

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION  
HELD AT OSHAKATI

JUDGMENT

Case No: CC 5/2019

In the matter between:

**THE STATE**

v

**AHAS NDAKONDJA SINDJALA THOMAS**

**ACCUSED**

**Neutral citation:** *S v Thomas* (CC 5/2019) [2021] NAHCNLD 46 (17 May 2021)

**Coram:** SALIONGA, J

**Heard:** 4-13 August 2020, 25-27 November 2020, 10 March, 17 March 2021  
and 26 March 2021

**Delivered:** 17 May 2021

**Flynote:** Criminal Law –Murder –Private Defence—Test and Requirements restated—  
Deceased was the aggressor—Danger created ceased to exist at the time of stabbing--  
Accused's conduct fell short of satisfying the test— No imminent danger at the time of  
stabbing— Evidence leaned towards vengeance —Self-defence rejected.

**Summary:** The accused before court was indicted on a charge of murder. He pleaded not guilty to the charge and submitted no statement in terms of section 115 of the Criminal Procedure Act, Act 51 of 1977. The state called seven witnesses in proving its case and at the end of the state case accused applied for a discharge in terms of section 174. The application was dismissed. The trial continued and accused testified under oath and no witness to call. During the trial it became apparent that accused's defence was that he acted in self-defence. From evidence led it is not disputed that on the day of the incident accused together with the deceased and two state witnesses were at Omanyenye cuca shop, Okamule village. While at that cuca shop an altercation between the accused and the deceased erupted over the bottle of tassenberg resulting in the deceased to stab the accused on the left wrist. They were then separated and continued drinking but accused did not drink from the said bottle. Then a second fight broke up after the accused confronted the deceased about the injuries the deceased had caused on him that consequently led the deceased to stab the accused again on the stomach. When a second fight erupted accused overpowered the deceased, got hold of a knife and removed it from the deceased. Accused used the same knife to repeatedly stab the deceased who later died at Oshakati hospital due to multiple injuries. Accused in his evidence maintained that he stabbed the deceased because he was provoked and he feared for his life.

*Held:* that although the deceased was the initial aggressor accused knew the person he was dealing with and could not have confronted the deceased the way he did.

*Held further:* that accused was in control when he succeeded in averting the danger, by dispossessing the deceased of the knife. He had no reason to believe his life was in danger. The moment the imminent danger ceased to exist, any attack thereafter amounts to revenge and not self-defence.

*Further held:* that the State proved beyond reasonable doubt that the accused intended to bring about the death of the deceased and subjectively foresaw death as a substantial possibility. The accused grossly exceeded the bounds of self defence when

he repeatedly stabbed the undefended victim with a dangerous weapon in vengeance or retaliation

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**ORDER**

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1. Guilty of murder with direct intent.
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**JUDGMENT**

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SALIONGA J:

Introduction

[1] Accused in this matter is facing a charge of murder. He pleaded not guilty and revealed no basis of his defence in terms of section 115 of the Criminal Procedure Act.<sup>1</sup> It only became clearer in the course of the trial that accused acted in self-defence.

[2] The State herein is represented by Ms Nghiyoonanye and Ms Boois represents the accused.

[3] The brief summary of substantial facts are that upon or about the 13<sup>th</sup> day of September 2017, the accused, deceased, Abel Petrus and Shiguwo Simon were at Omanyenye cuca shop, Okamule village. They contributed money so that they buy a bottle of tassenberg wine and cool drink. Having bought the said, Abel Petrus put the bottles on the ground outside the cuca shop. Then the deceased took them and walked away whereupon the accused followed him. A few metres from there accused caught up with the deceased and the two started fighting for the tassenberg bottle. Deceased took out an Okapi knife from his pocket and scratched the accused with it on the left hand.

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<sup>1</sup> Act 51 of 1977

Petrus separated the two from fighting and took the bottle of tassenberg and cool drink back to the cucashop. Accused and deceased also returned to the cuca shop and accused asked the deceased to forgive each other. They all started drinking but accused did not drink from the bottles. Deceased started insulting the accused and the two held each other. They both fell to the ground and deceased was now in possession of the Okapi knife while accused was seated on his stomach. Accused disarmed the deceased of the Okapi knife and started stabbing him several times on the body. After stabbing the deceased, accused stood up, threw the Okapi knife on the ground and left. The deceased stood up and asked to be taken to the hospital where upon he fell to the ground after walking a few metres from where he had been stabbed. Abel Petrus then called the police and the deceased was loaded in a motor vehicle and taken to Oshakati hospital where he later died as a result of multiple stab wounds.

