

NOT REPORTABLE

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case No: CC 8/2011

In the matter:

**THE STATE**

and

**CORNELIUS GANUSEB**

**ACCUSED**

**Neutral citation:**

*State v Ganuseb* (CC 8-2011) [2013] NAHCMD 11 (16 January 2013)

**Coram:** VAN NIEKERK J

**Heard:** 13, 14, 15, 16, 17, 20, 21, 22, 23, 24 February 2012; 3, 4, 5 September 2012; 16 October 2012; 22 November 2012

**Delivered:** 16 January 2013

**Flynote:** Judgment on the merits – Accused appearing on charges of murder and assault with intent to commit grievous bodily harm – Charge arising from incident in which deceased was stabbed 14 times with a

knife and a State witness who tried to intervene was cut once with the knife – Accused convicted on the count of murder but acquitted on the second count

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### ORDER

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The result is that I convict the accused on the first count of murder and acquit him on the second count of assault with intent to commit grievous bodily harm.

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### JUDGMENT

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VAN NIEKERK, J:

[1] The accused is charged with murder and assault with intent to commit grievous bodily harm. The indictment, read with the summary of substantial facts, alleges that the accused murdered John Justice Links ('the deceased') by stabbing him at least 15 times with a knife during the evening of Thursday, 3 June 2010, near Club Count Down in Epako, Gobabis, after an argument erupted between them. During the attack on the deceased the accused allegedly also stabbed the witness, Brussel Matroos, with the knife in his leg.

[2] The accused, who was defended by Mr *Ujaha*, pleaded not guilty to the charges. He made certain formal admissions in terms of section 220 of the Criminal Procedure Act, 1977 (Act 51 of 1977). In respect of the first count of murder he admitted (i) that he was at Club Count Down in the Gobabis district on 3 June 2010; (ii) that there was a fight between him and a group of people, including the deceased; and (iii) that during the fight, he stabbed the deceased once on the

shoulder and once in the lower abdomen. He however denied that these wounds caused the death of the deceased. The accused made no admissions in respect of the second count.

[2] The prosecution, led by Mrs *Ndlovu*, presented evidence by several witnesses.

[3] Dr Basu, the doctor, who conducted the post-mortem examination on the body of the deceased on 4 June 2010, had left Namibia by the time the trial commenced. His report was handed in as Exhibit 'A' with no objection by the defence. The State called the Principal Medical Officer of the Omaheke Region, Dr Jobarteh, to explain certain medical terms used in the report and to give medical evidence of a general nature.

[4] The post-mortem report records that the deceased was a well-built person of about 28 years. A total of 14 stab wounds were observed on deceased's body. Three of these were small stab wounds on the head. There were four superficial stab wounds on the left side of the neck and one on the right. There were two stab wounds on the left lower side of the deceased and one deep stab wound on the right side into the lower abdomen, which penetrated 2cm, pierced the abdomen wall and entered the intestines. The wound required considerable force to be inflicted. It could cause peritonitis, which is a very serious condition, difficult to treat and could very well cause a patient's death if not treated efficiently. There was a further stab wound on the back of the left hand. There was a wound in the left shoulder. The fatal stab wounds were located on the deceased's chest. The one went 1cm deep into the vessels of the heart, entering from the left side of the chest. It also entered into the left lung. This wound caused extensive bleeding. The other wound was more towards the right of the chest. Dr Basu recorded that the right lung was collapsed, although he could not observe an injury to the lung.

[5] The cause of death was determined to be due to a penetrating wound causing haemorrhagic shock. Dr Jobarteh testified that the wounds in the lower abdomen and the two wounds in the chest must have been inflicted with considerable force. The knife used by the accused (Exhibit 1) was consistent with the injuries inflicted.

The knife had a blade of 16,5cm in length. The blade was 2cm wide at the handle and tapered to a tip of ½cm in width.

[6] The doctor testified that the bleeding caused by the fatal chest wounds would have required immediate treatment as death was likely to ensue within about 5 minutes.

[7] Dr Basu examined Mr Matroos on 7 June 2010. He observed a 2cm cut wound on the lower right leg. He also examined the accused on that day and observed two slight bruises, one on the left shoulder and one on the left forearm. There was also a bruise on the right middle toe.

