



**CASE NO.: CC 02/2009**

*REPORTABLE*

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**THE STATE**

and

**FANUEL FESTUS SHIPANGA**

**ACCUSED NO. 1**

**PAULUS KAMATI**

**ACCUSED NO. 2**

**CORAM: USIKU, AJ**

Heard on: 01 - 04 June 2010; 07 - 10 June 2010; 14 June 2010;  
16 - 18 June 2010; 21 June 2010; 24 June 2010; 28 June 2010; 22 July  
2010; 18 - 20 August 2010; 30 August 2010; 01 - 03 December 2010;  
06 - 08 December 2010

Delivered on: 25 March 2011

### **JUDGMENT**

**USIKU, AJ:** [1] The accused persons stood jointly charged with murder on the first count, robbery with aggravating circumstances on the second count, kidnapping on the third count, possession of fire-arms without a licence on the fourth count, and possession of ammunition

on the fifth count. Each accused person pleaded not guilty to all the counts.

None of the accused persons offered any plea explanation in terms of section 115 of the Criminal Procedure Act, Act 51 of 1977 as amended.

[2] All the offences are alleged to have been committed on the 8<sup>th</sup> of July 2007 at or near the Khomas Hochland within the district of Windhoek.

[3] The summary of the substantial facts read as follows:

On Sunday the 8<sup>th</sup> of July 2007, the deceased and his wife Elke M G Fellingner arrived in Namibia from Germany. After hiring the pick-up motor vehicle as referred to in count 2 in the indictment, the couple drove in the direction of Khomas Hochland. At or near the Francious Feste Stone ruins in the district of Windhoek, the couple disembarked from this motor vehicle and they were attacked by the accused who were armed with the fire-arms and ammunition as referred to in counts 4 and 5. Neither accused had a valid licence to possess these fire-arms and ammunition. The accused persons shot the deceased at least once in the head and he died at the scene due to gun shot injuries. The accused persons then assaulted Elke M G Fellingner in the manner set out in count 2 and they stole properties as set out in count 2. The accused persons then dumped the body of the deceased and forced Elke M G Fellingner into the motor vehicle and sped off. The accused persons abandoned the motor vehicle after they overturned it and left on foot.

[4] The evidence in this case may be broadly summarised as follows:

The State called W H Pfeiffer, as its first witness. He is a practising legal practitioner and owns a farm Okariro No. 282 in the Khomas Hochland area within the district of Windhoek. On the fateful day he was returning to Windhoek from his farm accompanied by his wife. Whilst on their way they came across the deceased's motor vehicle which was being driven recklessly, at the time. He then tried to alert the driver but instead the driver increased his speed. According to him he at a certain point drove next to the vehicle and had a chance to look at the driver, but the driver did not stop. He also noticed that the driver seemed to be speaking to someone over a two way radio.

[5] After a while he found the motor vehicle having overturned, and he again observed the driver assisting the passenger in front to get out of the motor vehicle as the passenger was bleeding heavily.

[6] The two male persons at the time wore olive green safari clothes. He identified accused no. 2 as having been the driver of the motor vehicle. He was not called to identify the driver of the motor vehicle on an identification parade though. He later on as he followed the motor vehicle found it having been involved in an accident. He also met the complainant on the scene, after the other occupant had left the scene, and disappeared.

[7] As for the next state witness, it became common cause that the deceased was with his wife on that fateful day, having arrived in Namibia on the morning of the 8<sup>th</sup> of July 2008.

It is further common cause that upon their arrival, they had hired a pick-up motor vehicle. What transpired further is indicated in the summary of the substantial facts as referred to in this judgment.

[8] Most importantly is the complainant's evidence that she and her husband whilst having stopped at a certain place, were confronted by two male persons, also that one of the two male persons conducted a body search on her, and took a little camera which he then put in his pocket. The complainant was able to point out to court that the man who had taken the little camera, was accused no. 1. The said camera, was produced as an exhibit in court and the witness was able to identify it as the camera that belonged to her. Through investigations copies of photographs which were produced by another witness from the memory card which was in the camera when taken from the complainant on the date of the incident, were also identified by the complainant, which she testified that they were taken in Germany prior to their arrival in Namibia.

[9] Evidence that the camera, identified by the complainant as hers, was placed before court, that it had been given by accused, to his childhood friend Mr Namugongo.

