

**REPUBLIC OF NAMIBIA**



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

**JUDGMENT**

Case no: CC 23/2018

In the matter between:

**THE STATE**

and

**JOHANNES KATANGA**

**ACCUSED**

**Neutral citation:** *S v Katanga* (CC 23/2018) [2019] NAHCMD 21 (23 January 2020)

**Coram:** SIBEYA, A.J.

**Heard:** 05-09 August; 03-06, 17-20 September; 02-03, 17 October; 04-05 November and 05 December 2019

**Delivered:** 23 January 2020.

**Flynote:** Criminal law – Murder, Robbery with aggravating circumstances and attempted robbery with aggravating circumstances - Circumstantial Evidence must not be assessed in piece-meal but should be considered in its totality – The behaviour of an accused after the incident can reveal his intention - Running away from the scene without ascertaining if the person in whose direction the firearm was pointing when it went off during a struggle sustained injuries or not can signal a guilt mind.

**Summary:** The accused is charged with murder, robbery with aggravating circumstances and attempted robbery with aggravating circumstances. It is alleged that the accused person murdered the deceased who was a farmer and his employer by shooting at him and assaulting him all over his body with sticks, stones and unknown objects and proceeded to rob him of certain properties and further attempted to rob him of other properties. The accused pleaded not guilty to all counts and opted to remain silent. During cross examination the accused raised what appeared to be a defence of an alibi. Forensic evidence established that the grooves on the projectile retrieved from the thigh of the deceased substantially matched the grooves on the firearm (revolver) which was seized from the accused on the same day of the murder.

*Held*, that, the court's approach to circumstantial evidence is that such evidence should not be assessed in piece-meal but should rather be considered in its totality. In so doing inferences to be drawn should be consistent with proven facts and should exclude every other reasonable inference.

*Held*, further that, the behaviour of the accused person of running away from the scene without ascertaining whether the deceased sustained injuries or not subsequent to the firearm going off during a struggle with the deceased when the firearm pointed at the deceased signals a guilty mind. Moreover, where the accused testified that when he ran away from the scene, he left the deceased seated leaning against the wall and was breathing heavily.

*Held*, further that, there was credible evidence from the state witnesses that the accused was arrested hours after the murder while in possession of the cellular phone belonging to the deceased and despite a bare denial of this evidence no logical explanation for such possession came forth from the accused.

*Held*, further that, the injuries sustained by the deceased, the broken sticks, bloodied stones, blood drag marks observed at the scene and the manner in which the house of the deceased was ransacked was inconsistent with the explanation of the accused.

*Held*, further that, the accused's explanation was not reasonably possibly true and had to be rejected as false.

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**ORDER**

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- Count 1: Murder (*dolus directus*) – Guilty.  
Count 2: Robbery with aggravating circumstances – Guilty.  
Count 3: Attempted robbery with aggravating circumstances – Not guilty.  
and acquitted.
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## JUDGMENT

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SIBEYA AJ:

[1] The deceased, Karl-Heinz Kossmann, a 71 years old male farmer at Farm Aasvoelkrans in the district of Outjo died as a result of the assault perpetrated on him with sticks and stones all over his body and gunshot wound to his right thigh. The deceased and/or his wife were in the process allegedly robbed of the properties.

[2] The accused who was employed by the deceased as a farm worker at Farm Aasvoelkrans was thus arraigned in this court on the following three counts, namely: murder, Robbery with aggravating circumstances and Attempted robbery with aggravating circumstances.

[3] The allegations in the first count are that, on or about 25 September 2017 and or near Outjo the accused unlawfully and intentionally killed the deceased, Karl-Heinz Kossmann.