[8] Sergeant Kuahee of the Scene of Crime Unit of the Namibia Police handed in a photo plan and sketch plan to which there was no objection. The points on the sketch plan and photo plan were indicated by Rohla Tangeni Musirika, a state witness, in the presence of Constable Platt.

[9] This witness also testified regarding the packaging and delivery of certain exhibits to the forensic laboratory which were never examined. These included the trousers of the deceased, a t-shirt, sandals, a face cloth, a screw driver and Exhibit 1, the knife, as well as blood sample of the deceased and of the accused. The purpose of the examination was supposed to be to detect whether any blood could be found on the exhibits and to compare them with the blood samples to see whether there was any correspondence. In the light of the fact that the examination were never done I shall not deal further with these exhibits.

[10] This witness testified that the general area where the deceased was stabbed, was well lit during the night as a result of floodlights erected at different spots in that residential area. As this became an issue during the course of the trial I merely wish to note that all the witnesses in this matter except Melinda Musirika testified that the area was relatively well light by these floodlights. In fact one witness said they even played soccer there at night. Although it was disputed by accused's counsel throughout that there were lights, the accused himself testified that there were lights. Several of the photographs included in Exhibits F and H show the lights or the light

poles. It is clear from Sgt Kuahee's evidence, despite some reservations raised by defence counsel that the additional photos contained in Exhibit H were photos taken on 4 June 2010, which were not used in the first photo plan. This commonly occurs when crime scenes are photographed.

[11] The witness Brussel Matroos testified that he was a co-worker of the accused and also a friend. On 3 June 2010 during the evening he had drinks with the accused at the latter's house. There were many other people, as well as the accused. Some time later they bought a bottle of Richelieu brandy and a crate of beers which the group finished. They then went to Club Count Down. Also in the group were Charisma, Beauty, Mammies, Ricky, Caroline and Desmond.

[12] At Club Count Down, the accused played the jackpot machine, whilst Desmond, whose surname is Snyders, played snooker. Desmond became involved in an argument with three unknown men, one of which was the deceased. The accused moved to Desmond and Matroos went to play the jackpot machine. He noticed the accused following the three unknown men from the club. He and Mammies also followed.

[13] Outside the three men started running with the accused following them. They ran around a table standing outside. The accused took out a knife from his hip and when the last man, the deceased, came around the table, the accused stabbed him in the back. The deceased turned around to face the accused, where upon the accused stabbed him in the chest. The deceased fell to the ground. The accused kept stabbing the deceased while he was falling and while he was lying on the ground. The area where this occurred, it is common cause, was a big open space in front of the club, also often used to play soccer. The two men who had been with the deceased, his friends, came towards the accused and threw bottles at him. At this stage Matroos was about 20 metres away. The accused chased the two friends for about eight metres. He turned back and they ran away. The accused returned to the deceased and started stabbing him again. Matroos came closer and intervened, asking, 'The man is already gasping, why are you still stabbing him?' The deceased was lying on his side and the accused was stabbing him on his chest and on his back. In the process while Matroos was trying to stop the accused, the latter

stabbed him in the lower leg. Matroos had the impression from the manner in which the deceased gasped for air that he was dying.

[14] There was no else near the deceased. The knife which the accused used (Exhibit 1) was a knife which the accused made himself at work. The blade was set in a handle made of plastic pipe. Matroos was able to see well although it was in the evening. He was about 10 meters away from the accused when the latter drew the knife. The deceased had nothing in his hands. According to Matroos the accused did not stab him intentionally. I shall deal with this aspect in more detail later.

[15] Although Matroos drank several drinks throughout the evening he stated that he was not drunk. Matroos described the movements of the accused when he stabbed. He said the accused held the knife in his fist, showing the knuckles facing upwards and making repeated stabbing motions while moving his hand from the shoulder downwards. He said that the accused 'used his power', by which I understand that the accused stabbed forcefully.

[16] After the incident Matroos turned around and left, saying to the accused words to the effect that what had happened was the accused's business and that he should face it. He went home with his girlfriend, Mammies. That same evening the police arrived at his residence in the accused's presence. Matroos was arrested but released later.

