CASE NO: SA 3/2001

IN THE SUPREME COURT OF NAMIBIA

In the Appeal of :

TOBIAS NANDAGO

APPELLANT

And

THE STATE

RESPONDENT

CORAM: Strydom, C.J.; O'Linn, A.J.A. *et* Chomba, A.J.A.

HEARD ON : 02/10/2001

DELIVERED ON : 06/03/2002

APPEAL JUDGMENT

CHOMBA, A.J.A.: On the 8th of May last year the appellant appeared before the court *a quo* and was charged with four other persons on four counts, viz, one of murder and three of robbery with aggravated

circumstances as defined in section one of the Criminal Procedure Act, Act No. 51 of 1977 (hereinafter C.P.A.). On the murder count it was charged that on 19 November, 1998 at or near Katutura in the District of Windhoek, the five accused persons unlawfully and intentionally killed one Gotthardt Manyandero (Manyandero), a male person. On one of the robbery counts, namely the second count, it was elaborated that on the same date and at the same venue as that pertaining to the murder charge, the same accused persons did unlawfully and with the intent of forcing them into submission, assault/threaten to assault Joshua Hamufungu, (Hamufungu), Mathew Iimene, Stephanus Paulus and Manyandero by pointing them with fire arms and shooting Manyendero and unlawfully and with intent to steal took from them N$2273,81 and 7,65CZ Pistol with ammunition, the property of or in the lawful possession of Hamufungu, Mathew Iimene, Stephanus Paulus and Manyandero and/or Jakob Jakobus Deelie; and that aggravating circumstances as defined in section one of the C.P.A. were present in that the accused and/or an accomplice were before, after or during the commission of the crime in possession of dangerous weapons, namely Pistols and threatened to inflict and inflicted grievous bodily harm.

It is unnecessary to make elaborate references to the remaining two counts of aggravated robbery because all the accused persons were

acquitted on those counts. On the second count all but the appellant herein were acquitted while the appellant was convicted as charged except that the trial judge determined that the evidence fell short of establishing how much money was stolen. The Judge consequently sentenced the appellant to nine years imprisonment on the murder charge and seven years imprisonment on the other, ordering both sentences to run concurrently. The present appeal arises from those convictions and sentences.

In recapitulating the facts of this case I remind myself that, shorn of the involvement of the appellant's erstwhile co-accused and of the two counts on which all the accused were acquitted, the facts now lie in short compass. In setting these out it is necessary first of all to outline those facts which constitute common cause. They are that earlier in the day on the 18th of November, 1998 the appellant borrowed a white Ford Saphire saloon car, registration number N15106W, belonging to one Lazarus Petrus who was the eighth prosecution witness at the trial. The appellant required it to enable him purchase liquor and deliver it to his shebeen in Katutura Township. That mission having been accomplished, much later in the evening of that day the appellant drove from the shebeen in the same borrowed car, meaning to give a lift to the second accused, Erastus Kinge, who lived in Soweto. There were three other passengers in the car one of whom, according to his

own extra judicial statement made pursuant to section 115 of the C.P.A., was the fourth accused, Jonas Shitulepo.

The appellant and his passengers eventually drove to Hakahana Service Station where they stopped to refuel. The petrol attendant there, namely Hamufungu, began to serve the customers, but shortly thereafter the front seat passenger came out, took over the pump and poured petrol into the car tank. In due course, after payment for the petrol the occupants of the car had resumed their seats, one passenger disembarked from the car and headed for the room in which the petrol attendants usually take their rest (attendants' room). Two gunshots were then heard in the attendants' room and in the aftermath of the confusion that followed, Manyandero, who was a security guard at the filling station, was found to have sustained two fatal injuries in the chest. A substantial amount of money was spirited away by the perpetrators of the robbery and a pistol, which Manyandero had in the course of duty that night was also stolen.

Other undisputed facts are the following:

Ballistics expert, Superintendent Lucas W. Visser, who was prosecution witness number one, of the South African Police in the Ballistics Section of the Forensic Science Laboratory, testified that on the 19th of July, 1999 he received from Katutura Police, Namibia, the following:

1. 1 functionally sound .38 Smith Wesson Revolver (W &S Revolver) Serial No. 12701/737646
2. 2 X .38 S&W calibre spent cartridges
3. 1 x 9mm spent bullet
4. 1 x 9mm spent bullet

Superintendent Visser carried out a microscopic examination of the foregoing items with the following results:

1. 2 x 38 S&W spent cartridges were fired from the .38 S &W Revolver aforementioned
2. 1 x 9mm spent bullet was fired from the same .38 S&W Revolver
3. The second 9mm spent bullet was possibly fired from the same revolver but owing to insufficient firing marks it was difficult to make a definite finding
4. If both bullets were fired from the same gun, then they were fired from a wrong gun as such bullets ought properly to be fired from a chambered 9mm parabellum caliber gun. However the bullets can, albeit wrongly, be fired from a .38 S&W Revolver.

