

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case No: CC 4/2018

In the matter between:

THE STATE

v

PATRICK SHUYA MESHO

ACCUSED

Neutral citation: *S v Mesho* (CC 4/2018) [2022] NAHCNLD 109 (13 October 2022)

Coram: KESSLAU AJ

Heard: 7-10 June 2022; 14 June 2022; 16 June 2022; 7 July 2022

Delivered: 13 October 2022

Flynote: Criminal Law – Criminal capacity – Emotional stress and Intoxication – Defence of temporary non-pathological criminal incapacity raised – Onus on State to prove accused criminally responsible – Presumption that sane person acts consciously and voluntarily – Accused to lay a proper foundation for such a defence to create a reasonable doubt – Exculpatory statements to be repeated under oath unless the State failed to negate defence - Court to decide question of criminal capacity on totality of evidence.

Summary: Accused charged with two counts of murder for the unlawful killing of his ex-girlfriend and her new partner and furthermore charged with two counts of attempted murder. Accused pleaded not guilty and the basis of his defence is that, prior to the incident which led to the deceased's death, he was under emotional stress, had smoked cannabis and consumed traditional homebrew. His memory was clear up to a point where after he has no recollection until after his arrest later that day. Accused did not testify and presented no medical or expert evidence. After considering the evidence about the accused's behaviour immediately before, during and after the incident, it was concluded that the accused's defence was not reasonably possible and rejected as false. On the evidence it was established that the accused had acted with direct intent when committing the offences.

ORDER

1. Count 1: The accused is found guilty of murder with direct intent (read with the provisions of the Combating of Domestic Violence Act 4 of 2003).
2. Count 2: The accused is found guilty of murder with direct intent.
3. Count 3: The accused is found not guilty of attempted murder however in terms of section 258(e) of the CPA is convicted on the competent verdict of assault (by threat).
4. Count 4: The accused is found not guilty of attempted murder however in terms of section 258(b) of the CPA is convicted on the competent verdict of assault with the intent to do grievous bodily harm.

JUDGMENT

KESSLAU AJ:

[1] The accused is arraigned before this Court on four charges *to wit* Count 1: Murder (read with the provisions of the Combating of Domestic Violence Act 4 of 2003); Count 2: Murder; Count 3: Attempted murder and; Count 4: Attempted murder.

[2] The State alleges that these incidents occurred on 1 February 2017 at or near Cowboy Compound in the district of Katima Mulilo. Regarding count 1, Murder (read with the provisions of the Domestic Violence Act 4 of 2003), the charge alleges that the accused unlawfully, wrongfully and intentionally killed Ronnica Sipepiso Mashale, a 24 year old female, by stabbing her multiple times with a knife all over her body and that the accused and deceased were previously romantically involved in a domestic relationship.

[3] The second count of murder alleges that the accused unlawfully, wrongfully and intentionally assaulted Fredi Jona, a 31 year old male, by stabbing him multiple times on his head and body with a knife, inflicting wounds on the said victim which resulted in his passing the next day in hospital.

[4] Counts 3 and 4 are charges of attempted murder alleging that the accused unlawfully, wrongfully and intentionally attempted to murder Kemba Flora Elaine by chasing after her armed with a knife with the intent to stab and murder her and furthermore, in an attempt to murder Lafalaza Monica Nalufu, stabbed her on her left shoulder.

[5] The accused, represented by counsel, plead not guilty to the charges and presented a statement in terms of Section 115 (1) of the Criminal Procedure Act 51 of 1977 as amended (CPA).¹ Relying on the defence of temporary insanity or non-pathological insanity, the accused denied the intention to commit any of the offences. He stated that the non-pathological insanity was caused by a combination of emotional stress followed by the smoking of cannabis and the consumption of traditional beer ('pwaka').