[4] Several documents were introduced into evidence by agreement and were marked exhibits A to M respectfully; These are indictment, summary of substantial facts, State's pre-trial memorandum, reply to state pre-trial memo, minutes of the pre-trial review conference, photo plan, application for scientific examination, medical report, affidavit by doctor Armando Perez, post-mortem report, scene of crime photo plan, sworn statement by Josephine Nampila, affidavit by Seth Tsuseb, affidavit by Katrina Ndashiva, Identification of corpse by Katrina Ndashiva and J88 compiled by doctor Basima Andrew.

[5] The State led evidence of seven witnesses. Abel Petrus the first witness to be called knew the accused as a neighbour at Okamule. He testified, that on 13 September 2017 at around 18h00, he was together with the accused, the deceased and Shiguwo at Omanyenye Cucashop. They all gathered money and bought a bottle of Tassenberg. The deceased took the bottle of tassenberg and a cool drink and walked away. Accused followed him demanding the bottles back. A fight broke up and in that process the deceased stabbed the accused's left hand wrist with a knife. The witness separated them, removed the bottle (from the deceased), took it inside the cuca shop, opened it

and they started drinking. According to Petrus although accused had asked the deceased to forgive each other, accused did not drink from the said bottles.

[6] It was Petrus's testimony that while still inside the cuca shop drinking accused went outside. The deceased left the cuca shop thereafter. After they finished drinking the witness also went outside and found the accused and deceased holding each other as if they were fighting. It was sunset but he could still see. He stood about 22 paces and saw the accused and the deceased wrestling until they fell to the ground. Accused overpowered the deceased and put him underneath. Accused was sitting on the deceased's stomach when he realized that he was bleeding and that the deceased had a knife. He got hold of the knife and removed it from the deceased. He stabbed the deceased several times saying that "Ahas I am stabbing you, I am stabbing you." Abel recalls seeing the accused stabbing the deceased at least four times and the deceased was lying on his back shaking his body. After the accused stabbed the deceased he stood up, threw the knife away saying the thing I stabbed you with there is it and he left.

[7] In cross-examination the witness confirmed that the deceased was not entitled to take the bottle but denied that they were drinking outside the cucashop, he denied seeing the deceased slapping and insulting the accused before the stabbing. He further denied to have warned accused not to argue with the deceased. He maintained that he only saw them when the deceased was already on the ground and accused was bleeding from the rib side.

[8] The next state's witness Hilia Erastus whom together with her friend Nameya were sitting outside behind the cuca shop when the late Ahas and his friends came there. She testified that she saw the deceased walking from the cuca shop with a tassenberg bottle towards their house while accused was following him. The accused asked the deceased if he knew that they also contributed to the tassenberg but the deceased did not answer. Then the deceased took a knife from his pocket in preventing the accused from getting the bottle, swung the knife towards the accused who was moving backwards. In that process the deceased cut the accused on the hand.

Thereafter Ndjamba referring to Abel (the deceased's brother) came and took the bottle back in the cucashop. Her evidence corroborates the first witness's testimony in all material aspects in as far as the initial altercation between the accused and the deceased is concerned.

[9] Ms Erastus further testified that she was still sited outside the shebeen when the deceased came behind the cucashop and the accused followed him. She heard the accused asking the deceased while standing: "do you know that you have hurt my hand with your knife and I am bleeding?" She was sure they were fighting because the deceased took out a knife from the pocket and stabbed the accused in the stomach. At that stage accused was fighting with hands.

[10] It was further her testimony that the accused overpowered the deceased, put him underneath, sat on his stomach, removed the knife from him and stabbed him with the same knife more than twice. According to Ms Erastus; while accused was sitting on the deceased's stomach stabbing him, the deceased was just lying on his back using his hands to try and block the blows.

[11] Tobias Nepembe was the driver who transported both the accused and the deceased from the scene to Oshakati hospital. In his observation the deceased appeared to have been badly injured but was still alive. He testified that during transportation no further injuries were sustained by either of them.

[12] The evidence of Emilia Nepembe could not assist this court much as she did not witness the stabbing but heard about it. Her evidence relates only to the search of a knife done by the police on 19 September 2017. She testified that she was present at the cuca shop but was inside. She was able to point the scene because after the deceased was stabbed she went at the scene and found him lying there. According to the witness the police raked the place and they found blood and an Okapi knife. This evidence was corroborated by the investigating officer Saturianus Iwete.

