



CASE NO.: CC 21/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

AND

MICHAEL UIRAB

ACCUSED

CORAM: SHIVUTE, J

Heard on: 22 - 27 July 2010

Delivered on: 04 October 2010

JUDGMENT

SHIVUTE, J:[1] The accused faces an indictment containing two counts. Count 1 is that of murder read with the provisions of the Combating of Domestic Violence Act, 2004 (Act 4 of 2003) and the charge of defeating or obstructing or attempting to defeat or obstruct the course of justice constitutes the second count. He pleaded not guilty to the count of murder and guilty to the count of defeating or obstructing or attempting to defeat or obstruct the course of justice.

The charges were formulated as follows:

Count 1: Murder

It is alleged that during the period 7th to 8th December 2006 and at or near Otjimbingwe in the district of Karibib the accused unlawfully and intentionally killed Rosalia Charmaine Amutenya an adult female (“the deceased”).

Count 2: Defeating or Obstructing or Attempting to Defeat or Obstruct the Course of Justice.

The allegations were that during the period 7th to 8th December 2006 and at or near Otjimbingwe in the district of Karibib the accused unlawfully and with the intention to defeat or obstruct the course of justice:

1. Removed the body of the deceased from the place where she died and dumped it between some rocks so that it could not be found, and/or
2. Burned the blouse and skirt of the deceased after he killed her, and/or

3. Hid the knife with which he stabbed the deceased and his own clothes which he wore during the killing of the deceased.

These acts were perpetrated whilst the accused knew or foresaw the possibility that:

1. His conduct may frustrate or interfere with police investigations into the disappearance and/or death of the deceased; and/or
2. His conduct may conceal the death and/or destroy the physical evidence of an assault perpetrated on the deceased; and/or
3. His conduct may protect him from being prosecuted for a crime in connection with the assault, disappearance and/or death of the deceased.

[2] The summary of substantial facts states that the deceased was involved in a domestic relationship with the accused prior to her death in the nature of a marriage or engagement. During the late night hours of the 7th or early morning hours of the 8th December 2006 the accused stabbed the deceased multiple times on her body and throat as a consequence of which she died on the scene. Thereafter the accused defeated or obstructed the course of justice or attempted to do so as indicated in the particulars of the 2nd count.

[3] Mr Uirab (no relation) represents the accused on the instructions of the Directorate Legal Aid while Mr Nduna appears on behalf of the State.

[4] When the accused pleaded not guilty to the 1st count of murder he indicated that he had no intention to kill. However, he stated that he killed the deceased negligently therefore pleading guilty to culpable homicide. His legal representative prepared a statement in terms of section 112 (2) of the Criminal Procedure Act, 51 of 1977 in respect of the 1st and 2nd counts. The plea reads as follows:

“I, the undersigned, Michael Uirab, hereby state as follows:

1.1 I am an adult male person and an accused in this matter on the following charges:

- (i) Count 1 - Murder, read with the provisions of the Combating of Domestic Violence Act, 4 of 2004.
- (ii) Count 2 - Defeating or obstructing or attempting to defeat or obstruct the course of justice.

1.2 In respect of count 1, I plead guilty to the competent verdict of culpable homicide. With respect to count 2, I plead guilty as charged.

1.3 I confirm that I was not forced or threatened to plead guilty to the above charges, and do so freely and voluntarily, without any force, threats or undue influence.

1.4 I furthermore confirm that the abovementioned court has jurisdiction to adjudicate this matter.

- 1.5 I confirm that I have been advised by my legal representative about the effects and consequences of my plea of guilty.
2. In amplification of my plea of guilty I wish to make the following admissions:
- 2.1 Count 1

I admit that during the period 7 - 8 December 2006 and at or near Otjimbingwe in the district of Karibib I acted wrongfully and unlawfully by assaulting Rosalia Charmaine Amutenya, the deceased, an adult female person, by stabbing her several times with a knife. I assaulted the deceased after the latter attacked me with a knife and I defended myself against the unlawful attack by the deceased on myself.

