CASE NO.: CC 06/2010

IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI

In the matter between:

THE STATE

and

KARIPI MELVIN SIBUNGO **1st ACCUSED**

NICKSON MUTONGA MWIYA **2nd ACCUSED**

CORAM: **TOMMASI, J**

Heard on: 01 - 04/03/2011, 7/03/2011, 9 - 10/03/2011
Delivered on: 15/03/2011

JUDGMENT^

TOMMASI J: [1] Both accused were charged with murder and robbery with aggravating circumstances in that they on 27 February 2006 in the early hours of the morning stabbed the deceased and robbed him of his cell phone and an unknown amount of cash.

[2] Both accused pleaded not guilty and in their Plea explanations indicated that they were not at the scene as they were sleeping at the time.

[3] The State handed in by agreement the State's Pre-Trial Memorandum; the reply thereto by both accused; the amended reply by both accused; a document titled "Confession in terms of s 217 of the Criminal Procedure Act[1]" made before the Magistrate Shakala by Accused 2; the report on the medico legal post-mortem examination; an affidavit in terms of s 212 (4) of the Criminal Procedure Act[1]; certificate of Post Mortem; and the record of the proceedings in the Magistrate's Court

[4] Initially the identity, the post - mortem findings and the fact that the deceased did not sustain any further injuries were placed in dispute by accused 1 but during the trial it became apparent that these issues were no longer in dispute.

[5] The State called the following witnesses: the doctor who conducted the post-mortem examination; an eye witness, Robert Simasiku, his neighbour,

Doreen Nkando, a former police officer, Constable Kwenani who was living in the same street where the incident took place, Detective Sergeant Coetzee who compiled the photo plan; Det. Sgnt Antonius Gabriel; and Det. Sgnt Veldskoen.

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1 Act 51 of 1977

[6] A short summary of their evidence is as follow: On 27 February 2006, at around 4H00, the deceased, Samuel Johannes, died of a single stab wound at House no 765, Choto, Katima Mulilo. This, from the description of all the witnesses, is a shack with no fence and the yard extends directly onto the road. It was dark at the time but the yard was illuminated by a street light directly across the road. One single globe was on inside the house. Robert Simasiku was the only witness who saw the deceased and two assailants close to the door of the house. All the other witnesses were informed by Robert what transpired and they made some of their own observations.

[7] Robert was woken by a noise outside the house and he got up to investigate. He opened the door and saw three persons close together, two of them facing him and another with his back to him about 2.5 meters from the door. The two assailants ran away and he recognised accused 1. He has seen him before in town and he heard from people that his name was Karipi. He saw his back and the side of his face. He also saw the clothes he was wearing. The other assailant he did not recognise but observed the clothes he was wearing. The deceased entered the room and fell down. He went to wake the neighbours and the Police were called. He immediately informed the neighbours what happened and told them that he recognised accused 1.

[8] The neighbours came to the scene to witness what has happened. Two of those witnesses informed the Court what they observed at the scene where the crime was committed and what they were informed by Robert. One of the neighbours was a

constable who was not on duty at the time. He called the detective who was on duty.

[9] The Detective who was on duty at the time attended the scene and decided to fetch the other members of the criminal investigation unit. They arrived at the scene; interviewed Robert; and did a preliminary investigation of the scene in and around the house which included taking photographs. They, on the strength of the information that accused 1 was at the scene, ascertained that accused 2 was seen in his company. They arrested both accused the next day. Accused 2 made an oral statement to Det. Sgnt Veldskoen and a "*confession*' to the magistrate.

[10] At the end of the state's case both defendants applied for their discharge and submitted that there was no evidence placed before the Court upon which a reasonable Court, acting carefully, would convict. The State opposed the application.

[11] Both counsel furnished the court with a number of authorities for which the Court is indebted. The Supreme court in S v TEEK 2009 (1) NR 127 (SC)
cited with approval the decision of S V NAKALE 2006 (2) NR 455 (HC). In this
judgment Muller J at page 464 D - J after considering various authorities
comes to the following conclusion clearly setting out the approach that should
be followed by this Court:

> "*Having considered the aforementioned, it seems to me that the reasoning of Du Toit AJ in S v Phuravhatha is the closest to the approach that should be followed. Du Toit AJ held that the possibility that an accused may supplement the State case is only one factor and similarly the interests of the accused are also a factor to be considered. I suggest that the possibility of an accused supplementing the State case is not a factor, but a consideration. There are also other considerations, such as the interests of the accused. In order to evaluate these considerations, certain factors should be taken into account. I shall shortly refer to some of the factors which may assist the Court in its consideration whether the possibility exists that an accused may supplement the State evidence. When evaluating the reasonable possibility that an*

accused may supplement the State evidence as a factor according to Du Toit AJ's judgment in S v Phuravhatha and Others and supported in this Court by Mtambanengwe J in S v Paulus and 12 Others (supra) and which I call a consideration, I believe the Court should consider the following factors to come to a decision in respect of this consideration:

(a) the type of offence(s) allegedly committed;

(b) if there is more than one accused and there is evidence by the State supporting an allegation of common purpose;

(c) presumptions of law;

(d) reliance on an alibi;

(e) the manner in which the accused cross-examined State witnesses and statements made to them;

(f) allegations or admissions made during pleading.