[10] Namugongo himself testified that he got the camera from accused no. 1, though he had earlier on refused to tell the police about the origin of the camera, when first approached.

[11] Whilst accused no. 1 had denied throughout that he had given the camera to Namugongo. In cross-examination the first accused was questioned as to why Namugongo would implicate him about the camera, but did not say the reasons why. The complainant further testified that as a result of the accident she was injured, and also suffered injuries from the assault on her by the two accused persons. She was later on taken to the Roman Catholic hospital for treatment.

[12] Further evidence from Mr Pfeiffer is that he observed blood on the scene and two fire-arms where the motor vehicle had overturned. He was also able to figure out where the deceased's body could have been dumped after the complainant had explained to him about what had happened to them. The deceased's body was later on recovered upon information given to the police and the witnesses.

[13] Another state witness Mr Louw who at the time was a Chief Inspector in the Namibian Police also testified that he had to attend the scene of murder on the 8<sup>th</sup> of July 2007. He confirmed that several exhibits were collected where the deceased's body was found, as well as where the motor vehicle had overturned, and at a bridge. The exhibits were then sealed in evidence bags. These were then taken to his office for safe custody. According to Inspector Louw a green shirt found at the scene where the deceased was found was put in a bag, specifically marked, with NFE 03233, this exhibit was produced in court as Exhibit No. 4.

[14] Stones with blood were also collected at a point where the motor vehicle had overturned and placed in a bag marked as NFB 05797, which became Exhibit 8 before the court as well as Exhibit NFB No. 05828, which became Exhibit 9 before the court.

[15] A spent cartridge was collected near the bridge, and like other exhibits also placed in a bag marked NFB 05801 which was produced in court as Exhibit 11.

[16] Fire-arms found on the scene where the motor vehicle had overturned were also collected and were produced as Exhibits 12, 13 and 14 respectively.

[17] All the exhibits collected at the scene were handed over to Inspector Louw and then later handed over to the investigating officer Sgt. Hilundwa at the time. Exhibit bags were all

sealed.

[18] Accused no. 1's blood was later on drawn from his person and sealed in his presence by the late Dr Shangula. The sample was then handed over to NFSI laboratory and reference number allocated to it.

[19] Having received the Exhibits at NFSI properly sealed with specific reference numbers the said Exhibits were then forwarded to BCIT in their sealed form, whereafter they were given BCIT reference numbers. Both Mr Jason Moore and Dr Hildebrand testified about their experiences in the DNA testing and on the control measures that are put in place to guard against contamination. They also testified that the necessary calibration of the machines were done.

[20] Evidence placed before court is that accused no. 1's sample marked NFB reference no. 05253, was taken after he had been to NFSI accompanied by witness Alfonso, that piece of evidence has not been disputed.

[21] Ms Swart's evidence is that a portion of an exhibit is cut out, and it is then sent out for examination.

[22] Ms Swart also testified that she prepared the exhibits, that being the green jacket, Exhibit 4, as NFSI exhibit 7 and then marked out areas of interests. One of which was then labeled 7.5. This was then examined by Dr Hildebrand who gave it reference number Q4. There was no contamination found.

[23] From what Mr Jason Moore and Dr Hildebrand did, sample Q4 matched control sample

K3. It has been established that sample K3 came from accused no. 1, and the sample Q4 came from the green jacket which was found near the deceased's body, where it had been found dumped.

[24] There is evidence by the complainant that it was accused no. 1 who took the camera from her, and that it was also him, who shot her husband, (the deceased). It thus follows that accused no. 1 was in close contact with the deceased.

[25] On the issue of identification, it is common cause that no identification parade was held in order for the witness Elke Fellingner to identify her attackers.

[26] That being the case, there is still real evidence which was procured in the form of a camera. The complainant herself has identified the camera, as belonging to her, also identifying copies of the photographs, that she said were taken in her country, Germany, prior to their arrival in Namibia. This camera was received as real evidence in this court.

[27] Mr Namugongo one of the state witnesses testified that he received the camera from accused no. 1 whom he had known from their childhood. Throughout his testimony, he persisted that the camera, came from accused no. 1 even though when first approached by the police he was hesitant to reveal the origin of the camera.

