

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

JUDGMENT

Case no: CC 11/2018

THE STATE

v

JOHANNES AMBONDO DAVID

ACCUSED

Neutral citation: *S v David* (CC 11/2018) [2020] NAHCNLD 38 (09 March 2020)

Coram: SALIONGA J

Heard: 6-17 May 2019; 1 July 2019; 4 September 2019; 7 October 2019 and
21-22 November 2019

Delivered: 09 March 2020

Flynote: Criminal Law—Accused charged with —Attempted murder—Murder— Murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003—Private defence raised in all charges—Requirements of private — defence reiterated and not satisfied-Accused found guilty on all charges.

Summary: The accused was indicted on three charges namely, attempted murder, murder and murder read with the provisions of Combating of Domestic Violence Act, Act 4 of 2003. Accused pleaded not guilty on all charges and during the trial raised private defence. He made certain admissions in terms of section 220 of the Criminal Procedure Act 51 of 1977. The state called several witnesses in proving its case and at the end of the state case accused testified under oath and had no witnesses to call. On count one the court heard the evidence of a single witness and mutual destructive evidence. I cautioned myself of the danger of convicting the accused on such evidence. With regard to count two and three it was not disputed that the accused and state witnesses were at Timo's bar from where accused pulled the deceased in count three outside. Eye witnesses testified that they saw accused kicking the deceased in the stomach outside the bar. That resulted the deceased in count two to intervene and eventually was stabbed to death. Thereafter accused stabbed the deceased in count three several times and she died at the hospital the following day. Accused in his plea explanations indicated that he acted in private defense in all three counts. He also made admissions in respect of count two and three in terms of section 220 of the Criminal Procedure Act 51 of 1977. The court held that the evidence of the complainant was not reliable as it was unclear short and flawed with ambiguity and the balance leaned to the credibility of the defence in count one. The court further held that despite discrepancies in the eye witnesses' evidence, they were not material to reject the evidence in its totality. The court further held that defense failing to meet requirements of private –defense in count two and three. The court found accused not guilty on count one and guilty as charged on count two and three.

ORDER

Count: one: Not guilty and discharged on attempted murder;

Count two: Guilty of murder with dolus eventualis;

Count three: Guilty of murder with direct intent read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

JUDGMENT

Introduction

SALIONGA J:

[1] Accused was indicted before this court on three charges; namely attempted murder and two counts of murder of which one count of is read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003 in that at the time of the commission of the offences there was a domestic relationship between the accused and the deceased in count three Ndapanda Nekwaya because they have two children together. Furthermore the deceased Ndapanda Nekwaya was pregnant at the time of the incident. The deceased in count two Johannes Taapopi Uukongo is not related to the accused neither complainant in count one Joseph Ashipala is related to the accused. The State alleged that on the 8 August 2017 accused proceeded to have an argument with a complainant in count one. The accused got angry and took out a knife and stabbed Joseph Ashipala but only managed to cut the shirt. Joseph Ashipala and the accused then grabbed each other and Joseph Ashipala bite the accused on the shoulder and managed to get away.

[2] It was further alleged that on the 14 August 2017 in Ondumbo location the accused dragged Ndapanda Nekwaya now the deceased in count three out of the shebeen and started kicking her on her stomach. Johannes Taapopi Uukongo, the now deceased in count two, tried to intervene but the accused stabbed him in the chest leading to his death at the scene due to stab wound to the chest. The accused then proceeded to stab Ndapanda Nekwaya the now deceased in count three and stabbed

her nine times. Ndapanda Nekwaya died at Oshakati Hospital on 15 August 2017 as a result of multiple stab wounds on her body. After the stabbings accused disappeared from the scene. The accused was arrested the following day.

