



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: CC 09/2012

In the matter between:

THE STATE

and

ELTON GEORGE BARMEN

FIRST ACCUSED

AWASEB CLIFF LUCIANO

SECOND ACCUSED

Neutral citation: *The State v Barmen* (CC 09/2012) [2012] NAHCNLD 03
(30 October 2012)

Coram: LIEBENBERG J

Heard: 18-21; 24-28 September; 02; 15-19 October 2012

Delivered: 30 October 2012

Flynote: Evidence – Evaluation of evidence – Factual disputes and irreconcilable differences – Court must make credibility findings of the witnesses their reliability and the probabilities.

Evidence – Discrediting of witness under s 190 (2) of the Criminal Procedure Act 51 of 1977 – Court ruling made after all evidence heard.

Summary: Accused persons charged with murder to which they pleaded not guilty. The court was faced with significant factual disputes in the versions of six eyewitnesses. Several factors like poor visibility, a fast moving scene, intoxication and bias by some witnesses probably explain conflicting and irreconcilable differences. The court endorsed and applied the dictum enunciated in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) para 5, setting out the technique generally applied in resolving factual disputes. The State not succeeding to have one of its witnesses discredited in terms of s 190 (2) of the Criminal Procedure Act 51 of 1977. The evidence of such witness to be considered in the ordinary manner with the rest of the evidence adduced. Both accused found not guilty and discharged.

ORDER

On a charge of murder both accused are found not guilty and discharged.

JUDGMENT

LIEBENBERG J:

[1] The two accused are charged with one count of murder in that on 19 September 2010 and at or near Katima Mulilo they allegedly killed one Fele Mwangala Numwa, an adult male. Both accused are legally represented and pleaded not guilty and maintained their innocence throughout the trial;

denying any criminal conduct on their part that could have caused or contributed to the deceased's death.

[2] The State's case, as set out in its summary of substantial facts, is based on allegations that the accused persons on the said date attacked the deceased with broken bottles which resulted in his death soon thereafter. It is common cause that the incident during which the deceased was killed happened in the early hours of 19 September 2010 at an open area in a business area of Katima Mulilo. Also, that the only form of illumination of that area came from fluorescent lights situated at the entrance of one of the surrounding bars called Club Africa Entertainment ('Club Africa'). Although mention was made by one witness of a nearby streetlamp, it does not appear from his evidence that it lit up the area where the incident took place.

[3] It is further common cause that there were two separate incidents, the first being a fist-fight between the first accused and the deceased and the second, the stabbing of the deceased with broken bottles at the deceased's vehicle which was parked approximately 40 m away from the entrance of Club Africa. State witnesses, as well as the accused persons, seem to be in agreement that visibility at the deceased's vehicle where the stabbing took place was poor. A large number of people converged on the place where the fights took place, which clearly impaired the witnesses' ability to make proper observations – some even describing the situation that prevailed as chaotic.

[4] It is not disputed that the deceased succumbed shortly after the stabbing incident. A medico-legal post-mortem report was handed in by agreement and the content thereof admitted, according to which the cause of death is reported to be hypovolemic shock, secondary to a penetrating neck injury. The injury to the neck was described as the main injury, a contused gaping wound penetrating into the right hemithorax injuring the apex of the right lung and the right subclavian vessels. There were further two superficial contused lacerations in the immediate area of the main injury; a laceration and abrasions on the head; abrasions and lacerations on both forearms; small lacerations on the back and on the right arm and side of the body.

[5] A medical examination report (J88) completed by a medical doctor on 21 September 2010 in respect of first accused, Elton Barmen, was handed in by agreement. According to the report the accused had a laceration of the right parietal area which was sutured. It is not disputed that the accused was admitted in hospital as a result of this injury. It is the accused's contention that he sustained the injury when the deceased cut him with a panga shortly after the fist-fight.

[6] The State called seven witnesses who claim to have witnessed the events leading up to the stabbing of the deceased; each testifying from his own perspective about events taking place at different stages, as they had not all arrived at the scene the same time. What has to be said from the outset and, as in my view correctly observed by Mr *Bondai* during his submissions, is the fact that there are as many versions as the persons claiming to have witnessed the events taking place on that fateful night. This, for obvious reasons, made the court's assessment of the evidence extremely difficult – more so, where it became clear that some of the State witnesses did not give an objective account of the observations made at the time; but instead, tried to either implicate or exonerate the accused persons, depending in whose company they had been on the night in question or with whom they associated themselves during the trial ie the deceased or the accused persons.

[7] From those witnesses who were present at the scene that night and who claim to have witnessed the fighting between the deceased and first accused, the most condemning evidence implicating both accused persons and connecting them directly with the stabbing incident, mainly came from the witnesses Erick Tubazambe ('Erick') and Mutemwa Kennedy Mumba ('Kennedy'). I do not intend assessing their evidence separately and in isolation, but must consider it together with the rest of the evidence; full regard being had to any contradictions and corroborative evidence of the respective versions of other witnesses, and lastly, to also consider the probabilities of the case.