There may be other factors and it is not possible to provide a numerus clausus thereof"

[12] The Court therefore would therefore apply the above guidelines when considering the facts of this case.

[13] Counsel for the defence argued that the identification by Robert was unreliable and his evidence as a single witness was so poor that no reasonable Court would convict on this evidence.

[14] Robert testified that he opened the door and stood in the doorway. He saw three persons but could not identify any of the persons. His explanation was that he could not see what was happening in front of the door because it was dark. He could only identify accused 1 in the light of the streetlamp when he was running away. He only saw his back; the side of his face; that he was a light complexioned short person; the clothes he was wearing, and the tattoos on both his hands. This is how he identified the accused. The other assailant ran into the dark and he saw his length and clothes only. All of this took seconds. Doreen, Const. Kwenani, Det. Sgnt. Gabriel and Det. Sngt. Veldskoen all confirmed that there was enough light coming from the street lamp that was situated directly opposite the road and from the one globe inside the house which according to Robert was on at the time, to see what was happening in front of the house. Doreen testified that Robert informed her that

he ran after the assailant into the road and then recognised him. Det. Sgnt. Coetzee took a photograph of a point where he heard Robert say that that was the point where the deceased was stabbed. Det. Sgnt. Gabriel testified that Robert informed him that he was standing at the door and he observed a struggle and identified the deceased when he ran away; and Det Sgnt. Veldskoen was adamant that

Robert informed them that night that he identified accused 1 outside the door and he saw the struggle and accused 1 stabbing the deceased.

[15] Apart from the fact that this witness was a single witness to the events that occurred outside the house his evidence also embodies the identification of accused 1. This Court should therefore apply caution when considering his

evidence. In S v MTHETWA 1972 (3) SA 766 (A) at 768A-C: the following is

stated in respect of identification evidence:

> 'Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities …… '

(Also see S v KAVANDIJI 1993 NR 352 (HC); S v NDIKWETEPO AND OTHERS

1992 NR 232 (HC); and S v NANGO 2006 (1) NR 141 (HC))

[16] According to this witness this incident took seconds and he was also had to deal with the deceased that entered the house with a knife in his chest. The assailants were fleeing and only the side profile and back of accused 1 was visible. It is a mystery how he could see the tattoos on both the hands when all he could see was the side of his face and his back. When cross-examined on his prior knowledge of the accused 1, he indicated that he never spoke to him. He further did not testify how often he saw accused 1 and the distances from which he observed him. Of bigger concern is the different reports given of what he said that evening and the fact that it is clear from the evidence of the other witnesses that if, he did see the assailants in front of the door, he should have been able to see their faces. I cannot but agree with counsel for the defence that this witness's evidence was poor.

[17] When applying the caution that is required, the Court cannot only rely on this witness's evidence in respect of the identification and must turn to evidence which would corroborate it. I pause here to mention that the evidence of Robert that: he woke up and found two assailants fleeing the scene; and that the deceased was already stabbed with a knife when they fled the scene; was not disputed and could at this stage be accepted.

[18] The police testified that both accused wore clothing that fit the description given by Robert. The Police officers testified that accused 1 was wearing a short khaki shorts and navy sneakers and accused 2, a long black trouser and white falcon sandals at the time they arrested them which clothes fit the description given by Robert. These items were never shown to Robert to confirm whether it resembles the clothes he saw at the time. No reliance can be placed on the assessment of the police officers as they were only given a description of the clothes. Of importance is the fact that: the identification of accused 1; and the description of the clothes worn

by the second assailant given by Robert, enabled the investigating officer to identify accused 2 who made an oral statement and a "*confession*".

[19] Robert's description of the shoes worn by the assailants corresponded, according to the police, with footprints found at the scene and later with the shoes both accused had on when they were arrested.

[20] Doreen testified that she saw some footprints indicating that there were struggle marks at the right hand corner of the house. Det. Sgnt Coetzee said he found struggle marks in a 2 x 2m span around the front door. Det. Sgnt Gabriel said it was about 4t 5 m from the door and Det. Sgnt Veldskoen said he observed foot prints and struggle marks two steps just in front of the door. Constable Kwenani, Doreen, and at least one other person, accompanied Robert into the house to see. By the time the police arrived there were already 6 to 10 people in the yard or in the vicinity of the yard. Det. Sgnt Coetzee testified that he could not take photographs of the footprints as the area has already been tempered with whereas Det. Sngt Gabriel said the photos were taken but it could not be developed. Det. Sgnt Veldskoen testified that he was not able to preserve the shoeprint because it was early in the morning. He saw the size shoe accused 1 was wearing and concluded that it was the same size and type of shoeprint that he saw.

