

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION,
HELD AT OSHAKATI**

JUDGMENT

Case No: CC 02/2015

In the matter between:

THE STATE

v

ANANIAS EKONGO NAILENGE

ACCUSED

Neutral citation: *S v Nailenge* (CC 02/2015) [2020] NAHCNLD 36 (04 March 2020)

Coram: TOMMASI J

Heard: 30/04/2015; 27/05/2015; 24/06/2015; 29/07/2015; 24/09/2015;
28/10/2015; 25/11/2015; 27/11/2016; 24/10/2016; 16/11/2016;
26/01/2017; 23/02/2017;
23/03/2017;20/04/2017;18/05/2017;22/06/2017;24/08/2017;16-
18/04/2018;16/05/2018;4/09/2018;13/09/2018;19-27/11/2018; 29/01/2019;
04/03/2019;09/04/2019;12/04/2019;09/07/2019;09/10/2019;11/10/2019;25/
11/2019; 21/02/2020; 27/02/2020; 03/03/2020; 04/03/2020.

Delivered: 04 March 2020

Flynote: Criminal law – murder - alibi – no duty on the accused to prove alibi – part of alibi not confirmed – testimony in this regard found not credible. Evidence – identification/recognition of voice – witness recognized voice of accused as it is well known to him – manner in which the witness was addressed given the relationship between the parties - Criminal Procedure – ramifications of failing to cross-examine witness relating bias adverse to the accused - Criminal law – robbery with aggravating circumstances – force or injuries not inflicted with the intent to steal but to dispose of item – not guilty of robbery with aggravating circumstances

Summary: The accused faced charges of murder and robbery. The body of his girlfriend was found in his flat with a stab wound in her abdomen and her throat slit. His uncle testified that the accused called him to tell him that he had killed his girlfriend. The accused's flat mate also received a similar call. His uncle notified the police and they all met at the scene.

The accused was arrested in Epoko Village and later taken to the Oshakati Police station. The accused made a confession to the divisional magistrate and pleaded guilty in the district court during s 119 proceedings. These documents were handed into evidence after the court ruled it to be admissible. The evidence is that the deceased was last seen at 13h00. The accused raised an alibi defence during cross-examination of the last State witness indicating that he was in Outapi from 13h00 – 16h00. The court relied on the credible evidence of the accused's uncle which places him at the scene.

This was proven correct when they in fact found the deceased's body with the fatal injuries inflicted with a knife. The court found that the state proved beyond reasonable doubt that a murder was committed, that the person who inflicted the fatal incise injuries was the accused; and that he did so with direct intent. The court found that the evidence

failed to prove robbery of her cellphone as the clear intention was to dispose of this item and not to appropriate it.

ORDER

1. Count 1 - Murder read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003 –Guilty;
2. Robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 51 of 1977 – Not guilty

JUDGMENT

TOMMASI J:

[1] The accused is indicted on a charge of murder, read with the provisions of the Combating of Domestic Violence Act¹ and robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act.² He pleaded not guilty. No plea explanation in terms of section 115 of the Act was given. The State thus had to prove all the elements of the offence.

[2] The proven facts of this case is that on 04 February 2014 the body of a young woman, the girlfriend of the accused, was found in the accused's flat with a stab wound to her abdomen and her neck slit with her head connected to her body only by a piece of skin. Police officers from Oshakati police station were directed by the accused uncle, Mr Huluwa, who also happens to be a police officer, to go to the accused's flat between 16h00 and 17h00. A certain Nangula, a person who rented a flat on the same premises

¹ Act 4 of 2003

² Act 51 of 1977

as the accused and Mr Huluwa joined the police officers at the scene. The door of the accused flat was locked and it was forced open by the police officers. The photographs of the scene of crime which was handed into evidence by agreement depicts the conditions under which the body was discovered. The pictures were taken shortly after 18h00. The accused was not present at the time the body of the deceased was found.

