

REPUBLIC OF NAMIBIA

HIGH COURT OF
CIRCUIT COURT HELD



NAMIBIA MAIN DIVISION,
AT RUNDU

Case No: CC 23 /2022

THE STATE

v

KANDJIMI KATJOTJO HAINGURA

ACCUSED

Neutral citation: *S v Haingura* (CC 23/2022) [2023] NAHCMD CR 462 (3 August 2023)

Coram: DAMASEB JP

Heard: 1 August 2023

Delivered: 3 August 2023

Flynote: Criminal Procedure – Murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003 – *Mens rea* for murder is intention – accused pleaded guilty at the commencement of the trial– Court however entered a plea of not guilty because of his explanation that he had no intention to kill – *dolus eventualis* – the accused should have foreseen that his wrongful action will result in the death of the deceased – Accused guilty of murder in the form of *dolus eventualis*.

Summary: The accused is charged with the murder of his now deceased aunt (the deceased) which makes the alleged crime one of domestic violence within the meaning of s 21 of the Combating of Domestic Violence Act that it was alleged that on or about 12 June 2020 at or near Gcigco Village in the district of Rundu the

accused unlawfully and intentionally killed the deceased by whipping her with a homemade donkey leash and kicking her while wearing safety boots.

The accused pleaded guilty at the commencement of the trial but the Court entered a plea of not guilty because he explained that he did not intent to kill the deceased.

The state called two witnesses, one being the doctor that conducted the post-mortem examination who concluded that the cause of death was rapture of the liver and internal bleeding due to assault. The second witness was an eye witness whose evidence stated that the accused kicked the deceased repeatedly on the area covering the liver, consistent with the post-mortem report with regards to the cause of death.

The accused maintained that it was not his intention to kill the deceased and that he assaulted the deceased because she provoked him. He was further not aware that the side he kicked was a sensitive area where vital organs might be located.

The issue was, did the accused foresee that death might result as a consequence of his assault.

Held that, in the accused's settled intent to teach the deceased a lesson by assault, he was indifferent to whether it may result in her death and as such under our law, he had formed the intention to kill.

Held further that, the State proved beyond a reasonable doubt, it being admitted that the accused by assault caused the death of the deceased, that he had the requisite intent to bring about her death and as a result the accused is convicted of murder in the form of *dolus eventualis* read with the provisions of the Domestic Violence Act.

VERDICT

Accused is guilty of murder in the form of *dolus eventualis* read with the provisions of the Combating of the Domestic Violence Act 4 of 2003.

JUDGMENT

DAMASEB JP:

Introduction

[1] The accused is charged with the murder of his now deceased aunt (the deceased) which makes the alleged crime one of domestic violence within the meaning of s 21 of the Combating of Domestic Violence Act 4 of 2003.

[2] It is alleged that on or about 12 June 2020 at or near Gcigco Village in the district of Rundu the accused unlawfully and intentionally killed Nipembe Behatta, an adult female person.

[3] The summary of substantial facts in terms of s 144(3)(a) of the Criminal Procedure Act 51 of 1977 (the CPA) states:

‘Nipembe Behetta, the deceased in this matter is a biological mother of the accused person, placing them in a domestic relationship. On 12 June 2020 during the evening hours in the house of Hausiku Hilarius Katura, at Gcigco village in the district of Rundu, the accused person barbarically whipped his biological mother with self-made donkey halter ropes. The deceased fell down and the accused person continued viciously kicking his frail mother six times with booted feet. He only stopped after he was told by Mr Katura to stop kicking his mother. The deceased remained on the ground where she fell and savaged only to be dragged into their sleeping room by the accused person. She died on the scene due to liver rupture and internal bleeding from the abdominal cavity.’