[13] Dr Andrew Basime and Dr Armando Perez Ricardo both testified about injuries sustained by both the deceased and the accused. According to Doctor Andrew Basime, he recalled a young man brought in very sick and was soaked in blood. He treated the deceased when he arrived at the casualty department of Oshakati hospital on 13 September 2017. Whilst doctor Ricardo Perez Armando conducted the postmortem on the deceased's body and distinguished the injuries inflicted on the deceased during the fight, from incisions made as part of medical intervention aimed at saving the life of the deceased to various wounds inflicted on the deceased. His chief post mortem findings on the body of the deceased were a total of nine wounds, three penetrating wounds to the thorax cavity, one perforating the left aspect of the upper lip and wounded the tongue, four inserted wounds and one defensive wound. He concluded that the cause of death was multiple injuries inflicted on the body of the deceased by the accused. These doctors however could not deny that the wounds the accused sustained were serious leading to his admission in hospital for 13 days.

[14] At the end of the State's case, an opposed application for discharge in terms of section 174 of the Act was brought. Ms. Boois submitted that the actions taken by the accused were necessary to avert the imminent danger the deceased posed at that moment. She submitted that the State failed to establish that the accused had the necessary intention to kill the deceased and that a person cannot be convicted on a charge of murder if the element of unlawfulness has not been successfully satisfied. The court did not find counsel's submission convincing, dismissed the application and the trial continued.

[15] Accused in his defence testified under oath and had no witness to call. He testified that he was not guilty because he did not provoke the deceased. He knew the deceased as a neighbor and a violent person. On that fateful day he was with Abel at the said cuca shop and he was not drunk. It was Abel's initial idea to follow and remove the bottle of tassenberg and a cool drink from the deceased. After removing the bottles he gave them to him to carry. He was walking back to the cucashop when the deceased sneaked from behind and stabbed him with a knife on the left hand wrist.

[16] Accused further testified that after he was stabbed he put the bottle of tassenberg on the table outside the cucashop. He felt bad but since it was a person he knew he decided to let it go. He did not drink from the tassenberg bottle instead, he went out to another shop where he bought a glass of tombo. He came to sit outside where the deceased was sitting and put the glass on the table. The deceased stood up and slapped him twice over the table saying he is useless. At that moment they were facing each other and thereafter accused said to him 'you have already stabbed me with a knife and now you are assaulting me again' but the deceased did not answer. Deceased just stood up, remove a knife from the pocket of his trouser. As a result of that accused got scared and hit the deceased with a fist who then fell on the ground.

[17] It was accused's further testimony that while there, Abel came asking what was going on and took the deceased away saying he was taking him home but he didn't. Instead Abel passed by the accused warning him to be careful as he was about to be stabbed. Before he could turn around to see what he was warned about, he saw the deceased already holding his shirt from behind and started stabbing him in his stomach from the side. According to the accused he was stabbed seven times once on the left wrist arm, twice on the right arm and four times in the stomach. After he was stabbed he contained himself, took the knife from the deceased, sat on his stomach and stabbed him.

#### Submissions by counsel

[18] Counsel for the State, in her oral address supplemented by written submissions submitted that Abel and Hilia the key state witnesses corroborated each other in all material aspects of the evidence except in instances when they were not at the same place. She further submitted that their evidence is reliable in that they testified on events they observed from sufficiently close proximity of 22 and 9 metres with good visibility. That evidence before court is to the effect that at all material times during this incident deceased only drew the knife after being confronted by the accused. That on the last



occasion, the accused confronted deceased for being hurt earlier with the knife on the wrist. That accused knew that the deceased was drunk, that he had a knife and that he is likely to use it.

[19] Counsel rightly so submitted that the deemed discrepancies or contradictions argued by the defence between the witness's statement (Hilya) and her testimony is immaterial as the witness has clearly explained the discrepancies under oath. Further that accused's testimony that it was Abel's idea to follow the deceased for the bottles; that he was stabbed on the wrist from behind and the alleged slap and insult by the deceased and the stabbing of the accused in the abdomen whilst the deceased was holding the accused by the collar of his t-shirt are testimony fabricated and tailor-made to suit the alleged self-defence and should be rejected..

[20] In substantiating her argument Counsel referred this court to a recent case of *State v Malakia Penda Nanyemba* (CC 12/2018) [2021] NAHCNLD 20 (9 March 2021) in which an accused raised self defence as a ground of justification and Small AJ at page 17 para 63 in referring to *S v Monkoto* 1971 2 SA 319 (A) at 324 stated that: 'In considering private defence and the evidence presented in each case, it is essential to understand that in a fight, the unlawful attack need not emanate from the original aggressor and the attack might be unlawful even if provoked.' Counsel contented that this attack could not have happened if such confrontations could have been avoided.