[6] The statement by the accused confirmed that he and the deceased in count 1 were in a romantic relationship and were living together in her house. After some absence from their home and upon his return he found his girlfriend in bed with another man (the deceased in count 2). He was then told that the relationship was over which caused him sadness. He decided to numb his emotions and smoked

¹ Exhibit 'B'

some cannabis. Having the desired effect, he manage to sleep for a few hours and woke up later that afternoon. He stated that he then smoked a second 'bankie' of cannabis after which he was relaxed but thirsty. He then proceeded to Nora's Bar and smoked the last of the cannabis before entering. He remembers sitting down and sharing traditional beer with other customers. Even though he noticed his ex-girlfriend and her new partner at the same bar, he was not bothered by their presence. He remembers drinking more traditional beer, listening to music and being in a happy mood. Shortly thereafter he recalls seeing blood and everyone was running away. He had a knife in his hands which was full of blood. He recalls seeing his ex-girlfriend lying on the ground covered in blood. The police informed him the next day that he killed people at Nora's Bar. The accused stated that he suspects the cannabis he had smoked in combination with the beer caused him to be intoxicated to such an extent that he had no control over his mind or actions.

[7] The accused, with assistance of his counsel, made admissions in terms of section 220 of the CPA. The time, date and place of the incident regarding all four counts; the identities of the deceased persons in counts 1 and 2 and the identities of the victims in counts 3 and 4 were admitted; that he and the deceased in count 1 were in a domestic relationship, that he stabbed the deceased persons in counts 1 and 2 and that these stab wounds caused their deaths, that he chased the complainant in count 3 with a knife and; that he stabbed the complainant in count 4 with the knife. The admissions by the accused implies that he agrees with causing the death of his ex-girlfriend and Fredi Jona. Furthermore that he accepts the allegations surrounding the two additional charges. Considering his defence of non-pathological insanity, the onus is still on the State to proof his guilt beyond reasonable doubt.

[8] The State presented a photo plan² and sketch plan³ depicting, amongst others, the scene and surrounding area in the suburb of Cowboy in the town of Katima Mulilo. Nora's Bar is shown as a house with a trimmed privet marking the border to the street. There appears to be two entrances, to the left, one for vehicles and another for pedestrians to the right. Two mango trees are inside the yard with

² Exhibit 'O'.

³ Exhibit 'P'.

makeshift wooden benches in the shade for customers. When passing behind the left side of the house it is possible to cross into the neighbouring property and onto the next street. When crossing this street, another house is located where the body of the deceased (count 1) was discovered. This house in turn borders the house of the deceased (count 1).

[9] A knife was handed in by agreement which can best be described as a dagger with a total length of 29 centimetre of which the blade is 17 centimetre long⁴.

[10] The accused, claiming non-pathological insanity, left the evidence presented by the State for the most part unchallenged. Evidence from various eye-witnesses painted the following gruesome picture.

[11] On 1 February 2017 sometime between 10h00 and 12h00, Ronnica Sipepiso Mashale accompanied by Fredi Jona and a female friend, Lafalaza Monica Nalufu, arrived at Nora's bar. Whilst there the accused arrived and sat down under one of the mango trees. Some time passed after which Sipepiso, who was dancing at the entrance to the bar, left to the back of the house assumingly to visit the toilet area. The accused followed her to the back and after approximately 20 minutes, having circled the property, returned from the opposite side, once again entering through the small privet entrance at the front.

[12] The accused sat down for a moment, then stood up. He walked passed some customers, then produced a knife and started stabbing Fredi Jona on his head and back which caused Fredi Jona to fall down. Thereafter the accused once again disappeared to the back of the house in the direction Sipepiso and he had previously left. The accused found Sipepiso lying next to the house across the street. She was wounded, lying face down and breathing with difficulty. He then stabbed her four times in the back while an eye-witness, Mendai Charity Mpule, was pleading between each stab for him to stop. Finally she reasoned with him that Sipepiso might still be alive and to consider his children who might suffer due to his actions. Thereafter the accused did a trick with the knife by throwing it in the air and catching

⁴ Exhibit '1', Exhibit 'O' photo 48.

it in the other hand. He then found his shoes that were left in the street, put them on, and returned to Nora's bar, this time not using the front entrance.

[13] Upon the accused's return to the bar, two customers were supporting Fredi Jona at the side of the street as they were trying to him to hospital. The accused however started to chase after them still armed with the knife. The three managed to escape as they were warned by a crowd, including the victim Flora, of the accused coming for them. Flora then reprimanded the accused by telling him that 'you have finished killing people's kids'. After she yelled these words the accused started to chase her. She was carrying a two year old child. Whilst running away from him she tried to get over a fence, got strangled in a wire and fell down. The accused reached her, bend down and lifted the knife in a threatening manner. Flora screamed and begged for the accused to stop.

