

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

Case no: CC 3/2016

In the matter between:

THE STATE

v

ALBERTUS GANEB**ACCUSED****Neutral citation:** *S v Ganeb* (CC 3/2016) [2019] NAHCMD 80 (2 April 2019)**Coram:** USIKU J**Heard:** 22 August 2016, 24 – 27 October 2016, 7 November 2016, 5 December 2016, 18 – 25 July 2017, 30 – 31 October 2017, 4 November 2017, 4 – 5 December 2017, 6 February 2018, 1- 16 March 2018, 5 – 26 April 2018, 11 June 2018, 2 – 4 July 2018, 18 September 2018, 18 October 2018, 28 – 29 January 2019 and 7 February 2019.**Delivered:** 2 April 2019**Flynote:** Criminal law – Murder – Accused and the deceased children in a domestic relationship – State case based on circumstantial evidence – Court to consider every component in the body of evidence – Accused's guilt having been proven beyond reasonable doubt.**Summary:** The accused pleaded not guilty to two charges of murder and on two other charges of assault with intent to cause grievous bodily harm. Accused claimed

that on the date of the alleged murder, he was heavily under the influence of alcohol and could not recollect what had transpired. He was only informed by the police officers that he killed one of his children and severely assaulted his other child who was taken to a hospital where he died some few days later. Accused was the last person to be seen with the deceased children. Accused made admissions to other persons informing them that he had killed his own children. Though there had not been any eye witness and that the state's case entirely rests on circumstantial evidence the court found that the state proved the accused person's guilt beyond reasonable doubt. Accused's mere denial of not having been responsible for the deceased children's death clearly false.

ORDER

Accused is found guilty of the crime of murder with direct intent in respect of the two counts, as well as on the third and fourth counts of assault with intent to do grievous bodily harm read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

JUDGMENT

USIKU J

[1] The accused, an adult male, is indicted on two charges of murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003, in that upon or about the 25 April 2014 and at or near Gobabis in the district of Gobabis, unlawfully and intentionally killed the deceased, TS, a seven year old boy. The deceased was his son.

[2] Accused also stood charged with murder on the second count in that on the same date, and in the same district of Gobabis he unlawfully and intentionally assaulted GS, a four year old boy, by stabbing him at least six times with a

knife/knives on his body and/or head as a result of which GS died on the 1 May 2014 at the Katutura State Hospital in the district of Windhoek.

[3] Accused also faces charges of assault with intent to do grievous bodily harm on the 3rd count in that during 2014 and at or near Gobabis the accused did unlawfully assault Romely Swartz by hitting her with a police baton on her forehead with the intention of causing her grievous bodily harm read with the provisions of Act 4 of 2003.

[4] On the fourth count the accused faces charges of assault with intent to do grievous bodily harm in that during October 2013 in the same district of Gobabis accused did unlawfully assault the same complainant in count three by beating her with a clenched fist in the face with the intention of causing her grievous bodily harm.

[5] The accused was legally represented firstly by Mr Jantjies who withdrew. He was replaced by Mr Ipumbu and later on by Mr Isaacks while Mr Kumalo appeared for the State.

[6] After having pleaded not guilty to all the charges accused elected to disclose the basis of this defence.

[7] In respect of counts one and two the accused informed the court that on that particular afternoon he was heavily intoxicated and could not recall what happened. He was only informed by the police officers that he killed one of his children and severely assaulted the other child who was taken to hospital in Windhoek. He was then arrested.

[8] With regard to counts three and four accused did not give any plea explanation.

[9] The following documents were handed in to form part of the state's case by agreement between the state and the defence:

- (1) The summary of substantial facts and list of witnesses.

- (2) The Pre-Trial Memorandum.
- (3) Reply to Pre-Trial Memorandum.
- (4) Proceedings from the Magistrate's Court Gobabis and the transfer Certificate.
- (5) The bail proceedings from the High Court.
- (6) Certified copies of full birth Certificate and death Certificate in respect of the first deceased child.
- (7) Certified sworn statement relating to the first deceased child.
- (8) A form in respect of the identification of the body made by the police officer at the mortuary.
- (9) Identification form by the deceased children's mother.
- (10) Certificate of Post-Mortem examination by the police.
- (11) Pol 42 Affidavit and Sworn statement accompanying the Post-Mortem report made by the doctor who conducted the Post-Mortem examination on the 1st deceased.
- (12) The Post-Mortem examination report.