[8] The deceased, a fellow taxi driver and good friend of the witnesses Erick and Kennedy, had been socialising with them earlier that evening. Both of them, albeit from two different clubs, came onto the scene when first accused and the deceased were already fist-fighting. In broad outline their evidence is that when the fist-fight stopped they escorted the deceased to his vehicle which was parked nearby. Whilst there and before they could unlock the door in order to get the deceased inside, the accused persons arrived armed with broken bottles and started stabbing the deceased who subsequently collapsed and died at the spot while the accused persons fled the scene. Both witnesses conceded that visibility where the stabbing incident took place was not good; however, they are adamant that they were able to see what transpired because of their proximity that enabled them to make proper observations when the deceased came under attack. Although the two witnesses corroborate one another on certain aspects of their evidence, there are also material differences which need to be looked at.

[9] According to Erick the fist-fight broke up without the intervention of anyone. He did not observe any injuries on the deceased and he is unaware of any bottles that were thrown, either at them or anyone else. He says the deceased only appeared to him to be tired and not injured when he was leaning with his arms resting on the roof of his vehicle while he and Kennedy tried to unlock the door on the driver's side. He was unable to come up with a satisfactory explanation why there was some urgency to get the deceased into the car if he was not injured and first accused had walked away from the scene after the fist-fight. I pause here to observe that the witness in cross-examination said he only observe at the car that the deceased was injured – something he had not noticed before.

[10] I find this aspect of his evidence peculiar in the light of his earlier testimony that, where the fist-fight took place, visibility was good and that he had gone right up to where the deceased was standing after the fist-fight. One would have expected of him in these circumstances to already then have observed any injuries on the deceased and not only when they got to the

vehicle where visibility was poor. After joining the deceased, they walked together to the vehicle without any further incident or attack on the deceased. If the deceased was not injured during the fist-fight (a fact the witness was certain of), it certainly begs the question as to how he then got injured on the way to the vehicle, and why Erick did not see this if he had accompanied the deceased up to his car and stayed with him until the end?

[11] It is further his testimony that the deceased was still leaning onto the vehicle when the accused persons arrived and stabbed him. He contradicts himself as to the sequence of events pertaining to who stabbed the deceased first; the stage as to when he was hit by a bottle thrown by first accused, causing him to run away; and him subsequently returning to the vehicle after the accused turned back to join second accused in stabbing the deceased. He claims that it was only then that he noticed the witness Mazezo, a police officer, at the car and who then intervened.

[12] The same events narrated by Kennedy differ substantially from that of Erick. Kennedy said the fist-fight was broken up through the intervention of Mazezo and at that stage the deceased was already injured on his head. He did not observe any injuries on first accused. Also at that stage people were throwing bottles at first accused which continued even after they had reached the vehicle; though it is not clear at whom these were directed. The deceased handed his car keys to the witness whereafter they moved to the vehicle where he and Erick tried to unlock the door, with deceased standing at the rear end of the vehicle. From this witness' evidence the exact position of the deceased at the time when he came under attack from first accused, is unclear. When confronted in cross-examination with the evidence of Mazezo that he separated the deceased and first accused at the vehicle, Kennedy confirmed this; however, he said the deceased, who by then was on the left hand side of the vehicle, then came around to the right hand side where he and Erick were, but whilst on his way and having only reached the rear end of the vehicle, the deceased was attacked by first accused and they (Erick and Kennedy) then intervened. This was before second accused joined him. He was then pushed aside while Erick was hit by a bottle.

[13] I interpose to remark that Erick made no mention about first accused and the deceased having been separated by Mazezo on the left hand side of the vehicle, or that the deceased was stabbed at the rear end of the vehicle by first accused only; or about him and Kennedy trying to intervene. There is no logical explanation why Erick did not see Mazezo at that stage or why he made no mention about the stabbing incident taking place at the rear end of the vehicle – unless he fled the scene earlier than what he claims to have done. It was Erick's evidence that the accused persons arrived at the vehicle together, having broken bottles in hand.

[14] Not only do these two witnesses contradict one another in material respects as shown above, but their respective versions also stand in sharp contrast with that of other State witnesses; more so, that of Mazezo who was present and focussed on what was happening at all relevant times, but apparently unable to make the same observations as testified by Erick and Kennedy.

[15] A completely different picture emerged from the evidence of Mazezo. When he left the club he saw three persons involved in a fight some distance away from the entrance of the club. When he went closer he identified the first accused, the deceased and Diana Richter ('Diana'), first accused's girlfriend. Although he did not observe any injuries on the accused, he noticed that the deceased had an injury to his head which bled profusely. First accused and the deceased were exchanging fist blows and when Diana attempted to join the fight, he held her back and pushed her away. He did not see either the accused or the deceased having anything in their hands, and as far as he was concerned, it was nothing more than a fist-fight. He did not see how the deceased sustained the injury to his head. It was then decided to help the deceased into his car but before they could do so, he collapsed and died. According to Mazezo there was only one other (unknown) person at the car with him who assisted in trying to open the door. It is Mazezo's testimony that after he reached first accused and deceased busy fighting, the deceased was *not* attacked by any other person. He also remained at the scene until the

police arrived, thus excluding the possibility that any further injuries could have been inflicted to the deceased's body after he collapsed close to his vehicle.

