

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: CC 23/2017

In the matter between:

THE STATE

v

DAWID AMSEB

ACCUSED

Neutral citation: *S v Amseb* (CC 23/2017) [2019] NAHCMD 28 (20 February 2019)

CORAM: NDAUENDAPO J

Heard: 29, 30, 31 October 2018, 01 and 13 November 2018

Delivered: 20 February 2019

Flynote: Criminal Law – Murder – Attempted murder – Defence – Deceased slipped from accused arms and sustained head injuries – Denied attempted murder – Behaviour of accused demonstrated intention to murder – Medical Evidence corroborates intention to murder – Evidence of strangulation, but no evidence of attempted murder – Guilty of murder – Guilty of common assault.

Summary: The accused was arraigned in this court on a charge of murder and attempted murder. On the murder charge it is alleged that he hit the head of the deceased, his son of 3 months, on the ground and caused injury that led to his death. On the attempted murder, it is alleged that he strangled the mother of the deceased with the intent to kill her. He denied that he intended to murder the deceased, but that the deceased slipped from his arms and landed on the ground and injured his head. He denied having strangled the complainant.

Held, that, the version of the complainant that the head injury to the deceased was caused by severe force being used to hit the deceased to the ground was corroborated by the doctor and other witnesses.

Held, further that state proved beyond a reasonable doubt that the accused's behavior prior, during and after the incident was consistent with a direct intent to murder the deceased.

Held, further, that the evidence of the accused that the deceased slipped from his arms and fell to the ground by accident is false beyond a reasonable doubt.

Held, further that, the accused is convicted of murder with direct intent.

Held, further that, the evidence does not show that the accused attempted to murder the complainant by strangulation as she did not sustain serious injuries.

Held, further that, the evidence support a conviction of common assault.

ORDER

In the result, the following order is made:

- a) The accused is convicted of murder with direct intent read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003.
- b) The accused is found not guilty of attempted murder but convicted of common assault read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003.

JUDGMENT

NDAUENDAPO, J

Background Facts

[1] The accused was arraigned in this court on one count of murder and attempted murder read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003. On the murder charge, the state alleges that on or about 30 March 2017 and at Gobabis, the accused murdered Dube Morao, a three month old boy. On the attempted murder charge, the state alleges that on 30 March 2017 at Gobabis the accused assaulted Asina Morao by grabbing her on her throat and or strangling her and or suffocating her and pushing her with the intention to murder her.

[2] The accused pleaded not guilty to both counts. On the murder charge, he explained that the deceased fell to the ground by accident whilst he held him in his arms and injured his head. He had no intention to kill the deceased. He further denies that he attempted to murder the complainant by strangulation.

The state's case

[3] Ms Asino Morao, the mother of the deceased, testified that in the morning of 30 March 2017 at around 7am she went to lay next to the deceased as she was not feeling well. The accused, who is the father of the deceased, was initially sitting outside the house. He entered the room. He was quiet, but she could see on his face that he was angry. She testified that it was cold and the deceased was crying and

she asked him to cover the head of the deceased. The accused then said: 'you will see today you will make me to be locked up by the police today'. She testified that the accused then grabbed her with his hands on the throat with the intention to throttle her. She testified that she was struggling to take his hands off her neck as he was holding her tight and she was losing breath. She testified that he was pressing her on the cricoid and she managed to push his hands off her. He pushed her away and he grabbed the deceased and threw him head on the ground close to the door. Whilst on the ground, he wanted to kick the deceased and she managed to grab him from behind and prevented him from kicking the deceased. She was begging him not to kick the deceased as he had already thrown him on the ground. She screamed and called her neighbor, Francisca. Francisca came running and picked up the deceased who was on the ground. She went outside to look for assistance as she could see that the deceased was injured and his head swollen. The accused was just standing there under the tree without offering any assistance. The deceased's head was swollen and his eyes turning and making sound of being in pain. The accused could see that the deceased was injured but he offered no assistance. She then took the deceased to the hospital. She further testified that the deceased did not sustain further injuries from the time he was thrown on the floor up to the time he was taken to hospital. At the hospital the deceased succumbed to his injuries.

[4] Ms Francisca Ngautjiti testified that on 30 March 2017 between 7 and 8 am she heard somebody calling her name and she saw the accused and complainant pushing each other. She ran into their yard with the intention to stop the fight. Ms Morao then told her that the accused threw the deceased on the ground, she picked up the deceased and ran outside. The deceased's head was swollen and he was in pain. The accused and the complainant came out of the house. The accused stood under a tree and did not render any assistance.

