CASE NO.: SA 5/2000

IN THE SUPREME COURT OF NAMIBIA

In the matter between

JONAS KADILA First Appellant

SILAS NERO Second Appellant

JONAS NAKASHIMBWA Third Appellant

And

THE STATE

Respondent

CORAM: Strydom, CJ; O'Linn, AJA *et* Chomba, AJA

HEARD ON: 4 July 2001

DELIVERED ON: 9 October 2001

APPEAL JUDGMENT

STRYDOM, C.J.: The three appellants appeared in the High Court of Namibia on the following charges:

COUNT 1: MURDER.

COUNT 2: THEFT OF A FIRE-ARM, alternatively, **UNLAWFUL POSSESSION OF A FIRE-ARM** and,

COUNT 3: DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE.

They pleaded not guilty to all the charges and were represented by Ms. Hamutenya who is again appearing on their behalf in this Court as *amicus curiae.* The Court wants to thank her for her assistance in the matter. Notwithstanding their pleas of not guilty they were convicted as follows:

First appellant was convicted on Count 1, of murder, Count 2, of theft of a firearm and on Count 3, of attempting to defeat or obstruct the course of justice. He was sentenced as follows, 20 years imprisonment on Count 1, 18 months imprisonment on Count 2 and 3 years imprisonment on Count 3. The Court ordered that the sentences imposed on Counts 2 and 3 to run concurrently with the sentence on Count 1.

Second appellant was convicted on Count 1 of murder but as an accessory after the fact and also on Count 2 of theft of a firearm. He was sentenced to 10 years and 18 months respectively and the sentence on Count 2 was ordered

to run concurrently with the sentence on the first Count.

Third appellant was convicted on Count 1 of murder but as an accessory after the fact. He was sentenced to 10 years imprisonment.

They all applied for leave to appeal against their convictions as well as the sentences imposed by the Court-*a-quo*. These applications were refused. They thereupon filed petitions wherein they repeated their applications for leave to appeal. These applications were successful and they were granted leave to appeal against the convictions and the sentences imposed.

Mr. Small, who did not appear in the Court-*a-quo*, argued the case on behalf of the respondent.

Before dealing with the merits of the appeal reference must be made to an application for condonation for the late filing of the Heads of Argument by Counsel for the appellants. The application itself, although styled as a Notice of Motion, is not in proper form in that Counsel merely attached her Heads of Argument, wherein an explanation was tendered, to the Notice of Motion, instead of doing so by way of an affidavit. However because this was an instance where leave to appeal was granted by this Court on petition, the merits of the appeal and the fact that Mr. Small did not object to the form in which the application and the reasons for the delay was set out, we allowed Counsel for the appellants to argue the matter.

In the Court-*a-quo* all three appellants amplified their pleas of not guilty with written statements, which were read into the record. The relevant parts thereof read as follows:

First Appellant:

> "4.1 I deny the allegations that I did steal a firearm or that I did know that it did not have a licence.
>
> 4.2 I deny that I did want to defeat or obstruct the course of justice.
>
> 5.1 I know that the deceased shot himself in the head and died.
>
> 5.2 I admit that I attempted to sell the said firearm and did place it in the possession of Petrus Ipinge."

Second appellant:

> "4. I deny each and every allegation against me and put the State to the proof thereof.
>
> 5. I know that the deceased shot himself in the head and died."

Third Appellant:

> "4. I deny each and every allegation against me and put the State to the proof thereof.
>
> 5. I know that the deceased shot himself in the head and died."

According to the evidence, the second appellant and the deceased came from Rundu to Swakopmund and stayed in a shack belonging to the state witness

Thomas Shivolo. They arrived there about 5 or 6 days before the incident. Except for the evidence of a young boy, A.S., nobody but the three appellants knew what had happened on the night of the 17th October 1997. The first and third appellants testified that they met the deceased at a bottle store in Mondesa Township. From there the three of them went to the shack where the deceased and the second appellant were staying. They met the second appellant and from there, they all walked some distance to smoke dagga, which the deceased was rolling. At one stage the deceased removed a revolver from under his shirt. Third appellant wanted to look at it and the deceased handed it to him. Whilst this was happening the first appellant admonished the third appellant not to point the revolver in his direction. However the deceased said that there was no cartridge in the firearm. He took the revolver from the third appellant and took something out of his pocket, which he put into one of the chambers of the firearm. The deceased then pointed the revolver at his head. A shot went off and the deceased fell to the ground. All the appellants then left after the first appellant picked up the gun.

The witness, Helmut Palasius, testified that he met the first appellant, late at night, on a Friday. The appellant wanted to sell a firearm to him. Although Palasius could not remember the date when this had happened, it is common cause that this happened on the same night that the deceased was killed. Palasius himself did not buy the firearm but took the first appellant to the witness Petrus Ipinge. First appellant offered the firearm to Petrus for N$250 and told him that he was the owner of the firearm. Ipinge asked first

appellant for documents for the firearm and he promised to bring them the next day. The three appellants were all arrested the next day.

