

Guntramalbrecht

IN THE HIGH COURT OF SWAZILAND

REX

v

GUNTRAM ALBRECHT

CRI. CASE NO. 147/98

CORAM S.W. SAPIRE

FOR PLAINTIFF MR. L. NGARUA

FOR DEFENCE Mr S. NKOSE

DR. FINE JUDGMENT

(7/12/98)

The accused is charged with having murdered Horst Gansdahl. The prosecution alleges that on the 5th September 1998 and at or near Swazi African Candles the accused person did wrongfully and intentionally kill HORST GANSDAHL and thereby commit the crime of murder. To this charge the accused pleaded not guilty. He was represented by Attorney Nkosi & Co. and Dr. Fine conducted the defence on instructions of that firm.

At the outset Dr. Fine indicated that it would be the defence contention that the Deceased died by suicide. The question posed therefore for the Court was, did the deceased die by his own hand (suicide) or was the fatal shot fired by someone else, (homicide)?

The identity of the deceased as the person named in the indictment was never in issue. So too was the cause of death not a matter which has to be determined by the Court.

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The deceased like the accused was an Austrian. The accused is a consul representing the Austrian Government in Swaziland and is connected to the Austrian Embassy in Pretoria. The deceased was about sixty years of age, unemployed and without visible means. He had at the time of his death been sheltering for more than nine months in the Accused's premises at Hhelehhele, which serve as the consular offices, a factory for the business of African Candles conducted by the accused, and the accused's own place of residence.

The exact status of the deceased in the accused's establishment was not explained. The accused was emphatic that he was not a guest, notwithstanding that deceased had enjoyed free board and lodging afforded him by the accused since January this year. The accused did say that he was endeavouring to arrange for a pension from the Austrian Government for the deceased, and had intended giving this some attention on the visit to Austria which he was about to undertake on the very day that the deceased died. I was not previously aware that it is the function, duty or custom of a consul to succour and support derelict countrymen for unlimited periods.

The deceased had previously lived in Swaziland and had received attention at a local institute where psychological treatment is given. The defence led the evidence of a doctor N.D. Ndlangamandla of the National Psychiatric Centre Manzini to indicate suicidal tendencies in the deceased, which could have accounted for his death. These suicidal tendencies so he said were stemmed from his state of depression. Dr. Ndlangamandla had himself never examined, treated or even known the deceased. Despite this he was content to express his opinions based on the contents of a hospital file which at least, on the face of it did relate to the deceased. In this file a number of people had made entries and notes from time to time during the period from 1981 to 1986. The notes and entries related to symptoms observed in the deceased, and treatment given to him at that time. The only identifiable author of some entries is Frances Reinholdt whose signature Dr. Ndlangamandla claimed to recognise. She was a well-known psychiatrist in Swaziland at that time. The opinions so expressed based on observations of others, which are not proved in evidence, are not admissible. Even if admissible in evidence not much weight can be given thereto is very slight. This is especially so in this case where the observations were made

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years before the events with which we are now concerned. I am aware that the condition which the doctor diagnosed is said to be chronic and incurable. There is no evidence to show that at the time of his death the deceased harboured suicidal inclinations or tendencies or that he suffered from any state of depression.

The accused himself has testified that during the period that the deceased was with him he observed nothing which would indicate suicidal inclinations or tendencies. There appeared to be nothing about the deceased's behaviour which suggested that he was in need of medical attention.

I cannot as a fact find that at the time of his death the deceased had a predilection for suicide. This of course, in itself does not rule out self-destruction by the deceased.

The sleeping quarters assigned to the deceased were not in one of the bedrooms of the residential section of the house. He slept on a mattress on the floor of a room furnished as an office in the factory section and it was on this mattress and in this office that he met his end. The court inspected the premises at Hhelehhele to find that this office is separated by passages and stairs from the residential part of the house where the accused himself lived.

The deceased did not as a rule come into the accused's private quarters, and it would have been unusual for him to have done so. I make this observation as this is what the accused said and it relates particularly to the question of how the deceased could have come into possession of the accused's firearm which was the weapon which discharged the bullet which killed him.

It is true that the deceased did use the kitchen both for cooking his own meals and on occasions meals for both himself and the accused. He also used the sitting room where he spent evenings with the accused and it is suggested that on such occasions he might have seen that the firearm was stored where the police later found it. That is in a cupboard in the fixture in the lounge.

