



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case No: CC 15/2011

THE STATE

versus

NIKLAAS MUZORONGONDO

Neutral citation: *S v Muzorongondo* (CC 15/2011) [2013] NAHCMD 173 (21 June 2013)

Coram: SHIVUTE, J

Heard: 27 May – 30 May 2013 and 11 June 2013

Delivered: 21 June 2013

Flynote: Criminal law – Murder – Test for *dolus eventualis* – Subjective – Whether the accused subjectively viewed foresaw the reasonable possibility that his actions could cause deceased's death but, reckless as to such fatal reasonable possibility embarked on to assault deceased – The court assessed relevant facts as to the accused's state of mind and intention cumulatively – And drew inference – Accordingly accused found guilty of murder with intent in the form of *dolus eventualis*.

Summary: Criminal law – Murder – Test for *dolus eventualis* – Subjective test – The accused killed the deceased a 4 year old toddler by assaulting her with fists on the abdomen and throwing her on a concrete floor – The deceased landed with her head first – She sustained a fracture of the skull – The cause of death was head injuries – The accused denied intention to kill or foreseeing the reasonable possibility that his actions could result in the deceased's death – The court finds that all the relevant facts which bear the accused's state of mind and intention - cumulatively assessed, an inference can be drawn – that the accused subjectively foresaw the reasonable possibility that his actions could cause the deceased's death, but reckless as to such fatal possibility embarked on to assault the deceased – The test is a subjective one – Accordingly the accused is found guilty of murder with intent in the form of *dolus inventualis*.

VERDICT

1st Count: Guilty of murder with intent in the form of *dolus eventualis*.

2nd Count: Guilty of defeating or obstructing the cause of justice.

JUDGMENT

SHIVUTE J:

[1] The accused faces an indictment containing two counts namely murder and defeating or obstructing or attempting to defeat or obstruct the course of justice.

Count 1: Murder

It is alleged that during the period 7 – 13 March 2010 at or near Farm Rooidam in the district of Maltahöhe the accused did unlawfully and intentionally kill Antoinette !Aes, a female person.

Count 2: Defeating or obstructing or attempting to defeat or obstruct the course of justice.

It is alleged that during the same period, same place in the same district the accused did unlawfully and with intent to defeat or obstruct the course of justice.

- (a) Bury the body of the above mentioned deceased in a shallow grave; and
or
- (b) Report to the police that the deceased was missing.

Whereas the act was perpetrated whilst the accused knew or foresaw the possibility that:

- (i) His conduct may frustrate or interfere with police investigation into the disappearance and/or death of the deceased; and or
- (ii) 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 accused pleaded not guilty in respect of the first count and pleaded guilty in respect of the second count.

[3] Mr Isaacks appears on behalf of the accused on the instructions of the Directorate of Legal Aid while Ms Wantenaar appears on behalf of the State.

[4] Mr Isaacks prepared a statement in terms of s 115 (2) of the Criminal Procedure Act 51 of 1977 in respect of the first count which may be summarised as follows:

During the period 7 – 13 March 2010 the accused was on the Farm Rooidam, Maltahöhe district Namibia. During the said period Antionette !Aes, a was left in his care by Elias Muzorongondo and his wife Sofia, when they left for Matahöhe on 5 March 2010. On Tuesday night he was with the deceased in the house and whilst

there he heard dogs barking. He got up and looked through the windows to see why the dogs were barking. The deceased also got up, followed him and started crying very loudly and uncontrollably. He got angry and wanted her to stop crying. She cried excessively and he hit her with clenched fists in the stomach. He picked her up and threw her on the floor. The deceased struck the floor with her head first. His intention was not to kill her but to silence her. Thereafter he picked her up and laid her in her bed. At that stage she was still alive as he observed her moving whilst she was in bed. He went to sleep. The following day he got up and made something for them to drink. He looked at the deceased and observed that she was not breathing and that she was dead. The accused was very shocked and became afraid. The first thing that came through his mind was to conceal her death and hid her body. He dug a hole and buried the deceased. At a later stage he informed his grandmother Lezita Rhoman and the police that the deceased was missing.