[5] Ms Magdalena Jacobs testified that she came to the scene where the incident took place. Francisca gave the deceased to her and she sat with him on a bucket. She saw that his head was swollen. The deceased was then taken to the hospital. She approached the accused and asked him why he was killing the deceased, he responded by saying: 'it is my child I am the one who injured him.'

[6] Dr. Kabanje was called to read and explained the medico-legal report which was completed by Dr. Ikandi, who conducted the autopsy on the deceased. Dr. Ikandi, a Kenyan national, had retired and returned to his country. According to doctor Kabanje, the cause of death was blunt head injury. Dr. Kabanje testified that: 'There was extensive subdural haematoma and the brain tissue was extensively damaged'. The injury was extensive and was caused by the velocity or power of landing on the ground. He further testified that the chances of the deceased surviving with those injuries were virtually zero.

[7] Sergeant Kahivere testified that when he arrived at the scene he found the accused at the scene. After explaining his rights, he then asked the accused why he hit the deceased on the ground, he replied "I wanted to kill the kid". He arrested the accused and took him to the police station.

Defence's case

[8] The accused testified that in the morning of 30 March 2017 he woke up and went outside the house. He returned inside and started to quarrel with Ms Morao about ending the relationship. He took his bag, packed his belongings inside and the complainant informed him that she will not register the deceased in his name as he was not the father and she will register him in the name of her previous boyfriend. He was heartbroken. He grabbed her and she pushed him away and she went to stand in front of the deceased and he stood a distance from them. He wanted to leave and she told him that he must never come back and he must never claim that he is the father of the deceased. He then picked up the deceased with the intention to take him along and she grabbed him and the deceased fell on the ground in front of the door. He wanted to pick up the deceased, but the complainant screamed and called Francisca who came in the house and picked up the deceased. He further testified that after the incident he went out of the house and stood under the tree looking at what was happening.

Submissions by counsel for the state

[9] Counsel argued that the court is faced with two mutually destructive versions. On the one hand, the state through its witnesses have led evidence that the accused person intentionally threw the deceased head first to the ground. As a result the deceased sustained severe head injuries which led to his death. Counsel further argued that the evidence by the complainant showed that the accused strangled the complainant in count 2 with the intention of killing her.

[10] Counsel further argued that the version of the accused person is false beyond any reasonable doubt and should thus be rejected for the following reasons. Firstly, the conduct of the accused person before the incident is very important. According to Ms Morao the accused person during that morning threatened that he would do something that would get him locked up. These threats were not disputed during the state's case but only disputed when the accused was being cross-examined. The evidence by state witnesses on such issue should therefore be accepted as true. The dispute which came to light only during the defence case should be regarded as a mere after thought. Counsel relied on the matter of *S v Boesak*¹ where it was stated that:

'...it is clear law that a cross-examiner should put his defence on each and every aspect which he wishes to place in issue, explicitly and unambiguously, to the witness implicating his client. A criminal trial is not a game of catch-as catch-can, nor should it be turned into a forensic ambush.'

Counsel argued that with such threats the court can only infer that whatever the accused did subsequent to such threats, was intended to carry out his threats.

[11] Counsel further argued that, the accused person's explanation as to how the deceased apparently fell is full of contradictions and not consistent with the medical findings made during the autopsy. 'During the statement or confession made by the accused to the learned Magistrate, he indicated that the deceased fell at the point where he (accused) lifted him up and he was about to turn around. Further during cross-examination confirmed that when the deceased fell from his grip, he (accused) had not taken any step away from the point where he picked the deceased from.

¹ *S v Boesak* 2000 (1) SACR 633 (SCA) at 647 c-d.

However, when confronted with exhibit "B" (the photo plan) to explain how the deceased ended up 3 meters away from the point where he had picked him up, the accused adjusted his evidence to say that he had actually moved from point C to B as depicted in photo 5 of the photo plan. However, he still could not explain how the deceased then landed 2 meters away from such point.'

[12] Counsel further argued that 'another important aspect which he contradicted himself is the part of the deceased's body that first hit the ground. During the cross-examination of Dr. Kabanje, an impression was created that the accused alleges that the deceased landed on his head. However, during the cross-examination of the accused he indicated that the deceased actually fell either on his left or right upper side of his body. Therefore, having regard to the many discrepancies in the accused's version on such important facts and the fact that his narration of what transpired during such incident is by far inconsistent with the post-mortem findings, the court has no choice but to reject his version as false.