[16] Yet another version of events leading up to the stabbing of the deceased came from State witness Mwangala Muemwa ('Mwangala') who testified about an incident taking place inside Club Africa between first accused and his girlfriend Diana, the latter trying to stop the accused from leaving the club. It would appear from his evidence that there was already an ongoing fight when they stepped outside the club. He next saw first accused fighting the deceased, but fortunately Diana succeeded in breaking up the fight, each thereafter going his own way. The deceased went up to his vehicle and the witness saw a lot of people gathering around him. People started throwing bottles at first accused and an unknown person who in the mean time had joined him. This person started chasing after those who had been throwing bottles, while first accused ran straight to where the deceased was standing 'doing nothing'. They started fighting and the witness did not see either one using weapons. After the fight stopped first accused left the scene. He noticed the deceased moving around the vehicle to the driver's side where he tried to open the door but collapsed before he could manage.

[17] In cross-examination Mwangala said that due to poor visibility he was unable to see whether broken bottles were used during the fight between first accused and the deceased. He was thus unable to tell how the deceased sustained the injuries he succumbed to. Bottles were broken *on the side where the deceased was* and at this stage the first accused was still at the open area, some distance away. He was unable to say whether there was an ongoing fight at the spot where the deceased was as people had gathered on the scene and he could not see what was happening. The witness said he did not see Mazezo break up the fight, or that Diana tried to attack the deceased when stopped by Mazezo.

[18] When considering the evidence of Mazezo opposed to that of Erick, Kennedy and Mwangala, the contradictions between their respective versions

are simply irreconcilable. Though mindful of the poor visibility, especially at the vehicle which was parked a distance away from the nearest lights at Club Africa, I find it inconceivable that this alone could possibly explain the conflicting versions of those witnesses who all claim to have witnessed one and the same incident, yet, each giving a completely different account of what transpired in their presence. All these witnesses said that they were sober at the time, so, if they were to be believed on that score, the consumption of liquor (as admitted by some of them) could not have played any significant role in their ability to have made proper observations.

[19] Mazezo, who was immediately next to the deceased and first accused, did not observe either one having anything in their hands; neither did he see anyone else joining the fight as testified by Erick and Kennedy. The same applies to Mwangala. The deceased was already injured and no stabbing took place in their presence. This contradicts the evidence given by Erick and Kennedy about the stabbing of the deceased at the vehicle by the accused persons. What seems to be clear is that the version of Erick and Kennedy, as far as they corroborate one another about the accused persons having stabbed the deceased, is irreconcilable with that of Mazezo and Mwangala. Mr *Lisulo*, representing the State, contended that it at least proves that first accused went up to the deceased's vehicle and that he did not leave the scene after he sustained an injury to his head as he testified. Although this is a factor that must be taken into consideration, it should not be viewed in isolation and without regard equally being had to the contradictions in the evidence of the respective witnesses.

[20] The court, when particularly deciding the veracity of each of the aforementioned witnesses, will also look at the evidence of other witnesses who testified on the main and peripheral issues. It is trite law that circumstantial evidence play an important role during the court's assessment of the evidence adduced in a trial, and that certain inferences may be drawn from same when it is appropriate to do so.

[21] Turning to the events preceding the alleged stabbing of the deceased as testified by the witnesses Solastica Hoaes ('Solastica'); Fransina Eixas ('Fransina') and Diana, again there are material differences between the versions of the respective State witnesses for which there is no logical or satisfactory explanation.

[22] Solastica said she was outside Club Africa busy barbequing meat when she saw first accused and the deceased fighting 'with hands' (fist-fighting) and first accused being on the retreat. When he became weak he ran to a nearby rubbish bin from where he and another unknown young man that had joined him took bottles, broke it, and then ran to where the deceased was at his vehicle, busy opening the door. When they came close she saw the deceased throwing the car keys to someone else in order for that person to unlock the car. She also heard the deceased ask forgiveness from first accused and that they had to stop fighting. At this point Solastica left the scene to make a phone call to the police as people at that stage were breaking bottles, making a lot of noise. She confirmed that Diana tried to stop the fight when it started and when she later saw her again, she was sitting on the ground near the deceased's vehicle being injured on her knee. She however did not see how this had happened.

[23] It emerged under cross-examination that the young man she had seen in the company of first accused when approaching the deceased with broken bottles in hand, was *not the second accused*. She also did not see who stabbed the deceased as she was attending to her barbeque and in her own words 'did not pay much attention to the fighting persons'. She also does not know how the fist-fight came to an end. Although she confirmed the random throwing of bottles by the crowd, she was unable to tell who threw these or at whom it was aimed; neither did she see the young man chasing after those persons as testified by Mwangala.