[10] With regard to the 2nd deceased the following documentation were also handed in by agreement between the state and the defence:

- (1) Full birth certificate.
- (2) Pol 54 Sworn affidavit.
- (3) Pol 51 Identification of the body by the deceased's family.
- (4) Pol 53 Sworn statement and affidavit by an attendant.
- (5) Pol 29 Certificate of Post-Mortem examination.
- (6) Pol 52 Sworn affidavit by the pathologist.
- (7) Post-Mortem report in respect of the 2nd deceased.

[11] The state in the course of the trial, led the evidence of several witnesses of which none were eye witnesses to the actual killing of the deceased children. The evidence presented mainly relate to circumstances before and subsequent to the incident during which the deceased children were killed.

[12] Humphry Simvula Bayepi: At the time of the incident he was employed as a police officer at Gobabis. On the 25 April 2014 he was on duty at the Gobabis police station. He had known the accused as a fellow police officer.

[13] Whilst on standby duties, he received a complaint from Epako. He drove to Epako charge office to attend to the complaint and met a male person by the name Nekongo who sought assistance from the police. Mr Nekongo related to him that he had received a text message from one Ganeb threatening to kill him with a service pistol. When Bayepi asked Nekongo why he had received threats (he) (Nekongo) told him that he had exchanged text messages with one Romely. Bayepi did not know who Ganeb was at the time. He then asked for the cellphone number which he got and used his own cellphone to phone the number given.

[14] When he phoned the number a person responded. He introduced himself and asked where Constable Ganeb was. Ganeb could not say where he was and immediately terminated the call. Another cellphone was used to call but he did not receive cooperation. Bayepi decided to get a police vehicle in order to go to the house of Ganeb accompanied by other police officers. They finally got to Tswana block and were shown a house where Constable Ganeb was residing.

[15] Upon arrival at the house, Bayepi and Constable Shitumbuleni disembarked from the vehicle and entered the yard. The door to the house was open and he immediately saw a child's body lying with its head covered in blood. He tried to call out but there was no response from the house. He then withdrew and came out whereafter he called out for more manpower.

[16] Whilst still calling, he received a call from the number he had previously called, which was 081 3983 221 given by Nekongo. The caller introduced himself as Constable Ganeb. He told him to go to his house and collect bodies. Ganeb further informed him that he had killed his two sons and was looking for his girlfriend in order to kill her and then kill himself, he will be the last cop to be collected. The caller thereafter terminated the call.

[17] The message came at about 19h00 in the evening. Bayepi and other police officers then started to search for Constable Ganeb around Tswana block. In the meantime the girlfriend of the accused was found and kept at the Epako police station.

[18] As the search for the accused continued, he (accused) was spotted running and Bayepi recognised him. Police officers blocked him and he came to a standstill. When questioned what he was having in his possession, he responded that he had nothing except his cell phone. He removed it from his pocket and handed it over to Bayepi. It was a red and black cell phone.

[19] Accused questioned Bayepi why he was arresting him. In the meantime another police officer Kalimbula came in and took over. The reasons for the arrest were explained to him as well as his rights before he was formally arrested. The accused was loaded in the police vehicle and taken to the police station. During the arrest accused appeared normal. When Bayepi spoke to the accused, he did not smell alcohol neither could he notice his drunkenness, which could have made him not to know what was going on around him.

[20] Petrus Kwahe: He is also a police officer stationed at the Gobabis police station and a member of the Scene of Crime Unit. His duties are to attend to serious crime scenes. To take photographs of crime scenes and draw sketch plans. His training involves the taking of finger prints amongst others. He knew the accused as a fellow police officer at the Gobabis police station. The accused worked at the charge office.

[21] On the 25 April 2014 he was called out to attend to an incident at about 20h50 pm. He proceeded to Tswana block and arrived at house number 99 Yarnade Street where he met sergeant Bayepi and Commissioner Kalimbula.

[22] When he entered the house from the sitting room, he observed a body of a child laying in a pool of blood. He went around in order to see if he could find something more of significance. In another room he saw another child who was breathing. The child was smaller than the first one he had observed. The child was

laying on a bed facing towards a wall. He observed some vomit and a smell of liquor from the child who lay on the bed. The child had been seriously injured. He took photos of the child before it was carried out to the police vehicle. The child was driven to the hospital and handed over to the medical staff whereafter he returned to the scene. The child had injuries on the head and was bleeding profusely.

[23] Having returned to the crime scene he observed that the deceased was bleeding from the head. Photos were also taken of the deceased whereafter the body was removed to the mortuary. Besides the photos taken at the house, he also took photos outside indicating the area, and because it was night time, more photos were taken the next day.