Submissions by counsel for the accused

[13] Counsel in his written heads argued that there are a number of aspects in the complainant's testimonies which points to inherent improbabilities which indicates that her version of what materially took place is flawed and could not have taken place in the manner she testified, namely;

- 'a) She failed to give a reasonable account of how, if she was indeed strangled, why no one noticed any injuries on her;
- b) Why she did not tell anybody or the person who came to the scene first about her strangulation;
- c) And even when she had an opportunity to do so, she did not inform the nurses or the police about it;
- d) She did not receive any medical attention and no medical forms or police forms indicating any form of assault was completed.
- e) Her version that she immediately ran out of the house after she had unloosed the accused grip on her neck was not supported by Francisca who testified that she saw them wrestling each other inside the house. Her version is highly improbable and Francisca's testimony corroborates what the accused had explained in his plea

explanation that he was held on his waist in the house, which a remote witness could have interpreted as two people wrestling each other.

f) Francisca cast doubt as to the probabilities of this witness' testimony.'

[14] Counsel further argued that without any further proof in relation to count 2, and regard being had to what had been submitted above, there is no material proof that in fact an assault had occurred in relation to the complainant or that it was proven and this in itself establishes a doubt of whether, in fact, the complainant was assaulted in the manner she testified. Accordingly, the accused should be acquitted on count 2.

[15] Counsel further argued that the testimony of Doctor Kabanje was flawed and biased because, firstly he did not conduct the post mortem examination on the deceased and secondly, 'his conclusion that mortality was 100% when the head hit a blunt object in a child did not take into account the high vulnerability of the infant child skull that is only made of cartilage when he had concluded that the injuries could only have been sustained as a result of the blunt force.' He further argued that there was no basis for the witness to rebut that the head injuries could have been sustained as explained by the accused given that the child of that age is highly vulnerable to blunt force impact and has a very low protective mechanism.

Analysis of the evidence

[16] The testimony of Ms Morao, the mother of the deceased, was very clear as to what occurred on the morning of 30 March 2017. She testified that the accused strangled her and when she managed to push him away, he grabbed the deceased who was laying on the mattress and hit or threw him head first on the ground with such force that he sustained severe head injuries. The injuries were so severe that according to the doctor it could not have been caused by a mere slip from the arms of the accused as he explained that the deceased fell from his arms by accident. The severe injury was caused by the force used to hit the ground. The evidence of Ms Morao that the accused hit or threw the deceased on the ground with the intention to kill him was also corroborated by the behaviour of the accused before and after the incident. Shortly before the incident he told Ms Morao that 'today he will do something that will have him locked up'. That was followed immediately by the

accused hitting or throwing the deceased on the ground with the head landing on the ground, showing a clear intention to cause severe injury to a most vulnerable part of the body. He then intended to kick the defenceless deceased as he was laying on the ground and was prevented by Ms Morao. That behaviour was to make good on his prior threat of doing something unlawful for which he will be arrested and locked up. After hitting the deceased on the ground he went outside the house and stood under a tree, knowing that the deceased sustained injuries to the head as people were crying, and did not render any assistance to his own child, whom he claimed fell on the ground by accident. The evidence of Ms Morao was credible and reliable. When asked by Ms Jacobs, a relative of his father, why he killed the deceased, he responded: 'it is my child, I am the one who injured him'.

[17] Sergeant Kahivere testified that when he asked the accused why he hit the deceased on the ground, he replied that: 'I wanted to kill the kid.' That evidence is admissible against the accused². His behaviour prior, during and after the incident clearly showed that his intention was to murder the deceased. Although doctor Kabanje did not conduct the autopsy, as counsel for the defence argued, the finding that the cause of death was 'blunt head injury' was also corroborated by the evidence of Ms. Morao who testified that the deceased was thrown or hit on the ground with the head first. The evidence by Ms Morao and the other witnesses was that the head of the deceased was swollen. Doctor Kabanje also testified that severe force must have been used to cause that injury. The testimony of the doctor that severe force must have been used to cause the head injury corroborates the conclusion that the accused had the intention to murder his son. His version therefore, that the deceased slipped from his arms by accident and fell to the ground by accident is clearly false beyond reasonable doubt and I reject it.

[18] On the charge of attempted murder, the evidence of Ms Morao was that the accused throttled her but she managed to push his hands away from her neck. She did not sustain injuries and did not receive medical treatment. She did not inform the police or nurses shortly after the incident and that tend to show, together with the

² S 219 A of the Criminal Procedure Act, Act 51 of 1977 provides: '*Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, admissible in evidence against him at criminal proceedings relating to that offence*'

fact that she did not receive medical treatment, that the strangulation did not cause serious injury to her. The evidence adduced does not show beyond a reasonable doubt that the accused intended to kill the complainant but support a conviction on common assault.

[19] In the result, I make the following order:

- a) The accused is convicted of murder with direct intent read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003.
- b) The accused is found not guilty of attempted murder but convicted of common assault read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003.

G N NDAUENDAPO

Judge

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