

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case No: CC 8/2017

THE STATE

v

LAZARUS OSCAR AWASEB

ACCUSED

Neutral citation: *S v Awaseb* (CC 8/2017) [2018] NAHCMD 310 (27 September 2018)

Coram: USIKU, J

Heard: 13 August

Delivered: 27 September 2018

Flynote: Criminal Procedure – Power to Prosecute – Article 88(2) of the Constitution of the Republic of Namibia provides that the power to prosecute lies with the Prosecutor General and no other institution.

Criminal Procedure – The overriding objectives of the Namibian Police Force is to maintain law and order. – Murder in a domestic setting considered to be a heinous crime.

Summary: The accused, who is a member of the Namibian Police Force, was romantically involved with the complainant herein, whilst the complainant was also involved in a romantic relationship with another third party, being the deceased herein. The love triangle caused jealousy which resulted in the accused shooting the complainant three times in her leg which left her crippled. Accused killed the deceased herein. The firearm used in the commission of the aforesaid offences was not booked out, neither did accused obtain prior written authorisation as required in terms of the Police Manual.

ORDER

Count One: Guilty – Murder.

Count Two: Guilty – Attempted murder.

Count Three: Guilty – Possession of a firearm without a license.

Count Four: Guilty – Unlawful possession of ammunition.

Count Five: Guilty – Malicious damage to property.

Count Six: Accused is found not guilty and is acquitted on the charge of theft.

JUDGMENT

USIKU J:

Introduction

[1] The accused, a Detective Inspector in the Namibian Police and the Unit Commander of the Criminal Investigation Unit at the Epako Police Station in Gobabis, stood charged with several crimes. On the first count he was charged with murder in that upon or about 22 March 2016 and at or near Gobabis in the district of Gobabis, the accused did unlawfully and intentionally kill Odilo Rathebe Motonane, the deceased herein, being an adult male of 18 years of age.

[2] On the second count accused faces a charge of attempted murder, read with the provisions of Act 4 of 2003 in that upon or about 22 March 2016 and at or near Gobabis in the district of Gobabis, the accused did unlawfully and intentionally fire shot with a firearm at Mildred Haoses, being the complainant herein, with the intention to kill her. In the alternative to count 2, he is charged with contravening section 38(1)(i) read with section 1, 8, 10, 38 and 39 of Act 7 of 1996 – negligent discharge or handling of firearm, read with the provisions of Act 4 of 2003 in that upon or about 22 March 2016 and at or near Gobabis in the district of Gobabis, the accused did wrongfully and unlawfully handle or discharge a firearm and did thereby negligently injure and endanger the life or limb of Mildred Haoses.

[3] On the third count, accused is charged with contravening section 2 read with sections 1, 8, 10, 38 and 39 of Act 7 of 1996 – the possession of a firearm without a license - in that during the period 19 – 22 March 2016 and at or near Gobabis in the district of Gobabis, the accused did unlawfully and intentionally have in his possession a firearm namely, pistol CZ 75 B A826547 without having a licence to possess such arm.

[4] On the fourth count accused is charged with contravening section 33 read with sections 1, 8, 10, 38 and 39 of Act 7 of 1996 – the possession of ammunition - in that during the same period and at or near Gobabis in the district of Gobabis, the accused did unlawfully and intentionally have in his possession an unknown amount of live 9mm

bullets without being in the lawful possession of an arm capable of firing such ammunition.

[5] On the fifth count, accused is charged with malicious damage to property read with the provisions of Act 4 of 2003 , in that during the period 18 – 22 March 2016 and at or near Gobabis in the district of Gobabis, the accused did unlawfully and intentionally damage a home theatre system and/or television set and/or DVD player the property of or in the lawful possession of Mildred Haoses by hitting it or throwing it on the ground or by breaking it in an unknown manner with the intent to injure the said Mildred Haoses in her property.

[6] On the sixth count, the accused is charged with theft read with the provisions of Act 4 of 2003 in that during the period 18 – 22 March 2016 and at or near Gobabis in the district of Gobabis, the accused did unlawfully and intentionally steal an unknown amount of iron sheets and/or a fridge and/or a microwave oven, the property of or in the lawful possession of Mildred Haoses.

