

REPUBLIC OF NAMIBIA



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

Case no: CC 1/2020

In the matter between:

THE STATE

Versus

GILBERT LOUW

ACCUSED

Neutral citation: *State v Louw* (CC 1/2020) [2021] NAHCMD 268 (01 June 2021)

Coram: CLAASEN, J

Heard: 15 - 19 February 2021, 22-23 February 2021, 26 February 2021, 08
- 09 April, 2021

Delivered: 1 June 2021

Flynote: Criminal Law – Onus was on State to prove beyond reasonable doubt, that the accused stabbed the deceased multiple times with a knife, with the intention to kill her and that multiple stab wounds caused death – State did not discharge that onus – Contradictory evidence amongst state witnesses – Single eye witness observed only one wound on shoulder being inflicted on deceased by the accused – Convicted of competent verdict Assault with intent to do grievous bodily harm, read with Act 4 of 2003.

Summary: Accused arraigned on two charges namely murder of his sister and assault with the intention to do grievous bodily harm inflicted on the boyfriend of the deceased. Accused gave formal admissions and admitted to having inflicted one stab on shoulder of deceased, which accords with evidence of the sole eye witness of the state. Defence raised *novus actus interveniens* on count 1. In respect of count 2 the accused denied that it happened.

Held – Contradictory findings in post-mortem report as per the Doctors' opinion. Report indicated no trauma or injuries to the abdominal area, and that area was unremarkable, yet there were indicators that a laparotomy was performed and a colostomy bag was attached. Doctor who compiled report not available to explain the discrepancies in the report. Court cannot blindly follow a flawed post-mortem report.

Held – Deceased arrived in stable condition at the State Hospital and remained so the next day. It came to light that the deceased had undergone a medical procedure before she passed away. Patient file was not tendered and no other evidence availed about the accused's medical condition, at that stage, there is nothing to gauge what treatment was given and whether the correct procedures were followed.

Held furthermore – Too many discrepancies amongst the state witnesses who went to clinic about the nature and extent of injuries, including the investigating officer who had observed the body at the mortuary prior to the post mortem. It also do not accord with the evidence of the sole eye witness who testified that he observed the accused inflict only one stab wound on the shoulder of the deceased. At end of the day State's evidence did not constitute a cogent account to satisfy the murder charge.

Held – Count 1 court satisfied evidence established competent verdict of Assault with intent to do grievous bodily harm, read with Act 4 of 2003.

Held – Count 2 court rejected accused's version that the injury emanated from someone else and he is convicted as charged.

ORDER

Count 1: Murder Not Guilty, but Guilty of competent verdict of Assault with intent to do grievous bodily harm, read with Act 4 of 2003.

Count 2: Guilty of Assault with intent to do grievous bodily harm.

Exhibits 1 and 2 are to be returned to its lawful owners.

JUDGEMENT

CLAASEN J

Introduction

[1] The accused stands before court to answer to two charges namely: Murder, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003. The allegations are that during the period of 23-24 December 2016 at Henties Bay, the accused unlawfully and with the intention to kill assaulted his sister Jennifer Louw by stabbing her multiple times with a knife causing her to die on 26 December 2016 at the Swakopmund State Hospital.

In the second charge it is alleged that during the period of 23-24 December 2016 at Henties Bay, Swakopmund district, the accused did unlawfully and intentionally assault Ivan Nanub by hitting him with an unknown object on his head with the intent to cause him grievous bodily harm.

[2] The accused pleaded not guilty to both charges and tendered a plea explanation and formal admissions in terms of s 115(2)(b) and s 220 of Criminal Procedure Act as amended¹ (the CPA). In terms of count 1 the accused admitted to have stabbed the deceased once with a knife once on the upper back left shoulder on 24 December 2016 at Henties Bay. He further indicated that he stabbed her in

¹ Criminal Procedure Act 51 of 1977 as amended.

self-defense. He denied that her death was caused by that stab wound and also denies any responsibility for any other stab wounds or injuries.

General Overview of evidence

[3] The State presented evidence of eleven witness in various categories:

- 3.1 Mr Trevor Beukes, a single eye witness and only sober person at home at the relevant time. He was 15 years old at the time;
- 3.2 Mrs Mariana Louw, the mother of the deceased, who was not physically present during the fight;
- 3.3 Mr Ivan Nanub, the complainant in count 2 and the boyfriend of the deceased;
- 3.4 Medical Personnel namely:
 - 3.4.1 Nurse Sara Thomas, employed at Henties Bay Clinic who first treated the deceased at the Henties Bay Clinic;
 - 3.4.2 Nurse Tjaronda Simon, who transferred the deceased from Henties Bay Clinic to Swakopmund State Hospital;
 - 3.4.3 Doctor Katrina Mouton, a medical doctor at the Swakopmund State Hospital who came to testify in the place of Doctor Moses Ayoade, who conducted the post-mortem and was no longer available to explain his report.
- 3.5 Police Officials namely:
 - 3.5.1 Police Officer Jerome Basson, who was first called to attend to the complaint of the stabbing incident at home in Khomas street, Omdel location Hentiesbay;
 - 3.5.2 Police Officer Joseph Shipanga, who accompanied Officer Basson to the premises;
 - 3.5.3 Officer Ismael Murorua, the police officer from Scene of Crime Division who compiled the photo and sketch plan;
 - 3.5.4 Officer Gideon Kamulu, the investigating officer, to whom the case was assigned on 26 December 2016;

3.5. 5 Police Officer Wiseman Aebib, who collected the body of the deceased from Swakopmund State Hospital Mortuary and transported it to Walvis Bay Police mortuary;

