



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

CASE NO: CC 10/2016

In the matter between:

THE STATE

And

JOMO PETRUS

ACCUSED

Neutral citation: *S v Petrus* (CC 10/2016) [2019] NAHCMD 170 (31 May 2019)

CORAM: SIBOLEKA AJ

Heard on: 22, 23, 26, 27, 28, 29 March 2018; 24, 25, 26, 27, 28
September 2018; 9, 10, 15 April 2019;

Delivered: on: 31 May 2019

Flynote: Criminal law: Boy and girlfriend relationship – accused harbouring suicide action armed with a pistol took the deceased to the beach where she was later found still with the accused dead with two gunshot wounds on her forehead – inferential reasoning – guilty of murder *dolus directus* and theft of firearm.

Summary: The accused decided to commit suicide. He stole a properly functioning pistol from his guardian. He went into his room pointed the arm at himself without cocking it – no bullet came out wondering why. He took it along in the carry bag, fetched his girlfriend, took her to the beach where she was later found, still with the accused, dead, with two gunshot wounds on her forehead.

Held: Offence – serious – committed in a domestic setting.

VERDICT

In the result the accused is convicted as follows:

Count 1: Murder read with the provisions of the Combating of Domestic Violence Act 2003, Act No. 4 of 2003: Guilty as charged;

Count 2: Theft of a firearm: Guilty as charged.

JUDGMENT

SIBOLEKA AJ

[1] The accused was arraigned on the following charges of the indictment:

COUNT 1: MURDER READ WITH THE PROVISIONS OF THE COMBATING OF DOMESTIC VIOLENCE ACT 2003, ACT NO. 4 OF 2003

That the accused is guilty of the crime of murder.

In that upon or about 10 November 2014 and at or near Dunes Independence Beach in the district of Walvis Bay, the accused did unlawfully and intentionally kill Loise Ross Shimunu Alupe, a 24 years old female.

COUNT 2: THEFT OF FIREARM

That the accused is guilty of the crime of Theft.

In that upon or about 10 November 2014 and at or near Dunes Independence Beach in the district of Walvis Bay, the said accused did wrongfully and unlawfully steal: 1 x 9x18 CZ-82 pistol with serial number: 036784 the property or in the lawful possession of Jason S. Kasheeta.

1st ALTERNATIVE TO COUNT 2:

CONTRAVENING SECTION 2 READ WITH SECTIONS 1, 10, 38(2)(b) AND 39 OF ACT 7 OF 1996 AS AMENDED – POSSESSION OF A FIREARM WITHOUT A LICENCE

In that upon or about 10 November 2014 Dunes Independence Beach in the district of Walvis Bay the accused did wrongfully and unlawfully have in his possession an arm to wit: 1 x 9x18 CZ – 82 pistol with serial no. 036784 without having a licence to possess such arm

2nd ALTERNATIVE TO COUNT 2:

CONTRAVENING SECTION 33 OF THE ARMS AND AMMUNITION ACT, ACT NO. 7 OF 1996

In that upon or about 10 November 2014 and at or near Dunes Independence Beach in the district of Walvis Bay the said accused did wrongfully and unlawfully possess ammunition to wit: 2 x live ammunition without being in lawful possession of an arm capable of firing that ammunition.

SUMMARY OF SUBSTANTIAL FACTS IN TERMS OF SECTION 144(3)(a) OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977

At all material time, the accused and the deceased known as Loise Alupe were in a domestic relationship. They were in a boyfriend – girlfriend relationship. On 10 November 2014 the accused was at or near Kuisebmond Independence Beach in the district of Walvis Bay. On the said date the accused stole a 9 mm pistol with serial number: 036784 and ammunition from Jason Kasheeta. The accused

had no licence to possess such a firearm nor did he had any permission from the lawful owner to use or possess the firearm. The accused shot the deceased and attempted to commit suicide. The deceased succumbed to the injuries and died at the scene as a result of the gun shot.

[1] The accused pleaded not guilty to count 1, Murder and guilty to count 2, theft of a firearm.

[2] The prosecution witnesses.