The .38 S&W Revolver, according to the police evidence, was recovered from the appellant after his arrest.

Dr. Nadine Louise Agnew, the second prosecution witness, a senior medical officer at the Ministry of Health in the Namibian Government Service, conducted a postmortem examination on the body of Manyandero. The body was identified to her by Constable Mbandeka of the Namibian Police. The Doctor's findings were:

1. Palor of oral mucosa, lungs and brain
2. Left ventricle of the heart was lacerated
3. There was left haemothorax, that is 100 ml of blood in the left side of the chest
4. Rib fractures both interiorly and posteriorly
5. Lacerated left kidney
6. Lacerated spleen
7. Lacerated left hemidiaphram
8. Lacerated pericardium with 150 ml of blood having accumulated therein.

The Doctor's examination also revealed that the deceased sustained two gun shot entrance wounds in the chest and these exited from the back. Consequently there was no bullet embedded in the deceased's

body. She opined that death was caused by the two gun shot wounds in the chest.

It was equally undisputed that the police recovered two spent bullets from the attendants' room at Hakahana Service Station in which Manyandero was killed. Sergeant Felix Diunisius of Namibian Police Serious Crime Section, Windhoek, was the investigations officer. He told of how he went to Hakahana Service Station after receiving a report. He there found the dead body of Manyandero. From the information given to him by Hamufungu, the Sergeant ascertained that the perpetrators of the murder and robbery had used a Ford Saphire saloon car, registration No. N15106W. In the ensuing investigations he apprehended the appellant and recovered from him the S&W Revolver, which was subsequently sent to the Ballistics expert as earlier mentioned. He also traced the owner of the Ford Saphire N15106W who turned out to be Lazarus Petrus. It was upon information from the last mentioned person that Sergeant Diunisius sought and later apprehended the appellant. Upon his apprehension the appellant denied being engaged in the two offences under review. However the S&W revolver was found in his possession and he admitted that it was his and that it was licensed in his name. Sergeant Diunisius extracted from the revolver two spent cartridges, which were*, inter alia*, the subject of Superintendent Visser's evidence.

The foregoing are the incontrovertible facts of the present appeal.

The main stay of the appellant's case, given on oath, was that he was not party to the commission of the two offences. He conceded that the murder weapon, namely the S&W revolver was his. He however contended that one of his passengers on the material occasion, namely the fifth accused at the trial was the actual perpetrator of the murder. The appellant's version was further that the fifth accused, without the appellant's authority, took the revolver from the glove compartment of the Ford Sapphire and went with it into the attendants' room from where gun shots were shortly thereafter heard. Presently he saw the fifth accused returning to the car and he had in his hands two-hand guns. The appellant immediately concluded that the gun used to kill was his. He asked the fifth accused where he had taken the gun from without permission but the latter never answered that question. In short, the appellant's position is that he disassociated himself from the fifth accused's alleged criminal conduct.

The trial judge disbelieved the appellant and convicted him of both the murder and robbery with aggravating circumstances. He founded the convictions on the principle of common purpose.

In arguing the appeal on behalf of the appellant Ms. Hamutenya, as expected, made common purpose the main pillar of appellant's case. Her argument is encapsulated in the following submission contained in the Heads of Arguments:

> "The simple problem in this case is that there was no sufficient evidence in the court *a quo* to prove that the accused persons committed the murder by common purpose and the principal offender has never been identified beyond reasonable doubt."

However, it is necessary to refer to two other paragraphs in the appellant's heads of argument as these raise other collateral issues, *viz*:

> "The main issue in this appeal is whether the evidence before the court a quo proved beyond reasonable doubt all the elements of common purpose against the appellant, if not then the appeal must succeed. The issue is also whether absence of a finding as to who committed the murder a conviction on common purpose without a principal offender will follow.
>
> It is further submitted that where several persons have been charged with murder and it is certain that murder has been

committed by one or more of them, but a reasonable doubt exists, then they must be all acquitted."

In support of the tail-end of the foregoing submissions Ms. Hamutenya cited the cases of R v GANI and others 1957 (2) S.A. 212(A); S v JONATHAN and ANDERE 1987(1) S.A.633; and S v KHOZA 1982(3) S.A. 1019.