[7] When charges were put to him, accused tendered a plea of not guilty on all charges. He offered no plea explanation through his legal representative, Mr Tjituri. Mr Litubezi appeared for the State.

[8] It is important to note that at the end of the trial, the State opted not to proceed with the sixth count after Mildred Haoses testified and conceded to the fact that she gave permission to the accused to go and remove the property referred to in that count. As a result, accused was found not guilty and acquitted on that count.

[9] The summary of the substantial facts are in essence centred around a triangular domestic relationship. This eventually caused jealousy amongst the parties involved and led to the current charges the accused is facing before court. It is common cause that the accused was romantically involved in a relationship with Mildred Haoses, the

complainant herein. At the same time, the latter was also romantically involved in a relationship with the deceased.

The State's Case

[10] Mildred Haoses testified that at the time of the incident, she was 22 years of age. She testified that she and the deceased were romantically involved in a relationship since December 2014. The following year, she began a romantic relationship with the accused whilst still involved with the deceased. She began seeing both deceased and accused at the same time. She further testified that both accused and deceased came to know one another during February 2016 when they met at her house, Kanaan location in Epako at Gobabis. During that meeting, an argument broke out between the two as they were jealous because of her.

[11] On 18 March 2016, the complainant and accused had an argument through text messages on their cellphones about the fact that she was seeing someone else. Whilst at her house with her friend, Valencia Kapeotua, the accused arrived. She went to meet him in the car whereafter a quarrel ensued between them. She decided to leave the car, whereafter the accused followed her into the house. Accused ended up breaking the home theatre system, television set and DVD player which he had bought for her. As accused continued to break the said items, the complainant ran to her grandmother's residence in order to report what had happened whereafter they sought assistance from one police officer called Skara who resided in the same neighbourhood. Having made the report, they all returned to her house whereafter the accused was calmed down. It was agreed that they would end their relationship.

[12] On 19 March 2016, the complainant together with her friend Valencia, decided to take the aforesaid properties to the accused's house. Upon arrival at the house, Valencia remained outside, whilst the complainant went inside accompanied by the accused. According to the complainant, they had an argument in the bedroom which did not last long.

[13] The complainant and Valencia later on left for town whereafter they returned to the accused's house and stayed there until 15:00 whereafter they left. In the evening, accused came looking for her, but could not find her. He called the complainant and the phone was answered by her friend. He then told her that he was going to collect all the items he had bought for her. She did not object to him taking the said items. She then called her grandmother in order to confirm whether accused had taken his properties and informed her that she had given him permission to do so.

[14] On 20 March 2016, accused returned to the complainant's house and removed the iron sheets in her absence. The complainant had not slept at home that night, but only returned the next morning. She went out again, only returning in the evening and went to bed, whereafter the deceased joined her. They spent the night together.

[15] During the early morning hours of 22 March 2016, accused came to her house and knocked at the door. He asked her to open the door or he will break it down. The complainant asked him what he wanted to which accused responded that he wanted to ask her about something. In the meantime, the deceased got up and went to open the door. The accused immediately started firing whilst the deceased stood in the doorway. At that point in time, the complainant was seated on the bed in the opposite direction as three bullets struck her on the thigh. The complainant persisted that there was no fighting over the firearm though visibility was not so clear, she could still see because of the street light and it was about sunrise. In a state of confusion, she ran managed to run outside though she felt numbness in one of her legs and was in pain. As a result, she fell in front of her grandmother's house whereafter she lost consciousness and could not remember what happened thereafter. She found herself at the Gobabis state hospital where she was hospitalised for a week and received medical attention. The shots left her crippled and as a result, she can no longer lift up her feet, her toes on the right leg can also no longer move.

[16] Ms Juliana Goeieman confirmed about Mildred having come to her house in order to go look for “Skara” on 18 March 2016. Three days later and in the early morning hours of 22 March 2016, she heard noises coming from Mildred’s house. Mildred then came out running towards her house. She also saw accused come out of the same house. She started screaming at the accused and asking him what he had done. Accused went back inside the house. At the time, accused wore a clean t-shirt and was walking upright in a normal manner.

[17] Valencia Kapeotua’s evidence corroborates Mildred’s version with regard to the events of 18 March 2016. She also confirmed having taken the items to the accused’s house the following day. She further confirmed to have received a call from accused asking the complainant’s whereabouts on the evening of 19 March 2016.

