

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case no: CC 10/2018

In the matter between:

THE STATE

and

UNAARO MBEMUKENGA

ACCUSED

Neutral citation: *S v Mbemukenga* (CC 10/2018) [2020] NAHCMD 219 (11 June 2020)

Coram: SIBEYA AJ

Heard: 21-23 and 28-30 August; 07 October; 25-28 November and 11 December 2019; 09 and 16 January; 07, 08, 14, 18 and 27 May 2020.

Delivered: 11 June 2020

Flynote: Criminal law – Murder, Robbery with aggravating circumstances – Accused raising an alibi defence and bare denials to allegations linking him to the offences committed – Evidence to be evaluated as a whole and not in isolation – Circumstantial evidence proves that accused was at the scene and committed murder and robbery with aggravating circumstances – The doctrine of recent possession restated – On proven facts, court held that the accused killed the deceased with direct intent – Accused also committed the offence of robbery with aggravating circumstances.

Summary: The accused was indicted in the High Court on charges of murder and robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 51 of 1977. He pleaded not guilty to both counts, offered no plea explanation and opted to remain silent.

It is alleged that the accused, who worked for the deceased as a gardener violently assaulted the deceased with bricks and other objects on 7 August 2017. He tied the deceased and hanged him with an electrical cable. The deceased died of hanging. The accused then locked the body of the deceased in the bathroom and stole several properties belonging to the deceased. The accused pleaded not guilty to both counts and opted not to disclose the basis of his defence but to remain silent. During the trial the accused raised an alibi defence, that he was not at the scene on 17 August 2017, as he when he woke up in the morning from his residence, he just hiked to Outjo in order to go and visit his daughter

Held, that evidence should be evaluated in its totality and not on a piecemeal basis.

Held further, that where an alibi defence is raised, the onus is on the state to prove that such alibi is false beyond reasonable doubt and no burden rests on the accused.

Held further, that where no direct evidence exists, a court may convict based on circumstantial evidence, provided that the inference to be drawn is consistent with all the proven facts and that the proven facts excludes all other reasonable inferences. *R v Blom* 1939 AD 188.

Held further, that the doctrine of recent possession revisited and applied.

Held further, that the accused's explanation to the charge of murder and robbery with aggravating circumstances was not reasonably possibly true and is rejected as false.

Held further, that the evidence proved beyond reasonable doubt that the accused was guilty of murder and robbery with aggravating circumstances and he is so convicted.

ORDER

Count 1: Murder – Guilty

Count 2: Robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 51 of 1977. – Guilty.

JUDGMENT

SIBEYA AJ:

[1] 17 August 2017, marked the death of an innocent Namibian pensioner residing in Swakopmund through violent attacks. The death of the deceased resulted from a human studious calculation. Where after, the deceased was robbed of his properties. The nub of this matter lies in the determination of the identity of the perpetrator of these heinous acts.

[2] The accused was arraigned in this court on the following charges:

Count 1: Murder

Count 2: Robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 51 of 1977.

[3] *Mr. C. Lutibezi* appeared for the state while *Mr. Siyomunji* appeared for the accused and after his withdrawal, the accused was then represented by *Mr. V. Lutibezi*.

[4] The accused is *Unaaro Mbemukenga*, a 26 years old Namibian male. The deceased, *Manfred Karl Hartmann*, is a 79 years old Namibian male (hereinafter referred to as the deceased).

[5] The accused, is alleged to have been an employee of the deceased as a gardener, at a house in Vineta, in Swakopmund. The accused is further alleged to have assaulted the deceased with bricks and other unknown objects. The deceased died as a result of hanging. The accused then robbed the deceased of 1 x Lenovo

laptop; 1 x cordless mouse; 1 x USB stick; 1 x laptop charger; 1 x check long sleeve shirt; 1 x Orange leather jacket; 1 x maroon track suit trousers; 1 x yellow duvet cover; 1 x yellow pillow case; 1 x dark blue official trousers; 1 x black belt; 1 x belt buckle; 1 x green bath towel; 2 x denim trousers; 2 x beige long trousers; 2 x cream flat sheets; 2 x travel bags; 1 x pair of brown shoes; 1 x black under pant; 1 x Samsung J7 mobile cellular phone; one white Mobicel cellular phone; 1 x pair of prescription glasses; N\$1500. So alleged.

