



CASE NO.: CC 17/2010

**IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI**

In the matter between:

THE STATE

and

LAZARUS GABRIEL

CORAM: TOMMASI, J

Heard on: 7 - 9 & 11 February 2011

Delivered on: 11 February 2011

JUDGMENT:

TOMMASI J: [1] The accused was charged with murder read with the provisions of the Combating of the Domestic Violence Act, 2003 (Act 4 of 2003) in that he, on 27 March 2009 at or near Ohangwena in the District of Eenhana unlawfully and intentionally killed Tulonga Naudjebo Shitaleni. The accused pleaded not guilty and stated in his plea explanation that he inflicted the fatal injuries in self defence.

[2] The State was represented by Mr Shileka and the accused was represented by Mr Bondai on behalf of the Directorate Legal Aid.

[3] It was not in dispute that the accused on 27 March 2009 caused the death of Tulonga Naudjebo Shitaleni by stabbing her. What appeared from the evidence presented and the plea explanation to be in dispute, is the unlawfulness of the accused's action and intent.

[4] The State called the Pathologist who performed the autopsy on the deceased, Dr Vasin; the Medical Doctor who examined the accused, Tuwangapi Kalwena, Jonas Ndaendongula a security guard; and Tomas Mikasiu also a security guard. The accused testified in his own defence

[5] The following documents were handed in by agreement: A sketch plan and key of the scene of the crime; photographs depicting the scene of crime as well as photos of the deceased taken at the mortuary; the record of the proceedings in the Magistrate's court; the State's pre-trial memorandum compiled in terms of the High Court consolidated practice directives dated 2 March 2009; the accused's reply thereto; minutes of a pre-trial review conference held between counsel for the State and counsel for the defence; Affidavit and Report on a Medico – Legal Post Mortem Examination; and the Medical Report by the medical doctor who examined the accused.

[6] It was common cause that the deceased died of multiple stab injuries to the heart. The chief post mortem finding on the body were: Twenty six (26) cutaneous lesions inflicted with a sharp object. Five of these were stab injuries penetrating the chest; three thereof were stab injuries to the heart; a stab

injury to the upper aspects of the right lung; bilateral haematoma and; a single perforating stab injury to the liver. Apart from those mentioned in the chief findings the report also reflects a penetrating wound to the abdomen and an observation that most of the wounds on the torso have stab wound appearance. The schematic drawing of the body attached to the post mortem report discloses that ten (10) wounds appear on the anterior aspect and three (3) on the posterior aspect of the torso. This would be indicative of, for the most part, a frontal attack on the deceased.

[7] The evidence of Tuwangapi was that she, on 27 March 2009 at around 7 pm observed two persons walking on the main road at Ohangwena, quarrelling with one another. The sun had already set and it was getting dark although there was still some light remaining. She later identified the woman as being the deceased. The accused was apprehended at the scene so it was common cause that the man she saw was the accused. She did not know any of the parties at the time. She could not indicate what exactly it was that made her believe that they were quarrelling. This fact was however not disputed by the accused confirming that her observations were in fact accurate. She testified that the accused and the deceased disappeared from sight and she paid no further attention.

[8] After a short while she heard a scream. She, along with her roommates/colleagues, went to investigate. She observed from a distance of approximately 20 meters that the deceased was running off the tar road down towards a bush and the accused was following her. According to her they were both in a bent position and she saw the accused beating the deceased moving his arm up and down with rapid movements. She could not see what their respective positions were but indicated that the deceased was crawling and the accused was bent. She testified that they were close to one another. Her

ability to see was somewhat reduced due to the fading light and the distance between them. She readily admitted that: her visibility was impaired; that she did not see any weapon in the accused's hand and; that she could not see where the blows landed. She was not present to see what caused the deceased to scream.

[9] She left the scene but within seconds of doing so she heard the deceased screaming uttering the words "*help me I am being killed*" and heard a gunshot being fired. When she returned she observed the accused walking toward the security guard holding his hands behind his back. She also observed that he discarded an object he had in his hand although she could not see what it was. She later saw that the deceased had died because she was not moving. She confirmed that at that time the security guard was closer to the scene than she was.

