

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case no: CC 32/2019

In the matter between:

THE STATE

and

HENDRIK BOCK

ACCUSED

Neutral citation: *S v Bock* (CC 32/2019) [2020] NAHCMD 367(19 August 2020)

Coram: CLAASEN J

Heard: 27- 29 July 2020

Delivered: **19 August 2020**

Flynote: Criminal procedure – Murder, read with the provisions of the Combating of Domestic Violence Act – Attempted murder, read with the provision of the Combating of Domestic Violence Act – Guilty plea on murder accepted by State – State nevertheless presented evidence about different sequence of the unlawful acts – Court satisfied that the accused admitted all the elements of murder – Convicts of murder with direct intent on the circumstances as proved by the State as regards to the sequence.

Attempted murder – State failed to prove intention to kill – Convicted of competent verdict – Assault with the intent to do grievous bodily harm.

Summary: Accused was arraigned on a charge of a murder, read with the provisions of the Combating of Domestic Violence Act; and a charge of attempted murder, read with the provisions of the Combating of Domestic Violence Act. The accused and deceased were in a romantic relationship and are the parents of a child. Accused pleaded guilty to the charge of murder. Plea explanation indicated events occurred in a fit of anger, because deceased had emptied out a bottle of alcohol and told accused that she deliberately infected him with HIV/AIDS. Accused stabbed the deceased three times with a knife and cut her throat. In his plea explanation, the accused also admits that he knew, at the time of stabbing her and cutting her throat, that she will die and that his conduct was unlawful.

The plea explanation depicts the stabbing and cutting of the throat in an uninterrupted sequence. The prosecution, though, accepting the guilty plea, intimated that it will tender evidence that refutes the sequence. The State's evidence established a different sequence of the acts.

Held; that the court was satisfied that the accused admitted all the elements of murder and convicted the accused of murder with direct intent on the circumstances as proved by the State.

Held further, in respect of count 2, State failed to prove intent to kill and court convicted on competent verdict, assault with the intent to do grievous bodily harm.

ORDER

Count 1:

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

Count 2:

The accused is found not guilty of attempted murder but convicted of assault with the intent to cause grievous bodily harm, read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003.

JUDGMENT

CLAASEN J:

[1] The accused was arraigned a charge of murder, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 and a charge of attempted murder, read with the provisions of Act 4 of 2003.

[2] He tendered a plea of guilty on count 1, being the murder charge. In respect of count 2, he pleaded not guilty. The accused's plea explanation was that he has no knowledge about the incident and denies it.

Count 1

[3] The accused admits in his s 112 (2)¹ statement that he unlawfully and intentionally murdered his girlfriend, Angela Anab. According to the plea explanation, the day of 04 September 2018 started with breakfast at his girlfriend's parental home. Thereafter, the couple went to buy alcohol. Upon their return, they sat under a nearby tree. Mr Fritz Anab and a certain Mr Matjiua were also under the tree. They were playing a traditional game by the name 'onyune'.

¹ Criminal Procedure Act 51 of 1977 as amended.

[4] According to the accused, a quarrel erupted between the couple. This was because his girlfriend emptied the bottle of wine and told him that she deliberately infected him with the HIV/AIDS virus. In a fit of anger, he stabbed her three times in the upper body and cut her throat, with the same knife. She succumbed to the injuries.

[5] The plea explanation depicts the stabbing and cutting of the throat in an uninterrupted sequence. The prosecution, though, accepting the guilty plea, intimated that it will tender evidence that refutes the sequence of the unlawful acts as described in the plea explanation.

[6] On this front, the State's first witness was Mr Fritz Anab, the father of the deceased. He testified that after the stabbing, he stood up and walked to a neighbour's house to phone the police. The accused followed him. At the neighbour's house, the accused was refused entry. There and then, the accused uttered words along the lines that he will go and finish her off and walked away. Upon Mr Anab's return, he saw that his daughter's throat was cut and the accused sat not far from the body.

