CASE NO. CC 35/2009

NOT REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

BIZZAH GERHARDT TSAMASEB MOOTSENG **ACCUSED NO. 1**

GOTFRIED GARISEB **ACCUSED NO. 2**

CORAM: HOFF, J

Heard on: 16 – 17; 20 – 23; 27 September 2010

Delivered on: 28 September 2010

JUDGMENT

HOFF, J: [1]The accused persons were arraigned on one count of murder, ten counts of rape in contravention of sections 2 (1)(a)

and 2 (1)(b) of the Combating of Rape Act 8 of 2000 and one count of robbery with aggravating circumstances.

Accused no. 1 pleaded not guilty to the count of murder but guilty to culpable homicide. He also pleaded guilty to one count of rape in contravention of section 2 (1)(a) of Act 8 of 2000 and guilty to the crime of robbery with aggravating circumstances. In respect of the rape charges accused no. 1 admitted having sexual intercourse with the complainant on three occasions (i.e. in the sitting room, in the bedroom and in the toilet) without the consent of the complainant.

Accused no. 2 pleaded not guilty to the charges and gave no plea explanation.

[2]The first witness called by the State, Genevive Cloete testified that on the night of 31 October 2008 she was in the company of the deceased, walking in a street in Narraville in Walvis Bay, when they encountered the two accused persons and a third person Desmond Gomusab approaching from the opposite direction. The accused no. 1 said to the deceased that he had a beautiful girlfriend whereupon the deceased turned around and started to approach the accused persons. She testified that the deceased was not approaching the accused persons in an aggressive manner and nothing was said by anyone at that stage. Accused no. 1 thereafter stabbed the deceased with a knife in his chest. The deceased fell and she tried to help him on his feet. The deceased fell again.

[3]She tried to stop the bleeding and saw accused no. 1 approaching her with the knife intending to stab her as well. Accused no. 1 was then warned that a taxi was approaching and the three of them ran away. It is common cause that the deceased died a few hours later in hospital due to massive internal bleeding caused by the stab wound.

[4]The second state witness Desmond Gomusab testified that he was earlier that day in the company of the two accused persons when they met the deceased and his girlfriend. He confirmed that after something was said to the deceased he turned around towards the accused persons. A fight ensued in which accused no. 1 and the deceased pushed and pulled one another and there was also an exchange of fist blows. Accused no. 1 then produced a knife and stabbed the deceased. The deceased fell. They were standing there. When he saw the blood on the deceased he started to run. The knife used by accused no. 1 to stab the deceased belonged to him.

[5]Some time after this stabbing incident the complainant in the rape charges who was about 16 years old was baby sitting some children and a small baby in a flat in Narraville when accused no. 1 and accused no. 2 entered the flat through the front door. Accused no. 1 according to her, told her that she was beautiful and that he did not want to harm her. He ordered her to go to the bedroom. Accused no. 1 had a knife in his hand. He told her to undress and told her if she did not do as they told her he would stab her. Accused no. 1 was behind her and inserted his penis into her anus and had sexual intercourse with her. Accused no. 2 at the same time put his fingers

in her vagina and touched her breasts. Accused no. 1 pressed the knife against her buttocks. Thereafter he ordered her to the toilet and told her to hold onto the seat of the toilet. He inserted his penis into her anus and again had sexual intercourse with her. Then he ordered her to the sitting-room and threw items including some potplants from the table and told her to lay on top of the table. She was laying on her back. He then lifted her legs inserted his penis into her anus and proceeded to have sexual intercourse with her. Thereafter accused no. 1 went to sit on the sofa in the sitting room and told her to sit on top of him which she did because she was petrified. Her back was turned towards him and he proceeded to have sexual intercourse with her *per anum*. Accused no. 2 ten entered the sitting room and told her to suck his penis. He got hold of her head and pressed her head against his penis. She proceeded to suck his penis whilst accused no. 1 at the same time had sexual intercourse with her. They left her and accused no. 2 started to roam around in the house. Accused no. 1 then followed her to the bedroom. Accused no. 2 entered the bedroom and informed accused no. 1 that he found a purse containing a lot of money. Accused no. 1 wanted to stab her because she was part of the evidence against him. A quarrel erupted between he two accused persons which she could not understand. She asked them to leave and told them that she would not report them to the police. The accused persons eventually left, taking along a number of items. After they had left she sent a short message via her cellphone to the owner of the flat informing her that she had been raped. This was in the early hours of 1 November 2008. A statement was taken form her by the police and she was examined by a medical practitioner.

[6]At the end of the State's case Mr Swarts who appeared on behalf of accused no. 2 applied for a discharge in terms of section 174 of the Criminal Procedure Ac 51 of 1977. This application was not opposed by the State. The application was granted.

[7]Accused no. 1 testified that on the day of the incident he was in the company of accused no. 2 and Desmond Gomusab indulging in drinking wine, beer and smoking marijuana. His evidence regarding the stabbing incident corresponds to a large extend with the version presented by the State witness Desmond Gomusab. He testified that during the fight he produced the knife in order to scare the deceased. The deceased who was unarmed was holding on to his shirt. He held the knife in his hand with the blade in a horisontal position, not pointing towards the deceased. It was whilst he had the knife in this position that blows were exchanged between himself and the deceased. The deceased fell. He saw blood on the deceased and realized that he could have stabbed the deceased and then he started to run away.