[6] The accused pleaded not guilty to both counts and chose not to disclose the basis of his defence. He further opted to remain silent on the allegations mentioned in the indictment.

[7] At the start of the trial, several documents were received in evidence by agreement of the parties, the contents of such documents were not placed in dispute. Where necessary, particular reference will be made to such documents in this judgment. Details of all the documents need not be discussed.

The state's case

[8] *Ms. Christofine Garises (Ms. Garises)* testified that, from 2016 to the day of his arrest, the accused was her lover and they lived together at the same residence. She further testified that, both the accused and herself, worked for the deceased. At around 07:00AM on 17 August 2017, the accused left their place of residence and went to work at the deceased's place. *Ms. Garises* remained behind. He wore green shoes, a khaki beige overall, a black jacket and a red cap with white stripes.

[9] The accused usually knocked off from work at 16:00. After 16:00 on 17 August 2017, the accused never returned home. The cellular phones of the accused and the deceased were both not reachable. At night, *Ms. Garises* reported the accused and the deceased as missing to the police.

[10] In the company of the police, *Ms. Garises* went to the house of the deceased the next morning. After a search, the deceased was found dead in the bathroom with his hands tied behind his back. *Ms. Garises* testified further that an electrical cable was also observed around the neck of the deceased, tied to the washing basin. In the same bathroom, *Ms. Garises* further observed the red cap with white stripes worn by the accused in the morning of 17 August 2017 when he left their home. The door to the bathroom was locked.

[11] *Ms. Garises* later identified the following, clearly as properties of the deceased, found in the possession of the accused: the two travel bags; the black Lenovo laptop; a pair of prescription glasses; the orange leather jacket; 2 x denim trousers; 1 x yellow pillow case; 1 x yellow duvet cover; 1 x black underwear; 1 x pair of brown shoes; 1 x Samsung J7 cellular phone and prescription glasses holder. It was put to *Ms. Garises* in cross examination that, in the morning of 17 August 2017, the accused travelled to Outjo to visit his daughter. *Ms. Garises* responded that she was not aware of that hence, she reported him to the police as missing.

[12] *Sonia Ellis* testified that in 2017, she worked at Engen Truck port (Engen). She assisted with the CCTV at Engen for the duration of her employment. There was no interference with the CCTV during her tenure. She downloaded the CCTV footages on to a flash drive (the USB). From a USB footage, the court observed that on 17 August 2017 at around 14:10, *Mr. Efraim Tjiveze (Mr. Tjiveze)* and another person who is not clearly visible proceed to a certain area. *Mr. Tjiveze* later emerges carrying a black laptop which he carried to the office.

[13] *Mr. Tjiveze* testified that shortly before 17 August 2017, the accused requested for his assistance to tie up a white person as that person had money. He declined the request and informed the accused that nowadays white people do not store money in their houses. On 17 August 2017, the accused approached *Mr. Tjiveze* while at work at Engen and sold a black Lenovo laptop to him. *Mr. Tjiveze* handed the laptop to *Mr. Douglas Tsuseb (Mr. Tsuseb)* for safe keeping. *Mr. Tjiveze* described the appearance of the accused as having dreadlocks, he wore pants, a jacket and a cap. When questioned that the accused was not at Engen, *Mr. Tjiveze* maintained his position that the accused was at Engen and it is where the accused handed the laptop to him.

[14] *Mr. Tsuseb* testified that, he was employed at Engen and corroborated the evidence of *Mr. Tjiveze* to a large extent. He testified that, on 17 August 2017, he observed the accused walking with *Mr. Tjiveze* at Engen. *Mr. Tjiveze* later handed the laptop¹ to *Mr. Tsuseb* for safe keeping.

[15] *Katrina Au-Aibes (Ms. Au-Aibes)* testified that, the accused is her daughter's father. In the evening of 17 August 2017, the accused unexpectedly arrived at her house in Outjo. He carried bags Exhibit "1" and "2" together with a bottle of Tafel

¹ Exhibit "3".

lager. He did not meet his daughter because he did not phone to make arrangements earlier, in order to see his daughter. HI daughter was taken by her grandparents. The accused appeared stressful and was shivering, and he asked for a hat from *Ms. Au-Aibes* to cover himself for people not to notice that he had dreadlocks.