[3] Jason Kasheta, is residing in Walvis Bay. The accused is the son of his father's young brother who stayed at his house for ± 14 years through his schooling years up till he completed. On 10 November 2014 while at work, the accused called and requested him to go and see him at the beach and to take along drinking water as he was thirsty. Kasheta asked the accused why he wanted him to go to where he is, but he just said he must go to him, and he will tell him when he came there. He gave him direction and eventually he came there. He noticed that the accused was laying down on his stomach, his clothes and hands were having blood. On the accused's side was the deceased, whose head was partially covered with a cloth. She was also having blood. The situation shocked Kasheta.

[4] Kasheta asked the accused what he did, but he could not credibly remember the questions he asked the accused as well as the answers he got from him. When asked with what he shot her, the accused replied, he used Kasheta's gun. He further told him that he used the kitchen key to open the bedroom. When the accused was asked about the condition of the deceased who was laying next to him, he replied she was dead. From the time Kasheta arrived at the scene and started talking to the accused, the deceased was just laying next to him, did not show any sign of life or movement. On the question whether she was still alive he said "No".

[5] Kasheta was not aware that the kitchen key also opened his bedroom. He left the scene, drove off, called his wife and a friend Ndamkele who escorted him to the police station. He reported the incident to Sers. Namandje, the then, investigation officer on this matter. This officer followed Kasheta to the scene, and drove closer to the scene. At the scene Namandje saw a female body in a blue dress, her head covered with a cloth. There was a black bag at her legs. The accused was laying on his side behind the body of the female. The accused's head was wholly covered with a T-shirt. Next to the accused was a container of mineral water and a Nokia cellphone; a hat which the officer could not make out to whom it belonged. A bloody white T-shirt was laying some few metres from the two barefooted persons. Namandje noticed some movements on the accused while the deceased was motionless. Sers. Haimbodi and Andreas found Sers. Namandje already at the scene. Some moments later the ambulance also arrived. A nurse turned the body of the deceased and despite laying in a pool of blood, and some sand on her, Namandje noticed a wound on her head. The nurse also turned the accused around and the officer noticed open wounds on both his wrist arms. The black bag which belongs to the accused was opened and a pistol, a magazine with a stuck bullet and wet blood stains and sand stuck in the chamber was found inside it. Kasheta did not know that the gun found in the bag was his. He did not look at it closely. The accused did not answer questions put to him by the police while he was still there, and he left while the police continued to do their work.

[6] Haimbodi failed to remove the stuck round from the chamber. The officer suspected the accused to have committed the murder and as such an officer and a nurse escorted him on the ambulance to hospital. The officer traced their spore and found that the two had come to the scene from Swakopmund. There were no footprints of others around, nearby or at the scene of crime itself. Namandje's evidence is corroborated by D/W/O. Mariine who was in his company en route to the scene. Due to an existing domestic relationship between the accused and the

deceased, the investigation was handed over to Const. Ndinamuja of Woman and Child Protection Sub-Division.

[7] Const. Ndinamuja directed the male shoes found at a nearby tree to be taken in as exhibits. The nurses wanted to attend to the accused at the scene, but they could not as he was not responding to their questions. Neither were the police able to probe the incident from him at the scene. Kasheta, who led the police to the scene, identified the accused and told the officers the deceased was his girlfriend. The pistol was found to belong to Kasheta, and that the accused did not have permission to have it on him. She observed to entry wounds on the head of the deceased.

[8] Somaeb testified seeing the accused for the first time at Chadina and Shamakiti Bars respectively where he shared a table with the deceased and Erasmus. While still at Chadina Bar the accused came and called the deceased to the outside, when she was taking long to come back, Erasmus followed outside and saw the accused pulling her aggressively. Later she came back and rejoined them. When Chadina Bar closed, the three went to Shamakiti Bar and the accused again came to her. That was when the deceased asked the accused "... why he was still following her". Acting in the defence of the deceased, Erasmus started wrestling with the accused who eventually got away with the deceased's belongings. I accept the above evidence as credible because the romantic relationship between the accused and the deceased obtained and remained in existence up to the time she was found dead in his presence at the beach. It credibly stands out very clearly that the deceased's assailant at the Bar that evening was in fact her own boyfriend, the accused before court. The evidence of Somaeb and Erasmus credibly corroborates Kasheta's version saying the sourness in the accused and the deceased's relationship was caused by the suspicion the accused had, that the deceased was sleeping around with other men.

