REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 15/2013

In the matter between:

PAULUS MWANYEKELE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Mwanyekele v State* (CA 15/2013) [2013] NAHCMD 301 (25 October 2013)

Coram: HOFF J and SHIVUTE J

Heard: **28 June 2013**
Delivered: **27 September 2013**
Reasons: **25 October 2013**

Summary: The evidence of single witness must be approached with caution although such caution should not be allowed to displace the exercise of common sense.

Where the State fails to call witnesses who have been identified and who are available, certain consequences may follow, namely that a court would be justified to infer that the reason for such failure to call a witness, is that in the opinion of the prosecutor such evidence might possibility have given rise to contradictions which could have reflected adversely on the credibility and reliability of the single witness.

A finding by a court that an accused had acted negligently or carelessly, on a charge of attempted murder, excludes the element of *dolus* (intention).

The defence of self-defence is a denial that conduct was unlawful. In considering whether accused acted in self-defence a court is not required to consider whether there was an equilibrium between weapons used.

It must be ever present in the mind of a presiding officer that in the particular circumstances of a case the person claiming to act in self-defence might have done so in a emergency situation.

The act of self-defence may not be more harmful than necessary to ward off the attack but much depends upon the varying circumstances in each case in deciding whether the bounds of self-defence have been exceeded.

The vital question is not whether there were other methods of defence which might have been successful, in averting the unlawful attack but whether the method in fact adopted can be justified in the circumstances.

ORDER

(a) The appeal is upheld.
(b) The conviction and sentence are set aside.

JUDGMENT

HOFF J (SHIVUTE J concurring):

[1] On 28 June 2013 after hearing argument in this case by counsel this appeal was postponed to 27 September 2013 on which date the appeal was upheld and the conviction and sentence were set aside.

These are the reasons:

[2] The appellant was convicted in the Magistrate's Court sitting at Mungunda street, Katutura of the crime of attempted murder and sentenced to a fine of N$8000 or 2 years imprisonment.

[3] There are two conflicting versions of what had happened prior to the complainant being shot by the appellant.

[4] The complainant testified that he together with two friends entered Osho Bar in Okuryangava at 02h00 on 1 December 2009 with the intention to buy a recharge voucher (airtime). One of his friends, Kapia went to the jackpot machine where another person was already operating the machine. There was a misunderstanding between these two persons and by the time the appellant, who was a security officer at the bar, went to investigate, the problem had already been solved. Complainant testified that the appellant then went to his other friend Matheus who was seated at the bar counter. It appeared to him that they were arguing and he (ie complainant) went to them and asked Matheus what it was about. Matheus gave no answer but the appellant who had a 'stun gun', 'electrocuted' Matheus in the stomach, and he (ie the appellant) asked the complainant what he wanted, saying that he would beat them up. The appellant then ordered them to leave the bar. His friends were in front of him, leaving the bar and he was at the back and the appellant was behind him. He then just heard a gunshot and saw blood on his leg. According to the complainant he informed the appellant that he had been shot but the appellant gave no answer. Appellant at that stage still had the fire-arm in his hand 'cocking' it. The complainant testified that the same bullet which injured him on his leg also struck Kapia 'on his feet and the toes'. They were subsequently removed by an ambulance and taken to hospital.

[5] The appellant testified that the complainant and his friends entered the bar after the gate of the boundary wall had been locked with the intention to rob the establishment. He was surprised and enquired from them how they gained entry to the bar and the response was: ‘You, are looking for an excuse because you know very well’. There were about three other persons in the bar one male person and two female attendants who were busy counting money as well as three other patrons. The complainant and his friends then spread out in an attempt to surround him. He took out his fire-arm from his waist. The complainant was coming fast towards him and he then fired a shot on the floor whilst retreating. When he fired the shot the complainant and his friends were about one and a half metres away from him. The appellant testified that he did not aim at any person and that when he fired it was meant as a warning shot and did not expect that anyone would be injured.

[6] The J88 handed in as an exhibit indicates that the complainant had been examined by a medical doctor at the Katutura State Hospital on 1 January 2009 at 04h10. The injury observed during this examination was a gunshot wound and a fracture on the right leg just above the ankle. An open wound was indicated on the front of the leg.

[7] The State did, in spite of the testimony of the complainant, not call the two friends of the complainant to testify. The appellant also called no witnesses.

[8] The magistrate in her reasons before judgment stated that the complainant and his two friends surrounded the appellant and stormed at him in an attempt to grab his fire-arm and that the means used by the accused to retaliate couldn’t be said to be proportionate to the ‘alleged’ attack.

[9] The magistrate further found that the appellant as a security guard discharged a fire-arm negligently, in that he fired a shot in a close confinement and did so knowing very well that another person could be injured. The magistrate further stated that the appellant carelessly injured the complainant.

[10] It appears from the reasons of the magistrate that she accepted the version of the appellant that he fired a shot on the floor of the bar.

[11] The J88 indicating that an open wound was observed in front of the leg of the complainant supports the evidence that the complainant was facing the appellant when the shot went off and contradicts the evidence of the complainant that he was shot from behind by the appellant.

[12] Two of the grounds of appeal read as follows:

'The learned magistrate misdirected herself, alternatively erred in law and/or fact by failing to apply the cautionary approach to the uncorroborated evidence of a single state witness . . .

The learned magistrate misdirected herself, alternatively erred in law and/or fact by finding that the accused in his actions exceeded the bounds of self defence.'

[13] In terms of the provisions of s 208 of the Criminal Procedure Act 51 of 1977 an accused person may be convicted of any offence on the single evidence of any competent witness.

