

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION,  
HELD AT OSHAKATI

JUDGMENT

Case no: CC 12/2016

In the matter between:

**THE STATE**

v

**DANIEL NDARA KAMPANZA**

**ACCUSED**

**Neutral citation:** *S v Kampanza* (CC 12/2016) [2018] NAHCNLD 107 (12 October 2018)

**Coram:** TOMMASI J

**Heard:** 01 – 08, 10 & 12 October 2018

**Delivered:** 12 October 2018

**Flynote:** Criminal law – mistake which rules out intention – a question of fact – the facts in this matter do not support a conclusion that the accused indeed mistook the deceased for a snake . Criminal Procedure – plea of not guilty recorded in terms of section 113 – the State to prove the allegation which the accused disputes beyond reasonable doubt.

**Summary:** The accused pleaded guilty and was convicted on his plea of guilty. However during mitigation it appeared to the court that the accused was not admitting all the elements of the offence and it recorded a plea of not guilty. The State handed into evidence inter alia the post mortem report, the report by the Psychiatrist and called an eye witness. The accused did not testify and neither did he call witnesses. The difference in his statement in terms of section 112(2) and his testimony in court remained unexplained and the court concluded that the admissions were made by the accused person. The accused was convicted of murder with direct intent by hacking his girlfriend 15 times with a panga.

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### ORDER

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The accused is convicted of murder with direct intent.

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### JUDGMENT

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TOMMASI J:

[1] The accused herein was charged with murder read with the provisions of the Combating of Domestic Violence Act, 2003 (Act 4 of 2003) in that he unlawfully and intentionally killed Bertha Offen, a person with whom he had been in a domestic relationship

[2] The State was represented by Ms Nghyioonanye and the accused was represented by Mr Shipila on the instructions of the Directorate of Legal Aid. The accused pleaded guilty and a statement in terms of section 112(2) was handed into court. The State also handed into evidence documents and same was not placed in dispute by the counsel for the defense. The court was satisfied that the accused is guilty of the offence to which he has pleaded guilty and convicted him on the strength of his statement.

[3] The documents handed into evidence included the post-mortem report and it revealed the following facts: the deceased suffered 15 chop wounds i.e. 4 to the head, 4 in the neck, 2 in the chest and 5 on the upper limbs. The four chop wounds to the head penetrated the scalp, skull and brain. The 4 chop wounds in the back of the neck penetrated the skin muscles, vascular bundles, spine and spinal cord. The one cut on the chest cut through the skin and left scapula and the other cut is situated at the axillary region which did not penetrate the cavity.

[4] A further document handed into evidence without any objection was the report of the Psychiatrist in terms of section 79 of Act 51 of 1977 on the accountability and triability of the accused. The unanimous conclusion reached was that the accused was fit to stand trial and at the time of the commission of the alleged offence he was not mentally ill and as a result was able to appreciate the wrongfulness of the alleged offence and to act in accordance with such appreciation.

[5] The State called the father of the deceased to testify in aggravation and the accused was called to testify in mitigation. The accused declined to take the oath and was affirmed. During his testimony he then reneged on his unequivocal plea of guilty and testified that at the time he heard a whistle and the deceased informed him that it was her blood calling him. He told her they must go and investigate where the whistle was coming from. They both came out and when she bent down to put on her shoes, he just saw the head of a snake and he chopped the head of the snake. He then followed the snake and cut the snake again with the panga. He only realized it was the deceased when she fell down. The court was not satisfied that the accused admitted all the elements of murder and entered a plea of not guilty in terms of the provisions of section 113 of the Criminal Procedure Act, 51 of 1977.

[6] Mr Shipila at this point withdrew as legal practitioner and the accused, after having been given the option to apply for another legal practitioner deemed it pointless to apply for legal aid and opted to conduct his own defense.

[7] The State called an eyewitness to testify, to wit, Cornelia Offen, who is the deceased's sister. She testified that the accused and the deceased were in their hut whilst her sister prepared a meal. The accused did not want to eat but the deceased joined them at the fire and ate with them. She then returned to the hut.

[8] After a while, the accused, followed by the deceased, came out of the hut. The deceased had a panga and a cellphone which he used as a torch. The deceased came to the fire to put on shoes. Just as she was bending down to put on her shoes, the accused came around the fire and cut her with the panga. The deceased ran away and the accused followed her. She saw the accused swinging the cellphone light from side to side and demonstrated how he raised his other arm and brought it down to the ground. She heard what sounded like a person cutting into meat. The deceased returned to the area where they were and fell to her knees declaring "I am going to die now" or words to that effect. The accused followed shortly thereafter and hacked her 3 times with the panga on her neck. The deceased fell down and the accused picked up the baby and took the baby with him into his hut.

