

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

JUDGMENT

Case No: CC 10/2015

In the matter between:

THE STATE

v

RICHARD JESAYA WITBOOI

ACCUSED

Neutral citation: *S v Witbooi* (CC 10/2015) [2018] NAHCNLD 138 (6 December 2018)

Coram: SALIONGA J

Heard: 13 – 16, 26, 27, 28, 30 November 2018

Delivered: 6 December 2018

Flynote: Criminal law: Murder – Mens rea dolus directus – Intention to kill inferred from the extent and magnitude of the fatal wounds inflicted and parts of body occasioned. The accused allegedly stabbed the deceased with a knife 14 times – Victim declared dead on arrival at hospital.

Criminal procedure: Evidence – No obligation on accused to testify – Accused failing to testify – Court can take failure into account against accused in certain circumstances – Where direct evidence against accused is present – Failure to testify will be a great risk.

Evidence: Accused arguing that contradictions, discrepancies in the witness statements and failure to mention something in the statement to the police or in court – An indication that witness is a liar, unreliable or untrustworthy and does not make sense.

Summary: The accused stands trial on a charge of murder. He is accused of stabbing the deceased, whom he had an intimate romantic relationship as boyfriend and girlfriend. The charge is more elaborated in the summary of substantial facts as follows; during the early hours of 27 January 2013, the accused and deceased were together in the room they rented in Grootfontein. It is alleged that the accused atrociously and viciously stabbed the deceased fourteen 14 times on the chest, neck, back, right arm, hand, right leg and on the face. After stabbing the deceased, the accused took their small baby and left the scene.

Held: The fact that accused stabbed the unarmed lover with a knife on the most sensitive parts of the body several times demonstrates his intention to kill the deceased which he in fact did, resulting in her being declared dead upon arrival at the hospital.

Held further that the fact that the witness omitted to mention something does not mean that it did not happen. The contradictions and discrepancies in witness's evidence does not mean that the witness is liar, unreliable and dishonest.

Held further that the State proved its case beyond reasonable doubt and found accused guilty as charged.

ORDER

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

JUDGMENT

SALIONGA, J

[1] The accused is arraigned on the charge of murder read with the provisions of Act 4 of 2003. It is alleged that during the morning of 27 January 2013 and at or near Grootfontein in the district of Grootfontein, the accused did unlawfully and intentionally kill Rosalin Laurika Aukhumes, a female person.

[2] Accused pleaded not guilty to the charge and elected to remain silent and offered no explanation of his plea. He also did not disclose the basis of his defence. However in his reply to the State pre-trial memorandum the accused admitted that he and the deceased were in a domestic relationship since the deceased was his girlfriend and they have two children together.

[3] The following documents were handed in as exhibits by agreement between the prosecution and defence:

- (a) Summary of substantial facts in terms of section 144(3)(a) of the Criminal Procedure Act: Exhibit "A"
- (b) The State 's pre-trial memorandum in terms of the High Court practice directives issued in terms of Rule 3 of the Rules of the High Court of Namibia: Exhibit "B"
- (c) The accused's reply thereto: Exhibit "C"
- (d) Pre-trial review conference: Exhibit "D"
- (e) The Post mortem Report: Exhibit "E"
- (f) Affidavit in terms of section 212(4) of Act 51 of 1977: Exhibit "F"
- (g) Identification of body: Exhibit "G"
- (h) Scene of crime: Exhibit "H"
- (j) Proceedings in Grootfontein Magistrates' Court, Case GTF- CRM 120/2013 including the proceedings in terms of section 119 of the Act: Exhibit "J"
- (k) Dead on arrival form: Exhibit "K"

(l) Application for scientific examination: Exhibit “L”

(m) National Forensic science Institute Report no 775/2013/G-R1: Exhibit “M”

[4] The State called several witnesses to testify. Anna Muyenga who is one of the key witness, testified that she was at home around 22h00 when the deceased went to the kitchen in order to prepare milk for a child. The witness joined her and after the deceased was done, the two went to their respective rooms which were adjacent to each other.

[5] While Muyenga was sleeping, she was woken up by a person entering her room. She then asked who he was and what he wanted. It was accused person who entered her room. Accused apologised to her and proceeded to the room he shared with the deceased. She further testified that when the accused left her room for his, she heard him insulting the deceased but did not hear deceased responding to the insults.

[6] Muyenga further told the court that it was not too long after the insults that she heard footsteps of people running from the accused and deceased’s room. However in cross-examination she confirmed not to have seen these persons but concluded it was them.

[7] The witness remained in her room for a while before going outside. When she went outside she found the deceased lying dead at the door of other tenants. In responding to the court’s question as to how she could see the deceased if it was still dark early hours of the morning, the witness said she could see the deceased and she knew her as they were both renting at Mr Damaseb’s house.