I admit further that I did exceed the boundaries of self defence when I stabbed the deceased, by causing more harm or injury to my attacker than what was reasonably justified by the attack. Furthermore I admit that I ought to have reasonably foreseen that my actions may be excessive and that the deceased may have died. I therefore admit that my actions were negligent which resulted in the death of the deceased (*sic*).

2.2 Count 2

I admit that on the same date and place as contained in count 1 above, having realized that Rosalia Charmaine Amutenya died as a result of stab wounds I inflicted upon her, I wrongfully and unlawfully removed her body from the place she collapsed and died to a place between rocks some meters away, and hid the knife used to stab her.

I therefore admit that when I performed these acts I did so with the intent to defeat or obstruct the course of justice.

3. The deceased Rosalia Charmaine Amutenya was my lover with whom I had a relationship. I also knew that the deceased was residing on a farm with her boyfriend. On 6 December 2006 I met the deceased in Otjimbingwe and we spent the evening together at my room. The next day on 7 December 2006 we went our separate ways but met again in the afternoon at Mr Goseb's house, separated again and I met her again in the evening at the club. During the time at Mr Goseb's house and at the club we were both consuming alcohol. I could see that the deceased was reasonably intoxicated. We agreed to go and sleep and departed to my house.
4. At my house a quarrel started followed by a fight between myself and the deceased. During this fight the deceased *inter alia* wanted to burn me and my room with oil and I assaulted her with clenched fists and

chased her and she ran away. After approximately two hours the deceased returned whilst I was lying in my room. The deceased was armed with a knife and attacked me whilst I was in my room. A fight ensued during which after I grabbed the deceased's hand in which the knife was, we wrestled for possession of the knife. I managed to get hold of the knife and stabbed in the direction of the deceased. The deceased leaned forward against me, we continued to wrestle and fight until we held each other in the form of a hug, still fighting and I leaned over her and continued to stab her. When we became separated the deceased ran away and collapsed some meters away. I followed her and realized she passed away. I became scared and panicked, and dragged her body some metres away behind big rocks (*sic*).

5. I wish to add that when I committed these crimes I did consume alcohol which aroused my senses and diminished my sense of responsibility, although I was aware of what I was doing.
6. I am extremely sorry and remorseful for the crimes I have committed and I beg this Honorable Court for mercy in sentencing me."

[5] After the plea was read onto the record Mr Nduna on behalf of the State, stated that the State does not accept the plea of guilty on a competent verdict of culpable homicide, although it accepts all the general facts of murder as read onto record. The State accepted the plea of guilty on

the 2nd count. The Court was satisfied that that the accused admitted all the allegations in respect of the 2nd count and convicted him of attempting to defeat or obstruct the course of justice.

[6] At the conclusion of the State case, the accused closed his case without adducing any evidence.

[7] Doctor Simasiku Kabandje a medical officer in the employ of the State, attached to the Namibian Police Mortuary in Windhoek commented on the post-mortem examination conducted on the body of the deceased by Doctor Mihaylova Petrova who has since left for his country of origin.

[8] According to the post-mortem report the chief post-mortem findings made by Dr Petrova were: Deep lacerations over anterior aspect of the neck going through major blood vessels, the artery carotidis, and the veinous jugularis causing severe blood loss and brain anoxia incompatible with life. Massive right sided haemothorax due to three penetrating lacerations into the thorax over posterior right side aspect of the thorax. Deep laceration of the right lower lung lobe was also observed. Other findings were generalised anoxia, hypovolemia, and pregnancy in the 1st trimester. The cause of the death was determined to be stab wounds, massive right sided haemothorax, hypovolemia, generalized anoxia, brain anoxia.

[9] The following observations were made during the post-mortem examination: The height of the deceased was measured to be 1.65 metres

and her mass at 55 kilogrammes. Secondary post-mortem changes liver, rigor and algor mortis were present.

[10] The body exhibited multiple external injuries. The head had a laceration on the left parietal temporal area with even edges, the length of which was 8 centimetres reaching the skull. According to the first diagram the head had a laceration on the left side with the length of 4.5 centimetres with even edges reaching the skull. Dr. Kabandje commented that the presence of the even edges meant that the wounds were caused by a sharp object. The neck had a deep laceration over the anterior aspect of the neck which was about 5 centimetres deep, and the length was about 10 centimetres long with even edges. The neck of the deceased was cut across, which according to Dr. Kabandje meant that almost the whole neck was cut open.