[14] At the same time the friend of Sipepiso, Lafalaza Monica Nalufu, exited the house, carrying a child. The accused then turned his attention to them. He chased her and when she stopped to untie the child from her back, the accused reached them and stabbed her with the knife in her shoulder. She fell down and thereafter the accused crossed the road to a neighbouring building and sat down on a bench with the dagger stuck in the sand next to him. This is where he was arrested by the police.

[15] Ronnica Sipepiso Mashale passed away on the scene whilst Fredi Jona made it to hospital where he passed on the next day. The witnesses testified that the accused had some liquor however not a lot as he was drinking 'as if not interested'. There was no prior quarrel to the attack and the accused did not utter any words during the attack. Evidence from the arresting officer was that the accused smelled of alcohol. Mendai Charity Mpule, a neighbour to Sipepiso, testified that the accused moved out of the shared residence about a month prior to the attack. When it was put to her in cross-examination that there was no prior incident of violence, she said that she witnessed a previous attack from the accused on the deceased when he was hitting her for an unknown reason on the head with a stick.

[16] Medical evidence were presented by the State in the form of post mortem reports. Findings were that the deceased in count 1, Ronnica Sipepiso Mashale, died of a perforation to the heart and massive bleeding. A total of fourteen stab wounds were noted to her chest, breasts, upper limbs and left thigh varying in length from 2 to 7 centimetre. One of the wounds to her chest penetrated into the chest cavity and caused a fracture of the 4th and 5th ribs.⁵ The post mortem conducted on Fredi Jona found two stab wounds to the posterior of his head and another two wounds to his back which resulted in the perforation of his lung and his subsequent death.⁶ Lafalaza Monica Nalufu suffered a penetrative wound of 3 centimetres by 1 centimetre to the left shoulder.⁷

[17] Considering the principles in *R v Blom*⁸ regarding the drawing of inferences, from the evidence presented it can safely be inferred by this court that the accused on the fateful day attacked the deceased Sipepiso on two separate occasions. The first time when he followed her, circled the property and returned. The second time, when he revisited the scene and found her laying face down while struggling to breath. There was a witness to the second attack where she was stabbed four times on her back, however the witness found her already fatally wounded whilst medical evidence found a total of fourteen stab wounds. The only reasonable inference to be drawn from the proven facts is that ten stab wounds were inflicted by the accused on the deceased during the first attack.

[18] Upon the close of the State's case an application for a discharge in terms of section 174 of the CPA in respect of all charges was brought by defence counsel. It was submitted that the State failed to prove the element of intention to commit the offences as the plea of the accused properly laid a basis for the defence of non-pathological insanity which the State failed to negate. The State opposed the application.

⁵ Exhibit 'G'.

⁶ Exhibit 'K'.

⁷ Exhibit 'N'.

⁸ *R v Blom* 1939 AD 188

[19] Both counsel relied on the Supreme Court matter of *S v Hangue*⁹ in support of their respective submissions. In *Hangue* above, the Supreme Court quoted the following passage from *S v Eadie*¹⁰ regarding the defence of temporary non-pathological criminal incapacity, where Navsa JA restated the position as follows:

'It is well established that when an accused person raises a defence of temporary non-pathological criminal incapacity, the State bears the onus to prove that he or she had criminal capacity at the relevant time. It has repeatedly been stated by this Court that:

- (i) in discharging the onus the State is assisted by the natural inference that, in the absence of exceptional circumstances, a sane person who engages in conduct which would ordinarily give rise to criminal liability, does so consciously and voluntarily;
- (ii) an accused person who raises such a defence is required to lay a foundation for it, sufficient at least to create a reasonable doubt on the point;
- (iii) evidence in support of such a defence must be carefully scrutinised;
- (iv) it is for the Court to decide the question of the accused's criminal capacity, having regard to the expert evidence and all the facts of the case, including the nature of the accused's actions during the relevant period.'

[20] Section 174 of the CPA states: 'If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.'

