

THE STATE versus FRANS HASEB

CASE NO. CC 37/99

Silungwe, J.

2000.05.03

CRIMINAL PROCEDURE

COMMON ASSAULT: Elements of common assault - applying of force to the person of another - inspiring a belief that force is immediately to be applied against the victim.

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

versus

FRANS HASEB

CORAM: SILUNGWE, J.

Head on: 1999.09.15

Delivered on: 1999.09.15

JUDGMENT:

SILUNGWE. J.: The accused, who is aged 28 years, has pleaded not guilty to the crimes of murder and assault. On the murder count, it is alleged that on April 3, 1998, at Khoieb location, Otavi, the accused unlawfully and intentionally killed Mariane Garises a female person (hereafter referred to as the deceased).

The second count of assault alleges that on the same date and at the same place as on the third count, the accused did wrongfully and unlawfully assault Juliane Hai-oses by throwing stones at her and thereby causing her injuries.

Ms Wellmann represents the State and Miss Hamutenya (on instructions by the Directorate of Legal Aid) appears for the accused.

On the basis of first things first, I will start with the murder count. There is no controversy that the deceased, then aged about 28 years, died of stab wounds on April 3, 1998, at about 23h00. As I see it, two substantive issues emerge for determination, namely: who caused the deceased's death; and whether the death amounts to murder or culpable homicide?

On the evidence before me, the following facts are substantially not in dispute and I so find. Up until the deceased's demise, the accused and the deceased lived together as boyfriend and girlfriend and had a daughter, now aged three years. The accused, and a 20 year old man named Lukas Hoadom, were acquaintances. Martha Garises is the deceased's young sister and a girlfriend of Lukas' brother. Lukas and Martha were at the material time residing at the house of Lucia Cloete. Juliane Hai-oses is a cousin of the deceased and lives with her mother, the deceased's aunt, not far from Lucia's house.

During the day of April 3, 1998, the accused, the deceased, Martha, Juliane and Lukas were apparently together but nothing untoward occurred. The relationships among them were ostensibly harmonious.

At some stage in the evening of that day, at about 20h00, and seemingly by prior arrangement, the accused went to the house of Juliane's mother for the purpose of fetching the deceased. It so happened that the deceased and Juliane had gone to Lucia's house apparently to visit Martha and watch television. The accused then

proceeded to Lucia's residence. The State and defence evidence is divergent as to what transpired at Lucia's house and thereafter that night.

The State version (per Martha, Juliane and Lukas) is that when the accused arrived at Lucia's house where the deceased, Martha, Juliane and Lukas were sitting in the lounge watching TV, he knocked at the door and the deceased, together with Juliane, went to answer the knock. The accused said he was looking for Martha, not the deceased. When Martha saw the accused, he asked her where Lukas was; she responded that he was inside the house. Whilst the conversation between the accused and Martha was in progress, the deceased and Juliane went past the accused on their way to Juliane's home where the deceased had left her daughter. Presently, the accused followed the deceased and Juliane. When he stopped them, they obliged. The accused then threatened Juliane with stones which he was attempting to throw at her whereupon she became frightened and wasted no time in fleeing towards her home. Juliane was about 12-13 paces away from the accused when the latter attempted to throw stones at her.

Subsequently, Juliane saw the deceased also running towards her and calling her to hold her. Juliane held the deceased and they started to walk towards Juliane's home but, as the deceased was weak, she fell down. Juliane hurried home and summoned her mother's assistance.

As Juliane and her mother approached the deceased, she was walking towards them but, once again, she fell down, this time near the yard of Juliane's home. The police were alerted; they came over and took away the deceased's body.

Before then, and upon hearing the deceased's screaming, Martha called out Lukas and together proceeded in the direction of the screaming. However, when they saw the accused approaching them, Martha ran into a nearby yard for safety. Lukas was not so lucky for the accused stabbed him on the face and the back. Lukas then grabbed the accused by the hand but this did not help him to prevent the accused from stabbing him on the arm and the back. At long last, Lukas managed to push the accused away and to run home where Martha later found him and took him to a clinic for treatment. According to the evidence of Lukas and sergeant Jacobs Abel Mbeha, a charge of attempted murder was later preferred against the accused but this is yet to be prosecuted.