[3] The accused was apprehended at Epoko village at around 18h00 and taken to Okalongo Police station. His rights were explained and he signed a certificate of an arrested person. He was then transported to Oshakati police station that same evening. He appeared before the Divisional Magistrate on 05 February 2014 and gave a confession. He was taken to a doctor on 06 February as a result of a complaint that his throat was painful. The injuries were the result of a failed attempt at suicide. He was taken to court on 07 February 2014 for his first appearance in the district court and he was asked to plead in terms of section 119 of the Criminal procedure Act.

[4] No agreed reply to the State's pre-trial memorandum was handed into evidence but it was evident that the accused disputed the admissibility of the confession and the section 119 proceedings in the district court. The admissibility was determined in a trial with a trial. The court on 29 January 2019 ruled that the confession and the record of the section 119 pleading in the district court be admitted into evidence in the main trial. The court undertook to give reasons for its ruling and same will be released simultaneously with this judgment. For purposes of this judgment the court will deal with these 2 documents as part of the body of evidence adduced by the State.

[5] Mr Huluwa, testified that he received a call from the accused from an unknown number between 16h00 and 17h00. He testified that he recognized the voice of the accused and the accused addressed him as "uncle". It was further his testimony that the accused lived with him and he was familiar with the accused's voice even though he did not recognize the telephone number the accused was calling from. He testified that the accused informed him that he did something serious. He asked him what he did and the accused told him that he killed his girlfriend by stabbing her with a knife and that he left her in the flat where he was staying. He asked the accused where he was but the accused did not want to tell him where he was. It was his testimony that the accused

then indicated to him that he will just go and kill himself. It was on the strength of this information that he called the Oshakati Police and directed them to go the flat of the accused. This amounts to an admission by the accused that he was the person who inflicted a stab wound to the deceased.

[6] The accused denied ever making this call to his uncle. The accused explained that his uncle was physically abusive toward his wife. His uncle accused him of having an affair with his wife and when he defended his uncle's wife against the abuse, the uncle then evicted him from his house. The accused further testified that his uncle also accused him of killing his cousin. This was however not put to this witness.

[7] The court noted three issues with this admission. The uncle is a single witness and therefore cautionary rules apply to his testimony. As a result, the court ought to weigh the accused evidence that his uncle has a bias adverse to him. It is further important to consider the import of the accused's failure to put his version to his uncle when he testified. A further fact which warrants a cautionary approach, is the identification of the accused voice in light of the alibi the accused raised that he was elsewhere at the time.

[8] In *S v HN 2010 (2) NR 429 (HC)*, at p454, para 98, Liebenberg J states as follow:

'It is, in the words of Claassen J, stated in *Small v Smith 1954 (3) SA 434 (SWA)* at 438:

' . . . elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and if need be to inform him, if he has not been given notice thereof, that other witnesses will contradict him, . . . It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved.'

In *S v Boesak 2000 (1) SACR 633 (SCA)* at 647c – d Smalberger JA held the same view and said:

' . . . it is clear law that a cross-examiner should put his defence on each and every aspect which he wishes to place in issue, explicitly and unambiguously, to

the witness implicating his client. A criminal trial is not a game of catch-as-catch-can, nor should it be turned into a forensic ambush.'

[9] It was not disputed that the uncle received a call but his defense was that he is not the one who called. The importance of the strained relationship is substantially lessened by the fact that this fact was not disputed i.e. that the uncle received a call. In any event, the failure to confront his uncle with the soured relationship has serious ramifications for the accused. It appears from this failure that this is a mere afterthought.

