

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: CC 12/2016

In the matter between:

THE STATE

v

JOHNY RYNO DIERGAARDT

ACCUSED

Neutral citation: *S v Diergaardt* (CC 03/2015) [2019] NAHCMD 286 (9 August 2019)

CORAM: NDAUENDAPO J

Heard: 30 July 2019

Delivered: 9 August 2019

Fly note: Criminal Law – Accused charged with murder- plea – Not guilty – No recollections of events that led to death of deceased – Deceased stabbed 27 times by accused – Psychiatrist evaluations – Accused not suffering from mental illness or defect at crucial time – Intent – Stabbing deceased 27 times with different knives – Direct intent – Guilty as charged.

Summary: .The accused was arraigned in this court and charged with murder, read with the provisions of the Combating of the Domestic violence Act, Act 4 of 2003. He pleaded not guilty and explained that he had no recollection about the events that led to the death of the deceased. Evidence was led that the accused and the deceased were involved in a romantic relationship which was characterized by quarrels and sometimes physical altercations. There was evidence that the deceased abused alcohol and neglected her two minor children. That did not sit well with the accused and he unsuccessfully sought sole custody of the child he had with the deceased. On 3 March 2014 he went to look for keys from the deceased at a friend's house but the deceased was not there. He searched in the handbag of the deceased and found the engagement ring, necklace and specs that he had bought for the deceased and also a condom wrapper in her bag. He was disappointed to see that. He cried. He took those items with him and returned to his flat and slept. Later on that night he heard a bang on the door and when he opened the door it was the deceased. When she entered, she started swearing at him and a quarrel erupted between them inside the room. He testified that the next moment he lost consciousness and when he regained his conscious, he was standing next to the body of the deceased as she was lying in a pool of blood. He left the body and ran to the riverbed with a knife in his hand. When he returned, he was arrested by the police. After his arrest he was evaluated by psychiatrists.

Held, that, there is no dispute that it was the accused who stabbed the deceased twenty seven times.

Held, further, that at the time of the commission of the crime the accused was not suffering from any mental illness or defect and was accordingly criminally liable for his conduct.

Held, further, that by stabbing the deceased twenty seven times with different knives, the accused had the direct intent to cause the death of the deceased.

Held, further, that the accused is convicted of murder with direct intent, read with the provisions of the Combating of the Domestic Violence Act, Act 4 of 2003.

ORDER

The accused is convicted of murder of Tiffany Lewin, with direct intent, read with the provisions of the Domestic Violence Act, Act 4 of 2003.

JUDGMENT

NDAUENDAPO, J

Background Facts

[1] On 3 March 2014 a young mother's life was tragically cut short in the most brutal and vicious manner imaginable. She was stabbed twenty seven times. As a consequence of her death, the accused was arraigned in this Court on a charge of murder read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003.

Summary of substantial facts

[2] The state alleges that: 'at some time prior to the deceased's death, the accused and the deceased were involved in a domestic relationship in that they were involved in an actual or perceived intimate or romantic relationship from which they have a child together. 'On Monday 3 March 2014, during the evening hours the deceased and her four year old son arrived at the room where the accused resided situated at number 427 Garnet Street in Khomasdal in the district of Windhoek to collect some property which the accused earlier the same day had removed from her handbag. The accused attacked the deceased and stabbed her at least 27 times with knives, where after he fled the scene. The deceased died on the scene due to exsanguination/blood loss caused by the multiple stab wounds.'

[3] The accused pleaded not guilty to the charge. In his plea explanation he said he had no recollection of the events that caused the death of the deceased. He can also not remember the object or objects which caused her death. Nor does he remember that he stabbed the deceased twenty seven times.

Ms. Jacobs appeared for the state and Mr. Isaacks appeared for the accused.

The state's case

[4] Ms Elsabe Margareta Levine, the mother of the deceased, testified that the deceased and the accused were in a romantic relationship, from which relationship a daughter was born. She testified that the relationship between the accused and the deceased was strained at times as she was aware of bad text messages exchanged between the two. One such message that she saw was from the accused wherein he threatened to kill the deceased. She testified that the deceased had lived with her in her apartment in Rehoboth but shortly before her death she moved to the home of the grandmother.

