

"SPECIAL INTEREST"

CASE NO.: CC 14/2006

SUMMARY

THE STATE versus **ANDREAS SIMON (HAMPUDJA) NEHEMIA**

DAMASEB, JP

21/11/2006

Accused charged with murder. State failing to disprove accused drew knife to protect himself from the initial aggressor. Court therefore accepting accused's version that there was an initial aggression by another. Court also not satisfied that accused intended to kill initial aggressor when he stabbed the unintended victim who died. Court therefore not in position to 'transfer' intent on to the *actus reus* on the stabbing of the unintended victim. Accordingly, accused acquitted of murder but convicted of the competent verdict of culpable homicide because Court satisfied that in stabbing her, accused acted unlawfully and negligently.

IN THE HIGH COURT OF NAMIBIA

In the matter between

THE STATE

and

ANDREAS SIMON (HAMPUDJA) NEHEMIA

Accused

CORAM: Damaseb, JP

Heard on: 31.10 2006 – 03.11.2006

Delivered on: 2006.11.21

JUDGMENT

DAMASEB. JP: [1] Andreas Simon (Hampudja) Nehemia faces one count of murder. It is alleged that he, on or about the 17th day of August 2003 and at or near Eembo Village in the district of Eenhana unlawfully and intentionally killed Monica Mweshixwa by stabbing her with a knife on the chest and the right arm. The summary of substantial facts read into the record state as follows:

“On the 17th August 2003, the deceased was walking in the company of Frans Shihenuka Shihenuka, Dimbulukweni Shihenuka and Mandume Gideon in a mahango filed in the Eembo Village in the district of Eenhana. The accused arrived and an argument ensued between him and the deceased. The accused stabbed the deceased at least once with a knife on her upper arm whereafter he left the scene. The deceased died on the scene due to severe loss of blood caused by the stab wound(s).”

[2] In terms of s220 of the Criminal Procedure Act the accused admitted that the body of the deceased is that of Monika Mweshixwa; that she died as a result of a stab wound which he inflicted upon her, and that the body did not sustain further injuries on the way to the State mortuary.

[3] The s119 proceedings were admitted undisputed in this Court. The accused, amongst others, said the following in the s119 proceedings:

“Q – How did you kill her?

A – I stabbed her with a knife.

Q – How many times and on which part of her body?

A – I stabbed her once on the direction of chest. It was dark I could not say exactly where the knife struck.

Q – Do you dispute that you stabbed her on the right side of chest and right side of right arm?

A – No, it was dark it could be correct I stabbed her on those parts.

Q – Did she sustain any injury as a result of you stabbed her?

A – She sustained a stab wound on right side of her chest.

Q – Did you foresee that by stabbing the deceased with a knife on the chest you may cause her death?

A – Yes

Q – Do you dispute that the deceased died a result of the injuries you inflicted on her chest with the knife?

A – No

Q – Did you know that the law does not allow you to assault/injure any person whatsoever?

A – Correct

Q – Did the incident took place at or neat Eembo Village in Eenhana district?

A – Correct

Q – Do you dispute that this offence was committed on 17/08/03?

A – No

Q – Did you know and realize that by stabbing the deceased with the knife on the chest you were committing the crime and you can be punished for that?

A – Correct

Q – Why did you stab the deceased with the knife?

A – I found her with another man near their house in the land field.

Q – It is a crime to find an m... woman on the land field?

A – No

Q – Why then did you stab the deceased?

A – I intended to stab the man who was with the deceased because he knew the deceased was my girlfriend, but upon seeing me, he drew a knife against me.”

[4] In his plea explanation in this Court the accused repeated that he acted in *private defence* and *provocation*.

[5] The State called 6 witnesses in support of the indictment. The first was the medical doctor, Jori Jorge Mendez, who conducted the post-mortem. He

testified that the deceased died of acute external haemorrhage caused by a penetrating wound (4cm in depth and 1.5cm in length), inflicted with a sharp object to the right arm close to the axilla (armpit), touching the humerus (bone of the upper arm) only partially. The stab wound severed the brachial artery and brachial vein. The *artery* and the *vein* are tubes which convey the blood (respectively) from the heart, and to the heart: See Martin, E A, ed. *Oxford Concise Medical Dictionary* 6th ed. Oxford: Oxford University Press, 2003 at 49 and 728. Since these were severed according to the doctor the severe blood loss happened over a short time; and death was instantaneous.