[4] The allegations on the second count are that on or about 25 September 2017 at Outjo the accused unlawfully and with intention of forcing submission, assault Karl-Heinz Kossmann by firing shots at him with a firearm(s), and by tying his hands, hitting him with blunt and/or sharp object(s) on his body and head and/or fracturing his sternum or ribs and then he unlawfully and intentionally stole N\$1,737.00 and R95.00 cash, 1 x nokia cellular phone with sim card and battery, 1 x .38SP Astra revolver with serial number R233768, 1 x 9mm PAR Mouser pistol with serial number 91003843 and magazine, 11 x live ammunitions and 2 x spent cartridges the property of or which were in the lawful possession of Karl-Heinz Kossmann and/or Gesa Friederike Kossmann while the accused wielded dangerous weapon(s) and

threatened to inflict grievous bodily harm or inflicted such grievous bodily harm to Karl-Heinz Kossmann;

[5] The allegations in the third count are that on or about 25 September 2017 at Outjo the accused unlawfully and with intention of forcing submission assault Karl-Heinz Kossmann by firing shots at him with a firearm(s), by tying his hands, hitting him with blunt or and/or sharp object(s) on his body and head and/or fracturing his sternum and/or ribs and then he unlawfully and intentionally attempted to steal:

- A Samsung DVD player and two speakers;
- A black millennium brief case;
- A Masculine power body spray;
- 2 x James Bond body sprays;
- 22 x mtc N\$20.00 recharge vouchers;
- 1 x mtc N\$10.00 recharge voucher;
- 1 x Maxflash USB;
- 1 x pair of red pliers;
- Technics disc player;
- Technics amplifier;
- 2 x pioneer speakers;
- Proline UPS B line interactive UPS;
- Box of 15 x .38 SP live PMP ammunitions;

- 3 x boxes of 150 x 9mm PAR PMP live ammunitions;
- Box of 12 x .38 SP live ammunitions;
- 2 x boxes of 37 9mm luger para live ammunitions;
- Box of 13 starfire 20 centifire pistol live ammunitions;
- 17 live ammunitions;
- Acer laptop with serial number 00600235125;
- Acer laptop with serial number 10605577216;
- 1 x Mahindra motor vehicle

the property of or in the lawful possession of Karl-Heinz Kossmann and/or Gesa Friederike Kossmann while the accused wielded dangerous weapon(s) and threatened to inflict grievous bodily harm or inflicted such grievous bodily harm to Karl-Heinz Kossmann;

[6] The accused pleaded not guilty to all counts and opted to remain silent without providing a statement as the basis for his defence in terms of section 115 of the Criminal Procedure Act (the CPA).<sup>1</sup> It is pointed out at the outset that the accused cannot be faulted for remaining silent in pursuit of his constitutional rights to be presumed innocent until proven guilty according to law<sup>2</sup> and the right against self-incrimination.<sup>3</sup>

[7] It surfaced during the trial that the accused denied his involvement in the commission of the said crimes and further raised the defence which appeared to manifest into an alibi to the murder charge.

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<sup>1</sup> 51 of 1977.

<sup>2</sup> Article 12(1)(d) of the Constitution.

<sup>3</sup> Article 12(1)(e) of the Constitution.

[8] Mr *litula* appeared for the state while Mr *Siambango* appeared for the accused.

[9] The state led several witnesses in its endeavour to establish its case against the accused. It is not my intention to revisit the evidence of the state witnesses in entirety, save for evidence material to the charges.

[10] At the closure of the state's case, the accused brought an application for discharge in terms of section 174 of the CPA on all counts. After hearing submissions from Mr. *Siambango* and Mr *litula* the said application was dismissed in toto and the accused was placed on his defence. Prior to addressing the evidence of the accused it is pivotal to have regard to the evidence presented by the state in substantiation of the charges preferred against the accused.

[11] The state led the evidence of *Irene Otto* who testified that she knew the deceased as they occupied neighbouring farms in the district of Outjo. She testified further that at about 13h00 on 25 September 2017, she received a report regarding a shooting incident at the deceased's farm house. She heeded the report and proceeded to the deceased's house where only the deceased was present and laid on the floor in a room with his hands tied behind his back with wires. She observed blood drag marks which emanated from outside the house proceeding into the inside of the house. She further observed wooden droppers (sticks) broken into pieces. The deceased who was alive informed her that he was attacked from behind unexpectedly. She further testified that the deceased was bleeding profusely on his head and behind his knee. Another observation she made was that the house was ransacked, there were empty shells of ammunitions and coins scattered around. She observed the Mahindra pick-up belonging to the deceased with a matress loaded in its loading box. The deceased later passed on at the hospital.

[12] The state then called *Shinime Ananias* and *Tuhafeni Pohamba* who testified that they worked under the supervision of *Irene Otto* and on 25

September 2017 they were in her company and they corroborated her evidence in material aspects.