Later he found accused no. 2 who told him that there was a flat nearby and that they should go there. When they entered the flat he was still holding the knife with which he had stabbed the deceased. He went straight to a girl who was seated on a sofa whilst accused no. 2 went into another room. He ordered her to lay the baby down on the bed and to undress herself. When she was undressed he picked her up and put her on a table in the sitting room and had sexual intercourse with her. Thereafter he took her to the

bathroom and again had sexual intercourse with her. Then he took her to the bedroom and then accused no. 2 came into the bedroom and told him about the money he had found in a wallet. He then put on his clothes and they left. He admitted taking a DVD and a pocketknife on his way out of the flat. He denied that accused no. 2 had put his fingers into the vagina of the complainant or that he ordered her to suck his penis whilst he himself was having intercourse with the complainant. He admitted that he only had intercourse twice with the complainant.

[8]Accused no. 2 (having been discharged on the murder charge) testified in respect of the incident inside the flat. He confirmed that he told accused no. 1 about a flat, that they entered the flat, that accused no. 1 went to a girl whom they had found inside the flat. He testified that he then searched the flat for items to steal. He collected different items and at some stage he discovered a wallet containing money. He informed accused no. 1 about his find and the two of them thereafter left the flat. He denied that he inserted his fingers in the vagina of the complainant or that she sucked his penis on his orders. He testified that he after they had left the flat gave accused no. 1 N$500.00 cash from the wallet. He denied that he robbed anybody.

[9]Accused no. 1 testified that when accused no. 2 told him about a certain flat his understanding at that stage was that the two of them would go and steal goods from the flat.

[10]In respect of the charge of murder the State called two witnesses whose evidence in material respects were contradictory. The first state witness' evidence was that the deceased did not approach accused no. 1 in a aggressive manner and that the stabbing of the deceased by accused no. 1 was unprovoked. Desmond Gomusab, the second state witness testified the opposite namely that it was the deceased who started the fight by hitting the accused person. Ms Ndlovu initially submitted that this Court should accept the version of the first state witness but could provide no reason why this Court should reject the version of Desmond Gomusab. Gomusab was a witness called by the State. There was no attempt by the State to discredit him or to have him declared a hostile witness. This Court thus cannot simply ignore his evidence. His version corroborates the version of accused no. 1 and this Court will proceed on the basis that the deceased started the fight and that there was an exchanged of blows between the deceased and accused no. 1

[11]Accused no. 1 testified that he had no intention to kill the deceased. It may be on the facts found that there is no proof beyond reasonable doubt that he had direct intention to kill but he may still be convicted of murder if he had legal intention to kill the deceased. This form of intention is referred to as *dolus eventualis* and is present when an accused person foresees the possibility that death might occur but continues with his unlawful conduct in reckless disregard of the consequences.

[12]The test whether an accused had the intention in the form of *dolus eventualis* is subjective and a court may by way of inferential reasoning consider whether or not *dolus eventualis* was proved. It can be reasoned that an accused person ought to have foreseen the consequence i.e. the death of the deceased, and thus must have foreseen it and therefore by inference did foresee it.

[13]In *S v Mini 1963 (3) SA 188 (A) Williamson J A* described inferential reasoning as follows:

> "In attempting to decide by inferential reasoning the state of mind of a particular time, it seems to me that a trier of fact should try mentally to project himself into the position of that accused at that time. He must of course also be on his guard against the insidious subconscious influence of *ex post facto* knowledge."

and *S v Sigwahla 1967 (4) SA 566 (A) Holmes JA* expressed himself as follows regarding the degree of proof:

> "Subjective foresight, like any other factual issue, may be proved by inference. To constitute proof beyond reasonable doubt the inference must be the only one which can reasonably be drawn."

[14]Accused no. 1 during cross-examination admitted that he foresaw the possibility that the deceased might be injured by the knife at the time the blows were exchanged.

[15]Obey Nhiwatiwa, a qualified medical practitioner who attended to the deceased when he arrived at the hospital, but who did not do the post-mortem examination, testified that based on the post-mortem findings that the object used to inflict the wound damaged the cartilage, cracked a rib, penetrated the lung and entered the heart. His opinion was that quite a severe force must have been used to cause these injuries.

[16]Accused no. 1 testified that when he was attacked by the deceased and whilst he had the knife in his hand he *"lost control"* and landed three blows on the deceased.

[17]Accused no. 1 on his own version in my view far exceeded the bounds of self-defence. Furthermore in view of his concession that he foresaw the possibility that he could injure the deceased with the knife together with the undisputed medical evidence that severe force must have been used I come to the conclusion, by inferential reasoning, that the accused must have foreseen the possibility that the deceased could be fatally injured but that he recklessly proceeded nevertheless and inflicted the injury with the knife which caused the death of the deceased. In my view the accused thus did foresee the possibility that death might ensue.