[5] Under cross examination it was put to her that the deceased was neglecting the child and that is why the accused had reported the matter to the social worker so that he could get sole custody and control of the child. She denied that and testified that the sole purpose why the accused reported the deceased to the social worker was to manipulate the deceased as she had no longer wanted to be in a relationship with the accused. She testified under cross examination that there were occasions where the accused would keep the child in his care for periods of up to a week while having been told by the deceased to return the child to her earlier.

[6] Ms. Tuanatte Roxine Levine, the older sister of the deceased, testified that she knew about the romantic relationship between the accused and the deceased and that the deceased ended the relationship in 2014 due to the fact that the accused was a jealous person and that the deceased felt it was not worth continuing with the relationship and that at the time of the deceased's death, the accused and deceased were no longer in a relationship. Ms Levine testified that on 3 March 2014 at approximately 11:00 in the morning, the accused arrived at the home of the

deceased's grandmother in Rehoboth with the deceased's daughter. The accused then left his daughter with her (Ms Roxine Levine) and told her that he was going to see a social worker in order to apply for sole custody of the child as the deceased was neglecting the child. After some time the accused sent her (Ms. Roxine Levine) a text message saying: 'Tiffany (the deceased) will not put her foot again nearby the child'.

[7] Ms Levine further testified that the deceased had stopped drinking in 2013 and disputed the claim that the deceased was neglecting the child as she never left the child unattended or with strangers.

[8] Ms. Abida Frieda Swartz-Mcnab testified she was a friend of the deceased and knew about her relationship with the accused. She testified that it was a strained relationship and on an occasion she witnessed a physical altercation between the accused and the deceased. Ms. Swartz-Mcnab testified that on a specific evening in 2013, in Rehoboth, of which she cannot recall the exact day, she and the deceased were with the late Mr. Marius Du Plessis in front of club Suidwes when the accused arrived there and smacked the deceased because the deceased had left the child in the bakkie unattended whilst she was enjoying herself in the club. Under cross examination it was put to her that the daughter of the accused was present alone in the vehicle while they enjoyed themselves in club Suidwes. She denied this, saying that there was no child with them on that occasion.

[9] On 1 March 2014, the deceased was at her home when the accused arrived there to collect the deceased and his daughter. The deceased refused to accompany the accused and he slapped the deceased and one of Ms Mcnab's neighbor intervened and stopped the assault. The accused then took his daughter and left.

[10] Mr. Darlin Maritz testified that he was a close friend of the accused for well over 22 years. He testified that he was aware of the romantic relationship between the accused and the deceased. The relationship was characterized by quarrels. He recalled an incident where the deceased stabbed the accused in the presence of their daughter. He also testified about a second incident in Rehoboth where the

accused and the deceased got involved in a heated argument. The accused was angry with the deceased for having brought their daughter to a club and leaving her sleeping in a car whilst she was inside the club drinking. He intervened and the deceased agreed to take the child to her grandmother's house and locked her in a room.

[11] Mr. Maritz further testified that after the arrest of the accused, he visited him in prison and the accused told him that he could not remember how many times he stabbed the deceased nor did he believe that he could do something like that to her.

[12] Detective Chief Inspector Ndjandila testified that on 3 March 2014 around 23:30 they arrived in Khomasdal at the scene where they found the deceased laying in a pool of blood. The accused was not present. While on the scene he spoke to a Mr. Jacob Joubert, who was a tenant in the same complex as the accused. Mr. Joubert related the vents that unfolded in the evening to him. Detective Chief Inspector Ndjandila further testified that while searching the room of the accused, he came upon a note book (Exh "O") written by the accused in which he wrote:

'No family is perfect, we argue, we fight we even stopped talking to each other at the time but in the end, family is family. The love will always be there, we even say words to each other that really hurts but I believe that is love means a lot. Just imagine my life without you, I would just want to die rather than being without you. I know I get jealous sometimes. But it is because I love you a lot. I cannot imagine my life with anybody else than you. I have said and done a lot of things in the past that really hurts you and my two children, I know I cannot take those things back. But my love please forgive me and I am in love with you. Nobody will ever take your place, I am learning from my mistakes daily and I am not perfect. But I am trying daily to work on my mistakes and love and adore you, all every second. It does not mean because we argue a lot that we are not meant for each other. It is what we learn from our mistakes that makes us strong. Tiffany Twanita Lewin, I love you with all my heart and I want us to be a family my love please I beg you my love.'

