



CASE NO.: CC 26/2010

**IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI**

In the matter between:

THE STATE

and

KAFURO THEOPHILIE KANGURO

CORAM: LIEBENBERG, J.

Heard on: 20 – 23 June 2011

Delivered on: 04 July 2011

JUDGMENT

LIEBENBERG, J.: [1] Accused, an adult female, stands charged with the offence of murder, read with the provisions of the Combating of Domestic Violence Act, 2003 (Act 4 of 2003), in which it is allegedly that she, on 6 June

2008, at or near Kahanga village, Rundu, unlawfully and intentionally killed her son, Mukoya Disho, aged one year, by stabbing him with a knife.

[2] The accused is legally represented by Mr. *Bondaj*, while Mr. *Shileka* appears for the State.

[3] The accused was referred by this Court to the Psychiatric Department, Windhoek Central Hospital, for observation in terms of ss 77 and 78 of the Criminal Procedure Act, 1977 (Act 51 of 1977) ('the Act'), to be reported on in terms of s 79 of the Act, and she was under observation covering the period 21 July to 20 August 2010. A report (Exh. "G"), was compiled by Dr. N.F. Mthoko, a psychiatrist at the said hospital, and handed into evidence without objection. The nature of the inquiry included psychiatric interviews with the accused; physical examination; blood tests and brain scan; assessment by clinical psychologist; observations by ward psychiatric nursing staff; and information obtained from the accused's health passport. Whereas the inquiry also included other professional members, the report reflects the joint opinion of the aforementioned persons who together, formed a panel of professionals. The services of one of the nursing staff, according to Dr. Mthoko, were employed as interpreter as the doctor was unable to communicate with the accused in her vernacular, namely Mbukushu. I shall return to this point later herein.

[4] The accused has a history of epilepsy since childhood, for which she receives treatment. She also receives antipsychotic treatment during

episodes of confusion appearing after epileptic fits. Regarding the mental condition of the accused it is stated in the report that the accused was unable to recall the *sequence* of events leading to the alleged offence and on this point Dr. Mthoko amplified her findings during her testimony by saying that the accused could recall that she had an argument with her mother one day prior to the incident whereafter she went to sleep at her grandparents' home; that she in the morning went back to her parents' home (with whom she was staying), where she took a knife and from there she went to the cemetery with her child where she first stabbed him and then herself. She was adamant that the accused could *recall* stabbing the child and then herself. Dr. Mthoko said the accused, as regards the sequence of events, was unable to say where exactly she had found the child that morning or explain what happened to the knife; neither could she recall what transpired thereafter. To her the accused said that she was only able to recall as from the following day when she was in hospital. The reason why she had killed her child, accused explained, was because of feelings of hopelessness after the argument with her mother the previous day.

[5] According to Dr. Mthoko the accused, during interviews, did not say that she had an epileptic fit, either on the day of the incident (the 6th of June), or the previous day. As for the antipsychotic medication taken by the accused, she explained the need for this was to control the accused who would become restless after a fit and then needed to be calmed down. When put to Dr. Mthoko in cross-examination that what the accused has said about her going to the cemetery and stabbing her child, was information she obtained from her

uncle when he came to visit her in hospital and that it was not something she herself could remember, the doctor replied that it was not the case, as she specifically asked the accused whether she could recall this herself or whether it came from someone else, such as the police. She was adamant that this information came as a result of the accused's own recollection.

[6] In terms of the report the accused was found fit to stand trial. It was stated in conclusion that: *“At the time of commission of the alleged crime, the accused **was suffering from a mental defect**, as supported by the evidence of longstanding history of epilepsy with episodes of confusion. Her ability to appreciate the wrongfulness of the alleged offence and act in accordance with such appreciation was diminished.”* (Emphasis provided) Dr. Mthoko explained that because the accused suffered from epilepsy she was vulnerable to what she described as “stressors” which, in this instance, was the argument she had with her mother the previous day. Because of the stress she was under she experienced a feeling of hopelessness and that in her mind, this was the right thing to do to solve the problem (by killing her child and herself).

[7] The findings in the report were not disputed by either the State or the defence.

[8] I turn now to briefly summarise the evidence. Muyemburuko Kafuro is the brother of the accused and according to him the accused came to him on the morning of the incident and gave him some lemons. Despite saying that the

accused appeared normal, he found it strange that she did not greet him at the time. The deceased at this stage was in his sight where he was drinking coffee or tea with his grandfather. Although the witness did not see the accused leave, he later on left the homestead to go and pick berries when he heard someone crying. When he went to investigate, he came upon the accused and her son lying on the ground. She was wounded and the boy was no longer breathing. There was a knife lying between the two bodies which he picked up and took to his grandfather. Subsequent thereto the police were contacted and the accused and deceased were taken from the scene.