[7] It is apparent from the questions posed in cross-examination that the accused does not place in issue that he went to Mr Tjitemisa's house, but he disagreed with the sequence as described by Mr Anab. Mr Anab, however, remained steadfast in his version as regards to the sequence and the words that were uttered.

[8] Mr Matjiua Watjiwa testified that he was present at the time of the stabbing. He corroborated Mr Anab's version that shortly after the stabbing, the accused followed Mr Anab. At that stage the deceased was still alive, though she was breathing with difficulty. He then walked home to call his brother. Upon his return, he observed the deceased's throat was slit. He disputed the averment by counsel for the defence that the slitting of the throat followed immediately after the stabbing.

[9] Mr Israel Tjitemisa is also a resident of Houtsputz in Tallismanus. He is the neighbour who assisted Mr Anab to phone the police. His testimony validated the evidence by Mr Anab that the accused followed Mr Anab to Mr Tjitemisa's house, that Mr Tjitemisa refused entry to the accused and that the accused said he will go and finish her off. He also was not discredited during cross examination.

[10] Though the accused's instructions about the sequence were put to the witnesses, it was credibly refuted. On the other hand, the accused's averments in this regard remain unsubstantiated. The State's evidence thus established a different sequence and that the words were uttered.

[11] As for the cause of death, the medico-legal report admitted by consent between the parties, described it as haemorrhagic shock due to the section of the neck's vital structures.

[12] Therefore, the court was satisfied that the accused intended to plead guilty and has admitted all the elements of murder. He is convicted of murder with direct intent on the circumstances as proved by the State.

Count 2

[13] The State's witness in this regard is Mr Alfeus Lyakonga. He is a farmer and cattle herder in the Tallismanus area. He testified that he know the accused as they resided together.

[14] Mr Lyakonga narrated that on a certain date in 2016, the accused and his girlfriend, Ms Anab, were at his place. Both the accused and his girlfriend were intoxicated. The accused wanted to go home but Ms Anab refused. The accused grabbed her with his one hand and dragged her out of the yard. He had an axe, used for chopping wood, in the other hand. The accused hit Ms Anab with the blunt side on her forehead. She fell down and was motionless for a short while. Once she regained her senses, she stood up and they walked back home together.

[15] He recalled that he saw Ms Anab the next day. She had a swollen bump of about 5cm on the forehead and a cut about half the size of an eyebrow. He testified that she did not go to a hospital, or report it to the police, nor did anyone else.

[16] As regards to the incident, it was practically a bare denial that was postulated in cross-examination. The accused's instructions were that the incident did not occur and that he has no knowledge thereof. Mr Lyakonga was adamant that the incident occurred. An additional issue that was posed in cross-examination pertains to the element of intention to kill. Mr Lyakonga was asked whether in his view, the accused's act was deliberate, in particular, whether it was an attempt to kill the deceased. The witness answered that he cannot say whether it was an intentional act or not.

[17] At the end of the State's case, the accused closed his case without tendering any evidence.

[18] Counsel for the defence, in closing arguments, indicated that count 2 was unfairly brought against his client. He argued that his client should be acquitted. In support of that, he referred to the fact that his client bears no knowledge of the day in question, that the charge was not investigated by the police, and that Ms Anab is the only person who can testify as to what the intention of the accused was, at the time, and she is not here.

[19] The prosecutor had a different view on this. He conceded that the State's evidence on the element of intention to kill was scanty, but he argued that the evidence was adequate for assault with the intent to do grievous bodily harm.

[20] The question that arises is whether the State's evidence was sufficient to require evidence in rebuttal? In order to answer this, the court will commence with the legal requirements that pertain to a single witness's evidence.

[21] Section 208² stipulates that an accused may be convicted of any offence on the single evidence of any competent witness. *S v Noble*³ sets out the criteria that a court should follow to sustain a conviction on this basis. When weighing such evidence, a court is to exercise caution. Furthermore such witness should be credible and the evidence should be of such a nature that it constitutes proof of the guilt of the accused beyond reasonable doubt.

