



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 10/2021

In the matter between:

**THE STATE**

and

**INOCK MAZALA NALISA**

**ACCUSED**

**Neutral citation:** *S v Nalisa* (CC 10/2021) [2023] NAHCMD 50 (14 February 2023)

**Coram:** LIEBENBERG J

**Heard:** 15 – 18 November 2022

**Delivered:** 14 February 2023

**Flynote:** Criminal Procedure – Charges – Murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003 – Defeating or obstructing the course of justice or an attempt thereto.

Criminal Procedure – Mutually destructive versions – Court must have good reason for accepting one version over the other and should not only consider the merits and demerits of the state and defence witnesses, respectively, but also the probabilities. *S v Engelbrecht* 2001 NR 224 (HC); *S v Petrus* 1999 NR 105 HC.

Criminal Procedure – Evaluation of evidence – Section 78(7) of Criminal Procedure Act 51 of 1977 – Diminished criminal capacity on the part of the accused finds no application to the present facts.

**Summary:** The accused, is charged with the following offences: Count 1: Murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003; and Count 2: Defeating or obstructing the course of justice or an attempt thereto. He pleaded not guilty to both counts and elected not to disclose the basis of his defence.

During the trial it emerged that the accused had no recollection of circumstances that led to the death of the deceased due to a blackout. It was submitted on the accused's behalf that this was consequential to provocation. The state presented evidence showing otherwise.

*Held that* only the accused and the deceased were present during the physical altercation, the court is ceased with only the accused's direct evidence of what happened at the time.

*Held further* that undisputed evidence being inconsistent with the accused having blacked out and therefore unable to recall what happened, is that the body of the deceased was covered with a duvet. The only reasonable inference to draw from this is that the body was covered to hide it.

*Held furthermore* that the accused's behavior in these circumstances tends to show that he, at that stage, was conscious of his wrongdoing. This conclusion is fortified by his subsequent fleeing and going into hiding for two days.

*Held that* the defence tendered no medical evidence supporting the accused's assertion of having been incapacitated or having acted with diminished criminal capacity when allegedly killing the deceased.

*Held that* 'diminished criminal capacity' on the part of the accused finds no application to the present facts.

*Held that* provocation is no longer a defence.

*Held further that* the alleged suffering of a blackout is, on the strength of the evidence before court, clearly a fabrication and an afterthought aimed at creating a possible defence.

*Held that* the gravity of the injuries, are such that the only reasonable inference to draw is that the accused intended killing the deceased, thus acting with direct intent.

*Held that* it was not placed in dispute that a knife was used to stab the deceased and as the weapon could not be found during the police investigation the only reasonable conclusion is that the accused discarded it. To this end, the offence was complete and the accused's actions amount to defeating or obstructing the course of justice.

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## ORDER

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Count 1: Murder, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 – Guilty.

Count 2: Defeating or obstructing the course of justice – Guilty.

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## JUDGMENT

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LIEBENBERG J:

### Introduction

[1] The accused, an adult male, is charged with the following offences: Count 1: Murder, read with the provisions of the Combating of Domestic Violence Act 4 of

2003; and Count 2: Defeating or obstructing the course of justice or an attempt thereto. He pleaded not guilty to both counts and elected not to disclose the basis of his defence.

[2] On the murder charge it is alleged that on 31 October 2020 at or near Okahandja Park (informal settlement) in the district of Windhoek, the accused unlawfully and intentionally killed Njakwabo Petrah Munikozo (hereinafter referred to as 'the deceased'). Although the indictment reads that the provisions of the Combating of Domestic Violence Act 4 of 2003 (the Act) find application, the charge itself does not reflect that the accused and deceased were in a domestic relationship as defined in the Act. This notwithstanding, it is common cause that the accused and the deceased were in a domestic relationship as defined in the Act. The offence charged in count 2 is the alleged hiding or discarding of a knife or sharp object used in the commission of the alleged murder, with intent to frustrate the police investigations or conceal evidence to protect him from prosecution.