[11] At the back side of the chest, i.e. on the right side of the chest, there were three lacerations to the body. In total the deceased suffered five wounds namely, three on the back, one on the head and one on the neck. The three wounds on the back were described as of even edges the length of which were 3 centimetres each, penetrating into the rib cage causing massive right haemothorax. In other words the right lung was injured and it bled.

[12] On the neck structures, according to the report the following observations were made: a deep laceration over anterior aspect of the neck which is about 10 centimetres long, and 5 centimetres deep with even edges

running through the major blood vessels and cutting through the major blood arteries causing blood loss and brain anoxia. Dr Kabandje explained that if the above mentioned veins are severed there would be instantaneous blood loss and a very high volume of blood would be lost within a short period of time.

[13] An observation was made on the mediastinum and oesophagus. The mediastinum had shifted to the right side due to the massive right side haemothorax; the oesophagus was found to be intact; and pale walls were seen. The trachea and bronchia were intact. However, there was hypostasis (i.e. accumulation of fluid) in the walls of the trachea and bronchia as well as blood stained froth in the lumens. Observations made on the pleurae and lungs revealed massive haemothorax on the right, free blood of about 800 ml in the right pleural cavity due to penetration into the rib cage. Three stab wounds were also noted on the posterior aspect of the chest on the right side. The right lung collapsed due to the penetrating laceration through the right lower lobe. The left lung was marked with dark heavy pulmonary congestion. On the genital organs especially in the uterus it was observed that the deceased was ten to twelve weeks pregnant.

[14] It was Dr Kabandje's opinion that the force used was very heavy for it to cause the injuries to penetrate 5 centimetres deep. He expressed a further opinion that the injuries on the chest happened whilst the deceased was still alive. His opinion in this regard was based on the fact that there was

haemothorax present, which means that blood was accumulating and it only occurs when somebody is alive. Furthermore, so he reasoned, the presence of froth which was congested with blood means that the person was still alive; she was breathing in and out and as a result of the breathing in, blood was mixed with air and the froth formed. He further opined that in terms of the neck injuries, although it was not specified in the report that there was haemorrhagic infiltration, the fact that there was loss of blood leads to the conclusion that the deceased was still alive when the injuries were inflicted. The reason being that blood only flows when somebody is alive, once somebody has died, hypostasis sets in. It is more stagnant, there would be minor loss of blood, because the heart was not pumping. As the heart pumps there would be a leakage and blood would be leaked out.

[15] Concerning the injuries on the neck which was described to be 5 centimetres deep and 10 centimetres long, Dr Kabandje stated that there would be immediate extensive blood loss, and it would be highly unlikely for a person to walk without staggering. There would be difficulty with the brain as blood flows, which would result in loss of consciousness. As the person staggers, there would be a trail of blood until at a spot where a person would collapse and die. He further stated that the injuries on the neck were more serious and could cause death within a few minutes. However, concerning the chest injuries one could walk especially if bleeding internally. One could survive the type of injuries in the chest but not the type of injuries suffered on the deceased's neck.

[16] Under cross-examination Dr Kabandje was asked whether he was able to tell the sequence in which the injuries were inflicted to which he responded that it would be difficult to do so. He was again questioned whether after the infliction of the injuries on the neck a person would be able to move for approximately 10 metres before collapsing and he responded that it would be possible. Dr Kabandje was asked to comment on a scenario where a person moved immediately after being inflicted with injury and was specifically asked whether there would be more blood stains at the spot where the person collapsed. He explained that there would be more blood at the place where the person collapsed and a trail of blood would be present from the place where the person moved after the infliction of the injury.