[24] Fransina said she was in the company of Diana and first accused when approached by three taxi drivers as they were leaving Club Africa. One of the men pulled Diana on her arm, causing first accused to intervene and during a

subsequent altercation the deceased punched first accused on the mouth, breaking some of his teeth. The witness then described an incident during which the two other taxi drivers threw bottles at first accused running to a waiting vehicle. The accused threw some bottles back at his assailants and then moved to the deceased's car where he broke bottles. There he was joined by an unknown man (of light complexion) and when people started screaming, she ran away. She only returned later and found the deceased lying in a pool of blood.

[25] The State, after leading the witness' evidence in chief, applied in terms of s 190 (2) of the Criminal Procedure Act 51 of 1977 to have the witness, Fransina Eixas, discredited. In support of the application the prosecution exclusively relied on her earlier statement made to the police. I at that stage intimated to counsel that the court reserves judgment on the ruling until such time when all evidence has been heard. I will revert to this aspect later.

[26] Fransina, under cross-examination, admitted that she was intoxicated and that it might have affected her abilities to make proper observations – that is, besides the fact that it was dark and that she could not clearly see what was happening.

[27] The evidence of Diana, the girlfriend of first accused, broadly corroborates that of Fransina; though there are also material differences in their versions. She confirmed the incident when she was accosted by the taxi drivers and the punching of first accused by the deceased; that she and Fransina tried to stop them from fighting up to the stage where his friends teamed up with the deceased. According to Diana first accused was then hit on the side of his face by Mazezo (the State witness) with half a brick whereafter people, carrying sticks and broken bottles, converged on the deceased's car. The situation became chaotic and at this stage someone kicked her, causing her to fall down. She thereafter noticed first accused pushing second accused away. He had come closer when first accused came under attack. She said first accused then mentioned to her that second accused had stabbed someone. She said she was close to first accused and

did not see him with broken bottles or him stabbing the deceased; hence, she disputes such evidence; neither did she see anyone with a panga in hand. In cross-examination she said that first accused was attacked by many people and that a gang fight had broken out at the vehicle between those persons armed with sticks and broken bottles. She did not see second accused chase two persons being part of the mob, but did see him moving towards the vehicle ostensibly in order to help first accused who was under attack.

[28] First and second accused both testified in their defence and their respective versions amount to the following:

First accused confirmed the altercation with the deceased and the other taxi drivers during which he was punched in the face and kicked, sustaining a cut on his lower lip. He said he fell down when State witness Erick kicked him on his genitals and the deceased then struck him on the top of his head with a panga – the scar of the injury still visible. It was thereafter that Mazezo hit him with the brick on the side of his face, breaking his dentures in the process. People started throwing bottles and deceased, having been hit by a bottle, was bleeding when he walked into the crowd that had gathered on the scene. Two of the persons in whose company the deceased was that night then dragged first accused by his arms to where the deceased was. At that stage second accused intervened and, from his perspective, seemed to have pushed the deceased over. He did not observe anything in second accused's hands. Those who held first accused then let go of him. Deceased and the group came charging at them but he, Diana and two other friends managed to jump into a taxi which sped away at their insistence and took them first to the police station and then to the hospital. First accused's head-wound was sutured and he was admitted to hospital for three days. He was subsequently arrested. He disputes that he ever collected bottles from a bin; broke it and used same to stab the deceased with or that he at any stage went up the deceased's vehicle as testified.

[29] Second accused, at the time of the incident, was still a scholar at Katima Mulilo and although he knew first accused, they were not friends. He said he was inside Club Africa when he heard that people were fighting outside the

club. He also went outside and as he went closer, he saw first accused and another person busy fist-fighting. They were surrounded by a group of approximately 40 people and he could see that both of them were injured, each bleeding from their heads. When he moved closer in order to stop the fight, a man dressed in a blue shirt tried to stab him with a broken bottle. He ducked and when he charged at this person, the latter ran away. At that stage people were throwing bottles to and fro indiscriminately. He turned back and started chasing a second person wearing a 'floppy' hat, who also ran away. He explained that he did this because these two persons assisted a 'tall guy' (presumably the deceased) to beat up first accused. He said he threw his bottle of beer at the last person but was unable to tell whether he was hit. When he returned, he noticed the tall person lying next to his vehicle covered in blood, while first accused and Diana were going towards a taxi. He joined them but as there was no room for him as well, he sat on the boot of the taxi and left the scene in that way, going home. He disputes evidence that he, together with first accused, broke bottles to stab the deceased with or that he had pushed the deceased down. To this end, his evidence differs from that of first accused.

[30] In cross-examination when pointed out to second accused that in his reply to the State's pre-trial memorandum it is stated that he 'picked up bottles at the scene', he explained that what was meant is that he came with a bottle of beer from the club and not that he picked up any bottles at the scene. He confirmed that he saw Diana wielding a bottle during the fight between first accused and the deceased and explained that he observed this when she tried to stop the fight by pulling first accused away from the deceased. According to him the fight between the deceased and first accused took place close to the deceased's car. Second accused thus denies having been involved in the stabbing of the deceased; also that he saw first accused having a broken bottle in his hands or witnessed the actual stabbing.