[10] Jonas Ndaendongula, a security guard, testified that he was on duty at a lodge when he heard a scream of a female. He confirms that it was around 7 pm and that although it was getting dark, there was still some light. He went to investigate and found the accused person standing with his legs astride bending over the deceased who was lying on the ground, stabbing her. He could not see which part of the body was being stabbed or how many times. The deceased was not moving at the time she was being stabbed. He could see the blade and he heard the sound of someone being stabbed. He fired one shot into the air. The accused got off and started walking away toward the road. He ordered the accused to come back. The accused started walking toward him and he ordered him to stop which he did. He saw that the accused threw away the knife. He summoned the police who then arrested the accused. The police took some photographs and he pointed out where the accused threw down the knife. He observed that blood was dripping from the accused's hand but could

not tell whether it was his own or that of the deceased. He also did not know any of the parties before this incident.

[11] Thomas Mikasiu, a security guard patrolling the area, testified that he arrived after Jonas had fired the shot and in time to see the accused holding his hands behind his back and throwing the knife on the ground.

[12] I now turn to the evidence of the accused. It was common cause between the parties that the deceased was the girlfriend of accused and that a child was born of this relationship. The child is currently 4years old. At the relevant time the accused and the deceased had ended their relationship but were sharing accommodation. In terms of s3 (b) & (c) of the Domestic Violence Act, 2003 (Act 4 of 2003) this relationship falls squarely within that definition and the parties were therefore in a domestic relationship.

[13] The accused testified that he on 27 March 2009 consumed beer earlier the day. At no point in his evidence did the accused indicate that this affected his cognitive abilities or that it played a role in what transpired between him and the deceased.

[14] The accused had a quarrel with the deceased over an amount of N\$500.00 which in his opinion the deceased had appropriated for herself. They were walking on the main tar road near Oshikango quarrelling about the money. The accused handed his keys to the deceased to open the room since she did not have her own available to open the room to give him his money. According to the accused the deceased took the key which had a small pocket knife attached to it.

[15] According to the accused, the deceased insulted him and he turned towards her. The deceased attacked him with the pocket knife that was attached to the key ring. He warded off the attack by grabbing her hands and removing the knife from her hands. As he did so the knife cut him on his right hand and he sustained three wounds, one deep wound on the side of his right index finger; a smaller wound on top of the same finger and; a small wound on the inside of his thumb. The accused admitted that he was angry at the time. A medical report was handed in by the state supporting the fact that the accused sustained the injuries as alleged. His version of this incident is the only one before court. The Court, in view of the proven facts, accepts this version of the accused as reasonably possibly true.

[16] After the accused was injured he moved away from the deceased as his hand was bleeding and he squatted. He noticed the deceased was approaching him again and she grabbed him around his waist. Another shuffle ensued when he tried to release himself from her grip.

[17] The deceased managed to grab his testicles. In his evidence in chief counsel for defence asked him how he felt when that happened to which he replied "*What else was I supposed to do? I just took the knife and stabbed her because I do not know what to do*" Under cross examination he stated "*I stab her when she touched my testicles*". The accused admitted that she did not injure him but the mere touching of his testicles enraged him to the extent that he was unable to recall how many times and where he stabbed the deceased. For the most part the accused testified he could not remember how many times he stabbed the deceased but suggested that it was "*maybe two times or more*". When asked under cross-examination whether he was disputing that there

were 26 stab wounds inflicted he replied: *"I cannot stab a person for more than that times"* . During the questioning in the magistrate's court in terms of section 119 of the Criminal Procedure Act, 1977 (Act 51 of 1977), the accused was asked the following questions:

- “Q Where on her body did you stab her with a knife:
 A I cannot remember very well but what I know it was on the parts of the chest and the stomach
 Q The state is alleging that you stabbed her 26 times. What do you say to that?
 A It can be correct I am not disputing.
 Q What type of knife did you use to stab the deceased
 A It was a small knife written Samarai 2000
 Q What happened after you stab her with a knife?
 A She fall to the ground. I left her there after the police took me away
 Q Where is Tulonga Shitaleni now?
 A She is now dead.
 Q Why did you stab the deceased with a knife 26 times?
 A My head lost control that is why I caused her death?
 Q What do you mean?
 A I know I took alcohol on that day.
 Q Did the deceased do anything wrong to you on that date?
 A She took my N\$500.00 dollars in cash which was in my brief case.
 Q Is that the only thing she did to you on that date
 A Yes
 Q The state is alleging that you intentionally stabbed and killed Tulonga Shitaleni?
 A I did not have an intention to kill her
 Q What was your intention?
 A What caused me to stab her is because she is the one who cut me first on my finger because the knife was on the key holder.”

[18] When confronted during cross-examination about his failure, during the s119 proceedings, to inform that court that he stabbed the deceased because he was angered that she grabbed his testicles, the accused replied that he was not asked for more details and he understood the question to mean whether that was the only thing she took from him that day.

[19] The accused only realised and was shocked when the deceased screamed. When she screamed, he let go of her. He saw her walking away and

she fell down. He stood there for a while as he could not move. He then wanted to run away but stopped when the security guard fired a shot. He did not observe any other persons at the time. He recalled that he was taken to the Police station and to the hospital that same evening. When he was asked why he wanted to run away he testified that he did not want to go to jail and that it was just his anger that he could not control.

[20] The photographs handed into evidence reflect that the security guard pointed out certain points to the Police officer. A sketch plan and key thereto, also handed in as an exhibit, contains various positions pointed out by the same witness. The key to the sketch is incomplete in that it does not indicate point D and this renders this document almost unusable. Points F, E and A on the sketch however point out the movement of the deceased and the accused. These points are almost in a direct line. Point F indicates the place where the deceased shoe was found on the road. This confirms the accused's version that the incident started on the road. Point E is positioned in the middle between Point F and A and it indicates the presence of blood. The blood would indicate the presence of the accused (who was bleeding from his right hand) or the deceased or both them. No analysis was done so the Court cannot assume that the blood found was that of the deceased as indicated on the sketch plan. Point A is where the body was found. The direction from point E to A indicates the path of the accused and the deceased from the beginning of the altercation to the end leaving the deceased lifeless.

[21] The photographs taken of the scene (Photo 1 & 2) indicate some points that are not clearly visible because of poor lighting. This also offers limited use of this exhibit. The position indicated where the security guard first saw the accused standing over the deceased (point D in photo 2) is a short distance from where the body was found (Point A). The security guard testified that the

body of the deceased was found by the police in the position he found it and the deceased did not move when she was being stabbed. Logic dictates that the accused should have been standing closer to point A (where the deceased's body was found) for the accused to have been able to stab the deceased as observed by the security guard. The Police officer, who took the photographs and compiled the sketch plan, was not called to testify and therefore this contradiction remains unexplained.

[22] Furthermore photograph one (1) indicates point C which is a stain of blood without evidence who the blood belongs to. This point is in close proximity to point B where the knife was found. The possibility that the blood stain could be that of the accused can therefore not be excluded. These two points were some distance from Point A where the deceased was found. These facts lend credibility to the accused's averment that he had already left the deceased when Jonas, the security guard, instructed him to return.

[23] The two witnesses for the State are single witnesses in respect of the scenes they described. The Court therefore has to apply caution to their evidence. Although these witnesses have no motive for implicating the accused, the Court has to take into consideration the fact that accurate observation was not possible given the poor light. According to Tuwangapi Kalwenya the deceased screamed twice and the security guard only heard one scream. The first scream, according to Tuwangapi was near the road and this was some distance from the lodge. The second scream she heard places the deceased closer to the lodge and it is therefore possible that Jonas did not hear the first scream. The accused testified that he let go of the deceased after she screamed. It is highly improbable that the deceased would scream after she has been stabbed twenty six (26) times. I therefore reject his evidence of the

accused in respect hereof with the contempt it deserves and accept the evidence of Tuwangapi in respect hereof.