[17] The next witness called by the State was Detective Sergeant Hannes Goagoseb who testified that on 8 December 2006 he found a blood spot at a place which is a few metres away from the police station. He followed the blood spots up to some rocks. There he observed a foot of a person sticking out between the rocks and some blood on the rocks. He investigated further and discovered that it was the deceased whom she personally knew. The deceased was barefoot and only had underpants on. He lifted up the body of the deceased and observed open wounds on the back, open wounds on the head behind and in front and a huge cut across the deceased's neck. The deceased's face was covered with blood, sand and grass. Sergeant Goagoseb with the assistance of his colleagues picked up the body and moved it to an open space. He took some photographs of the deceased

namely photographs 8 and 9 depicting the body of the deceased as found at the scene. The photographs were contained in a photo plan which was admitted in evidence by consent and was marked as exhibit "H".

[18] Sergeant Goagoseb with his colleagues went back to the place where they found the bloodspot. They observed barefoot tracks from the bloodspot to the rock and around the rock the same barefoot tracks were observed leaving the rock where the body was left. They followed the barefoot tracks for about 15 metres up to the spot where a person put on sport shoes. They followed the sport shoe prints up to the place where the accused was residing. The prints entered the accused person's room. Between the bloodspot and the accused person's residence there was no blood trail. The blood trail was only observed between the place where the bloodspot was found and the rocks where the deceased's body was discovered.

[19] Sergeant Goagoseb testified that he observed two sets of tracks from the accused person's residence to the bloodspot. One set was barefooted and another set was wearing sports shoes. The shoe tracks had some signs which appeared as if the persons concerned were chasing each other.

[20] Upon cross-examination the witness was asked whether he agreed that the accused had made all efforts possible to conceal that he had committed the offence and that he went to the extent of hiding the knife that he used to stab the deceased and the deceased's clothes. The witness responded in the affirmative.

[21] Apart from calling two witnesses the State handed in the following documents as exhibits by consent:

The identification of the body of the deceased; the affidavit by Dr Petrova in terms of section 212 (4) Act 51 of 1977 in which she certified that she had carried out an examination of the body of the deceased; the report on a medico-legal post-mortem examination; the photo plan, and the photograph of the knife that was used to stab the deceased.

[22] It was submitted on behalf of the State that in the light of the testimony of Dr Kabandje concerning the injuries suffered by the deceased and the testimony of Detective Sergeant Goagoseb, an inference could be drawn that some of the injuries inflicted on the deceased took place at the accused person's residence whilst the other injuries were inflicted outside the accused person's residence especially the life threatening injury on the neck. This submission was made on the basis that if the deceased had received all the injuries at the accused person's residence it should have been evident in the accused person's room or from the accused person's room to the place where the bloodspot was found which was some metres away from his house. Blood trails were going to be visible from the accused person's residence to the bloodspot. Mr Nduna further submitted that the accused could not be subjectively be believed that he was acting in self defence, because an inference could be drawn that the severing of the deceased's neck was the final blow after the accused had inflicted initial

injuries and this could be viewed as the confirmation of the accused person's intention to kill the deceased. Therefore, it was the State's prayer that the accused should be found guilty and convicted of the offence of murder with direct intent.

[23] On the other hand counsel for the defence submitted that although there was no blood found at the accused person's residence it is possible that the accused might have wiped out the blood trail given the fact that the accused tried to conceal that he was responsible for the commission of this offence. It was further submitted by Mr Uirab that there is no substance in the state's submission that an inference could be drawn that the deceased was initially stabbed at the accused person's residence and then moved to another place where the injury on the neck was inflicted. As far as the injuries suffered by the deceased is concerned, it was submitted that there is no proof that all the injuries as recorded on the post-mortem report were inflicted by the accused. There is no evidence that the wounds shown in the photographs that appear to be so severe were necessarily in the same condition as inflicted by the accused. Counsel for the defence concluded that the Court cannot disregard the possibility that the injuries to the head could have occurred during the period when the accused dragged the deceased's body to the rocks. I do not find any substance in the submissions made by counsel for the defence. There is no evidence on the basis of which the inferences he urges the Court to draw could be drawn. At best for

counsel, the submissions in this regard amount to speculation. They are rejected.