[6] On the state's version, the stabbing was observed by 3 witnesses, namely:

- (i) Mandume Gideon
- (ii) Frans Shihenuka Shihenuka
- (iii) Dimbulukweni Shihenuka

[7] The first State witness was Gideon Mandume. He is now 17 years old and acquainted with both the accused and the deceased. On the date named in the indictment he was in the company of one Mweshipandeka on his way to Pombili's house when he met with Dimbulukweni Shihenuka and Frans Shihenuka who asked them to return to the house of Monika Mweshixwa (the deceased) whence they had just left. When they reached the deceased's house, Mandume testified, Dimbulukweni called out for the deceased. (It appears this was while they were in the mahangu field next to the house of the deceased.) Mandume's evidence is that the accused then wanted to know why Dimbulukweni was calling the deceased. It is not clear whether in response to the question by the accused, but according to this witness Dimbulukweni then said, "*That girl of mine, I like her so much; I want to marry her in the future.*" In context this was a reference to the deceased. On the version of Mandume when this exchange took place the deceased was inside the house. She later came out and asked Dimbulukweni, Mweshipandeka and the deponent to

accompany her to return someone's key at the house of Pombili. Dimbulukweni declined the request of the deceased because, according to Mandume, Dimbulukweni feared the accused might beat the deceased.

[8] On Mandume's version, the accused then called the deceased to come to him – which she did; and when she returned she held Dimbulukweni's hand. Seeing this, the accused called the deceased but she said the accused should rather come to her. The accused came and held the deceased by the hand and the duo walked away. The next Mandume says he heard was the deceased say to the accused: *"Leave me; I said I don't want you!"* . According to Mandume the deceased then moved away from the accused and the accused walked towards her. At that moment, Mandume testified: *"I thought he hit her ... I heard him saying: I told you already your mother's."* Mandume testified that the expression *'your mother's'* is an insult. Mandume then heard the deceased say she had been stabbed. According to Mandume, at the time he thought the accused hit the deceased she had bent down as if she was throwing up. When he got to her though he established she was bleeding. Mandume's evidence is that the accused walked away in a hurry after stabbing the deceased.

[9] Mandume also testified that when the accused stabbed the deceased Dimbulukweni was about 6 meters away from the deceased and the accused. He said Dimbulukweni was actually with him. According to Mandume he never saw Dimbulukweni produce a knife and attempt to stab the accused. Mandume said he had no direct knowledge of the fact but heard that the accused had a love relationship with the deceased. He was firm however that Dimbulukweni had a relationship with the deceased.

[10] On cross-examination Mandume stated that a boy named Mweshipandeka only came out of the house after the deceased was stabbed. (This was to counter a suggestion made on cross-examination that Mweshipandeka was present during the events that lead to the deceased being stabbed.) Mandume

also testified that he never heard any statement by Dimbulukweni to the accused that he wants to propose to the deceased. He also denied that he heard the accused challenge Dimbulukweni to propose the deceased in his presence and asking if Dimbulukweni is afraid of him. Mandume maintained that Dimbulukweni and the accused exchanged the words he now testified about in reply to a suggestion made on cross-examination that the accused never spoke to Dimbulukweni. Mandume also denied that he heard anyone on the fateful night warn the accused and the deceased that Dimbulukweni was wielding a knife and that they should be careful. He also denied hearing the accused say to Dimbulukweni: *“That knife that you have will stab me today.”* Mandume also denied seeing Dimbulukweni push the deceased towards the accused and being stabbed as a result. When put to him (as the accused’s instructions) that Frans Shihenuka was not present on the fateful night, Mandume insisted that Frans Shihenuka was present. He stated that it was Mweshipandeka who was not present at the time.

[11] The next witness for the state was Frans Shihenuka. He is now 19 years old. He confirmed that he was present when the deceased was killed by the accused. He said that he was with Mandume and Dimbulukweni at the time, placing himself on the scene where the events leading to the death of Monika Mweshixwa unfolded.