[9] The evidence of the witness Frans Shamatjongora can safely be ignored as being hearsay evidence as far as it concerns the relevant parts of his evidence.

[10] Manfred Yatwimana, a neighbour of the accused, testified about a fight he observed between the accused and her mother at home the previous day, during which he heard the mother insult the accused. He went up to them and separated them as they were physically fighting one another. He heard the mother say to the accused that she would kill her.

[11] The evidence of the accused's biological mother, Mukara Tjangano, differs markedly from that of Yatwimana regarding the fight, and according to her, the accused hit her first with a stick, without reason. This witness did not strike me as credible; neither does her version of the incident appear to be

probable. In my view, the detail of the fight between the accused and her mother is not material to the outcome of this case and it will suffice to say that there is sufficient evidence that a fight had taken place between the accused and her mother the previous day, which obviously upset the accused as she started crying. Consequential thereto she spent the night at her grandparents' home; possibly also because of the threat made against her by her mother that she would kill her. They thereafter had no further contact prior to the killing of the deceased.

[12] The accused was taken to Andara hospital where she was examined by Dr. Okebie on the same day. The accused had two deep lacerations on the abdomen and two superficial lacerations on the neck. He considered the abdominal wounds life-threatening and immediately referred the accused to Rundu Intermediary (State) hospital for treatment. While he examined the accused at Andara she appeared calm and not in shock (although she did not speak to him).

[13] The post-mortem report compiled by a certain Dr. Ricardo and handed in by agreement, states the chief post-mortem findings as: Multiple wounds in the neck; intervertebrale space between 3rd and 4th cervical vertebrae perforated; and spinal cord rupture, the latter being the cause of death. On the sketch annexed to the report five wounds are indicated on the anterior aspect of the throat of which one wound is 4 x 3 cm in diameter.

[14] The record of the proceedings held in the Mukwe Magistrate's Court was handed in and, according to which, the accused on 29 October 2008 was asked to plead in terms of section 119 of the Act; whereafter she pleaded guilty on a charge of murder of Mukoya Disho (the deceased). During the section 112 (1)(b)-questioning she answered as follows on the question why she pleaded guilty: *"My mother assaulted me during the night and chased us out of the house. I became angry and I killed my child. I took a knife and stabbed my child once in the neck. My child's name was Mukoya Disho, a boy of one year. After I killed my son I was crying and my grandmother came where I injured myself."* When asked whether she appreciated the wrongfulness of her act she answered in the affirmative and added that she also wanted to kill herself. She furthermore said that she killed the deceased because she was angry and hurt. These admissions, with the accused's consent, were noted as formal admissions.

[15] The accused was almost twenty years of age at the time of the incident and according to her she dropped out of grade 8 in 2006 because of epilepsy she was suffering from. I have my reservations whether that was the sole reason for her leaving school because that would have been the same year she fell pregnant with the deceased. She thereafter did seasonal work at Shadigongoro irrigation project and on the 5th of June she had a fit at work whereafter her grandmother escorted her home. She rested and when she felt better in the afternoon she started cleaning her room when her mother came to her and inquired from her why she had come home early. She in detail described the fight that took place between the mother and herself

during which she was insulted, hit with a broomstick, and throttled. After they were separated she went to her grandparents' home (situated within the same homestead) where she spent the night as she feared her mother would kill her. She described her emotions at the time as being "not happy" or "not at ease" because of the fight and the fit she had earlier that day.

She testified that she had no reminiscence of what transpired the following day and only came to her senses after she was hospitalised. According to her this was at Andara (not Rundu) and whilst there, her uncle paid her a visit and narrated to her what she earlier had done i.e. that she took her child to the cemetery where she stabbed him. Under cross-examination she said it was possible that she could have been taken to Rundu hospital, but that she could not remember it. She has no independent recollection of the incident – neither that she stabbed herself. As far as it concerns the information she had given to Dr. Mthoko during interviews, this, she said, was merely what her uncle had told her while she was in hospital after the incident and not what she independently could remember. Regarding her appearance in court at Mukwe when she was asked to plead, she said she can *recall* that she pleaded not guilty. She also said it might be possible that she could have said what is contained in the explanation, but at present, she cannot recall what she then said.

[16] The basis of the accused's defence is that at the time of the alleged offence she was suffering from a mental illness or defect; thus, she was incapable of appreciating the wrongfulness of her act or incapable to act in accordance with the appreciation of the wrongfulness of her act.

Furthermore, that she suffers from memory lapses and does not fully appreciate the circumstances under which she committed the alleged offence. In the notes compiled in respect of the pre-trial conference held between the respective counsel, it is stated that, in the alternative, the accused's defence is one of non-pathological criminal incapacity.