[17] From cross-examination of Matroos it became clear that the State witness Beauty Saul was accused's girlfriend and that Mammies was Matroos' girlfriend. He also described Desmond as a person with a big beard and long hair. He also described a person that was commonly referred to during the course of the trial as 'the Herero guy', who, it is further common cause, is the witness Vetumbasana Kamuzerao. I shall refer to him as Vetumbasana. Matroos did not see Sergeant Mwandí there that evening but he admitted that one of the deceased's friends wanted to play pool and put his dollar down on the pool table where Desmond was playing. One of these friends was named Rohla Musirika, also a state witness. I shall refer to him as Rohla. Matroos also admitted that Rohla argued with Desmond.

It is further common cause that Desmond was also arrested and released on the Saturday, after the events.

[18] Certain instructions were put to Matroos by defence counsel, amongst which, that the accused and Mwandu stopped the quarrel between Matroos, Desmond, the deceased and Rohla, but Matroos stated that he was not paying snooker and that there was no quarrel.

[19] After the accused and the deceased left the club, Matroos stated in cross-examination, he stood at the door to see what would happen. When he saw that the others exited the yard of the club he also moved from there to see what was happening.

[20] Defence counsel put instructions to Matroos that he also had a knife which he denied. This was not repeated by accused under oath. Defence counsel put instructions to Matroos that the deceased threw an empty beer bottle at the accused when they reached the table. Matroos said that he did not see this. Defence counsel further put instructions to Matroos, that he (Matroos) and Vetumbasana attacked the accused, which he denied. These instructions were not repeated by the accused under oath. Further, defence counsel put instructions to Matroos that the accused brought the police to Matroos' place because the accused was aware that Matroos inflicted the fatal wounds. These instructions were also not repeated under oath.

[21] The next witness was Rohla Tangeni Musirika. The deceased was his best friend. On the fateful evening he went to Club Count Down with the deceased and another friend, Raymond de Bruyn. During the course of the evening they were joined by Mwandu. At some stage the deceased left the club to take a call on his cell phone. When the deceased returned, Rohla noticed that the deceased was involved in a quarrel with the accused. It appeared to become more serious as they were pointing at each other. Rohla went closer to intervene and Mwandu also tried to stop the quarrel. The security staff ordered them outside where there were also some of the accused's friends. At some stage he saw Matroos amongst the accused's friends, but did not notice Desmond Snyders there. The accused suggested that he and the deceased should fight one-on-one. Rohla said that if there were to be a

fight, he would fight alongside the deceased. He attributed these happenings to the fact that they had all been drinking and were slightly under the influence.

[22] The two opposing groups, namely the accused's and the deceased's groups were pushing each other back and fro, but there was no actual fighting. The accused then pulled something like a knife from his hip, whereupon the deceased ran to the area in front of the club where the tables were. His impression was that the deceased wanted to pick something up there in order to defend himself. At some stage he noticed the deceased had something like an empty beer dumpy in his hand. Rohla said that he had a bottle of beer. After the deceased ran around the table he came to a stand still next to Rohla. They heard people screaming and looked around and saw the accused's friends approaching. The only thing he and the deceased could do, was to move towards the accused who still had the knife in his hand. Rohla and the deceased threw the bottles at the accused, who dodged them. They ran past the accused. The deceased was slightly in front of Rohla and the accused followed. The accused stabbed the deceased one blow in the back. The deceased fell at point E on the plans before Court and the accused bent towards the deceased and stabbed him repeatedly more than four times. Rohla turned around and came closer to stop the accused, but the latter stood up and moved towards him. At this stage Rohla ran away in the direction of the Lutheran church. The accused gave chase and grabbed Rohla's jacket by the collar. Rohla succeeded in removing the jacket and left it behind while continuing to run away. The accused did not chase him far, but returned to the deceased where he and the two other male persons were very close to the deceased. Rohla later corrected himself and stated that it was the accused and three other men. He could see that the accused, who was tall, was again stabbing the deceased with the same black object, the knife.

[23] He was not sure what the other three persons were doing, whether they were also stabbing, or kicking or even trying to stop the accused. He could only see that there was some activity, apart from the accused's conduct. He could not see whether the other three persons had any objects with them. In the immediate vicinity there were no other people. The onlookers from the club were further away.

[24] Rohla stated that the stabbing motions were inflicted with 'very hard force' as he could hear the sound the knife made on the body which was like the sound of



someone kicking a small box. He saw the deceased trying to ward off the blows with his hands and arms.

