



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
JUDGMENT**

Case no: CC 06/2017

In the matter between:

**THE STATE**

and

**HENDRIK NOWOSEB**

**ACCUSED**

**Neutral citation:** *S v Nowoseb* (CC 06/2016) [2017] NAHCMD 225 (15 August 2017)

**Coram:** LIEBENBERG J

**Heard:** 31 July; 01 – 02 August 2017

**Delivered:** 15 August 2017

**Flynote:** Criminal procedure – Charges – Murder, read with the provisions of the Combating of Domestic Violence Act – Housebreaking with intent to murder – Attempted murder, read with the provision of the Combating of Domestic Violence Act – Attempted murder.

Criminal procedure – Plea of guilty on murder, read with the provisions of Domestic Violence Act – Plea explanations relying on lack of intent not to kill but to injure – Plea explanations not accepted by State.

Criminal law – Accused's intent inferred from circumstantial evidence – Subjective test applied – On both occasions accused armed himself with a knife and stabbed the deceased on vital areas of the human body – Accused's intent not merely to cause the deceased pain – Accused's acts were premeditated with intent to kill.

**Summary:** Accused was arraigned on a count of a murder, read with the provisions of the Combating of Domestic Violence Act; Housebreaking with intent to murder and Attempted murder, read with the provisions of the Combating of Domestic Violence Act and Attempted murder. Until one week before committing the offences, accused and deceased were in a romantic relationship from which one child was born. He pleaded guilty to murder and attempted murder but in his plea explanation indicated that on both occasions he did not intend to kill the deceased when stabbing her with a knife on the upper body, but merely intended to cause her pain because of her lack of respect. His plea explanation was not accepted by the State. Consequently, pleas of not guilty were noted on all counts. Despite the accused's assertion that he did not act with intent to kill, evidence led by the State shows otherwise. In order to establish the intention of the accused the court applied a subjective test.

Held, considering the type of weapon used (being a knife); the part of the body where the stab wounds were inflicted (the chest area); the nature and seriousness of the injury inflicted and the objective probabilities of the case, accused did not act with intention of causing deceased pain, but on both counts 1 and 2 acted with intent to kill.

Held further, there is no evidence adduced suggesting that accused had the intention to stab complaint in count 3, thus the possibility cannot be ruled out that the injury was unintentionally inflicted during an ensuing struggle.

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**ORDER**

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Count 1: Murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003 – Guilty.

Count 2: Housebreaking with intent to murder – Not guilty and discharged. Attempted murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003 – Guilty.

Count 3: Attempted murder – Not guilty and discharged.

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**JUDGMENT**

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LIEBENBERG J:

[1] The accused stands indicted on the following charges: Count 1: Murder, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003; Count 2: Housebreaking with intent to Murder and Attempted Murder, read with the provisions of Act 4 of 2003; and Count 3: Attempted murder.

[2] The accused tendered a plea of guilty on the charge of murder on the basis of having acted with intent in the form of *dolus eventualis* when he murdered his former girlfriend, Willemina Tsauses. The State however declined the plea on the basis tendered and elected to lead evidence to prove the allegations set out in the indictment.

[3] On count 2 the accused admitted having stabbed the deceased with a knife but denied having acted with intent to kill. He however offered a plea of guilty on the lesser offence of assault with intent to do grievous bodily harm, which plea was equally turned down by the State. As regards the charge of

housebreaking with intent to murder, the accused denied any unlawful entering on his part and claims that the door of the room where the deceased and complainant in count 3 were at the time, was opened by the deceased. It must be noted that it is not alleged in the charge that the accused also attempted to kill the complainant in count 3, only the deceased.

[4] In respect of count 3 the accused pleaded not guilty on the basis that, after he stabbed the deceased he was attacked by the complainant, Deodorius Khamuxab, and it was whilst they fought for possession of the knife the accused was having, that they fell down onto the bed and when the complainant sustained a cut injury in his face. He therefore denies having acted with intent to stab the complainant.