As I perceive them, the supposedly two collateral issues are in reality one issue only. This is whether it is competent to convict any one of several persons jointly charged with murder, but where it is unclear as to which of them actually delivered the coup de grace.

I have perused GANI and KHOZA, supra, and my understanding of them is the following. In GANI the trial judge had held in effect that the murder was committed by any one of three accused persons or a combination of any two of them. However, he found that the evidence fell short of identifying which one or which two of the accused were the principals. For that reason he felt inhibited from convicting, and did not convict, any of them of murder. He then considered the crown's alternative submission that if a conviction of murder was not possible because of lack of evidence of the identity (or identities) of the principal (s) then all three should be convicted of being accessories

after the fact to murder. The judge rejected that submission. His rationale was that since one or two of the three must have actually committed the murder that one or those two could not be accessories after the fact to the murder he or they committed.

It still being undetermined as to the principal offender, and as convicting all the three would mean holding that the lone principal offender or any two of them who were the principal offenders was or were accessory or accessories after the fact to their own act of murder, a position he found untenable, he felt that the only way out, as a matter of law, was to acquit all of them. He did exactly that.

The Crown appealed on a reserved question, namely -

> "Whether, the (trial) court having found as a fact:
>
> (a) That one or any combination of two of the three accused persons had murdered the deceased; and
> (b) That the Crown had not proved that the three accused acted in concert; and
> (c) That it had been proved during the trial that after the commission of the murder all three accused participated in the disposal of the deceased's body, the trial judge was wrong in law in coming to the

> conclusion that none of the three accused could be convicted of being an accessory or accessories after the fact to the crime of murder.

The appellate court consisting of Fagan, C.J. and four others, unanimously set aside the acquittal on the alternative charge of accessory after the fact to murder. It instead ordered the three to be re-arraigned on that alternative charge.

As to KHOZA, there the second accused, who never appealed, was convicted of murder. The first accused, KHOZA, appealed against his conviction of murder with extenuating circumstances. The appellate court, also composed of five judges, held by a majority of three to two that in as much as the only incontrovertible evidence against the appellant was that he struck the deceased with a cane stick, but it had not been established conclusively that such striking had causally contributed to the death of the deceased, the murder conviction against him was unsustainable. The court quashed that conviction and substituted it with one of common assault.

With due respect, therefore, GANI and KHOZA were wrongly cited in support of the submission that where several persons are charged with murder and it is proved that the murder was actually committed by

one or more of such persons, but the identity (or identities) of such person (or persons) is unclear on the evidence, then they must all be acquitted.

Despite GANI and KHOZA being wrongly cited for the proposition put forward by Ms. Hamutenya, the proposition itself would appear, in a proper case, to be tenable. However, it is my considered opinion that that proposition is inapplicable to the case wherewith the present appeal is concerned. This appeal stands or falls on the principle of common purpose.

The critical issue in this appeal is whether the appellant was a party to the murder and aggravated robbery, acting in concert with other persons. That issue did not escape the attention of the learned trial judge. He correctly analyzed and considered the essentials, which constitute common purpose. He cited the case of S. V. Mgedezi and Others 1989(1) S.A.687, which itemizes those essentials in a case where there is lack of evidence of an express agreement by would-be criminals to pursue such a purpose. Summarized, these essentials are:

1. The presence of the accused at the locus in quo;
2. Awareness on accused's part of a plan to commit the subject offence;

3. The accused's intent to act in tandem with his colleagues in the furtherance of the common purpose;
4. Performance by the accused of some act of association with the conduct of his co-accused;
5. Proof of *mens rea* on his part to commit the crime charged or proof that he foresaw the possibility of the targeted offence being committed and performing an act of association with recklessness as to whether or not the targeted result of the planned offence was to occur.

The learned trial judge determined, upon examination of the entirety of the evidence before him, that each and every one of the foregoing essentials was proved. The presence of the appellant at Hakahana Service Station was common cause. As to the second, third and fourth essentials the judge determined as hereunder:

> ".....even if he is to be taken on his own turf, he allowed his firearm to be used. His attempt to explain how the fifth accused supposedly took his firearm from the glove box without being seen by him when he (the first accused) was also in the vehicle was muddled and in fact bordered on absurdity. A conclusion is inescapable that he knew that his firearm was going to be used to induce people in the submission and if necessary to kill and

that he intended to achieve one of these objectives or at any rate was reckless as to whether any of these objectives were to be achieved.

Apart from allowing his firearm to be used another instance of association is the transportation of the robber or robbers to and from the scene."

I fully endorse the foregoing observations by the learned trial judge.

The judge also stated that the appellant generally fared badly as a witness both in examination-in-chief and especially under cross-examination. He amplified that assessment by referring to pertinent parts of the evidence. However I feel that there are other equally important self-incriminating aspects of the appellant's evidence to which the judge did not advert his mind.