[9] Celeste Mbali worked as a Scene of Crime Officer. At the scene she was assisted by Sers. Ndinamuja who indicated the relevant points enabling her to draw up a photo plan of the crime scene.

[10] Sergeant Murorua, a scene of Crime Officer Walvis Bay transported the exhibits from their offices to the National Forensic Science Laboratory. The exhibits were under cover of an application for scientific examination compiled by D/Sers. Ndinamuja.

[11] Sers. Amamub, a police officer at Kuisebmond, Walvis Bay, drove a 4 x 4 police vehicle to the scene with the help of Sers. Shinedina. They loaded the deceased's body on the vehicle and transported it to the Police Mortuary in Walvis Bay and no further injuries were sustained.

[12] Bernard Shinedima is stationed at the Pathology Department of the Police Mortuary in Walvis Bay. He took out all the equipment required to pick up a corpse and drove to the scene, which he did not access as the vehicle was not a 4 x 4. It was then that he drove with Sers. Amamub whose vehicle accessed the scene. They took the corpse to Dr. Musasa for the holding of a post mortem examination.

[13] Sers. Ambambi, a police training officer Special Reserve Force was asked by Sers. Ndinomupya to help remove a round that was stuck in the chamber and he removed it, and gave the firearm back to her.

[14] Kalipus Sam, a scientist working for the National Forensic Science Institute examined the firearm, live rounds and a spent case. He found the pistol to be in a working condition.

[15] Sers. Haimbodi and Andreas found Namandje and other officers at the scene. These officers corroborate the evidence of Namandje regarding to what

they saw at the scene.

[16] Dr. Musasa testified that he examined the body of the deceased and found two gunshot wounds and their respective exit points, one bullet entrance wound was on the frontal bone going through the brain and exiting at the occipital bone. Another bullet entrance wound was on the left parietal bone also going through the brain exiting at the right parietal bone. The doctor found the cause of death to be the gunshot on the head. There was gun power at the entrance points of the two wounds, which according to him indicated that the deceased was struck at a close range.

[17] Jomo Petrus is the accused on this matter. He is the only person who was with the deceased at the beach in Walvis Bay. It was the accused who fetched her from her residence and they were together until her passing on. At the time of the incident, the accused was residing at his uncle's house Jason Kasheta in Kuisebmond, Walvis Bay. The deceased was the accused's girlfriend for three to four years. On the day of the incident he was a bit depressed, and just down such that all that he could think about was just to kill himself there and then. He did not grow up with his mother and that was the cause of the depression. He saw his mother when he was still very small, this is the reason he only had a sketch memory of her.

[18] On the day of the incident he recalled that the kitchen key also opened Kasheta's main bedroom. He located the gun (a black pistol) underneath Kasheta's clothes. He locked the main bedroom the way he found it, went into his room and closed himself inside. He tried to shoot himself with the gun, but the bullet did not come out, and he did not know the reason therefore, neither did he know whether there was a bullet inside or not. Hereafter he felt he needed to talk to someone about what he was going through. His girlfriend came to mind. The gun was heavy, he put it in his carry bag and went to the deceased's residence. He knocked at the door crying, she came out. The deceased wanted to know

what was going on, and he explained to her he wanted to end his life. They walked towards the Owambo Beach. As they walked and talked he got much more weak emotionally, the reason being that he only wanted to kill himself. As they proceeded to the beach, he told her he had a gun in his carry bag. She looked inside and saw the arm. She then took the carry bag advising him not to do so.