4. The State also tendered the following documentary evidence, which was admitted by consent between the parties:

- 4.1 The indictment marked as exhibit 'A';
- 4.2. The accused's plea statement and admission in terms of s 115(2)(b) and s 220 of the CPA marked as exhibit 'B';
- 4.3. The post-mortem and affidavit in terms of s 212(4) of the CPA marked as exhibit 'C';
- 4.4. The State's pre-trial memorandum marked as exhibit 'D';
- 4.5. The reply to the State's pre-trial memorandum marked as exhibit 'E';
- 4.6. Photo plan marked as exhibit 'F1' and sketch plan marked as exhibit 'F2';
- 4.7. Death certificate of the deceased marked as 'exhibit 'H';
- 4.8. Health passport of the deceased marked as exhibit 'I';
- 4.9. Witness statement of Sara Thomas marked as exhibit 'J';
- 4.10. Witness statement of Marianna Louw marked as exhibit 'K'; and
- 4.11. Witness statements of Gideon Kamhulu dated 26 December 2016 marked as exhibit 'L1', another witness by same witness dated 20 September 2017 marked as exhibit 'L2' and a 3rd witness statement by same witness dated 31 August 2017 marked as exhibit 'L3'.

[5] The State also presented real evidence, admitted by consent namely a knife with a yellow handle exhibit '1' and a wooden knife with the black and brown handle exhibit '2'.

[6] The defense called two witnesses namely, Mr Gilbert Louw, and Ms Emilie Hoxobes, a friend of Ms Louw who accompanied her to the mortuary.

Prosecution's Germane Evidence

[7] Mr Trevor Beukes, a teenager at the time of the incident, set the scene. He and his minor siblings reside at erf 309 Khomas Street, Hentiesbay. It is the same house where the accused, the deceased, her boyfriend, Ivan Nanub and his grandmother, Mariana Louw resided. On the date in question he and the accused

were at a party at his uncle's house. The accused drank some beer, but Mr Beukes did not consume alcohol. He left the party around midnight while the accused stayed behind.

[8] As he approached their house, the lights were on. He saw that Ivan Nanub, ran out of the yard, with baby Nico in his arms and that a pot was thrown out of the house. Upon entering Mr Beukes found the accused and the deceased strangling each other in the kitchen. The deceased was of a bigger built and taller than the accused. The deceased bit the accused on his eyebrow and Mr Beukes pushed the brother and sister apart and out of the house. The accused exited the house and the deceased locked the front door from the inside.

[9] Thereafter the accused entered the house through the back door and found the deceased in front of the television. She had a knife with a yellow handle, exhibit '1,' ordinarily used in the household to cut vegetables. The accused approached her and they swore at each other. The deceased stabbed the accused on the shoulder blade. At the time Mr Beukes stood about a meter away from them and he saw blood on the accused. He intervened to stop them. All three of them exited the house.

[10] In the street his source of light was a street light. The accused approached the deceased while having a knife with a brownish handle in his hands, also ordinarily used for cutting vegetables. He testified that 'it is when they again started stabbing each other.'² After they finished stabbing each other, the deceased fell to the ground and the accused returned inside the house. Mr Beukes also entered the house and called the police.

[11] When he returned outside to assist the deceased, she was no longer at that spot. He assumed that she went to a relative's house that is nearby. After a while the police arrived and the accused went with them. He does not know what happened to the knives.

[12] During cross-examination he was questioned about the photo plan. Mr Beukes indicates that point 'G' on photo 9 was where the accused stabbed the

² Page 25 of the transcribed record.

deceased at the back of the shoulder blade, though he could not recall on which side. The deceased also retaliated by stabbing the accused on his left shoulder blade, the same place where the deceased initially stabbed him in the house. He was confronted with photo 17 and photo 18 with the question as to the feasibility of being stabbed twice on precisely the same spot. He tried to clarify his answer as follows: 'I am not saying that he was stabbed at the same spot My Lady or on the same wound twice My Lady what I am saying is that he was stabbed twice the same side.'³

[13] Furthermore the accused's version was put to him, narrating how the accused was first stabbed by the deceased, which conforms to the evidence of Mr Beukes. The only varying aspect is that in the accused's version, he did not have a brown handle knife in his possession as he followed his sister outside, but the witness disagreed on that aspect. Another feature of the defence's version was that outside the deceased stumbled and fell, causing the knife to fall also. The accused picked that up and stabbed her once on the left shoulder with that. He was unable to comment about the phrase that the yellow handle knife fell.

[14] It was put to him that given that he was standing at the gate when he observed the outside stabbing, he was not in close proximity to point 'G' on photo 9. He was adamant that he was in close proximity. Instead he said that the deceased's daughter stood at the gate. He conceded that there was a moment that he did not observe the scene, which was when he chased the daughter back inside the house.

[15] Furthermore, the issue of visibility was also canvassed by Counsel for the accused. Mr Beukes evidence was that the street light that illuminated point 'G' is not depicted in the photo plan. He was unable to estimate how far it was from point 'G' but said it was close enough for him to see.

[16] Mr Beukes could not explain how or where the accused disposed of the alleged brown knife, nor was he able to say why he did not inform the police that it was that knife which was used by the accused when he stabbed the deceased. He explained that on the date that the family learnt about the death of the deceased,

³ Page 70 of the transcribed record.

the police came and arrested the accused. At that time the Police took another brown handle knife which they found under the bed of the accused.

[17] Mr Ivan Nanub testified that on the relevant date he, the deceased and her mother, Ms Marianne Louw had a few beers at a bar. At around 23h00, he and the deceased went home and Ms Louw remained behind. At home, the deceased started preparing a meal. Shortly thereafter the accused arrived and requested his sister to also prepare food for him. The deceased refused which sparked a quarrel between them. Mr Nanub went to collect their one year old baby and took him to the sitting room on the mattress that he prepared.