The medical evidence of Dr Ignatius Elendu shows that five wounds were inflicted upon the deceased. These consisted of two lacerated wounds each measuring 4cm long on the posterior aspect of both shoulders; two incised wounds both of which were 3cm long, one was over the para-spinal area of the upper left thorax and the other was over the right lumbar area; and one 1.4cm long perforating wound on the right infra clavicular area just medial to the shoulder. The upper lobe of the right lung was perforated and lacerated. Blood and air accumulated in the right chest cavity as a result of the 1.4cm wound which was fatal. Also fatal was the wound to the neck. There were multiple bruises and abrasions on the right forearm attributable to a struggle between the assailant and the victim. According to the Doctor, two knives were possibly used. Severe force was used to inflict the injuries. The cause of death was due to shock and inadequate oxygenization of the body tissues. In the absence of immediate medical attention, death in such circumstances can occur within 10 minutes.

Sergeant Mbeha, having conveyed the deceased's body to a mortuary, met the accused with a blood stained shirt at Otavi Police station. When asked what the sergeant could do to help him, the accused replied that he had stabbed his girlfriend, Mariane Garises, with a knife which, on request, was handed over to the sergeant and subsequently produced as exhibit 1. After sergeant Mbeha had warned the accused, the latter said: "I'm guilty with reasons." In his amplification, the accused stated that on his return from a farm, he left his girlfriend, Mariane Garises, at her mother's house and went for a walk in the evening of April 3, 1998. Upon his return to the house, he found his girlfriend was no longer there. Having received information to the effect that the deceased had a boyfriend, he went straight to the alleged boyfriend's house. This turned out to be Lucia's house where Lukas and Martha resided. On arrival at the house, the accused found the door open. At the door, the accused saw his girlfriend, the deceased, seated with her alleged boyfriend (who was obviously Lukas) plus two of her sisters. The accused then called one of the deceased's sisters and said: "You see, this is the thing which I used to tell you that my girlfriend is moving with that boy." The accused stated that, as he talked to the deceased's sister, the deceased came out with another sister and walked past him. The accused then followed the deceased and the other sister. When they were still nearby, he called them to stop; they did as requested whereupon he stabbed the deceased who then fled. When the accused gave his statement, he was calm.

I will, later on, consider the evidence of Jacobs, the Presiding Magistrate, and of the Court Interpreter, Musambani.

The gist of the accused's version is that when he knocked at Lucia's kitchen door, Martha came over and told him, on enquiry, that the deceased had returned home. Subsequently, the accused was allegedly going home and was already outside when he heard someone inside the house ask: "Who is looking for me?" The accused then stopped next to a gate; the deceased and Juliane then walked out of the house up to where he was standing. The accused told the deceased that the information he had received was that she had already gone home; the deceased replied that she had been in a toilet. The accused opened the gate and all three of them went out on their way towards the house of Juliane's mother where his and the deceased's child had been left. When they crossed a road and walked about 50m, Lukas came running from behind with a hunting knife in his hand and said: "You will see today, both of us will lose or both of us will feel pain". Lukas aimed a blow at the accused but the latter dodged it. The accused then took out his Okapi knife and with it started stabbing Lukas; he stabbed him three times. Whilst Lukas and the accused were engaged in this encounter, the deceased came along and intervened by asking them to stop and she attempted to separate them. But she was not as strong as the two combatants. When she interviewed, the accused was lying down and Lukas was on top of him. The accused managed to get up and push Lukas away. Thereafter, Lukas went in the direction of his home while the accused also walked towards his own home. The accused cannot say whether the deceased injured herself during the combat between himself and Lukas. When the accused got home, he did not see the deceased there, but he saw his mother and told her about his encounter with Lukas. His mother advised him to go the police and he acted on that advice.

At the police station, the accused found the police had already laid a charge against him. Sergeant Mbeha asked him if he was the one who has stabbed a lady and a man. In his reply, the accused admitted having fought with a man but denied having assaulted or touched the lady. The sergeant then asked him whether he should lock him up and the accused responded to the following effect: "Yes, go and lock me up because I stabbed Lukas and there is even blood on my shirt to show."