Quite apart from being less than candid regarding the time when the appellant said he placed his revolver in the glove compartment, his evidence was in part to the following effect:

The fifth accused left the car at a time when the appellant and his colleagues in the car were set to depart from Hakahana Service

Station. The appellant patiently, supposedly, let the fifth accused go to see one Stephanus Paulus at the service station. While the fifth accused was in the attendants' room the appellant heard two gunshots fired. Not long thereafter he saw the fifth accused returning to the car holding two handguns. He immediately concluded that his revolver was used in the shooting he had heard.

The question arising from this is, if the fifth accused emerged from the attendants' room while in possession of two guns, how is it that the appellant was so sure that it was his gun and not the other that was used? This question is important because on his own evidence the appellant did not see the fifth accused take the appellant's gun from the glove compartment, nor did he see the fifth accused carrying any gun as he left the car supposedly to see Stephanus Paulus in the attendants' room.

Before venturing to provide an answer to that question, it is necessary to examine attendant evidential circumstances. The appellant testified that the fifth accused was never a friend of his; but that that accused was a regular patron at the appellant's shebeen; that the fifth accused just happened to have had a ride in the appellant's car at the time when the appellant was taking home the second accused, who was a friend and workmate of the appellant. Yet it was the fifth accused who

sat with the appellant in the front seat of the car. Normally a driver instinctively chooses to sit with a friend, an acquaintance or a family member in the front seat while others less known to him sit behind. This is so because one is freer with a front seat passenger with whom one is associated in the manner just mentioned and can therefore chat with him/her as one drives. Additionally we see this chancy rider, the fifth accused, being allowed by the driver to delay the departure of the car solely so that the fifth accused could see a friend in the attendants' room. It is not stated whether it was critically necessary for the fifth accused to see that friend. It was quite late in the night when this happened. In fact it was after two o'clock in the morning when the urge to go and sleep would have made it imperative that the appellant should drop off his passengers as quickly as possible so that he himself could go home and sleep. The question may also be asked whether it is usual that a person with whom one is not connected can steal a gun from a good Samaritan who is giving him a rare lift home, go out and commit a ghastly murder with it virtually in the presence of the gun's owner, then coolly return to the car from which he stole the gun and brush aside with impunity a query from the gun's owner as to where he took the gun from. Even more surprising is that that owner, in the full knowledge that his mischievous casual passenger has committed a serious offence using his gun without permission, helps the murderer to escape from the scene of the crime and from justice.

These are a concatenation of rare and odd coincidences, which are difficult to accept as representing the truth. They do not suggest a non-existence of acquaintanceship between the appellant and the fifth accused. To the contrary they strongly and circumstantially prove existence of acquaintanceship. And on that particular occasion they suggest that a tacit collaboration existed in the planning and commission of the robbery. This can be inferred from the fact that the appellant knew that the actual perpetrator went to the attendants' room armed with the S&W revolver, which was no doubt loaded. The appellant therefore must have had knowledge that that gun would probably be fired in the event that the intended victims of the robbery or any one of them, put up resistance to the intended robbery. That explains why the appellant never disassociated himself from the perpetrator's deed, but instead gave solace and help to the murderer to make good his escape from justice.

Regarding the fifth ingredient of common purpose, i.e. mens rea, this mental element is not always capable of proof through direct evidence. It is usually inferred from proved facts relating to a person's conduct. In the present case, when it is established that the appellant travelled with the perpetrator of the subject offences to Hakahana Service Station; that he allowed that perpetrator to assail the occupants of the

attendants' room while armed with the appellant's own revolver; that the appellant was cock sure, upon hearing gun shots coming from the attendants' room, that his revolver was the one used to fire those shots; that the appellant saw the perpetrator return to the appellant's car and nonetheless let the latter enter the car with the loot which included a second handgun; and that the appellant sped off thereby, enabling the perpetrator to escape from justice, it becomes irresistible to hold, and I so hold, that the appellant had the necessary mens rea to commit the subject offences.

From all the foregoing inferences and facts, it is irresistible to additionally hold, and I so hold, that the appellant did associate with the actual perpetrator of the twin felonies both immediately before and immediately after committing the said offences.