[18] He heard that the accused and the deceased started grabbing and beating each other. They were in the kitchen and he went there. Mr Nanub forced himself in the middle of them, with the deceased at his back. Whilst he was talking to the deceased, the accused took a ceramic cup and hit Mr Nanub at the back of his head. He felt a warm sensation and when he touched that area he saw blood. Though he managed to separate them for a moment, the accused and deceased still grabbed at each other. Mr Nanub then took the baby and went outside to look for assistance from the neighbours, but they were asleep. Upon his return he met Trevor Beukes as he approached the gate. After a while the police arrived. They offered him a lift as the clinic is opposite the police station in Henties Bay.

[19] At the clinic he found Mr Beukes with the other children. He was informed that Ms Louw was inside where the nurse, Sister Thomas was treating the deceased. He entered the room. The deceased was on a bed and he saw blood on her t-shirt and skirt and all over. The nurse informed Ms Louw that something at the back of the deceased was not fine for which she must be taken to Swakopmund State Hospital. Mr Nanub went home to fetch clean clothes and a facecloth for the deceased. Upon his return, in his presence Ms Louw cleaned the bloody areas on the deceased's body and dressed her.

[20] Thereafter the deceased walked with the drip to the ambulance. Though she was talking as she walked to the ambulance, she did not disclose how she got the injuries. He and Marianna Louw returned home and slept. At around 07h00 am on

24 December 2016 the accused was released from police custody and came home. Upon entering the house the accused told him that he is next. Ms Louw who was in the bedroom reprimanded the accused by telling the accused to leave Mr Nanub alone.

[21] About an hour later Ms Louw send him to go and check on the deceased in Swakopmund. He complied. In Swakopmund at the State Hospital he met the deceased lying in bed. She told him she was having severe pain in the abdomen. She requested his help to get to the toilet. Once there, she asked him to pull down her trouser. Once she was done he again assisted her to pull up her trouser and took her back to the hospital bed. At that stage the deceased told him that when she is discharged she will lay a charge against the accused. He returned to Henties Bay. On Christmas day a friend of the deceased called her in their presence. The deceased told her that she was in pain. The cellphone battery was low and it cut off, which stopped the conversation.

[22] The next day around 07h00 am the police arrived and took the accused to the police station. An hour later a police officer came with nurse Thomas, who told Ms Louw that the deceased must be taken to Windhoek as her condition worsened. They gave Ms Louw a few minutes to prepare herself to accompany the deceased to Windhoek. Shortly thereafter they returned with the news that the deceased passed away.

[23] During cross-examination he indicated that he never opened a case against the accused, nor did he go to the doctor because it was not a serious wound. It was put to him that the accused denies the allegation in count 2, Mr Nanub was adamant that the incident occurred and showed counsel a 2cm scar on his centre left of the back head.

[24] Ms Marianne Louw, corroborated Mr Nanub's story that they were drinking at a bar on the evening of the 23rd of December 2016. She went home in the early morning hour of the 24th of December. Somewhere along the way she came across the deceased and her 4 year old and 5 year old children, Nicole and McDonald walking in the street. She noticed blood stains on the shirt of the deceased, it was in

the area of the left shoulder. Nicole told her grandmother that the deceased and the accused stabbed each other with knives. Ms Louw continued the journey with them to the clinic and said that the deceased did not sustain any wounds further on to the clinic.

[25] At the clinic, the security phoned Sister Thomas, who came. Ms Louw sat on the bench outside with the two children whilst Sister Thomas treated the deceased. Shortly thereafter Mr Nanub and Mr Beukes arrived. Sister Thomas called her and informed her that the wound on the left shoulder was of concern and that the deceased will be taken to the Swakopmund State Hospital. Ms Louw send Mr Nanub for clean clothes. Upon his return she cleaned the deceased's face, chest and the left shoulder, where she saw blood. She did not clean the stomach area because she did not see anything there. She testified that Mr Nanub was also in the room standing half a meter from the deceased, when she was cleaning the deceased. Thereafter the deceased walked to the ambulance in a normal manner, not like a person with injuries in the stomach.

[26] She, Mr Nanub, Mr Beukes and the children went home to sleep. She corroborated the evidence of Mr Nanub that she sent him to go and check on the deceased in the hospital on the 24th of December 2016. She testified that she made a telephone call to the hospital on Christmas day. The nurse informed her that he deceased was stable, but that the doctor will not be able to discharge her on that day as it's a public holiday.

[27] On the morning of 26 December 2016 the police came to collect the accused. At around 08:00 am Sister Thomas came to inform her that the deceased is not well and has to go to Windhoek. Ms Louw was informed that they will come and collect her shortly. After ten minutes, Sister Thomas returned with Police Officer Paula. They broke the news that the deceased passed away.

[28] Thereafter she was accompanied by her friend, Emily and Police Officer Kamulu to Swakopmund State Hospital to identify the body. There the night shift nurse, whose name she did not ask, directed them to the mortuary. The nurse opened the drawer half way while Officer Kamulu stood about three meter away

because he was afraid. Upon her request the nurse opened the drawer fully. She then noticed that the deceased had a big white plaster on her stomach. It prompted her to ask the nurse whether the deceased had an operation. The nurse answered in the affirmative and said that the deceased's stomach swelled and the doctor had to perform an emergency operation. The nurse also informed her that there were glass pieces removed from the deceased's stomach. She related that she was shocked because she did not observe a stomach wound on the deceased at the clinic.

[29] She furthermore explained that when Mr Nanub was at home alone the police came to collect the deceased's bloody clothes, the accused's identity document and a small brown broken pocket knife.

[30] The nature and extent of the injuries were extensively canvassed in cross-examination. She reiterated that she removed the clothing on the upper body of the deceased including her brassiere when she cleansed her at which time the deceased sat on the bed. It was only her left shoulder that was bandaged. She denied that Sister Thomas mentioned an abdominal wound, nor did she notice any wound other than the shoulder wound.