[13] The state further called *Simon Awene*, who testified that while driving, from Khorixas towards Outjo, he was stopped by the accused who asked for a lift to Outjo. The accused had was not carrying anything in his hands. About 20 kilometres before Outjo they encountered two police officers who turned to be Sergeant *Risias Ipinge* and Warrant Officer *Fillemon Ipinge* who arrested the accused. The officers searched the accused and retrieved two firearms (a revolver and a 9mm pistol) from underneath the clothes of the accused.

[14] Sergeant *Risias Ipinge* testified that on 25 September 2017 at around 16h00, he was in the company of Warrant Officer *Fillemon Haikali* (W/O *Haikali*) when they stopped a motor vehicle on the road between Outjo and Khorixas, following information that someone was shot at a farm. In the vehicle, the accused was found and arrested. Upon searching him they retrieved two firearms. His evidence was corroborated by W/O *Haikali*, who proceeded to testify that the firearms recovered from the accused's body at the road block was a revolver with a wooden handle bearing a serial number 233786 (which he corrected to 233768) with 2 x empty cartridges and 1 x live ammunition and a Parabellum pistol bearing serial number 91003843 with 10 x live ammunitions. He further said that he also found an amount of N\$1,713.00 in the left front pocket of accused's jeans while an amount of R95.00, a cellular phone and a sim card was found in the accused's right front pocket. After the legal rights were explained to him, the accused started crying. The search was denied by the accused in cross examination.

[15] Inspector *Benedictus lipumbu* confirmed in his evidence that the properties seized by Sergeant *Ipinge* and Warrant Officer *Hakali* were booked in at the police station.

[16] *Gesa Friederike Kossmann (Mrs Kossmann)* testified that she was the wife to the deceased. She testified that on 24 September 2017, the deceased took her to Windhoek. The following day, 25 September 2019, while travelling



on a tour from Windhoek airport to Soussesflei lodge where she served as a tour guide, she received messages that something was wrong with the deceased at the farm. She returned to the farm on 27 September 2019.

[17] *Mrs Kossmann* testified that by 25 September 2019, the workers at the farm were *Anselm Mukuve* and the accused. She produced the firearm licences which proved that the revolver with serial number R233768 belonged to the deceased while she was the lawful owner of the Mouser pistol 9mm PAR with serial number 91003843. These are the firearms which were retrieved from the body of the accused and which were usually kept in the safe at the farm. She also identified the properties which the police officers obtained from the vehicle of the deceased. Some of these properties were found together with properties of the accused.

[18] *Sergeant Asser Mbangu* took photographs of the scene and compiled a photoplan which was received into evidence.

[19] *Sergeant Evalistus Shimafo* testified that the accused requested him to bring his properties from the farm. These properties included a matress, clothes, his identity document and some of these properties were found together with the properties of the deceased in the Mahindra pick up. The properties of the deceased are amongst the properties listed in count three.

[20] *Sergeant Gersoline Horases* testified that, all the properties obtained from the farm were handed to the accused who then separated his properties which included clothes from the other properties. The accused vehemently disputed engaging in the exercise of separating properties.

[21] *Kalipus Sem*, a forensic scientist on ballistics, testified that he carried out an examination of the exhibits submitted to the National Forensic Institute in this matter for analysis. During such examination, he determined that, the land and groove engraved areas on the projectile retrieved from the deceased's right thigh had sufficient individual and class characteristics with the revolver found in the possession of the accused.

[22] His conclusion that there were sufficient characteristics found between the projectile retrieved from the deceased and the revolver in question is supported by proven facts. It therefore appears inevitable to arrive at the conclusion that the expert evidence of *Kalipus Sem* relating to the murder is satisfactory and reliable. This court therefore find that the projectile retrieved from the thigh of the deceased was discharged from the revolver in question.

[23] Dr *Mamadie Guriras*, a forensic medical officer who was not the medical doctor who examined the body of the deceased but was called to court to explain the post-mortem examination report, testified that the presence of blood was recorded under the skull and on the brain and the brain was swollen. She testified further that it was not normal to have blood on the brain and in this matter, such presence of blood to the brain resulted from severe blunt impact to the head. She testified further that several ribs of the deceased were fractured. The deceased sustained several injuries but his death was caused by blunt trauma to the head and thorax and gunshot wound to the right thigh.