[3] The accused pleaded not guilty on all the charges preferred against him and gave a statement in terms of section 115 of the Criminal Procedure Act, Act 51 of 1977 as amended. In his plea explanation accused disclosed the basis of his defence as follows:

Count one

'On 8 August 2017 at Okeeholongo location in the district of Outapi an altercation started between the accused and Joseph Ashipala. During such altercation the accused cut the jacket of Josef Ashipala with a knife. He stated that Josef found him at a shebeen busy talking to Andreas and confronted the accused of gossiping him. Accused went out of the shebeen and Josef followed him and threw a punch towards the side of his face which he ducked and he missed. Accused walked away and again Josef followed him and threw a punch at him again. Accused ducked again and grabbed the complainant and threw him to the ground asking him what he wanted from him. Josef followed him, threw a punch which he ducked again. He held Josef by the legs and threw him on the ground. Josef bit him on the right shoulder. Accused held his arms and Josef bit him on the right thumb. His thumb was still in Josef's mouth and for him to release his finger he applied pressure to his throat with his left hand and he let him go. Accused let Josef go as well. Thereafter Josef stood up ran and came back to him again with a panga. Accused took out a knife he had from his pocket. Josef tried to cut him on the neck. Accused ducked and cut his jacket. Josef ran and called the accused to go to him. Accused left home. He never intended to murder the said Josef and was defending himself all along against an unlawful attack.'

Count two and three

'On count two accused admitted that on 14 August 2017 he was at Timo's shebeen Ondumbo location in Outapi district. He went in the shebeen to call Ndapanda Nekwaya the deceased in count three and the mother of his two children. He needed to talk to her in respect of the children. He pulled her lightly on the jacket and she followed him outside. He asked her why the children never came to pick up the things he bought for school as he had sent a message

through meme Shikule her sister. Ndapanda started insulting him saying that the children came out of her vagina and not from his mother's vagina. He asked her why she was insulting him. He was about to leave when Johannes Taapopi came to them and said "that is my mom" and started assaulting him with fists on his chest. Ndapanda went in between them and grabbed him on the collar of his jacket and started to suffocate him with one hand and the other hand she grabbed his testicle (sic) and was pulling them. Whereupon Johannes Taapopi held him on the left hand and took out a knife. At the same time, accused took out a knife from his pocket and pushed it towards the chest of Taapopi now deceased which penetrated his chest. At that stage Ndapanda was still suffocating him and pulling his testicles. He was in pain and he stabbed her several times until she let go of him. He stabbed both deceased in order to defend himself from an unlawful attack perpetrated by them on his person.'

[4] Apart from the plea explanation given, accused admitted in terms of section 220 of the Criminal Procedure Act 51 of 1977;

Count two: the identity of the deceased as Johannes Taapopi Ukongo; that the body of the deceased did not sustain any further injuries during transportation from the scene until the postmortem examination was conducted. The accused further admitted that the deceased died on the 14 August 2017 at Ondumbo, location, Okahao in Outapi district and that he stabbed the deceased with a knife in the chest and died as a result of the stab wound.

[5] Count three: the identity of the deceased as Ndapanda Nekwaya; that the body of the deceased did not sustain any further injuries during transportation from the scene until the postmortem examination was conducted. That the deceased died on 15 August 2017 at Oshakati state hospital after being stabbed on 14 August 2017 at Ondumbo location, Okahao in the district of Outapi. That he stabbed the deceased with a knife several times and died as a result of the stab wounds and that the deceased was his girlfriend and they have two children born during the subsistence of their intimate and /or romantic relationship.

[6] The following documents were handed in by agreement: A sketch plan and key of the scene of the crime; photographs depicting the scene of crime as well as photos of

the deceased persons taken at the mortuary; the record of the proceedings in the Magistrate's court; the State's pretrial memorandum compiled in terms of the High Court consolidated practice directives ; the accused's reply thereto; minutes of a pretrial review conference held between counsel for the State and for the defence; affidavit and report on a medico-legal Post mortem examinations and were marked as exhibits accordingly..

[7] The State called several witnesses in proving its case and accused testified under oath and no witness to call. Mr Gaweseb appears for the State and Mr Grusshaber on the instruction of legal aid represented the accused.