[25] He could not state where de Bruyn was during the chasing and stabbing incident, because when they were ordered out of the club, they had to told de Bruyn to go back to fetch their drinks. However, he met up with de Bruyn again at the Lutheran church. From there Rohla ran home to fetch a motor vehicle to take the deceased to hospital. He returned to the scene by car with his sister Melinda and one August Bikeur. The deceased was lying still. According to the testimony of Melinda, who is a nurse, the deceased seemed dead. They transported the deceased to hospital.

[26] During cross-examination Rohla admitted a slight quarrel between him and Desmond at the pool table. Someone intervened, but it was not Mwandu or the accused, whereas it was put to him that Mwandu came over to stop him and the accused came over to stop Desmond. He denied bumping the accused near the jackpot and that the deceased pushed the accused. He denied uttering the words 'Vat jy gat van my bra?' or 'Vat jy gat van my vriend?' inside the club, but admitted that he could have used it later outside. Although there was some difficulty in translating this expression into English, it would appear to mean something like posing the question, 'Are you contemptuous of my friend?' or "Are you holding my friend in contempt?', or something to that effect, but it seems that the expression has a derogatory meaning. He said he used these words because the accused did not want to refrain from engaging in the altercation with deceased. He denied any suggestion by defence counsel that he took the bottle of beer to use in a fight with the accused.

[27] Cross-examination highlighted some differences between Rohla and Matroos as to where Matroos was outside the club but in my view these differences were not material. Accused said outside that he would beat the deceased up and deceased reciprocated in similar terms.

[28] The next who testified was Raymond de Bruyn, also known as Rise. He went to the club with the deceased and Rohla. He confirms Rohla's testimony as to what had occurred in the club in all material respects. After the accused, the deceased and Rohla were ordered out by the security guard, he remained inside for a while

with Mwandu to collect their group's drinks. He was called outside by a young boy. Outside in the open space in front of the club in the distance he saw people, and heard screaming. He went closer and saw dust at a certain point and realized there was a fight. He did not see where Mwandu went. From a distance of about 10 meters he saw a tall person with a dark complexion stabbing the deceased. He recognized this person from the club, it was the accused. He did not want to go closer as he was scared. He could only see the blade of the instrument used, it was very long. The deceased was lying on the ground and the accused stood astride over him while stabbing the deceased several times. He also saw two persons close to the accused, the one was Matroos. The other had a brown complexion and had long hair with a pony tail. I pause to note here that this appears to be the only reference to a person resembling Desmond, who was close to the scene of the stabbing. He did not remember seeing the person in the club that night.

[29] He could not see whether they were also fighting or whether they were trying to stop the accused. However, the stabbing was done only by the accused. He did not watch the scene for a long time, only for about half a minute. He then noticed Rohla running near the Lutheran church. De Bruyn ran in that direction and met up with Rohla. From there they ran to Rohla's house to arrange transport for the deceased and when they returned the deceased appeared to be dead.

[30] I pause to note that for first time in cross-examination of de Bruyn does it become clear that the accused allegedly does not know who stabbed the deceased when he ran after Rohla.

[31] The next witness was Sergeant Kefas Mwandu, a police officer stationed at Gobabis. On the particular evening he was at the club in his private capacity in the company of the deceased, Rohla, Matroos and Raymond de Bruyn. He saw Rohla talking to friends of the accused who were at the pool table. A quarrel started. The accused and later the deceased also joined the quarrel. It looked like they wanted to fight. Mwandu went over to separate them. The barman asked the two groups to leave. Mwandu remained inside. A short while later he was called outside by Maureen. She took him to a place where the deceased was lying covered in blood. The deceased was breathing abnormally. There was no one with the deceased, only onlookers who were about 5-7 meters away. Mwandu called Sergeant Mbangula who

was on standby. While he waited, Rohla arrived in a sedan with his sister. They put the deceased into the car and took him to hospital. At that stage the deceased was quiet.

