2002 with full knowledge.

Turning to accused 6. According to Ms Sakeus, accused 6 was known to her for about a year and was present at her shebeen on the evening of the 18th, there he joined accused 2, 3 and 5. I have already referred to Ms Sakeus's evidence that there was no consumption of alcohol that they just talked asking questions from time to time about the whereabouts of accused 1.

The State has argued that what was being done in the shebeen, hours before the robbery was the planning and putting into place the nuts and bolts of the robbery about to be committed. The conclusion in my view, seems perfectly reasonable and compelling as the only inference to draw. Why, would six men sit in a shebeen for hours on end without partaking in any alcoholic consumption, then leave in the dead of night to go to town, as related by Mrs Sakeus'. It is curious. It is without doubt that accused 1 called to check on the state of preparedness of the accomplices and check on the plans. Apart from the evidence concerning accused 6, there's the evidence of Ms Sakeus that, the following evening, accused 6 called again at her shebeen, that he was alone and had a drink while walking about. She said she approached him and told him that accused 2 and 3 had gone to the north of Namibia. But it remains strange that an accused (6) who had been part of a robbery and murder a few hours before, was making himself so visible at a public place, and the place where he had a meeting with his accomplices before the robbery.

The presence of accused 6 at the shebeen that early evening is in sharp contrast

to the behaviour of his accomplices. For instance the rapidity with which accused 2 and 3 got away from the shebeen that morning ie as soon as they could. That is very different, it is more consonant with the actions of a criminal who wants to slip away while the scent dies down and to emerge only when it seemed quiet and safe to do so.

Accused 6 seems to portray a naive and curious individual. Did he want to know, perhaps, what had happened to the plans of the previous day? This is arguable.

Apart from this, and unlike the others, accused 6 never made any confession to the police. In his evidence, accused 6 gave varying accounts of where he was on the 18th - 19th. First, he said he was not sure, but thought he was in Windhoek -sleeping at his Hakahana home, then he said he was at Farm, Asaria where he was employed.

The State disproved his evidence and questioned his alibi. It was then established that accused 6 did not start work at Farm Asaria until the 26th of May. Accused explained that he had made a mistake about the dates.

In my opinion it is reasonably possible that a man who feels innocent of what is being alleged especially when what is alleged is a serious crime yet is aware that there is something in his movements that might be held against him, namely that he was part of the appropriation and planning of the criminal enterprise. Even though that fear may be slight, the accused person may feel that he needs to do more to establish his innocence by inventing, say, a false alibi that takes him away from the scene of the crime, in the belief that a bare denial would not suffice or carry conviction about what he was saying. In that

state of mind he thus comes to the conclusion that the best thing to do is to pretend that he was elsewhere, even though that was utterly false.

In this case I am of the view that the State has not led sufficient evidence to prove beyond reasonable doubt that once accused 6 and the group left the shebeen that night he had proceeded with them to the scene of the crime, became part and parcel of the crime, that the participation was with full knowledge of the nature of the weapons carried and, the objective of the enterprise to steal money from the patrons at the People's Bar.

In the result, I find the case for the State is not sufficiently and adequately proved for the purposes of a criminal trial.

I turn finally to accused 2 and 3. I will deal with these two cases together wherever there is common ground and wherever possible. The State has placed great reliance on the evidence of

Ms Sakeus. Ms Sakeus' incriminatory evidence was undoubtedly against her own interest. Though her evidence is largely circumstantial the inferences to be drawn from it are compelling and exclusive. The assertion during cross-examination that she still loved Accused 2 even though he had thrown her out of their home, came over as truthful, simple and honest. Her declaration that she was financially dependent on accused 2, that he had been fully supportive of her and the child means that a conviction, if one may to result, will deprive her of her support. The acceptance of that consequence tells just how honest and trustworthy Ms Sakeus's evidence was.

There is no doubt that accused 2 was lying in his evidence when he claimed

that he left for Ovamboland some days before the incident and was not therefore in Windhoek on the day of the commission of the offences. Clearly too, his younger brother was lying. Barnabas had been called by the State but his evidence contradicted his statement and the evidence of Ms Sakeus. I prefer the version and account of Ms Sakeus to that of Barnabas.

Ms Sakeus said how very surprised she was when accused 3 revealed that they were about to depart for the north as she was making them breakfast. I agree with the State's view that the inference that it became necessary for accused 2 and 3 to get out of town as quickly as possible after the events of the previous night is inescapable. The accused was bound to try and escape the consequences of his actions.