[24] Tuwangapi testified that the deceased ran off the road and the accused followed. Corroboration for this can be gleaned from the objective evidence compiled by the scene of crime indicating the presence of blood off the road at Point E on the sketchplan. She saw the accused and the deceased in a bent position and the accused beating the deceased. The accused at no time testified that he assaulted the deceased but admitted that he stabbed the deceased. It is therefore reasonable to infer that the rapid up and down movements observed by Tuwangapi was that of the accused stabbing the deceased whilst she was crawling and the accused in a bent position. Despite the minor discrepancies and poor visibility I found this witness, given the totality of the evidence, to be truthful. She was a confident witness that made a good impression on the Court especially in view of her frank acknowledgement that she could not observe everything but testified only about what she could see.

[25] I have already dealt with the contradiction apparent from the photographs. Although Jonas, the security guard, was an honest witness and made a favourable impression on the court, the unexplained and confusing points on the photograph leaves doubt as to whether Jonas in fact saw the accused stabbing the deceased and whether he arrived before or after the accused left the body of the deceased. The court therefore cannot rely on the evidence of this witness in respect of what he observed.

[26] Having accepted the evidence of Tuwangapi to be truthful, this court accepts her evidence that the deceased screamed for a second time which scream alerted Jonas, who fired a shot in the air.

[27] The accused never disputed that he held his hands behind his back and that he discarded the knife. The accused omitted to testify what he did with the knife after stabbing the deceased but this evidence was not challenged or even disputed in cross-examination. His avoidance hereof is with good reason as it would clearly indicate that his awareness and realisation already at that point, that he had done something wrong and that he wanted to conceal his wrongdoing. This is indicative of his knowledge of the unlawfulness of his conduct. The same applies for his departure from the body of the deceased to avoid being captured and to be brought to justice for his wrongdoing.

[28] The questions put to the accused by the Magistrate during the section 119 proceedings are clear and open ended questions that afforded the accused ample opportunity to explain exactly what the wrongdoings of the deceased were and the accused omitted to mention at this early stage of the proceedings, the fact that the deceased grab his testicles. His testimony in this respect is regarded by the Court as nothing but a recent fabrication.

[29] The accused stated in his plea explanation that he acted in self defence and stated that the deceased stabbed him first when he appeared in the Magistrate's Court. When the accused testified he conceded that he managed to remove the knife from the deceased and therefore removed the threat to his life. He indicated during the s119 proceedings that he stabbed the deceased because she cut him on his finger. The threat to his life having been removed, the accused retaliated by stabbing the deceased twenty six times.

[30] The requirement of self defence is as stated in *S v Naftali 1992 NR 299 (HC)*(cited with approval in *S v Jonkers 2006 (2) NR 432 (SC) Chomba, AJA*) at page 303 as follow:

'Self-defence is more correctly referred to as private defence. The requirements of private defence can be summarised as follows:

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

(b) The defence must be directed against the attacker and necessary to avert the attack and the means used must be necessary in the circumstances. See Burchell and Hunt South African Criminal Law and Procedure vol I, 2 ed at H 323 - 9.'

The circumstances prevailing at the time as described by the accused, certainly does not meet the above requirements as the attack was already averted by the time the accused started stabbing the deceased. I am satisfied that the State has proven beyond reasonable doubt that the accused did not act in self defence.

[31] The defence half heartedly raised the defence of non-pathological criminal incapacity. The Court held in *S v Ngoya 2006 (2) NR 643 (HC)*that 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 that 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. In *S v Potgieter 1994 (1) SACR 61 (A)*, Kumleben JA indicated (p73 (b - c) that the reliability and truthfulness of the alleged offender is, in the nature of the defence, a crucial factor in laying such a foundation.