[4] The accused pleaded not guilty to the charge and made the following admissions in terms of s 220 of the CPA:

- 4.1 The deceased is Behatta Nipembe who is his aunt and not his biological mother as his biological mom passed on. He admits that there is a domestic relationship between him and the deceased in terms of the Domestic Violence Act.
- 4.2 During the evening on the 12th of June 2020 in the house of Mr Hausiku Hilarius, he only assaulted the deceased three times with a donkey leash. He further admits that this was at Gcigco Village in the District of Rundu.
- 4.4 He admits that, after he assaulted the deceased three times she fell to the ground. When she stood up, he slapped her three times on her left cheek. Thereafter, he kicked the deceased three times on her ribs.
- 4.5 He states that his intention was not to kill the deceased.

[5] After questioning by the court in terms of s 115(2) of the CPA, the accused made the following additional admissions in terms of s 220 of the CPA:

- 5.1 The deceased was his aunt.
- 5.2 She was younger than his late mother.
- 5.3 He does not dispute that the deceased was 57 years old at the time of her death.
- 5.4 The deceased accused him of riding neighbours' donkeys and causing them to get lost.
- 5.5 He assaulted her because of that allegation. He thinks that he is 23 years old now although he does not know when he was born.
- 5.6 The deceased was married to Mr Hilarius Katura, a state witness.

5.7 He admits that Mr Katura was present when he assaulted the deceased.

5.8 After assaulting the deceased, he went to the homestead of one Mr Thimotheus, his uncle. He does not deny the cause of death.

[6] The following exhibits were admitted into evidence with the accused's consent and their contents admitted in terms of s 220 of the CPA and duly received and marked as exhibits "A" – "K":

1. Indictment – 'A'
2. Summary of substantial facts – 'B'
3. State's pre-trial memorandum – 'C'
4. Reply to states pre-trial memorandum – 'D'
5. Pre-trial minutes – 'E'
6. Pol51 identification of the body by Siwogedi Thimotheus dated 13 June 2020. – 'F'
7. Affidavit in terms of section 212 (4) of Act 51 of 1977 Alweendo Philipus, (PM 240/2020) dated 15 June 2020. – 'G'
8. Affidavit in terms of section 212 (4) of Act 51 of 1977 and a report on a medico-legal post-mortem examination compiled by Dr. Katamba Banza (PM240/2020) dated 15 June 2020. – 'H'
9. Sworn statement by the Medical officer or pathologist in terms of s 212(4) of Act 51 of 1977 dated 15 June 2020 – 'J'
10. Photo plan and keys thereto compiled by D/W/O. F. K. Marungu dated 24 September 2020. – 'K'

[7] The accused is legally represented by Ms Hango on the instruction of the Directorate of Legal Aid while the State is represented by Mr Shileka of the Office of the Prosecutor-General.

The State's Case

[8] The state called two witnesses. The medical doctor who conducted the post-mortem and Mr Hilarius Katura, the husband of the deceased. I will now summarise their evidence in turn.

[9] Dr Katamba Banza testified that he is employed at the Rundu State Hospital as a senior forensic officer since 2014. He was previously employed at the Grootfontein State Hospital. He completed his Bachelor's degree in Medicine in the year 2004.

[10] His main duties are to conduct autopsies on dead bodies and to prepare reports of his findings. The doctor testified that his post-mortem finding on the deceased was that death was due to the rupture of the liver and internal bleeding from the liver. He removed 200ml of blood from the abdominal cavity of the deceased and considered that to be severe internal bleeding.

[11] Dr Banza testified that the human liver is located under the ribs on the right side stretching towards the chest area since the liver is a large organ. According to the doctor, rupture of the liver can be caused by external excessive force on the abdomen or by a fracture of the ribs causing the rib to rupture the liver. He added that the liver is a sensitive organ and can easily be damaged by excessive force.

[12] According to Dr Banza, a rupture to the liver such as in the present case cannot be treated even with the best medical intervention and that the prognosis was poor. It was his testimony that a rupture can be caused by punching or kicking and that the injury on the deceased was consistent with excessive force from repeated kicking.