[24] Photos of the Post-mortem examination were taken after the deceased's bodies had been identified by the deceased's mother Romily Swartz. A photo plan was compiled with key to it. A sketch plan of the layout of the house was also drawn. More exhibits were collected and placed in sealed forensic bags whereafter they were forwarded for scientific examination.

[25] Amongst the exhibits collected were:

- (a) A blade and handle of a knife received as Exhibit "1".
- (b) Dry blood taken from the Crime Scene.
- (c) A blue blanket and a fitted sheet.
- (d) One kitchen knife.
- (e) A pair of addidas shoes.
- (f) A Sport shorts for police.
- (g) A shirt.
- (h) A blue vest.
- (i) A pair of takkies.
- (j) A Blood control sample was taken from the deceased in count one and bottle of beer was taken from the crime scene.

[26] Besides the exhibits referred to, there were other exhibits which were handed over by one Emvula, being the cell phone containing text messages which were to be retrieved. The cellphone was packaged in an exhibit bag whereafter it was forwarded for further examination. All exhibits were recorded in the Control register with their respective reference numbers. Those exhibits were kept safely without any form of tampering.

[27] Mr Kwahe testified further that he did not see the accused on the 25 April 2014 but only saw him the next day at the police station. He could not therefore testify about his intoxication status.

[28] Jonas Johanes Matias: He is a mortuary curator stationed at the Windhoek mortuary. He attended to the post-mortem examination on the 6 May 2014 at about 9am. As per the doctor's directives he took photographs of the body and compiled a photo plan after which he appended his signature.

[29] Jonas Kahono: He is a friend to the accused. On the 25 April 2014 he together with other friends visited Socks bar about midday. They drunk some liquor. Accused joined them and drunk with them. The accused wanted to make a call and requested his phone. He gave him his cellphone. Accused thereafter stood up and went to make a call. Kahono could not hear what the accused was talking about on the line. He (accused) then left for his house to get ready for work with Kahono's cellphone. Kahono and his friends remained behind.

[30] Later in the evening Kahono decided to go to accused's house in order to get his cellphone. At the accused's house he met police officers standing in the yard. He explained to them that he was looking for his cellphone which accused had taken earlier in the day. The police requested him to call his number after which the accused responded.

[31] When he spoke to accused informing him that he was looking for his cellphone the latter informed him that he was at Herero block whereafter he switched off the phone. Kahono remained at the accused's house as police waited for him to

come. Kahono's number was 081 327 473 at the time and it was the number he called to which accused responded.

[32] At the time the accused left them at the bar, he was in his sober senses and walked normally. They had only drunk a beer because the accused was to report on duty. Kahono refuted the claim that accused had drunk another liquor Monis Granada. He also denied that when accused left he was carrying beers.

[33] Ndahamebela Shitumbaleni: She is an officer at the Gobabis police station. She knew the accused as a colleague. During 2014 she was attached to Internal Investigation Unit. On the 25 April 2014 she received a report from Epako police station. She and another officer drove to Epako police station in order to attend to the complaint. There she met Mr Nekongo who reported to her that he received threats from an officer called Defney. According to Shitumbuleni, officer Defney had threatened to kill Nekongo should they meet. The threats were made through text messages and phone calls. She was shown a text message which appeared to be threatening.

[34] Shitumbuleni directed one of the officers to call the number from which the text messages were sent. A call was made after which the person hung up. She then personally made a call to the number in order to arrange for a meeting to resolve the issue. The accused answered whereafter Shitumbuleni introduced herself and gave the reason for the call. Accused responded that he did not want to see Shitumbuleni as he believed that it was his girlfriend who reported him. He hung up thereafter.

[35] After informing Nekongo about the accused's refusal to come for a meeting, Shitumbuleni advised him (Nekongo) to go home. It was thereafter that Shitumbuleni and Bayepi decided to visit the accused's house to see if he was there. With the assistance of other members they managed to locate the accused's house. Upon arrival at the accused's house his name was called out but no response. The door to the house was partly open and as they made their entry she observed a boy lying on the ground downwards. Having made the observation, they stepped backwards and left the yard. Other police officers were called to the scene and another boy was found inside the bedroom.

[36] Both Mr Baepi and Shitumbuleni testified about Nekongo having given them cellphone number 081 3983 221 which they called and that the person who answered the phone sounded aggressive. It was from the same cell phone number where the person had stated that he will not sleep, till he had done what he has to do and threatening to kill the girlfriend and then kill himself, or words to that effect.