[31] From the summary of the evidence above it is clear that there are no two witnesses who corroborate one another in material respects – irrespective whether they were called by the State or the defence. There are substantial

differences in the respective versions of some of the witnesses; not only on peripheral issues, but also, and most importantly, on the central issue namely, the events that took place which led to the killing of the deceased. The versions of some, when compared, are simply irreconcilable and without any explanation that could possibly explain the differences; though all the witnesses seemingly are in agreement that visibility was poor at the place where the deceased's vehicle was parked and where the stabbing took place. Where some witnesses claim to have witnessed an incident from a short distance, others were unable to do so, though they were in similar positions and some even closer. Another factor that possibly played a bigger role than what most of the witnesses were willing to admit when testifying, is the effect of liquor on them in relation to their ability to make proper observations. It was only Fransina who was willing to admit that her sense-perception was impaired due to intoxication. The witnesses also seem to be in agreement that it was not only a fast moving scene involving quite a number of people, but when the indiscriminate throwing of bottles had started, the situation became chaotic and it was during this period that the stabbing of the deceased took place.

[32] When coming to the evaluation of evidence, this court in *U v Minister of Education, Sports and Culture and Another*¹ applied and endorsed the dictum enunciated in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others*² where the following appears at para 5:

'On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarized as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its

¹*U v Minister of Education, Sports and Culture and Another*, 2006 (1) NR 168 (HC)

²*Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others*, 2003 (1) SA 11 (SCA)

impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.'

[33] In my assessment of the evidence adduced in casu, I shall as far as possible follow the approach enunciated in *Stellenbosch Farmers' Winery* and make findings on the credibility of the respective factual witnesses; their reliability; and the probabilities of the case. After having done so, it remains to be decided whether or not the State succeeded in proving the guilt of the accused persons beyond reasonable doubt.

[34] I earlier alluded to the fact that the most incriminating evidence came from the witnesses Kennedy and Erick, in that they were the only persons who claim to have witnessed the actual stabbing of the deceased by both accused, using broken bottles, in circumstances where no other witnesses in their immediate vicinity were able to make the same observations; or, on the contrary, made completely different observations. As for the objectivity of these two witnesses regard must be had to both of them being close friends of

the deceased and that they either had been working together as taxi drivers or had given assistance to some fellow taxi drivers by finding customers.

[35] It must be said from the outset that Kennedy struck me as being blatantly bias in that on his own evidence, he implicated first accused as the one who inflicted the injuries to the deceased's head during the fist-fight, although he did not witness such incident. Again, though unable to tell who those persons were who indiscriminately threw bottles at others, he said that it was those who had sided with first accused. He further testified that he earlier gave a description to the police of the 'other person' (who was with first accused during the stabbing); however, when confronted with the content of the statement and it being pointed out to him that there was no description of such person, he was unable to explain why it did not form part of his statement as he earlier testified.

[36] A material and crucial difference between the versions of these two witnesses turns on the events which took place during the actual stabbing of the deceased and, more so, the presence of another witness who was in their presence, namely Mazezo. Kennedy described an incident during which Mazezo separated the fighting deceased and first accused on the *left* hand side of the vehicle, whereafter deceased, whilst moving to the other side of the vehicle, was stabbed at the rear end of the vehicle by both accused. Opposed thereto stands the evidence of Erick who only saw Mazezo *after* the deceased was stabbed and down, and not sooner. There is no satisfactory explanation why Erick did not see Mazezo in his immediate vicinity on the other side of the vehicle from where he stood. According to Kennedy the stabbing took place at the *back* of the vehicle, while Erick said that it took place when the deceased was leaning against his vehicle on the *right* hand side, waiting for him to unlock the door. Unlike Kennedy, Erick did not see any bottles being thrown at them whilst at the vehicle – Erick seemingly being the only witness *not* to have observed this – something that could hardly have gone unnoticed. Not only do these two witnesses contradict one another in material respects, their evidence also stand in sharp contradiction with that of Mazezo.

[37] Turning now to Erick's evidence about which of the two accused stabbed the deceased first, the witness contradicted himself several times. His version on this score interchanged from saying in chief that second accused stabbed first while he was being chased by first accused, but in cross-examination changed course and said that first accused first stabbed the deceased *before* giving chase. He thereafter again changed his evidence by saying that the deceased had *not* been stabbed the time he (Erick) was being chased and that this only happened *after* first accused returned to the vehicle when he and second accused started stabbing the deceased. Both these witnesses were adamant that what they testified was the truth.

[38] Except for Erick, it seems common cause between the State and the defence that Mazezo was the one who eventually separated the deceased and first accused. Mazezo (and also second accused) places Diana at the front of the fight as she wanted to join in, but was prevented from doing so by Mazezo who pushed her to one side. According to Mazezo it was only the deceased and first accused that fought and he did not see a second person (besides Diana).