### Introduction

[5] It is common cause that the accused and the deceased had been in a romantic relationship that was terminated by the deceased towards the end of November 2014. On the night of 6 December 2014 the deceased was with Deodorius who, at that stage, was living in with his uncle Lucas Aib and Rosa Haeses, in Outjo. The accused earlier in the evening enquired from Lucas as to the whereabouts of the deceased and later turned up at his house while they were asleep, calling out the deceased's name. It is not disputed that after the accused entered the room in which Deodorius and the deceased were, he took out a knife and stabbed the deceased once in the upper chest, at the base of the neck. The deceased was hospitalised and the following day the accused turned up at the hospital and approached the deceased. After a brief conversation the accused drew a knife and stabbed the deceased several times which resulted in her death shortly thereafter. The circumstances surrounding both stabbing incidents are however in dispute.

### The murder charge

[6] The witness Deodorius testified that he and the deceased were in a romantic relationship since October of that year and were asleep when the

accused at night arrived at his uncle Lucas's house and called out the deceased's name. The deceased arose and whilst on her way to the door, the accused pushed open the door and entered the room. Though the electric light inside the room was switched on, the accused said he wanted to use his cell phone (to make light) in order to see who the person was with the deceased. Instead of taking out his cell phone, he pulled out a knife and stabbed the deceased who immediately fell down but then managed to escape. Deodorius got out of bed and grabbed the deceased on both his arms. Whilst wrestling one another they fell down onto the bed and in the process Deodorius sustained a 3 cm cut injury to his cheek. He cried out to his uncle Lucas for help who then entered and took the accused outside. The deceased in the meantime was taken to hospital by Rosa.

[7] Deodorius specifically disputed the accused's assertion that the deceased had opened the door before he could enter; also that there had been an argument between the accused and the deceased prior to her being stabbed. According to him the deceased was stabbed the moment the accused entered the room.

[8] The witnesses Lucas and Rosa corroborate one another in material respects as far as it concerns the events that took place at their residence that night. According to Rosa she saw a text message sent to Lucas's phone by the accused at 23h00, enquiring whether Lucas had seen his 'wife'. On her advice Lucas did not send a reply. When the deceased later came running into their bedroom, she observed that she had been stabbed in the chest on the left side, just below the collar bone. With the help of two police officers she managed to get the deceased to the hospital.

[9] Lucas recounted the events when he woke up from cries for help and went to the room where Deodorius and the deceased were sleeping. He found the accused sitting on top of Deodorius whilst wrestling one another and the accused having a knife. He pulled the accused off Deodorius and took him outside where after the accused ran away. He then accompanied Deodorius to

the hospital as the latter had a cut in the face. Nothing further turns on the evidence of State witnesses Lucas and Rosa.

[10] The following day, Sunday 07 December 2014, Laurentia Khamuxas went to the hospital to visit the deceased. She found the accused outside and together they entered the deceased's room. They found the deceased in bed and it appeared to her that the deceased experienced some difficulty to speak as she spoke in a soft voice. She and the accused remained standing at the foot-end of the bed where after she sat down next to the bed, facing the other persons across the room with whom she started up some conversation. Though her back was turned on the accused, she heard him saying to the deceased that they have only been separated for one week and the deceased already got herself a new boyfriend. The deceased replied that she and this person only came together after she and the accused had broken up. The deceased thereafter kept quiet. The next moment she heard the deceased screaming and jump out of bed, landing on the floor in front of her. She saw blood on her body and the accused having a knife; he thereafter ran out of the room. She and those present also went out of the room whilst calling out for help from the nurses.

[11] In cross-examination the witness Laurentia disputed the accused's assertion that prior to the stabbing the deceased had insulted the accused. She said that although she was in conversation with other ladies in the room, she could still hear what was said between the accused and the deceased. She also disputes that the accused at that stage sought the deceased's forgiveness for having injured her the previous night.

[12] Emma Hanes had been visiting her aunt who was hospitalised and in the same room as the deceased. She corroborated the evidence of Laurentia about the accused asking the deceased about her new relationship with another man and the deceased's reply. She did not see the actual stabbing but heard the deceased screaming and saw her falling onto the floor while the accused was running out of the room. The witness equally denies that the accused

apologised to the deceased or that the deceased insulted him prior to the stabbing incident.