[5] The accused made formal admissions in terms of s 220 of the Act as follows:

“During 7 – 13 March 2010 I hit the deceased with my clenched fists and threw her on the floor where she hit her head because I was angry and wanted to quiet her down (*sic*). The deceased died either later that night or the next morning, Wednesday 10 March 2010 of the injuries that I caused her. The deceased’s body did not sustain any injuries whilst she was transported from farm Roodam to the police mortuary. The deceased was a human being at the time of her death. I had no legal right to have assaulted the deceased in that manner. I knew my actions aforesaid were wrong.”

[6] Counsel for the accused prepared a statement in terms of s 112 (2) of the Criminal Procedure Act in respect of the second count of which the accused pleaded guilty. In his amplification of his plea of guilty he restated what was contained in his plea explanation as stated above and I do not wish to repeat it. He further stated that after he buried the deceased he informed his grandmother Lezita Rhoman as well as the police at a later stage that the deceased went missing whereas in truth he knew that his conduct would frustrate or interfere with the police investigations into the death of the deceased. He also knew that his actions may protect him against prosecution for the crime of assault on the deceased. He was aware that his actions

were wrong and against the law and if caught he could be punished for them. He had no right to bury the deceased and to tell the people and the police that the deceased was missing. He stated further that he was very sorry for his actions and prayed for this court to receive his plea of guilty as a token of his remorse.

[7] The court was satisfied with the accused's plea on the second count and convicted him accordingly.

[8] The State called its first witness Lesetha Muzorongondo who testified inter alia that she is a biological mother of the accused. After she was informed that the deceased was missing they looked for her together with the accused but they did not find her. They started looking for the deceased on Wednesday and the body was only recovered on a Saturday. After the accused was arrested she asked him why he killed the deceased. He said he hurt the deceased because she was crying and that the deceased died at the spot.

[9] The second witness David Muzorongondo, the brother of the accused, testified that the deceased was a daughter to the accused's girlfriend. The accused told him that he killed the deceased and buried her at the farm in front of the water pipes. After he was told this, he informed their grandmother and all the people who were on the farm. The deceased was left in the accused's custody.

[10] The third witness called by the State was Doctor Simasiku Kabanje who explained the post-mortem report as the doctor who conducted the post-mortem on the deceased had since returned to his country of origin.

[11] According to the post-mortem report, the deceased was 4 years old. The cause of death was head injuries. Dr Kabanje explained that looking at the photographs depicting the deceased's skull after it was opened; the deceased had a linear fracture of the skull. The fracture could have been caused by someone striking with a force to the head or the head being struck to a heavy object or if someone falls on a wall or on a concrete. The doctor went further to testify that the severe injury could have been caused by moderate to high energy impacted on a skull. When he was given the scenario that the accused threw the deceased on the ground, he stated that the kind of linear fracture suffered by the deceased could only

be caused by a moderate to severe impact, otherwise if it was a light impact it could have only caused bruises or abrasions. It was again the doctor's testimony that children's skull structures are soft.

[12] The accused gave evidence under oath and called no witnesses. His testimony is that on 5 March 2010, he was left with the deceased by Elias Muzorongondo and his wife Sofia. The accused and the deceased were on Rooidam Farm. It appears they were left during the weekend because the accused testified that the deceased was fine on Sunday until a Tuesday evening when the accused heard dogs barking. The accused went to the window to inquire what the dogs were barking at. The deceased was crying a lot. She followed the accused. The accused got angry, picked her up and threw her on a concrete floor. He did not know why he did that to the child. However, he testified further that he wanted to hurt the deceased by throwing her on the ground so that she could stop crying. Apart from the accused throwing the deceased on the ground, he also assaulted her on the tummy but that was not very hard. After the accused threw the deceased on the ground, he took her to bed.

[13] He did not observe injuries on the deceased. When he took the deceased to bed she was still alive because she was breathing. The following morning, after he prepared something to drink he went to the deceased and realised that the deceased was dead because she was not breathing. He was shocked and frightened and the first thing that came into his mind was to hide the deceased's remains. He then buried the deceased. After he buried the deceased, he telephoned his grandmother and informed her that the deceased had gone missing. The people were looking for the deceased and he also joined them in the search. On Friday when the police came and wanted to take the accused to the police station, the accused informed his brother that he had killed the deceased and buried her. He also showed his brother where he buried the deceased.