[12] Like Mandume, Frans Shihenuka’s version is that on the date named in the indictment there was a confirmation celebration at the deceased’s to which he was also invited. He went there. While he was at the deceased’s house he heard Dimbulukweni call the deceased. The accused thereupon asked Dimbulukweni why he was calling the deceased, and according to this witness, the reply given by Dimbulukweni was: *“Maybe I want to propose to her.”* And the accused said *“Then propose to her.”* Frans’ evidence further is that the deceased then asked Dimbulukweni to accompany her to return a key to

someone at her grandmother's house. Dimbulukweni refused the request which was made twice.

[13] According to Frans the accused then told the deceased to come to him so they can go but she did not want and said she already told the accused she does not want him. According to Frans, Mandume, Dimbulukweni and he then moved some distance away from the accused and the deceased. The estimation he gave was about 20 meters away. He next testified: *"And when he went away... I saw Hampudja holding his hand into the pocket and then he lifted it up. I just heard, your mother's, I told you so."*

[14] Frans' evidence is that he then heard Monica ask: *"Hampudja, what did I do to you"*, and then fell to the ground. Frans said he and others then went to the deceased and discovered that she had died. Frans insisted that when the accused stabbed the deceased no one was near the accused and the deceased. In cross-examination he persisted that he heard the accused say to Dimbulukweni *"Propose to her now while I am here, are you afraid?"* Frans was persistent in his denial that Mweshipandeka was present at the time the events unfolded, maintaining that the latter only came after the deceased had been stabbed. Frans maintained that Dimbulukweni did not charge at the accused with a knife and denied that the accused ever charged at Dimbulukweni with a knife.

[15] The next witness to testify on behalf of the state is 17- year- old Thomas Mweshipandeka Matheus. He testified that the deceased was his aunt and that he was inside the house on the fateful night. He said he never saw how the deceased was killed and only went to see her lifeless body in the mahangu field after the event. Nothing was made in cross-examination of this witness. He however confirmed on cross-examination that Frans Shihenuka was present on the night the deceased died, contrary to the denial of the accused.

[16] The next State witness was Dimbulukweni Shihenuka. He knew both the accused and the deceased and confirmed that he was invited to the house of the deceased for her confirmation celebrations on the date named in the indictment. He said that he was with Mandume and Frans at the time. Initially they had been drinking at some other place but left to go to the deceased's place when they met the deceased on her way to deliver some keys. Dimbulukweni said the accused person then came from the front and confronted the deceased. According to Dimbulukweni, he then saw the accused raise his hand and thought that the accused assaulted the deceased but later established that she had been stabbed with a knife. He testified that the stabbing took place in the mahangu field next to the home of the deceased.

[17] Contrary to the tenor of the State's case so far, Dimbulukweni denied ever having been invited by the deceased to accompany her to deliver some key but confirmed that she mentioned returning a key to someone. Dimbulukweni denied ever hearing any exchange of words between the accused and the deceased and was vehement in his denial that he ever had any exchange of words with the accused. He denied any relationship with the deceased or that he had any interest in such a relationship. Dimbulukweni said the accused ran away after stabbing the deceased. Dimbulukweni said that when he got to the house of the deceased on the fateful night he never saw the accused (presumably until the events that unfolded in the mahangu field.) Dimbulukweni's evidence is that he was, on that fateful night, in the presence of Gideon Mandume and Frans Shihenuka.

[18] On cross-examination Dimbulukweni denied that the deceased ever held him on his hand or touched him. He also denied that he was requested but refused to accompany the deceased because he feared she would be beaten by the accused. Dimbulukweni denied that he ever had a knife that night. He denied that the ever ran behind the deceased and pushed her towards the

accused as a result of which she got stabbed. He said that he was not even close to them.

[19] The next state witness was detective constable Ben Shekutamba Shilongo who is the investigating officer. He is the one who took the body of the deceased from the mahangu field and retrieved the weapon used in the killing from the home of the accused after it was pointed out by the accused. It was an okapi knife. It was introduced as an exhibit in this Court.

[20] At the end of the state's case, the accused testified on his behalf. He called no other witnesses. He is a 34- year -old male who said he had a relationship with the deceased at the time. His evidence is that he accompanied the deceased to church on the 17th August 2003 as it was her confirmation. He said he returned with her to her home where they drank traditional beer. It was while they were thus drinking (and it appears Mandume and Mweshipandeka were also present) when the deceased sent Mandume and Mweshipandeka to some other place to fetch beer (referred to in evidence as the 'dumpsies'.) According to the accused, when Mweshipandeka and Mandume left, he and the deceased followed them. They caught up with the duo at the deceased mother's house and discovered that the deceased's mother refused to give the two boys the beer they had been sent by the deceased. The party then agreed to leave and decided to go to Pombili's house from where they came in the first place.