[32] The accused, despite having consumed alcohol, clearly remembers all the events up and until his decision to stab the deceased. Thereafter he could not recall where and how many times he stabbed the deceased. The accused dished up a highly improbable averment that he only realised what he was doing after the deceased screamed i.e the deceased screamed for the first time after having been stabbed 5 times in her chest, three of those penetrating her heart. He clearly remembers what happened directly hereafter i.e that he left the scene of crime to avoid incarceration. He immediately after the incident hid the weapon behind his back and discarded it when confronted. Apart from the evidence that he injured himself whilst removing the knife from the deceased and that the fact that he had left the deceased already when the security guard fired the shot, which this Court found to be reasonably possibly true , the remainder of his evidence is rejected as false beyond reasonable doubt.

[33] After the accused was stabbed he followed the deceased and fabricated a story that he was attacked by the deceased. It is highly improbable that the deceased would attack the accused, armed with a sharp knife. The accused stated when questioned in the Magistrate's Court that he stabbed the deceased because she cut his finger. Having found that the accused's version was less than truthful in respect of the crucial part that led to the death of the deceased, there is, to my mind, not even a foundation laid for this defence. It is not enough for the accused to state that "I lost control of my head" as a result of some provocation by the deceased. In *S v Henry, 1999 (1) SACR 13 (SCA)* at 20 C-D, the following was said:

"By the very nature of things the only person who can give direct evidence as to the level of consciousness of an accused person at the time of the commission of the alleged criminal act, is the accused himself. His ipse dixit to the effect that his act was involuntarily and unconsciously committed must therefore be weighed up and considered in the light of all the circumstances and particularly against the alleged criminal conduct viewed objectively. It is not sufficient that there should merely have been a loss of temper. Criminal conduct arising from an argument or some or other emotional conflict is more often not preceded by some sort of

provocation. Loss of temper in the ordinary sense is a common occurrence. It may in appropriate circumstances mitigate, but it does not exonerate."

[34] The State argued that this court should convict the accused of having killed Tulonga Naudjebo Shitaleni with the direct intent whereas the defence argued that the State failed to prove that the accused had the required intent to kill and should be convicted of culpable homicide.

[35] The State referred me to an unreported judgment of *The State v Amunyela, Case No CC22/2006* where the accused stabbed the deceased 23 times in anger. Although there are remarkable similarities, the facts before this Court must be considered in order to determine the subjective mindset of the accused. In *S v Dlodlo 1966 (2) SA 401 (A)* at 405G-H the following was said about the subjective state of mind of an accused:

"The subjective state of mind of an accused person at the time of the infliction of a fatal injury is not ordinarily capable of direct proof, and can normally only be inferred from all the circumstances leading up to and surrounding the infliction of that injury. Where, however, the accused person's subjective state of mind at the relevant time is sought to be proved by inference, the inference sought to be drawn must be consistent with all the proved facts, and the proved facts should be such that they exclude every other reasonable inference save the one sought to be drawn. If they do not exclude every other reasonable inference then there must be a reasonable doubt whether the inference sought to be drawn is the correct one."

[36] In this case the accused reacted and retaliated in response to being injured by the deceased. He in a deliberate manner decided to stab the deceased by following her with the knife in his possession. The accused made use of a very sharp knife to inflict the injuries on the deceased which he knew from personal experience to have been sharp. His attack on the deceased was severe considering both the number as well as the location of the stab wounds. The medical evidence suggests that the bulk of the serious injuries were situated in front on the upper part of the torso. The deceased weighed a mere

45 kg and the accused admitted that he was much stronger than the deceased and managed to disarm the deceased of the knife. He could have opted for a less fatal way to retaliate but chose to stab the deceased 26 times with a knife that he knew from own experience capable of inflicting serious injury and directed the blows to the most vulnerable parts of the deceased body. The accused stated that he did not intend to kill the deceased. The evidence leads one to the inevitable conclusion that the accused formed the intention to stab the deceased fatally, despite the *ipse dixit* of the accused that he did not intend killing the deceased. Granted that it was on the spur of the moment, but this Court is satisfied that the accused nevertheless, given the proven facts herein, formed the direct intent to kill the deceased.

[37] In the result the State succeeded to prove beyond reasonable doubt that the accused had unlawfully and intentionally in the form of *dolus directus* killed Tulonga Naudjebo Shitaleni and the accused is thus found guilty of murder as charged.

TOMMASI, J