[3] The prosecution presented the evidence of nine witnesses and their testimonies primarily turn on events which are directly linked to the death of the deceased, while the accused was the only witness for the defence.

#### Evidence presented

##### *The State's case*

[4] Ms Beauty Mbango (Beauty) is the cousin to the deceased and a direct neighbor as their shacks are about 4 – 5 metres apart and situated opposite one another in Okahandja Park informal settlement. During the late afternoon on 31 October 2020 and whilst at her shack, she met with the deceased who arrived home. Shortly after the deceased entered their place she heard an argument between the accused and the deceased. Beauty stepped outside and when she enquired about what was going on, the accused replied that the deceased started hitting him upon entering their shack. When she in turn asked the deceased, she replied saying that if Beauty continued asking, she would be beaten as well. Beauty then entered her house and locked the door.

[5] When she later on heard people talking and 'the strange sound of zinc', she decided to call the accused's sister Melody and told her that she was unable to stop the fight between the accused and the deceased. When Melody asked to talk to the accused, she passed her phone to him through an opening at the doorpost. Upon hearing from Melody that the accused said he would not fight back, Beauty returned to her shack. When the fighting again flared up shortly before 20h00, she informed the accused and the deceased that she was going to call the community leader, Mr Theobald Sikaki (Sikaki).

[6] Next she heard the deceased screaming for help, saying that the accused was killing her, where after she went silent. Beauty responded by saying to the accused that he must open the door and when he refused, she phoned Sikaki. Upon hearing her speaking to him, the accused opened the door and stepped outside. On a question as to what he was doing to the deceased, the accused replied that she was sleeping. Not believing him, Beauty followed him inside but was pushed back by the accused towards the door. She forcefully shoved the accused inside, causing him to fall between two cupboards. This afforded her the opportunity to enter and she then saw the deceased lying on the floor, covered with a blanket and a lot of blood on the floor. She started crying and moved outside. The accused had disappeared in the meantime. When Sikaki arrived and enquired about what was going on, she directed him inside the house and when he came out, he reported that her cousin had died.

[7] During cross-examination Beauty disputed defence counsel's assertions that the deceased was a violent person; neither had she any knowledge about the deceased using cannabis. When put to her that the accused was in shock at the time he opened the door and stepped outside, she countered saying that he was rather in a happy mood as he was smiling.

[8] Sikaki corroborates Beauty's evidence in material respects and confirmed the call he received from her and that he went to the accused's house where he found the deceased as described earlier; she was no longer alive. He then notified the police.

[9] Constable Mundia Mulisa was on duty at Wanaheda police station when the accused arrived on 3 November 2020 at 4h00 to make a report and spontaneously started explaining about an altercation between him and his wife the previous Saturday. He said she had a knife but that he managed to disarm her and in the process she got stabbed once in the chest and once in the back; resulting in her death. Upon being asked where he came from, he replied that he had been hiding in the bushes after committing the offence. I pause to observe that it had not been disputed that the accused was in hiding in the bushes for two days. The accused also reported that he was confused at the time and only came to his senses when he brought himself to the police station. He further said that he was a suspect in the case. The accused was then arrested.

[10] Inspector Jacob Haihambo from the Crime Investigation Sub-Division of the Namibian Police visited the crime scene and found a bloodstained hammer on the bed covered by a duvet. He observed female hair on the claw side of the hammer head and deduced that it had been used during the murder. He attended the autopsy performed on the body of the deceased and noticed that it had 19 body wounds<sup>1</sup> caused by a sharp object and 15 lacerations on the head. He further observed bruises and cut wounds on the left arm. During the investigation the sharp object used to inflict the stab and cut wounds could not be found. The hammer was taken to the Namibian Police Forensic Science Institute (NPFSI) for forensic analysis.

[11] After the accused was charged Inspector Haihambo interrogated him and took his warning statement. During the recording thereof the accused pointed out a single bite mark on his left arm and chest, while both eyes were red which he claimed was consequential to the fight.