The accused denies having threatened Juliane or having done anything to her; and he maintains that her evidence is untrue. He further denies having picked up stones or threatened Juliane with such stones. The accused claims that the attack upon him by Lukas had taken him by surprise. He denies having made an admission during the Section 119 proceedings and goes on to say: "What I know and what I'm sure about is when I took out my knife I used it to stab Lukas with." He denies having told the Court Interpreter, Musambani, that he had stabbed Mariane Garises. When he talked to the Magistrate during the Section 119 proceedings, he made reference to Lukas, not to the deceased. He told the Court that he had stabbed Lukas twice on the head and once on the left eye. Maybe Lukas had a reason to come and fight him, so contends the accused; but there was no hostility between them.

In her submission, Ms Hamutenya contends that the accused is largely credible and that his explanation is reasonably possibly true. She concedes, however, that the state witnesses are also largely credible, with a few exceptions which she does not amplify.

She submits that there is no direct evidence and that the evidence available is circumstantial. She claims that the only evidence that implicates the accused is the Section 119 proceedings. She, however, relies on an allegation that there were communication problems between the interpreter, Musambani, and the accused during the proceedings aforesaid. The interpreter who interpreted from Damara into English and vice versa is portrayed as someone who is not conversant with the Damara Language.

The Learned Magistrate Jacobs who presided over the Section 119 proceedings maintains that he is satisfied that his record of April 8, 1998, is a correct record of what transpired on that occasion, namely: that the accused made an admission in terms of Section 220 of Act 51 of 1977. The said admission is a highly contested issue.

As the Learned Presiding Magistrate is not conversant with the Damara Language, the success or failure of the argument on this issue hinges upon the evidence of Mr Musambani, the court interpreter.

It is indisputable that at the material time, in April 1998, Mr Musambani was a senior court interpreter stationed at Grootfontein. He testifies that he has been speaking the Damara language since his childhood; that he attended a Damara Lutheran Church Kindergarten and a Damara Primary School from Grade 1 up to Grade 5; that he is fully conversant with the Damara Language; that he is one of the best interpreters in that language; and that he is available to be tested in the language anywhere.

Having heard both Mr Jacobs and Mr Musambani, I am satisfied that they are both credible witnesses and that Mr Musambani is not only fully conversant with the Damara Language but also that his interpretation in English/Damara properly reflects what the accused told the Magistrate's Court and what transpired on the material occasion. I am further satisfied that the Magistrate's Court properly explained to the accused what his rights were and cautioned him that he was not obliged to make a statement or to answer questions put to him. Thereafter, the accused said, and I quote:

" I understand and wish to make such a statement. I committed the offence as I caught the deceased with another man. We had a relationship. I called her and I confronted her. She ran off and I caught up with her again. I again confronted her, she denied my allegations. I became cross. I drew out the knife and stabbed her. The other man with whom I caught her also came and I also stabbed him. I then reported myself to the police.

Q: What kind of knife did you use?

A: It was an Okapi pocket knife with white handle.

Q: What was the length of the blade of the knife?

A: Accused showed a length of 60mm on the ruler.

Q: How many times did you stab deceased with the knife?

A: Three times.

Q: Where on her body did you stab her with the knife?

A: First on the left side of the neck and the other two on her back.

Q: The person you stabbed with the knife, was it Mariane Garises?

A: Correct.

Q: What was your intention when you stabbed her with the knife?.

A: I only wanted to injure her."

At this stage, Mr Jacobs explained to the accused the nature of the admission in terms of Section 220 of Act 51 of 1977. The accused said he understood, as the record of the proceedings shows.

COURT: May the Court record that what you said in you statement and you answers on questions from the court record as admission in of terms Section 220 of Act 51/77.

ACCUSED: Yes.

The Magistrate then proceeded to write the following in a paraphrased form:

That accused admits that on 3rd April 1998, at Otavi Khoab Location, district Grootfontein he stabbed Mariane Garises with an Okapi pocket knife three times. That the blade of the knife is 60mm long.

This was read out to the accused who confirmed that it was correct. I am satisfied that the accused made a clear and unequivocal statement of admission concerning the killing of the deceased and the circumstances in which she met her death. It is noteworthy that this admission closely resembles what the accused told Sergeant Mbeha under warning.