Const. Ndinda was the first on the scene of the killing. He alerted the charge office and Const. Indonga and Sgt. Awarab soon thereafter joined him. The deceased had two wounds, one on each side of the head, but he was still alive when the ambulance arrived to take him to hospital. Their investigation brought the officers into contact with the witness Shivolo. Whilst busy they were informed that the deceased had passed away and they then went to the hospital to take photographs of the body. Early the next morning the police officers returned to Thomas Shivolo's shack where he mentioned to them the name of one Tara. Tara informed them that the second appellant had left for Walvis Bay. With the help of Tara, Const. Indonga was able to locate second appellant in Walvis Bay. Second appellant was interviewed and he informed Const. Indonga that he was with the deceased and first and second appellants, seemingly the previous evening. Second appellant also told the police that the deceased was playing with the revolver and accidentally shot himself in the head. Thereafter one of the other two appellants, second appellant was not sure whom, removed the revolver out of the hand of the deceased and they then ran away. Second appellant said that he then also ran away.

Second appellant was arrested and taken to Swakopmund where he took Indonga to Mondesa Township and pointed out a certain shack to him. The police found first and third appellants inside the shack. They however denied that they were with the deceased and second appellant the previous evening.

They were then also arrested.

The three appellants were handed to Sgt. Awarab who continued with the investigation. He asked the three appellants where the weapon was that killed the deceased but they told him that they did not know what had happened to it. He also asked them who had shot the deceased and they all said that the deceased was playing Russian roulette and he shot himself. However on the 19th October third appellant told Sgt. Awarab that he knew where the weapon was. He took the officer to Helmut Palasius who, in turn, took them to Petrus Ipinge who gave the weapon to Awarab. It was later established that the revolver was the property of a Ms. Brand of Rundu who testified that her house was burgled on the night of the 3rd October 1997 when the weapon, together with other property, was stolen.

Sgt. Awarab also took a warning statement from third appellant in which the appellant repeated the allegation that the deceased had shot himself. He further stated that his friend took the weapon after which they ran in the direction of the Mondesa single quarters and that they met again at the Duadide Bottle Store where they then discussed the incident.

A.S. is a young boy of 13 years. He testified that on the night of the 17th he was sitting on the fence surrounding their residence when he saw two men chasing a third. When one of the persons chasing came close to the one who was running away he pointed something at him and the witness heard a shot

going off. The person in front fell down. A.S. could not make out what the object was that was pointed at the person who was shot. It seems that there could be little doubt that this was a firearm. The person who had fired the shot then bent down and picked up something from the ground. Thereafter both persons ran away in different directions.

When the three appellants appeared before the magistrate during the section 119 proceedings they again repeated their allegations that the deceased was playing Russian roulette and accidentally shot himself. That was also their stance when they testified in the Court-*a-quo*. An important part of their evidence was that the deceased, when he fired the shot, was holding the revolver in his right hand and that the muzzle of the firearm was not further away than one or two inches from the right hand side of his head when he pulled the trigger.

The learned Judge in the Court below did not believe the appellants' story of accidental death of the deceased by his own hand. In this regard the learned Judge relied strongly on the evidence of Dr.Matheis, who performed an autopsy on the body of the deceased, and the witness A.S.. It seems that it was particularly the evidence of A.S., which led to the conviction of the first appellant of murder.

Ms. Hamutenya criticized the findings of the learned Judge and submitted that he should have rejected the evidence of A.S. and the finding of the doctor that, contrary to what the appellants had testified, the bullet had entered the head

of the deceased on the left side and had exited on the right side. She further submitted that the Court should have accepted the evidence of the appellants, as there was a reasonable possibility that it might be true and she asked this Court to acquit them on all charges. Counsel also criticized the police for not taking skin samples of the hands of the deceased in order to establish whether there were gunpowder deposits, which could be a strong indication that he was the person who handled the gun when the shot was fired.

Mr. Small made two important concessions. The first was that the young boy, A.S., was not in all respects a satisfactory witness and that the Court should only accept his evidence in so far as that evidence is supported by other creditable evidence. The second concession, which follows almost naturally from the first, is that the Court-*a*-*quo* erred in convicting the first appellant of the crime of murder, as there was no evidence, which proved beyond reasonable doubt that he was in fact the person who pulled the trigger. Counsel submitted that the medical evidence clearly showed that the deceased did not die by his own hand and he submitted that on the first count the appellants should all be convicted as accessories after the fact to the crime of murder. This submission is based on, what Counsel called the lies told by all the appellants to shield the actual perpetrator and the removal of the weapon. Counsel submitted that some of the other convictions by the Court-*a*-*quo* were also not in order. I will deal with those submissions when I deal with the other charges.

It is now necessary to look at the evidence of the doctor who performed the

post mortem on the body of the deceased. It is clear that the medical evidence played an important role in the finding of the learned Judge-*a-quo* that the killing was not accidental. In fact on the concession made by Mr. Small regarding the evidence of the witness A.S., the State's case stands or falls by the evidence of the doctor.

Dr.Matheis, who performed the post mortem, completed his medical studies in 1978 at the University of Pretoria. Thereafter he worked for 10 years as a medical officer in the Windhoek State Hospital. During this period he also worked for about half a year as a medical legal officer in the morgue. Since 1989 he has been a medical practitioner at Swakopmund where he is also the district surgeon. Dr. Matheis testified that he performs some 20 post mortem examinations per year. The post mortem in this case was performed on the 21st October. The doctor found that there were bullet wounds on both temples of the head. The cause of death was loss of blood as a result of the bullet wounds.