[9] During cross-examination the accused complained that this witness was not the right witness to testify and that the court should call Sarah, the witness' sister. The court explained that he would have the opportunity to call her as a witness if the State does not do so. He in essence wanted her to tell the court where they were going to when they came out of the hut. He did not dispute the sequence of the events. He wanted her to tell the court where she was when he picked up the baby. She admitted that she and her sister ran away when he was cutting the deceased for the last time and that they left the baby behind.

[10] The accused did not testify in his defense and neither did he want to call any witnesses.

[11] Ms Nghiyoonanye submitted that the admissions made in terms of section 112(2) stand and the evidence adduced by the State proves the State's case beyond reasonable doubt. She pointed out that the report of the psychiatrist was not disputed. The report indicated that the accused denied having used alcohol or illicit drugs on the day of the incident; and he was found not to have been mentally ill at the time of the event. She furthermore argued that the intention to murder is apparent from the multiple stab wounds inflicted on the deceased. She urged the court to convict the accused of murder with direct intent.

[12] The accused submitted that he never had the intention to murder the deceased. He blames the panga which he picked up. When the court asked him

about his statement in terms of section 112 (2) he indicated that the court ought to examine that statement. He asked the court to resolve the problem.

[13] The accused in fact relies on a mistake which, if proven, would exclude intention. C R Snyman *Criminal Law* 5 ed at 191 and at 192 states as follow:

‘The knowledge component of intention must relate to the act, all the circumstances or consequences mentioned in the definitional elements of the crime, as well as the unlawfulness of the act.’ At 192 whether there really was a mistake is a question of fact.’

This court therefore has to determine, subjectively, what the true state of mind of the accused was at the time he committed the act.

[14] Section 113 of the Criminal Procedure Act provides as follow:

‘If the court at any stage of the proceedings under section 112 and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he has pleaded guilty or is satisfied that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defense to the charge, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution: Provided that any allegation, other than an allegation referred to above, admitted by the accused up to the stage at which the court records a plea of not guilty, shall stand as proof in any court of such allegation.’ [my emphasis]

[15] The allegation which the accused disputed is the intention to murder and the State was thus called upon to prove beyond reasonable doubt that he intended to murder the deceased. The court must consider all the evidence adduced inclusive of the documentary evidence handed into evidence and the plea of the accused in terms of s 112(2).

[16] There is no evidence that the accused was hallucinating be it as a result of the use of drugs or alcohol or being in a dream state. He further testified that he heard a voice speaking to him. This he clearly did not mention during his observation or if he did, it did not persuade the psychiatrist that he was mentally unstable as the report clearly states that he was able to appreciate the wrongfulness of the alleged offence and he was capable of acting in accordance with such appreciation. There is no evidence to support his version that he was hallucinating or hearing a voice.

There is thus no evidential support for his suggestion that he saw an imaginary snake.

[17] From the questions he posed to the State witness it is clear that he recalled having had a mission when he came out of the hut, that he noted the deceased bend down to put on her shoes and that the witness and the others who were sitting around the fire were not there when he returned to the homestead and administered the final blows. These are indicators that the accused's recollection of actual events is accurate. The witness furthermore clearly stated that there was no snake that night in the vicinity. In the absence of a real or imaginary snake there could have been no mistake as to the subject he was cutting with the panga. The evidence supports an inference that he knew he was cutting the deceased.

[18] The more probable explanation for his actions that evening is contained in his statement which he gave in terms of section 112 (2). In this statement he admitted that: he had an argument with the deceased; he was angry about an earlier incident; he lost his temper; he grabbed a panga which he used to hack the deceased. He further stated that the argument was triggered when she criticized him for cutting another person by the name of Dingo and requested him to go see how much blood he caused him to lose.

[19] The accused confirmed this statement as being correct and at no stage did he indicate to the court that those were not his instructions to his legal representative. In *S v Martins* 1986 (4) SA 934 (T) the Court held that there was no legal basis for the distinction between admissions made by an accused personally and admissions made by his legal representative in terms of s 112(2). The failure to explain the difference between his plea explanation and the testimony in court leads this court to infer that the accused personally made those admissions. These inculpatory admissions ring true.

[20] I conclude that accused's version that he mistakenly believed that the deceased was a snake and that he lacked the intention to kill the deceased is nothing other than an afterthought, a straw he clutched in the hope that he would be believed.

[21] I am satisfied that the State proved beyond reasonable doubt that the accused unlawfully murdered Bertha Offen with direct intent.

[22] In the result, the following order is made:

- (a) The accused is convicted of murder with direct intent.

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M A TOMMASI

Judge

## APPEARANCES:

For the State:

Ms M Nghiyoonanye

Of Office of the Prosecutor-General, Oshakati

For the Accused:

Mr D N Kampanza

In Person

Oluno Correctional Facility, Ondangwa