[8] The State called Joseph Ashipala the complainant in count one. He testified that he knows the accused from their village. On the date of the incident, accused found him at a certain Mr Kamulunga's cuca shop and they greeted each other. The accused asked him about the donkeys and the witness responded that if he wants the donkeys he should go get them in the field. Accused got angry and a quarrel started. The accused took a knife from his pocket and stabbed him on his shirt. Thereafter accused threw him down, and during the altercation the witness bit the accused on his finger in trying to let him off

[9] I must state that his evidence was scanty and lack details of what happened, despite an attempt by the state to get detailed evidence from him. The missing part or details of his evidence only became apparent when the plea explanation of the accused was read to him. In cross examination the witness testified that, accused was not happy about him using his uncle's donkey. He denied to have grabbed or threw punches at the accused nor did he at any stage fetch a panga from his house.

[10] Veronika Kalistu was the second State witness and she knew Johannes Taapopi as her boyfriend and Ndapanda Nekwaya as her mother in law now both deceased. On 14 August 2017, the witness was with Ndapanda, Kakulupe, Diina and others at Timo's bar dancing. Ambondo, the accused was also in the bar. The witness testified that she

was standing at about three cm from the deceased Ndapanda. Whilst there, accused came to Ndapanda, requesting or asking her to go with him outside so that they could talk. The deceased responded that what was that she would talk to him outside. She refused saying the accused should say it there. Whereupon accused grabbed Ndapanda on a collar of her jacket and pulled her backwards outside. According to the witness, Ndapanda said "you guys can you see now that Ambondo is pulling me outside, I am not in speaking terms but is pulling me outside." In her opinion Kalistu testified that when accused demanded Ndapanda to go outside and talk, accused was peaceful or said it in a peaceful voice. He only raised his voice in an angrily tone after Ndapanda refused to go outside.

[11] Kalistu further testified that she thereafter went outside to relieve herself and she could only see the accused but not Ndapanda. She went back inside the bar and continued dancing. When it was almost knocking off time, the bar lady informed them she was closing and they should leave. As she was going out of the bar, she heard a sound but could not see what it was. She went and stood in the bar entrance door looking outside. She heard Ndapanda's voice talking and accused was standing next to her. Accused started kicking her in the stomach. She was at a distance of about eight footsteps from them when she saw accused kicking Ndapanda in the stomach.

[12] It was Kalistu further testimony that Taapopi also came out of the bar and stood where she was standing in the entrance door. He walked towards the accused wanted to know what was going on and why the accused was beating a person like that. The witness understood that to mean why beating a pregnant woman. Accused kept on asking Taapopi why interfering in the matter between him and his wife and whether he would stand for it. Taapopi responded that he was not interfering but why fighting in the night and kicking a person like that. He further wanted to know what that to stand for was and if it was about dying he would die with his mother. At that stage the accused stabbed him with an object in the chest. Taapopi walked for a short distance of about six footsteps and fell on the ground. Ndapanda went towards Taapopi and said; "you have

killed somebody's Taapopi." Accused who remained at the scene said oh Ndapanda you're still here and you are the cause of killing Taapopi.

[13] According to Kalistu the accused was a distance away from Ndapanda, he walked towards her and stabbed her between the shoulders. The witness was able to see clearly because there was light outside and inside the bar. After she saw Taapopi was dead she screamed, crying and left the scene. In cross-examination Kalistu denied taking any alcohol that night. She however admitted that it was dark in the night but the light in the bar and outside were on. She further testified that she could not hear their conversation outside. She maintains that at no stage did she see the deceased Ndapanda attacking the accused or observed her with a weapon. She denied that Taapopi stormed the accused, he just walked normally towards the accused and Ndapanda. She further testified that at the time Taapopi was stabbed he did not have a weapon with him. She conceded that she did not see with what Taapopi was stabbed but testified that Ndapanda was stabbed with a knife. According to her Ndapanda was not in between the accused and Taapopi it was in fact Taapopi who stood in between them. After the stabbing. Taapopi walked a distance of six footsteps and fell on the ground near the entrance of Timo's bar and Ndapanda went to stand next to the tree.