Both accused persons denied the contents of their statements, I had ruled these admissible earlier on. In addition both accused challenged the fairness of the evidence of pointing out. What did not appear to be challenged was the evidence of Inspector Viljoen. He said on the 19th of June 2002 he took both accused, each in turn, to the People's Bar, that in there each accused pointed out various positions within the People's Bar and

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Gambling Inn. Inspector Viljoen, like Inspector Van Zyl, said he did warn the accused of their rights and, their entitlement not to go out for a pointing out. Both accused persons, however deny that they were arrested in circumstances which the State has described. They each claimed that they were arrested in Okahandja.

As part of its case the State produced photographs taken after the accused's arrest, the photo shows a zinc metal house and, inside, the base of a bed showing a hole where the accused were found hiding. The accused denied that

they were found thus.

It is inconceivable however that the State would have gone to such great lengths as to set up a fictitious scene of such detail. There is no doubt in my mind that the probabilities are against such a suggestion, the suggestion is as farfetched as the evidence of the accused persons is.

Further, the State relies on the evidence of the warning statements. The statements are on record, I need not set them out. Both accused persons gave conflicting reasons to support their objections to the evidence of the warning statements. The contradiction in each is material and goes to the hard core of the issues.

The challenge to the admissibility of statements, during the trial within a trial, was on the ground that Inspector Unandapo assaulted the accused for days before taking them to make statements in front of Inspector Brune. When giving evidence in the main trial, both accused, in turn, claimed that the contents of the statements were not theirs, that they were dictated to them by Inspector Unandapo, who told them to go and repeat the details to Chief Inspector Brune. The omission to put this to the State witnesses resulted in the failure by Defence Counsel to cross-examine Inspector Unandapo on that basis. It is quite unlikely that Counsel of such experience would have confused the one ground for the other if the latter defence had been raised. I find that the claims of assault with a view to making them make statements, or that the contents of the statements were dictated by Inspector Unandapo is not at all credible. The claims can't possibly be true.

In regard to the evidence that accused 2 had a spot of blood on his T-shirt as a result of the assault, and a bruise on top of the head, that evidence does not take the Defence case far. As Chief Inspector Brune said, the slight injury was on top of the head, while Accused 2 claimed that he was beaten and suffered an injury to the eye and the face. He said that that injury was bleeding and thus resulted in the spots of blood on his T-shirt. Chief Inspector Brune however said he inspected the accused for any injury or swelling, and he found none, apart from what he had already described to the Court.

As regards the assaults on the chest, Inspector Brune clarified his evidence to the extent that he said having found no bruise he asked the accused to raise his T-shirt that the inspection revealed nothing. He said, it may well happen that a person is assaulted but no external bruising results and only internal injuries. He said even then, some kind of swelling would have been evident from the outside, even on a visual inspection. So the evidence of the source of the spots of blood is unclear. Further there is no knowing how old those blood spots were or where they could have come from? The accused's explanation clearly had no basis because if there had been a cut on the eye which had caused blood to flow the skin would have been broken. Such an injury would have been easily visible to Chief Inspector Brune. The Chief Inspector's final word was that the accused's face was perfectly normal, that there was neither a bruise nor a cut.

Then there came a stage in the cross-examination of Chief Inspector Brune in which the Chief Inspector was invited to speculate about the reason why it took from 16:30 to 20:35 pm to conclude the statement of accused 3. Whereas the Chief Inspector said the interview could have lasted for half an hour only,

but said he couldn't remember, he was cross-examined time and again and asked to concede various possibilities. At the end of many questions, the speculation changed into positive evidence and the Inspector appeared to accept the accused's propositions as put to him by Defence Counsel, I quote from a passage in the record,

> ***"Question. Well you would not be in a position (to) dispute it if I put it to you that it's my instruction from the accused that the first time he was into your office, he informed the Interpreter that he doesn't want to give the statement without his lawyer. Yes. And then you said. Okay. In that case then I will leave you here alone.***
>
> ***Would you be in a position to dispute that? It is quite possible,*** Sir."

This is a typical example of what happens in cross-examination when a witness is questioned time and again, and, even though he says, he cannot remember, it is put to him that it is possible. Thereon possibilities are continuously put to the witness, the witness explains the general practice which is adopted in situations such as that under cross-examination. The accused person's case is then put to him and the witness having said, it might be possible, turns around and says, yes. Cross-examination of this nature becomes misleading, it should not be encouraged. Cross-examination is an essential weapon in the adversarial system of justice. It is intended and designed to test the other side's witnesses. To be of assistance to the Court, cross-examination must remain fair to the witness.

I admitted the warning statements and ruled them admissible because, in my view the Court has to be realistic when dealing with, largely sophisticated individuals who are well aware of their rights. As I have previously observed,

common sense should not be thrown out of the window. Thus I reject entirely the claims that the accused persons were viciously assaulted by Inspector Unandapo who then took them to Chief Inspector Brune to record confessions. Inspector Unandapo would have known when sending the suspect to a senior officer that a brutal assault would leave telltale marks on the body. So it would be risky in the circumstances, and was bound to result in a rejection of any confession that may ensue. As it happened, in this particular case the Chief Inspector said he inspected the accused persons for marks and injuries as a result of their complaints. He said he found none except those already indicated.