[21] The investigation of the scene was not thorough; no sketch plan was given to the Court to indicate relevant distances between various points and no reliance could be placed on the estimates given by the witnesses as each differed; the evidence of the police officers in respect of the location of the footprints differ and no photograph was presented to indicate that they indeed saw the footprints, given the fact that there were already so many people in the

area. In S *v IMENE 2007 (2) NR 770 (HC)* at 772 E-F Damaseb JP, referred to the matter of Jacob Reinold v The State HC case No CA 69/2003 (unreported) delivered on 28/10/2003), where Silungwe J said:

> *It is trite law that footprints may provide circumstantial evidence of identity. In S v Mkhabela 1984 (1) SA 556 (A), the Appellate Division remarked at 563B (per Corbett JA, as he then was, with Joubert JA, and Cillie JA concurring) that cases that deal with footprints, such as R v Modesane 1932 TPD 165; R v Nkele 1933 TPD 36; R v Mabie 1934 OPD 34; and F R v Louw 1946 OPD 80, merely lay down that evidence of footprints is admissible but that the court must be cautious in relying upon it, especially where it is the only evidence against the accused; and that the cogency of such evidence must depend on all the circumstances of the case.*

[22] The evidence in this instance is not convincing. No reasonable court, acting cautiously would rely on this evidence as corroboration for the identification.

[23] The statement and "*confession*" made by accused 2 becomes crucial to determine the outcome of the application for discharge in terms of section 174 as it forms part of the evidentiary material before Court.

[24] According to Det. Sgnt Veldskoek accused 2 made an oral admissions to him in the presence of his guardian (accused 2 was a minor at the time) to the effect that he only took a cell phone from the deceased and that it was accused 1 that stabbed the deceased. It is trite law that the *extra-curial* statement would only be admissible against the maker thereof. Counsel for accused 2 put it to the witness that he will dispute making an oral statement. Until this happens this forms evidence before this Court. In the reply to the pre-trial question whether accused 2 will dispute that the admissibility and contents of his oral statement; accused 2 first admitted and in his amended reply disputed it. Furthermore, accused 2 in his "*confession*" indicated that he made a statement to Det. Sgnt. Veldskoen. This admission contains an important admission that it was the deceased whose cell phone was taken. The credibility of Det. Sgnt. Veldskoen in respect of this evidence plays a limited role at

this stage and this evidence should therefore be evaluated at the end of the state's case.

[25] Counsel for the accused submitted that the State did not prove the offence of robbery and that the words of the deceased should not be admissible as it amounts to hearsay. Without elaborating on this issue at this stage, I can only indicate that the words of the deceased are not admissible as it does not amount to a dying declaration. The admission of accused 2 to Det. Sgnt

Veldskoen, however, given the further admissions contained in the "*confession*" could support a conviction of robbery.

[26] It was common cause between counsel for the state and counsel for the defence that the "*confession*" was not a confession as it does not amount to an unequivocal admission of guilt. I am in full agreement with this submission.

The following is an extract from the "*confession*"*:*

> "*It was on 26 February 2006 it was night. It was in Choto. I was with Karipi Sibongu. We were sitted (sic) inside Choto Inn; Karipi was outside. Karipi came in and asked me to escort him. As we were walking he said we should make a turn into another street and later into one residential premise. As we were approaching the door of the house there was a man knocking on the door. Before the man saw us Karipi told me to grab the cell phone from the man who was knocking on the door. I grabbed the cell phone from the mans (sic) waist and I ran away. Karipi followed me and found me at the house of his girlfriend.30 (thirty) minutes later. Upon his arrival he told me that his knife was lost it fell down. He did not tell me where it fell. He asked me for the cell phone. I gave him and he got it. He removed the s card and hide it somewhere. He asked me to escort him first to Choto to change his clothes because the people had seen him where I had left him. We first went to Choto where Karipi changed his*
> *clothes, the jacket he had on. …….. The following morning when we woke up we came to the shopping center where Karipi sold the cell phone.*"

[27] Counsel for the defence indicated that the date is not the same as the date on which the deceased was stabbed i.e in the early morning hours of 27 February 2006. Counsel for the State argued that the concept of night may include the early

morning hours. I am more inclined to agree with the State. Night generally include the hours of darkness. The *extra-curial* admissions, at this stage, forms part of the evidentiary material and together with the testimony of Robert is sufficient to put accused 2 on his defence.

[28] The consideration for accused 1 is different in that, as I already mentioned that the *extra-curial* admissions made by 2 is not admissible against him; but it is an indication that there exist a reasonable possibility that accused two might implicate him in both the murder and the robbery. This is a consideration in applying this Court's discretion whether to grant a discharge. It however is not the only consideration. A further consideration applied by the Court is the fact that common purpose is alleged by his co-accused in his "*confession*". Furthermore, from the reply to the pre-trial memoranda, it is evident that accused 2 never disputed that he was in the company of accused 1 during the early hours of the morning whereas accused 1 disputed this. This contradiction lies at the heart of the alibi of accused 1 and 2. For these reasons this Court considers it premature to discharge accused 1.

[29] In the premises

The application for the discharge of both the accused is dismissed in respect of both counts.

Tommasi J