[14] Timoteus Shikwambi was also in Timo's bar with Taapopi, Ndapanda now deceased person on 14 August 2017 and accused was also there. Shikwambi testified that the accused and the deceased Ndapanda were talking to each other. Accused requested the deceased to go outside so that he could tell her something. Ndapanda insisted that whatever the accused wanted to talk should say it there. He grabbed her arm and pulled her outside behind the bar. It was a bit dark but there were lights in front of the bar. The witness together with Taapopi (deceased) also went out and he stood near the window of the bar. The witness saw accused beating the deceased in count three with his hand and kicked her once in the stomach. He was at a distance of five footsteps. At that point Taapopi asked the accused why beating his mother like that and accused responded to say what it concerns you between me and my wife. Accused stabbed Taapopi with a knife and the deceased went and fell near the entrance door.

The witness did not see any of the deceased persons attacking the accused and did not also see any of the deceased with a weapon. He however did not know what happened to Ndapanda as he went to report the matter.

[15] In cross-examination, the witness stated that he did not see Veronika inside the bar. He only found her outside Timo's bar standing near the entrance. The witness maintained that he was the one who came out of the bar with Taapopi and not Veronika. He also said Taapopi told the accused before the stabbing that "that is my mother why are you beating her" to which accused responded 'what concerns you between me and my wife'. The witness maintained that the deceased in count two and three did not attack or provoke the accused before the stabbing. Taapopi did not have a knife and he did not see Ndapanda suffocating the accused and pulling his testicles at any stage. That the witness knows accused for three years as they are from the same village prior to 2017. According to him Ndapanda was not willing to go at the time accused was calling her outside.

[16] The next witness was Armando Perez Ricardo a Doctor in medicine since 1988 currently stationed at Oshakati state hospital forensic department since 1999 conducted the post-mortem on the body of Ndapanda Nekwaya an adult female. The witness read the report into evidence and marked exhibit N1 and 2. He found multiple injuries on different part of her body and the chief findings were a total of nine wounds, eight penetrating wounds and one incised wound; marked cutaneous-mucosa pallor; Diaphragm, lungs, stomach, colon, mesentery and liver wounded; male fetus estimated 35 weeks pregnant of a male child measuring 42 cm in length and estimated to be 1.5 kg and Visceral pallor. He concluded that the cause of death was multiple stab wounds. During the examination he noticed that the woman lost a lot of blood. In cross-examination the witness insisted that although it is possible, it was difficult to believe that at the material time Ndapanda was holding the accused on the collar and was pulling his testicles because she was nine months pregnant.

[17] Petrus Kangulohi Amutenya is a detective sergeant in Nampol attached at serious crime management unit and the investigating officer in a case. On 14 August 2017 he received a report of two people who were stabbed with a knife and one of them died on the spot. He was further informed that Johannes Taapopi died at the scene and Ndapanda was taken to the hospital and they were related to each other as aunt and nephew. He visited the scene the following day accompanied by sergeant Taapopi from the crime scene unit. At the scene they found three witnesses who pointed out the scene and points where the crimes took place and he obtained statements from them. On the same day he joined others who followed the accused's footprint where accused was later arrested by sergeant Amukwaya and was taken to Okahao police station.

[18] The witness attended a post mortem of Johannes Taapopi at Okahao state hospital. During the examination he observed a stab wound penetrated into the heart. After the examination he took the accused to Okahao state hospital for examination in case he had injuries on him. He observed a dry marks on the shoulder as well as a mark on his thumb. In his presence the accused informed the doctor that he was bitten by Ashipala when they were fighting on the 8 August 2017.