[24] In his defence the accused testified that he was employed by the deceased to fix the fence at the farm. He testified further that he worked on the farm together with *Anselm Mukuve (Mukuve)*. He testified that before the murder there was a visitor at the farm whose presence the deceased did not want at the farm. On 25 September 2017 *Mukuve* was instructed by the deceased to fix the engine while his task was to feed goats. After feeding goats he returned to the deceased for further instructions, where after he was instructed to cut firewood to a particular size for purposes of heating the water. The deceased took out a sample of firewood and instructed the accused to cut other firewood to the size of the sample using an axe. The deceased then went to inspect the engine which was being fixed and when he returned to the accused, he politely inquired as to whether the accused was still busy cutting wood where the accused responded in the affirmative but stated that he has cut more than what remained in ratio. The deceased then entered into his house and later emerged from the house carrying two

firearms (a pistol and a revolver). He then placed one firearm on the table while the other firearm remained on his waist.

[26] The accused testified further that the deceased noticed firewood which was shorter than the sample provided, he kicked it and angrily stated that it was nonsense and not according to measurements provided. Accused then said that the wood is too dry and will therefore not be even, to which the deceased cautioned the accused not to interrupt him when he talks. The deceased then grabbed the accused by the neck and pushed him against the wall. He testified that the deceased then punched him and in turn he held the deceased and together they fell on the ground facing each other. While on the ground the deceased removed the firearm from his waist and the accused held the deceased's wrists. They struggled for the firearm but the deceased was holding the firearm and it went off in the process. The accused had no knowledge of where the discharged projectile struck. The deceased then let go of the firearm.

[27] He testified further that after the deceased let go of the firearm, he took it together with the firearm which was on the table and by then the deceased was seated in a position where he was leaning against the house wall. He testified further that he then went to his sleeping room when he took money and then proceeded to hike to Outjo at around 09:00AM to 10:00AM. The accused testified that his aim of leaving the farm was to get to the Ministry of Labour in Outjo in order to report the fight with the deceased. When the accused hiked the driver asked him as to how much money he had in his possession to which he responded that he had N\$50 while in fact he had N\$1,700.

[28] Accused testified further that just before Outjo they encountered a police roadblock where the two firearms were retrieved and confiscated from him. Although the police claim to have further seized a sim card, R95 and N\$1,700 from at the roadblock the accused disputed this version and stated that at the roadblock only the firearms were retrieved from him while the amount of N\$1,700 was only retrieved from him upon his arrival at the police station.

[29] The accused further testified that after a few days he was called to an office by police officers where he noticed properties lying around and he was asked as to who did the properties belong to and he responded that they belonged to the deceased. Regarding his properties, the accused testified that he has not seen his properties after his arrest and that he was only informed to sign a piece of paper where his properties were mentioned which he complied with.

[30] He testified that when he left the farm the deceased was still alive and not tied up.

[31] He testified further when he went to his room to get his money, he did not see *Mukuve* or *Mukuve's wife*. He was aware that the deceased's wife was not the farm. He further emphatically stated that he never entered the deceased's house at all.

[32] He testified that the photo plan which was produced in court as an exhibit depicts, *inter alia*, his shoes and his bag loaded in the loading box of the Mahindra vehicle but harbours no knowledge of who loaded his properties in the vehicle. It was his testimony that on 25 September 2017 he left his shoes, bag and matress in his room and had no knowledge of how his said properties ended up on the loading box of the Mahindra.

[33] In the assessment of evidence in a criminal trial courts should not consider such evidence in isolation but evidence should be considered as a whole. In *S v HN*<sup>4</sup> it was held that:

'in its assessment of these conflicting versions of fact, the proper approach of the court in a case as the present is to apply its mind not only to the merits and demerits of the state and the defence witnesses but also to the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond all

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<sup>4</sup> 2010 (2) NR 429 (HC) at 451.

reasonable doubt. ... The respective versions should not be viewed in isolation and weighed up one against the other; but rather that the court must strive for a conclusion in its determination whether the guilt of the accused has been proved beyond reasonable doubt, when considering the totality of the evidentiary material.'