[14] The accused was arrested on a Friday. The following day the accused pointed out to the police where he had buried the deceased. The police transported the deceased's body to the mortuary and it did not suffer further injuries. The accused testified that he had no right to assault the deceased; he did it because he

was very angry. When he was assaulting the deceased, he knew that what he was doing was wrong but he had no intention to kill her. He did not know that the deceased was going to die if thrown on the concrete floor, his intention was not to hurt her seriously. He only wanted to hurt her so that she could keep quiet. It was further the accused's testimony that the deceased's mother was his girlfriend and that he had a very good relationship with the deceased. The accused testified that he was shocked by the deceased's death because he had no intention to kill her. He asked for forgiveness for causing the death of the deceased from the Almighty God and from the family as well as from the community at large.

[15] It was put to the accused that a normal hiding does not include assaulting a 4 year old with clenched fists in the stomach and throwing her on a concrete floor. The accused responded in the affirmative. When he was asked what he expected by throwing a 4 year old girl on a concrete floor he said he did not know what spirit went through his mind. He just did it when he got angry and he never thought that she could be seriously injured. When the accused was asked about the sequence of his action, he said that he first assaulted the deceased with clenched fists twice on the stomach and after that he picked her up and threw her to the ground. The accused expected the deceased to stop crying after he assaulted her on the tummy. The accused never comforted the deceased. The accused was asked why he had told the magistrate when he pleaded "That Tuesday evening I assaulted the deceased it was mostly in the stomach and as a result she died". He replied that at that stage he had no legal representative and furthermore, was not aware that the deceased had a skull fracture. As to the question whether the deceased was alive at the time she was taken to bed, the accused said that the deceased was alive because her body was moving. She had put her arm around him but she was no longer crying or speaking to him. It was put to the accused that he buried the deceased in a shallow grave; the accused replied that he did not know what was going on with him. It was again put to the accused that he threw the deceased hard to the ground and he answered that he did not know.

[16] It was further put to the accused that by throwing the child using much force he must have foreseen the reasonable possibility that if her head hit the concrete floor first this could cause her death. He said he had no intention to kill the

deceased that was the reason he did not bother to check on her or to look if she had sustained injuries. It was also dark.

[17] Counsel for the State argued that the court should find the accused guilty of murder in the form of *dolus eventualis*. She further argued that the doctor testified that the deceased's skull could not have been fractured by a light fall. For the deceased to sustain a fracture of that nature, moderate to severe force must have been used. The State contended that the accused by lifting up the deceased and throwing her on the ground must have foreseen that this might cause some serious damage to her. The court must also look at the accused's behaviour afterwards. He did not check on the child to determine if she was injured or to comfort her. The court should also consider the fact that the accused told the mother that the deceased died at the spot. Counsel contended that the accused said his intention was to hurt the deceased to keep her quiet. By hitting the deceased with fists, throwing her head to the ground and causing a skull fracture, the accused must have foreseen that she might die of such injuries, so counsel argued.

[18] Counsel for the accused contented that the State conceded rightly that direct intent is absent in the present case. Therefore, the State should prove beyond a reasonable doubt that the accused killed the deceased with intent in the form of *dolus eventualis*. The State must prove that the accused subjectively foresaw the reasonable possibility that the deceased could die as a result of his actions and that he must have acted recklessly in causing that result. Counsel for the accused argued that the court should consider the accused's version he constantly informed this court that he had no intention to kill and during his testimony he said he did not foresee the possibility that his actions could cause the deceased's death. Furthermore the State could not rebut the evidence that after the accused threw the deceased to the ground the deceased was still alive. Counsel submitted further that the accused's version that the deceased did not die immediately was consistent with the doctor's evidence that there is a possibility that after the assault, a few minutes, the deceased could have gone into a comma.