[14] In *R v Mokoena* 1932 OPD 79 at 80 De Villiers JP held that the uncorroborated evidence of a single competent and credible witness is sufficient for a conviction but only in those instances where the evidence of such single witness is clear and satisfactory in every material respect.

[15] In S v HN 2010 (2) NR 429 at par 56 the court (per Liebenberg J) held that it is a well-established rule of practice, that where a witness gives evidence as a single witness, that such evidence must be corroborated or approached with caution, although such caution should not be allowed to displace the exercise of common sense. (See *also S v Esterhuizen and Another* 1990 NR 283).

[16] It was submitted by Mr Brockerhoff, who appeared on behalf of the appellant, that the complainant was not a credible witness if one has regard to the medical report (which was undisputed) which clearly shows that the testimony of the complainant was false. The testimony of the complainant being that he was shot from behind when he was walking away from the appellant cannot be reconciled with the injury he sustained on the front part of his leg. I agree that on this important point that the complainant was untruthful.

[17] I may state at this stage that it is trite law that the State has the burden to prove the commission of an offence beyond reasonable doubt and in this regard it is appropriate in my view to once again remind prosecutors of the consequences of the failure to call witnesses where they have been identified and are available.

[18] In *S v Teixeira* 1980 (3) SA 755 AD at 764A the court held that in the circumstances the failure by the State to call the other witness to testify justified the inference that in State's counsel opinion his evidence might possibly have given rise to contradictions which could have reflected adversely on the credibility and reliability of the single witness.

[19] In this appeal the witnesses Kapia Johannes and Iita Matheus were at court and were warned to appear in court when the case was postponed. There is no reason apparent from the record why they have not been called as state witnesses. The doctor who had examined the complainant was also not called by the State.

[20] The appellant was charged with attempted murder and the onus on the State was to prove the required intention and unlawfulness (ie that he did not act in self-defence). The finding by the magistrate that the appellant acted negligently or carelessly in the circumstances excluded the element of *dolus (intention)* and the magistrate thus in my view misdirected herself in law by convicting the accused of attempted murder.

[21] In my view once the magistrate had found that the appellant acted negligently that should have been the end of the matter and she should have found the accused not guilty.

[22] However I shall deal with the finding that the appellant exceeded the bounds of self-defence. The plea of the appellant that he acted in self-defence constitutes a denial of the allegation that he acted unlawfully.

[23] The magistrate by stating that the means used by the appellant to retaliate was disproportionate to the alleged attack or storming by the complainant and his friends, implies that she accepted that there was an attack on the appellant. In the circumstances it should be apparent that this attack was unlawful.

[24] It is axiomatic that the act of defence may not be more harmful than necessary in order to ward off the attack but much depends upon the varying circumstances in each case in deciding the question whether the bounds of self-defence have been exceeded. In the consideration of this question the courts adopt a robust approach.

[25] In *Ntanjana v Vorster and Minister of Justice* 1950 (4) SA 398 CPD at 406A-D van Winsen AJ stated the following:

> 'The very objectivity of the test however, demands that when the Court comes to decide whether there was a necessity to act in self-defence it must place itself in the position of the person claiming to have acted in self-defence and consider all the surrounding factors operating at the time he acted. The court must be careful to avoid the role of armchair critic wise after the event, weighing the matter in the secluded security of the courtroom . . . Furthermore, in judging the matter it must be ever present to the mind of the Judge that, at any rate in the particular circumstances of the case, the person claiming to act in self-defence does so in an emergency, the creation of which is the work of the person unlawfully attacking. The self-defender is accordingly entitled to have extended to him that degree of indulgence usually accorded by law when judging the conduct of a person acting in a situation of imminent peril.'

[26] In *Ntsomi v Minister of Law and Order* 1990 (1) SA 473 CPD at 529C-D Van Deventer AJ stated the following:

'As both *Snyman* and *De Wet and Swanepoel* point out, it would be nonsensical to require equilibrium between weapons used. An assailant selects his method of attack and picks his weapon. A victim can only employ the weapon that happens to be at hand. An offender who uses an object such as a stone to attack a policeman who is armed only with a shotgun is certainly not entitled to expect the policeman to lay his shotgun neatly aside and to take up the challenge to a fight with a stone in his hand.'

[27] In *S v T* 1986 (2) SA 112 OPD at 128D MT Steyn J stated that the true legal position is that where a person who is being attacked does not find himself in a life threatening situation, but who can only escape mutilation or serious bodily injury by using a fire-arm against his attacker, may do so, and if necessary even kill the attacker.

[28] In my view, in the final analysis, and as was stated in *Ntsomi* (supra), the question is not whether there were other methods of defence which might have been successful, in averting the unlawful attack but whether the method in fact adopted can be justified in the circumstances.

[29] In this particular instance the appellant was about to be cornered by assailants including the complainant, who intended to disarm him. He was outnumbered. Even though there is no evidence that anyone of these assailants was in possession of any weapon, would it have been reasonable to expect of the appellant to put his fire-arm aside and to engage the assailants in a fist fight? It would have been the height of folly to have expected of him to do so.

[30] In my view the appellant was justified to use a fire-arm in the circumstances, especially if one has regard that he only fired a warning shot on the floor which ricocheted and struck the complainant above his right ankle.

[31] The State therefore did not prove beyond reasonable doubt that the appellant did not act in self-defence and the appellant should for this additional reason have been found not guilty on the charge of attempted murder.

E P B HOFF

Judge

N N SHIVUTE

Judge

APPEARANCES

APPELLANT:	Mr Brockerhoff Instructed by Directorate of Legal Aid
RESPONDENT:	P S Kumalo Office of the Prosecutor-General, Oshakati

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