[13] The accused testified in defence and confirmed that the deceased broke up with him towards the end of December 2014. He said she was the mother of his child and when they on several occasions in the past had broken up, they would rekindle their relationship and come together. According to him that was the reason why he went looking for her at the house of Lucas at 22h30 that night. He went over to his uncle's house and called out the deceased's name. The deceased opened the door where after he entered the room and upon seeing Deodorius, he asked her whether she was in a relationship with this person. When she replied it was none of his business he grabbed her on arm and repeated his question. She replied that she had started a new relationship because he was not man enough whereupon he took out his knife and stabbed her once. This he did in order to hurt her and to teach her to show him some respect. Though admitting that he acted with intent to cause her grievous bodily harm, he denied having acted with intent to kill.

[14] He confirms the ensuing struggle between him and Deodorius but disputes having had the intention to stab him with the knife. Any injury sustained by Deodorius in the process was unintentional and must have been inflicted when they both fell down onto the bed. I pause to observe that the accused's evidence on this point is corroborated by Deodorius. After Lucas took him outside he went home and slept.

[15] The next day he learned that the deceased was in hospital and went over to apologise to her. He said the moment he apologised she started insulting him by saying that she no longer wanted him and after they had separated, she met someone else. When he took out his knife she jumped out of bed and he then stabbed her whilst she was down on the floor. Laurentia and Emma had run outside even before he stabbed the deceased where after he fled the scene. He was arrested shortly thereafter. The accused claims that the reason for him carrying a knife on both occasions when stabbing the deceased, was because the town of Outjo is an unsafe place.

[16] In cross-examination the accused admitted that he never accepted that the deceased broke up with him and the reason for going to Lucas's house at that late hour of night was to find out whether their breakup was for real. Though disputing State counsel's contention that, when he went to the house of Lucas that night in search of the deceased, he already knew she was in a relationship with Deodorius, the accused was unable to explain why he went there looking for her if she was not residing there. Both he and Deodorius are related to Lucas (being their uncle) and as Deodorius had been residing at that place for the past year, it seems highly unlikely that the accused would not have known this. It would equally explain why he directly went to his uncle's house in search of the deceased and not to her grandfather's house where she used to live when they were still together.

[17] There is a significant difference between the State witnesses and the accused's version as regards the sequence of events when the accused stabbed the deceased in hospital. During cross-examination of witnesses Laurencia and Emma, it had not been put to them by defence counsel that it would be the accused's evidence that the stabbing only took place after they had run out of the room. Though not much turns on the actual time of the stabbing, there is a duty on the defence when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the particular differences during cross-examination and to afford the witness the opportunity to give an explanation open to the witness and of defending his or her character.<sup>1</sup> It brings about that if a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct.

[18] The testimonies of the two State witnesses were not challenged in cross-examination and neither were they afforded the opportunity to respond to the accused's assertion to the contrary. These were two independent witnesses who corroborated one another in material respects and who has no interest or

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<sup>1</sup> *President of the RSA v South African Rugby Football Union* 2000 (1) SA 1 (CC) at 36J-37B.

reason to falsely incriminate the accused. The accused's evidence on this point, however, has the making of an afterthought and suggests that he was provoked before he acted. Though neither of the witnesses saw the actual stabbing, both were clear in their testimonies that it happened shortly after the accused questioned the deceased about her new relationship. They were adamant that the deceased did not insult the accused in any manner; neither was he provoked prior to his attack on the deceased.

[19] In my view the two stabbing incidents should not be viewed in isolation, as they arose from the same cause i.e. the fact that the deceased was in a new relationship and which the accused refused to accept. He admitted having acted with intent to cause grievous bodily harm on the first occasion and 'with intent to injure' during the last incident, having foreseen the possibility of death ensuing the stabbing of the deceased with a knife and associated himself with such possibility. During both incidents the accused beforehand had armed himself with a butcher's knife with a blade length of 20.7 cm to which he resorted without hesitation in order to injure the deceased. Both attacks were unexpected and in circumstances where the deceased was a defenceless victim. Though claiming that he wanted to know from the deceased whether she was in a relationship, reality must already have dawned on him the moment he found them together in bed; moreover after the deceased confirmed her intention on both occasions and made it clear that she had no further interest in the accused.