According to the doctor the entrance wound was on the left side anterior to the ear. It was an irregular wound plus-minus 1,3mm in diameter. The exit wound was also anterior and above the right ear and brain tissue was protruding from the wound. The bullet passed through both frontal lobes of the brain and its direction was upwards. The entrance into the skull on the left temple was small and round as was the exit wound. The doctor further testified that if the muzzle of the firearm were put against the head of the deceased when the shot was fired one would find a blow up of the wound

margins and also bruising. These signs were not present on examination. Furthermore, if the muzzle of the firearm was held less than a metre away from the skin one would expect to see powder particles deposited around the entrance wound. This was also not found by the doctor as a result of which he concluded that the firearm was further than a metre from the head of the deceased when the shot was fired. He ruled out the proposition that this could have been a contact wound and stated that that was very unlikely. The doctor testified that the person who fired the shot must have been to the left-hand side of the deceased when he did so, or, if the person was behind the deceased, the tract of the wound indicated that the deceased must have turned his head backwards at least to the side, when the shot was fired.

Under cross-examination by Counsel the doctor further elaborated on his findings as to the entrance and exit wounds, and stated that on the skull itself is found a funnel shaped wound with a wider open end in the direction in which the bullet had traveled. This is so because the bullet, on exit from the skull, breaks away particles, seemingly from the bone.

The evidence of the doctor as to what one should find if the shot was fired with the muzzle of the firearm against, or close to, the head of the deceased was not really challenged by Ms. Hamutenya under cross-examination. Counsel however challenged the finding of the doctor in regard to where the entrance and exit wounds were. This was done on the basis that experience has shown that in cases, involving bullet wounds, the exit wound caused by it is usually bigger and more irregular than the entrance wound. It seems however that

there was at times a misunderstanding between the doctor and Counsel for the defence. Whilst the doctor based his findings on what he saw on the piercing of the skull by the bullet, counsel was referring to the external wound where the skin was pierced. In regard to the piercing of the bone the doctor agreed with Counsel.

From the evidence of the doctor it seems that his findings in regard to the entrance and exit wounds on the head of the deceased were based, not so much on the external wounds, but on what he found on the skull of the deceased. In this regard he testified that the piercing of the skin by the bullet may only leave a small laceration. However, the piercing of the skull by the bullet leaves a funnel shaped opening in the direction of which the bullet is fired. This is due to the breaking away of particles of bone as the bullet leaves the skull. The same effect is found on the opposite wall of the skull-bone, namely a small entrance wound and a bigger exit wound where the bullet exits.

Against the background of all the evidence the Court must now consider the accounts given by the three appellants of the shooting. First appellant testified that after the deceased took the firearm from third appellant he opened and closed it and then put the firearm to his head with the right hand. He further elaborated on this and said that the deceased put the gun to his temple and fired the shot. Later the appellant further changed this evidence by saying that he did not know whether the firearm touched the temple or how far it was away. The second appellant testified that the deceased, after receiving the firearm from the third appellant, took a cartridge out of his

pocket, put it in the chamber and, after spinning the cylinder, put the firearm against his head and fired the shot. According to the appellant the deceased held the firearm in his right hand. Under cross-examination second appellant demonstrated that the muzzle of the firearm was between 1 and 3 inches away from the head of the deceased. The evidence of the third appellant was more or less the same as that of the others. He demonstrated in court that the deceased was holding the revolver in his right hand with the muzzle pointing to the right-hand side of the head about an inch away from the head.

What emerged from the evidence of the appellants was that the deceased held the firearm in his right hand and pointed the muzzle to the right-hand side of his head when he fired the shot. On their version the entrance wound should have been on the right-hand side of the head and the exit wound on the left side. What is also clear from the evidence of the three appellants is that the muzzle of the revolver was either against or near the head of the deceased, but in any event not further than an inch or three away from the head when the deceased pulled the trigger. Under these circumstances the doctor would at least have found a blow up of the wound or powder particles in and around the wound as he had testified. The very absence of these signs, together with the further evidence that, contrary to what the appellants had said, the entrance of the bullet was on the left side of the head, proves in my opinion beyond reasonable doubt that there is not a reasonable possibility that the versions of the appellants might be true. There is no reason why the medical evidence should not be accepted and Ms. Hamutenya, during argument, conceded that there was no real basis on which she could attack the evidence

of the doctor that on the versions of the appellants one should have found a blow up of the wound, or powder particles deposited in and around the wound, or both. In this instance it is also in my opinion safe to add the evidence of A.S. where he testified that he saw a person or persons chasing the deceased before the shot was fired. This evidence coincides with the evidence of the doctor and the inference that can be drawn from that evidence, and it contradicts the evidence of the appellants that they were an amicable group of friends, standing around and smoking dagga, when the deceased accidentally shot himself in the course of playing Russian roulette.

Ms. Hamutenya's criticism of the police for not taking samples on the hands of the deceased in order to establish whether there were gunpowder particles present, which would have indicated that he was the person who handled the firearm, is to a certain extent justified. In this instance the police was the very next day, after the shooting, informed of the allegation that the deceased had shot himself. However the medical evidence of the absence of such signs in and around the wound, as well as the evidence concerning the entrance and exit wounds, in my opinion clearly excludes the possibility of an accidental killing by the deceased himself.