[34] At the backdrop of the above principle this court considers the evidence presented in its totality and not in isolation and this court further retains the responsibility to account for the total evidence presented.

[35] It is apparent from the evidence presented that there is direct evidence implicating the accused. The state invited this court to convict the accused on all charges based on circumstantial evidence led. It is trite that when the determination of the guilt or innocence of the accused is dependent on circumstantial evidence, courts have adopted the two cardinal principles laid down in *R v Blom*<sup>5</sup> where it was stated that:

'In reasoning by inference there are two cardinal rules of logic which cannot be ignored: (a) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn; (b) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inference then, there must be a doubt whether the inference sought to be drawn is correct.'

[36] In the analysis of the testimony of the accused it is evident that he contradicted himself on the position in which he fell on the ground with the deceased. The position in which they fell on the ground is crucial for the court to determine the merit or demerit of the version that when the firearm went off the accused and the deceased were facing each other and that they were fighting or struggling for the firearm. On this aspect the accused testified that they both fell on the ground on their left side and were struggling for the firearm. When asked further how this was possible the accused stated that while on the ground, they were facing each other but not directly. In cross examination the accused said that he was mistaken with the position in which they fell to the ground suffice to state that they faced other.

<sup>5</sup> 1939 AD 188 at 202-203.

[37] At pain to explain how the deceased sustained the gunshot injury on his right thigh, the accused testified in evidence in chief that while they were struggling for the firearm on the ground, the deceased held the firearm while the accused held the deceased's wrist and the firearm went off while it was in between the two of them. When this aspect was probed further by *Mr litula*, the accused introduced new evidence to the effect that while struggling with the deceased for the firearm, he pushed the firearm to the deceased and the firearm pointed towards the deceased's legs at the time when it went off.

[38] It is worth mentioned that notwithstanding that the gunshot wound sustained by the deceased is at the heart of this matter, the version of the struggle for the firearm and the firearm pointing at the legs of the deceased when it went off only surfaced during the defence case and was not put to any of the state witnesses. There was no reasonable explanation advanced by the accused why this version was not put to any of the state witnesses.

[39] The accused testified that when the firearm went off the deceased let go off the firearm, the accused then picked it up and the deceased sat while leaning against the wall breathing heavily but still the accused had no knowledge if the accused was injured by then. These factors demonstrate a high probability of the conclusion that deceased was injured by the time he sat leaning against the wall breathing heavily.

[40] The accused further testified that he intended to go to the Ministry of Labour in Outjo to report his fight with the deceased and show them the firearms so that they could hand them over to the police. He further testified that the reason why he carried the two firearms along was that he thought that the deceased who was angry would follow him. When it was put to him that the deceased was incapacitated and could not follow him, he responded that he did not know if the deceased could follow him or not, he just left because of the struggle.

[41] *Simon Awene*, the driver of the vehicle where the accused hiked, is an independent witness who testified that the accused was barefooted which were dusty when he gave him a hike and maintained this evidence despite the accused stating that he wore flip flops. *Simon Awene* further testified that the accused was out of breath and he appeared to have been running.

[42] The accused disputed the evidence of Sergeant *Ipinge* and Warrant Officer *Haikali* that when they searched him at the roadblock, they recovered R95, a cellular phone belonging to the deceased and N\$1713 and stated that such officers had a motive to demonstrate that they conducted a successful operation or that they carried out their work diligently. To the contrary the officers who did not know the accused before testified forthrightly and corroborated each other.

[43] The accused further testified that he informed the police that the properties brought to him belonged to the deceased whom he referred to as his late boss. When he was questioned as to how he knew that those properties belong to the deceased when he never entered the deceased's house, he introduced a new version to the effect that the police officer Gariseb said to him that take your items from the properties in order for the remainder thereof to be returned to the deceased.

[44] The accused further testified that when he commenced employment at the farm *Anselm Mukuve* was already working on the farm. It should be mentioned *Mukuve* did not testify as he could not be traced during the trial. After fighting with the deceased on 25 September 2017 he did not attempt to speak to *Mukuve* notwithstanding the fact that he knew that *Mukuve* was busy fixing the engine but rather just opted to take the guns and run to the Ministry of labour. When he was questioned on the reason why he did not seek assistance from or inform *Mukuve* about the fight, the accused said that such thought did not cross his mind as he was still afraid of the deceased. When pressed on how he could be afraid of the deceased when he had two firearms in his possession while the deceased was disarmed, the accused could not explain.