[37] According to another police officer Kauandenge, the accused used to have three cell phone numbers. He had saved all the accused's cell phone numbers in his cell phone. He received a text message in the Afrikaans language where accused told him that he was going to die on the 25 April 2014. Accused also called and told him that he stabbed his two children with a knife, and both of them are dead. The accused did not seem to have been intoxicated at the time. Kauandenge's cell phone was received as exhibit "17".

[38] Mr Nekongo: He testified that he received text messages from Romily's phone. The next text message questioned the person who was chatting with his girlfriend and another text message informed him that he (the sender) will find out who he (Nekongo) was, but firstly he will fuck the girlfriend up. Nekongo also received a call from cell phone number 081 3983 221. The caller told him that he had already told him (Nekongo) that he will find out and that the weekend will be his (Nekongo). The caller informed Nekongo further that he (Nekongo) will be buried. He will start with his girlfriend and then him (Nekongo).

[39] Nekongo reported the threats to the police and handed in his cell phone which was received as Exhibit "14" before the court. Photos of the cell phone were taken showing text messages depicted on the screen. A photo plan was compiled and handed in as Exhibit "LL".

[40] Amongst other evidence were DNA samples on various exhibits collected from the crime scene. Those were forwarded to the National Forensic Science Institute for analysis. Results of the analysis and reports were also handed in before court. Several cell phones collected from witnesses were also submitted and forwarded to the National Forensic Science Institute for analysis and examination.

[41] Ms Romily Swartz: She is the deceased children's biological mother. She had been involved in a domestic relationship with the accused for a period of 10 years. Her evidence regarding their relationship was never challenged. Her further testimony is that during 2013 accused assaulted her using a black baton stick usually used by the police in the execution of their duties. He struck her on the forehead. She made a report to the police. On another occasion during 2014 accused assaulted her again.

[42] With regard to the two murder of her sons. Romily testified that on the night before the 25 April 2014, accused visited her at her residence and spend the night there. On the morning of the 25 April 2014, accused took possession of her cell phone, which he used to sent out text messages. He had her cell phone most of the time on the 25 April 2014.

[43] During the morning of the 25 April 2014 accused insisted that he would take the children with him. Romily then left for work as usual. After he had taken the two children with him, that was the last time she saw her children alive. During the course of the day, she received several calls and text messages from the accused of which some were threatening towards her and the children. She sought help to get the children from the accused because she feared for their lives. Her cell phone was handed in as Exhibit "15" which she identified before court.

[44] She further testified about text messages between herself and the accused on the 25 April 2014. These text messages were extracted from her cell phone and handed in before court as Exhibit "BB2".

[45] Mr Michael Ganeb the accused's brother's testimony corroborate Romily's evidence pertaining to the accused having been in the company of his two sons just before 6 pm on the 25 April 2014. Accused had sent him a text message asking for N\$100. Michael later on received information that the accused was threatening his children at the house. He sent a text message to the accused asking him why he wanted to hurt the children. Accused's response was that his children are already dead and that Michael should go and see for himself.

[46] It is common cause that the accused opted not to testify in his defence and only called two police officers who had been involved in his subsequent arrest. Not much turn to their respective evidence. Deputy Commissioner Kalimbula confirmed that accused was sober although her smell alcohol at the time of his arrest. Sergeant Mwita confirmed that a red and black cell phone was recovered by sergeant Baepi from the accused, which fact was disputed by the accused throughout the trial.

[47] I pause here to briefly refer to the evidence adduced before Court. It is common cause that there were no eye-witnesses of the actual killing of the deceased children. The State's case is entirely based on circumstantial evidence from which the Court, through inferential reasoning, may draw inferences. That may be done only when the inference sought to be drawn is consistent with all the proven facts, and those facts are such that they exclude every reasonable inference from them, save the one to be drawn *R v Blom*.¹

[48] The approach the Court must follow when dealing with circumstantial evidence therefore is not to consider every component in the body of evidence separately and individually in determining what weight should be accorded to it, but to consider the cumulative effect of all the evidence when deciding whether or not the accused's guilt has been proven beyond reasonable doubt *S v H N*.² The accused person was the one who took the deceased children from their mother's residence on the morning of the 25 April 2014. Accused did not dispute that fact.

[49] The accused's own brother Michael Ganeb saw the accused just before 6 pm in the company of the deceased children. Michael later on got information about the accused threatening to hurt his children. When Michael texted the accused to ask him why he wanted to hurt the children, his response was that, "His children are already dead he should go and see for himself – or words to that effect". The deceased children were last seen alive in their father's company and not long after,

¹ R v Blom 1939 AD 188.