[19] Amutenya further testified that he again attended the postmortem at Oshakati police mutual the next day 18 August 2017 and was accompanied by w/o Taapopi who took the photos. He observed multiple wounds on the deceased Ndapanda. He also noticed that she was pregnant of a male child and the fetus was removed from her womb. He gave a summary of his investigation and observation he made during the investigations.

[20] Maria Nandjebo is a doctor who performed a post mortem examination on Johannes Taapopi Ukongo, the deceased in count two. The chief post-mortem findings were that the, deceased had two (2) wounds and described them as a penetrated incised wound to the chest and perforation of the heart. She read the findings into the record and post mortem was marked as exhibit "K". The witness excluded the possibility that the deceased could have sustained the injuries as is alleged by the accused. In her

opinion the wounds could not have caused by pushing something in, as one needs too much force to penetrate the heart. In terms of the admitted post-mortem report of doctor Nandjebo, the cause of death were heart injury and hypovolemic shock.

[21] The accused testified that on 8 August 2017 he was at Okeeholongo location at a cuca shop of Kumulunga talking to Andreas. Whilst talking, Josef the complainant arrived and confronted him of gossiping him with Andreas. Thereafter an altercation ensued. Accused left the cuca shop and complainant followed him and threw a number of punches towards the accused which he ducked and the complainant missed. The complainant bites the accused on the right shoulder as well as on the thumb. Thereafter complainant went across the road and came back with a panga. Accused took a knife from his pocket and stabbed the complainant on his jacket. In cross examination accused testified that he did not know where the complainant got a panga and denied that the complainant fetched the panga at his house as it was far from the cuca shop. He conceded that it could be wrong instructions given to his lawyer.

[22] Accused further testified that on 14 August 2017 he was at Timo's cucashop when he called Ndapanda the deceased in count three out of the cucashop. She was reluctant to go, he held her jacket and pulled her outside. The two went outside and were discussing why the children did not come to fetch their school items. Ndapanda then said the children came out of her vagina not your mother's. The accused asked her why she was insulting like that as if she was not a woman. When he turned around to leave Taapopi came and said that one is my mother and started throwing a punches at the accused. Ndapanda grabbed his jacket around the collar as well as his testicles and was pulling them. Taapopi threw four to five punches on his chest and he held the accused left arm. By then, Ndapanda was in between the accused and the deceased in count two. The accused insisted that he did not intent stabbing the deceased persons as he stabbed Taapopi when he saw that he took out a knife and thereafter he continuously stabbed Ndapanda because when he told her to let him go she refused to do that and his testicles were paining.

Submissions by the State

[23] Counsel for the State submitted that in assessing the evidence the court is required to exercise caution because certain kinds of evidence cannot be safely relied upon unless accompanied by some satisfactory indication of trustworthiness, corroboration being one such indication, although the list is an open one. He further submitted that it has been a long practice of our criminal justice system for a court to apply caution when dealing with evidence of a single witness. However, it is not to say the evidence of a single witness should be disregarded but the court must look at all the probabilities when evaluating the evidence and must apply mere common sense. Counsel referred the court to the guidelines found in decided cases and other relevant sources. Reference was specifically made to *S v Sauls* 1981 (3) SA 172 (A) at 180 where the court held:

‘There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness... The trial judge will weigh his evidence, will consider its merits and demerits and having done so will decide whether it is trustworthy and whether despite the fact that there are shortcomings or defects or contradictions in his testimony, he is satisfied that the truth has been told. The cautionary rule...may be a guide to a right decision but it does not mean’ the appeal must succeed if any criticism, however slender, of the witnesses’ evidence was well founded...It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense’.

[24] With regard to the second and third incidents counsel submitted that all State witnesses featured very well in the witness box, despite minor shortcomings. Nothing in their manners of testifying affects their credibility as trustworthy and credible witnesses. He submitted further that a court should make a careful evaluation while taking into account inter alia the nature of the contradictions, their number and bearing on the other parts of the witness’s evidence before deciding how same should bear on the credibility of the witnesses.