[39] I pause here to remark that Constable Maiba who attended the scene that night testified that Mazezo had told him that there was a 'mob fight involving the deceased, two males and one female person'; while Constable Goahebab said that Mazezo told him that night whilst at the scene, that 'the deceased fought with a group of people'. Mazezo, having testified first, was not required to explain these conflicting versions when considered against his *viva voce* evidence.

[40] From the foregoing it is evident that Mazezo's version is irreconcilable with that of the witnesses Kennedy and Erick, pertaining to events immediately prior to the stabbing of deceased. The only form of corroboration between their respective versions seems to lie in the fact that they accompanied the deceased to his vehicle. At that stage, according to Erick, the deceased was not yet injured as he did not observe blood on him. This he

only noticed after they had reached the vehicle – opposed to Kennedy who saw this shortly after the fist-fight had stopped and before they were going to the vehicle. If Erick were to be believed on this score it could only mean that the deceased was injured *whilst on their way to the vehicle* while neither of them testified about that. Thus, it either did not happen or they were not present to witness the incident.

[41] From Mazezo's evidence it is clear that neither the deceased nor first accused had weapons in their hands when they fought, though he is unable to say how the deceased was fatally wounded – unless this happened before his intervention, which also seems unlikely, given the nature of the injuries inflicted to the person of the deceased. Therefore, Mazezo's version is equally questionable, unless it was so dark that he could not have made the kind of observations one might have expected of him in the circumstances. Of course, that would equally apply to Kennedy and Erick who were right next to him. Further doubt might be cast on the credibility of all three witnesses when regard is had to the evidence of first accused who said that Mazezo hit him with a brick on the side of his head, and that Kennedy and Erick were also physically involved in the fight.

[42] Regarding peripheral areas of dispute mainly covering the fist-fight between the deceased and first accused, Erick, who had been at the scene throughout, made no mention about first accused coming under attack from the deceased and the involvement of other taxi drivers in his company. On the version of Erick and Kennedy there is also no explanation as to how both the deceased and first accused sustained head injuries during the fist-fight. According to first accused his head injury came as a result of deceased striking him with a panga. Although he is the only one who testified about a panga and, given the nature of the evidence presented by the remaining State witnesses, I do not think that the accused's evidence on this point was rebutted in any manner. As for the deceased's injuries, first accused said that when the deceased later emerged from the crowd, he was bleeding. This was the time that bottles were flying around and to me, in the absence of any

evidence to the contrary, the possibility of the deceased having been struck by a bottle does not seem to be farfetched in the circumstances of this case.

[43] Another unsatisfactory aspect of their evidence is that when the fist-fight stopped, and each going his own way, the deceased was still wearing his shirt. However, when he reached the vehicle (in their company), he was without his shirt, which seems to support the notion that something must have happened in between for deceased to have lost his shirt. The impression I gained from the testimony of Kennedy and Erick is that, when the deceased arrived at his vehicle, he was already seriously injured and that is why they wanted to get him into his vehicle, and for no other reason – despite them testifying otherwise. On their own evidence this was *before* the accused persons arrived being armed with broken bottles. Mazezo said that when he separated them the deceased became weak and fell down, while Erick said the deceased appeared ‘very tired’ and was leaning on the side of the vehicle with both hands resting on the roof in line with the rear door on the right hand side. It is interesting to note that on photo 3 of the photo plan (Exh ‘B1’) the same spot on the side of the vehicle is clearly depicted, showing massive blood spots and streaks running from the roof downwards across the door. This seems to strengthen the notion that by the time the deceased arrived at the vehicle, he was already seriously injured.

[44] I have already mentioned about Kennedy saying that he gave a description of the second assailant to the police and that his witness statement contained such description, whilst in fact, it was not the case. As regards Erick, when asked to explain the discrepancies in his witness statement opposed to his testimony in court about the deceased’s condition, he said that the police officer who reduced his statement to writing ‘frustrated’ him for not recording it correctly and has inserted certain facts that were untrue into the statement. This notwithstanding, he failed to bring this very important fact to the attention of anyone involved in the prosecution of the case, claiming that he ‘overlooked’ the mistakes when going through his statement. I find this explanation fanciful and unconvincing.

[45] When the court considers the factual evidence of the witnesses Mazezo, Kennedy and Erick, the only conclusion in my view that can be reached, is that they are untrustworthy and that their evidence is unreliable. Not only did they contradict themselves but also contradicted one another in material respects. It is further evident that Mazezo did not take the court into his confidence when testifying as he did, whereas Kennedy and Erick were blatantly bias and most probability fabricated evidence to give credence to their respective versions. The court should therefore be very cautious when considering the evidence of these witnesses and the weight attached thereto, unless where corroborated by (other) reliable evidence.

[46] I now turn to consider the evidence of the witnesses Muemwa; Solastica; Fransina and Diana, as far as it had not been dealt with hereinbefore.

