

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: CC 9/2011

In the matter between:

THE STATE

and

MATHEUS FRANS JOHN TJAPA

ACCUSED

Neutral citation: *State v Tjapa* (CC 9/2011) [2013] NAHCMD 225 (30 July 2013)

CORAM: NDAUENDAPO, J

Heard on: 10 April 2013

Delivered on: 30 July 2013

Flynote: Criminal Law—Accused charged with robbery with aggravating circumstances, 3 counts of attempted murder, negligent discharge or handling of a firearm and possession of a firearm and ammunition without a licence—Plea—Bare denial—Accused positively identified as the perpetrator of the robbery—Aimed and fired at police officers—Attempted to kill them—Fired shots with a revolver—No licence—Proven that possession of firearm and licence unlawful—Guilty as charged.

Summary: The accused was charged with robbery with aggravating circumstances, 3 counts of attempted murder, negligent discharge or handling of a firearm and possession of a firearm and ammunition without a licence. He denied all the charges. The witnesses positively identified him as the one who entered the supermarket on the date of the robbery wielding a firearm, ordering people to lie down, threatened, assaulted and pointed a firearm at some of the staff members. They testified that he then ordered them to put the money from the safe and the tills in the money bags and he then walked out of the shop carrying the bags and the revolver in his hands.

Held, that the accused was positively identified by the witness as there was sufficient illumination in the shop and that some witnesses saw his face at a close distance when he pointed the firearm at them and therefore he was positively identified by the witnesses.

Held further that he was the one who ordered the witness to put the money in the bags and he then left with the bags and the revolver in his hands, and that the bags and the revolver were found in the pipe and the riverbed where he was found.

Held further that, the evidence sustains a conviction of robbery with aggravating circumstances.

Held further that, when the police officers pursued him after he left the shop and carrying the bags and a revolver he turned around, aimed at the police officers and fired 3 shots at them he thus had the intention to kill them and therefore he is guilty of attempted murder.

Held further that on a charge of negligent discharge or handling of a firearm, it was proven that the accused negligently discharged the firearm whilst being pursued by the police and members of the public and by so doing endangered the lives or limbs of the witnesses and is therefore guilty as charged.

Held further that, the accused admitted that he did not possess a firearm licence and therefore when he possessed the firearm and the ammunition he did so unlawfully and is therefore guilty as charged

ORDER

In the result, the accused is found guilty as charged.

JUDGMENT

NDAUENDAPO, J

[1] The accused is arraigned in this Court and charged with the following crimes:

COUNT 1: ROBBERY WITH AGGRAVATING CIRCUMSTANCES AS DEFINED IN SECTION 1 OF ACT 51 OF 1977.

The allegations being that on or about **11 October 2008** and at or near **Windhoek** in the district of **Windhoek** the accused did unlawfully and with intention of forcing them into submission assault **Maria Shagama, and /or Shali Ndapewa Hamutegela, and/or Christina Karises, and/or Sherine Cloete, and/or other people** by pointing firearm(s) at them and/or hitting and/or kicking and/or pushing them and/or threatening to shoot or kill them and with intent to steal from them at least **N\$42 600 cash money** the property of on or in the lawful possession of Maria Shagama, and/or Shali Ndapewa Hamutegela, and/or Christina Karises, and/or Sherine Cloete.

And that aggravating circumstances as defined in section 1 of Act 51 of 1977 are present in that the accused and/or an accomplice was/were before, during or after the commission of the crime wielding firearm(s) and/or threatened to inflict grievous bodily harm to the said **Maria Shagama**, and/or **Shali Ndapewa Hamutegela**, and/or **Christina Karises**, and/or **Sherine Cloete**.

COUNT 2: ATTEMPTED MURDER

The allegations being that on or about **11 October 2008** and at or near **Windhoek** in the district of **Windhoek** the accused did unlawfully assault **Sadrak Jeremia Katjuanja** by firing shot(s) at him with a .22 revolver with serial number 739938 with the intent to kill him.