[31] The medical personnel account start with Sister Sara Thomas. Upon her arrival at the clinic she found the deceased with blood on her arms, upper body and abdomen area. After she stitched the deceased, she was experiencing breathing difficulties so she administered oxygen to the deceased. She called the doctor and reported the case and that she was concerned about the wound on the left lower abdomen. She was told to send her to the hospital. Nurse Thomas stitched all the wounds, stabilized the deceased and put her on a drip she was transported to the Swakopmund State hospital. She further explained that after she applied bandages to the stitched wounds they were still bleeding but not that much.

[32] She compiled exhibit 'I' after treating the deceased on 24 December 2016. Therein she described an open wound on the left shoulder, left upper arm and a wound plus minus 6 centimetres deep and 7 centimetres long on the left side of the

abdomen. These wounds she also confirmed on photo 32, photo 33 and photo 35 of the photo plan.

[33] She testified that she followed up on the condition of the deceased on the 24th or the 25th of December 2015 by telephone. The nurse at the Swakopmund State Hospital said that the deceased was in a stable condition, but on 26th of December she learnt that the deceased had passed away.

[34] She was extensively cross-examined about the wounds as depicted in the photo plan. She said that she did not measure the wound on the upper left shoulder, but from her observation, it did not penetrate the chest cavity. She further indicated that the small wound on the lower right side of the deceased's abdomen depicted on photo 31 is not a wound that she saw at the clinic. She assumed that the Doctor inserted a drainage pipe, but could not say for sure. She did not recognize the stitched wound on photo 34. In her view the larger wound on the left abdominal area on photo 32 was stitched and it looked as if the stitches were removed. She had no idea that a laparotomy was conducted on the deceased and only learned about it during cross-examination. She could not comment on the bruises on the left thigh and right knee which was noted on the post-mortem report as she could not remember these bruises.

[35] Nurse Tjaronda Simon, the nurse who received the deceased in the company of Sister Thomas, testified that the deceased was stable at around 4 o'clock in the morning upon arrival at the Swakopmund State Hospital.

[36] Doctor Katrina Mouton was called for an expert opinion about the post-mortem findings, which was compiled by Doctor Ayoade at the Walvis Bay Police Mortuary. The main findings were recorded at para (iv) as:

- '1. Lacerations on right side of abdomen, left side of abdomen, left side of lower back*
- 2. Laceration on left shoulder, left upper arm*
- 3. Bruises on left thigh and right knee'*⁴

Doctor Ayode's conclusion was that the cause of death was due to 'multiple stab wounds'.

⁴ Page 1 of the post mortem report Para (iv) & (v)

[37] There were also notable features of medical intervention where a mid-line incision for a laparotomy and the deceased was having a colostomy bag. Additional remarks about the abdominal area that was recorded by Doctor Ayode were that the peritoneal cavity was unremarkable; stomach and the content of the stomach was unremarkable; and the mesentery was unremarkable.⁵

[38] Doctor Mouton testified that the sketches of the post-mortem report reveals a laceration on the left upper arm as well as at the back, the left scapular area, a laceration on the left abdomen and the right side of the abdomen as well as a laceration on the back a few centimetres from the spinal cord. In addition, bruises are depicted on the left upper limb and the right knee area.

[39] When asked to comment about photo 31 her observation was that it depicts a mid-line incision that is probably due to the laparotomy that was done. In addition on the right side of the abdomen there is a small wound with what looks like one stitch. On photo 32 she observed a larger laceration on the left side of the abdomen.

[40] She explained that a laparotomy is a mid-line incision to open the abdominal cavity to see whether there was any trauma or injury on the intestines or organs. If there is injury to the large intestine, the large intestine is brought out to the skin and the colostomy bag is attached to it. The stool of the patient will then pass into the colostomy bag. She explained that this procedure is usually done to give the large intestine time to heal. She indicates that if there is an injury to the abdomen, then it can lead to death if it penetrates the large intestine.

[41] Additionally, she explained that the injury to the left shoulder of the deceased may also be fatal as it can penetrate the chest cavity at the lungs which may result in air or blood in the lungs and consequently cause the victim to not get enough oxygen in the tissues. The victim may then experience symptoms such as shortness of breath and difficulty breathing.

[42] During cross-examination the Doctor testified that the size and depth of the lacerations observed was supposed to have been measured and recorded on the

⁵ Page 2 of the post mortem report, No 16-18

post-mortem report, which was not done in this instance. She further noted that the laparotomy and colostomy were procedures done while the deceased was still alive. It was indication that the deceased had an operation before she died.

[43] She further stated that the finding of 'unremarkable' at the intestines and mesentery on the post-mortem report represents that there was no injury or trauma to those parts of the anatomy of the deceased. That was pointed out by Council for the accused as a clear contradiction with the laparotomy and colostomy bag. Doctor Mouton confirmed that this was indeed a contradictory finding in the post-mortem report.

[44] Her view was that the small wound on the right side of the abdomen with the one stitch could not have been the incision where the colostomy was done, but that the larger wound on the left side could have been where there was trauma to the large intestine and where the colostomy was performed by re-opening the stitched wound.

[45] She advanced two possibilities as to what calls for a laparotomy operation. One may be due to the depth of the wound in the abdomen which caused trauma to the injuries, and the other possibility is when a patient has severe abdominal pain which can be an indication of peritonitis, which is an infection of the abdominal cavity. She, in the absence of the patient file, and the confusing post mortem report was unable to speculate as to why the operation had to be done in this particular case.

[46] The version of the accused was also put the witness, in that an emergency operation, i.e. the laparotomy was conducted on the deceased because the stomach of the deceased started to swell and glass fragments were found in the wound where the colostomy bag was affixed. Doctor Mouton could not comment on the glass fragments but she confirmed that the stomach may swell as a result of an infection in the abdominal cavity, 'especially in the peritoneal, the membrane that protects your internal organs...'⁶

⁶ Page 091-058 of the transcribed record.