[8] Matheus Damaseb and the accused were both renting separate rooms at the same residence during January 2013. On the night of the incident, he was awakened by a voice of a person calling “uncle, uncle come and help”. He could not figure out whether the voice was coming from inside or outside the room. When he opened the shack he could see two people holding each other as if they were embracing. On a closer look the witness testified that he recognised the people as accused and the deceased. He was sure of their identity because he resided with accused and the deceased in the same yard. He could see the accused hitting the deceased on the

back. According to this witness deceased did not retaliate. He struggled to separate them by pushing the accused away from the deceased. After separating them, the deceased went to sit near the fire place next to the drum.

[9] Damaseb told them to stop fighting as anything can happen and during that process the deceased told him she was stabbed by the accused. With the help of the lights at the side where he and the deceased moved, the witness could see blood on deceased's body, got frightened and ran for help. He then went to the deceased's parents' home who rushed to the scene. Damaseb further testified that when he saw accused assaulting the deceased he did not realise accused had a knife, only after separating them and after the deceased had told him that she was stabbed, that he saw the knife in accused's hand.

[10] The most significant challenge with this witness's evidence was the difference of what he said in his statement to the police as he did not mention a knife but, he came to state it in court. Accused did not deny that he had a knife in his hand but he just pointed out the discrepancies on a witness statement he gave at the police station and the one he gave in court. On the discrepancies relied upon Judge Liebenberg in *S v Unengu*¹ at paragraph 76 had the following to say deviation can be allowed only if it is a major or material that it can be disallowed (my emphasis). The Court can conclude that the witness saw the knife.

[11] Indiana Tsouses testified that she together with her boyfriend were renting a room at the same house in 2013. That on 27th January 2013, early morning hours, she was sleeping in her room with her boyfriend. She heard noise of a lady screaming outside. Her boyfriend Cloete woke up and opened the window. She also woke up and peeped through the window. She could see the accused and the deceased outside the room and no one else was there. She saw the deceased lying on the ground near the fire place and accused was on top of the deceased moving his hand up and down to the body of the deceased as if he was beating the deceased. The witness demonstrated to the court that accused was moving his hand up and down in a motion similar to stabbing.

¹ (CC 14/2013) [2015] NAHCMD 33 (24 February 2015).

[12] Indiana heard her boyfriend shouting “hey you are hurting the lady – let her go” and was addressing those words to the accused. When the door of their room was opened the witness heard the deceased saying “he stabbed me, take me to the hospital” and she fell down at the door of the room. She could see the deceased was injured because when she entered the room, blood splashed all over the door, the microwave and on the cupboards as depicted on point D and F in photograph 6, 7, 8, 9, and 10.

[13] Timotheus Xoaseb is the father of the deceased. He testified that he has been a police officer for 29 years and in 2013 he was stationed at Grootfontein CID. He knows the accused as he was in love with his daughter now the deceased. On 27th January 2013 he was on standby and at around 5 o'clock in the morning someone knocked at door of his house. When he opened he saw Damaseb, witness No. 2 who informed him that the accused whom he referred to as Ivan was busy stabbing Rosalin (deceased) at home with a knife. He jumped into his vehicle and drove to the scene.

[14] On his way he observed the accused carrying a baby and was walking towards their house. At that moment the witness observed blood on the accused's clothes, took him back to the scene in his vehicle. On his arrival he jumped out of the vehicle, rushed to the deceased who was laying at the door. He observed blood on her upper body which was not covered. With the assistance of people, he took the deceased's body in the bakkie to the local hospital where she was declared dead upon arrival. He came back to the scene, went in accused's room where he found a bloody knife as depicted in Exhibit “H” point A3 which he handed to the police for further investigation.

[15] Xoaseb identified the bloody clothes accused was wearing as per Exhibits “2a & b and 3”, these were confirmed at the lab that the blood on the clothes was indeed the human blood as per Exhibit “M”.

[16] At the close of the State's case accused's rights were properly explained and he elected not to testify, or call witnesses and then closed his case. In that regard the state case remained unanswered and the court is left with the evidence for the prosecution for consideration.

[17] The trite principle of our law is whether it can be said that the State has proved murder beyond reasonable doubt. There is no direct evidence implicating the accused in as far as the stabbing of the deceased is concerned. However there is circumstantial evidence which must not be considered in isolation, but, cumulatively. Advocate Nghiyoonanye correctly submitted that the only reasonable inference the court must come to is that the accused stabbed the deceased as alleged. The inference Court is aware if it is to be drawn must be consistent with all proven facts and should exclude any reasonable inference.