Another aspect that was not fully investigated concerns a statement made by Counsel for the appellants during the cross-examination of the state witness Thomas Shivolo. It was put to this witness that it was the habit of the deceased to play Russian roulette and that the witness, and others, have seen this. This was denied by Shivolo. It was further put to Shivolo that at one

stage a certain Tara even warned the deceased not to play Russian roulette and that the witness must have heard it. This was also denied. Notwithstanding the fact that various names were mentioned by Counsel, of persons who would have seen the deceased acting in this manner, nothing was done by Counsel to bring this evidence before the Court, even though some or all of these witnesses were available after the close of the State's case. However even if there were such evidence it does not follow that this was what had actually happened on this particular evening. The medical evidence and the evidence of A.S. seem to me to conclusively rule out an accidental killing. Furthermore the one witness, who was supposed to have been aware of this habit of the deceased, denied that that was so. Nevertheless it is the duty of Counsel to put the case of her clients fully before the Court. The possibility that this might have happened should at least have been investigated by Counsel and if there was such evidence then to present it. In certain circumstances where it appears to the Court that evidence is essential for the just decision of a case it will be the duty of the Court to call for such evidence. Where this is necessary Judges should not hesitate to make use of their powers in terms of the Criminal Procedure Act, Act 51 of 1977. See in this regard sec 186 of the Act and further S v van den Berg, 1995(4) BCLR 479(Nm); 1996(1) SACR 19(Nm).

I am however satisfied that the Court-*a*-*quo*'s finding that the deceased did not accidentally kill himself, was correct. From this it follows that one of the three appellants must have shot and killed the deceased.

The second question, which must now be considered, is whether there was evidence beyond a reasonable doubt to convict the first appellant of murder. Mr. Small's concession that the finding of the Court-*a*-*quo* was not based on cogent and satisfactory evidence was in my opinion correct. For its finding the Court relied on the evidence of the witness A.S. who stated that the person who took something from his pocket, immediately before the shot was fired, and pointed this object at the deceased, was also the person who picked up something from the ground, and the evidence of the first appellant who stated that he picked up the pistol after the deceased had accidentally shot himself.

I agree with Mr. Small that it would be unsafe to accept A.S.'s evidence unqualifiedly. Although A.S. was no longer a child of tender years the general cautionary rule regarding the evidence of children still applies especially where he was the only witness implicating the appellant. (See in general Woji v Santam Insurance Co. Ltd. 1981(1) SA 1020(A) at 1028A-E.) There are various indications in his evidence that the Court-*a*-*quo* should have approached his evidence with caution. His description of what clothes the various appellants were wearing was patently wrong. In evidence he stated that two persons chased the deceased. This differed from his police statement where he said that one person was chasing the deceased. When challenged under cross-examination he first of all denied that he only referred to one person when making his statement. This he later changed by explaining that he only mentioned the one person who, after the shot was fired, ran in his direction. He did not mention the other person as that person ran in a different direction away from him. The logic of this explanation escapes

me. Sight should also not be lost of the fact that A.S. could not identify any of the appellants and that he could not say what it was that was picked up from the ground.

The learned Judge further accepted the evidence of the appellants that first appellant picked up the revolver from the ground. However the evidence in this regard was most conflicting. Apart from this unsatisfactory feature the appellants had no choice but to say so in order to let it fit in with their version that the deceased shot himself. How confused this evidence was, was brought out by the different versions given by the appellants in their statements before the magistrate during the sec. 119 proceedings, and their evidence in Court. Before the magistrate, first appellant stated that it was the third appellant who picked up the firearm after the deceased had fired the shot. In evidence before the Court-*a*-*quo* he said that he in fact picked up the firearm. When confronted by Counsel for the State with this discrepancy the appellant had no problem in denying his statement, made to the magistrate, and of accusing the magistrate of writing down words which were not said. There were also other discrepancies between the statement made before the magistrate and his evidence in Court, which the appellant simply denied. This was now also the first time that these statements were challenged by the appellants.

In his statement before the magistrate second appellant stated that after the deceased had shot himself accidentally, first appellant asked where the gun was whereupon third appellant stated that it was in the hands of the deceased.

First appellant then instructed the third appellant to pick it up and, after the third appellant did so, they both ran away. In evidence before the Court second appellant said that the firearm was, after the shot was fired, still in the hand of the deceased, when the first appellant took it from him. He now said that it was the third appellant who asked where the firearm was and, after answering the question, first appellant then took the firearm. To Cst. Indonga second appellant said that he was not certain who had picked up the revolver.

Third appellant in his statement to the magistrate denied that he picked up the firearm. In his evidence he now said that after the shot was fired, he asked where the gun was and first appellant told him that it was in the hands of the deceased, whereupon the latter took it and he, the third appellant, then went on his way. In his warning statement to Sgt. Awarab this appellant stated that after the shooting they again met at Doatite bottle store. During cross-examination he now denied that he had said so to Awarab First and third appellants also stated under oath that when second appellant pointed them out to Const. Indonga they did not deny that they were with the deceased and second appellant the previous evening. This is contrary to the evidence of Indonga whose evidence on this point was not challenged by the defence.