[10] Both counsel referred this court to the case of *S v Kenneth Siyambango*, Case No. SA 5/2002, SA delivered on 13 February 2003 and *Siambango vs. The State* Case No. CA 98/99 (unreported) delivered on 23 January 2002 where the guidelines for assessing the reliability of the voice recognition/identification were given. Suffice it to say that Chomba A.J.A found the voice identification evidence credible having considered that the witness was familiar with the voice of the caller and the nature of the conversation. The accused admitted that he had lived with his uncle for a period of time. It was his uncle's testimony that: "He is my child, I am the one who raised him. I know his voice. He grow (sic) up in my place". The form of address is another factor which identified the accused given the relationship between the parties. I have no reason to disbelieve the testimony of his uncle when he said that he knew the accused well and that he positively identified the accused's voice.

[11] His uncle further testified that the accused called him to the police station. During his visit the accused fully confessed to the murder. The accused denied that he called his uncle and he denied that he confessed and gave the details to his uncle.

[12] The evidence of his flat mate Nangula is that she was also called by the accused and informed that he had killed his girlfriend and had left her in the flat. She testified that she thought that the accused was joking and she ended the call. She further testified that he called her again from a number she did not recognize and informed her once again that he had killed his girlfriend. It was her testimony that she was still at work and she obtained permission from her employer. She went to the flat and found police

officers at the scene. According to her the accused called her again from the unknown number and she informed him that the door was locked. The telephone call log of this witness's phone, which was handed into evidence, reflect one call from the accused's known number and three calls from the number which the witness allege was the unknown number the accused used to call her. The witness was unable to account for the fourth call/third call from the unknown number. The accused admitted to calling this witness once and testified that it was to tell her where he had placed the gate key. He denied calling her from an unknown number. He was unable to state why she would falsely implicate him. This witness was unable to satisfactorily account for the calls by the accused from an unknown number. The undisputed fact is that there was an admitted call made to her. Despite the unsatisfactory aspect of this witness' testimony, I am satisfied that the reason for her untimely arrival at the flat must have had its origin in the call of the accused. I accept her version of the conversation during the call by the accused.

[13] The evidence of the investigating officer was that his investigation revealed that the deceased was at work and that she left during lunch time and was not seen again after that. The accused testified that he had last seen the deceased at 09h00 that same morning and he had took a taxi to Outapi a little after 11h00. He testified that he was at a bar in Outapi at around 13h00 where he met a person whom he knew from birth. He called this person, a certain Mr Cleophas Hailenge, who testified and confirmed that he had seen the accused at a bar in Outapi between 12h00 and 13h00.

[14] In terms of the confession he admitted that the deceased visited him around lunch time and that she started an argument. She hit him with her bag and he pushed her. She was still coming towards him and he slit her throat because she was talking about him and "*his baby who die or go crazy*". He left her in the room and he went to Okalongo. He had her cellphone with him and he threw her cellphone away along the road. He also took of his T-shirt and threw it away along the road. He called his uncle and a certain lady and told them that he killed his girlfriend and that the body was inside his room. He told them that he was at Okalongo. He indicated that he had killed the deceased because he wanted to save himself and his baby.

[15] The accused during his testimony under oath denied that he made this confession voluntarily. He maintained that he was assaulted and coerced into making the confession. He however admitted that there was a break down in their relationship and that that he had fathered a child with another woman. It was however his testimony that the deceased had no problem with this fact.

[16] His plea in terms of s 119 reflects that he pleaded guilty and when questioned in terms of s 112(1)(b) he admitted that he killed the deceased by stabbing her and cutting her throat. The accused however denied that he had the intent to kill the deceased. During his testimony he maintained he was afraid of being assaulted and that he was coerced into making this statement.

[17] The offence of murder was sufficiently proven by the State. The question is whether the State proved that it was the accused who committed the offence as he raised the defense of an alibi.

[18] In *S v Britz 2018 (1) NR 97 (HC)* the court held that there was no duty on the accused to prove his alibi.³ The question is whether it is reasonably possibly true that the accused was in Outapi during the hours of 13h00 and 16h00 as he testified.