[19] The deceased also offered to assist him to get help. At the beach the accused walked away from where they were sitting, a distance from her till he found a spot where there were a lot of broken bottles which he took and started cutting the inner parts of both his wrist arms so that he could bleed out and die, because he no longer had the gun on him. In court he pointed the scars on both his left and right hands. The deceased noticed that he was bleeding. She left the carry bag where she was sitting and came over to the accused to help him. They walked back to where the deceased was left with the carry bag, she could not stop the bleeding. When the accused realized this he took out the gun with his hands in order to shoot himself. The deceased grabbed the one side of the arm but the accused could not say which side he grabbed because according to him he did not know the names of the parts of the arm such as the butt or barrel. At this point the accused was at pains to tell the court who between him and the deceased held what part of the gun.

[20] The court had to intervene for purposes of clarity to know who held where and eventually the accused said he held the butt and the deceased the barrel. The tussle for possession of the gun proceeded till they both fell to the ground and a shot went off, but he does not know how many shots went off. He just heard the sound of one shot, and realized the deceased was no longer holding the arm. Meanwhile he continued to have the gun pressed on his head, pressing the trigger, but it was jammed completely; it did not shoot at all. When the accused realized the gun was not firing the bullet out, he realized the deceased was not moving. It was here that he called Kasheta and asked him to bring along

drinking water. He wanted him to come and help, but he did not give details. He directed Kasheta and on arrival he was asked what had happened. The accused told him "... there has been an accident, Loise, (the deceased) is shot. On being questioned about the gun, the accused told him he stole his – Kasheta's gun. Kasheta handed the bottle of water at him and started talking on his cellphone. The accused called Kasheta to come and help the deceased. The accused became very weak and he only regained his senses the next morning, realizing he was in hospital.

[21] In his evidence the accused confirmed that during their relationship there were good and bad days. He explained that during the bad days he could not even pick up his cellular when she called him. He said all these were caused by merely misunderstanding. He cited an example where they could go for a pizza, and he would end up not attending to any event. That was how misunderstandings cropped up. According to the accused he never beat the deceased. In the main, they only engaged in arguments, but he did not beat her at any point during their relationship. The accused explained the occasion when Kasheta's wife accompanied the deceased to his room and some relatives were called together for a discussion. The accused said the deceased was crying and he was asked to explain what happened. He told them they had an argument and after the discussion, Kasheta's wife and others left.

[22] When the accused started to ask the deceased for an apology she refused to accept it, saying he had to do so to the whole family. The accused recalled them and when they came he apologized assuring them that he will not argue with the deceased anymore but would in future prefer the family to intervene. He stated that the deceased died as a result of an accident he never intended killing her. According to the accused he did not tell Kasheta about his depression for missing his mother because he was not always there, he used to come late. In the same breath he said from the time he decided to shoot himself, he never liked to talk to anyone about it. The accused also conceded that there was

nothing that prevented him to talk to Kasheta about his suicidal tendencies.

[23] During cross-examination the accused said he put the pistol in his carry bag after realizing that he could not use it to kill himself. He took along the carry bag and went to the beach in order to cut himself with broken bottles. The gun was no longer relevant to killing himself, but he took it along "...just to show the (deceased) that I really want to kill myself".

[24] The accused's details about his reason of going to the deceased's residence with a pistol in his carry bag he said the following "... by then I needed help. I needed help, someone to talk to and then that is why I went there to her. I only needed someone to talk to me and see how the seriousness of killing myself. That is why I probably put it in the bag, but it was not functioning at that moment". The accused was at pains to explain why he did not talk to the deceased right away at her residence, asking for help – he lamely said "... we could have spoke at that moment but then I was not myself I start crying again when I start talking to her".

[25] According to the accused he wanted to speak to somebody else about his depression and the deceased's assistance in that regard came to his mind. However, in the same breath the same accused testified that at the beach when the two started talking about his suicidal tendencies, he got more emotional and started crying. He walked away from her for a distance and started cutting the inner wrist parts of his arms with broken bottles and was bleeding heavily. He went back to where he left the deceased. He grabbed the gun to see if at that moment the bullet will come out. This turn around evidence is in reference to same gun which he earlier on testified that it failed him, it did not release a bullet to end his life despite him pulling the trigger several times. Did the accused expect the deceased with whom he left with his carry bag wherein he had put it, to have fixed it in the time he walked apart to cut his wrist arms? The story of the tussle for possession of the gun in my considered view is only an afterthought.