[12] Dr Kabanje conducted an autopsy on the body of the deceased and noted his findings in a report styled MEDICO-LEGAL POST MORTEM EXAMINATION dated 2 November 2020. The chief post-mortem findings are:

- The body was covered with blood.
- 15 scalp lacerations.

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<sup>1</sup> In the autopsy report 22 wounds to the upper-body is noted.

- 22 stab wounds on the chest and back.
- Left temporal linear fractures.
- Sub-galial hemorrhages on the occipital area.
- Right frontal-parietal subarachnoid hemorrhages.
- Left intercostal perforations and through the 6<sup>th</sup> right posterior intercostal perforation.
- Haemothorax and haemopericardium.
- Pulmonary artery injury.
- Stab injuries to the left lung.

It was concluded that death was caused by multiple stabbings with a sharp object and multiple blunt impact to the head.

[13] Of the 11 stab wounds to the chest, two (2) on the left side of the chest penetrated the thoracic cavity (T-1; T-2). There were a further 11 stab wounds on the back of which one (1) penetrated into the chest and was potentially fatal (B-3).

[14] Dr Kabanje opined that the 15 head injuries (of which 5 were tears) were inflicted with a blunt object. Also, that the infliction of injuries to the head, as well as the stab wounds, required the application of severe force and that the injuries inflicted were of serious and fatal nature, irrespective of the weapon used. When put to

Dr Kabanje in cross-examination that the length of the knife (used) was between 50 – 60mm, he explained that it would fit in with the depth of the penetrating wounds found on the body.

[15] A forensic analysis of the hammer, conducted by Mr Simwanza Liswaniso, a Chief Forensic Scientist with the NPFISI, revealed that the DNA of the deceased was found on both the handle and head of the hammer.

[16] Other documents handed into evidence by agreement relate to the identity of the deceased, death certificate and other documents which provide information on issues which are not in dispute and therefore of little significance.

#### *The Defence case*

[17] The accused is the only witness for the defence. His narrative of the events on 31 October 2020 which led to the death of the deceased, to whom he was married, amounts to the following: He said he did not go to work that day for lack of taxi money and when the deceased heard about it, she called him to enquire where he was. His phone died on him and when he switched it on later, the deceased called again but this time he left it unanswered. She then texted a message saying that if he did not go to work he would come to see her true colours.

[18] He left home at some stage and upon his return at around 19h00 he found the deceased in the kitchen busy smoking cannabis and drinking beer. He proceeded to the bedroom section of the shack and sat down on the bed when the deceased came and slapped him once on the left cheek. She then struck him with a broomstick on his shoulder and he tried to take it away from her but without success. Next she ran back into the kitchen where she took a knife and approached the accused. He said she then provoked a fight but he was not interested and told her not to bother him. She responded by saying that that was the day one of them would be found at the mortuary or prison. Realising that she was serious, he called out to Beauty to come and see what the deceased was doing. From outside Beauty asked what was going on and, when he said that the deceased was fighting him, the deceased threatened Beauty saying that if she continued asking questions about her and the accused, she would also be beaten. He confirmed Beauty calling his sister and that he spoke to her over the phone, saying that he would not fight the deceased. After handing back the phone, Beauty left and it was calm.

[19] However, a few minutes later the deceased came to the accused with a knife and wanted to stab him. They wrestled for possession of the knife during which the knife fell to the floor. When the deceased went for the knife he pulled her back on her dress whereupon she grabbed him on his private parts and squeezed it. He told her



to let go but she refused. The accused became dizzy and then blacked out. He said he found himself in the bush morning time when he recalled about the fight he had with the deceased. He observed blood on his jacket and had bite marks on his arm and chest. He stayed in the bush for the rest of the day, being Sunday.

[20] He said on Monday morning he became hungry and decided to report to the police as they could possibly establish what had happened at his house; he was then arrested.