[17] It is trite law that where a person suffers from mental illness or defect (insanity) the test to determine such person's criminal responsibility is governed by section 78 (1) of the Criminal Procedure Act, 1977 which states:

“(1) A person who commits an act which constitutes an offence and who at the time of such commission suffers from a mental illness or mental defect which makes him incapable-

(a) of appreciating the wrongfulness of his act; or

(b) of acting in accordance with an appreciation of the wrongfulness of his act, shall not be criminally responsible for such act.”

If the court at the end finds that the accused, when committing the act in question, was by reason of mental illness or defect not criminally responsible for such act, the court shall find the accused not guilty because of mental illness or defect, and then direct that the accused be detained in a mental hospital or a prison pending the signification of the State President (section 78 (6)).

[18] Where the defence is one of mental illness or defect the onus of proving it rests on the accused who raises the defence. On the other hand, where the defence is that of non-pathological criminal incapacity, the onus is on the prosecution to disprove the accused's defence. In the latter instance a foundation should be laid in the evidence for the raising of the defence, but if, on the evidence, there is a reasonable doubt as to whether the accused at the time of the commission of the offence had criminal capacity, he or she should be given the benefit of the doubt.¹ In its determination whether or not a foundation has been laid, the approach that should be followed by the trial court was stated by Kumleben, JA in *S v Potgieter*,² in the following terms at 73b-e:

“The reliability and truthfulness of the alleged offender is in the nature of the defence a crucial factor in laying such foundation. This fact, and hence the need to closely examine such evidence, has been stressed in earlier decisions of this Court. For instance, in R v H 1962 (1) SA 197 (A) at 208A-C it was observed that:

‘(D)efences such as automatism and amnesia require to be carefully scrutinised. That they are supported by medical evidence, although of great assistance to the Court, will not necessarily relieve the Court from its duty of careful scrutiny for, in the nature of things, such medical evidence must often be based upon the hypothesis that the accused is giving a truthful account

¹*S v Wiid*, 1990 (1) SACR 561 (A); *S v Rittman*, 1992 (2) SACR 110 (NmHC) at 117.

² 1994 (1) SACR 61 (A).

of the events in question. (Cf R v D Kennedy 1951 (4) SA 431 (A) at 438, and R v Horn 1944 NPD 176.)'

(See too S v Trickett 1973 (3) SA 526 (T).)

*The **ipsi dixit** of an accused person that the act was involuntarily and unconsciously committed, based on evidence tendered in support of such assertion, is to be accepted unless it can be said that such evidence 'cannot reasonably be true' - S v Kalogoropoulos (supra at 20a). (Cf too S v Mahlinza 1967 (1) SA 408 (A) at 419C.)"*

[19] Where the accused, as *in casu*, claims that she is unable to remember the fateful events of that day, the learned author *Snyman: Criminal Law*, (Fifth Ed.) at page 55 para 10 states the following:

"Mere amnesia after the act, that is, the inability to remember what happened at the critical moment is not to be equated to automatism, because the question is not what X can remember of the events, but whether she acted voluntarily at the critical moment."

[20] In the present case it is common ground that the accused caused the death of her son, Mukoya Disho, by stabbing him with a knife and that this constituted an unlawful act. What the Court needs to determine is whether the accused at the relevant time of so acting i.e. the stabbing of her child with a knife, had the required criminal capacity. Capacity is determined by two psychological factors, namely (i) the ability to distinguish between right and

wrong (cognitive), and (ii) the ability to act in accordance with such appreciation (conative).

[21] A person suffering from epilepsy, *per se*, does not suffer from mental illness or defect, as it does not emanate from a disease and such a person would otherwise, psychologically, be normal. As for the accused, she has a history of epilepsy since childhood for which she takes medication. According to the psychiatric report the accused, as *per* her medical passport, is also on antipsychotic treatment for the episodes of confusion which follow the epileptic fits. These episodes of confusion, described by Dr. Mthoko, would be when, for instance, the person paces up and down and is restless; during which period medication, that reduces the psychosis, is required – in her words, ‘to get the person under control’. The accused was assessed as cognitively intact and of average intelligence, while her insight and judgment were preserved. This means that the accused has the ability to distinguish between right and wrong. As for the accused’s ability to appreciate the wrongfulness of the alleged offence and to conduct herself in accordance with her insight into right and wrong at the time of committing the alleged offence, it was found that she suffered from a mental defect and that her ability was *diminished*. It was explained that the fight with her mother the previous day put the accused under severe stress, in circumstances where she was (already) vulnerable due to her suffering from epilepsy. It does mean to say that, because of the accused’s diminished ability to appreciate the wrongfulness of the offence and to act accordingly, therefore, she lacks criminal capacity.