[16] *Ms. Au-Aibes* testified further that, the accused's mother called and spoke to the accused over the phone. After the telephone call, the accused informed *Ms. Au-Aibes* that, he hit the deceased with a stone on the forehead. The deceased fell down, the accused dragged him to the toilet and tied him. He searched the deceased's properties and took N\$1500 and 2 bags. He informed her that, at the scene he was with his two friends. She later heard gunshots and noticed that the accused was shot in the leg by the police and the bags exhibit "1" and "2" were in the same yard where he was shot.

[17] *Detective Warrant Officer Immanuel Kausiona (D/W/O Kausiona)* testified that, he arrested the accused on 18 August 2017 at around 18:00. He approached the accused who was jumping the fence and when he notified him to stop, the accused dropped the bags Exhibit "1" and "2" and ran. Warning shots were fired in the air but the accused was unmoved. He was then shot on the leg. *D/W/O Kausiona* later handed the two bags, the Samsung cellular phone and the Mobicel cellular phone of the accused to *Sgt Auxab*.

[18] *Detective Warrant Officer Ndilyoke Josef (D/W/O Josef)* testified that, he investigated the cellular phone numbers of the accused and the deceased. He obtained cellular phone records of the two phones and found that, the two phones used the same tower in the morning of 17 August 2017. The deceased's phone number was active on 17 August 2017 up to 10:56AM. The number of the accused was also active on 17 August 2017 up to 10:44:19AM.

[19] *Detective Chief Inspector Erich Nghaamwa (D/C/Insp. Nghaamwa)* testified that, the accused made pointing outs² to him. He pointed the place where he killed the deceased and where he pushed the deceased in the bathroom. It was put to *D/Insp. Nghaamwa* that the accused was requested to point out the areas where he worked at the scene and that is what he pointed out. This was disputed by *D/C/Insp. Nghaamwa* who insisted that the accused pointed out how he killed the deceased.

² Exhibit "R".

[20] *Warrant officer Onesmus Shiweva (W/O Shiweva)* testified that, he was responsible to take photos of the pointing outs. He corroborated the evidence of *D/C/Insp. Nghaamwa* to a great extent.

[21] When the accused made his first court appearance in the Magistrate's Court of Swakopmund, he pleaded guilty in terms of section 119,³ to a charge of murder of the deceased. Notwithstanding that, the accused challenged the admissibility of the section 119 proceedings. After conducting a trial-within-a-trial, this court ruled the said proceedings admissible.

[22] In the aforesaid plea, the accused stated that: on 17 August 2017, he hit the deceased once with a brick on his head and killed him. The deceased bled. He then tied the deceased's arms as well his neck with a rope. He removed a bag of the deceased with clothes, a cellular phone and a laptop.

The defence case

[23] The accused testified that, in the morning of 17 August 2017, after he woke up, he went straight to the hiking point and travelled to Outjo to visit his daughter. He denied being present at the house of the deceased on the said date. He further denied killing the deceased, taking the properties of the deceased and being found with the properties of the deceased. He also denied telling *Ms. Au-Aibes* that he killed and robbed the deceased. He denied being present at Engen and denied meeting *Mr. Tjiveze* and *Mr. Tsuseb*.

Analysis of evidence

[24] It should be remembered that the state bears the onus of proving the guilt of the accused beyond reasonable doubt. The accused, on his part, may only provide an explanation which may be reasonably possibly true, for him to be found not guilty of the charge(s) against him. Where the accused provides an explanation which is improbable, the court may not convict him unless, it is satisfied that the explanation is false beyond reasonable doubt.⁴

³ Criminal Procedure Act 51 of 1977.

⁴ *R v Difford* 1937 AD 370 at 373.

[25] In assessing the evidence, trial courts should not consider such evidence in isolation, but the evidence should be considered in its totality. In *S v HN*⁵ 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 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.'

[26] With the above established legal principle in mind, I proceed to consider the evidence presented as a whole and not in isolation.

[27] It is not in dispute that the deceased died as a result of hanging. The chief post-mortem findings were:

27.1 laceration on the forehead and right side of the neck;

27.2 Haematoma on the right ear and haemorrhage on the forehead, right eye lids and right side of the face;

27.3 Bruises on the chest and the arms;

27.4 Ligatura abrasions around the neck.

[28] The accused raised the defence of an alibi to both charges.