[21] Counsel lastly submitted that there is no evidence before this court that accused's life was in imminent danger and in the light of the evidence and all admissible evidential material, she submitted that accused intended to kill the deceased and he did not act in self-defence. Alternatively he grossly exceeded the bounds of self-defence and knew it. In the further alternative, he foresaw the reasonable possibility that he was exceeding the bounds of self-defence and proceeded nevertheless-regardless of whether or not he was exceeding the bounds of self-defence. (See *David Silunga v The State* (SA-2000-1) [2000] NASC 5 (8 December 2000))

[22] To the contrary counsel for the accused submitted that the evidence placed on record does not support a charge of murder in that the elements of unlawful and intentional killing of another human being have not been proven by the State. She further submitted that there is no evidence from the State witnesses to support nine wounds during altercation, this submission could not be correct. The evidence of Doctor Ricardo was well on point and the post-mortem report clearly indicates nine wounds sustained. She further submitted that there is no testimony that the deceased did not sustain other injuries from being transported at the back of the truck without a mattress and being picked up by untrained persons. These submissions were made notwithstanding the fact that the state led the evidence of the driver who testified that during transportation no further injuries were sustained by either of them. In her view the State had also failed to call witnesses to testify on the motive for the killing.

[23] Counsel further submitted that, in the present case, the accused person acted in self-defence after being provoked. Counsel referred this court to the following cases as authority for her submissions. These are *S v Johannes* HC-NLD-CRI-SLA-2019/00079) [2020] NAHCNLD 50 (07 May 2020), *S v Boois* (CC 8/2016) [2018] NAHCMD 226 (27July2018) and *S v Jonkers* 2006 (2) NR 432. She further submitted that accused was insulted and assaulted by the deceased calling him useless among other things that the deceased held the accused from behind and stabbed him on the wrist and later stabbing him on the side of his stomach. The accused was attacked and he had to use whatever means necessary to safeguard his life against an unlawful attack by the deceased. According to counsel accused merely feared for his own life at the time. He chose to fight back although he had no intention of killing the deceased before conceding that from the *viva voce* evidence of the witnesses and on his own admission accused indeed overpowered his assailant, removed the knife and stabbed him multiple times.

The applicable law

[24] It is common cause that on the date in question there was a fight between the accused and the deceased; that the deceased stabbed the accused with the knife firstly on the left hand wrist and again on the stomach; accused sustained serious injuries as a result of being stabbed by the deceased; that the accused overpowered the deceased, removed the knife and stabbed the deceased with his own knife; that the deceased died as a result of multiple injuries inflicted on the deceased by the accused as depicted in the post-mortem report Exhibit "J2".

[25] The only issues in dispute are whether the accused was acting in self-defence at the time he stabbed the deceased and if he was indeed acting in self-defence whether he exceeded the bounds of self-defence.

[26] I share the sentiments that in considering private defence and the evidence presented in each case, it is essential to understand that in a fight, the unlawful attack need not emanate from the original aggressor.<sup>2</sup>

[27] I am alive that when an accused raises self-defence in a murder trial, the State carries the burden of proving beyond reasonable doubt that the accused did not act in self-defence and the accused has no duty or burden whatsoever to prove his innocence.

[28] Private defence is defined by Snyman<sup>3</sup> as

‘Definition: A person acts in private defence, and her act is therefore lawful, if she uses force to repel an unlawful attack which has commenced, or is imminently threatening, upon her or somebody else’s life, bodily integrity, property or other interest which deserves to be protected, provided the defensive act is necessary to protect the interest threatened, is directed against the attacker, and is reasonably proportionate to the attack.’

[29] In *Naftali*<sup>4</sup> the court set out the requirements of private defence as follows:

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<sup>2</sup> *State v Malakia Penda Nanyemba* (CC 12/2018) [2021] NAHCNLD 20 (9 March 2021)

<sup>3</sup> Snyman, C R (2008) *Criminal law* 5<sup>th</sup> ed. Durban: Lexis Nexis at 103

<sup>4</sup> *Naftali* 1992 NR 299 HC at 303-4

'Self defence is more correctly referred to as private defence. The requirements of private defence can be summarized 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. When the defence of self-defence is raised or apparent, the enquiry is actually twofold. The first leg of the 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 here is objective but the onus is on the 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.'