[22] From my understanding of Dr. Mthoko's evidence the accused, at the relevant time, sufficiently appreciated the wrongfulness of her act when killing the deceased, but, as a result of a combination of her suffering from epilepsy and other stressors i.e. the fight with her mother the previous day resulting in a feeling of hopelessness within, her ability to act in accordance with such appreciation, was diminished. This conclusion seems to be fortified by the fact that the accused not only killed her son, but immediately thereafter tried to kill herself. It is also consistent with the admissions the accused had made during her section 119 pleadings where she said that she knew she committed a punishable offence but, that she also wanted to kill herself.

[23] The only evidence contradicting the findings made by Dr. Mthoko and the constituted panel, is the evidence of the accused namely, that she has no independent recollection of the events taking place on the specific day. To me, this assertion seems to be nothing more than the skin of truth stuffed with lies. The report clearly states that the accused was unable to recall the *sequence* of events and *not* that she was unable to recall the *events* at all – a big difference between the two. She could recall that she took a knife from her parents' home and that she and the deceased thereafter went to the cemetery where she first stabbed him and then herself. The testimony of Dr. Mthoko furthermore excludes the possibility that what has been narrated to her by the accused, pertaining to the events of that day, did not come from the accused herself, but the uncle. Except for the fight that took place between her and her mother, the accused's evidence about her having an epileptic fit

the previous day, differs not only from what her brother had testified, but also, what she had told Dr. Mthoko.

[24] I am neither convinced that what the accused had explained, either in the Magistrate's Court or to Dr. Mthoko, came from her uncle and not what the accused herself could remember, and I have come to that conclusion for the following reasons: The accused was transferred to Rundu hospital still on the same day she arrived at Andara and whereas her uncle was working in Grootfontein that day, it seems highly unlikely that he could have been there at the time, as she claims. She was adamant that she remained at Andara hospital at all times, which is clearly wrong. She furthermore contradicted herself by testifying that she could *remember* pleading not guilty in Rundu Magistrate's Court; that someone sitting next to the magistrate then said her plea must be changed to one of guilty; and that she was then taken back to the cells. When the Court enquired from her whether she was certain of these facts, she answered in the affirmative. Her evidence in this regard, however, is in sharp contrast with para 14 of the accused's reply to the State's plea trial memorandum, which reads that the accused does *not* recall the contents of the record of the said court proceedings, inclusive of the section 119 proceedings. These contradictions remain unexplained.

[25] For the foregoing reasons I am convinced that the accused's version is not only highly improbable, but that it is false beyond reasonable doubt. Hence, the accused failed to lay a factual basis that she was criminally incapacitated when committing the offence.

[26] I turn here to briefly deal with Mr. *Bondai's* submission that, because the interpreting services of one of the nurses were made use of during consultations between the accused and Dr. Mthoko, therefore it is possible that the accused was wrongly understood and that what she has narrated at the time, is information given to her by her uncle, and not what she could recall herself. This may be a valid consideration, but in the present instance the defence at no stage attacked the reliability of the psychiatric report on that basis; on the contrary, it relied thereon as far as it supported the evidence given by the accused. To me it seems highly unlikely that where there had been an inaccurate translation, that it would only refer to the events of the second day and not also on the first as well. In these circumstances I find the submission without merit and nothing more than conjecture.

[27] Consequently, the State succeeded in proving beyond reasonable doubt that the accused was endowed with criminal capacity at the time of the commission of the act, but, that her capacity to appreciate its wrongfulness and to act in accordance with an appreciation of such wrongfulness, was diminished by reason of mental defect.

[28] Whereas criminal capacity on the part of the accused has been duly established, what remains to be considered is culpability. These are two different concepts.³ In order to determine whether the accused had the required *mens rea* at the time of her conduct, regard is had to the evidence of Dr. Mthoko that the accused appreciated the wrongfulness of her act – despite

³*Snyman (supra)* at p.160 para 4.

her thinking that it was the right thing to do to solve her problems. The accused furthermore in the court *a quo* admitted that she knew that it was unlawful to kill another human being; and when regard is had to the circumstances where a one year old boy is stabbed with a knife several times in the neck rupturing the spinal cord, the only reasonable inference to draw from it is that she acted with direct intent. This inference is supported by the accused's earlier admission that she wanted to kill the deceased and herself. I accordingly so find.

[29] In the result, on a charge of murder, read with the provisions of the Combating of Domestic Violence Act, 2003, the accused is found guilty.

LIEBENBERG, J

ON BEHALF OF THE ACCUSED

Mr. G.F. Bondai

Instructed by:

Directorate: Legal Aid

ON BEHALF OF THE STATE

Mr. R. Shileka

Instructed by:

Office of the Prosecutor-General