[21] In applying the above I considered that before court, at this stage, was the untested plea explanation of the accused. After considering the evidence presented, the plea explanation was not sufficient to create reasonable doubt. The accused's version was presented to the witnesses who could not confirm or deny his mental state except. Therefor there was a prima facie case for the accused to answer to, in that there was evidence upon which a reasonable court, acting carefully, may convict¹¹ and thus the application for a discharge was refused.

[22] The accused elected to remain silent and called no witnesses.

⁹ *S v Hangue* 2016 (1) NR 258 (SC) 280-281.

¹⁰ *S v Eadie* 2002 (3) SA 719 (SCA) (2002 (1) SACR 663) para 28

¹¹ *S v Lameck* (CC 11/2010) [2019] NAHCMD 347 (18 September 2019)

[23] Apart for the required intention of the accused to commit the offences, the elements of the two counts of murder were conclusively proved. Counsel submitted, and I agree, that the only question before court is whether the accused suffered from a temporary non-pathological incapacity which, if found to be present, will result in his acquittal on all charges. In other words was the accused, whilst under emotional stress and intoxication/drugged to such an extent that he was deprived of the capacity to appreciate the wrongfulness of his conduct or to act in accordance with this appreciation?

[24] It is trite law that the degree of intoxication, be it from alcohol or drugs, may impact on a person's criminal accountability when a crime is committed whilst that person is so intoxicated. In *S v Chretien*¹² the court recognised that various degrees of intoxication may arise which could affect a person's criminal liability.

[25] In this regard I wish to echo what was said in *S v Ngoya*¹³ by Damaseb JP: 'The defence of non-pathological incapacity cannot be had for the mere say-so of an accused person. There must be cogent evidence revealed during the evidence before a Court can find such a defence in favour of an accused person. The reason is obvious: it is such an easy defence to put forward and one it would be very difficult for the State to disprove; yet it remains the State's duty to disprove it beyond reasonable doubt if the evidential foundation for it has been laid.'

[26] In *the State v Rickets*¹⁴ the court discussed the presumption of sanity in relation to the defence of temporary non-pathological criminal incapacity and stated that:

'In order to prove that the act was voluntary, the State is entitled to rely on the presumption 'that every man has sufficient mental capacity to be responsible for his crimes: and that if the defence wish to displace that presumption they must give some evidence from which the contrary may reasonably be inferred.'¹⁵ The presumption of mental capacity is only provisional as the legal burden remains on the State to prove the elements of the crime, but

¹² *S v Chretien* 1981 (1) SA 1097 (A)

¹³ *S v Joseph Hakoonde Ngoya* (HC CC 10/2006) delivered on 12/05/2006 at par 43.

¹⁴ *The State v Rickets* (CC 08/2015) [2016] NAHCMD 30 para 22-23; *Januarie v S* (HC-MD-CRI-APP-CAL-2017/00047) [2019] NAHCMD 329 (06 September 2019)

¹⁵ An excerpt from the speech of Lord Denning referred to in *Bratty v Attorney-General for Northern Ireland* (1961) 3 All ER 523 at 534.

until it is displaced, it enables the prosecution to discharge the ultimate burden of proving that the act was voluntary’.

[27] The State argued that the accused had criminal capacity in the form of *dolus directus* when committing the offenses. It was submitted, and rightfully so, that the determination of intention of an accused normally requires a court to draw inferences from the surrounding circumstances of each case as the State will seldom be able to offer direct evidence of accused’s state of mind. Surrounding circumstances might include factors such as the nature and duration of the attack, the nature of any weapons used and the nature, position and extent of injuries inflicted.¹⁶

[28] Counsel for the accused submitted that the State failed to prove the intention of the accused and that evidence instead supported that the accused was using alcohol. Furthermore that the fact that the accused said nothing during the attack and him going to sit down on a bench afterwards indicated a person not in control of his mental faculties. It was furthermore submitted that when drawing inferences regarding the intention of the accused the accused should get the benefit of the doubt as from his actions there was not only one reasonable inference to be drawn that he acted with the required intention based on the proven facts.¹⁷

[29] In *S v Wiid*¹⁸ it was stated that: ‘Where the defence of a temporary non-pathological incapacity is raised, the onus rests on the State to rebut it, but a foundation should be laid in the evidence for the raising of the defence. If, on the evidence, there is a reasonable doubt whether the accused, at the time of the commission of the offence, had criminal capacity, he or she should be given the benefit of that doubt’.