[21] On their way to Pombili's house, and while walking in the mahangu field, they came across Dimbulukweni who was carrying a radio. Dimbulukweni came towards him and the deceased, whereupon, the accused said, he moved a distance away from the deceased. He testified that he then heard someone warn that he and the deceased be careful as Dimbulukweni had a knife. The accused said that he then saw Dimbulukweni pass the deceased and come towards him with a knife in his hand. According to the accused, upon seeing

this he moved further away, turned around and said to Dimbulukweni: *“That knife you are having in your hands is going to stab me today?”* His evidence is that he then took out his knife and charged at Dimbulukweni who moved away and ran behind Monica’s back and pushed her towards him (the accused). It was then that he accidentally stabbed the deceased. According to the accused, when Dimbulukweni pushed the deceased towards him he had already commenced a motion to stab Dimbulukweni with the knife but accidentally stabbed the deceased who then said: *“Mother I’m stabbed.”*

[22] The accused testified that after stabbing the deceased he went home and informed his parents that he accidentally stabbed the deceased with a knife. He testified that he was in a state of shock which explains why he went away after the stabbing. He stated further that he had had no quarrel with the deceased that day. He denied that the deceased ever told him to leave her as she did not want him. The accused confirmed that he heard Dimbulukweni call out for the deceased and that his only reaction was to tell her that she was being called. He was adamant that he never spoke to Dimbulukweni that night.

[23] The accused also testified that he believed that Dimbulukweni was going to stab him with the knife and that as Dimbulukweni charged at him the former did not say anything.

[24] On cross-examination the accused testified that when Dimbulukweni called for the deceased she refused to go to him. He was adamant that there was no exchange of words between him and Dimbulukweni and that Dimbulukweni charged at him without any words being exchanged between the two of them. He testified that he did not know why Dimbulukweni charged at him. According to the accused on the way to Pombili’s house it was the four of them: Mweshipandeka, Mandume, Monica, and himself. He said that on the night in question the deceased was in his company, and when put to him that this was in contradiction with what he said at the s119 statement which

suggested that the deceased was with Dimbulukweni, he denied that he had said so at the s119 proceedings which he had no difficulty following as an interpreter translated for him. He at some point said: *“My Lord, if I had said that to the Magistrate then maybe I cannot remember it.”* He then later said that he recalled being asked by the Magistrate if it is a crime to find a man and a woman in the field. His response was that he had no intention of stabbing the deceased with a knife but that the lady was pushed into the knife by Dimbulukweni. The accused testified that he cannot remember if he told the Magistrate that he had stabbed the deceased because he found her with another man. He described such a version as a lie.

[25] On cross-examination, the accused said that when he produced the knife upon being charged at by Dimbulukweni, the latter ran backwards, went behind Monica and pushed her towards him. He said he had no intention of stabbing the deceased and wanted to defend himself against Dimbulukweni. He was asked why he had never said in the Magistrate’s Court that the deceased was actually walking with him when Dimbulukweni approached them and charged at him with a knife. He said that his intention was to tell *that* to the Magistrate but could not recall whether he did so. He added, for good measure, that it is possible that he had forgotten to tell the Magistrate that part.

[26] The accused said that he went on the offensive against Dimbulukweni as he was afraid of what Dimbulukweni would do to him with the knife. When asked why he charged with a knife when he had the opportunity to run, the accused testified that that did not cross his mind at that moment and that all that crossed his mind was that Dimbulukweni was going to stab him.

[27] The accused testified when asked for a motive that Mandume may have said the things he did in Court because he is a close friend of Dimbulukweni’s and that Mandume may have a grudge against him. He conceded though that

there is no animosity between the two of them. The accused also conceded that on the fateful night the deceased did not do anything which could have provoked him.