[24] In addition to the common cause facts indicated in the plea, the following facts are also not disputed namely: the identity of the deceased; the admissibility of the content of the post-mortem examination on the deceased; the cause of death, and that the deceased's body did not sustain any injury during the transportation from the scene until the post-mortem examination was conducted. This Court is called upon to determine whether the accused acted with the intention to kill the deceased or he acted negligently in causing the deceased's death. Private defence is defined by Professor CR Snyman in his book, Criminal Law, Third edition, on page 97 as follows:

"A person acts in private defence, and his act is therefore lawful if he uses force to repel an unlawful attack which has commenced, or is imminently threatening, upon his or somebody else's life, bodily integrity, property or other interest which deserves to be protected, provided the defensive act is necessary to protect the interest threatened, is directed against the attacker, and is not more harmful than necessary to ward off the attack."

[25] In *S v Naftal* 1992 NR 299 (HC) at 303 the requirements of private defence were summarised as follows:

- a. The attack: To give rise to a situation warranting action in defence there must be an unlawful attack upon a legal interest which had commenced or was imminent.

- b. The defence must be directed against the attacker and necessary to avert the attack and the means used must be necessary in the circumstances. See also Burchell and Hunt, South African Criminal Law and Procedure, Volume 1 2nd at 323-9.

[26] Whenever private or self defence is raised, the enquiry is twofold. The first leg of the inquiry is whether the requirements of private defence have been met. This entails the question whether the bounds of private defence were exceeded. The *onus* rests with the State to prove beyond reasonable doubt that the requirements or conditions for private defence did not exist or that the bounds of private defence have been exceeded. The test to be applied is an objective one. When the test of reasonableness and the conduct of the hypothetical reasonable person are applied, the Court must put itself in the position of the accused at the time of the attack. If the State does not discharge this *onus*, the accused must be acquitted. On the other hand, if the State discharges the said *onus*, that is not the end of the matter and the second leg of the enquiry must be proceeded with. The second leg of the inquiry is then whether the State has proved beyond a reasonable doubt that the accused did not genuinely believe that he was acting in self-defence and that he was not exceeding the bounds of self defence. The test is purely subjective and the reasonableness or otherwise of such belief whether or not it is based on or amounts to a mistake of fact or of law or both, is only relevant as one of the factors in the determination whether or not the accused held the aforesaid genuine belief. (See Burchell and Hunt,

South African Criminal Law and Procedure (*supra*) at (164-81 and 330-2); *S v De Blom* 1977 (3) SA 573 (AD)

[27] If the state discharges the *onus* to prove beyond reasonable doubt that the accused held no such genuine belief, then the accused must be convicted of the charge of murder. If the said *onus* is not discharged, then the accused cannot be convicted of murder requiring *mens rea* in the form of *dolus*, but can be convicted of a crime not requiring *dolus* but merely *culpa*, such as culpable homicide.

[28] Culpable homicide will be a competent verdict where, e.g. the accused, although he genuinely believed that he acted in self-defence and within the bounds of self-defence, was not objectively speaking, acting reasonably in holding the aforesaid belief. (See *S v De Blom* (*supra*); South African Criminal Law and Procedure (*supra*) at 180); *S v Ntuli* 1975 (1) SA 429 (A) at 435H - 438A; *S v Ngomane* 1979 (3) SA 859 (A) at 863A - 864C.

[29] It cannot be disputed on the available evidence that the deceased was the aggressor. However, if the accused who was originally attacked is aware of the fact that his conduct is unlawful because it exceeds the bounds of self defence and that it will result in the deceased's death or if he subjectively foresees this possibility and reconciles himself to it he acts with *dolus* and is guilty of murder.

[30] The State bears the burden of proof to prove beyond reasonable doubt that the accused had the requisite intention to kill the deceased in order to secure a conviction of murder.

[31] In *S v Sauls and Others* 1981 (3) SA 172 (A) at 182G the following was stated:

'The State is, however, not obliged to indulge in conjecture and find an answer to every possible inference which ingenuity may suggest any more than the Court is called on to seek speculative explanations for conduct which on the face of it is incriminating... A passage in a minority judgment given by Malan JA in R v Mlambo 1957 (4) SA 727 (A) at 738 is apposite. Two paragraphs in this passage were cited with approval by Rumpff JA in S v Rama 1966 (2) SA 395 (A) at 401:

"In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilty of the accused.