As regards the other State witnesses, I have no reason whatsoever to doubt the veracity of their evidence individually and severally. I am satisfied that what they have told the Court is substantially the truth of what transpired in this matter.

I reject the accused's version as a deliberate attempt to falsify what took place in this case. The truth of the matter is that he was driven by suspicion and jealousy to kill the deceased and a desire to teach her a lesson, let alone Lukas. I find that the accused's tale cannot reasonably possibly be true, and for this reason, it is rejected.

The accused had the opportunity to kill the deceased; when he frightened Juliane with the stones, causing her to flee to safety, he remained alone with the deceased. It was during that time that he stabbed her with exhibit 1, inflicting all the injuries, not just the three injuries admitted in the Section 119 proceedings. The doctor found that there were five stabbed wounds inflicted with severe force, two of which were fatal. The doctor indicates that two sharp objects could have been used. I think that he was probably mistaken about this as it is inconceivable that anyone else could have used another object to inflict injury upon the deceased. And the possibility of the accused having used two separate objects seems inconceivable. The version given by the accused to the effect that the deceased could have been injured when she intervened in the combat between Lukas and himself is nothing but a cock and bull story and it is hence dismissed.

On the totality of the evidence before me, I am convinced beyond a reasonable doubt that the accused was the aggressor against the deceased as well as against Lukas.

Although there is in this case strong circumstantial evidence, it is not the only evidence on which the case rests. Of equal importance is the accused's admission to both Sergeant Mbeha and the Learned Magistrate who presided over the Section 119 proceedings. It suffices to say that the evidence available is sufficiently cogent to

justify conviction on the murder count. I am satisfied that it was the accused who caused the death of the deceased and that he did so unlawfully and intentionally; that is to say, the accused murdered her.

I now turn to the assault count. The question of physical violence does not arise here as there is not evidence to that effect. Although what is alleged in the particulars of offence has not been established, to wit, that stones were thrown at Juliane and thereby caused her some injuries, the clear evidence adduced by the State is that the accused made gestures which suggested that he was going, or was about, to throw stones at Juliane which induced fear into her to such an extent that she ran away.

As I indicated in my earlier ruling at the "no case to answer" stage, the crime of assault consists in lawfully and intentionally (a) applying force to the person of another, or (b) inspiring a belief in that other that force is immediately to be applied to him/her. The law forbids the application of physical force of whatever sort and in whatever degree to the body of another person. Taking cognizance of the fact that the human body is made up not only of flesh and blood, but also of the mind, the crime of assault punishes, not only the application of force to the body but also to the mind. This it does by punishing as assault the inspiring of fear in the mind of a person that he/she is about to suffer physical harm. The crime thus protects not only the human body from injury, but also the person from invasions of the mental tranquility of the individual. The thrust of the latter form of assault is the creation of the apprehension in the mind of the victim of the assault. An assault is thus any act or gesture which induces in the mind of another an apprehension that he/she is about to suffer immediate personal violence and the person threatened must have reason to believe

that the assailant intends, and has the power immediately, to carry out that threat. See *S v Miya* 1996(4) SA 274(N) at 276A-277H; *Charles Rudolf Coertzen v State* Case No. CA 57/1996 (unreported); and Jonathan, Burchell and John Milton: Principles of Criminal Law, second edition, at pp 478 and 283.

/// casu. it is obvious that Juliane had reason to believe that the accused intended immediately to carry out the threat and that he had the power to do so. Had Juliane not fled, it is likely that physical assault could have been inflicted upon her. Obviously, the accused did not cherish the idea that Juliane should be present during his assault upon the deceased, hence his threat against her.

Ms Hamutenya submits that reasonableness has not been proved, but this submission is a misconception, in the light of what has been said above.

I am thus satisfied that the crimes of murder and assault have been proved beyond a reasonable doubt. Accordingly, I find the accused -

Count 1: Murder: guilty and I convict him as charged with *dolus eventualis*;
and

Count 2: Assault: guilty and he is convicted.



SILUNGWE, J.

ON BEHALF OF THE STATE

MS WELLMANN

Instructed by:

Office of the Prosecutor-General

ON BEHALF OF THE DEFENCE:

MS HAMUTENYA

Instructed by:

Directorate of Legal Aid