[29] This court while discussing an alibi defence stated the following in *S v Strong*⁶ at para 62-63:

'... there is no burden on the accused to prove the truth of his alibi as the onus is on the state to prove beyond reasonable doubt that the alibi is false. In the event of the existence of a reasonable possibility that the alibi may be true then the accused must be given the benefit of the doubt.

⁵ 2010 (2) NR 429 (HC) at 451.

⁶ (CC 16/2019) [2020] NAHCMD 210 (04 June 2020).

[63] Mr. *Engelbrecht* referred this court to the judgment of *S v Katjiruova*⁷ where Hoff J (as he then was) quoted with approval the following passage from *R v Biya* 1952 (4) SA 514 (AD) at 521 C-D:

'If there is evidence of an accused person's presence at a place and a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime.'

[30] Armed with above principle, I proceed to consider the alibi defence of the accused together with all the evidence led in this matter.

[31] It should be pointed out at the outset that, no one observed the accused at the scene, therefore there is no direct eye witness.

[32] It is settled law that a conviction may follow based on circumstantial evidence, provided that the following requirements set out in often cited case of *R v Blom*⁸ are met:

(a) Whether the inference sought to be drawn is consistent with all proven facts, because, if not the inference cannot be drawn; and

(b) Whether the proven facts are such that they exclude all other reasonable inferences from them save for the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.'

[33] It is now opportune to consider the evidence in order to ascertain whether the guilt of the accused was proven beyond reasonable doubt or not.

[34] It was the evidence of Ms. Garises that, the accused left their place of residence destined for the deceased's place. Ms Garises testified further that the accused departed from their place of residence while putting on a red cap with white strips. This cap was found locked in the washing basin of the bathroom where the deceased's body was discovered. The photos taken during the pointing out by the accused corroborates the evidence of Ms. Garises as it depicts the said cap as found in the washing.⁹ The explanation from the accused on the presence of the cap at the place of the deceased was that, he used to put on that cap while at work and

⁷ (CA 83/2008) [2012] NAHC 84 (20 March 2012).

⁸ 1939 AD 188 at 202-3.

⁹ Exhibit "H".

when he knocks off, he would leave it at work. This statement was disputed by *Ms. Garises* who stuck to her version of having observed the accused leave their residence with the cap.

[35] The cellular phone of the accused and that of the deceased utilised the same tower in the morning of 17 August 2017, thus indicative of the two phones being in the same vicinity.

[36] The accused testified that he was not at Engen on 17 August 2017. The significance of his denial of being at Engen is that, it is at Engen where *Mr. Tjiveze* and *Mr. Tsuseb* claimed to observed him with the deceased's laptop in his possession and while carrying two bags. *Mr. Tjiveze* and the accused were friends. The accused had, few days before 17 August 2017, requested *Mr. Tjiveze* to assist him to tie up a white man who had money, which request *Mr. Tjiveze* turned down. On the CCTV, *Mr. Tjiveze* is seen carrying a laptop which he obtained from a male person, whom he identified as the accused. *Mr. Tjiveze* testified with emphasis that, it is the accused who sold and handed the laptop to him at Engen. *Mr. Tsuseb* corroborated the evidence of *Mr. Tjiveze* that he saw the accused walking with *Mr. Tjiveze* at Engen on 17 August 2017. To these allegations, the accused offered bare denials.

[37] It was the evidence of *Ms. Au-Aibes* that the accused, without notice, showed up at her residence in Outjo in the evening of 17 August 2017, carrying two bags (belonging to the deceased).¹⁰ As no notice was given, the accused did not find his daughter, whom he allegedly intended to visit. *Ms. Garises* corroborated the evidence of *Ms. Au-Aibes* in that it was not the intention of the accused to go to Outjo to visit his daughter and he did not inform *Ms. Garises* as such, hence *Ms. Garises* reported the accused missing. The accused intended to remain incognito in Outjo by covering his dreadlocks with a hat. He admitted to the commission of the offences to *Ms. Au-Aibes* and detailed the manner in which he carried out his actions.

[38] Upon his arrest on 18 August 2017, he was found in possession of the two bags and a Samsung cellular phone belonging to the deceased. He was also with his own Mobicel cellular phone. It was just a day after the death of the deceased that the accused was found in possession of the properties of the deceased. *Strydom, JP*

¹⁰ Exhibit "1" and "2".