[30] When the test of reasonableness and the conduct of the hypothetical reasonable man is applied, the court must put itself in the position of the accused at the time of the attack. If the State does not discharge this onus, then accused must be acquitted. On the other hand, if the State discharges the said onus, that is not the end of the matter and the second leg of the enquiry must be proceeded with. The second leg of the enquiry is then whether the State has proven beyond reasonable doubt that the accused did not genuinely believe that he was acting in self-defence and that he was not exceeding the bounds of self-defence. Here the test is purely 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 of whether or not the accused held the aforesaid genuine belief. If the State discharge the onus to prove beyond reasonable doubt that the accused held no such genuine belief, then the accused must be convicted of the charge of murder. If the said onus is not discharged, then the accused cannot be convicted of murder requiring mens rea in the form of dolus, but can be convicted of a crime not requiring dolus but merely culpa, such as culpable homicide. Culpable homicide will be a competent verdict where, for example, the accused, although he genuinely believed that he acted in self-defence and within the bounds of self-defence, was not, objectively speaking, acting reasonably in holding the aforesaid belief.'

### Evaluation of the evidence

[31] Having stated the legal position of private defence I now proceed to relate the facts of this case to the law. Accused having admitted that on that fateful day he succeeded in removing the knife from the deceased, he attacked the deceased repeatedly with the same knife and inflicted fatal injuries on the deceased who succumbed to the injuries at the hospital. It follows therefore that the only issues for determination are unlawfulness and intention.

[32] In determining whether accused's conduct was unlawful, this court has taken into account the circumstances of the threat or attack that was directed at the accused and the possibility of fatality arising therefrom as well as the emotional pressure the accused was exposed to as testified. This court went further to assess the evidence of Abel and Hilia the key state witnesses in that the accused was firstly stabbed when he followed the deceased to reclaim the bottle of tassenberg and again when he confronted the deceased regarding the injuries he initially sustained on his hand. In that regard it could be safe to say at that moment accused perceived the imminent danger had of being attacked by the deceased. However there is evidence that accused succeeded in removing the knife from the deceased, was in control of the knife and stabbed the deceased multiple times.

[33] Counsel for the State correctly submitted that by the time the deceased was lying down on the ground and accused sitting on his stomach the danger had ceased to exist. I agree with the submission when regard is had to the dictum enunciated in *Nanyemba's* case.<sup>5</sup>

[34] Furthermore, accused was not honest in his evidence. His testimony of being stabbed on the wrist from behind, of being slapped by the deceased outside the cuca shop and the alleged stabbing in the abdomen while the deceased was holding him by the collar of his t-shirt were tailor made to suit his version. Such evidence was disputed

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<sup>5</sup> Supra

by the two eye witnesses whose evidence was not displaced in cross-examination. At that moment the threat to his life having been removed, any action taken by the accused could not be self defence. Such conduct amounts to grossly exceeding the bounds of private defence. In this case, I find no justification that necessitated the use of the knife on a defenceless person if the attack on him by the deceased has already ceased at the time of the stabbing. His version fell short of satisfying the first leg of the requirement of self-defence and is rejected as implausible and unreliable. The court accepted the version of the state witnesses.

[35] On the question whether the accused had intention to murder the deceased or not regard is had that accused in this matter had ample time to reflect and desist from his unlawful and intentional thoughts but proceeded to stab the deceased profusely well knowing that the deceased is disarmed. To further demonstrate the accused's intention to kill the deceased is the fact that the accused, not only did he stab the deceased once but multiple times on his body. According to the post mortem report and the testimony of Dr. Ricardo, the deceased was stabbed nine times with an Okapi knife on the upper part which is the most vulnerable part of the human body. Further accused's intention can be deduced by the fact that after stabbing the deceased he did nothing to assist the deceased instead he threw away the knife and left the scene as if nothing happened. Although the deceased could have been the initial aggressor accused knew the person he was dealing with and could not have confronted the deceased the way he did. The most logical thing expected of a reasonable person in the circumstances in which accused found himself was to refrain from confronting the deceased having known him as a violent person, who was drunk on the fateful day and was armed with a dangerous weapon. Although by law accused has no duty flee he could have walked away with the knife and/or report the matter to the police instead.

[36] The accused's conduct during and after the stabbing, the number of wounds inflicted, the seriousness and the location where those wounds were inflicted and lethal weapon used on a human being, appears to suggest a deliberate motive.

[37] For the reasons stated above, this court is satisfied that the state has proved beyond reasonable doubt that the accused intended to bring about the death of the deceased and he subjectively foresaw death as a substantial possibility when he inflicted multiple injuries on an unarmed person who was lying on the ground after defusing the danger.

[38] I accordingly find the accused guilty of murder with direct intent.

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J T Salionga  
Judge

APPEARANCES:

For the State:

Ms M Nghiyoonanye  
Office of the Prosecutor General, Oshakati

For the accused:

Ms B Boois  
B Boois Attorneys, Ongwediva