[22] In my view, these requirements were met by the evidence of Mr Lyakonga. This witness resided with the accused and he had no reason to falsely implicate the accused. In response to a question from the court as to what time of day it occurred, he indicated it was around 17h00. Visibility was thus not an issue. Moreover, his evidence was not discredited. Therefore, his evidence was clear and satisfactory in all material respects.

[23] The accused exercised his right to remain silent and this is the next issue to consider. An accused's choice to remain silent can be a double edged sword. The dilemma was succinctly articulated in *S v Katari*⁴ by the Maritz J:

'It is trite that an accused cannot be compelled to give evidence against himself (Article 12(1)(f) of the Namibian Constitution) and has the right to be presumed innocent until proven guilty according to law, (Article 12(1)(d) of the Constitution). The entrenchments of those rights do not mean that an accused's election to remain silent in the face of incriminating evidence against him is without consequence in the overall assessment of the evidence by the Court.'

[24] Mr Lyakonga gave cogent evidence which called for a rebuttal by the accused. The accused decided to remain silent in the face of incriminating evidence, which sways the pendulum against him.

[25] When it's all said and done, the question is whether the State discharged the onus on it and proved the offense of attempted murder?

² Criminal Procedure Act 51 of 1977 as amended.

³ *S v Noble* 2002 NR 67 (HC).

⁴ *S v Katari* (CA 124/04) [2005] (16 June 2005).

[26] The author C.R. Snyman, in *Criminal Law*⁵ has this to say, that a person is guilty of attempting to commit a crime if, intending to commit that crime, he/she unlawfully engages in conduct that is not merely preparatory but has reached at least commencement of the execution of the intended crime.

[27] As for the elements in *S v Ndlovu*,⁶ Joubert JA at 26I -27 stated that that the components of attempted murder are wrongfulness, intent and an attempted act. I return to the facts to consider if the elements were proven.

[28] As alluded to earlier, the court was satisfied that the State had proved that the accused committed an unlawful act of hitting Ms Anab with the blunt side of an axe. The only issue that remains is whether an intention to kill was present at the time when the assault took place.

[29] This question was posed to the State's witness, Mr Lyakonga, who cannot attest to that specific aspect. Intention pertains to the subjective state of mind of an accused who, in this case elected to remain silent. The court will have to consider the other available evidence to assess whether the intent to kill can be inferred. I turn to that.

[30] The uncontroverted evidence was that both the accused and his girlfriend were intoxicated. The one person wanted to go home and the other person wanted to stay. No physical confrontation preceded the incident. The blow was affected by the blunt side of the axe. The injury, a swelling of 5 cm and a small cut, were not of a lasting nature. No medical intervention was sought for it. On these facts, the concession by the State was rightfully made that the evidence is inadequate to prove an intention to kill. Therefore, the court does not convict the accused of attempted murder.

[31] The same cannot be said for a conviction on a competent verdict of assault with the intent to do grievous bodily harm. The court remained satisfied with the unlawful act that was perpetrated by the accused against Ms

⁵ *Criminal Law* 4th edition at page 282.

⁶ *S v Ndlovu* 1984 (3) SA 23 (A).

Anab. The requisite intent to cause grievous bodily harm is evident from the object being the blunt side of an axe that was directed towards a sensitive body part of another human being. This person was his girlfriend and the mother of his child. It was only through sheer luck that the injuries sustained were not more serious or fatal.

[32] In the premises, the accused is convicted of assault with the intent to cause grievous bodily harm, read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003.

Conclusion

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

- a) Count 1: 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) Count 2: The accused is found not guilty of attempted murder but convicted of assault with the intent to cause grievous bodily harm, read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003.

C CLAASEN
JUDGE

APPEARANCES:

STATE:

General

M Olivier
Office of the Prosecutor-

Windhoek

ACCUSED:

Aid

N B Tjituri
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