COUNT 3: ATTEMPTED MURDER

The allegations being that on or about 11 October 2008 and at or near Windhoek in the district of Windhoek the accused did unlawfully assault **Saratiel Mukohongo** by firing shot (s) at him with a .22 revolver with serial number 739938 with the intent to kill him.

COUNT 4: ATTEMPTED MURDER

The allegations being that on or about 11 October and at or near Windhoek in the district of Windhoek the accused did unlawfully assault **Gerhard Kakonda** by firing shot(s) at him with a .22 revolver with serial number 739938 with the intent to kill him.

COUNT 5: CONTRAVENING SECTION 38 (1) (I) READ WITH SECTIONS 1, 8, 10 AND 39 OF ACT 7 OF 1996 – NEGLIGENT DISCHARGE OR HANDLING OF A FIREARM

The allegations being that on or about **11 October 2008** and at or near **Windhoek** in the district of **Windhoek** the accused did unlawfully and negligently discharge a firearm, namely a .22 revolver with serial number 739938 and did thereby endanger the life or

limb of other persons, namely **Sakrack Jeremia Katjuanjo**, and/or **Saratiel Mukohongo**, and/or **Gerhard Kakonda** or handled this firearm in a negligent manner.

COUNT 6: CONTRAVENING SECTION 2 READ WITH SECTIONS 1, 8, 10, 38 AND 39 OF ACT 7 OF 1996 –POSSESSION OF A FIREARM WITHOUT A LICENCE.

The allegations being that on or about 11 October 2008 and at or near Windhoek in the district of Windhoek the accused did unlawfully and intentionally have in his possession an arm, namely a .22 revolver with serial number 739938 without having a licence to possess such arm.

COUNT 7: CONTRAVENING SECTION 33 READ WITH SECTION 1, 8, 10, 38 AND 39 OF ACT 7 OF 1996-POSSESSION OF AMMUNITION.

The allegations being that on or about 11 October 2008 and at or near Windhoek in the district of Windhoek the accused did unlawfully and intentionally have in his possession ammunition, namely an unknown amount of live .22 bullets without being in the lawful possession of an arm capable of firing such ammunition.

[2] In the **summary of substantial facts** the state alleges that:

‘At approximately 19h00 on Saturday 11 October 2008 the Woerman & Brock grocery store in Khomasdal in the district of Windhoek was in the process of closing business for the day. A group of men sharing a common purpose, amongst whom the accused, and armed with firearms entered the store and wielded their firearms and ordered all customer and personnel who were still in the store to lay down on the floor. This group, including the accused, demanded that the store personnel hand over to them all cash money in the tills and the safe and they threatened and assaulted people including those mentioned in count 1 in the indictment. The accused fled the store with at least two bags of money and money stuffed in his clothes. In an attempt to escape from the police and other members of the public who attempted to apprehend him the accused fired numerous shots at them with the .22 revolver mentioned in count 6 hereof for which he

did not have a licence, neither did he lawfully possess the numerous live bullets which he fired in his attempt to escape. The accused failed to escape and he was arrested in a nearby storm water pipe'.

The accused is represented by Mr Ntinda and the state by Mr Khumalo. He pleaded not guilty to all the charges. He denied having been at the scene of crime and having committed the crimes.

CASE FOR THE STATE

The following witnesses were called by the state and the **summary** of their evidence is as follows:

[3] NDAPEWA HAMUTENGELA

She testified that she was employed as a supervisor at Woerman Brock supermarket Khomasdal. On 11 October 2008 at 18h45 she was picking up trays in front of the tills when she saw a person ordering customers to lie down and cocking his gun. She went behind the shop, lay down and covered herself with toilet papers. She heard footsteps and suddenly this person came to her, lifted her up and pointed a firearm at her right side of the neck. It was a male person but she did not see his face. The person told her to go where the money was, they proceeded up to the safe and she was ordered to take money out the safe and packed it in a money bag. She complied with the order as she was beaten with the firearm. After she finished putting the money in the bags, he pointed the firearm at them and proceeded to the tills and took money from the tills and placed it in the money bags. He then ordered them to lie down on the floor and he left. They lay on the floor until the police arrived.