[18] Constable Johannes de Jager’s testimony is that on 19 March 2016, he was housed at accused’s residence. During their conversation, accused informed him that he and Mildred separated the previous day. He also informed him that he broke the DVD player at her place. Later that day, Mildred accompanied by her friend arrived at the house carrying boxes.

[19] Cescilia Johannes, a neighbor to the complainant, testified that on 22 March 2016, she woke up early to prepare food for her school going child. She then noticed accused’s car parked outside Mildred’s house. Visibility was clear due to sunrise. She then saw accused knock three times at the complainant’s house whereafter on the third knock, he was opened. Whilst inside her house for a short period, she heard 4 gunshots. She rushed outside and saw Mildred coming out of her house crying, whereafter she fell down at the entrance of her grandmother’s house. In the meantime, accused cocked his firearm and went back into Mildred’s house. He closed the door behind him after which she heard two more gunshots. She did not observe any fight at the house.

[20] Warrant officer Bartho Kandjombo testified that whilst on duty on 22 March 2016, he received a call from Detective Sergeant Nanueb calling him to attend a scene of crime. Upon his arrival, he observed a live bullet on the ground and blood stains from the door towards the yard's gate on the ground. He also observed spent cartridges outside the house. Furthermore, he observed the deceased's body laying on the ground as accused lay on the bed with a pistol next to him. He then turned to the accused and asked him whether he was shot to which accused responded in the positive pointing to his upper left chest. He observed blood stains on his t-shirt.

[21] Inspector Kadundu testified that he took photos of the scene and compiled the photo plan. According to his observations, he did not see any sand or dirt on both bodies, neither on the firearm. That was confirmed by Mr Nambahu, the ballistic expert, who tested the firearm after it had been submitted to National Forensic Science Institute for analyses.

Defence' case

[22] The accused testified that he is currently 50 years of age. His version is that he became romantically involved with the complainant since March 2015 and that they had been together for over a year by the time of the incident. He met her at MegaSave where he was a regular customer and that is how they started seeing each other.

[23] According to him, he had not been aware that Mildred was involved in a relationship with anyone else at the time. He later discovered that she was seeing someone else, during February 2016. According to him, there was an occasion when he and the deceased met at the complainant's house. He then confronted the deceased about what he was looking for. The complainant informed him that she was involved in a romantic relationship with him but that they have since separated. She promised him that she wanted to be with him and not with the deceased. Thereafter she asked him to call in the police. Accused refused to call in the police asking her to do it herself but she had no airtime. He then drove to the service station to buy her airtime. In the meantime, he then called Epako Station informing them about a problem at the location.

[24] Police responded and drove to the location arriving there the same time. Constable Michael Casada came there with other officers he could not recall. Mildred then came out of the house, pointing to the deceased and telling Casada that they were involved in a relationship, but she no longer wanted him. According to him, she told Casada to warn the deceased not to come to her house anymore. In the meantime, Juliana, the complainant's grandmother also arrived. He overheard Juliana telling Mildred to leave the old man and take the younger man whereby Mildred reminded her not to meddle in her business. Accused left for his house.

[25] With regards to 18 March 2016, accused testified that he was communicating via sms with the complainant. Whilst communicating, she asked for money. He later went over to her place. Whilst he was entering the house, he bumped into the stand on which the TV was anchored and this is how the TV got damaged. He returned to his car and waited. After some time the complainant returned with Skara and her grandmother Juliana. Upon their arrival, Skara asked her what was wrong. Accused responded by suggesting that the complainant was upset because he did not want to give her money. She responded in vulgar language whereafter accused left promising to take his belongings. When he arrived at his house, he informed De Jager that there was a misunderstanding between him and Mildred. De Jager did not question him in order to elaborate. Accused denied ever having told De Jager that he and Mildred had separated.

[26] On 19 March 2016, accused testified that Mildred and Valencia arrived in a taxi carrying a broken TV and the home theatre system in a box. They went inside the house and he followed them. He opened his bedroom and placed the box inside whereafter Valencia went out and left the accused together with Mildred. Mildred then asked about the money she had asked before. He then gave her his bob card, whereafter she and Valencia left for town.