The deceased died as a result of a bullet, which passed through his skull. The entry wound was in the right temporal area. The bullet's track passed through and on its passage destroyed a large portion of the deceased's brain. The exit wound was a 20mm postero-lateral laceration of the left parietal scalp. The explosive

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pressures created in the cranium not only blew away part of the skull but distributed gore, brain, bone,

and hair over several meters. Debris and marks of human tissue were found on the walls and furniture some distance away from where the body lay. The direction of the shot was right to left and slightly upward and backward.

The crucial issue is whether the injury was self inflicted or caused by someone other than the deceased. I pause at this moment to deal with an aspect of the evidence which I myself introduced. I noticed in the photographs taken of the deceased while he lay as found, that he was wearing his wrist watch on the wrist normally used by left-handed persons. If the deceased were in fact left-handed the suicide would have been impossible from the position which he was proved to have died when the fatal shot was fired. Although there is evidence that the accused was indeed left-handed this is denied by the accused and I am not in a position to draw any real inference from the position of the wrist watch on the accused body

Both the prosecution and the defence led the evidence of experts, who gave opinions on relevant scientific aspects of ballistics and of what is known as forensic medicine. Photographs were produced as exhibits in evidence, which graphically portray the gory details, of the scene, which met the eyes of the investigating police officers who answered the accused's call. Other photographic exhibits are close-ups of the deceased's shattered head and blood-covered body. A vivid, (if such a word may be used in the circumstances), picture has been presented by the photographic material.

The experts were ad idem that the shot, which killed the deceased, was fired at extremely close range. The muzzle of the firearm was actually in contact with the scalp but it does not really matter whether the shot was fired from that position or whether the muzzle was a few millimetres away. What is of importance is that the deceased could physically have fired the shot. A shot fired outside arms length, (in the absence of an especially devised mechanism for firing a shot), could not be suicidal. On the other hand a shot fired from close range could, equally be homicidal.

The site of the entrance wound is one, which is recognized as one of election in suicide. That means that it is one of the sites in the body where suicides are inclined to aim when firing a shot at themselves. The testimony of the experts was in

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accord, that there are sites, such as in this case the temples, which are preferred as a target of a suicidal shot from a firearm. It does not follow that a shot through the temple or any other preferred site is necessarily suicidal.

The experts seem to agree that the deceased was when shot, lying on his side on the mattress, with his head on the pillow. (Much as he is depicted in the photographs). Observed physical features including blood splatter, lead them to this conclusion which I accept.

There is one aspect of the evidence which was urged to be positive indication that the death was caused by suicide. This was that there was considerable blood still in the working of the revolver even when later examined by the expert. From this he deduced that the firearm must have laid on a pool of blood or in contact with blood for some period for the blood to seep into and cover the workings. This may be so but on the other hand it does not indicate how the revolver came to be lying in the pool of blood in the first instance. Did it fall from the hand of the deceased or did it fall from the hand of the other person who may have fired the shot.

The expert evidence given by witnesses called by both the prosecution and the Defence was given in a professional manner. Good preparation presentation and illustration was a feature of this testimony, which was also marked by a commendable absence of partisan theorising. All the witnesses deserve and receive the appreciation of the court.

The crucial issue however cannot be decided on this evidence, which is equivocal as to whether the

deceased's death was suicidal or homicidal. The determination of the crucial question has been found in the actions, behaviour and evidence of the accused himself.

The accused's account of the events of the day in question and the circumstances of the death of the deceased are as follows:-

The accused had planned to travel to Austria and had long before the incident booked to leave for Vienna on a flight, which left Johannesburg International Airport at seven o'clock on the evening of the Saturday in question. He rose early, had

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breakfast and at that time saw the deceased to whom he spoke. He then left for Manzini, some twenty minutes drive from the property at Hhelehele in order to do some business including, so I understand, to deposit some cheques. Before leaving he also saw and spoke to Bennett a servant who works for him. After transacting what ever business he had in Manzini he returned to the house where he again saw Bennett from whom he enquired as to the whereabouts of the deceased. Bennett was unable to tell him so he went into the house to look for the deceased. He looked into the room in which the deceased slept only to find the deceased lying on his mattress on the floor in a pool of blood.

He did not at that stage enter the room, so he says, or examine the body but came to the immediate conclusion that the deceased was dead.