[19] Furthermore, counsel argued that the fact that the accused made tea for the deceased in the morning is not an action of a person that foresaw the possibility of

his action killing the deceased or someone who was reckless in achieving that result. Counsel contended furthermore that there is no history of the accused being a violent person to indicate that he had an intention to kill the deceased. Therefore the evidence before court does not pass the test that the accused subjectively foresaw that there was a reasonable possibility for the deceased to die due to his actions. The court should apply an objective test and measure the accused's actions against a reasonable man in his position. Therefore the court should find the accused guilty of Culpable Homicide. Both counsel referred this court to authorities concerning the test to be applied in respect of *dolus eventualis*.

[20] Having summarised the evidence and arguments advanced by both the State and the defence, it is my duty to determine whether the State has proved its case beyond a reasonable doubt that the accused killed the deceased with an intent in the form of *dolus eventualis*. The following facts are common cause:

The accused assaulted the deceased, a four year old toddler, with fists in the abdomen. After he assaulted her with fists he picked her up and threw her to the ground. The deceased's head landed first on a concrete floor. The deceased died of head injuries due to a linear fracture of the skull. For the deceased to suffer a fracture of the skull of that type moderate to severe force must have been used.

[21] According to the post-mortem examination, Exhibit "F", the deceased suffered right temporoparietal fractures. The deceased died of head injuries. For the deceased to sustain fractures of the skull, this strengthens the inference that the force applied to the deceased's head was considerable.

[22] The approach to determine the accused's state of mind at the time of the assault was set down in *S v van Wyk* 1993 NR 426 (SC) at 443 B-D as follows:

"The State is, from the nature of things, seldom able to offer direct evidence of the accused's state of mind at the time of assaulting the deceased and must therefore rely on inferences to be drawn from the circumstances of the assault (including its nature and duration), the nature of any weapons used and the nature, position and extent of the injuries inflicted. These must in turn be weighed up against any other circumstances (such as the consumption of drugs or alcohol) which may indicate that the accused did not foresee the consequence of his actions. 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 a 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 persisted with the assault."

[23] I will therefore approach this present case in the light of the above principles. In determining whether intention in the form of *dolus eventualis* has been established, the court must apply a subjective foresight test. The court must be satisfied beyond reasonable doubt that the accused, viewed subjectively, appreciated that there was a reasonable possibility that the prescribed consequences will ensue but, despite that reasonable possibility the accused recklessly assaulted the deceased.

[24] In the present case the victim was a 4 year old toddler. The accused at the commission of the offence was 29 years old. The accused picked up the deceased after he assaulted her with fists in the abdomen and threw her on a concrete floor where her head landed. This in itself was a dangerous action on the part of the accused. The head is a sensitive and fragile part of the body especially given the fact that the victim was a toddler. After the accused threw the deceased to the ground, he did not bother to find out whether the deceased was injured. It is evident that the accused adopted a reckless attitude towards the well being of the deceased.

[25] There is no medical evidence establishing when the deceased died. After the accused killed the deceased he buried her in a shallow grave and at the time the body of the deceased was recovered it was in a decomposed state. Counsel for the accused's argument that the fact that the deceased did not die immediately is an indication that the accused had no intention to kill the deceased is without merit. Whether the deceased died at the spot or the following day this is not a determining factor of intention to kill.

[26] The accused by merely stating that he had no intention or that he did not foresee the reasonable possibility that his actions could cause the deceased's death is not the only decisive factor. All the relevant facts which bear the accused's state of mind and intention must be cumulatively assessed. There is no slight evidence

suggesting that the accused's state of mind was impaired or that there were other circumstances which may indicate that the accused did not foresee the consequence of his actions. I am therefore inclined to draw an inference that the accused realised that the deceased could have sustained serious injuries.

[27] Having considered all the facts as stated above, I am satisfied beyond a reasonable doubt that the state has proved that the accused subjectively foresaw a reasonable possibility that his actions could cause the deceased's death but reckless as to such fatal possibility embarked on to assault the deceased. Accordingly I find that the accused had an intention to kill the deceased with intent in the form of *dolus eventualis*.

[28] In the result the accused is found guilty as follows:

1st Count: Guilty of murder with intent in the form of *dolus eventualis*.

2nd Count: Guilty of defeating or obstructing the cause of justice.

N N Shivute
Judge

APPEARANCES

STATE : Ms Wantenaar
Office of the Prosecutor-General

ACCUSED: Mr Isaacks
Instructed by Directorate of Legal Aid

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