[21] The accused has no knowledge of the deceased allegedly screaming that she was being killed; that he opened the door smiling (when called by Beauty); or that he told Beauty that the deceased was sleeping. He however disputes having told Constable Mulisa that he stabbed the deceased with a knife in her chest and back, causing her death. According to the accused he had not been injured prior to the blackout. Despite claiming to have been the victim for having sustained injuries to his person, he was unable to account for not reporting the incident to the police for that reason.

[22] During cross-examination it was pointed out to the accused that, at para 26 of the accused's Reply to the State Pre-Trial Memorandum, he admitted having stabbed the deceased multiple times with a knife. In para 27 he admitted having struck the deceased multiple times with a hammer. In response the accused claimed to have seen the reply for the first time in court and has no knowledge as to who made those admissions. Though confirming his signature appearing on the document, he denies having made those admissions.

[23] It was further pointed out by the court that a conflicting instruction was put across to the state witness during cross-examination by his counsel as to when the accused blacked out. The accused then explained that the blackout was not after he had spoken on the phone to his sister (as per the instruction), but only when the deceased squeezed his genitals some time later. He was however unable to explain why he allowed a factually incorrect instruction to be put to the witness without attempting to correct it.

[24] That summarises the evidence presented to court.

#### Evaluation of evidence

##### *Facts that are common cause*

[25] It is not in dispute that the accused and the deceased were either legally married (as per the accused) or in a romantic relationship at the time of her death. Also, that a physical altercation occurred between them which led to the killing of the deceased. The nature and extent of the injuries inflicted to the body of the deceased, as testified by Dr Kabandje and his medical opinion in that regard, were also not disputed.

[26] Though during oral submissions counsel for the defence asserted that it was common cause that the deceased physically challenged the accused to the extent that she squeezed his genitals, causing him severe pain, which provoked him to the point where he blacked out, the accused's evidence in this regard is challenged by the state.

##### *Deciding the blackout issue*

[27] When asked to plead to the charges preferred against the accused, he opted to remain silent and did not offer any plea explanation. It was only during the trial that the issue of the accused having suffered a blackout during the incident that led to the death of his wife arose. In essence, the accused raised the defence of non-pathological criminal incapacity. The accused contends that he did not suffer from a pathological disturbance of his mental abilities, but due to provocation (anger), that he seemingly was unable to direct his conduct in accordance with his insight into right and wrong. In *CR Snyman Criminal Law (Sixth Ed)* at 159 it is stated thus:

'A typical allegation of X in this type of situation is that he cannot remember anything of what happened at the critical moment; that "everything suddenly just became black around me, and when I came to my senses again, I found that I had shot Y".'

[28] As it was only the accused and the deceased who were present during the physical altercation, the court is ceased with only the accused's direct evidence of what happened at the time. In order to determine whether or not the accused's version is reasonably possible, the court must consider that possibility in light of the totality of evidence adduced, moreover, when presented with two mutually destructive versions as to what transpired immediately after the physical altercation that led to the alleged blackout.

[29] An established principle of our law is that where a court is presented with two mutually destructive versions, the court must have good reason for accepting one version over the other and should not only consider the merits and demerits of the state and defence witnesses, respectively, but also the probabilities (*S v Engelbrecht*;<sup>2</sup> *S v Petrus*<sup>3</sup>). The evidence presented by the state and the defence must neither be considered in isolation as an independent entity when assessing the credibility of the witnesses and the reliability of their evidence. The approach the court must follow is to take into account the state's case and determine whether the defence case does not establish a reasonable hypothesis.<sup>4</sup>

[30] Turning to the accused's claims to have blacked out, the contradicting evidence of Beauty is that the accused communicated with her when at first saying that the deceased was sleeping. He only opened the door when Beauty said she would call Sikati to come and when she tried to move deeper into the shack, the accused forcefully prevented her from doing so. When she managed to force her way inside and discovered the body of the deceased on the floor, the accused fled the scene and went into hiding for two days. Though disputed by the accused, the testimony of Constable Mulisa that the accused admitted stabbing the deceased to death, stands in sharp contrast with the accused's version that he had a blackout and therefore is unable to remember what happened. On the latter evidence, the gist of the report made to Mulisa is that he had stabbed the deceased and that she was no longer alive. The nature and extent of the accused's report to the police is such that it shows that the accused at the time of making the report had a recollection of events that led to the death of his wife. This directly contradicts his evidence that he

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<sup>2</sup> *S v Engelbrecht* 2001 NR 224 (HC).