An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case."

[32] There is no direct evidence from the State concerning the accused's state of mind at the time he was stabbing the deceased. Therefore, the state relies on inferences to be drawn from the circumstances of the assault. This *inter alia* includes the nature of the assault, the weapon used, the position, nature and extent of the injuries inflicted on the deceased.

In *S v Van Wyk* 1993 NR 426 at 443 (C) it was stated:

"This does not involve any piecemeal assessment or process of reasoning. All the relevant facts which bear on the accused's state of mind and intention must be cumulatively assessed and a conclusion reached as to whether an inference beyond reasonable doubt can be drawn from these facts that the accused actually considered it a reasonable possibility that the deceased could die from the assault but, reckless as to such fatal possibility, embarked on or persists with the assault".

[33] I now proceed to relate the facts of this matter to the above mentioned legal principles.

According to the evidence of Dr. Kabandje who was called to explain the post-mortem examination report and to recapitulate, the deceased suffered three stab wounds to the back, some of which penetrated the lungs causing perforation to the right lung and resulting in the collapse of the lungs. Each of these stab wounds was about 3 centimetres deep. There was a laceration on the head with the length of 4-5 centimetres reaching the skull and a cut to the neck, which severed the neck. This according to Dr. Kabandje caused instantaneous massive blood loss which could cause death within a few

minutes. The injuries described above strengthen the inference that heavy force was applied in striking the deceased.

[34] Although the knife used to stab the deceased was not produced before court, a photograph depicting the lethal weapon was produced in evidence. It depicts a horrific looking instrument. All the injuries inflicted on the deceased were directed to sensitive organs of the body. As already noted, the cause of death was stated to be stab wounds, massive right sided haemothorax, hypovolemia generalized anoxia and brain anoxia. Although the deceased was said to be an aggressor, it will be recalled that the accused stated in his plea statement:

“I managed to get hold of the knife and stabbed in the direction of the deceased. The deceased leaned forward against me, we continued to wrestle and fight until we held each other in the form of a hug, still fighting and I leaned over her and continued to stab her”.

It is quite evident that after the accused disarmed the deceased he stabbed her not only once but he continued to stab her several times. He also stated in his plea that:

“I admit further that I did exceed the boundaries of self defence when I stabbed the deceased, by causing more harm or injury to my attacker than what was reasonably justified by the attack”.

[35] The deceased was a fairly light built female with a body mass of 55 kg and her height was 1.65 meters. She was described by the accused in his

plea to have been “reasonably intoxicated”. The accused was a 23 year old male. He indicated in his plea statement that he was under the influence of alcohol at the time he committed the offences. The accused did not testify so that the allegation that he was under the influence of alcohol could be tested through cross-examination to determine how much alcohol he consumed and what effect it had on his power of perception and foresight. It is noteworthy to mention that despite the consumption of alcohol by his own admission he knew what he was doing

[36] Having considered all the evidence before me as well as the relevant legal principles regarding the defence of private defence it has as a matter of inference been established beyond reasonable doubt that the accused did exceed the bounds of self-defence and realize that there was a reasonable possibility that the deceased might die as a result of continuous stabbing of the deceased but was reckless as to the result. I am satisfied that the State had proved beyond a reasonable doubt that the accused had an intention to kill the deceased in the form of *dolus eventualis*. There can therefore be no suggestion, in law, for a possible conviction on culpable homicide. In the result, the accused is convicted on the first count of murder with the intention to kill in the form of *dolus eventualis* read with the Provisions of the Combating of Domestic Violence Act, 4 of 2003 and on the second count, he is convicted, as previously announced, of attempting to defeat or obstruct the course of justice.

SHIVUTE, J

ON BEHALF OF THE STATE

Mr Nduna

Instructed by:

Office of the Prosecutor-General

ON BEHALF OF DEFENCE

Mr Uirab

Instructed by:

Directorate: Legal Aid