[47] Doctor Mouton further opined that if the deceased passed away at the Henties Bay Clinic, the cause of death could have been the stabbing. However with the evidence that an operation was performed at the hospital, which may have been indicative of trauma to the intestines or an infection there are other factors that could have been responsible.

[48] With regards to the injury on the left shoulder, Doctor Mouton explained that the injury caused depended on the manner of stabbing. She explained that the shoulder blade could block the blade of the knife from penetrating the chest cavity especially if the deceased was taller than the accused. She explained that the shoulder blade could also have blocked the knife blade if the deceased was on the ground. Finally her opinion about the shoulder wound of the deceased was that it could not have been fatal because it is at the scapular, i.e. the shoulder blade that protect the chest cavity.

[49] I move to the Police Officers. Officer Jerome Basson testified that they arrived at the house a few minutes past midnight. They found the accused inside the yard, bloody and bare-chested. He told them he fought with his sister, they stabbed each other and thereafter she ran towards the clinic. He asked the accused to put on a shirt and to accompany them to the police station. The accused was co-operative. About 50 metres from the house he observed blood on the ground, with a radius of about 50 centimetres. From there he collected a knife with a yellow handle, from the ground. He delivered the accused and the knife to the charge office. At that stage, the deceased was not at the clinic, which is opposite the police station. He testified that he and a colleague searched for her for about an hour in the vicinity of Liambezi and Khomas streets, but to no avail.

[50] Upon their return to the police station, the deceased was sitting with her mother, Ms Louw on the benches in front of the clinic, in a stable condition, waiting to be treated. He noticed blood all over her t-shirt and her skirt but did not see an open wound on her body. He left her there and attended to other complaints. He testified that the deceased did not disclose any information about the incident. Later he called the charge office to release the accused as the sister was in a stable condition.

[51] He identified the knife in photo 23 and photo 24 of the photo plan as the knife he picked up from the scene, exhibit '1'. The blade was measured at 9 centimetres and the handle 11 centimetres. He had no knowledge about a brown pocket knife.

[52] Officer Basson further indicated that the street light to the left of point 'G' that Mr Beukes and Mr Nanub referred to was not working when he went to the scene. However, he spoke of a light about 20 to 30 metres from point 'G' that could have illuminated the scene because it was working that night.

[53] Officer Gideon Kamulu testified that he found the accused at the charge office at the Henties Bay police station where Warrant Officer Havenga told him there was a fight between the accused and the deceased on 24 December 2016. Thereafter he drove Ms Louw and two of her friends to Swakopmund to identify the body. There a male staff member of the mortuary took them to the mortuary. Officer Kamulu opened the fridge drawer, took out the body, placed it on a trolley bed and pushed the trolley into another room. There he uncovered the corpse from head to the chest. Upon seeing her child, Mrs Louw started crying and went outside with the two ladies who accompanied her.

[54] He remained and fully uncovered the corpse. He noticed stab wounds on the upper arm, left shoulder and on the lower left side of the abdomen. He covered the body and returned it to the fridge. He gave instructions to Sergeant Aebek that the body has to be transferred to Walvis Bay Police Mortuary and took Mrs Louw and her companions back to Henties Bay.

[55] Back at the Police Station he questioned the accused. He noticed a bite mark on the accused's left eye brow as well as on his left breast as well as a wound on his left shoulder. The accused then said there was a fight and that he stabbed her with a knife, though he did not specify where on the body he stabbed her. Officer Kamulu asked about the whereabouts of the knife that was used. The accused accompanied him home. They retrieved two knives from a drawer in the accused's bedroom. One with a blue handle as well as a pocket knife with a black and brown handle, made of wood.

[56] During his testimony Officer Kamulu identified the black and brown handle pocket knife. It had a blade of 7 centimetres long and the handle at 10 centimetres long. Back at the charge office, Officer Kamulu located the yellow handle knife. The accused was then arrested and charged. Officer Kamulu sealed all three knives in a forensic bag and gave it to Sergeant Murorua of the Scene of Crime Unit.

[57] According to this witness the accused used the yellow handle knife as the accused told him that it was the yellow knife that the sister had that he picked up and stabbed her.

[58] During cross examination he denied that it was a female nurse that took them to the mortuary. He also denied that the overheard information of an operation performed on the deceased or glass fragments in her stomach. He was not aware of any emergency operation that was conducted on the deceased. According to him he did not observe the long stitched wound along the centre of the deceased's body where the laparotomy was conducted.

[59] Similarly, when Counsel for the accused put to him that according to the other state witnesses' account the accused did not accompany him nor did he point out any knife at home, Officer Kamulu was adamant that the accused was present. He did concur with Counsel for the defence as to the particular light that in the defence's version was the only street light that could have illuminated the scene that night. He estimated it to be about 10 meters away from point 'G' at photo 9.

[60] Ismael Murorua, is the Police Officer who compiled the photo plan and the sketch plan. It was done on 28 December 2016 at the request of Sergeant Kamulu. He documented the scene through photographing the material points with the assistance of Trevor Beukes. He had no knowledge of a brown knife and as such there is no picture of that in the photo plan.

Pertinent Evidence for the Defense

[61] The accused testified that on the material date he went home around midnight after he consumed 4 beers at his uncle's house. Upon reaching the house, the deceased refused to open the front door so he entered through the back door. He disputes that Mr Nanub opened the door for him and indicated that Mr Nanub's testimony that it was so, is a lie as: '...Ivan them were drunk.'⁷

[62] Upon entering, the deceased was cooking and he asked that she dish up for him too, once the food is done. She responded with an insult and told him that he did not buy the food. He returned an insult. Then the deceased grabbed him on the chest and they wrestled in the kitchen. It is where she bit him on the left eyebrow. He pushed her but she again managed to bite him on his chest.