[13] Upon further search of the room, he found a set of knives in a box similar to those found around the body of the deceased and in the deceased's body. He further testified that four knives were missing from the box. The accused was later arrested

after he had returned to his flat. Detective Chief Inspector Ndjandila further testified that the following day he went to the Mortuary where they viewed the body of the deceased and observed 25 stab wounds on the body of the deceased. The knives were admitted into evidence as Exhibits '4' and '5'.

[14] Ms. Priscilla Ferris, a social worker at the Ministry of Gender Equality and Child Welfare and based in Rehoboth testified that the accused came to her on 7 May 2013 to apply for sole custody of his child. The accused told her that the mother of the child was abusing alcohol and neglecting the child. Upon her investigations she had realized that the child was left in the care of the deceased's grandmother. She's testified that the last time she had seen the accused was on 24 February 2014 when he came to enquire about his custody application.

[15] Under cross examination she had denied the point put to her that it was the accused's instructions that he had come to see her on 3 March 2014 to file an application for custody of his daughter.

[16] Mr. Joubert testified that he was a neighbor of the accused as both were tenants in the same complex. He testified that they lived across each other and a mere distance of about two to three meters separated their respective doors. He recognized the deceased from frequently seeing her at the flat of the accused and he had assumed that she was the girlfriend of the accused as she would frequent the accused's place with two children, mostly a little girl. He testified that a strained relationship existed between the accused and the deceased as the deceased seemed to have been a very difficult person who swore and screamed at the accused frequently. He testified that on 3 March 2014 at around 22h00 he heard screams of the deceased and the son saying 'don't stab my mother' coming from the room of the accused, he ran out and found the son of the deceased with his back facing him (Mr. Joubert) standing outside the flat of the accused with a knife in his hand.

[17] He saw the body of the deceased laying in front of the room of the accused with the accused standing over the body of the deceased as he stabbed the

deceased in the head with a knife. Mr. Joubert then proceeded to grab the little boy, shook his hand to let go of the knife out of his hand and took the boy into his own room where his own children and fiancée were as he feared for the safety of the boy. He then proceeded to watch the accused after having stabbed the deceased in the head and heard him mumbled to the body of the deceased as it lay on the floor. He could not clearly hear these mumbles. He could however only make out a few words. He said to her: **'this was for all the embarrassment and pain.'**

Mr Joubert proceeded to ask his landlord to call the police as the accused had gone to sit next to the corpse of the deceased and continued to mumble. Mr. Joubert testified to trying to get the accused to calm down as he was unable to understand what emotions the accused was going through at the time. After having told the accused to calm down the accused replied to Mr Joubert saying:

'How can I calm down after what I have done and what had happened.'

He further testified that the deceased then left the house with a knife walking in the direction of the gate where he ran towards two men, who, when they saw the accused approaching, ran away from the gate. Mr Joubert further testified that the accused was arrested later that evening after he had returned to his flat after having left for a time period he had estimated to be around one hour to one and half hour.

That was the case of the state.

Defense's case

[18] The accused testified that he was in a romantic relationship with the deceased that started in 2009. In the beginning, the relationship blossomed but that after a few months, they ended the relationship briefly and resumed it again. On 13 September 2011 a beautiful daughter was born to them. Shortly after that, their relationship became strained again. He testified about an incident where he found the deceased in front of club Suidwes in Rehoboth with their daughter inside the car alone whilst she was inside the club. He was angry with her and pleaded with her to take the child home.