[30] The final decision rests with the court to determine whether the accused had the requisite criminal capacity at the time of acting, having regard to the evidence and to all the facts of the case, including the accused’s decision not to testify and the nature of the accused’s actions at the relevant time¹⁹. The court will approach the evidence on which a defence of non-pathological incapacity flowing from emotional

¹⁶ *S v Van Wyk* 1993 NR 426 p 443

¹⁷ *S v HN* 2010(2) NR 429 (HC)

¹⁸ *S v Wiid* 1990 (1) SACR 561 (A), See also *S v Ritmann* 1994 NR 384 (HC)

¹⁹ *S v Dausab* (CC 10/2015) [2017] NAHCMD 199 (25 July 2017)

stress is based with circumspection, and such a defence must be subjected to scrutiny by the court²⁰. Furthermore, the court will be especially cautious in accepting the defence where the only basis for the defence is the accused's own version of events.²¹ Thus, where the accused's state of mind is in issue, it will not be easily found in favour of the accused unless he himself has given evidence on the subject.²² In *S v Tjiho*²³ it was made clear that exculpatory statements made by an accused during his section 115 plea explanation does not form part of evidential material unless repeated under oath, failure of which, allows the court to draw an opposing inference.

[31] When considering the evidence before court, there is only the version of the State witnesses. The accused did not testify, however defence counsel submitted that his plea was sufficient to displace the onus. Furthermore it was submitted that the lack of criminal capacity of the accused was proved by the State evidence presented based on: the fact that he did not say anything during the attack; that there was no prior quarrel; that he did not target specific group of people and; that he smelled of alcohol afterwards when arrested. I respectfully disagree with submissions by defence counsel that the plea offered and putting the accused's version to the witnesses was sufficient to lay a proper basis for the defence to succeed. In *Januarie v S*²⁴ it was held that sound evidence should be led in support of the defence of non-pathological criminal incapacity and that it is not sufficient to merely allege such defence without laying a proper foundation. This was a case where remaining silent in the face of the evidence presented was damning and thereby the accused left a prima facie case to speak for itself.²⁵

[32] The onus is on the State to proof the required intention and criminal capacity beyond a reasonable doubt. In applying the principles stated in *S v Hangué*²⁶ the evidence needs to be carefully scrutinised to decide the question of the accused's

²⁰ *S v Amwandi* (CC 1/2013) [2016] NAHCNLD 34 (28 April 2016)

²¹ Criminal Law, 7 edition, C.R. Snyman, page 142

²² *S v Shivute* 1991 NR 123, *S v Auala* 2010(1) NR 175; *S v Haikele and others* 1992 NR 54

²³ *S v Tjiho* 1990 NR 266

²⁴ *Januarie v S* (HC-MD-CRI-APP-CAL-2017/00047) [2019] NAHCMD 329 (06 September 2019)

²⁵ *Machili v S* (CA 35/2017) [2017] NAHCMD 334 (27 November 2017)

²⁶ *S v Hangué* 2016 (1) NR 258 (SC) 280-281; *S v Khamuxas* (CC 20/2012) [2014] NAHCMD 381 (15 December 2014)

criminal capacity, having regard to all the facts of the case, including the nature of the accused's actions during the relevant period.