On the above evidence, and bearing in mind the discrepancies and contradictions, the learned Judge, in my opinion, erred to accept the appellants' version that it was the revolver which was picked up and that it was picked up by the first appellant. Not only is their evidence on this aspect clearly contradictory of what was previously stated by them but their clumsy and inept

retraction of what was previously said, and the many other contradictions, showed that they were lying. In this regard it was also previously pointed out that the picking up of the revolver was prompted to fit in with their versions of the deceased killing himself accidentally. The Court-*a*-*quo*, in accepting this evidence, should then also have put this as a factor in the scale in favour of the appellants, because it supported their version that the deceased was in possession of the firearm when the shot was fired. This the Court did not do.

All that remains on the evidence, and which distinguishes the first appellant from the other two, is the fact that some time after the shooting he was in possession of the revolver when he offered it for sale to the witnesses Palasius and Ipinge. This evidence is circumstantial and in my opinion it cannot be said that it supports, as the only reasonable one, the inference that he should then also have shot and killed the deceased. It is equally possible that the actual killer, in order to minimize his own association with the murder weapon, gave it to first appellant to sell, or that the first appellant saw this as an opportunity to make some money.

From the above it follows that the conviction of the first appellant of murder on the first count must be set aside. Mr. Small however submitted that the first appellant should also be convicted as an accessory after the fact to the crime of murder and Counsel further submitted that the convictions of the second and third appellants as accessories after the fact were correct.

I agree with the finding of the learned Judge-*a*-*quo* that there was not sufficient

evidence to find beyond reasonable doubt that the appellants acted together in the execution of a common purpose with the person who fired and killed the deceased. From this finding it follows that each of the appellants can only be convicted of their own criminal acts, if any, committed by them.

In terms of sec. 257 of the Criminal Procedure Act, Act no. 51 of 1977, (the Act) it is competent to convict a person as an accessory after the fact to the crime of which such person is charged if it is proved that he or she is an accessory. An accessory after the fact to a crime is someone who assists the actual perpetrator, after the commission of the crime, to escape justice or to evade conviction for his crime. (See Hiemstra: Suid-Afrikaanse Strafproses, 5th Ed. P 620; du Toit *et al*: Commentary on the Criminal Procedure Act, pa. 26 – 2A and Snyman: Criminal Law 3rd Ed. P. 262-266). The principle that a person cannot be an accessory after the fact to his own crime created a problem in those cases where more than one person was involved but it could not be proved which one of them committed the crime but all, or some of them, took part in the attempt to shield the actual perpetrator to evade justice.

The above problem was overcome in the case of S v Gani and Others, 1957 (2) SA 212 (A), on the basis that if one of the accused had committed the crime, and it was not proven which one, or more, committed the crime, then the others who assist him, after the commission of the crime, are accessories after the fact, and if they are accessories, then the actual perpetrator, in assisting them, becomes an accomplice to their crime. In this way all the accused can

be convicted as accessories after the fact to the specific crime. This basis for liability of all the accused was again confirmed by the South-African Appeal Court in the case of S v Jonathan en Andere, 1987 (1) SA 633 (A). (See however S v Rossi-Conti, 1971 (2) SA 62(RA) and S v Velumurugen and Another, 1985 (2) SA 437 (D).) The Gani-case, *supra*, was heavily criticized, more particularly in academic circles, as pointed out by Hiemstra *op. cit.* Notwithstanding this criticism the principle set out in the Gani-case was followed in more recent decisions of the Appeal Court. (See S v Munonjo en 'n Ander, 1990 (1) SACR 361 (A) and S v Phallo and Others, 1999 (2) SACR 558 (SCA).)

Although this Court is no longer bound by decisions of the South African Courts there is no doubt that decisions, of particularly the Court of Appeal, have great persuasive value. This fact is demonstrated by many decisions of this Court. The principle set out in the Gani-case, *supra*, has been followed in the South-African Courts, and in our Courts, for the past 44 years and in my opinion has practical application and should be continued to be followed by our Courts. It seems to me that Snyman *op. cit.* p 266 is correct when he concluded that the rule adopted in these cases should be regarded as an exception, based on policy considerations, to the rule that one cannot be an accessory after the fact to a crime committed by oneself.

Ms. Hamutenya, in reply, and in the alternative to her argument that all the appellants should be discharged, submitted that the first appellant was only guilty of an attempt to defeat and obstruct the course of justice. She further argued that he could not also be convicted of the theft of the firearm. In

regard to the second appellant, Counsel submitted that he could not be convicted of being an accessory after the fact to the crime of murder as he only told lies and that was not sufficient for a conviction as an accessory. He could however be convicted on the alternative charge to Count 2, namely the offence of being in unlawful possession of a firearm without a licence. As far as the third appellant was concerned she submitted that he was not guilty of any crime as his liability as an accessory after the fact rested on lies told by him.
Mr. Small, on the other hand, submitted that the telling of lies with the intent to shield the actual perpetrator to escape justice is sufficient for a conviction as an accessory after the fact to commit a crime. Council submitted that the first appellant be convicted on Count 1 as an accessory after the fact to the crime of murder. Counsel further submitted that under the circumstances the conviction for attempt to defeat or obstruct the course of justice is no longer competent and should be set aside. The conviction on Count 2 of theft of a firearm was in order and should not be disturbed. In regard to the second appellant, Counsel submitted that his conviction as an accessory after the fact should stand but that his conviction of theft of a firearm, on Count 2, should be set aside and be substituted with a conviction on the alternative count, namely of unlawful possession of a firearm without a licence. Third appellant was only convicted as an accessory after the fact to the crime of murder and Counsel submitted that this should be left undisturbed.