[63] Thereafter the deceased grabbed the knife with the yellow handle and asked him '...do you not believe that I will stab you'.⁸ That is the stage where Mr Trevor Beukes came in and tried to stop them. It was to no avail as the deceased stabbed him on the left shoulder blade with her right hand and ran out of the living room.

[64] He testified that he pursued her into the street because 'I also wanted to make things even My Lady'.⁹ When she saw him she stood still while having the yellow handle knife in her hand. It was his testimony that he did not possess a knife when he followed her. He asked her why she stabbed him, and she responded by angrily by storming towards him. She struck him on the right side of his forehead. His explanation as to why that particular wound was not in the photo plan is that he did not show it to the Police Officer who compiled the document.

[65] Thereafter, the knife fell out of her hands. He stormed towards her and hit her with his knee in her stomach. There was no sharp object on his knee during that time. She bent down to catch her breath. He then picked up the knife with the yellow handle and stabbed her once on the shoulder blade, confirming that it was the wound depicted on photo 35 of the photo plan. He threw the knife on the ground and returned to the house. He saw the deceased walking down the street. Though

⁷ Page 512 of transcribed record

⁸ Page 516 of transcribed record.

⁹ Page 519 of transcribed record.

she was drunk and walked like an intoxicated person, her posture was normal. He went to the bathroom and rinsed the blood from his body.

[66] According to him the only street light that illuminated the scene in the street was the lamp pole right next to the house with the clay roof on photo 9 of the photo plan. Furthermore, according to him he did not see Mr Nanub at the scene. As for Mr Trevor Beukes' location he intimated that he was at the gate of their residence, during the outside incident.

[67] Shortly thereafter the Police arrived. He told Officer Basson that he and the deceased stabbed each other. As such he was loaded and detained at the police station. At around 06h00 a.m. he was told that the deceased did not open a case and therefore he was released from police custody. He went home to sleep. Early in the morning of 26 December 2016 the police collected him again, now informing him that the deceased had passed away. He was charged that afternoon. He denies pointing out two knives in his room to Officer Kamulu as he was detained in custody until he got bail. He has no knowledge where Officer Kamulu obtained the knife with the black and brown handle. According to him the blue handle knife was in his room in the wardrobe. He furthermore vehemently denied inflicting any other stab wound on the deceased, apart from the one he admitted to.

[68] As far as count 2 was concerned, he disputed that he hit Mr Nanub with a ceramic cup. He testified that the mark that Mr Nanub showed in court was an old wound inflicted by someone that Mr Nanub owed money. Counsel for the State put it to the accused that it was never put to Mr Nanub that the wound he showed the court was an old wound. The accused replied that he did not think of it at that time.

[69] Furthermore, during cross-examination the accused indicated that Mr Trevor Beukes was not really able to separate him and his sister as Mr Trevor Beukes was shorter than him. When Counsel for the State put it to him that his Counsel never disputed that Mr Trevor Beukes separated them, he had no comment or explanation.

[70] He agreed that after the deceased stabbed him on the shoulder blade she ran out of the house and he followed her. The point was made that she was no longer

attacking him. He further agrees that the reason why she ran out of the house was as follows: 'My lady maybe she did not wanted me to hurt her My Lady...'¹⁰

[71] He was adamant that he only stabbed the deceased once on the shoulder blade and did not cause any of the other injuries. Counsel for the State later on put it to the accused that it is immaterial what knife he used to stab the deceased.

[72] Ms Emilie Hoxobes, also testified for the defence at what happened at the mortuary. In her account it was a female nurse that directed them to the mortuary. When the drawer was opened Officer Kamulu stood about 2 meters from them. The drawer was opened only half way, and Mrs Louw requested that the drawer be pulled out fully. Once that was done she saw a big plaster cover the large wound on the abdomen of the deceased. They enquired why the big plaster was there. The nurse said that an emergency operation was conducted on the deceased because her stomach was swelling. The nurse furthermore said that she was told by the Doctor that there were fine pieces of glass in the intestines of the deceased which the Doctor removed.

[73] At the close of the defense case, Counsel for the defense informed that they attempted to get the deceased's file from the hospital but to no avail. Counsel for the State was however silent on this aspect.

Closing Submissions

[74] Both parties drew the court's attention to selective portions of the evidence in pursuit of their paths, which I will briefly summarise. Counsel for the State, Mr Muhongo emphasized the evidence of Mr Beukes, the wounds as described by Sister Thomas and the findings of the post-mortem report. He relies on the cause of death as multiple stab wounds as per the post mortem and cited case law as to the significance of post mortem report. Counsel argued that the accused was the only one seen stabbing the deceased, and he calls upon the court to infer that he is in fact the person who caused all the wounds. As such he should be convicted as

¹⁰ Page 570 of the transcribed record.

charged. He also argued that from the evidence of Mr Beukes, the accused person failed to prove that he acted in self-defense when he stabbed the deceased.

[75] In relation to count 2 he submitted that the accused should be convicted as charged as Mrs Louw also observed the injury on Mr Nanub's head.

[76] Counsel for the accused argued that the deceased was the aggressor and the accused did not exceed the bounds of self-defense when he stabbed the deceased once on her shoulder. He furthermore emphasised the multiple contradictions in the State's case. In particular it was strange that Mrs Louw and Mr Nanub did not observe any abdominal injury, nor did Mr Beukes attest of abdominal injuries being inflicted by the accused. In addition he pointed to the evidence of the defense witness Mrs Emilie Hoxobes who corroborated the evidence of Mrs Louw about the information that they obtained from a nurse about an emergency operation that was conducted on the deceased.

[77] Most importantly he relied on the effect of *novus actus interveniens*, which is explained in the textbook 'Criminal Law' by CR Snyman¹¹ as that if a novus actus has taken place, it means that something happened that has broken the chain of causation between X's initial act and the ultimate death of Y, preventing one from regarding X's act as the cause of Y's death.