² S v H N 2010 2 NR 429 (HC).

the children were found laying in a pool of blood inside the accused's house after having been stabbed several times each.

[50] Accused did not only tell his brother about his dead children but also told Kauandenge his friend about having stabbed his two children with a knife. These admissions were made freely and voluntarily, without any questions being put to the accused at the time.

[51] Furthermore, the doctor who conducted the post-mortem examination on the body of the deceased children found multiple stab wounds on different aspects of the body of Gregory O'Grade Holmes Swartz. From the medical report it is evident that a sharp object i.e. knife was used when inflicting those injuries which caused the deceased's death on the 1 May 2014 at the Katutura State Hospital in Windhoek.

[52] With regard to the deceased, TS it is also evident that the deceased died as a result of haemorrhagic shock due to multiple skull fractures. It must be noted that significant blunt force was applied to the head causing fractures to the skull.

[53] Both in the first and second incident it must be noted further that the injuries were directed at the head and the neck of the deceased, GS, both considered to be exceptionally vulnerable aspect of a human anatomy. It is further clear that there was continuous assault on the deceased during which several injuries were inflicted. Taking all the circumstances of the case into account, the only reasonable inference is that accused had acted with a direct intent to bring about the deceased's death in respect of count one.

[54] The same can be said in respect of the deceased, TS. The cause of death was found to have been haemorrhagic shock due to multiple open skull fractures. He sustained four stab wounds on the scalp. That implies that a lot of force was applied to the deceased's skull for it to be fractured. A human skull is a sensitive part of the body. The deceased was stabbed more than once.

[55] Coming to the issue concerning the accused's failure to testify. It is a well-established principle of our law that when an accused fails to testify or answer in the

face of directly implicating evidence by the State, then the Court can safely conclude that such evidence warrants a conviction as it stands uncontested see *Tobias Namweya v State*.³

[56] The accused herein did not testify but only called two defence witnesses. Those witnesses could not assist him. In as much as the accused has a right to remain silent, by doing so he did not place any evidence on record to contradict the prosecution's evidence. Turning to the question whether, in the light of all the evidence adduced during the trial, the guilt of the accused was established beyond reasonable doubt. One must guard against a tendency to focus too intently upon separate and individual parts of what is after all a mosaic proof. Doubts about one aspect of evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts however, may be set at rest when it is evaluated again together with all the other available evidence. Thus, evidence must be looked at as a whole and not be viewed in isolation. There is overwhelming evidence against the accused implicating him in the commission of the offences of murder in respect of the first and second counts.

[57] It is also common cause that the accused has been indicted on two charges of murder read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003. In that he and the deceased children, during the commission of the offence, were in a domestic relationship as defined in the Act. He was in a domestic relation with the mother of the deceased children. He did not dispute those facts. He regarded Romily as his girlfriend at the time. From the evidence adduced in the trial accused had spent the night with Romily prior to the death of the first victim on the 25 April 2014.

[58] Moving on to the charges of assault with intent to do grievous bodily harm in respect of the third and fourth counts. Romily Swartz's evidence is that accused had assaulted her on two occasions, firstly during 2013 and also in 2014. That evidence has remained unchallenged. Furthermore, accused prior to the death of the two deceased children threatened to hurt her, through text messages. The fact that she received no medication does not necessary mean that she was not assaulted. In

³ Tobias Namweya v State Case No 12 of 2012 (HC).

cross-examination accused persisted in asking the complainant how she was assaulted. An object used in the commission of the assault is not an element of assault, what is required to be proven in a case of assault is an intention to injure in a serious manner. Accused has used a baton in the assault as well as his clinched fist. It is therefore confirmed that the domestic relationship between him and Romily was still on going. Section 3 subsection 2 of the Act, *inter alia* provides that where a child is born to a couple from an intimate relationship, their “domestic relationship” continues throughout the lifetime of that child or for one year after the death of the child. The accused, the two deceased children and their mother falls within the definition of a domestic relationship.

[59] There is no doubt that the accused intentionally killed the two deceased children and assaulted their mother on different occasions, and that the state had proven its case beyond reasonable doubts in respect of all counts.

[60] In the result, the accused is found guilty of the crime of murder with direct intent in respect of the two counts, as well as on the third and fourth counts of assault with intent to do grievous bodily harm read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

D N USIKU
Judge

APPEARANCES:

APPLICANT: Mr Ganeb, In Person, Windhoek

RESPONDENT: Mr Kumalo
Of the Office of the Prosecutor General, Windhoek