I turn to consider the evidence of pointing out. Accused 2 and 3 in turn, complained that they were assaulted by Inspector Unandapo. In the case of accused 2 it was said the Inspector carried out the assault in the company of Sergeant Ndikoma and another officer. Both accused claimed that they were shown the place to point out by the Inspector on the previous day, that they were then told to indicate the place to the Chief Inspector the following day.

Inspectors Van Zyl was assisted by Constable Iyambo. He said when the accused told them about the assaults they asked the accused to strip, so they could check for injuries, none were found. The Chief Inspector said he particularly warned the accused about his right to remain silent and, that he was entitled to say no to going for indications or pointing out, that the accused agreed to go ahead anywhere, and was cooperative.

Further the accused assured the Chief Inspector that he was acting freely and voluntarily, not as a result of the assault. Thereafter the pointing out ensued.

The Chief Inspector then gave a very detailed account of what the accused said, how the accused directed them to this or that spot. The Chief Inspector was very convincing when he said that though accused person had made a complaint of assault, once the Chief Inspector had repeated his rights, the accused elected to go ahead with the pointing out. He said it was as a result of the pointing out by accused 2 that the Markorov pistol was found.

Accused 2 said in his evidence that he had been told by Inspector Unandapo where to go when he took him out the previous day.

Accused 3 also said that Inspector Unandapo took him to the scene on the previous day. Later however, accused 3 changed his mind and said that although Inspector Unandapo took him to the scene, they did not get into the Bar because it was locked, but it was Inspector Viljoen who took him the following day told him what to point out, and where to go. He said Constable Haraseb was also there at the time.

None of this evidence was put to the Inspector or Constable Haraseb. My view, having regard to all the evidence, is that accused 2 and 3 are making up their cases as they go along.

There can be no doubt that a failure to put to a witness evidence which is crucial is a denial of a chance for the other side to deal with their opponent's case. The omission to do so is prejudicial to them.

In the case of *Small v Smith* 1954 (3) SA 434 (SWA) the Court said that:

> ***"It is grossly unfair and improper to let a witness evidence go unchallenged in cross-examination and afterwards argue that he***

must he disbelieved."

I entirely agree and endorse those remarks.

As I previously observed the chops and changes in the story of accused 2 and 3, as well as the last minute addition to the instructions, are all symptomatic of the story that has no foundation in truth. Besides, there is a multitude of corroborative evidence about the complicity and involvement of accused 2 and 3 in the crimes committed on the 18th.

In the case of accused 3, his presence at the scene was confirmed by a witness who was in the People's Inn Gambling Bar. Salom Walinga said he told the police that he could recognise accused 3. This claim adds to the evidence of a get together at the planning stage earlier. That evidence of the events of the evening in my view is overwhelming. Further, Salom Walinga identified accused 3 at an identification parade. The identification parade which was very properly run by Chief Inspector Sass ie in accordance with the rules. Walenga had no difficulty in picking out Accused 3.

The identification evidence was criticised. The defence's claim is that accused 2 was taken back to the same room where he had been waiting before the parade, that the next witness was still present. It was argued that this was unfair.

I am not swayed by the claim, there is no substance in it all. All that appears to have been done, if it was done, and which Inspector Unandapo denies, is that Walinga was taken under escort from the parade to the previous room where

Martin, now deceased, was. But on the defence's claim at the time Martin was on the way out to the parade. Thus there is no suggestion that there was any communication between the two witnesses, as the one entered the other left.

It was put to Walinga that he was making up the statement that he had told the police before the parade that he could identify accused 3. Walinga however said that he was surprised as to how the police came to miss out that part of the evidence.

As regards the criticism about the omission, it is known in the Courts that shortfalls in police interrogation and taking down of statements do occur. Statements are not always complete, nor should they be expected to contain everything that a witness has said. This observation was made in S *v Hanekom* No. 4 2001 (Supreme Court) by the then Chief Justice, Chief Justice Strydom.

Apart from this, the State fairly conceded that the evidence of Walinga was not always perfect but was sometimes confused and contradictory. It is not in dispute, and is on record that Walinga was undoubtedly confused at times when he said Inspector Unandapo, for instance, showed him the firearms the day he went on parade. That could not have been the case because the firearms according to evidence in Court were only found on the day of the pointing out, namely in the presence of Chief Inspector Van Zyl. At that time Inspector Unandapo was nowhere near the scene. If one were to accept Walinga's evidence on this point it would mean that the police had set-up a fake and complex piece of evidence, away from the police station simply, to implicate the accused person. The suggestion is farfetched and implausible. The confusion in Walinga's evidence is understandable. The ordeal that he must

have undergone on the night of the robbery was considerable. At the time of the interview he was not long separated from the events. Thus allowance should be made for that circumstance.