[32] Mwandu joined other police officers to look for the suspect, ie the accused, after having been informed at the hospital that the deceased had died. They first made enquiries at the accused's mother's house. They were referred to Sgt Kahija's house where the accused was renting a garage as accommodation. In the fence near the garage they discovered the accused hiding. The accused appeared to be angry and aggressive. When Mwandu searched him, he had a screwdriver in his possession. Mwandu looked around inside the garage for the knife, but could not find it. He found the accused's girlfriend, Maureen and her mother inside. The accused was arrested and taken to the police station for questioning. The reason why he arrested the accused was because Maureen and her mother informed him that it was the accused who stabbed the deceased. He observed small spatters on the accused's trousers that appeared to be blood stains. At the police station the accused claimed that Matroos also stabbed the deceased. This led to Matroos' arrest.

[33] There were small differences in the evidence between Mwandu, Rohla and de Bruyn regarding who separated the fight in the club, who left with who and so forth but in my view nothing turns on this.

[34] The accused denied through his lawyer that he was hiding in the fence, but it was put to Sergeant Mwandu that he was entering the yard coming from 'somewhere' by creeping through the fence. However, Sergeant Mwandu stated that there was no hole in the wire fence next to the bushes. He was adamant that the accused was hiding. I accept his evidence.

[35] Simon Shindombe was the next witness. He is employed at Club Count Down as a security guard and was on duty on the evening in question. He knew the accused and deceased by sight as patrons of the club. At about midnight he noticed a quarrel between the accused and the deceased. He spoke to them and they stopped. Later the accused was at the jackpot machine where he was joined by the deceased. They were talking and pushing each other. Sergeant Mwandu tried to stop them, but they did not listen and Shindombe said they should go outside. The two men left, each with his group of friends. In the deceased's group there were two

other men, one of which was Rohla. In the accused's group there was an Otjiherero speaking person (Vetumbasana) and another man.

[37] Outside the two groups started fighting by throwing punches at each other. Then the accused chased Rohla and more particularly the deceased. The latter fell down in the open area in front of the club. The accused also chased Rohla in the direction of the church, but did not catch him. The accused returned to where the deceased was lying. It seemed as if he was hitting the deceased with his fists. Shindombe was unable to see this from the chair where he was sitting in the club, as he climbed onto the chair to see what was going on. Next to the deceased he saw Vetumbasana who held a beer in his hand. There were also some people who observed the chasing. They went straight to where the deceased was lying.

[38] Afterwards the accused came back to the club and said that he was looking for the deceased's friend. Shindombo said that the friend was not there and refused the accused entry because he had been fighting. At the time the accused had a blood stained knife in his hand and Shindombo became afraid. The accused then went to lie down at a tree next to the yard of the club. Shindombo decided to rather close the club for the night. The accused later disappeared. He described the knife as having a long blade.

[39] To my mind Shindombo did not give satisfactory evidence in all respects. For instance, he testified that he personally searched the accused before he entered the club to make sure he did not carry a weapon. Yet it is common cause that the accused was throughout carrying the knife (Exhibit 1) on his person. It is such a large knife that it could not have been overlooked in any proper search. Furthermore, Shindombe's testimony in Court and his witness statement show some material differences. He testified in detail about what he saw and how he got onto his chair to see what was happening when his view became obscured by the bystanders. Even then he was able to make out the accused's movements as set out above. Yet, under cross-examination it was common cause that in his witness statement he did not give this description. In his statement he merely described that the deceased fell down while the accused was chasing him, that the deceased and Rohla had run into an open 'field' and that the deceased fell 'again'. He explained that he meant by this that the deceased wanted to lift up his body but fell back. Then

he stated in his witness statement that he could not see what was really happening as the bystanders were many and obstructed his view since he was just observing from his seat at the club entrance. He sought to explain the difference between the oral testimony and the police statement by saying that, unlike in the witness box, he was not responding to specific questions when he gave his statement. Yet he also testified that the police asked him to state what had happened and to state what he had seen and heard that night. In this regard his explanation is not entirely satisfactory.

[40] On the other hand, I do accept Shindombo's evidence that the accused returned to the club later that night looking for the deceased's friend. Shindombo described him wearing boots. This detail is confirmed by Sergeant Mwandu who testified that the accused was wearing boots when he was arrested. He confiscated these boots for them to be examined by the investigating officer. The accused's girlfriend, Beauty Saul also testified that the accused wore sandals during that evening and after the incident at the club returned home where he changed into boots. Beauty Saul also testified that the accused repeatedly left his residence that evening and the witness Annalies Kandetu also testified that she met the accused who state that he was looking for the deceased's friend. In this respect their evidence corroborates Shindombo's.