What distinguishes this case from those in which one or more accused persons escape conviction on account of the prosecution's failure to prove the role the one or more of such larger groups played in the commission of a subject offence is this. Here the appellant's role in this robbery and consequential murder was circumstantially established beyond peradventure. He drove with the murderer as his passenger to Hakahana Service Station, allowed the murderer access to the appellant's S&W revolver and the murderer took it with him to

the attendants' room. The murderer initially used the revolver to, and did, score at least one of the occupants of the attendants' room, and later fired it at Manyandero, fatally wounding him. All this was done to the knowledge and with the connivance, as well as in the presence, of the appellant. The murderer then returned to the appellants' waiting car with the loot and an additional handgun. The murderer having returned to and entered the car, the appellant drove off and thus helped that principal offender to escape from justice. These circumstances clearly portray the appellant as an active participant in the crimes charged.

Unfortunately we have in this case an incongruous situation where the appellant is glaringly guilty of charge, but the man he identified as his accomplice in the crime has had to be acquitted. Because the State has not appealed against the fifth accused's acquittal, this appellate court cannot return any verdict adverse to him.

Since as already indicated in the preceding paragraph the Appellant is unquestionably guilty, having been convicted on impulsively compelling evidence, I find no merit in his appeal against conviction on both counts.

Coming to the sentence, Ms. Hamutenya conceded that she knew of no case in which a person convicted of murder, which is committed in the prosecution of a robbery got only nine years imprisonment. She however, submitted that a nine-year prison sentence deprives the inmate concerned of a chance to earn a living for himself and his family. Suffice it to state that in the Heads of Arguments regarding sentence, the Prosecutor General, Mr. January, stressed the aggravating circumstances in which the subject offences were committed. He argued that in the light of those circumstances, the sentence imposed by the trial judge in relation to the murder was inadequate. Otherwise at the hearing of the appeal he did not find it necessary to address us on sentence.

This was a particularly heinous homicide. The victim, Manyandero, was sleeping and although he seems to have woken up just before he was fatally shot, all for the sake of money, which the robbers wanted to steal, he had absolutely no chance of either defending himself or retreating to avoid being shot. The gun-wielding, murderous intruder blocked the only exit he could have used.

These circumstances call for a much stiffer punishment than the one, which was imposed by the trial judge in respect of the murder conviction. Moreover, the appellant was at the material time a soldier

in the defence force of Namibia. His clear duty was to ensure the safety and security of Namibians. To the contrary he engaged in a homicidal venture purely to satisfy his avarice for easy money. In my view he deserves a condign prison sentence which should also be deterrent. Moreover society needs protection from criminals like the appellant. To ensure that, the appellant needs to be incarcerated for a much longer period.

In the event I would set aside the sentence of nine years imprisonment and in replacement thereof impose one of twenty years imprisonment. This sentence is to run concurrently with the sentence imposed in respect of the robbery conviction.

The appeal is consequently dismissed in its entirety.

In concluding this judgment I must refer to the fact that in this appeal there was a preliminary application for condonation. This is because Ms. Hamutenya did not file her Heads of Arguments within the time stipulated by the rules of the Court. However the Prosecutor General quite properly intimated at the outset that he was not opposing the application. Consequently the court granted the application and therefore condonation was not an issue in this case.

(signed) CHOMBA, A.J.A.

I agree.

(signed) STRYDOM, C.J.

I agree

(signed) O’LINN, A.J.A.

STRYDOM C.J.:

I have read the judgment of my brother Chomba and agree therewith. It is perhaps necessary to explain shortly how the matter came before us on appeal. The appellant firstly applied to the trial Judge for leave to appeal against his conviction and sentence. This application was unsuccessful. The appellant thereupon filed a petition in terms of Act 51 of 1977 in which he repeated his previous application. This petition was partly successful in that the appellant was granted leave to appeal against his convictions only. However, after the whole record was studied and after consultation with the other Judges of the Supreme Court, a notice was sent to the appellant and the State, through the Registrar of this Court, in which he stated as follows:

"I have been requested to inform you that the Court would like to hear argument why sentence of the appellant should not be increased in the event that the appeal is unsuccessful."

Consequent upon this notice both Counsel, during the appeal proceedings, addressed us fully in regard to the sentence imposed by the Court *a quo.*

In the result the order proposed by my learned brother is set out as follows:

1. The appeal against the convictions for murder (Count 1) and robbery with aggravating circumstances (Count 2) is dismissed;
2. The sentence of 9 (nine) years imprisonment imposed for the conviction for murder (Count 1) is set aside and a sentence of 20 (twenty) years is substituted therefore;
3. The sentence of 7 (seven) years imposed for the conviction of robbery with aggravating circumstances (Count 2) is ordered to run concurrently with the sentence of 20 (twenty) years imprisonment imposed on Count 1.

(signed) STRYDOM, C.J.

I agree.

(signed) O'LINN, A.J.A.

I agree.

(signed) CHOMBA, A.J.A.

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