[27] Accused maintained in his testimony that the complainant never informed him that they had broken up. Whilst in the bedroom, they kissed each other as usual and so he had no reason to think otherwise. Upon their return in the afternoon, the complainant

told him she would go home and return later in the evening. She never returned. He decided to go look for her with a friend but could not find her.

[28] On 20 March 2016, he still could not locate her. He asked her via text messages where she was.

[29] On 21 March 2016, he communicated with her via text messages. He went over to her house in the morning and took the iron sheets, 4 poles and a microwave that he had all given her in the past.

[30] According to accused's testimony, on 22 March 2016, he went over to Mildred's place in the early morning hours. They had not broken up so he just wanted to see her. Upon his arrival, he parked his car across the gate. He got out and went to the door and knocked. The door was opened by the deceased. The deceased then asked him what he was looking for. He responded that he came to look for his girlfriend. The deceased refused him to enter. He was surprised to see the deceased at the house.

[31] A confrontation ensued between the deceased and the accused. The deceased pushed him, and he fell to the ground. A pistol fell out of his pocket which the deceased picked up and cocked more than once. In the process, the deceased pointed the pistol towards the accused. They wrestled over the pistol. In the meantime a shot went off. During the scuffle, deceased's left arm was on accused's shoulder as the right arm held the firearm. Accused's testimony is that he was not able to grab the firearm from the deceased.

[32] Accused confirmed that Mildred screamed and ran out of the house. Accused's version is that he attempted to grab the firearm from the deceased whilst inside the house. He heard the complainant screaming and saw her run outside though he could not clearly see because it was still dark. He could also not recall how many shots were fired but they were more than one.

[33] According to the accused, it was the deceased who held the trigger. He was not sure whether the safety mechanism was on or off. Accused also confirmed that the firearm had not been in a holster as required at the time of the shooting incident. He persisted that whilst twisting the deceased's hand that held the pistol, two shots were

released whereafter the deceased fell to the ground. It was at that point in time that he got hold of the pistol and only then did he remain with it after which he also lost consciousness.

[34] Accused has denied having shot at the deceased claiming that the deceased got struck by the shots that were released accidentally during their scuffle over the pistol. He is not responsible for the two shot wounds the deceased sustained during the scuffle.

The analysis of evidence

[35] Having considered the evidence presented before court, I intend to deal with the evidence in respect of each count as they appear on the charge sheet.

Count 1 and 2

[36] In relation to count one relating to murder, the state called to the witness stand a retired ballistic expert by the name of Mr Onesmus William Nambahu who worked at the National Forensic Institute since 1993 until his retirement in the year 2016. He was requested to analyse the firearm and to see whether the spent cartridges found at the scene of crime were indeed shot from the said firearm. He testified that the second wound found on the deceased was a distance wound, being longer than 60 cm and slightly longer than an arm's length. The deceased could not have possibly shot himself from such a distance? And even if he did, how is it possible that the deceased was able to shoot himself on all two occasions without at least falling down or passing out from the first shot? Accused testified that he was not able to remove the gun from deceased's hand during the scuffle. One should also bear in mind the size of the accused and the deceased who was a lean young man of 50kg at the time of his death.

[37] Furthermore, both accused and deceased had no traces of dirt on them, yet accused testified that he had fallen to the ground when deceased had pushed him and began to wrestle for the gun. Neither was dirt found in the firearm. Murder has been defined as the intentional, unlawful killing of another human being and therefore

requires that the accused acts with the intention to kill. I am of the opinion that the State managed to prove its case beyond reasonable doubt that the accused had the necessary intention to kill the deceased in count one. A firearm is a dangerous weapon that when used against another person would usually result in fatal consequences. Accused being a trained police officer is well aware of that fact. The deceased was not only shot once, but twice in the back of his body thereby dying on the scene. Accused had a direct intent to kill the deceased when he fired at him first at close range as confirmed by the gun powder found on the deceased's body. He did not stop there, but fired at the deceased for the second time. Consequently, accused is found guilty of murder on the first count with direct intent.

[38] In respect of count two which relates the charge of attempted murder, the complainant was left with the bullet wounds in her thigh which left her crippled. The fact that accused had come out of the house running after Mildred clearly indicates his intentions to harm Mildred. The minute he saw her collapse to the floor, he went back into the house and closed the door behind her. His actions all point in the direction of someone who wanted to kill the complainant, Mildred. Why leave with his gun in the early morning hours to Mildred's house when he was not even on duty at the time? One is left to wonder what the accused would have done had Mildred not fallen to the ground where she lost consciousness.