[13] During cross-examination Dr Banza indicated that the rupture was 9 cm long but that he cannot remember its depth.

[14] The next witness was Mr Hausiku Hilarius Katura. He testified that he was born in 1956 and is 67 years of age. The deceased was his wife under customary marriage. He testified that he knows the accused person before court and described him as his stepson. Mr Katura testified that on 12 June 2020 he did not consume alcohol. On the date mentioned in the indictment, he and the deceased were sitting by the fire when he witnessed the accused strike the deceased with a donkey leash and proceeded to kick her six times, twice at her lower back, twice around the ribs towards the chest area and twice on the upper back towards the backside of the neck. It was his further testimony that after the accused kicked the deceased the accused dragged her towards a pole and leaned her against it. It was then, that the deceased started signing Roman Catholic hymns. The accused further dragged the deceased towards the hut and leaned her against the bed and he left for his uncle's house.

[15] According to Mr Katura, when he came to join the deceased in the hut she was lying on the ground. He asked her to get onto the bed and she replied that she felt weak. He thereupon picked her up and placed her on the bed. He went outside

for a smoke and upon his return the deceased had moved to his side of the bed. When the deceased did not respond to his requests for her to move, he took a light to inspect the deceased and noticed that she was no longer alive. He then rushed to her brother's house to inform him of what had transpired.

[16] They then called the police who came and removed the body of the deceased.

[17] During cross-examination Mr Katura indicated that on the day in question there was clear visibility and that he could see clearly as it was around 18h00 and the sun had just set. He stated that the accused kicked the deceased as if he were kicking a soccer ball with excessive force while wearing safety boots. He testified that it was not the first time that the accused had assaulted the deceased.

The defence's case

[18] The accused testified in his own defence and elected not to call any witnesses. He testified that on the day in question the deceased who was alert and in good health, accused him of riding the donkeys of other people in the village. This was not the first time she made such an accusation. He was angered by the accusation and whipped the deceased with a donkey leash three times. Whilst she was seated, he proceeded to kick the deceased three times around the area of her right ribcage.

[19] The assault happened in the presence of Mr Katura. He then went to his uncle's homestead, leaving the deceased in the presence of Mr Katura. Later that evening the police came and took him to the police station. He denied wearing safety

boots at the time he assaulted the deceased. He denied kicking her more than three times.

[20] The accused testified that he had no knowledge where in the human body the liver is located. He testified that he did not use excessive force in assaulting the deceased. As he put it, he did not kick her like he would kick a soccer ball. He only kicked her 'lightly'.

[21] The accused testified that he was not on good terms with the deceased because she was not treating him well. He denied that he intended to kill the deceased. He did not realize that the ribcage area is a 'delicate' part of the human body. He admitted that he kicked the deceased on the right ribcage area of her body. He reiterated that although the deceased had consumed alcohol on the fateful day, she was not drunk and was 'alert'. He stated that the deceased had given him no cause (reason) to beat her and that he knows that what he did was wrong. He testified that the deceased was seated when he kicked her.

[22] Under cross-examination the accused stated that he did not foresee that the deceased would die from the assault. He testified that when he went to his uncle after beating the deceased, he did not tell the uncle what he had done. He admitted that he did nothing to render assistance to the deceased after assaulting her. He stated that he assaulted the deceased because he was angered by the allegation she made against him.

[23] Under re-examination he maintained that he kicked the deceased only 'slightly' and did not use excessive force.

[24] The court asked the accused if he did not consider that whipping the deceased was sufficient to avenge the anger he felt from the accusation she made against him. He answered that he could not explain that. When further asked by the court whether he would have acted differently had he known where in the human body the liver is located, he replied that he probably would not have acted differently. In other words, that we would probably still have assaulted her in the manner that he did.