[78] Counsel for the defence relied on the only expert opinion before the court, that of Doctor Mouton who had to try and make sense of what may have happened to the deceased at Swakopmund State Hospital from the post-mortem and the photoplan. What was definitely clear was that a laparotomy was conducted on the deceased before her death, which could have been a result of trauma to the intestines or an infection in the intestines. He thus argued that the death of the deceased was not caused by the shoulder wound, but by a medical intervention which broke the chain of causation, and that the State effort to ignore this information from the equation will not suffice.

The law and analysis

¹¹ CR Snyman, Criminal Law 6th edition, Durban, LexisNexis (Pty)Ltd at page 86,

Count 1

[79] For the State to succeed it had to prove, beyond reasonable doubt, that the accused stabbed the deceased multiple times with a knife, with the intention to kill her and that the multiple stab wounds caused her death.

[80] Mr Trevor Beukes is the only sober eye witness of the family dispute that started as a result of food. It is common cause that the accused and the deceased had a physical fight in the kitchen. During that instance the deceased bit the accused on the left eye brow and left breast as well as stabbed him on the left shoulder blade. Both Mr Beukes and Mr Nanub attempted to intervene and stop the physical fight. They were not successful.

[81] It is the physical fight outside the house, that forms the nub of the dispute. Initially visibility surfaced as an issue as there were divergent descriptions about the location of the street light in relation to point 'G'. The issue dissipated as at the end the court was satisfied that the scene was illuminated by a street light in the vicinity. Related to that, is the distance from where Mr Beukes observed the fight in the street. That was also resolved as during cross-examination the accused conceded that he merely speculated that Mr Beukes was standing at the gate of the house instead of the wet piece of land close to point 'G', where Mr Beukes said he stood.

[82] The notion of the accused that he acted in self defense when he followed the deceased outside does not hold water. By that time, their physical fight in the kitchen ended and she walked out into the street. Thus it created an interval and the accused's bodily integrity was no longer in imminent danger. The answers by the accused that she went out because she did not want to be injured, confirms that the first attack had stopped. In respect of his answer that he followed her because he wanted to make things even, it is apposite to refer to *S v Shaningua*¹² wherein it was stated that:

'Private defence is not a means of exercising vengeance or retaliation and there would be no defensive act where the unlawful attack had already passed.'

¹² *S v Shaningua* (CC 09/2016) [2017] NAHCMD 224 (14 August 2017).

[83] The material question is whether it can be inferred that the accused's actions were the cause of death? The accused admitted to having inflicted one stab wound on the shoulder of the deceased, which evidence was corroborated by state witness Mr Beukes.

[84] There are discrepancies amongst the State witnesses about many features in the story, one of which was which knife was by the accused in the street. According to Mr Beukes the accused had a knife with a brown handle in his hand. It emerged during the trial that the knife that Mr Beukes referred to, was not the knife handed in by the State, which illustrates in the State's version there is no clarity as to which knife was used.

[85] More critical issues that linger pertain to the number and degree of wound(s) on the deceased, the location, whether it was lethal in nature, and whether there was any other intervening event that may have caused the death of the deceased, in view of the evidence by Doctor Mouton and the problematic aspects that emanated from the post mortem report.

[86] Mr Beukes, who observed the incident in close proximity attested of one wound inflicted on the shoulder. This information do not tally with the wounds seen by Sister Thomas. She noted a wound on the left shoulder blade, a wound on the left upper arm and a wound about 6 centimetres deep and 7 centimetres long on the stomach. The strange thing is the there was no visibility problems at the clinic. Despite that, it was Ms Louw's evidence that did not observe an abdominal wound when she undressed and cleansed the deceased. The same goes for Mr Nanub's evidence on this aspect. Mr Nanub had a second opportunity to have noticed the big laceration on the deceased's abdomen, the day that he assisted her to use the bathroom at the Swakopmund State Hospital, but again he did not see any abdominal wound.

[87] It is common cause that the deceased passed away on 26 December 2016, that the post-mortem was conducted on 3 January 2017, by Doctor Ayoade and he recorded the cause of death as multiple stab wounds. He noted no trauma or

injuries to the peritoneal cavity, the stomach, the stomach content, the mesentery and the intestines. He however did indicate that there was a medical intervention where a laparotomy was conducted and the deceased had a colostomy bag. It is this report and findings that the State relies on for a conviction. Counsel for the State's answer to the defence of *novus actus interveniens* and the post mortem issues was to refer the court to *Lifatila v The State*¹³ and *S v Jacobs*.¹⁴

[88] What I understand from Doctor Mouton's expert opinion is that the post-mortem report is tainted by defects, inaccuracies and contradictions. It is a far cry from the flawless post-mortem reports in the cases referred to in the previous paragraph. In addition the cases are not exactly on all fours with the case before court. In reading the *Jacobs* matter, the accused therein admitted to having stabbed the deceased multiple times and it appears that there were no issues that arose from the post mortem report. In the *Lifatila* matter the court had the benefit of hearing definite medical evidence that the deceased received the right treatment and that the correct procedures were followed at both the hospitals, which is not the case here.

[89] I find it difficult to embrace findings for conviction purposes in view of the inconsistencies as highlighted by Dr Mouton. The report does not contain the required measurements of the wounds observed prior to post-mortem. More importantly, the Doctor who conducted the post-mortem contradicted himself, by indicating that there was no trauma or injuries to the stomach area and that it was 'unremarkable'. That was in the face of a laparotomy which the court learnt is an operation normally done while the patient is alive, and where the colostomy bag was attached, a further indicator of trauma to the intestines or an infection that penetrated the abdominal cavity according to Dr Mouton.