<sup>3</sup> *S v Petrus* 1995 NR 105 (HC).

<sup>4</sup> *S v Radebe* 1991 (2) SACR 166 (T) at 168D-E.

had suffered a blackout during a physical altercation with the deceased and has no recollection of what happened during that period.

[31] A further contradiction in the accused's evidence is his different versions as to the exact time of him suffering the blackout; something he was unable to explain. This is material for reason that, on the first version he blacked out after speaking on the phone whilst on the second, this only happened later during the physical altercation which led to the death of the deceased. Contrary to his testimony stands the accused's replies in the Reply to the State's Pre-trial Memorandum where he admitted to stabbing the deceased multiple times with a knife or other sharp object, and having struck her multiple times with a hammer on the body/head. The accused's denial of having made these admissions seems incredulous in view of his signature appearing at the end of the reply which serves as an endorsement of what is recorded in the reply.

[32] In addition, undisputed evidence being inconsistent with the accused having blacked out and therefore unable to recall what happened, is that the body of the deceased was covered with a duvet. The only reasonable inference to draw from this is that the body was covered to hide it from Beauty who was standing outside, insisting that the accused must open the door. It probably prompted him to come up with the excuse that she was asleep. The accused's behavior in these circumstances tends to show that he, at that stage, was conscious of his wrongdoing. This conclusion is fortified by his subsequent fleeing and going into hiding for two days.

[33] In view of the belated defence raised about the accused having suffered a blackout and submissions of him having acted with diminished criminal capacity, it seems apposite to repeat what this court occasioned to say in *S v Bryan Rickerts*<sup>5</sup> at para 22:

'The burden is on the State to prove beyond reasonable doubt that the accused in this instance had the required criminal capacity when he committed the murder i.e. that he acted voluntarily. In order to prove that the act was voluntary, the State is entitled to rely on the presumption "that every man has sufficient mental capacity to be responsible for his crimes: and that if the defence wish to displace that presumption they must give some

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<sup>5</sup> *S v Bryan Rickerts* (CC 08/2015) [2016] NAHCMD 30 (25 February 2016).

evidence from which the contrary may reasonably be inferred.”<sup>6</sup> The presumption of mental capacity is only provisional as the legal burden remains on the State to prove the elements of the crime, but until it is displaced, it enables the prosecution to discharge the ultimate burden of proving that the act was voluntary. Lord Denning further reasoned that:

“In order to displace the presumption of mental capacity, the defence must give sufficient evidence from which it may reasonably be inferred that the act was involuntary. The evidence of the man himself will rarely be sufficient unless it is supported by medical evidence which points to the cause of the mental incapacity. It is not sufficient for a man to say ‘I had a blackout.’” (Emphasis provided)

[34] The defence tendered no medical evidence supporting the accused’s assertion of having been incapacitated or having acted with diminished criminal capacity when allegedly killing the deceased. Counsel’s view on this score was that the court must make a value judgment of the provocation at the time. The defence therefore solely relies on the accused’s own evidence as proof of his assertion. To this end, his evidence is unsubstantiated and, at face value, must be considered together with the rest of the evidence.

[35] Counsel for the defence further argued that due to the provocative conduct of the deceased, the accused acted with ‘diminished criminal capacity’. I have difficulties in following defence counsel’s reasoning on this point as it appears to me to advance divergent views as regards the legal concepts of provocation and diminished criminal incapacity.