[28] In re-examination when effort was made to explain his s119 statement about finding the deceased and Dimbulukweni in the field, the accused said: *"My Lord if it is written there in my statement then its true that I have said that but it was not my intention to tell the Magistrate something that did not happen."*

[29] On questioning by the Court the accused said that it was either of Mandume or Mweshipandeka who warned him and the deceased about the knife. He testified that when the warning was given as Dimbulukweni charged at him, he moved away from the deceased as he thought that Dimbulukweni wanted to speak to her. He also responded in the affirmative to the Court's question that the s119 proceedings were discussed between him and his lawyer, and said that he had told his lawyer that he did not recall the things attributed to him therein. As I said at paragraph [3] above, the s119 proceedings were never placed in dispute.

[30] The accused confirmed that when Dimbulukweni retreated after the accused's charge, his back was facing the accused. Dimbulukweni thereafter turned back and came towards the accused with the knife. The accused said he moved a further 3 meters away which in total made it about 9 meters. He then charged back at Dimbulukweni taking out his knife and pursued him with the intention of stabbing him. When he caught up with Dimbulukweni --who by then had reached the deceased- Dimbulukweni went behind the deceased and pushed her towards him (the accused) and thus got stabbed.

[31] In providing answers to clarifications sought by the Court as regards the positions in which they (the deceased Dimbulukweni and the accused) found themselves at the time the stabbing occurred (which was done by demonstration) I was left in no doubt that the accused was conveying to the

Court that he, the deceased, and Dimbulukweni were so proximate to each other and that everything happened so quickly that stabbing the deceased was both accidental and unavoidable. He in fact suggested that the distance between him and Dimbulukweni on the one hand, and between the two of them on the one hand, and the deceased on the other, was a matter of a few centimeters only. On that version the accidental stabbing of the deceased could not be rejected as reasonably possibly true, if one were also to accept his version that it was Dimbulukweni who, without cause and justification, produced a knife and charged at him in order to harm him. However, in answering questions posed by Ms Nyoni for the State *that* version had, crucially, changed completely. On that new version, not only were the three of them not standing together at the time, but he was standing about 9 meters away from the deceased and Dimbulukweni when the latter first produced the knife and charged at him, but following the initial charge by Dimbulukweni he (the accused) retreated a further 3 meters and only thereafter produced a knife. He testified that when he thus produced the knife Dimbulukweni turned his back and ran away. The accused then pursued Dimbulukweni over *that* distance and caught up with him as he reached the deceased; and it was then that Dimbulukweni ducked behind the deceased and pushed her towards the accused. The answers elicited by Ms Hamutenya in clarification did not have the effect desired and the explanation given to the questions by Ms Nyoni stood unaltered. (I will return to this issue later).

[32] It is the duty of the State to prove the case against the accused beyond reasonable doubt. In doing so it must not only prove the elements of the offence charged, but must also disprove all the defenses raised by the accused. The accused is under no obligation to prove his innocence, and his innocent explanation should only be rejected if it is false beyond reasonable doubt and cannot be reasonably possibly true.

[33] The first issue I must resolve is whether the accused was initially charged at with a knife by Dimbulukweni. Had Dimbulukweni confirmed the version given by the State witnesses before him in every material respect, it would have been difficult to accept the accused's version in this regard. The problem is that Dimbulukweni disowned very important evidence given by the other State witnesses. He denied calling the deceased. He denied being asked to accompany her. He denied the accused wanted to know why he was calling the deceased and challenged him to propose her in his presence. He denied that he said anything suggesting that he had a relationship with her or that he had some interest in her. What he confirmed is the version that he never produced a knife and charged at the accused. He also confirmed that the accused was alone with the deceased when he stabbed her.

[34] Now why would Dimbulukweni's version differ in this way? Ms Nyoni says that Dimbulukweni was a reluctant witness. The State chose not to have him declared hostile and no basis was laid at all why he is said to be reluctant. What this discrepancy shows, however, is that either Dimbulukweni or the other witnesses are not being entirely truthful. The version given by the accused at the s119 proceedings is not inconsistent with the assertion that Dimbulukweni produced a knife first and charged at him. He said that the man who was with the deceased, upon seeing him, '*drew a knife against me*'. I therefore find that the State failed to disprove beyond reasonable doubt that Dimbulukweni drew a knife at the accused first.