[28] Ms Elke Fellingner, explained to this court that, accused no. 1 was the one who had taken the camera from her, and placed it in his pocket, on the date of the attack on her and the deceased. Also that it was the same accused, who shot at her husband, as she remained with accused no. 2 at the motor vehicle.

[29] Accused no. 1's version was a mere denial. He denied everything. He then called one witness in order to strengthen his alibi.

In my view, if his alibi was to be taken seriously by the court, such alibi could have been raised upon his arrest. In the matter of <sup>1</sup> the court held:

"It did not seem reasonably possible that his corroborating witness would not come forward immediately upon his arrest, or at least some short time later -and advise the police investigating the crimes, which has shaken the whole community as a whole, that he had been with them at the crucial times.

It was equally not possible that the 1<sup>st</sup> appellant himself having so cogent an alibi, when arrested and charged did not advise the police or the prosecution that this was the case. The only inference that could be drawn from his failure to advise the police, and from the other witnesses' failure to do so, was that the alibi had no truth in it at all."

[30] It is trite that in assessing the reliance to be placed on the evidence before court, by the witnesses it must be emphasised at the very outset that all the witnesses were quite independent and impartial with no involvement either with the victim or with the accused persons (i.e. the attackers).

[31] Also there is absolutely nothing to suggest any bias on their part, they must therefore be treated as honest witnesses.

[32] Counsel for accused no. 1 tried to discredit the DNA evidence placed before the court. There was evidence that there was no contamination, when samples were analysed. What is of importance is the chain of the evidence. No doubt that the DNA test is a complex one, which is based upon the scientific thesis that all individuals, possess a unique genetic code.

Accused no. 1 is neither an identical twin to the deceased in this matter. Thus the deceased's

<sup>1</sup> S v Thebbus and Another, 2002, (2) SACR at 566



DNA found on the same jacket shown as accused no. 1's DNA, show that it has been proven beyond reasonable doubt that indeed accused no. 1 was the one who shot at the deceased as testified to by the deceased's wife. Accused no. 1 had thus been in close contact with the deceased. In the matter of <sup>2</sup> it was held:

"That the onus of proof lies on the State, the adequacy of proof and the trial court's evaluation of the evidence. The onus which rested upon the State in a criminal case was to prove the guilt of the accused beyond reasonable doubt. Not beyond all shadow of a doubt. Our law did not require that a court had to act only upon absolute certainty - but merely upon justifiable and reasonable convictions. Nothing more and nothing less. What the courts have to consider is the cumulative impression, with all the fragments made collectively in order to determine whether the accused's guilt had been established beyond reasonable doubt."

[33] With regard to accused no. 2, a confession which he had made after his arrest was ruled to be admissible as it had been made to the authorized officer, who testified before this court during the trial. The said confession was made freely and voluntarily by accused no. 2. It has become part of the evidence before the court. Like his co-accused, he denied any involvement in the commission of the offences charged. Accused no. 2 had also made a pointing-out, which he had since also denied - claiming that the pointing-out had been cooked by the police themselves and he merely did what the police requested him to do. The pointing-out was video recorded and the video became part of the evidence before the court. Section 218 of the Criminal Procedure Act, authorises the pointing-out, provided that such pointing-out is done freely and voluntarily. It is trite that evidence of the pointing-out is not admissible because it is an extra-curial admission, but because it shows that the accused has knowledge of the place or thing pointed out or some facts connected with it, from which knowledge an inference with regard to accused's guilt can be drawn. The court had the opportunity to view the video, and accused no. 2 could be clearly seen, heading the police to the scene where the alleged murder was carried out. Contrary to his claim that it was police who had indicated to him about what to do, it became very clear from the video, that

accused no. 2 knew the scene and explained in full detail in the confession how events unfolded on that date. In fact accused no. 2 corroborates the complainant's evidence as to how the deceased was killed, and who had killed the deceased.

[34] Moreover, the DNA extracted and the examination done on sample Q5 and QH had the same profile which matched K4, a blood sample drawn from accused no. 2. Further, that the blood and rock samples collected on the scene where the vehicle had overturned proved beyond reasonable doubt that accused no. 2 was at the scene as he himself had explained in his detailed confession.