[19] In light of the undisputed testimony of his friend it can be concluded that it is reasonably possibly true that the accused was in Outapi at a bar between 12h00 and 13h00. His witness however does not confirm his presence in Outapi beyond 13h00. His friend testified that the accused was in the company of another mutual acquaintance. He bought the accused and his companion two beers and he left thereafter. The accused traveled to Outapi that morning in just under two hours using public transport. The deceased was last seen at 13H00. The disputed call to Mr Huwulu was made between 16h00 and 17h00. An inference which is consistent with the proven fact is that the accused had called his uncle after he committed the offence. This would be the only reasonable inference. Such a conclusion would place the accused back in Oshakati during 16h00 and 17h00 i.e. at least 3 hours after he was last seen in Outapi.

³ See also *S v KANDOWA 2013 (3) NR 729 (HC)* para 12

[20] The alibi was raised late during the trial and this is a factor the court has to consider although there exist no burden on the accused to prove his alibi. It was not raised at pre-trial stage nor was it raised during the plea explanation. It was raised during cross-examination of the investigating officer who was the last witness to testify. The testimony by the accused that he was in Outapi during the period between 13h00 and 16h00 should be weighed against the other facts which this court found has been proven such as; the phone call to his uncle who was a credible witness and the fact that the deceased was found in the flat of the accused as he described to his uncle. I do not find that the accused's testimony that he was in Outapi from 13h00 to 16h00 to be credible.

[21] The single most damning evidence against the accused is the admission made by the accused during his telephone call to his uncle. When it comes to the subsequent confessions the following has been held in *S v Titus 1991 NR 318 (HC)*: that the accused could not be convicted on the strength of his confession alone: s 209 of the Criminal Procedure Act specifically stated that an accused could only be convicted on the basis of his confession 'if such confession is confirmed in a material respect or if the offence is proved by evidence, other than such confession, to have been actually committed.' It was held, further, that the onus to prove the accused's guilt beyond a reasonable doubt thus remained the burden of the prosecution and the requisites stated in s 209 ensured that there was a rational connection between the confession and the crime perpetrated: furthermore, there was a rational connection (on a narrower basis) between the prima facie evidence appearing *ex facie* the written confession and the actual voluntariness thereof.

[22] Having considered the body of evidence adduced by the state and the accused in its totality, I am satisfied that the State proved beyond reasonable doubt that the offence of murder was committed, that it was the accused who stabbed the deceased and slit her throat and that he did so with direct intent. Given the domestic relationship between the accused and the deceased, the provisions of the Combating of Domestic Violence Act would find application.

[23] The state submitted that the accused should be convicted of robbery of the deceased's cell phone. The State submitted further that the court ought to admit into evidence the "inadmissible" pointing out by the accused after his arrest. I am reluctant to accept this evidence as a certain Sergeant Aupa admitted that it was not admissible given the fact that the officers were not commissioned officers. Even if I accept that he stopped to point out where he disposed of the cell phone, it only serves to prove the intent of the accused. His intent was clearly demonstrated by the act of disposing of the cell-phone of the deceased. In his confession he admits to having had the deceased cellphone. This is not a confession of robbery as he did not admit to having had the intention to steal or appropriate the cellphone of the deceased. If anything he demonstrated that he intended to dispose of evidence which may link him to the offence.

[24] The State did not prove beyond reasonable doubt that the accused forced the deceased into submission by stabbing her and slitting her throat with the intent to steal her cell-phone and the accused stands to be acquitted on the charge of robbery with aggravating circumstances as defined in s 1 of the Criminal Procedure Act, 51 of 1977.

[25] In the result the following order is made:

1. Count 1 - Murder read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003 – Guilty;
2. Count 2 - Robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 51 of 1977 – Not guilty.

M A TOMMASI

JUDGE

APPEARANCES

STATE: J Mudamburi
of the Office of the Prosecutor-General
Oshakati

ACCUSED: P Grusshabber
Instructed by Directorate of Legal Aid
Outapi