[19] He testified that his friend Dylan drove the deceased and the child home. After a short while he again ran into the deceased in a club and asked her where the child was, upon which the deceased told him that the child was locked in a room alone at her grandmother's house, this infuriated him and he proceeded to beat the deceased

with his left hand in her face and told her that the child was only five months old and could not be left in front of a night club or left in a room alone. He proceeded to go the police station to lay a charge of child neglect against the deceased but was advised by the police officer to return the next day when he was calm as he was very angry at the time.

[20] The accused further testified about multiple incidences where the deceased would abuse alcohol and go off to drinking establishments and parties and in the process neglecting her two minor children. He was frustrated and disappointed with her behavior. He testified about constant quarrels and fights between him and the deceased that related directly to her abuse of alcohol and neglect specifically of their daughter. He further testified about an incident when he was stabbed in the hand by the deceased in the presence of their daughter. Mr. Maritz also testified about that incident. . He further testified that they attended counseling sessions in June 2013 with a social worker where the deceased was informed to stop her behavior and take better care of her children otherwise they would be taken away from her. The counselling helped for a while but after that, the deceased returned to her old tricks of abusing alcohol and neglecting the children.

[21] The accused further testified that on the Monday morning of 3 March 2014 he was on leave from work and took his daughter to Rehoboth as he had taken her from the deceased the Saturday as she was busy partying with her friends. He denied the testimony of Ms Abida that he had slapped the deceased the Saturday after she had refused to accompany him to his flat. He testified to having been with his daughter from that Saturday and up to Sunday. The agreement with the deceased was that she would come and collect the child from him that Saturday, however she did not do so. On Monday he arrived in Rehoboth and left his daughter at the home of the deceased's grandmother and he proceeded to the offices of the social worker, Ms. Ferris. He testified that when he got there she was in a hurry and she did not want to listen to him. He further testified that he completed an application for sole custody of the child, but that application was never processed. He returned to Windhoek a frustrated man.

[22] In Windhoek he called Mr. Frey and told him that he needed somebody to talk to. Mr. Frey arrived at 17h00 and they went to Khomas mall. They drank two beers there. He told him that he was unhappy with the deceased and how she had humiliated him on Saturday. Later that evening of 3 March 2014 he went to Ms Swartz-Mcnab's place and told her that he wanted the keys to the deceased's room in Rehoboth so that he could go and remove the child's clothes from the room in Rehoboth. Ms. Swartz-Mcnab informed him that the deceased was not there at the time but he could come and search through the deceased's bag for the keys. He searched the bag and discovered that the deceased had taken off the engagement ring and necklace he had given her and also found a used condom wrapper in her bag. He was heartbroken at what he saw. He was in tears and exhausted with the relationship with the deceased and he felt that he no longer wanted to be in this world. He left and at around 21h00 he again returned to the home of Ms. Abida Swartz-Mcnab to see if the deceased had returned, but to his disappointment she had not. He proceeded to take all the things he had bought the deceased: the ring, the necklace, the cell phone and the specs from her bag.

[23] He went back to his flat. At the flat, he consumed one beer with his prescription medication and went to sleep. After a while he heard a bang on the door and on opening the door, it was the deceased who started insulting him. He told her that she was sleeping around and he saw that she was in the company of two men, the one was the father of her son. They were standing at the gate. He testified that a quarrel broke out between the two of them in the room at which point he lost consciousness. He told the court;

'I can remember we were quarrelling there and after a time I went blank My Lord.'

[24] He testified that when he regained his consciousness, the deceased was lying in a pool of blood. He proceeded to say: "look what I have done, call the police so that they can come and shoot me dead". He testified to running out of the yard to a nearby riverbed holding a knife. . He was wearing a trunkie and was barefooted. He was asking himself what he had done and thought of killing himself. He then went back to his flat .where he was arrested by the police.

Under cross-examination he testified that he felt humiliated on the Saturday, 1 March 2014 when he went to collect his daughter from the deceased. She had sworn at his mother and said he would die like his mother and that which humiliated him the most, was the deceased saying to him, in front of people that he was taking their daughter to go and rape her. Under cross-examination he also testified that his heart is broken, nobody deserves to die like that and he loved the deceased very much.