[20] Against this background, the accused's explanation for having injured the deceased merely so that she could show him respect, has a hollow ring to it. Also the evidence that his intention was merely to cause her pain which, on the strength of the totality of evidence before court, can safely be rejected as false beyond reasonable doubt. On both occasions when he approached the deceased, he had armed himself with a knife and was quick to use it against her. If the accused merely intended inflicting some pain to the deceased as he asserts, then he could have assaulted her physically without resorting to a dangerous weapon such as the knife used in the process. This seems to show

that the accused had other intentions, moreover if regard is had to those parts of the deceased's body he directed the blows at.

[21] As regards the first injury the accused inflicted a penetrating wound on the left anterior chest area at the base of the neck. Though the depth of the chest injury is unknown, it could not be reasoned away that a penetrating injury was inflicted on what is considered a vital part of the body.

[22] The injuries inflicted during the second attack are even more serious as noted in the post-mortem report, stating the following:

- 3 cm x 1 cm laceration on the left parietal area.
- 3 cm x 2 cm laceration on the left upper arm.
- 2.5 cm x 1 cm laceration on the right shoulder (posterior).
- 2 cm x 1 cm laceration on the left shoulder (posterior).

The latter two injuries penetrated the lungs, resulting in hypovolemic shock due to blood loss, and subsequent death.

[23] What remains to be decided is whether the accused had acted with intention to kill when stabbing the deceased on both occasions. Whereas the accused's alleged intention is inconsistent with established facts and therefore cannot be relied upon, the Court has to infer the accused's intention from evidence relating to his outward conduct at the time; as well as the circumstances surrounding the events. The test is a subjective one and in order to decide by way of inferential reasoning what the accused thought or foresaw when committing the prohibited acts, the Court looks at objective factors such as the type of weapon used; at which part of the body the attack was directed; the nature and seriousness of the injuries inflicted and the objective probabilities of the case.

[24] Whereas the accused pleaded guilty to the murder charge, the s 112 (2) statement in which his guilty plea is set out at para 12 reads as follows:

'I stabbed her out of anger and only had the intention to injure her. I admit that I was reckless with my actions and that the deceased died as a result of my actions. I further admit that as much as I only wanted to injure and not to kill her I could foresee the possibility of her death ensuing from my actions and I reconciled therewith by stabbing her. I therefore admit that my actions were unlawful, wrongful and intentional and I am therefore pleading guilty to murder in respect of count 1 albeit murder *dolus eventualis*. (sic) I further acknowledge that I knew at the material time that what I was doing is wrong and against the law and that I could be punished if caught.'

[25] From the accused's plea explanation it is evident that he denies having acted with intent to kill, though the evidence adduced by the State tends to show otherwise. How a court ought to approach a criminal case on fact where there is a conflict of fact between the evidence of the State witnesses and that of the accused was stated in the oft-quoted case of *S v Singh*<sup>2</sup> where the learned judge says the following at 228F-G:

*'It is quite impermissible to approach such a case thus: because the court is satisfied as to the reliability and the credibility of the State witnesses that, therefore, the defence witnesses, including the accused, must be rejected. The proper approach in a case such as this is for the court to apply its mind not only to the merits and the demerits of the State and the defence witnesses but also to the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond all reasonable doubt.'*

See also: *Sakusheka and Another v Minister of Home Affairs*<sup>3</sup> where the Court, endorsed the *dictum* enunciated in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others*.<sup>4</sup>

[26] When applying the above test to the present facts, the only reasonable conclusion to come to is that the accused during both stabbing incidents acted

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<sup>2</sup> 1975 (1) SA 227 (N).