[47] Muemwa described an incident inside Club Africa where first accused wanted to fight an unknown person but was stopped from doing so by Diana. He seems to be the only witness to have seen this as none other testified about it. It is also in conflict with the evidence of Kennedy who had been in the club at the time and would have noticed the incident. Muemwa witnessed the fist-fight between deceased and first accused, whereafter deceased moved to his vehicle; also that bottles were thrown and that an unknown person chased persons who had been throwing bottles on the scene. He said that whilst first accused was still standing at the open area, he heard the sound of bottles breaking coming from the direction where the deceased was, though unable to tell what caused it or whether a fight had broken out separately from the first. His version about first accused going to the deceased's vehicle and the continuation of the fight there, materially contradicts that of Mazezo, Kennedy and Erick. He places only first accused at the scene; he was unable to see bottles or weapons used during the fight; and made no mention about the deceased and other taxi drivers attacking first accused. His evidence further differs as to the sequence of events taking place at the vehicle. He also did not see Mazezo at the vehicle or that he broke up the fight; neither did he see Diana trying to attack the deceased. From his version it is also not clear when

or how both the deceased and first accused sustained the injuries during the fist-fight, something that is common cause.

[48] Muemwa's evidence not only differs substantially from that of other witnesses, but he also contradicted himself on the nature of the fight and where it started. Towards the end of his evidence under cross-examination he became extremely vague pertaining to his observations and attributes this to poor visibility and people having moved in between him and the place where the fight was going on. In the light of the discrepancies pointed out and the witness' concession that he did not have a clear view of what happened, the court should equally follow a cautious approach before relying on his evidence as it does not appear to be reliable.

[49] The most incriminating aspect of Solastica's evidence is that she saw first accused and an unknown man breaking bottles and them running towards the deceased *who was busy opening the door of his car*. On the evidence of the other witnesses, the deceased only tried to open the door of his car *after* the fight at the car and not before. In that regard her evidence stands contradicted. The witness, during her testimony, admitted that she was busy with her barbeque and therefore did not pay much attention to the two fighting persons. Also that she left the scene to make a phone call to the police and did not witness the alleged stabbing of the deceased by the two accused. It therefore explains the gaps in her version of the events, lacking particularity on aspects which one might have expected of her to testify on, given her positioning at different stages during the ongoing fight. She explained that she was unable to identify the person who joined first accused; however, she under the same circumstances saw when the deceased threw his keys to someone else to unlock the door. When it was pointed out to her in cross-examination that she constantly changed her position on events having taken place at the vehicle before she left the scene, she said she was 'confused and could not recall'. In my view, this certainly raises doubt as to the reliability of this witness' evidence and in this regard the court should also follow a cautious approach when relying on same.

[50] I already alluded to the application brought by the State to have its own witness, Solastica, discredited on grounds that her witness statement differs materially from her evidence in chief. She did, to some extent, explain these differences with mixed success and places the cause for some of the discrepancies squarely on the shoulders of the police officer who took down her statements. It seems to me that there is merit in the explanation, for several additional witness statements were taken from other witnesses as well, with similar complaints about the correctness of their statements. I do not think this fact can simply be ignored in order to have the witness discredited as a result thereof – despite the officer’s testimony to the contrary. The reason proffered why several subsequent statements were taken from some of the witnesses seems implausible. However, the witness Solastica, knowing very well that her statement did not correctly reflect her narrative to the police failed to point this important factor out to the prosecutor at the trial, and took the witness stand, notwithstanding. In her *viva voce* evidence she denied having stated in her witness statement about first accused having killed the deceased or that he refused to accept the deceased’s apology. These are indeed material discrepancies which could not readily have been forgotten and therefore should have been brought to the attention of either the investigating officer or State counsel.

[51] The court, when faced with an application in terms of s 190 (2) of the Criminal Procedure Act 51 of 1977, must consider the credibility or otherwise of the witness in view of the evidence as a whole and not only in relation to the discrepancies between the witness statement and the witness’ testimony in court. It is for this reason that the court reserved the ruling until all evidence has been heard. Although it might *prima facie* appear to the court, when comparing the witness statement with the witness’ testimony, that there are material differences, the court must not only have regard to the explanation proffered by the witness explaining the discrepancies, but should also consider the explanation together with *other evidence* that bears on the credibility of the witness, ie corroboration from other witnesses on same facts. The need for this, is evident from the present case, where the discrediting of the witness Solastica is sought, based on facts favouring the accused but not

mentioned in her witness statement, but which is then during the trial corroborated by other witnesses. On what legal basis would the court be entitled to completely disregard evidence that is corroborated?

[52] Although the explanation given by the witness may not be satisfactory in respect of every discrepancy shown between her witness statement and her testimony in court, it is, in my view, insufficient to have the witness discredited under the Act. Hence, the court's ruling on the s 190 (2) application is that the application is dismissed.