[41] The next witness who testified was Fransiska Kuyembera (also known as Mammies). She who was a colleague of the accused and the girlfriend of Matroos. In general she confirms the events inside the club. She was part of accused's group of friends. I shall not repeat the details of the evidence about what happened inside the club. After the two groups left the club she heard people screaming outside. She saw people running towards the open space in front of the club. She saw two men in front with the accused and Matroos following, the one behind the other. The one fell and the other continued running away. The accused remained with the one who fell, bending towards that person with a black object in his hand. She did not see what Vetumbasana, who was also there, or Matroos did, if anything, but they did not have anything in their hands.

[42] She was afraid of what was happening and ran towards the nearby Club Ongunu. Shortly afterwards she was joined by Matroos, the accused, Caroline and

Beauty. She and Matroos went home. The latter appeared shocked and was bleeding from under his trouser onto the right foot. Later that evening Matroos was arrested.

[43] Under cross-examination she was confronted with her witness statement in which she said that the accused was chasing three men, whereas in court she mentioned two men. She also stated in the statement that after the accused stabbed this man, he got up and chased the other two men. The witness denied that she mentioned this to the police and stood by her testimony in court. She said that she and Constable Platt did not understand each other very well when she told him what happened. I accept her explanation.

[44] The next witness is Beauty Shirley Saul who was the accused's girlfriend at the time. In broad terms she confirmed that a quarrel involving Desmond, Rohla, the accused and the deceased broke out in the club and that they left the club. Outside Annalies Kandetu pacified the accused and deceased but it seems that when Rohla uttered the words 'Vat jy gat met my vriend?', matters escalated and people started running towards the open space. The accused was also amongst these people but she did not see what happened there. After a little while, the accused came from there. He had a knife with him. He said that he had stabbed someone and at a later stage he said he stabbed the person twice. He said that they should go home. She saw someone lying in the open space and saw two men close to that person. The one was Vetumbasana and the other was Matroos. Matroos sat on both knees, bending forward. He got up, dusted off his hat, put it on and joined her and the accused. He had blood on his hands and on his trousers. He said that he had been stabbed. Matroos asked her for toilet paper to wipe his hands, which she gave him.

[45] She did not see either Matroos or Vetumbasana with any object in their hands. Matroos, Caroline, the witness and the accused then left to go home. At home the accused threw the knife in the ashes from a fire they had made earlier that day. A while later he retrieved it again, but she did not notice what he then did with it. As I said earlier, she said that the accused took off his sandals and put on boots. The one sandal had blood inside it. Upon her enquiry the accused explained that his toe had been cut by a bottle. I pause to note that in this respect the accused must have lied because there's no such cut was observed by the doctor.

[46] The accused then took a long piece of iron and a screw driver from a tool box. She asked him where his going to. He replied that he is also going to die. He then went out. I pause to note that this answer conveys that the accused must have known that the deceased had died.

[47] After about 20 minutes the accused returned with Annalies Kandetu, who informed her in the accused's presence that the accused had stabbed someone to death. The accused remained silent. He just turned and walked away from the residence. After a while the accused returned and threw something into the toolbox. He left again. The witness looked for something bloody in the toolbox but could not find anything. The police arrived looking for him. They left and returned later. She noticed at some stage that the accused was on the police vehicle. At a later stage the police looked for the knife and found it in the black dustbin inside the residence.

[48] Annalies Kandetu testified that she is related to Beauty Saul, the accused's erstwhile girlfriend and also described the quarrel in the club. Outside she tried to pacify the accused and the deceased. Rohla then came out with a bottle in his hand and asked 'Vat jy gat van my bra?'. Thereupon the deceased pushed the accused in his face with his hand. They started running. She also saw Vetumbasana running. The deceased fell. On her way to the spot she met the accused coming from that area. He said to Beauty that they should go home, he stabbed the man. She also saw Matroos come back from that direction. He had blood on his trouser leg. The witness went to the spot where the deceased lay. He died soon thereafter. Rohla came with a vehicle and took the deceased away. She started walking home. On her way she met the accused. He had a knife and a kerie in his hand. She told him that the man he stabbed passed away. The accused said he was looking for Rohla. They both walked to his home. She further confirmed Beauty's evidence in broad terms about the occurrences at the accused's residence.