Regarding the evidence of identification, the Court has warned itself of the need to be cautious. Therefore I have weighed the evidence adduced by the State especially, in the light of those aspects of Walinga's confused evidence. Having done so I am satisfied beyond doubt that that evidence was true and correct. The evidence of Inspector Van Zyl of the pointing out is on record and is sufficient support to confirm that it was as a result of the pointing out the firearms including the shotgun were discovered.

I have also referred to the evidence of Inspector Viljoen. He went on indications on the 19th of May with the two accused. On returning, after warning them, the two made various indications within the Bar/Gambling house. Apart from the evidence of identification by Walinga, the evidence of the State is largely circumstantial. In coming to the decision whether or not the State has proved its case beyond reasonable doubt, I have to weigh all the evidence and decide whether or not the inferences to be drawn are consistent with the proved facts and, are the only reasonable inferences that can be drawn: *R v Blom* 1939 AD.

I have no doubt in my mind that the State has proved its case beyond reasonable doubt.

The decision is supported by overwhelming and incriminating evidence against the accused persons, thus leading to the conclusion as the only one that each particular accused was part and parcel of the robberies and murder, as well as

the subsequent attempt to try and dispose of the weapons - either by hiding them or burning them.

It is trite that this Court must not throw away common sense and require the State to close every avenue of escape that may be open to the accused. It suffices that the State has adduced evidence of such a high degree of probability that a reasonable man may, after consideration, conclude that there exists no reasonable doubt that an accused person has committed the offence: See S *v Rama* 1966 (2) SA 395.

I find therefore that accused 1, 2, 3 and 5 acted together and in concert, and were present, and participated in the offences that were committed at the People's Bar Gambling House No. 2 on the night or early morning of the 18th - 19th of May 2002.

As to the question of intent, evidence was led through Doctor Shangula who carried out the post-mortem examination on the deceased, Nghatanga. As there was no challenge by the accused persons, I shall simply state that the Doctor found that the bullet which killed the deceased was fired in a horizontal projection and went through one set of ribs and exited on the opposite side through the ribs, then rested inside the skin. I find that there is no reasonable possibility whatsoever that that bullet could only have been fired from an upward/downwards position as suggested in one of the confession statement, namely that it was a ricochet bullet which the accused fired in the air. Furthermore, from the evidence the bullet was fired at close range, about 3 metres away from the deceased. Firing at a person at such close range with a firearm directed to the most vulnerable parts of the body can only lead to one conclusion, namely that the person firing the shot intended to kill his victim.

The accused persons planned together, went together and were well aware that at least two of them were armed with weapons. The failure to dissociate themselves from the plans or with the activities once inside, such as when threats were made and money taken from the patrons or owners makes all the accused guilty of the acts perpetrated. Ample evidence of possession by accused 1, 2 and 3 of $1 coins, which could only have been part of the proceeds of the robbery, hours later, finally nails the coffin against all.

Accordingly I find as follows: In

count 1 of murder:

Accused 1, 2, 3 and 5, I find guilty with intent to kill. Accused 4
and 6, are found not guilty.

With regard to count *2,* and 3, of robbery with aggravating circumstances:

Accused 1, 2 3 and 5, are found guilty of robbery in aggravation circumstances.

Accused 4 and 6 are acquitted.

With regard to count 4, defeating or obstructing the course of justice.

Accused 1, 2, 3 and 5 are found guilty on the main count and acquitted on the alternative count of malicious damage to property.
Accused 4 and 6 are acquitted.

Accused 4 and 6 are acquitted and discharged on all the counts.

GIBSON,

ON BEHALF OF THE STATE **Ms R Gertze**

Instructed by: **Office of the Prosecutor-General**

ON BEHALF OF ACCUSED NO. 1 **Mr C Mostert**

ON BEHALF OF ACCUSED NO. 2 & 3 **Mr B Basson**

ON BEHALF OF ACCUSED NO. 5 **Ms L Hamutenya**

Instructed by: **Directorate of Legal Aid**

In the matter between:

GERSON HOVEKA t/a HOVY TOUR AND SAFARI **Plaintiff**

Versus

FGI NAMIBIA LTD **Defendant**

CORAM: **MARITZ, J.**

Heard on: Delivered on: 2000/09/02 2002/01/31

JUDGMENT

MARITZ, J.: The crisp issue to decide in this action for payment of indemnification under an insurance agreement is whether the defendant isthe "Specific exempted fromExceptions" of liability because thesection 17 of the person who hadMultimark driven the insured vehicle "was not licensed to drive such vehicle" (as contemplated in clause 1(c) (ii) of