The reason being that it is so full of inconsistencies that one would easily see from the onset that it is a lie. The accused even failed to tell the court whether they were sitting or laying down when the alleged tussle for possession of the gun started. He only said in that process they both fell down and a shot went off. He only heard the sound of one bullet.

[26] I am aware of the psychological report 'exhibit V', sketching the accused having grown up without knowing his parents; having being raised in an orphanage; moved from Angola to Namibia, placed from one relative to the other. In that process, he was exposed to assaults and abuse. The firearm expert and forensic scientist Kalipa Sam, stated that when a firearm is involved in a tussle between two people one holding the slide, the latter part will in the process move back and forth and will shoot. Once a shot has gone off, the firearm in question being a semi automatic pistol; will reload itself after every shot.

[27] According to Sam it only requires a trigger pull of only two kilograms if it is loaded. This witness was corroborated by another officer a field firearm expert to say if the firearm had already gathered sand and blood in the manner it was found at the scene, its firing mechanism will be jammed. It will not properly chamber a round. The firearm was found with two rounds, one facing down, the other facing slightly up, all two jammed in the chambers. He removed the jammed bullet in its chamber. The ballistic expert found that the pistol that killed the deceased was in a working condition. It follows from this evidence that there was nothing wrong with the firearm at the time the accused stole it from Kasheta's main bedroom.

[28] From the whole body of evidence placed before this court, it is credibly so and beyond reasonable doubt, that the accused carried a properly functioning firearm from Kasheta's house. He had it in that condition when he fetched the deceased from her residence up till they reached the beach. The same firearm was still in a good working condition. It is undisputed evidence before this court

that the said firearm was still functioning at the time the fatal shots went off striking the deceased twice on her forehead as a result of which she died at the scene. The above reasoning is based on the fact that if the arm jammed before the fatal shots were fired the deceased would not have died at all. This evidence displaces the accused's version that the firearm did not and could not shoot that is the reason he was unable to take away his life inside his room.

[29] Counsel for the accused cited various authorities on the identity of a suspect. It is my considered view that all the prevailing circumstances at a given time will play a vital roll in the court's determination whether he has been properly and credibly identified or not. One of the crucial aspects of evidence on this matter is that it was the accused himself who placed it on record that it was only him who fetched the deceased (his own girlfriend for three to four years) at her residence, took her to the beach where she was later found dead while still in his presence. This is where the decision of the Supreme Court of Appeal on *The Shaduka* matter finds connection. In the accused's own evidence, his company with the deceased from her residence to the beach, up and until she was found dead by the police was not interfered. He is therefore held to account on her death because he was the only person who was with her uninterruptedly till she died.

[30] The accused's counsel submitted that when Kasheta came back with the police the accused did not respond to any questions put to him, because he was unconscious due to severe blood loss. There was no witness who testified seeing the accused physically assaulting the deceased. In my considered view however, the matter does not end there. Kasheta's evidence to the fact that he seriously talked to the accused on the aspect of him having assaulted the deceased which he did not see, finds credence here because it shows that him and the deceased did not have a peaceful relationship at all.

[31] The accused's counsel further submitted that Kasheta's wife convened a

family meeting after she found the deceased sitting on the floor of the accused room crying. No one knew or saw what caused her to cry. According to the accused they had an argument about her going to town without informing him contrary to what they had agreed to earlier on. This was what caused her to cry. There was no physical assault. According to this counsel when Kasheta later came and joined the meeting "...he warned the accused person, that whatever he did, whether he assaulted her or insulted her he should not do it again". The defence counsel asked the court to find the accused not guilty on the murder count and only guilty of theft of the firearm.

[32] Kasheta testified that shortly before the incident in November 2014 he arrived at home from work and found a lot of people surrounding his yard. He went to the accused's flat and found the door locked. He knocked and asked he should open for him, which he did. Inside the accused's room he saw the deceased crying. He asked him why she was crying but the accused told him to ask the deceased "... the reason why she was being assaulted". Kasheta asked the deceased but there was no answer, she only continued crying for a long time till Kasheta's wife also came back from work. They learned from the deceased that the accused was suspecting her sleeping around with other men.