THOMAS NEILENGE

[4] He testified that on 11 October 2008 at 19h00 he was on duty at Woerman Brock, supermarket, Khomasdal. At 19h00 he was in the toilet and whilst inside somebody

came and pulled the door. After realising that there was something wrong in the shop, he ran out of the toilet to another place and lay down and covered himself with toilet papers. Whilst laying down the accused came to him and asked for the key to the safe and who the supervisor was. The accused slapped him with his open hand on the right side of the face. He left him and he then took Ndapewa and went with her. He testified that that person pointed a firearm at him and he had a good look at him. He had a beard and red eyes. He recognised him as the accused in the dock.

GEORGE MOATSHE

[5] He is a traffic officer at Windhoek City Police. He testified that on the date of the robbery he was on his way home to Khomasdal. As he was passing Woerman Brock store, he was stopped by bystanders who told him that there was a robbery at the store. He peeped through the door of the store and saw ladies laying on the floor. Outside where he parked his car, he saw a white Toyota corolla without a registration number. Whilst there he saw a man emerging from the store and carrying a white cotton money bag and a revolver and the man fired shots into the air. The other 2 men boarded the car and as they drove off they aimed at him pointing a firearm at him. When his colleagues arrived at the scene, he gave them directions the person who was carrying the money bags took and that is the direction where the accused was later found.

[6] SALATIEL MUKOHONGO

He is police officer employed by Windhoek city police. He testified that on 8th October 2008 he was on patrol duty in Khomasdal and Otjomuise with his colleague Katjjuanjo. While patrolling, they received a complaint of a robbery at Woerman Brock supermarket. They proceeded to Khomasdal and when they arrived there they saw many people at the shop who pointed out the suspect to them and they started pursuing the suspect. They told him to stop but, instead the suspect turned around, aimed at them and started shooting at them and they shot back and the person fell into the riverbed. They followed him in the riverbed and found him in the storm water drain pipe. He was pulled out of the pipe. They searched him and found money on his body. A revolver with two cartridges in

the chamber and a bag of money next to him were also found. He identified the accused as the person they followed and found in the riverbed. He was injured on the right foot.

Jan Swartz

He was an employee of Woerman Brock supermarket. On 11 October 2008 at approximately 19h00 he was in the store and the store was busy closing. The next moment he heard cashiers screaming and he saw a man wielding a firearm. He threw himself on the floor. He saw the man moving towards the cashier. He ran to the store room to hide. The man came towards him and pointed a firearm at his head. The man ordered him to show him the manager. He managed to escape and ran outside. Whilst standing outside the man with the gun came out of the store and took the direction of the playground. He later heard gun shots from that direction. The person was dark in complexion and wearing yellow pants and white tekkies.

[7] Angula Amulungu

He is a police officer. On 11 October 2008 he was in Khomasdal with a private vehicle. He was off duty. He parked his vehicle and walked on foot to Woerman Brock supermarket. At the store he observed that the steel door was a slightly open. As he was about to cross the road, a person emerged from the shop carrying a gun in the right hand and a money bag in the left hand. He moved backwards, crossed the road into the playing ground and called for the police. The man was wearing a yellowish trouser. Later he proceeded to the riverbed where the suspect was arrested wearing the yellowish trouser. He saw the revolver and the money bag next to where the man was arrested.

[8] Detective sergeant Simasiku

He visited the scene of crime and compiled the photoplan which was admitted as exhibit E in Court.