### *Alibi defence*

[45] The defence of an alibi was not specifically pleaded, however the accused's version in relation to the charges reveals the existence of the allegations of an alibi defence. The version of the accused that the assault perpetrated on the deceased, the ransacking of the deceased's house and the loading of the properties in the Mahindra were all carried out in his absentia amounts to an alibi. This court is mindful of the legal principle applicable to the assessment of an alibi defence as set out in *S v Kandowa*<sup>6</sup> at 732F–I where it was stated as follows regarding an alibi defence:

- (1) there is no burden of proof on the accused person to prove his alibi;
- (2) if there is a reasonable possibility that the alibi of an accused person could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt;
- (3) an alibi must be assessed, having regard to the totality of the evidence and the impression of the witnesses on the court;
- (4) if there are identifying witnesses, the court should be satisfied not only that they are honest, but also that their identification of the accused is reliable; and
- (5) the ultimate test is whether the prosecution has proved beyond reasonable doubt that the accused has committed the relevant offence and for this purpose a court may take into account the failure of an accused to testify or that the accused had raised a false alibi.'

[46] It should further be pointed out that there is no direct evidence in this matter and therefore the evidence led by the state to prove its case beyond reasonable doubt is circumstantial in nature. The approach to be followed was therefore set out in *S v Reddy*<sup>7</sup> that evidence should not be assessed in piece-meal but in its totality. The court must carefully weigh the cumulative effect of all the circumstantial evidence together from which inferences may be drawn.<sup>8</sup>

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<sup>6</sup> 2013 (3) NR 729.

<sup>7</sup> 1996 (2) SACR 1 (A) at 8c-g.

<sup>8</sup> *R v Blom* 1939 AD 188 at 202-203.



[47] In *R v Mtembu*<sup>9</sup> the court stated the following:

‘But in any event it is not clear to me that the Crown’s obligation to prove the appellant’s guilt beyond reasonable doubt required it to negative beyond reasonable doubt all pieces of evidence favourable to the appellant. I am not satisfied that a trier of fact is obliged to isolate each piece of evidence in a criminal case and test it by the test of reasonable doubt. .... But that does not necessarily mean that every factor bearing on the question of guilt must be treated as if it were a separate issue to which the test of reasonable doubt must be distinctly applied.’

[48] The court in *Mtembu* further said that:

‘Circumstantial evidence, of course, rests ultimately on direct evidence and there must be a foundation of proved or probable fact from which to work.’

#### *Count 1: Murder*

[49] The evidence established the following:

- 49.1 That the deceased died as a result of blunt trauma to the head and thorax and gunshot wound to the right thigh sustained on 25 September 2017 at the farm.
- 49.2 That the accused was together with the deceased in the morning of 25 September 2017.
- 49.3 That the deceased’s house was ransacked and the safe was found open, coins and other properties were observed, blood drag marks were also observed outside and inside the deceased’s house. Broken pieces of sticks (droppers), spent cartridges were further observed outside and inside the house and these were photographed and such photographs forms part of evidence.

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<sup>9</sup> 1950 (1) SA 670 (A) 679-680.

- 49.4 That the accused ran away from the farm heading to the main road in order to hike to Outjo. By his own version the accused ran away from the farm with two fire arms which the deceased possessed leaving the deceased sitting while leaning against the wall and breathing heavily following the discharge of a firearm at the time when it was pointed to the legs of the deceased and where the accused should have realised that the deceased sustained injuries. *Mukuve* and his wife lived on the farm yet the accused did not ascertain their whereabouts to report his fight with the deceased but just opted to run out of the farm to the extent that when he received a hike he was out of breath. When questioned as to why he ran out from the farm he responded that it was due to the fact that he was afraid of the deceased. He later changed when probed on how he could still be afraid of the deceased when the deceased was disarmed, to which there was no reasonable explanation.
- 49.5 The probabilities do not further support the accused's version in this regard as it is highly improbable that after taking possession of the two firearms from the deceased, that the deceased would continue to instil fear in the mind of the accused. The scales weigh heavily against the accused where the deceased is most probably injured at the very least from a gunshot and had to sit by leaning against a wall breathing heavily. I interpose to state that from his own version, the accused left the deceased immobile leaning against the wall while the accused was able to run thus suppressing the fear that the accused might have had which would have emanated from the deceased and therefore rendering such perceived fear nugatory.
- 49.6 That when he was asked by *Simon Awene* as to how much money he had, the accused respondent that that he had N\$50

while per his testimony, he had N\$1700 on him. The accused therefore lied.