[53] However, this does not mean to say that Solastica was a credible witness. The evidence of the witness must still (like the rest of the evidence of other witnesses) be assessed in order to decide its veracity and what weight should be given thereto. In its assessment the court must obviously have regard to the internal and external discrepancies in her evidence, inclusive of the material differences between her written statement and oral evidence given at the trial. Although she is corroborated by Diana about first accused coming under attack from three taxi drivers, she is the only person to have seen the deceased sitting on the boot of his vehicle, and the deceased calling first accused to him in order to ask for his forgiveness. Given the circumstances described by the other witnesses of an ongoing fight, I consider the alleged conduct on the part of the deceased highly unlikely. From the aforementioned it must be clear that this witness can neither be seen to be credible and the court must be careful not to give too much weight to her evidence.

[54] As for the witness Diana, her version of the events that night largely confirms that of first accused, though there are some minor discrepancies. One such instance is where she claims that first accused told her that second accused had stabbed someone – something both accused during their testimony disputed. She further disputes the evidence of those witnesses saying that she tried to stop first accused from leaving the bar; and that he subsequently approached the deceased with broken bottles in hand and stabbed him. She confirmed that first accused came under attack from a

number of people; also that Mazezo hit him with a brick; and that there was a gang fight going on where deceased's vehicle was parked; sticks and broken bottles being used during the fight. Besides seeing second accused run towards the deceased's vehicle, she did not make any other observation on him. When considering the credibility of this witness, regard is had, not only to the contradictions between her evidence when compared with that of other witnesses having testified on the same facts, but also where her version is corroborated by the evidence of Fransina, and particularly, first accused. The relationship between her and first accused might have had an influence on the evidence she gave, but that was not established through cross-examination; neither was it shown that she was an unreliable witness. It is interesting to note that this witness was formerly charged in this case together with the two accused, but the charge was subsequently withdrawn against her.

[55] Both accused testified in their defence and notwithstanding the evidence of two witnesses claiming to have witnessed an incident during which they stabbed the deceased; and that of other witnesses placing them in the immediate vicinity where the stabbing incident took place or nearby, they maintained their innocence throughout. They were, as mentioned, corroborated by some witnesses on certain aspects of their evidence. It is the State's contention that, despite the contradicting versions of the State witnesses, one thing that stands out is that both accused were seen by some of the witnesses, having broken bottles in hand, whilst others placed them at the scene where the deceased was subsequently found with stab wounds. The argument is *inter alia* based on evidence that the deceased was not seen fighting anyone else; therefore, it had to be the accused persons who killed him, as testified by the two State witnesses.

[56] Although this possibility cannot completely be ruled out, the test is whether the versions of the accused, considered together with the rest of the evidence, is reasonably possibly true. In this regard I can do no better than repeat what is stated in *The State v Elias Absalom*³ para 50:

³ Unreported Case No CC 02/2011 delivered on 06 July 2012.

'The onus of proof beyond reasonable doubt is on the State and there is no duty on the accused to convince the Court of the truth of any explanation he gives. Even if the explanation that he gives seems improbable, the Court may not convict, unless it is satisfied that it is false beyond reasonable doubt. Whether the Court subjectively believes the accused, is not the test. Neither does the Court have to reject the State case in order to acquit him. The question is simply whether there is a reasonable possibility that his evidence may be true.⁴ If an accused is found to have been untruthful in some aspects of his evidence, it does not mean that he is therefore guilty.⁵

[57] In order for this court to conclude on the totality of the evidence adduced that it was indeed the two accused persons who caused the death of the deceased, it must be convinced of that conclusion beyond reasonable doubt. An unassailable aspect of the State's case is the unreliability of its witnesses and the extent of the contradictions in their respective version on material aspects. A contention that the deceased was not seen fighting anyone other than first accused does not exclude such possibility; more so, in view of the large number of people who gathered on the scene, some even armed with bottles (and sticks) that were thrown at others indiscriminately – not only at the accused, but also where the deceased was. In addition, evidence was adduced about a mob fight that broke out where the deceased was at his vehicle and that the situation soon became chaotic. There is further evidence before court that the deceased was already seriously wounded when he got to his vehicle without the court knowing the extent of his injuries and the circumstances under which these were inflicted. Poor visibility and a mobile scene definitely impacted adversely on the witnesses' ability to make proper and reliable observations.

[58] Therefore, after due consideration of the totality of the evidence and proper regard being had to the merits and demerits as well as the probabilities of the case, I am not persuaded that the State succeeded in proving its case against the accused persons beyond reasonable doubt.

⁴S v *Haileka*, 2007 (1) NR 55 (HC) at 58A-B; S v *Kubeka*, 1982 (1) SA 534 (W) at 537F-G

⁵S v *Engelbrecht*, 1993 NR 154 (HC)

[59] In the result, on a charge of murder both accused are found not guilty and discharged.

JC LIEBENBERG

JUDGE

APPEARANCES

STATE

D Lisulo

Of the Office of the Prosecutor-General, Oshakati.

FIRST ACCUSED

R Nathaniel-Koch

Instructed by the Directorate: Legal Aid

SECOND ACCUSED

G F Bondai

Instructed by the Directorate: Legal Aid