In my opinion if lies are told with the necessary intent to assist the actual perpetrator to escape conviction that would be sufficient to constitute the crime of being an accessory after the fact to that crime. In the Phallo-case,

supra, p 567, Olivier JA, who wrote the judgment of the Court, stated that in order to secure a conviction the prosecution "…..must prove that the accused performed some act or acts intended to assist the principal offender to escape conviction."

In the Phallo-case 17 policemen arrested a suspect who was thereafter in their company until he died. They then removed the body from the place where the victim had died to some other place and then summoned an officer to the spot where the body was removed. They then reported to the officer that the deceased had died at the second spot and that he died of natural causes. The Court was however satisfied that it was proved beyond reasonable doubt that the deceased did not die at the second spot and that he did not die as a result of natural causes. All the appellants also made statements in which they repeated this version. One of the grounds on which the appellants was convicted was their failure to report the true facts to a superior officer. In this regard the Supreme Court of Appeal found that failure to report a crime would not ordinarily give rise to a conviction as an accessory after the fact, but the Court stated that police officers had a duty to report a crime. In regard to the false statements made by the appellants, Olivier JA said the following on p 567, namely:

> " If mere intentional failure by a police officer to report a crime constitutes the necessary act giving rise to a conviction of being an accessory after the fact to the crime, *a fortiori* do the false statements made by the officer prior to being charged. The statements now under discussion were obviously made with the intention of misleading any police investigation and shielding the principal offender or offenders."

(See further S v Jonathan, *supra,* and S v Munonjo, *supra*.)

I respectfully agree with the law as set out by the learned Judge of Appeal. The telling of lies with the intent to shield the actual offender or offenders from a conviction can be as effective as any other act, and even more so, as was clearly demonstrated by the present case and the other cases referred to herein before. I also agree with Mr. Small that this finding does not interfere with the right of an accused to remain silent. If, after proper caution, the accused persons nevertheless decide to make false statements, with the intention to shield the actual perpetrator, then they do so at their peril. This is a situation which can in any event only arise where the Gani principle applies. I do however share the reservations expressed by Botha, JA, who wrote the minority judgment in the Jonathan-case, *supra*, concerning what statements made by the accused persons would constitute an act or acts which would give rise to a conviction as an accessory after the fact of a crime. (See p 657 C-H). My reservations are however limited to evidence given by the accused during the trial on which they are arraigned. This would not include statements made by the accused when they were called upon to plead before a magistrate during Sec. 119 proceedings. In my opinion the two situations differ materially. Firstly there is no duty upon them to make any statement at the stage of the Sec. 119 proceedings and they are specifically warned to that effect. Although there is also no duty on them to give evidence at their trial, once a *prima facie* case is made out by the prosecution they may have to testify in order to avoid any prejudicial inference drawn by the Court because of

their silence. Secondly, and after the pleas in terms of Sec. 119, the matter is in the hands of the Prosecutor-General who must now decide whether to prosecute and on what charges. Any statement made by the accused at this stage may still have an influence on the further investigation of the case.

In regard to the first count Mr. Small submitted that the following acts by the appellants would constitute them liable as accessories after the fact to the crime of murder, namely:

First Appellant

(i) He lied to the Magistrate at the Sec. 119 proceedings when he said that the deceased killed himself accidentally;

ii) He lied when he gave evidence at his trial when he repeated the same version; and

iii) He took away the firearm from the scene of the crime.

Second appellant

i) He lied to the police when he told them that the deceased killed himself accidentally;

ii) He lied when he repeated this version during the Sec. 119 proceedings before the Magistrate; and

iii) He lied again when he testified in Court and repeated the same version.

Third appellant

i) He lied when he made a warning statement to the police and told them that the deceased accidentally killed himself;

ii) He lied to the Magistrate when he repeated the same version; and

iii) He lied when he testified during the trial that the deceased accidentally killed himself.

In my opinion there can be no doubt that the three appellants conspired to tell lies in order to shield the actual perpetrator to escape conviction. Only one person could have fired the shot that killed the deceased. The second appellant was the first person who was arrested by the police. He was found at a different location from where the other two appellants were found. When second appellant was arrested he was ready with his story that the deceased shot and killed himself. After the other two appellants were arrested they were all three interrogated by Sgt. Awarab. Awarab testified that all of them repeated the same story of an accidental killing by the deceased himself. This then became the theme, which was repeated again and again. The lies to the police and the magistrate sufficiently constitute acts whereby the

appellants are liable as accessories after the fact to the crime of murder and it is not necessary for me to decide whether the lies told in Court can or cannot also constitute such acts.

In regard to the first appellant the State also relied on the removal of the firearm from the scene of the crime. I have found that it was not proven who in fact was responsible for this removal. It is however so that the first appellant, well knowing that this was the murder weapon, later disposed of it to Ipinge.