[25] Counsel further submitted that it is not unusual especially after a long time has passed, for witnesses to forget or differ on certain aspects of their testimonies or even

to contradict themselves in the witness box. More so where a witness or accused is found to have lied in one respect does not necessarily justify a finding that the whole evidence is false, it depends on the manner and nature of the lie whether it can be accepted as an honest mistake or be regarded as a carefully thought about and deliberate lie. Counsel thus submitted that there was nothing in the individual testimonies of the State witnesses that shows they have deliberately and consciously lied to this court; that the contradictions or inconsistencies if any in their testimonies are not only minor but also of the type that would be expected of any person in the circumstances. He prays for convictions.

Submissions by the defence

[26] Counsel for the defence submitted that the State had failed to prove its case beyond reasonable doubt. He implores this court to find the accused not guilty and acquit him on all charges. In substantiating his submission, counsel submitted that the complainant in count one was a single witness and his evidence was not so clear, short and flawed with ambiguity. He further submitted that in count two and three the evidence of the eye witnesses showed that the two were both in the same bar with the deceased persons but could not see one another. From Veronika's evidence Timoteus Shikwambi could not have been in the bar as he was still attending school. Whereas Timoteus testified that he was in the bar and exited with the deceased in count two him. Counsel further submitted that if Veronika was indeed in the bar, she ought to have seen Timoteus in the company of deceased in count two and likewise or vice versa. In respect of count two counsel submitted that the more plausible version was accused acted in self-defence. That the deceased in count was the attacker as he assaulted the accused with fists and took out a knife but the accused pre-empted by stabbing him. It is therefore submitted that the requirement of an attack is satisfied as there was an unlawful attack upon a legal interest which was imminent. In this regard the accused did not exceed the bounds of self-defence.

[27] With regard to count three counsel submitted that it must be taken into account that the unlawful attack on the accused as per his testimony was perpetrated jointly by both deceased persons. The deceased in count three after the Taapopi, the deceased in count two was stabbed continued to hold the accused's testicles despite accused's request to leave him. The accused had a knife so he used it as the only weapon in his possession at the time and stabbed her continuously until she let go of him. Submitted further that accused acted in private defence and warded off the imminent attack by stabbing the deceased once in the chest. It could not be said he exceeded the bounds of self-defence because at that stage the deceased in count three was still pulling his testicles and strangling him.

The law

[28] I must be grateful to both counsel for referring me to authorities in connection with the requirements of self –defence. Having summarised the evidence and submissions by counsel I must now consider whether or not the State has established its case beyond reasonable doubt. It is a well-known principle in criminal cases that the State bears the burden of proof and no onus whatsoever is placed on the accused to prove his innocence. If the State has failed to prove its case beyond reasonable doubt, then the accused should not be found guilty and be acquitted.

[29] In the instant case the eye witnesses for the State were subjected to lengthy and intense cross-examinations. Counsel for the defence criticised Veronika and Timoteus's evidence argued that there were discrepancies between their evidence and as such the only satisfactory version was that of the accused. I agree with counsel for the defence in as far as Timoteus presence in the bar. To the contrary Timoteus testified that Veronika was not in the bar at the time the accused pulled Ndapanda outside and that it was him who came out of the bar with Taapopi and not Veronika. Another contradiction counsel stressed was that Veronika testified that the accused and Taapopi exchanged words before the stabbing whilst Timoteus said nothing was said.

[30] However in my view the two witnesses corroborated each other on material respects in that they saw the accused kicking the deceased in count three in the stomach, that they did not witness any of the deceased person with a weapon or attacking the accused at any stage. They also together pointed out the points to the investigating officer and sergeant who photographed the crime scene marked exhibit. I had the opportunity to observe both witnesses and the accused testifying and I was left with the impression that the witnesses gave their evidence in a straight forward manner and were not shaken in cross-examination. It is not unusual especially after a long time has passed for witnesses to forget or differ on certain aspects of their testimonies or even to contradict themselves in the witness box. Their failure to observe properly all the happenings does not mean their entire testimony should be rejected.