Gerhard Kakonda

[9] He is a superintendent at the traffic department, city of Windhoek. He testified that on 8th October 2008 at 19:00 he was in Khomasdal at Woerman Brock supermarket where he saw a lot of people shouting at a person who was walking towards the playground. He saw this person carrying money bags and firing shots at the police officers who were pursuing him. He was also pursuing this person when shots were fired at them. This person went into the riverbed, still shooting and went into the storm water drain pipe. He was pulled out. He was injured on the right foot. He testified that the person was searched and money was found on this body. Also found was a revolver with two cartridges and a money bag close to him.

Sadrack Katjuanjo

[10] He testified that he is employed at Windhoek city police for the past 16 years. On 11 October 2008 at 19h00 he was doing patrol duties with Mukohongo. They received a call about a robbery at Woerman Brock supermarket, khomasdal. They proceed to Woerman Brock. When they arrived there, bystanders pointed out the suspect to them and together with the public members, they pursued the suspect. He was carrying money bags and a revolver and was shooting in the air. When they started pursuing him, they told him to stop, but instead he turned around and aimed at them and started shooting at them. They lay down to take cover and he took the firearm from his colleague and shot the suspect in the right foot and the suspect went down and started crawling until he went into the riverbed. They followed him into the riverbed and found him in the storm water drain pipe. The suspect was removed from the pipe. He was searched and money was found on him. Money bags and a revolver was also found at the place where he was. He identified the person that he shot and went in the riverbed as the accused in the dock.

Percy Openshaw

[11] He testified that he is from the emergency crisis response company. He assisted the police on the day of the robbery. He pulled the accused person out of the storm water drain pipe. He also retrieved a revolver from the drain pipe where the accused

was found which was admitted as exhibit 'Z'. He also testified that money was found in a carrier bag in the riverbed.

Sherien Cloete

[12] She was employed as a manager at Woerman Brock supermarket, Khomasdal. She testified that on 11 October 2008 around 18h45 she gave instructions to the security guard to close the door of the store. Whilst standing there, three men arrived at the door and pushed the security guard inside the store and ordered the people inside the shop to lie down. She lay down and after a while a man came to her and pointed the gun at her head. He took her to the office and asked her where the money was, hit her with the gun and she fell down and he also strangled her. He went to the back of the store and returned to where she was laying, hit her again with a gun and beat her and demanded money from her. Ndapewa gave him the money and put it in bank bags. He was wearing a yellow trouser. At the tills he ordered that the money be placed in the money bags. He then left with the money bags. She testified that she will never forget the face of the accused as the person who pointed the gun at her, beat her and robbed the shop on that fateful day. In her own words that man's face is embedded in her memory-conscience till today'. She identified that man as the accused person.

Tuyoleni Endjala

[13] On 11 October 2008 he was employed at Nampol emergency response unit. He was called to a scene of crime at Woerman Brock supermarket, Khomasdal. At the scene he found the suspect in the storm water drain pipe. They pulled him out of the pipe. He searched the suspect and found money in his underpants, socks and under his shirt. The money was handed over to Chief Inspector Unandapo. The suspect was wearing a yellowish trouser. A revolver was also found in the drain pipe where the suspect was found. He identified the accused as the person who was pulled out of drain pipe on that day.

Horst Werner Hoebel

[14] He is the owner of the firearms which were stolen from his residence in Olympia. All the firearms except the revolver were recovered. The revolver was a .22 magnum revolver with serial number 739938 (exhibit 'L') which was found next to the accused in the drain pipe.

Kai Lauenroth

[15] He was the financial manager at Woerman Brock supermarket khomasdal during 2008. After the robbery he went to the store to receive the money and banked it. He made a summary of the missing money, reconciled it with stocks and sales of the day and came to the conclusion that the financial loss to the company as a result of the robbery was N\$32600.