[49] She clarified in cross-examination that she saw no objects in the hands of Matroos or Vetumbasana.

[50] Constable Platt, the investigating officer, confirmed that three suspects were initially arrested, they were the accused, Matroos and Desmond Snyders. However all the state witnesses he interviewed indicated that it was the accused who stabbed the deceased. He therefore released Matroos and Snyders after a day or two. He

confirmed that he found the accused's knife in a dustbin at his home. He gave further evidence about the conduct of the investigation and the collection of exhibits. It is not necessary to deal with this in detail.

[51] Vetumbasana Kamuzerao testified that he was with the accused's group that day. After the security guard ordered them outside, he also went out. According to him, the accused and the deceased started fighting, but he did not take part. Thereafter the accused chased the deceased. When the deceased fell, the accused started stabbing him. He knew that the accused was stabbing the deceased with a knife because the witness had seen the accused taking the knife from his house earlier on. He described the accused making motions of stabbing several times. Under cross-examination he denied that he stabbed the deceased.

[52] This witness, under cross-examination, was confronted with discrepancies in his statement to the police and evidence he gave to court. Defence counsel stated to Vetumbasana that these discrepancies would be taken up with Constable Platt, when he would come to testify, but nothing was said to Platt about these discrepancies. In my view Vetumbasana explanation for the discrepancies are reasonable and I accept them. In my view he stood firm under cross-examination.

[53] This concluded the evidence for the State.

[54] The accused testified in his own defence. Broadly speaking his evidence about the events before they went to the club is the same as that of the State. At the club he says Matroos and Desmond Snyders play pool. The deceased and Rohla wanted to take over the pool table. The accused and Mwandu intervened. Matters calmed down. Later while he was playing jackpot, the deceased pushed him and he pushed back. The security guard ordered them out. Outside Rohla joined them. The accused was challenged to a fight with fists in the open space by Rohla and the deceased. He took up the challenge. On their way near the last table Rohla threw the beer he had in his hand at the accused. The deceased also picked up a beer bottled and threw it at the accused. He managed to evade being hit. The accused then took out his knife. Rohla was two to three metres away and the deceased about one meter. He stabbed the deceased twice – once on the right shoulder and once on his right side in the area of the waist. He then chased Rohla. The deceased also ran to the side of a certain club. He did not look to see what



happened to the deceased. He only saw Beauty and Caroline. He later stated that he actually saw Matroos and Vetumbasana standing next to the deceased where he fell. He does not know what they did, if anything. He went home with Beauty. On their way he saw Matroos and Mammies walking behind them. He also saw Vetumbasana going home. At home he left the knife on the table, and took out a screwdriver. He stated that he went to look for Desmond Snyders, his friend, because he was new to Gobabis. However, in the light of the evidence by Annalies Kandetu and Shindombo that he was looking for the deceased's friend, more specifically Rohla, I reject this evidence of the accused. On his way he met Annalies who told him that the deceased had passed away. He went home with Annalies. He threw the screwdriver into the toolbox. The police found him at the house and arrested him.

[55] Although his counsel denied that there were blood spots on his trousers during cross-examination, the accused gave an elaborate explanation that there were blood spots on his trousers from a sausage that he had been braaiing. He even told the Court where he bought the sausage. I find that this evidence is suspect as an explanation after the fact.

[56] The accused denied inflicting any other stab wounds than the two he described and testified that he did not know who inflicted them.

[57] He stated that he had a good relationship with Brussel Matroos still on that night. He denied stabbing Matroos.

[58] The accused testified that he stabbed the deceased with the intention to hurt him. He ran after Rohla with the intention to hurt him as well. The accused testified that he was sober, although he had been drinking. He said that he did not see Matroos with a knife that night.

[59] This concluded the defence's case

[60] At this stage it is noted that all the State witnesses who were at Club Count Down consumed alcohol to a greater or lesser degree that evening. Most of them already started drinking earlier that day. They all stated that they nevertheless knew what was going on around them. From the quantities consumed I have the impression that the witness Matroos appeared to have quite a lot to drink. That may

explain some of the differences between his evidence of what occurred inside the club when compared to the testimonies of other State witnesses who had consumed less.