Submissions

The State

[25] Mr Shileka for the state submitted that in view of the admissions made by the accused, the only issue that remains is that of *mens rea*. In other words, did the accused assault the deceased with the intent to kill her? According to counsel, the evidence considered in its totality leads to the inescapable conclusion that the accused had the necessary intent. Mr Shileka submitted that the evidence shows that the assault on the defenceless and vulnerable deceased was vicious and that the deceased had offered no resistance to the accused. Besides, the assault on the victim was on a sensitive part of the human body and was consistent with Dr Banza's finding that the rupture to the liver was caused by excessive force. Counsel further submitted that the intent to murder is evident from the accused's conduct after the assault: He offered the victim no assistance and in fact dragged her about after the vicious assault. Mr Shileka submitted that the State had established beyond a reasonable doubt that the accused subjectively foresaw death as a possibility when he assaulted the deceased and reconciled himself with it.

[26] Counsel relied on a leading judgment of the Supreme Court of Namibia on *dolus eventualis*, *S v van Wyk*¹ to support his submission that the accused was guilty of murder with *dolus eventualis*. As Ackerman AJA put it in that case:

'In order to prove the requisite intention to kill it is not necessary to establish that the accused desired the death of the deceased or was certain that death would ensue from the assault on the deceased. It is sufficient if the accused subjectively considers that death is a possible consequence of his unlawful actions but proceeds with such actions reckless as to whether death will ensue or not or, as it is sometimes stated, reconciles himself with the possibility that death may ensue'.

The Accused

[27] Ms Hango for the accused submitted that the State bore the onus to prove beyond reasonable doubt that the accused had the intent to cause the death of the deceased. Counsel submitted that in the present case, intent is negated by the accused's evidence that he only kicked the deceased three times with takkies (not safety boots as alleged by the State) and only kicked her 'slightly'. Ms Hango submitted that the proven facts do not establish that the accused reasonably foresaw that death would result from the assault on the victim. She added that the accused's conduct did not deviate from that of a reasonable person. Ms Hango submitted that the following factors should count in favour of the accused: His evidence that he kicked the deceased only three times in the area covering the liver, that he wore takkies (not safety boots) during the assault; that he was not aware where the liver is located in the human body, and his denial that he used excessive force.

¹ *S v van Wyk* 1993 NR 426 (SC) p 439.

[28] Ms Hango submitted that since Mr Katura is a single witness whose evidence must be approached with caution, the court must prefer the accused's version instead of Mr Katura's that the accused wore takkies at the time of the assault and that he kicked the deceased only three times.

[29] Because the State failed to disprove the accused's version about the type of shoes he wore at the time of the assault, I will accept, as argued by Ms Hango, that he wore takkies at the time. I am also prepared to accept that the accused kicked the deceased only three times and not six times as testified by Mr Katura.

The Law

[30] Murder is the act of unlawfully and intentionally causing the death of another human being². In our law, there are three forms of intention (*dolus*): *dolus directus*; *dolus indirectus* and *dolus eventualis*³. In the present case, the State relies on *dolus eventualis* and I confine the present discussion to it. Snyman writes of *eventualis*:

'A person acts with intention in the form of *dolus eventualis* if he commission of the unlawful act or the causing of the unlawful result is not his main aim, but: (a) he subjectively foresees the possibility that, in striving towards his main aim, the unlawful act may be committed or the unlawful result may be caused, and (b) he reconciles himself to this possibility'.⁴

[31] As Snyman correctly submits⁵, *dolus eventualis* is not confined to 'cases where the result is foreseen as a strong possibility' 'as long as there is a real or reasonable possibility that the result may ensue'.'

² *Ndlovu* 1945 AD 369 373; *Valachia* 1945 AD 826 829.

³ *CR Snyman Criminal Law 6th ed Lexis Nexis 2014 p 177 onwards.*

⁴ *Ibid*, 176.

⁵ Snyman (*supra*) p 180.