[31] I should now consider whether the actions of the accused have satisfied the requirements of private defence in all charges. Both counsel referred me to the requirements of private defence as stated in the case of *S v Naftali* 1992 NR 299 (HC) where the accused who had the original aggressor had been convicted of inter alia murder. O'Linn J observed at 303 F -304 E with the concurrence of Frank J that; 'self-defence is more correctly referred to as private defence. The requirement of private defence can be summarised as follows:

(a) The attack: To give rise to a situation warranting action in defence there must be an unlawful attack upon a legal interest which had commenced or was imminent.

(b) The defence must be directed against the attacker and necessary to avert the attack and the means used must be necessary in the circumstances.¹ I fully agree with both counsel that the aforesaid are requirements for private defence.

[32] The court in *S v Naftali* supra stated that where self-defence is raised or apparent the enquiry is twofold. The first leg of enquiry is whether the conditions and /or requirements of self-defence have been met which includes the question whether the bounds of self-defence were exceeded. The test is objective but the onus is on the

¹ See Burchell and Hunt *South African Criminal Law and procedure* vol 1, 2nd ed at 323-9.

State to prove beyond reasonable doubt that the conditions or requirements for self-defence did not exist or that the bounds of self-defence have been exceeded. If the State discharges the onus that the accused exceeded the bounds of self-defence, the second leg comes into play. The state is required to prove that the accused did not genuinely believe that he was acting in self-defence and he was not exceeding the bounds of self-defence. Here the test is subjective and the reasonableness or otherwise of such belief whether or not it is based on or amounts to a mistake of fact or of law or both is only relevant as one of the factors in the determination whether or not the accused held the aforesaid genuine belief. If the state discharged the onus accused will be convicted and if not accused will be guilty of culpable homicide if culpa is.

Evaluation of evidence

[33] On count one the court was confronted with the evidence of a single witness and mutually destructive version of the complainant and that of the accused. It has been long practice of our criminal justice system for a court to apply caution when dealing with evidence of a single witness and in this regard I cautioned myself of the danger of convicting solely on the evidence of a single witness in this case the complainant. For it to be a conviction the evidence must be clear and satisfactory in all respects. Further that the court, in the evaluation of the evidence where there are two mutually destructive versions, ought to have regard to the following citation from *S v Singh* 1975 (1) SA 227 (N) at 228F –(cited with approved by Mtambenengwe J, as he then was, in *S v Engelbrecht* 2001 NR 224 (HC) at 226E – G) that:

“Because this is not the first time that one has been faced on appeal with this kind of situation, it would perhaps be wise to repeat once again how a court ought to approach a criminal case on fact where there is a conflict of fact between the evidence of the State witnesses and that of an accused. It is quite impermissible to approach such a case thus: because the court is satisfied as to the reliability and the credibility of State witnesses that, therefore, the defence witnesses, including the accused, must be rejected. The proper approach in a case such as this is for the court to apply its mind not only to the merits and demerits of the

State and the defence witnesses but also to the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond all reasonable doubt. The best indication that a court has applied its mind in the proper manner in the abovementioned examples is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses.' The complainant is a single witness in respect of the attempted murder incident and the court therefore has to warn itself of the inherent dangers of relying on the single uncorroborated evidence of the complainant."

[34] It is common cause that the attempted murder incident happened at the shebeen where other people could have witnessed the assault. However none was called by either party to testify. The State did not advance submission with regard to count one. There was further conflict of fact between the evidence of the State witness and that of an accused. Guided by the approach in Singh's case supra when considering not only the merits and demerits of the State and the defence witness but also the probabilities of the case the balance lean more on the defence case. I agree with counsel for the defence that the complainant's evidence was not clear, short, flawed with ambiguity and remained uncorroborated, lends credibility to the version of the accused reasonably possibly true.