[35] Next I must consider whether the accused was justified in acting in self defence or provocation, assuming Dimbulukweni was the initial aggressor. I have already pointed to the crucial respect in which the accused's version changed on how exactly the stabbing took place. I must add to this the accused's undisputed version at the s119 proceedings that he found the deceased with another man. Before me his version was that he was with the deceased when Dimbulukweni came. His explanation for this discrepancy does

not make sense. It is clear from the accused's own version that he pursued Dimbulukweni for about 9 meters before stabbing him and missing him, and striking at the deceased instead. He made clear that Dimbulukweni ran away. By thus producing the knife the accused had, in my view, warding off the initial attack by Dimbulukweni who was then on the run. By the accounts of all the witnesses, including the accused, these events took place not far from the house where other people were. It was perfectly reasonable to expect of the accused, once he warding off the attack, to seek protection by running into the house and raise the alarm. I therefore find that the accused was not acting in self-defence when he pursued Dimbulukweni. For the same reason, I reject the defence of provocation. I do not however find it established as false beyond reasonable doubt that the accused was pursuing Dimbulukweni with the intention to stab him.

[36] I should now consider whether the accused stabbed the deceased accidentally. That is met sufficiently by the finding that the accused was not justified in pursuing Dimbulukweni and, *a fortiori*, stabbing him. The intention with which the accused resolved to stab Dimbulukweni is, however, very crucial. The State laid great store by the statement made by the accused at the s119 proceedings whereat he said that he stabbed the deceased '*in the direction of the chest*' and that he foresaw that he may cause her death. This loses sight of the other explanation of the accused that it was dark and he did not know where he stabbed. Most importantly, these explanations, however damaging they may be to his cause, do not negate the accused's version that the deceased was not the initially intended victim. Nowhere, either in this Court or at the s119 proceedings, is there evidence which shows what the intention of the accused was when he resolved to stab the person he says drew a knife on him. *Murder* is the killing of another with the *intent*, direct or indirect, to cause death. The state failed to prove that intent which I assume, for present purposes, was transferable on the *actus reus* in respect of the stabbing of the

deceased. The count of murder has therefore not been proved and the accused is acquitted in respect of it.

[37] That is however not the end of the matter: The accused can still be convicted of any competent verdict, including *culpable homicide* which consists in *unlawfully* and *negligently* causing the death of another human being, if in causing the death of the deceased the accused's conduct fell short of the standard by which the conduct of a reasonable person would be measured (as to which see *Ngubane v SA Transport Services* 1991 (1) SA 756 (A) 776-777; Snyman, CR *Criminal Law*, 4th ed, Durban: Butterworths, 2002 at 209). It is *that* issue which I will now address.

[38] The accused, on his version (which I accept since it was not disproved beyond reasonable doubt) was pursuing Dimbulukweni after the latter's initial aggression. He was able to see him: I cannot imagine how else he was able to pursue him if he did not see him. He must have seen too that Dimbulukweni was running towards the deceased. Firstly, a reasonable man would not have pursued another in order to stab him with a knife when the threat posed by that other had ceased to exist. The act of pursuing Dimbulukweni beyond what was necessary to ward off the initial aggression was therefore unlawful. A reasonable person would have realized that if he stabs a human being in the dark while not knowing where exactly he was stabbing them, he could inflict injury in a way that may cause the death of another. A reasonable person would therefore not have assumed such a risk. A reasonable person would also have foreseen that stabbing a person whom he was pursuing when that person was close to another human being posed the risk that he might miss and injure the person whose injury he had not intended. He would have taken steps to ensure *that* did not happen. The unreasonableness of the accused's conduct in this case is accentuated by his conduct after the stabbing of the deceased. If what he did was accidental, a reasonable person would have

paused to render assistance to the person he injured unintended; more so when that injured person is his girlfriend who, on his own version, had done nothing wrong to him. The evidence in this Court shows, beyond reasonable doubt, that the accused unlawfully and negligently caused the death of Monika Mweshixwa.

[39] Accordingly, the accused is convicted of the culpable homicide of Monika Mweshixwa.

DAMASEB, JP

ON BEHALF OF THE STATE:

Instructed By:

Mrs. I Nyoni

Office of the Prosecutor-General

ON BEHALF OF THE ACCUSED:

Instructed By:

Ms L Hamutenya

Directorate of Legal Aid