- 49.7 It is undisputed that at the road block the two firearms belonging to the deceased and his wife were retrieved from his waist by Sergeant *Haikali* and Warrant Officer *Ipinge*. The said officers further testified that they also seized R95, N\$1713, a sim card and cellular phone belonging to the deceased. There is no reasonable explanation why the said officers would falsely incriminate the accused.
- 49.8 The land and groove engraved areas on the projectile retrieved from the thigh of the deceased had sufficient individual and class characteristics with the revolver found in the possession of the accused at the roadblock. This court finds no reason to doubt the conclusion of the forensic expert *Kalipus Sem* that the said projectile was discharged by the revolver in question.
- 49.9 Considering that the accused testified that the firearm went off during his fight with the deceased, the question that is unanswered is what and who caused the multiple lacerated wounds, bruises and abrasions all over the body of the deceased.
- 49.10 The painless answer to what caused the injuries can be uncovered from the closet of the presence of broken sticks, bloodied stones and blood drag marks within the vicinity of the deceased and his house. I hold the view that it can reasonable be inferred that the said stones, sticks and the ground where dragged blood marks could be observed caused the above-mentioned multiple injuries to the deceased. I record that the nature of the injuries suffered by the deceased were not disputed by the accused. What remains to be determined therefore is who caused such multiple injuries.

- 49.11 The accused paints a picture in his testimony that any other person inclusive of *Anselm Mukuve* or the visitor whom the deceased did not want on the farm could have caused such multiple injuries on the deceased. Can the version that the accused left the deceased seated while leaning against the wall with no multiple injuries on his body be reasonably possibly true?
- 49.12 It is evident from the nature of the seriousness of the injuries sustained by the deceased that he was severely assaulted. Doctor *Guriras* testified that blood was observed on the brain of the deceased and this is indicative of the severity of the blunt impact to the head of the deceased. The blunt trauma to the head and thorax (the chest) and the gunshot wound caused the death of the deceased. The deceased's clearly identified properties, namely: the two firearms and the cellular phone were found in the possession of the accused at the roadblock within a few hours after the deceased was shot. It is highly probable that the accused assaulted the deceased, tied him up and rendered him defenceless after which he then took the two firearms and the cellular phone from him.
- 49.13 This court find that Sergeant *Ipinge* and Warrant Officer *Haikali* were credible witnesses who testified frankly and I find no reason not to believe their evidence. I thus reject the version of the accused as false where he insinuates that the two officers who corroborated each other falsely implicated him in order to paint a picture that they were carrying out their work diligently. In the same vein I reject as false the denial by the accused that the cellular phone of the deceased was not found on him at the roadblock.

49.14 Why and how then did the accused end up in possession of the cellular phone of the deceased. The only reasonable inference to be drawn from the proven facts is that, it was after the deceased was rendered defenceless resulting from several assaults including the gunshot that the accused managed to get away with the properties of the deceased.

[50] Mr *Siambango* submitted that the guilt of the accused was not proven beyond reasonable doubt in view of the evidence led by the state. He reminded the court that all that is required from the accused is to provide an explanation which is reasonably possibly true in order to be acquitted of the preferred charges and he proceeded to submit that in this matter the accused did just that. Mr *litula* was not to be outclassed as he strenuously submitted the contrary.

[51] The submission made by counsel for the accused is not supported by the established facts as pointed out hereinabove. At least in as far the charge of murder is concerned.

[52] The problem with the accused's evidence is that there is no logical explanation as to how it is possible that the accused was found with the cellular phone belonging to the deceased, how it is possible that the accused was still afraid of the deceased after the deceased was disarmed, why the accused ran off from the farm, how the deceased ended up sustaining the injuries that he sustained over and above the reasons and conclusions reached above.