Lorenzo Snyders

[16] He was at Woerman Brock supermarket on the date the robbery took place. He observed a man pointing a fireman against a woman's head, he got scarred and came out of the store. He saw the same man coming out of the store with bags of money and went to the side of the playgrounds. He also had a revolver in the one had. He saw him until he disappeared in the riverbed. He positively identified the accused in the dock as the person who pointed a firearm at the head of the woman in the store and who left the store with money bags and a revolver.

Johannes Iyambo

[17] Compiled the photoplan of the scene on 25 January 2011 and admitted into evidence as Exhibit 'h'.

Sakaria Amakali

[18] He testified that on 11 October 2008 he was summoned at the crime Investigation office and given money by Chief Inspector Unandapo to count. He counted N\$20663.60.

Chief Inspector Unandapo

[19] He testified that on 11 October 2008 he received information about a robbery. He drove to the scene. At the scene he found the suspect who was shot in the right foot side. He also received bags of money from city police and .22 revolver. He took the items in police custody. The money was handed over to the owner of Woerman brock.

Williama Nambahu

[20] He is chief forensic scientist. He testified that on 31 January 2012 he received a firearm and spent cartridges from Hilundwa to analyse and check whether it was the firearm which fired the spent cartridges. After analysis, it was found that the cartridges were fired from the revolver that he received from Hilundwa.

Linekela Hilundwa

[21] He is attached to the Serious Crime Unit and was the investigating officer. On 8 October 2008 he went to a scene of crime at Khomasdal. When he arrived at the scene the accused was being attended to by members of emergency unit. He saw two bags of money next to the accused. A .22 magnum revolver was also handed to him and he booked it in and sent it to the forensic division together with spent cartridges for comparison. He testified that at the scene he informed the accused of his right to legal representation. The accused informed him that his name was John Frans and that the money found on him was his to purchase a vehicle.

Few days after his arrest, he visited the accused at the hospital. He informed him about his rights and that he is being charged with robbery. He collected the trouser which he was wearing when arrested, a yellowish trouser. At the hospital he was also informed that his real name was Matheus Tjappa and not Johan Frans.

He again met the accused at his office and again explained his rights to him. He asked him whether there was any problem if the money found on him was handed to the

rightfully owner and he said 'no'. He was given a form to sign to consent to the handing over of the money and he signed it.

That was the case of the state.

DEFENCE'S CASE

[22] The accused testified in person. He testified that he is businessman who sells liquor and clothing. He came to Windhoek from Oshakati to buy a car. He got into a taxi and proceeded to Khomasdal to a place where they sell cars. The taxi dropped him somewhere in Khomasdal nearby the garage where they sell cars and he then walked to the garage. On his way he saw people charging at him and throwing stones at him. He walked backwards and put his money in the trouser and he fell in the riverbed. These unknown people continued throwing stones at him and one stone hit him on the head and he fell backward in the riverbed. He observed that these people wanted to hit him in the face and he crawled into the storm water drain pipe. Somebody came and pulled him at the foot and said he was a police officer. He came out of the pipe and he saw police officers surrounding him. He testified that he heard shots being fired whilst in the pipe. He denied having a firearm. He had N\$30020 in his trouser and he put it in his trunkie.

He realised that when he came out of the pipe he was shot. He was searched and money was found on him. He further testified that he saw money bags being placed near him. He denied that he fired shots in the air and at the police officers and that a revolver was found in the pipe from which he was pulled

He denied having gone to Woerman Brock store in Khomasdal at 19h00. He was taken to Woerman Brock store after the incident and the civilians were looking at him. He denied having robbed anybody or fired shots at anybody. He denied having consented to the money being given back to Woerman Brock.