(as he then was) in an authoritative judgment on the doctrine of recent possession, in *S v Kapolo*¹¹ stated that:

'It is correct that where a person is found in possession of recently stolen goods and has failed to give any explanation which could reasonably be true, a court is entitled to infer that such person had stolen the article or that he is guilty of some other offence. (See: *Hoffmann and Zeffertt The SA Law of Evidence* 4th ed at 605-6.) I also agree with the magistrate that there are instances where a lapse of 14 days or longer was still regarded as recent possession. The test to be applied in this regard was laid down in *R v Mandele* 1929 CPD 96 where the following was stated at 98, namely:

"Is the article one which could easily pass from hand to hand, and was the lapse of time so short as to lead to the probability that this particular article has not yet passed out of the hands of the original thief?"

This *dictum* was approved on many occasions and again by the South African Appeal Court in *R v Skweyiya* 1984 (4) SA 712 (A) at 715E.'

[39] In association with the *Kapolo* judgment, there is need to consider that, *in casu*, the accused was found in possession of two bags and a cellular phone of the deceased, a day after the death of the deceased. Even worse, the accused on the same day of the murder and the robbery, was observed carrying the deceased's laptop and sold it. The recentness of the possession of the aforesaid goods is beyond question.

[40] In his guilty plea tendered at the magistrate's court on his first court appearance, the accused revealed the manner in which he committed the murder. He was particular about how he hit the deceased with a brick on his head and killed him. In the bathroom where the deceased's body was found there was a brick recovered. The deceased was found with his arms tied behind his back just as the accused said in court.

[41] When pressed in cross examination that there is ample evidence incriminating him emanating from state witnesses, the accused said that the witnesses connived to falsely implicate him.

[42] From the above, it is concluded that there is overwhelming evidence proving that, the accused did not move from his place of residence and hiked to Outjo directly. The only reasonable inference proven from the established facts is that he

¹¹ 1995 NR 129 (HC) 130D-F.

detoured to the place of the deceased. The evidence of the cellular phone tower, his cap, the CCTV, *Mr. Tjiveze* about accused's presence at Engen with a laptop and the assistance sought to tie-up a white man, *Mr. Tsuseb*, *Ms. Au-Aibes's* version as told by the accused, the recovery of the bags at arrest, the guilty plea and the pointing out (as aforesaid) proves that the accused was at the place of the deceased in the morning of 17 August 2017.

[43] This court therefore, finds in the foregoing, that the alibi defence cannot be said to be reasonably possibly true and is false beyond reasonable doubt. It further therefore stands to be rejected accordingly, as I hereby do.

[44] Considering the totality of the evidence, there is no doubt that it is the accused who killed the deceased. His intention to kill the deceased can be deduced from the evidence that, days prior to 17 August 2017, he requested assistance from *Mr. Tjiveze* to tie up the white man who had money (the aim was to rob) and that ultimately the deceased was robbed of his properties. The intention was therefore to kill in order to force the deceased into submission so that the robbery, may be carried out. This court is therefore satisfied that the state proved the guilt of the accused beyond reasonable doubt on the charge of murder with direct intent to kill (*dolus directus*). The accused is found guilty and convicted of murder as charged.

[45] From the evidence, it is further apparent that the only reasonable inference to be drawn from the proven facts is that the accused robbed the deceased of his two bags, the Lenovo laptop, 1 x pair of prescription glasses, the leather jacket, 2 x denim trousers, a pillow case, a duvet cover, an underwear, a pair of shoes and a Samsung J7 cellular phone. This court harbours no doubt that the guilt of the accused was proven beyond reasonable doubt on count 2 and he is convicted accordingly in respect of the properties mentioned in this paragraph only.

[46] In the result, the court finds as follows:

Count 1: Murder – Guilty

Count 2: Robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 51 of 1977. – Guilty.

O S SIBEYA

ACTING JUDGE

APPEARANCES:

FOR THE STATE:

C. Lutibezi
Of Office of the Prosecutor General
Windhoek

FOR THE ACCUSED:

V. Lutibezi
Of K Kamwi Law Chambers
(Instructed by Legal Aid)
Windhoek