[90] More than that Doctor Mouton could not say. The Doctor who compiled the post mortem report was not at court to clarify or explain the discrepancies. Dr Mouton pointed out that the patient file at Swakopmund State Hospital would be a source of information as to what really happened at the hospital. The failure of the State to provide the said patient file leaves a *lacuna* in the State's case. This was

¹³ *Lifatila v State* (CC 12/2011) [2014] NAHCNLD 12(26 February 2014)

¹⁴ *S v Jacobs* (CC 1/2017) [2018] NAHCMD 35 (16 February 2018)

because the position is that the deceased was in a stable condition at the Henties Bay clinic and remained so upon arrival at the Swakopmund State Hospital. Her condition was also stable the next day that was according to the testimony of both Ms Louw and Sister Thomas who telephoned the Hospital as well as Mr Nanub who visited the deceased.

[91] I briefly pause to note that the investigating officer, Officer Kamulu's, evidence that he did not see the midline incision on the deceased's body on the day of the mortuary visit, prior to the post-mortem cannot be accurate. His evidence was further contradicted by Mrs Louw and Mrs Hoxobes who testified that they heard from the nurse at the mortuary about the emergency operation of the deceased, in his presence. If Mrs Louw and Mrs Hoxobes was untruthful about that information, why would the post-mortem show the laparotomy and colostomy? Furthermore, where else would they have acquired this information, especially since Officer Kamulu was unaware of this operation? Officer Kamulu's denial of knowledge of any medical intervention before the deceased's death may have been an attempt to salvage the bleeding case of the State.

[92] In respect of the inference that State called for, the court disagrees that it satisfies the cardinal rules of inferential reasoning of *S v Blom*¹⁵. Some state witnesses attested of more wounds than other state witnesses. Most importantly, the single eye witness who observed the stabbing, spoke of only one wound being inflicted. Furthermore, there are other reasonable inferences as to how the other injuries could have been sustained, which were not excluded. It is not inconceivable that the deceased may have injured herself, as the evidence shows that she was intoxicated, aggressive, uncontrollable, and had a knife. According to the accused's version she fell outside with the knife. Furthermore, she walked away from home, in the dark of night after the one wound was inflicted, which single stab was admitted by the accused and observed by witness Mr Trevor Beukes. There was a distance during which Ms Louw was not with her. The police testified that they were searching for the deceased for almost an hour in that vicinity, before finding them at the clinic. This provided an opportunity for a 3rd party that may have caused other injuries. A

¹⁵ *R v Blom* 1939 AD 188 at 202

simple suspicion by the State that it was the accused that caused multiple wounds is not enough and not consistent with the evidence of the sole eye witness.

[93] At the end of the day the issues for a conviction of murder were unsurmountable and the State's evidence did not constitute a cogent account. The court cannot ignore that somewhere between the deceased being stable at the Swakopmund State Hospital and then succumbing to death, there was medical intervention, but the details and treatment thereof remain a secret. That period, the condition of the accused and the treatment at the Swakopmund State Hospital was material, as it preceded the death of the deceased. The State called Doctor Mouton to clarify the post-mortem report and to rely on her opinion. Her evidence did not advance the State's case. Her credible evidence brought to light that definitely the deceased had an operation before her death.

[94] In *S v Haileka*¹⁶ Muller, J held that:

'Normally the intervening incident that breaks the chain of causation and constitutes a *novus actus interveniens* has to be an abnormal one and not one foreseen by the person injuring another.'

It should have been clarified by the State what caused the change in the condition of the deceased, whether it was related to the shoulder stab wound or what precisely caused her death. This court cannot blindly follow a flawed post mortem report. In addition, it is not known whether the correct procedures were followed and proper treatment was given at the Swakopmund State Hospital. If the State has nothing to hide, why not bring the patient's file. If it was so that the patient file was missing, why not call a staff member who bears knowledge of the case to fill in the gaps as to what happened at the Hospital? In conclusion, the defence managed to create reasonable doubt and successfully raised the defence of *novus actus interveniens* in respect of the murder charge.

[95] That does not mean the end of count 1. Regardless of which knife was used, in view of the uncontested evidence of Mr Beukes that he saw the accused stabbed the deceased outside with a knife on her shoulder and the formal admissions made

¹⁶ *S v Haileka* (CA-2006/92) [2006] NAHC 62 (30 November 2006).

by the accused, the court is satisfied that that the elements of the competent verdict of assault with the intention to do grievous bodily harm were proven. In the premises, the accused is convicted of assault with the intention to do grievous bodily harm, read with the provisions of Act, 4 of 2003.

Count 2

[96]As for count 2, the State had to prove that the accused assaulted Mr Nanub with the intention to cause him grievous bodily harm. The question is whether Mr Nanub gave credible evidence as to the incident that the accused hit him with a ceramic cup when he was trying to stop the fight in the kitchen between brother and sister?

[97]That is answered in the affirmative. It is clear from Mr Nanub's evidence that he has no reason to falsely implicate the accused. He did not even open a criminal case for the assault, which shows that he harbours no ill motives towards the accused. Although Ms Louw was not present when the incident occurred she confirmed to have noticed the mark on his head later on. Moreover, during cross-examination Mr Nanub in court physically pointed out the mark of the injury. Counsel for the defence looked at it and confirmed that there was a mark. That was the opportune moment to offer the explanation that the mark emanated from another incident. That was not done, and the court heard the explanation for the first time during the testimony of the accused. I concur with Counsel for the State that it was a mere afterthought and I reject it as such. I am satisfied that the act of the accused to hit Mr Nanub with a heavy object on a vulnerable part such, as the skull, is indicative of an intention to cause grievous bodily harm. As such the accused is convicted accordingly on count 2.

[98]For these reasons I make the following order:

Count 1: Murder Not Guilty, but Guilty of competent verdict of Assault with intent to do grievous bodily harm, read with Act 4 of 2003.

Count 2: Guilty of Assault with intent to do grievous bodily harm.

Exhibits '1' and '2' are to be returned to its lawful owners.

C Claasen
Judge

APPEARANCES

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