[53] Despite the fact that the accused disputes assaulting the deceased and firing shots at him, it is highly unlikely that another person would have observed a wounded person and take advantage and injure him further, that the deceased would have informed Ms. Otto that he was attacked from behind

unexpectedly if he was injured or shot during the fight or struggle with the accused. When the explanation is considered together with the fact that during his testimony the accused was not impressive as a witness and was evasive in his answers to questions raised in cross examination and therefore not credible his explanation becomes highly improbable. His evidence was further full of contradictions and improbabilities and was not corroborated by other evidence. The only conclusion this court arrives at is that his statement cannot be reasonably possibly true.

[54] It should be stated further that the behaviour of the accused after the event when he ran away from the farm and hiked to Outjo is consisted with a guilty mind. If the accused was innocent as he claims he would have assessed the possible injuries sustained by the deceased as a result of the gunshot or at least determine where the gunshot struck, he would not have bolted away from the scene, he would have sought assistance from people at the farm of the nearby farm.

[55] In considering the whole evidence this court is satisfied that the state had proved beyond reasonable doubt that the accused's defence is not reasonably possibly true and falls to be rejected as false. This court therefore harbours no doubt that the accused unlawfully brought about the death of Karl-Heinz Kossmann.

[56] Whereas the accused's testimony has been rejected as false, this court is not placed in a position to ascertain the circumstances which led to the killing of the deceased. Such information could only be obtained from the accused who is the only one privy thereto. In circumstances where an accused's version has been rejected as false, the court in *R v Mlambo*<sup>10</sup> per Malan, J (dissenting) stated that the court may draw an inference that the accused committed the offence with the serious form of *mens rea*.

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<sup>10</sup> 1957 (4) SA 727 (A).

[57] In this matter the court is denied the benefit of knowing what the accused's subjective state of mind was when he caused the death of the deceased. In order to determine the accused's intention, the objective factors should be resorted to. These include the nature of weapons used, the degree of force used, the nature of injuries sustained and the parts of the body at which attacks were directed. From these factors it can reasonably be inferred that the accused acted with direct intent when he fired the fatal shot at the deceased and assaulted him. I accordingly find that the accused committed the offence of murder with the intention to kill (*dolus directus*).

*Count 2: Robbery with aggravating circumstances*

[58] Whereas this court have come to the conclusion that the accused murdered the deceased, it could reasonably be inferred from proved facts that the accused was responsible for robbing the deceased of the two firearms, the nokia cellular cellphone with a sim card, and 11 x live ammunitions. In view of the evidence discussed herein above I find that the only reasonable conclusion to come to is that the accused committed the offence of robbery with aggravating circumstances as defined in section 1 of the CPA. I am therefore also satisfied that the accused's guilt has been proven beyond reasonable doubt on this charge but only limited to the properties mentioned in this paragraph.

*Count 3: Attempted robbery with aggravating circumstances*

[59] The state evidence is that the items belonging to the deceased and his wife mentioned in this charge were found loaded in a Mahindra vehicle together with the properties of the accused. The assumption is therefore that the accused loaded the said properties in the vehicle and probably intended to drive away with such loaded vehicle. It should be mentioned that the said

vehicle was found stationery at the farm and there is no evidence of any attempt to have moved it an inch. In the result, this court harbours doubts as to whether the accused indeed loaded the properties on the vehicle and did so with intent to steal the said properties.

[60] It is well settled in our law that where the court doubts if the guilt of the accused was proven, it should give the benefit of such doubt to the accused. In the result this court is not satisfied that the guilt of the accused was proved beyond reasonable doubt on this charge and stands to find the accused not guilty and acquit him.

[61] In the result, the court's verdict is the following:

- Count 1: Murder (*dolus directus*) – Guilty
- Count 2: Robbery with aggravating circumstances – Guilty
- Count 3: Attempted robbery with aggravating circumstances – Not guilty and acquitted.

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O S SIBEYA  
ACTING JUDGE

APPEARANCES:

STATE: T litula  
Of the Office of the Prosecutor-General,  
Windhoek.



ACCUSED:

K Siambango

Directorate of Legal Aid, Otjiwarongo.