[39] Furthermore, accused testified that the room was closed whilst wrestling for the firearm and that it was dark. Shots were thus fired at random. Counsel for the State argued that if these shots were to have been shot at random, how is it possible that 6 spent cartridges were found at the scene and all 6 were used to shoot a target, namely 3 on Mildred, 2 on the deceased and 1 on the accused. Surely these gunshots could not have been shot at random. I must say that the Counsel for the State had a point in that regard. Accordingly, accused is found guilty on the charge of attempted murder.

Counts 3 and 4

[40] In respect of counts 3 and 4, Counsel for the defence argued that the term “no persons” referred to in the Arms and Ammunition Act 6 of 1997, were not intended to apply to the police force. He argued in submissions that the Act only applied to other institutions excluding the armed forces such as the Namibia Defence Force and the Namibian Police. The Namibian police being a creature of statute is thus an autonomous institution and as such requires no further authorization.

[41] The relevant provisions of the Arms and Ammunition are hereby quoted for ease of reference:

‘2 Prohibition of possession of arms without licence

Subject to sections 1(4), 3(6), 4, 8, 24, 34(2) and 44, no person shall have any arm in his or her possession unless he or she holds a licence to possess such arm.

33 Prohibition of possession of ammunition in certain circumstances

Subject to sections 34(2) and 44, no person shall be in possession of any ammunition unless he or she is in lawful possession of an arm capable of firing that ammunition.’

[42] The words “no person” is however not defined in section 1 of the Arms and Ammunition Act 6 of 1997. However, Section 44 reads:

‘(1) The provisions of this Act, other than the provisions of Chapter 2 or section 42, shall not apply to the possession or supply of arms or ammunition by-

- (a) any person on behalf of the State;
- (b) any person in his or her capacity as a person in the service of the State;
- (c) any person for the purpose of the Defence Act, 1957 (Act 44 of 1957).

(2) The provisions of sections 2, 31 and 32 shall not apply to -

- (a) the possession or supply of any arm or ammunition by any person in his or her capacity as a person in the service of such State-aided body or institution as the Minister may determine from time to time; ...”

[43] Surely if the legislators had the intention to exclude the Police Force, then they would have specifically excluded them like how they did with Defence force. Or could it

be that the terms “any person on behalf of the State” includes the Namibian Police Force? Evidence deposed to is that the firearm in question had not been booked out as per the regulations by the accused herein, neither did accused apply for a written authorization from the Inspector General of the Namibian Police to take the firearm to his house. Accused was neither on duty and it cannot therefore be argued that accused might have shot deceased in the scope of his employment. One must bear in mind that the overriding objective of the police force is to maintain law and order.

Counts 5

[44] In respect of count five, the accused had conceded in the bail proceedings that he had bought the items for Mildred. Surely this implied that the property now belonged to her and as such the properties damaged were in the lawful possession of Mildred at the time of their damage. It is also clear from the evidence that the reason why he damaged the property was because he was angry about Mildred being involved with another man.

[45] He further denied that he and Mildred had ended their relationship. If that was indeed so, then why would he go and dismantle the shack and remove the rest of the property? How does he explain the text messages between them where she told him not to bother her again? To this, the accused had no answers but simply stated that she did not make it clear that they had broken up.

[46] Having regard to what was testified, this Court is satisfied that a case has been proven beyond reasonable doubt by the State that the accused unlawfully and intentionally damaged the properties of Mildred, being the home theatre system, television set and DVD player.

[47] In the result, accused is found guilty on the following counts:

Count One: Guilty – Murder.

Count Two: Guilty – Attempted murder.

Count Three: Guilty – Possession of a firearm without a license.

Count Four: Guilty – Unlawful possession of ammunition.

Count Five: Guilty – Malicious damage to property.

[48] Accused is therefore convicted as charged. He is, however, found not guilty on the sixth count and is acquitted on that count.

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D USIKU

Judge

APPEARANCES:

FOR THE STATE:

Mr Litubezi
Office of the Prosecutor-General, Windhoek

FOR THE ACCUSED:

Mr Tjituri
Tjituri & Associates, Windhoek