[33] The following facts indicates that the defence of non-pathological insanity is unsupported and that, on the contrary, it is indicative of calculated, reasoned, targeted and controlled behaviour from the accused whilst having full control over his physical abilities: The accused was aware of his surrounding as he could recognise the opportunity to follow his ex-girlfriend when she walked to the back of the property; he had sense of direction and with the intent to hide his actions circle the property and return from the opposite side whilst hiding his knife; he had the physical skills to perform the act of stabbing repeatedly (19 times); he had the ability to recognise vital and vulnerable parts of the body and aim for these; he could recall where he left Sipepiso wounded after the first attack and revisited this scene; he had the physical and mental ability to do a trick with the knife which required control and skill; he managed to find his shoes that he left in the street and was able to put them on; the attack was targeted in that he passed other people to attack his ex-girlfriend, her new partner, the friend of his ex-girlfriend and Flora who was instructing him to stop his behaviour; the accused reacted when addressed by both Flora and the witness Mendai by looking at them and thus acknowledging their words; the accused listened to reason when Flora begged for her life; the accused listened to reason when the witness Mendai argued that Sipepiso might still be alive and he must consider his children and; finally the whole ordeal played out for an extended period of time wherein the accused was able to complete different actions displaying full physical control over his body. When regard is had to the evidence from Mendai that the accused had left the common house a month prior to the incident and his plea explanation regarding the alleged infidelity, it can safely be inferred that the crimes were premeditated.

[34] Considering the above the defence of the accused is rejected as false beyond reasonable doubt and I find that the accused had the ability to appreciate the wrongfulness of his conduct and the ability to conduct himself in accordance with such an appreciation.

[35] In *S v Khoikhoi*²⁷ it was stated as follows with regard to intention and the inferential reasoning to be adopted.

'Whereas the court rejected the accused's evidence pertaining to the circumstances surrounding the stabbing of the deceased, the accused's intention must be determined by way of inferential reasoning. The test is subjective and by looking at the evidence related to his outward conduct at the time, the type of weapon used, at which aspect of the body it was directed to, the nature of the injuries inflicted and the objective probabilities of the case, the court is able to draw inferences consistent with the proven facts'

[36] Regarding the two counts of murder, I will consider the following to determine the form of intention proved by the State. The accused was armed with a deadly weapon in the form of a dagger; much force was used to inflict penetrative wounds; the wounds were inflicted on vital parts of the victim's bodies; both deceased were repeatedly stabbed and; the fact that the accused targeted his ex-girlfriend and her new partner, is an indication that he acted in revenge. Thus in all probability the offences were premeditated. From the above it is clear that the accused acted with direct intent. Having reach the conclusion, I am satisfied that the State proved the offences of murder in counts 1 and 2 beyond reasonable doubt as the evidence overwhelmingly speaks for itself.

[37] When applying the said inferential reasoning to the third count, attempted murder, the following facts are present: the accused stopped his attack when the victim Flora was on the ground, he did not stab in her direction as the knife was only lifted at this stage. One inference to be drawn is that the accused attempted to stab the victim but was interrupted, which will then allow a conviction as charged. However another inference that can be drawn from these facts is that the accused wanted to scare the victim into submission and thus committed the offense of assault by threat. Given the possible probability that he had the intention of threatening her into silence, the accused will be given the benefit of the doubt.

[38] Similarly on the fourth count of attempted murder, the facts presented were that the accused stabbed the victim once in her shoulder, there was no evidence

²⁷ *S v Khoikhoi* (CC 01/2014) [2015] NAHCMD 51 (10 March 2015); See also *Shaalukeni v The State* (HC-MD-CRI-APP-CAL-2020/00114) [2021] NAHCMD 406 (10 September 2021)

presented on whether the wound was life threatening or the treatment required.²⁸ Furthermore the accused seized his actions once the victim fell down. An inference in this regard does not conclusively point to only attempted murder as it might be that he had the intention to cause her grievous bodily harm her.

[39] In the result the court finds as follows:

1. Count 1: The accused is found guilty of murder with direct intent (read with the provisions of the Combating of Domestic Violence Act 4 of 2003).
2. Count 2: The accused is found guilty of murder with direct intent.
3. Count 3: The accused is found not guilty of attempted murder however in terms of section 258(e) of the CPA is convicted on the competent verdict of assault (by threat).
4. Count 4: The accused is found not guilty of attempted murder however in terms of section 258(b) of the CPA is convicted on the competent verdict of assault with the intent to do grievous bodily harm.

E. E. KESSLAU
ACTING JUDGE

²⁸ Exhibit 'N'.

APPEARANCES

FOR THE STATE: Ms. S. Petrus
Office of the Prosecutor - General, Oshakati

FOR THE ACCUSED: Mr. L.P. Shipila
Directorate of Legal Aid, Oshakati