[33] The above evidence is relevant to show that there was something untoward that led to her, being found by Kasheta crying continuously. The fact that none of the prosecution witnesses testified seeing her being assaulted by the accused is neither here nor there. These surrounding factors are important indicators of the fact that their relationship was indeed sour. The above evidence also shows that it was a guilty mindset that led the accused to avoid answering Kasheta's simple question "...whether he was beating her?" but instead referring him to the continuously crying deceased. It is my considered view that if for example her reason for crying was as a result of a death of a family member or a friend, the accused would not have hesitated to inform Kasheta about it.

[34] From the sketch pertinently showing the injuries the deceased had sustained the following is of great importance. One gunshot struck her on the upper part of her forehead. The other shot struck her on the left side of her forehead just above the horizontal line of the left eye and ear. These gunshot entry wounds do not tally with the evidence of the accused related to how the alleged tussle for possession of the firearm took place. These entry gunshot wounds cannot in my view be as a result of an accidental discharge of the bullets during a tussle for the possession of the firearm. They appear to be direct shots from a person possessing the gun, in this case the accused himself.

[35] I reject the evidence of the accused saying that he intended to commit suicide because he missed his mother. Common knowledge has it that it is practically not normal to do so in the presence of another person because he will definitely try to stop it and report the same to the police.

[36] If the accused indeed intended to end his life, his own room at Kasheta's residence was generally and reasonably the most convenient and conducive place to do so. His evidence is that he pointed the arm to his head; pulled the trigger several times but no bullet came out and he did not know why. I reject this evidence as a lie. It is false beyond reasonable doubt. This is so because there is no way he would have chosen a pistol as a weapon he would use to shoot himself, if he did not even know how to use it in the first place.

[37] There is also no reason why the accused would still engage in a tussle over the weapon he has long found not to be in a working condition after pulling the trigger several times, nothing came out inside his room. I agree with the prosecution that "*The Mlambo case dictum*" as cited in the Supreme Court case of *S v Shaduka*¹ finds application on this matter. It states the following:

"When an accused causes somebody's death by means of an unlawful assault

¹ S v Lazarus Natangure Shaduka Case No. SA 71/2011 delivered on 13 December 2012.

and only the accused is able to explain the circumstances of the fatal assault, but he gives an explanation which is rejected as false, then the Court can make the inference that the accused committed the said assault with the intention to kill rather than with any other less serious form of *mens rea*".

[38] Testifying under oath, the accused said, for reasons unknown to him, the pistol did not release a bullet in order for him to have died therein. Suddenly the same weapon again became a worthwhile tool for the execution of his alleged suicide. He said he grabbed his travelling bag that was in the hands of the deceased resulting in a tussle that culminated in an accidental discharge of shots that struck the deceased on the forehead as a result of which she died.

[39] I have rejected the above account of events as a lie; an afterthought and above all, it is false beyond reasonable doubt. From the whole body of evidence placed before court and indeed from the accused's own account of events it is credibly clear that the accused never intended to commit suicide at all. The act of cutting his wrist arms with broken bottles came in only as an afterthought to cover up the crime of murder. He brought this version in to exculpate himself from the blame and possible conviction. All that is generally common practice in suicide cases is the writing of a note, explaining to family members why the victim decided to end his own life.

[40] It was him who collected the deceased from her residence, took her to the beach where she was later found still with him – dead with two gunshot wounds on her forehead. It is by inferential reasoning that the court is satisfied that it was indeed the accused who launched the said vicious attack on the deceased.

[41] In the result the accused is convicted as follows:

Count 1: Murder read with the provisions of Act 4 of 2003: Guilty as charged;

Count 2: Theft of a firearm: Guilty as charged _____

A. M. SIBOLEKA

Acting Judge

APPEARANCES:

STATE : Mr. S. T. Kanyemba
Office of the Prosecutor-General, Windhoek

ACCUSED : Mr. M. Dube
Directorate of Legal Aid, Windhoek