[36] Section 78(7) of the Criminal Procedure Act 51 of 1977 provides that:

‘If the court finds that the accused at the time of the commission of the act in question was criminally responsible for the act but that his capacity to appreciate the wrongfulness of the act or to act in accordance with an appreciation of the wrongfulness of the act was diminished by reason of mental illness or mental defect, the court may take the fact of such diminished responsibility into account when sentencing the accused’. (Emphasis provided)

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<sup>6</sup> An excerpt from the speech of Lord Denning referred to in *Bratty v Attorney-General for Northern Ireland* (1961) 3 All ER 523 at 534.

[37] From the above it is evident that 'diminished criminal capacity' on the part of the accused finds no application to the presents facts and requires no further consideration.

[38] The concession by counsel that provocation is not a complete defence is consistent with present law and as such applied by our courts.

*'According to this approach, provocation affords X no defence on a charge of murder, although it may furnish X a ground on which he may rely for the mitigation of punishment.'*<sup>7</sup>

[39] As for counsel's submission that the court should follow the 'middle course approach to provocation' it will suffice to state that, since the Appellate Division's judgment in *S v Mokonto*<sup>8</sup> this approach is no longer followed. *Snyman* (supra) states that an important point of criticism of the middle course approach was that the presence of objective criteria rendered it incompatible with the by then firmly recognised subjective test to determine the intention to murder.

[40] Whereas it being settled law since 1971 that provocation is no longer a defence, it seems inevitable to come to the conclusion that the accused is left without any defence. Though the evidence of Beauty tends to support the aggressive behaviour of the deceased shortly before the incident that led to her demise, the accused's version that her anger was directed at him and escalated to a physical confrontation, has merit. However, the evidence regarding the accused's behaviour immediately before and after the killing of the deceased is inconsistent with the accused's version that he had suffered a blackout and has no recollection of what happened up until he recollected his wits some two days later. These facts not only show that the accused acted consciously, but also that he appreciated the wrongfulness of his actions. The alleged suffering of a blackout is, on the strength of the evidence before court, clearly a fabrication and an afterthought aimed at creating a possible defence. It is accordingly rejected as false beyond reasonable doubt.

[41] With regards to the charge of murder, it is not disputed that the accused caused the death of the deceased. This came as the result of a vicious attack on the

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<sup>7</sup> *Snyman* Criminal Law at 233.

<sup>8</sup> *S v Mokonto* 1971 (2) SA 319 (A).

deceased by inflicting 15 blows with a hammer to the head and 22 stab wounds to the upper-body of the deceased. The gravity of the assault is borne out by the number of individual injuries inflicted to sensitive parts of the human body which resulted in death shortly thereafter. The gravity of the injuries, in my view, are such that the only reasonable inference to draw from these is that the accused intended killing the deceased, thus acting with direct intent. I accordingly so find.

[42] Count 2 concerns the knife or sharp object which was used during the murder and which was not found at the scene of the crime. It is alleged that the accused removed it and in the process obstructed the course of justice as the knife or object could not be found during the police investigation.

[43] It was not placed in dispute that a knife was used to stab the deceased and as the weapon was not to be found at the scene of the crime, the only reasonable conclusion to reach is that the accused removed it. He did not advance any defence or explanation as to what he had done with the knife and it can only be conceived that he had thrown it away. The only reason to have done so would have been to prevent it becoming part of the investigation. To this end, the offence was complete and the accused's discarding thereof amounts to defeating or obstructing the course of justice.

### Conclusion

[44] In the result, the court finds as follows:

Count 1: Murder, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 – Guilty.

Count 2: Defeating or obstructing the course of justice – Guilty.

Judge



APPEARANCES:

STATE: E MOYO  
Of the Office of the Prosecutor-General, Windhoek.

ACCUSED: T K KAURIVI  
Of T K Kaurivi Legal Practitioners (Instructed by Legal Aid),  
Windhoek.