For the foregoing reasons I am satisfied that the conviction of the first appellant of murder on Count 1 cannot be sustained and that the conviction must be set aside and be substituted by a conviction of being guilty as an accessory after the fact to the crime of murder. Second and third appellants were convicted of murder but as accessories after the fact. In my opinion the appellants could not be convicted of murder and the convictions should also be altered to those of accessories after the fact to the crime of murder.

On Count 2 the first appellant was convicted of theft of a firearm. I agree with Mr. Small that this conviction is in order. The appellant's explanation why he sold the firearm ranges between allegations that he was shocked to that he wanted to sell it on behalf of the family of the deceased. He however admitted that he did not know any family members of the deceased and also did not know where to find them. The learned Judge-*a*-*quo* correctly rejected this explanation. First appellant was also convicted on Count 3 of an attempt

to defeat or obstruct the course of justice. It was conceded by Mr. Small that this conviction could not stand if the conviction of the appellant on Count 1 was set aside and a conviction of an accessory after the fact to the crime of murder was substituted. This concession was in my opinion correctly made because the same evidence would constitute both crimes. See also the discussion by Snyman, *op. cit.*, p266.

Second appellant was convicted on Count 2 of the theft of the firearm. It was alleged in the charge sheet that the firearm was stolen on the 17th October 1997, that was the date of the incident when the deceased was killed. There was in my opinion no evidence to substantiate this conviction and Mr. Small also conceded this. The second appellant admitted that he was in possession of this firearm and he should be convicted of the alternative charge to Count 2, namely that he contravened sec. 2 of Act No. 7 of 1996, being in unlawful possession of a firearm without the necessary license.

Third appellant was only convicted on Count 1 as an accessory after the fact and this conviction, as amended, is upheld.

The appellants also appealed against the sentences imposed by the learned Judge. Because of his conviction of murder on Count 1 first appellant was sentenced to 20 years imprisonment. On Counts 2 and 3 the appellant was also sentenced to imprisonment but these sentences were ordered to run concurrently with the sentence of 20 years on Count 1. This was clearly done to ameliorate the cumulative effect of the three sentences. As a result of the

setting aside of the conviction on Count 1 and the substitution therefore of a conviction as an accessory after the fact, together with the setting aside of the conviction of an attempt to defeat or obstruct the course of justice on Count 3, it follows that there must be a reconsideration of the sentence of the first appellant.

The second appellant was sentenced to 10 years imprisonment on his conviction as an accessory after the fact on Count 1 and 18 months imprisonment on Count 2. The sentence on Count 2 was ordered to run concurrently with the sentence on Count 1. The third appellant received a sentence of 10 years imprisonment on his conviction as an accessory after the fact to the crime of murder on Count 1.

All the appellants also have previous convictions. First appellant has a previous conviction for theft and one for assault with intent to do grievous bodily harm. He was sentenced for these crimes in October 1993 and August 1995 respectively, and both sentences were suspended on certain conditions. Second appellant has a previous conviction for assault with intent to do grievous bodily harm and a previous conviction for attempted theft as well as another conviction for theft. He was sentenced in April 1995, June 1996 and April 1998 respectively. In the first two instances a fine of N$600 was imposed, whereas in the last instance he was sentenced to 12 months imprisonment. It is not clear when the second theft was committed and I shall not take this conviction into account. The third appellant has one previous conviction for housebreaking with the intent to commit a crime

unknown to the prosecutor and was sentenced to 9 months imprisonment in September 1993. The Court-*a-quo*, correctly in my view, regarded the third appellant as a first offender in regard to his conviction as an accessory after the fact. On the charge sheet the respective ages of the appellants are given as 20 years, 18 years and 20 years respectively.

Sec. 257 of the Act provides that punishment for an accessory after the fact shall be at the discretion of the Court provided that such punishment shall not exceed the punishment, which may be imposed in respect of the offence with reference to which the accused is convicted as an accessory.

Although punishment must be determined on the facts of each particular case and the personal circumstances of each accused, I have found it useful to look at punishment imposed in other cases. These ranged between an order for correctional supervision and 20 years imprisonment. In the latter instance a sentence of 20 years imprisonment was not disturbed on appeal because the two appellants had two previous convictions each for murder. In the Munonjo-case, *supra*, two people were killed and the appellants were sentenced to 8 years imprisonment on each conviction as an accessory after the fact. The Court however ordered that the sentences should run concurrently. In the recent case of Phallo the accused were sentenced to various terms of imprisonment by the trial Court. On appeal to the Full Bench the sentences were reduced to 8 years. When the matter came on appeal before the Supreme Court of Appeal that Court declined to disturb the sentences. The Court however took an extremely serious view of the conduct

of the police officers that put their loyalties to colleagues above their duty as police officers. (See S v Jonathan*, supra*; S v Munonjo en ‘n Ander, *supra*; S v Nkosi and Another, 1991 (2) SACR 194(A); S v Kleynhans, 1994 (1) SACR 195 (O); S v Noordien en Andere, 1998 (2) SACR 510 (NKA); S v Phallo and Others, *supra*, and S v Vilikazi and Others, 2000 (1) SACR 140 (WLD)).