[18]Regarding the charges of rape in respect of accused no. 1, he admitted that he had sexual intercourse with the complainant on three occasions and at three different locations inside the flat and that this was without the consent of the complainant. The complainant in her evidence described four

occasions. This was never disputed during cross-examination. The accused during his testimony referred to only two incidents. He was unable to explain why in his plea explanation he admitted that he had intercourse with the complainant, thrice. My deduction is that accused no. 1 tried to minimize his involvement in sexual acts with the complainant. There is no reason and none was shown during cross-examination why this Court should reject her evidence that accused no. 1 had sexual intercourse with her *per anum* on four occasions. The fact that accused no. 1 denied that he had sexual intercourse *per anum* but instead that he had inserted his penis into her vagina cannot make any difference to a conviction on charges of rape. This court therefore accepts the evidence of the complainant that she was raped on four occasions as described by her.

[19]The submission by Mr Tjituri that accused no. 1 should be convicted of only one count of rape since his conduct constituted “a single continuous act” with respect has no foundation in law or logic. This Court was not referred to any authority in support of this contention.
If one has regard to the definition of rape then it should be clear even to a layperson that accused no. 1 committed four separate acts of rape.

[20]In respect of accused no. 2 the complainant described how he inserted his fingers into vagina and later forced to suck his penis. This was denied by accused no. 2. Accused no. 1 corroborated this version. He testified that accused no. 2 was not present on the occasions that he had sexual intercourse with the complainant. This version of the accused persons was

not shaken during cross-examination. It is trite law that there is no onus on an accused person to prove his innocence. To escape conviction an accused person must present a version to court which can be said to be reasonably true in the circumstances. It was not shown that the testimony of accused no. 2 was false on this point or so improbable as to be rejected as false. In the circumstances of this case I am of the view that it has not been proved beyond reasonable doubt that accused no. 2 committed any sexual intercourse with the complainant, neither that he assisted accused no. 1 in the commission of any sexual act perpetrated by accused no. 1 on the complainant. Similarly, it has not been proved beyond reasonable doubt that accused no. 2 was present on those occasions when accused no. 1 had sexual intercourse with the complainant. It is further trite law that where the court is faced with two mutually destructive versions one presented by the State and the other by the defence and the version of the defence has not been discredited, then the accused should be given the benefit of the doubt.

[21]In respect of the charge of robbery with aggravating circumstances it is common cause that the complainant was robbed of the goods mentioned in the charge sheet and that aggravating circumstances were present. It was also common cause that the two accused persons prior to entering the flat met outside where accused no. 2 informed accused no. 1 what was described as an open flat. Accused no. 1 testified that he saw this is an invitation by accused no. 2 to participate in unlawful conduct, namely theft. At that stage accused no. 1 still had the knife in his hand and this was the same situation when they entered the flat. Accused no. 2 must have been aware of the fact

that accused no. 1 was in possession of the knife since he told accused no. 1 inside the flat not to injure the complainant. The testimony of accused no. 2 that they would have run away had they met any resistance is far from convincing. This is especially the case if one has regard to the fact that earlier that evening when according to accused no. 1 the deceased attacked him accused no. 1 was prepared to use a knife in retaliation.

In any event once inside the flat it was clear that there was no resistance. The complainant had fear written all over her face, this much was visible to both the accused persons. A dangerous weapon (knife) was used by accused no. 1 threatening to inflict grievous bodily harm to the complainant should she not obey orders. Accused no. 2 feigned ignorance of the violence perpetrated by accused no. 1 on the complainant.

I am not convinced that accused no. 2 did not foresee the possibility that accused no. 1 would again use the knife should any resistance be met inside the flat. If that was not the case did he caution accused no. 1 not to hurt the complainant ? I am of the view on the evidence as a whole that accused no. 2 reconciled him with the use of any force during their unlawful acquisition of goods inside the flat, that they acted in concert and with common purpose and that he cannot escape a conviction on the charge of robbery.

[22] In the result my findings are as follows:

In respect of Accused No. 1:

Count 1: Guilty on the crime of Murder *(dolus eventualis)*

Counts 2, 4, 5 and 6: Guilty of the crimes of rape in contravention of section 2 (1) (a) of the Rape Act 8 of 2000.

Count 12: Guilty of robbery with aggravating circumstances

Counts 3, 7 , 8, 9, 10 and 11: Not guilty

In respect of Accused No. 2:

Count 1: Not guilty on the charge of Murder

Counts 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11: Not guilty

Count 12: Guilty – Robbery with aggravating circumstances.

_____

HOFF, J

COUNSEL ON BEHALF OF THE STATE:

MS NDLOVU

Instructed by:

OFFICE OF THE PROSECUTOR-GENERAL

COUNSEL ON BEHALF OFACCUSED NO. 1:

MR TJITURI

Instructed by:

DIRECTORATE OF LEGAL AID

(HENGARI, KANGUEEHI & KAVENDJII INC.)

COUNSEL ON BEHALF OF ACCUSED NO. 2:

MR SWARTS

Instructed by:

DIRECTORATE OF LEGAL AID

(SWARTS & BOCK LEGAL PRACTITIONERS)