[18] In its lengthy submission, the State took cognisance of the fact that accused had a right to remain silent and is presumed innocent until proven guilty. The state referred the Court to *S v Haikela & others*² on the effect of silence. I associate myself with the said reasoning.

[19] The accused in his strong submission contended that the State had failed to prove beyond reasonable doubt that he inflicted the fatal wounds upon the deceased. None of the witnesses confirmed that it was him who inflicted the fatal stab wounds on the deceased. He went on arguing that the fact that the witnesses saw him does not necessarily mean he is the one who inflicted the wounds on the deceased. In his respective opinion the court should reject the State witnesses' versions as unreliable and incredible as there were discrepancies in their versions. He singled out the version of first and second witnesses with regards to those aspects.

[20] Accused further submitted that the evidence of four state witnesses should be rejected as false as the State falls short of proving his guilty beyond reasonable.

[21] As alluded earlier accused did not testify and in cross examination he did not even put to the witnesses what his case is all about. Most of his questions were directed at contradictions on what the witnesses had said in their statements to the police and what they stated in court.

[22] I am alive to the accused's Constitutional right to silence. Evidence led by the State placed him on the spot and ought to indicate either in his plea explanation or at least during cross examination what his defence is. In our law, the failure of the accused

² 1992 NR 54 (HC).

to testify in certain circumstances may be taken into account against him and may strengthen the State's case irrespective of the reason for the accused's silence. (See *S v Nkombani & another* 1963 (4) SA 877 (A) at 893 G.

[23] In *S v Chabalala*³ the court quoted with approval what was pointed out in *S v Mthetwa* that 'where – there is direct prima facie evidence, implicating the accused in the commission of the offence, his failure to give evidence whatever his reason may be for such failure, in general ipso facto tends to strengthen the State case because there is nothing to gainsay it and therefore less reason for doubting its credibility or reliability. The remedy lies in the hands of the accused person and if he chooses not to avail himself thereof he has only himself to blame if an adverse verdict is given'.

[24] It is not in dispute that the deceased and accused were in a domestic relationship in which two children were born; that Rosalin the deceased was stabbed several times on the neck, chest, back, arm, hand, leg and on the face and the cause of death was multiple injuries, i.e. hypovolemic shock. It is further not contested that the killing was brutal, cruel, barbaric and cowardly without any justification recognised by law. The Court found that the State proved that the crime of murder has been committed.

[25] What remains to be decided is whether the State has proved that it was in deed the accused who stabbed the deceased with intent to murder. There is direct evidence that accused was with the deceased in their room, was seen outside their room holding each other and accused was beating the deceased on the back, accused was seen holding their baby with bloody clothes the early hours on the date of the incident.

[26] The evidence of State witnesses is clear on the visibility; in that the street lights enabled them to identify the accused, the proximity of the witnesses, their opportunity for observation and the fact that all witnesses had prior knowledge of the accused ruled out the possibility of mistaken identity.

[27] Although sight should not be lost that some of State witnesses' might have deviated from their statements, these deviations as pointed out earlier do not warrant the evidence to be rejected in its totality. The court should weigh up the previous

³ 2003 (1) SACR 134(SCA)par 15.

statements against viva voce evidence and assess evidence as a whole to determine whether it is reliable or not.

[28] Even though there were discrepancies between some witness's statements made to the police and the ones given in court, such discrepancies are not material to disregard the crucial evidence. The law in this regard provides that deviation from a statement made to the police impacts on the credibility of a witness only where there are material differences which this court could not find to be the case.

[29] I found that the deviations pointed out by the accused such as Damaseb's failure to mention to the police that he saw the knife in accused's hand, that the deceased's mother was at the scene and felt the deceased's pulse do not per se make him unreliable or a liar as argued. On the source of human blood the failure of police to submit the required sample cannot blow the State case as Exhibit "1" is proof enough to the contrary that the blood found and analysed was that of the deceased given the fact that the blood was found the same day on the knife from accused's room and on the clothes he wore that day. Failure by the State to send the samples required to complete the forensic test in arriving at the source of the blood found cannot defect or imperfect the State's case.

[30] Having had the privilege of observing the witnesses when they were testifying, the court found the all witnesses were truthful and credible. Their versions are more probable in the circumstances and accused's silence has operated against him. State has proved beyond reasonable doubt that accused stabbed the deceased 14 times, that caused her death.

[31] In view of the overwhelming credible and uncontested evidence placed before this court which has not been shaken during cross examination, I am satisfied that the prosecution has proved the charge of murder with direct intent preferred against the accused beyond reasonable.

[32] In the result;

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

J T SALIONGA

JUDGE

APPEARANCES:

For the State:

Ms Nghiyoonanye
Of Office of the Prosecutor General,
Oshakati

For the Accused:

Mr Witbooi (In Person)
Oluno Correctional Facility