[61] In his address Mr *Ujaha* submitted that his client's version was honest and open and that his evidence should be accepted that he only stabbed the accused twice with the intention to hurt him.

[62] I turn now for the moment to the evidence of Matroos and Vetumbasana. State counsel prepared useful heads of argument in which she set out the matter as follows:

'24. Both Matroos and Vetumbasana denied that they fought with the deceased and his friends outside Club Countdown and ran with the accused after the deceased. Fransisca, Shindombe and Beauty all testified that Vetumbasana and Matroos ran behind the accused. Shindombe also testified that the deceased and the accused and their respective friends fought just outside the club. Rohla and Raymond also testified that the accused was with the people that he had been drinking with and some people did run after them in the company of the accused.

25. It is submitted that these discrepancies show that the two, Matroos and Vetumbasana want to distance themselves away from the actual stabbing of the deceased. The evidence shows however that even if they ran after the deceased with the accused and were at the place where the deceased was lying, they did not take part in the stabbing. There is also evidence that Matroos even tried to stop the accused from stabbing the deceased.

26. It is submitted that since there is independent evidence from all the other witnesses that only the accused stabbed the deceased, their trying to distance themselves from the stabbing is not because they did stab the deceased, as all other witnesses vouch for their innocence on that point.'

For the reasons set out in her submissions as well as the further reasons that I shall now provide I am in agreement with these submissions.

[63] On a *conspectus* of the evidence presented by the State, the evidence is to my mind, overwhelming that it was only the accused who stabbed the deceased 14 times. Although Rohla said that he saw the accused and the accused's two friends on 'top of the' deceased and 'busy with him', he also made it clear that he could not

say that the two friends were stabbing the deceased. No one else saw any such stabbing and no weapons were seen in the hands of Matroos or Vetumbasana. Even the accused was not willing to state under the oath the instructions that they were the killers.

[64] In my view it must be taken to have been proven beyond a reasonable doubt that all the wounds were inflicted by the accused. All the wounds were inflicted in vulnerable areas of the upper body. The accused, although he may have been provoked, was clearly intent upon not only hurting the deceased, but on finishing him off. This much can be deducted from the number of wounds he inflicted, the areas on the body which he targeted, the force with which he repeatedly stabbed the deceased who was lying helpless on the ground and the weapon he used. Being sober he could have been under no misapprehension about the likelihood that such repeated stabs would surely lead to his victim's death. In fact, the evidence shows that the deceased died very quickly, if not while the assault was still taking place, then very soon thereafter. The accused first stabbed the deceased while he was still on his feet, but continued stabbing about four to six times while the deceased was lying on the ground. He then chased Rohla and when he did not succeed in catching up with him, he returned to the helpless and already injured deceased to continue his vicious assault on him. I accept the evidence by Brussel Matroos that he wanted to intervene and that he told the accused that the deceased was virtually dead, or words to that effect. Only then, it seems, did the accused relent. I reject his evidence about only having stabbed twice as false beyond a reasonable doubt.

[65] In his submissions Mr *Ujaha* asked the court to convict the accused of attempted murder, alternatively assault with intent to cause grievous bodily harm on the basis that he inflicted the two stab wounds that he admitted. Based on this submission, I take it that counsel agrees that the State made out a case that the accused had intention to kill although the wounds inflicted are not admitted to be fatal. On this argument there is, on the accused's own version, a case to be made out for intention to kill.

[66] As far as the second count is concerned, I accept Matroos' evidence that the accused did stab him in the process of Matroos intervening, but that this stabbing did not appear to have been intentionally. Matroos testified that he received no stitches

for the wound, only ointment and tablets, and that he did not lay a charge against the accused. I have taken note of State Counsel's argument on *aberratio ictus* and that he accused must have had intention. However I have doubt in my mind whether in all the circumstances it can be said that he actually foresaw that he might stab Matroos while actually aiming at the deceased and nevertheless continued, reckless as to the consequences. I prefer to give the accused the benefit of the doubt.

[67] The result is that I convict the accused on the first count of murder and acquit him on the second count of assault with intent to commit grievous bodily harm.

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K van Niekerk

Judge

APPEARANCE

For the State:

Mrs Ndlovu  
Office of the Prosecutor-General

For the accused:

Mr Ujaha  
of Mbaeva & Associates, instructed by Legal Aid