It is not clear whether the accused called to Bennett, but Bennett who was a prosecution witness said that he heard the accused talking loudly in a foreign language. Bennett says he went to see what happened and he says he met accused in the corridor leading to the room. Bennett asked the accused what happened and according to Bennett the accused said "He is dead" but Bennett thought the Accused as referring to the car, which Bennett had been trying to repair. The accused then told him to go and look in the room where the deceased slept and on doing so was met by the sight depicted in the photographs.

Accused then told Bennett to go outside and wait for the police, as he would report the matter to them.

The accused has said that this is what he then did. He must have telephoned and left at the same time or thereabout left a message for his friend and co-countryman Reiter Gotthard to come and assist him in the serious trouble he had now found himself as a result of the deceased having died.

Accused says that he busied himself with packing for his intended trip.

What is significant is that at that stage the Accused indicated to both Bennett and Gotthard that the deceased was dead and that he had died as a result of a fall.

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Not even by the most casual viewer of the scene could this theory of the cause of the deceased's condition have been maintained. The deceased lay on his mattress in a position which clearly indicates that he was lying down normally when he met his death. I must infer that even at that early stage the accused must have determined to give out a fabricated account of how the deceased met his death. The accused says that he waited for 11/2 hours for the Police and then when there had been no response to his several calls he telephoned the Fire and Emergency services and the official to whom he spoke enquired if he was sure that the deceased was dead. Only then did he have cause to doubt apparently and he returned to the deceased's room to make sure. I find that it sounds more than strange that a man who had been lying dead or lying motionless with his skull blown away and his brains all over the room

that anybody could have any doubt that this person was dead. But the accused says that he then went in and it was only then that he examined the deceased body more closely and discovered his pistol (that is the accused pistol) in a pool of blood under the a deceased hand next to his body. Then follows the most extraordinary part of his testimony.

He says he panicked and in order to save the embassy the embarrassment of having someone found shot with the consul's firearm dead on consular office he removed the pistol, took it to a distant bathroom, washed it and presumably washed himself and place the pistol in its normal place of safekeeping in a cupboard in the lounge.

This does not tie up with what Bennett told the Court. Bennet told the court that after he had left the accused to phone the Police he returned after some twenty minutes and found the accused mopping out blood and blood stains which were to be found extensively in the corridor and on the stairs. Bennett assisted and only then did he learn that the accused claimed to have been covered with blood because had kept the pulse of the body in order to ascertain whether he was alive or not. The accused account in this respect is also clearly a fabrication. It is difficult to understand how the removal of the pistol could save the embassy any embarrassment. The dead body was there and could not be washed away. The deceased had obviously been shot with a firearm and there would of necessity be enquiries which result in it being known that the deceased died of the firearm wound and it would be the accused firearm

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which was involved. How he hope save the Embassy from embarrassment it is difficult to contemplate. The only reason for interfering with the evidence and to misrepresent to the Police who were shortly to arrive could have been to hide some guilt on his part on the death of the deceased. When the police came he did not disclose to them that he had removed the pistol and let the police conduct their investigation on the basis that the deceased had died firstly of an explosion. When the Police asked the accused whether he had a firearm, he produced a .22 rifle but did not produce the firearm which he must have known the police were looking for and which he knew was in fact the weapon used to cause the death of the deceased. The accused says that he did infact produce this handgun to the police. It is denied by the police and one can hardly imagine that the police could have at that stage ignored a weapon produced to them, which turned out to be the weapon, which caused the death of the deceased. The accused certainly does not even claim at this stage to have produced the weapon that he had indicated that that was the weapon which he had found close to the body. The accused himself in cross examination admits that he made a mistake and he says that it was his intention in order to avoid embarrassment to convince the police that they should treat the accused death as an accident. Such a misrepresentation of facts, even if it were true, did not put a consular person in credit. He is at least guilty of defeating the ends of justice and trying to induce policemen not to carry out their duty. This is not expected of a man in his position. The police did not at that stage suspect the accused as being the person responsible for the death and after the riffle has been produced they allowed the accused to leave Hhelehhele and to go on his way to South Africa in order that he may catch his flight which was expected at 7.00 that evening. After he left however it was discovered that there was nobody at all responsible for the death of the deceased and the accused .357 magnum was found by the police still with blood on it in the cupboard in the lounge. This discovery must have indicated to the police that they have made a mistake in not insisting that the accused remain in the premises and they were able to contact the Border post at Ngwenya where the accused and Bennett with whom he was driving were arrested and they were brought back to the Police at Manzini. Here the accused was again questioned and he still maintained the false story which he had presented until the blood stained pistol was brought into the room where the police were interrogating him and then he claims then all of a sudden to have remembered that he removed the pistol from the body of the deceased. This is a further indication

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of the unacceptability of the account he has given. Because of this I am driven to the conclusion that the deceased did not die of suicide and that he died in the accused hands that the pistol was when the fatal shot was fired.