The offence of being an accessory after the fact to the crime of murder is no doubt serious. It manifests itself in many ways and in this instance the acts committed by the appellants consisted mainly in the telling of lies through which they succeeded in shielding the actual perpetrator from a conviction on the charge of murder. No authority is needed to support the principle that sentencing is pre-eminently a matter for the discretion of the trial court and that a Court of Appeal would only interfere where the trial court had misdirected itself or where it can be said that the sentence is such that a reasonable court would not have imposed it.

However, in my opinion there is merit in the submission of Ms. Hamutenya that the Court-*a-quo* over emphasized the interest of the public against the personal circumstances of the appellants and the other principles applicable to sentencing. In a short judgment of which the reasons for sentence did not take up more than one and three-quarters folio pages, the learned Judge-*a-quo* no less than five times referred to the interest of the community, the public outcry against lenient sentences and the Court’s duty to protect the public. There is no doubt that the interest of the community in the sentencing process is an important one, one which Courts have a duty to consider when they have

to determine an appropriate sentence in a particular case. Depending on the circumstances of each case, the interests of the community and their protection may be an overriding factor which does not only determine the type of punishment but also the duration thereof. It does however not follow from this that the other principles applicable to sentencing should not play a role in the determining of what an appropriate sentence would be. All the appellants are relatively young persons and although the Court correctly regarded third appellant as a first offender for purposes of sentencing he effectively received the same sentence of 10 years imprisonment, which was also meted out to the second appellant with a previous conviction for assault with intent to commit grievous bodily harm. In so far as it may be permissible to also look at more or less similar cases, the sentences of 10 years imprisonment, in the present instance and under the particular circumstances, also seem to be much harsher.

For the foregoing reasons I am of the opinion that the learned Judge-*a-quo* committed a misdirection by over-emphasizing the interests of the community at the expense of the other principles applicable to sentencing. This Court is therefore competent to interfere with the sentences imposed on this Count. In my opinion a sentence of 8 years imprisonment in regard to the first and second appellants, and a sentence of 7 years imprisonment in regard to the third appellant will achieve all the objects that the learned Judge-*a-quo* had in mind.

On count 2 the first appellant was sentenced to imprisonment of 18 months

which was ordered to run concurrently with his sentence of 20 years which latter sentence must now be set aside. Bearing in mind the relevant previous conviction this sentence of 18 months imprisonment is in my opinion in order.

The conviction of the second appellant of theft must be set aside. He stands now convicted of the alternative charge to count 2, i.e. the unlawful possession of a firearm. This in itself is a serious offence and one where imprisonment of a first offender is often justified. Bearing in mind the circumstances of this case I am satisfied that a sentence of six months imprisonment would be appropriate. I am further of the opinion that there is no good reason why this Court should order that the additional sentences should run concurrently with those imposed on count 1 as the cumulative effect of the sentences imposed no longer require such an order and first and second appellants will have to serve these sentences on count 2 and the alternative charge thereto.

In the result the following orders are made.

1. AD THE APPEALS AGAINST CONVICTION

FIRST APPELLANT

COUNT 1

The appeal against his conviction of Murder is successful and the conviction and sentence are set aside and the following conviction is substituted therefore, namely:

The first appellant is convicted of the offence of being an accessory after

the fact to the crime of murder.

COUNT 2

The appeal against his conviction of theft is dismissed.

COUNT 3

The appeal succeeds and the conviction of an attempt to defeat or obstruct the course of justice, and the sentence imposed, are set aside.

SECOND APPELLANT

COUNT 1

The appeal against his conviction is dismissed but the wording of the conviction is amended to read as follows:

> The appellant is guilty of the offence of an accessory after the fact to the crime of murder.

COUNT 2

The appeal against his conviction of theft succeeds and such conviction and sentence are set aside. The appellant is however convicted of the alternative charge namely being in unlawful possession of a firearm in contravention of the provisions of Sec 2 of Act 7 of 1996.

THIRD APPELLANT

COUNT 1

The appeal against his conviction is dismissed but the wording thereof is

amended to read as follows:

> The appellant is convicted of the offence of being an accessory after the fact to the crime of murder.

2. AD THE APPEALS AGAINST SENTENCE

FIRST APPELLANT

COUNT 1

8 (eight) years imprisonment.

COUNT 2

The appellant's appeal against his sentence of 18 (eighteen) months imprisonment is dismissed and it is further ordered that this sentence be served consecutively.

SECOND APPELLANT

COUNT 1

The appeal against his sentence of 10 (ten) years imprisonment succeeds and the following sentence is substituted therefore, namely:

> 8 (eight) years imprisonment.

ALTERNATIVE COUNT TO COUNT 2

6 (six) months imprisonment and it is further ordered that this sentence be served consecutively.

THIRD APPELLANT

COUNT 1

The appeal against his sentence of 10 (ten) years imprisonment succeeds and such sentence is set aside and the following sentence is substituted therefore, namely:

7 (seven) years imprisonment.

(signed) STRYDOM, CJ

I agree,

(signed) O'LINN, AJA

I agree,

(signed) CHOMBA AJA

COUNSEL ON BEHALF OF THE APPELLANTS: ADV. L. Hamutenya (*Pro-Amico*)

COUNSEL ON BEHALF OF THE RESPONDENT: ADV. D.F. Small (Prosecutor-General)