[35] Ms Nehale, testified how accused no. 2 arrived at her house. Accused no. 2 had injuries. That was merely some few days after the incident. Ms Nehale was not so clear about the exact date. Mr Pfeiffer, the first witness too testified that the passenger appeared to have been hurt, and was being assisted by the driver.

[36] Mr Nambahu's evidence was about the recovered fire-arms, which were handed in to him, which he then had to examine. These were handed in as exhibits 12, 13 and 14 respectively. Mr Nambahu also confirmed that the spent cartridge matched fire-arm Exhibit 12, which was said to have been used in the killing of the deceased.

[37] It was also testified to by the deceased's wife that both accused had fire-arms and that it was accused no. 1 who shot her deceased husband. She added that accused no. 2 then moved towards where the deceased had been shot. Accused no's 1 and 2 were both in possession of fire-arms which were later on found abandoned at the scene. None of the accused had a licence to possess such fire-arms. There is further evidence before court that ammunition was recovered near the deceased's body and these were said to belong to the two accused persons - according to the complainant - the deceased's wife. Both accused had control of these ammunition throughout.

After the deceased was shot dead, by accused no. 1 the complainant was ordered into the motor vehicle and the accused persons then drove off with both the deceased's body and herself. She remained under their command, up until when the motor vehicle was overturned. The complainant testified that at some point in time she was struck with the fire-arm. She had no idea where she was being driven to

[38] Each accused person testified in his defence, denying any involvement in the commission of the crimes charged. Further testimony is that they had not known each other. Accused no. 1 specifically testified that he only came to know accused no. 2 in September 2007. Whilst accused no. 2 testified that he came to know his co-accused in November 2007. Accused no. 1 denied to have given the camera to Namugongo. Accused no. 1 then also called a witness one Penda whom he claimed to have gone to see at the Wanaheda Police Station, and that he would not have been involved in the commission of the crimes as alleged.

Mr Penda could however not shed sufficient light about the date, as he could not with certainty recall. The court is of the view that Penda's version cannot take this case any further.

[39] With regard to the evidence on common purpose, the court heard that it was accused no. 1 who produced a fire-arm from his person and shot the deceased, whilst accused no. 1 had engaged the deceased, accused no. 2 approached the deceased's wife and started to search her - demanding money - which according to the deceased's wife, accused no. 2 took from her. The deceased's wife was then forced into the motor vehicle and was driven away. From the evidence before the court, it is clear that the spontaneous acts of accused no. 2, searching and demanding money from the deceased's wife shows that a plan existed. Thus the conclusion is that accused no. 2 was to provide the additional force in case of any resistance from the deceased's wife.

[40] In my view accused no. 2 was part and parcel of the common design to commit the offences, to employ such force as was necessary to subdue those present at the scene.

[41] In his confession, accused no. 2 gave full details about how events unfolded, and which the court ruled admissible, accused no. 2 confirmed that they had firearms. The said firearms were recovered at the scene by the police - almost immediately when the vehicle had overturned. It is clear that the use of the said fire-arms was part of the modus operandi. Ammunition too was recovered on the scene.

[42] In terms of the Arms and Ammunition Act, Act 7 of 1996, possession is described to include "custody". The Act however does not define the word "possess". Thus the ordinary meaning of the word possession in legal terminology must be applied. The law does recognise that possession through another is possible as long as the parties have a common intention for control of the article. At no time did accused no. 1 or accused no. 2 distance himself from one another.

[43] In the result I am satisfied that the State has proved the two accused's guilt beyond reasonable doubt.

[44] On the credible evidence before court I am satisfied that firstly the accused persons with common purpose shot at the deceased with direct intent to kill him. Secondly, their intent which was common was to subdue the deceased and his wife in order to rob them of their properties. The two accused had lay in wait overnight and had been armed with firearms. They had loaded the deceased's wife on the vehicle thereby depriving her, her liberty - until the time the vehicle overturned, and they abandoned it.

[45] Accordingly the two accused persons are convicted as charged on all the counts.

**USIKU, AJ**

**ON BEHALF OF THE STATE:**

**MS NDLOVU**

**Instructed by:**

**OFFICE OF THE PROSECUTOR-GENERAL**

**ON BEHALF OF ACCUSED NO. 1:**

**MR NAMANDJE**

**NO. 2**

**MR KWALA**

**Instructed by:**

**DIRECTORATE OF LEGAL AID**