The process of deciding a case on circumstantial facts such as this requires that the inference drawn must be consistent with all the proved facts and there must be no proved facts which are not consistent for the conclusion which is drawn. The conclusion to which I have come complies with this test. The version given by the accused in order to be reasonably possibly true does not have to comply with the test but what is required is that it could in the light of the evidence possibly be true. There is one aspect however on which no reasonable explanation can possibly be advanced on behalf of the suspect and that is how it was the accused pistol which was to shot the fatal shot. The accused says that he had the pistol with him the previous night and that he slept with it under his pillow and he left for Manzini that morning with the pistol still under the pillow. I cannot understand how the deceased even if he was of suicidal intention that morning would have gone hunting for this pistol under the pillow of the accused bed in a room which he never went to and to which he had no access. There is no explanation as to how the deceased could possibly come into possession of this firearm. It is in this regard that it is also strange that the accused would have left the firearm in that place at all. The accused told the Court that he used the firearm for self-protection and that he would normally take it with him if he went to bank money. This is a precaution, which I am not convinced, that it is a wise precaution but in any event it is done. But the accused says he did not take the pistol on this occasion because he only had cheques to deposit. If one thinks about it for one moment one would realise that intending robbers do not know the nature of the deposits and they will hijack whether the deposits consists of cash or cheques and the accused it was his normal course to take a firearm with him for self-protection on such a journey there is no reason why he could not have taken it with him on that morning and I am by no means convinced that in fact the pistol was under the pillow. There is certainly no reason for the deceased to have known about that and to have known where the pistol was and the probabilities are that the pistol was with the accused when he was away from the house that morning but I do not have to find that as a case. The position is that there is no explanation in the evidence as to how the deceased could possibly have come to shoot himself with the accused pistol.

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In these circumstances as I say I am determined there is no other decision to which I could come than to find that the accused infact killed the deceased. The evidence however does not allow me to conclude whether there was intention as it is necessary in a case of murder. What happened in that room is impossible to imagine but there are only two undoubtful facts:

- (a) that the deceased died as a result of a gunshot would, and
- (b) that the gunshot would was inflicted by the accused.

In these circumstances the proper finding is one that he is guilty of culpable homicide.

SENTENCE

The Accused in this matter has been found guilty of culpable homicide. The circumstances of the offence which the accused has committed is somewhat cloudy and a mystery. One thing is clear that the accused is at least guilty of improper use of a firearm and is perhaps lucky that the inference is not drawn that he had the intention to kill this unfortunate deceased person. But he is entitled to the benefit of any doubt which there may be in the matter and for this reason I have not found him guilty of murder. But his behaviour subsequent to the event of the death is also reprehensible because a man in his position should know much better than to interfere with the evidence in order to create a false impression. He even have contemplated to try to persuade the police to treat the matter as something other than what it really

was and from his aspect he does not deserve the sympathy of the Court. It also affects on his suitability for the position which he has recently occupied. But I also do bear in mind that this is a man who is over sixty. He has spent most of his life without being convicted of any offence, he has led an honourable public life and there is little which would be achieved by making him spend a long time in prison or any time at all. As he stands before this court, he has obviously been under strain over the last month since the occurrence of this event and as he is a Roman Catholic, as I have been told,

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I believe that may be he will find some solace in confessing to what had happened. But that is a matter for the church and not for this Court. I must treat him on the basis that he has killed another person through the irresponsible use of the firearm and that he has tried to make the situation look something other than what it was. I also do not see any reason why the Swazi tax payer should support him for any length of time in prison. I accordingly am inclined in this case to impose a fine but it will have to be a substantial fine, and an alternative imprisonment and a further period of imprisonment which will be suspended on certain conditions.

The sentence which I impose is that the accused to be fined E30 000 in default of payment of which 3 years imprisonment. He will also be sentenced to another 3 years imprisonment all of which will be suspended for a period of 3 years on condition that the accused is not hereafter found guilty of an offence involving the unlawful killing of a human being committed during the period of suspension.

S.W. SAPIRE

CHIEF JUSTICE