[35] With regard to count three there was unchallenged evidence that when accused approached Ndapanda in the bar requesting her to go and talk outside she was hesitant to go with him. That piece of evidence was corroborated by accused's testimony in that he pulled her arm. In my view it makes no material difference whether Ndapanda was pulled on the arm or on the collar of her jacket. This evinces that the accused was initial the aggressor. Even if this Court was to believe that the deceased in count three had indeed held him as testified, the accused has failed to show why he saw the need to stab her continuously. Both Veronika and Timoteus testified that they did not see the deceased attacking the accused with either fists or the knife. They both testified that Taapopi intervened because the accused was assaulting the pregnant woman, the deceased in count three. The accused's evidence upon which counsel appears to rely

on this aspect was displaced by the evidence of these two state witnesses. I have no reason to doubt the evidence of the two state witnesses.

[36] Whilst on count two there was evidence from two witnesses who witnessed the events that particular night. As counsel for the defence submitted these witnesses contradicted themselves in their testimonies and I am alive to that fact. I have carefully consider the evidence given by Timoteus and his reluctant to answer certain questions in cross examination. This court endorses what the court in *S v Bruinders en 'n Ander*² and *S v Auala (1)*³ had stated that experience has shown that two or more witnesses rarely give identical evidence with reference to the same incident or events, and that regard must be had to the evidence as a whole in deciding whether or not the contradictions are sufficiently material to warrant the rejection of the State's version; also, that contradictions *per se* do not render evidence unreliable. I endorse the pimple of law expressed in that regard. In the matter before me the eye witnesses saw the accused assaulting and kicking the deceased in count three in the stomach. That prompted the deceased in count two to walk towards them in order to intervene. The witnesses maintained that there was no attack on the accused and I believed them. It follows naturally that if there was no attack at the time on him, there was no danger real or imagined towards his person which he had to avert. That being the case the other requirements do not even come into play.

[37] When regard is had to what photo four and five of the sketch plan depict it became apparent that there was quite distance from point H where deceased in count two was stabbed in relation to point J where deceased in count three was stabbed. That goes well with the state witnesses' testimony that after Taapopi was stabbed he walked for a short distance and fell near the entrance of the bar, Ndapanda walked towards him. Therefore it is improbable that when deceased in count three was stabbed she was still holding the accused at that point in time.

[38] The accused's intention to kill the deceased in count three was further demonstrated by the fact that the accused, not only pulled her out of the bar against her

² 1998 (2) SACR 432 (SEC)

³ 2008 (1) NR 223 (HC)

will but went outside kicked her and stabbed the deceased several times on a very sensitive part of her body. When regard is had to the number of wounds inflicted, the seriousness and the location of those wounds as well as the lethal weapon used on a human being namely a knife, appear to suggest a deliberate motive. I find no justification that necessitates the use of the knife on defenceless persons.

Conclusion

[39] The court is not satisfied that the state has made out a case in an attempted murder charge. However the court is satisfied beyond reasonable doubt that on counts two and three, the witnesses told the truth as they witnessed the events on that night. It is quite easy for one to say things about a dead person because they are no longer able to defend themselves against such allegations and/or give their side of the story. The accused's actions on that day were a clear manifestation of his aggression and in spite of all these, the events of that day are damning against the accused person. The killing of Taapopi might have occurred in a spur of a moment but safe to conclude that there was no manifestation of imminent danger or attack from any of the victims. The court found that the accused acted with *dolus eventualis* to murder the deceased in count two while in count three he acted with *dolus directus* to murder the deceased. I reject accused's defence not only as far-fetched and unfounded but also not a true reflection of what happened that particular night.

[40] For the aforesaid reasons the following orders are made:

Count: one: Not guilty and discharged on attempted murder;

Count two: Guilty of murder with *dolus eventualis*;

Count three: Guilty of murder with direct intent read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

J T SALIONGA
Judge

APPEARANCES

For the State:

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For the Accused:

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