[25] The accused conceded that taking into account the events that had happened on the weekend of 1 March 2014 and the earlier part of the day of 3 March 2014, and now also the deceased coming to his room yelling and banging on his door made him angry and frustrated and he just wanted to separate from the deceased. He however denied having had any intention of stabbing the deceased. The accused insisted that he could not recall how many times he had stabbed the deceased as he had no recollection of the events that unfolded that evening after he had opened the door. He testified that he cannot dispute the evidence of Mr. Jaco Joubert as he does not have any recollection of anything he could have possibly said to Mr. Joubert.

Submissions by counsel for the state

[26] Ms Jacobs submitted that the accused acted with direct intent when he stabbed the deceased twenty seven times. She dismissed the testimony of the accused that he had no recollection of stabbing the deceased twenty seven times. She argued that three psychiatric reports that were admitted into evidence by consent, all concluded that the accused did not suffer from any mental illness or defect at the time of the commission of the crime. No other medical or other evidence was submitted to the court to support the defence of the accused or to raise reasonable doubt as to his mental capacity at the time of the commission of the offence. Counsel further argued that the accused acted voluntarily and was well aware of his actions when he stabbed the deceased twenty seven times with various knives.

[27] She argued that Dr. Sieberhagen concluded in his report that:

“4.1 *The accused did not suffer from any psychiatric illness, also that at the time of the murder he was compis mentis.*

4.2 *The accused's realization that he had killed his fiancé was immediate. This negates a possibility of temporary insanity...*"

[28] Dr. Sieberhagen also added in his report that the accused claims to have blocked out memory at the time of the stabbing as he claims to only remember what happened before and after the incident, so-called psychogenic amnesia. She argued that the court in *S v Henry* held that psychogenic amnesia cannot exclude criminal liability. The case of *S v Henry*¹ (supra) was followed with approval in Namibia in the unreported case of *S v Joseph Simon Kangondi*².

[29] Dr. Mthoko concluded in her report in terms of Section 79(4)(d) of the Criminal Procedure Act, Act 51 of 1977 that:

"At the time of the commission of the alleged crime, there was no evidence of mental illness or defect. He was able to appreciate the wrongfulness of the alleged offence and act in accordance with such appreciation."

[40] The defense requested for a third psychiatrist's evaluation of the accused. The accused was then referred to Dr. Marx, who evaluated the accused and concluded as follows:

"...Mr. Diergaardt has not suffered from a mental illness prior to the incident nor is there any evidence that he has suffered from one after the incident... It is my opinion that he understood right from wrong during the period of the alleged offense occurred. I can find no reason from a mental health perspective why he cannot stand trial or to doubt his ability to decide right from wrong during the incident."

[41] Counsel further argued that the murder was not committed on the spur of the moment. The accused earlier that night took the property of the deceased and told her friend Abida, that if the deceased wants her property back she should come collect it from his flat. This action was an attempt on the part of the accused to get the deceased to his flat. When she arrived at his flat the accused then stabbed the deceased. Accordingly, counsel argued that the state had proven the guilt of the accused beyond a reasonable doubt.

¹ 1999(1) SACR 12 SCA.

² CC 9/2002 delivered on 23 September 2003.

Submissions by counsel for the accused

[42] Mr Isaacks conceded, rightly so, that having regard to the totality of the evidence the accused had the intention to commit murder. Counsel argued that the state failed to prove that the accused acted with *dolus directus*, because of the following reasons:

- '1. The deceased arrived at the accused person's house and started the erupted altercation.
 2. The accused person was asleep at the time the deceased arrived at his residence.
 3. The accused consumed alcohol and took his ARVs before going to bed.
 4. According to the psychological report, Dr. Edwina Mensah-Husselman after examination which was conducted from 25 April 2014 to 18 June 2014, which report was handed up by consent, the following diagnosis is apparent.
 - (a) The accused stabbed the deceased without premeditation.
 - (b) The accused did not have the deliberate intention to kill.
 - (c) His actions were driven by unconscious rage which drove him over the cliff.
 - (d) His action was out of character. (this is supported by his sister, Dylan and Jacob Joubert)
 5. In terms of the psychiatric report by Dr. Sieberhagen, which was also handed up by consent, the following is apparent:
 - (a) The accused acted in a diminished criminal capacity.
 - (b) The accused may have had a reduced conative ability.
 6. The accused in his bail application stated that he stabbed the deceased in a moment of weakness.
 7. According to the witness, Dylan, although he admits stabbing the deceased, he could not remember how many times.
- On these premises, Mr Isaacks submitted on behalf of the accused that he acted with the intent to murder in the form of *dolus eventualis*.'

Analysis of the evidence

[43] There is no dispute that the deceased was stabbed 27 times according to the post-mortem examination report. The accused does not deny having stabbed the deceased. All what he said is that he cannot remember what had happened. He testified that he lost consciousness when the quarrel with the deceased started and when he regained his consciousness she was dead and laying in a pool of blood. The accused was evaluated by three psychiatrists and their reports were admitted into evidence by consent. As alluded to by Ms Jacobs, Dr. Sieberhagen concluded in his report that:

“43.1 The accused did not suffer from any psychiatric illness, also that at the time of the murder he was compis mentis.

43.2 The accused’s realization that he had killed his fiancé was immediate. This negates a possibility of temporary insanity...”

[44] Dr. Mthoko concluded in her report in terms of Section 79(4) (d) of the Criminal Procedure Act, Act 51 of 1977 that:

“At the time of the commission of the alleged crime, there was no evidence of mental illness or defect. He was able to appreciate the wrongfulness of the alleged offence and act in accordance with such appreciation.”

[45] Dr. Marx, who evaluated the accused and concluded as follows:

“...Mr. Diergaardt has not suffered from a mental illness prior to the incident nor is there any evidence that he has suffered from one after the incident... It is my opinion that he understood right from wrong during the period of the alleged offense occurred. I can find no reason from a mental health perspective why he cannot stand trial or to doubt his ability to decide right from wrong during the incident.”

[46] The psychiatrists who evaluated the accused were unanimous in their findings that the accused did not suffer from any mental illness or defect at the time he stabbed the deceased. He was able to appreciate the wrongfulness of his conduct and acted in accordance with such appreciation. Mr. Joubert testified that he saw the accused standing over the body of the deceased and stabbing her in the head. Mr Isaacks for the accused conceded that the accused stabbed the deceased, but he had no direct intent to cause her death, but rather acted with intent in the form

of *dolus eventualis*. He argued that according to psychological report of Dr. Mensa-Husselman the accused stabbed the deceased without premeditation, the accused did not have the deliberate intention to kill, his actions were driven by unconscious rage which drove him over the cliff, his action was out of character and he stabbed the deceased in a moment of weakness and therefore he acted with intent in the form of *dolus eventualis*.

[47] The learned author *Snyman*³ defines *dolus eventualis* as follows: A person acts with intention in the form of *dolus eventualis* if the commission of the unlawful act or the causing of the unlawful result is not his main aim, but;

- (a) he subjectively foresees the possibility that in striving towards his main aim, the unlawful act may be committed or the unlawful result may be caused, and
- (b) he reconciles himself to this possibility (*Snyman: Criminal Law 5ed at 184*)

[48] By stabbing the deceased twenty seven times with several knives all over her body, including the knife that got stuck in the head, the accused's main aim was clearly to cause the death of the deceased and therefore he acted with direct intent and not with intent in the form of *dolus eventualis* as submitted by his counsel. He is accordingly convicted of murder with direct intent.

[49] Having considered the totality of the evidence, I make the following order: The accused is convicted of murder of Tiffany Lewin, with direct intent, read with the provisions of the Domestic Violence Act, Act 4 of 2003.

G N NDAUENDAPO

Judge

³ *Snyman: Criminal Law 5ed at 184.*

APPEARANCES

FOR THE STATE

Mr. S Jacobs
Of the Office of the Prosecutor General

FOR ACCUSED

Mr. Isaacks
Of Isaacks & Associates