That was the case for the defence

Analysis of the evidence

[23] The accused was positively identified by the witnesses as the one who entered the supermarket on the date of the robbery wielding a firearm, ordered people in the supermarket to lie down, pointed the firearm at some of the staff members, like Cloete, beaten them, ordered them to remove money from the safe and tills and placed them in money bags and walked out of the supermarket carrying the money bags and the firearm in his hands. The court is mindful that evidence of identification must be treated with caution as was rightly pointed by Maritz J (as he was then) *“In S v NANGO 2006 (1) NR 141 (HC), when he stated that: ‘evidence of identification should always be regarded with caution. The court must take into account the age of the witness, whether there was anything which could have an impact on visibility and the fact that a long time lapse affects the accuracy of people’s recollection. The court will also consider other evidence to determine whether the evidence of identification is corroborated by other evidence.’”*

In this case there was sufficient illumination in the supermarket as the lights were on, some of the witnesses had a very close encounter with the accused as he pointed out the firearm at them, like Cloete who testified that the accused’s face is embedded in her memory till today, and that he was wearing a yellow trouser which was identified by the witnesses. The accused admitted wearing the yellow trouser. Outside the supermarket it was still light, he was seen carrying money bags and a revolver in his hands and he was pointed out by members of the public to the police who pursued him until he ended up in the riverbed and in the storm water drain pipe. The revolver was found in the pipe and the money bags in the riverbed close to where he was. In my view the evidence sustains the charge of robbery with aggravating circumstances.

24. The evidence by Kakonda, Mukohongo and Katjiuanjo was that when they pursued the accused, they told him to stop, but instead he turned around and aimed the firearm at them and shot at them. More than three shots were fired at them and they were 25 meters from the accused when he fired at them. Given the circumstances under which

the shots were fired at them, I am satisfied that the state proved beyond reasonable doubt that the accused attempted to kill them.

[25] The accused's testimony that he was at Woerman Brock around 21h00 is simply not true at all. He testified that he was brought to Woerman Brock around 21h00. All the witnesses testified that the shop closed at 19h00 and the robbery took place few minutes before closing time. He was seen with the money bags outside the shop when he emerged from the shop shortly after 19h00. He does not deny that he was found in the storm water drain pipe. The witnesses testified that the money bags that he came out with from the shop were found next to him at the riverbed.

The accused never informed the police when found in the pipe that unknown people threw stones at him and that he hid in the pipe to avoid being injured. If that was true, that would have been the first thing that he would have told the police. His failure to do so clearly shows that was not true at all. He also never informed the police that he had his own money on him with which he wanted to buy a car with. He authorised Hilundwa to return the money which was found on his body and in the bags to Weorman Brock without any protestation. If that was his own money, why would he allow Hilundwa to give money to Woerman Brock store who was not the owner of the money? His story is simply incredible and stands to be rejected as false.

The witnesses were subjected to lengthy cross examination by defence counsel. But their evidence on the material aspects or elements of the crimes remained unshaken. Despite the passing of time, they gave detailed and vivid evidence on those material aspects of the crimes. They corroborated each other in every material respect. The witnesses for the state were credible. And as counsel for the state submitted, 'they did not seek to embellish their testimony to deliberately inculcate the accused'. Were concessions were wanted they made them.

[26] The revolver that was seen in his hand and later found in the pipe where the accused was, was shown by Mr Nambahu, a forensic scientist, to have fired the two cartridges found in the chamber and that shows that the accused fired that revolver. By firing that revolver at the police and members of the public who were behind the police, the accused was negligent in discharging and or handling the revolver.

[27] The accused admitted that he neither possessed a firearm licence nor for ammunition. It was shown that he was found in possession of the revolver together with the ammunition and his possession was therefore unlawful.

The evidence against the accused was conclusive, undeniable and overwhelming.

I am satisfied that the guilt of the accused was proven beyond a reasonable doubt.

In the result the accused is found guilty as charged.

G N NDAUENDAPO

JUDGE

APPEARANCES

THE STATE:

**MR KUMALO
OF THE PROSECUTOR GENERAL OFFICE**

ACCUSED:

MR MBUSHANDJE NTINDA

OF SISA NAMANDJE INC