Discussion

[32] Ms Hango for the accused accepted that the only dispute between the State and the accused is whether he intended to kill the deceased. Counsel submitted that the State bore the onus to prove beyond reasonable doubt that when the accused assaulted the deceased he intended to kill her. According to counsel, the disputed issue is to be determined against the backdrop of a very narrow factual matrix: Did the accused kick the deceased six times as alleged by the State; or should the court accept the accused's version that he kicked her three times; did the accused use safety boots when he kicked the deceased as alleged by the State or Puma takkies as he maintains; that the accused did not know when he kicked the deceased around the right ribcage that the liver was located in that area.

[33] I have already found that the accused wore takkies and not safety boots when he assaulted the deceased and that he kicked her only three times.

[34] Since the accused admits assaulting the deceased but denies that it was with the intent to kill her, the starting point is the cause of death which is a 9cm rupture of the liver and internal bleeding resulting in 200ml of blood being removed from the abdominal cavity. Dr Banza amplified the post-mortem findings under oath and stated that the liver rupture is consistent with excessive external force to the area around the right ribcage area of the deceased's body. The doctor testified that it was impossible for the deceased to survive such an injury even with the best medical intervention.

[35] The medical evidence therefore establishes that the assault on the deceased was a vicious one. The victim stood no chance of surviving. She was bound to die even with the best medical intervention. The severity of the assault further becomes apparent from the state in which the deceased was after the assault. She was unable to walk on her own. The accused even by his own admission had to drag her to her room. Her state of weakness was also corroborated by Mr Katura who stated that she could not get on the bed herself.

[36] Nothing therefore turns on whether it was safety boots or takkies that were used or whether the accused inflicted three or six kicks on the deceased. Rather than diminish the brutality of the assault, the two factors relied upon by Ms Hango in fact point to the ferocity of the attack. If takkies are less lethal than safety boots, the force with which the takkies were used must have been proportionally greater than if safety boots were used. Similarly, if six kicks would ordinarily be more lethal than three, the admitted three kicks must have been administered with such ferocity that it produced the effect that would be expected of six kicks. Those two considerations on which Ms Hango relies therefore undermine the accused's version that he did not intend more than slight injury against the deceased.

[37] Mr Shileka for the State correctly submitted that at the very least the accused reasonably foresaw that death might result from the assault on the deceased and reconciled himself to that result. Mr Shileka urged the court to find that the accused caused the death of the deceased with *dolus eventualis* not least because the excessive force used was calculated to and did cause very serious injuries to the victim.

[38] The accused's own evidence under oath significantly corroborates the State's case that he acted with *dolus eventualis*. He testified that the deceased was in the habit of nagging at him; often accusing him of riding neighbours' donkeys (presumably) without permission. It was apparent that he was upset with the deceased for this nagging. The assault on the deceased on the fateful day was (it seems clear) a reaction to what he perceived as the accused's nagging. So, he made up his mind to teach her a lesson. That lesson was to assault the deceased. The deceased's death may not have been his objective but the inference is inescapable that he foresaw that death might result but was not deterred thereby and reconciled himself to that possibility. In other words, in his settled intent to teach the deceased a lesson by assault, he was indifferent to whether it may result in her death. Under our law, he had formed the intention to kill.

[39] Answering a question put to him by the Court, the accused said that had he known where the liver is located he would probably not have acted differently: He thus clearly reconciled himself with the possibility of causing the deceased's death.

[40] I am therefore satisfied beyond a reasonable doubt, it being admitted that the accused by assault caused the death of Behatta, that he had the requisite intent to bring about her death.

[41] I accordingly convict the accused of murder as charged in the indictment.

Order

[42] The accused is guilty of murder in the form of *dolus eventualis* read with the provisions of the Combating of the Domestic Violence Act 4 of 2003.

P.T. DAMASEB
Judge-President

APPEARANCES:

THE STATE:

R. Shileka

Of Office of the Prosecutor-General

ACCUSED:

P. Hango

Instructed by the Directorate of Legal Aid