<sup>3</sup> 2009 (2) NR 524 (HC).

<sup>4</sup> 2003 (1) 11 (SCA) at 14I-15D.

with the intention to kill, despite his evidence to the contrary. His actions were clearly premeditated, carefully planned, and likely to have been spawned by jealousy. The accused's explanation as to why he had stabbed the deceased on both occasions is accordingly rejected as false.

[27] In view of the above, I am satisfied that it had been established beyond reasonable doubt that on counts 1 and 2 the accused acted with direct intent to kill.

#### The charge of housebreaking with intent to murder and attempted murder

[28] Whereas the court had already found that the accused during the first stabbing incident had the intention to kill the deceased as set out in count 2, it remains to be decided whether he was also guilty of the offence of housebreaking with intent to murder.

[29] As mentioned, it is not in dispute that the accused during the night of 6 December 2014 went to the house of Lucas in search of the deceased and that he called out her name when he got there. The only reason for that could have been that he expected to find her there but did not know in which of the rooms (corrugated structures) she was. It has further been established that the deceased awoke and went to the door, in all probability, to open it and attend to the accused's call. Though the accused said the deceased did in fact open the door, Deodorius's testimony is that it was the accused who pushed it open and stepped inside before the deceased even reached the door.

[30] It is common cause that the door was closed and that a big stone was rolled against the door on the inside to keep it closed. When assessing the evidence on this point, regard must be had to the fact that the evidence of Deodorius is single and that the court should follow a cautious approach in its evaluation of single evidence. However, the court in terms of s 108 of the Criminal Procedure Act 51 of 1977 may convict on the evidence of a single witness if satisfied that the truth has been told. Though the court found the

accused's testimony on different aspects of his version to be false, there is no basis for finding that his evidence must therefore be rejected *in toto*.

[31] Bearing in mind that the accused had called out the deceased's name and her having been on her way to the door, the probabilities seem to favour the accused's version that the door was opened by the deceased before he stepped into the room. In the circumstances the accused's evidence on this point seems reasonably possible and he should therefore be given the benefit of the doubt. I am accordingly not satisfied that it had been proved beyond reasonable doubt that the accused was guilty of housebreaking with intent to murder. However, the further offence of attempted murder contained in the charge had, for reasons set out hereinbefore, duly been proved.

#### The charge of attempted murder (count 3)

[32] Both the accused and complainant Deodorus gave evidence on the circumstances relating to the charge of attempted murder in count 3, from which it is clear that the injury to the complainant's cheek was inflicted during a scuffle when both fell onto the bed. On the evidence adduced there is nothing suggesting that the accused had the intention to stab the complainant. This is consistent with the nature of the wound inflicted being a cut and not a stab wound. It is common cause that the accused was grabbed by Deodorus on both hands where after a struggle ensued and them falling down onto the bed.

[33] From the aforesaid it is evident that it had not been established that the accused acted with intent when the complainant got injured. Mr *Olivier*, appearing for the State concedes that to be the position; the concession in my view is properly made.

[34] Though no evidence had been led by the State pertaining to the accused having been in a domestic relationship as defined in s 3 of the Combating of Domestic Violence Act 4 of 2003, the accused during his testimony said he fathered a child with the deceased whilst being in a relationship with her. The relevant part of s 3 provides as follows:

### ‘3 Definition of domestic relationship

(1) For the purposes of this Act a person is in a "domestic relationship" with another person if, subject to subsection (2)-

- (a) ....
- (b) ....
- (c) they have, have had or are expecting a child together, ...

(2) Subject to subsection (3), where a "domestic relationship" is based directly or indirectly on past marriage or engagement, past cohabitation or any other past intimate relationship, the "domestic relationship" continues for one year after the dissolution of the marriage or engagement, the cessation of cohabitation or the end of any other intimate relationship, but, where a child is born to any couple, their "domestic relationship" continues throughout the lifetime of that child or for one year after the death of the child.’

(Emphasis provided)

[35] Section 3 makes plain that where a child was born from a relationship, the parents continue throughout the child’s lifetime to be deemed to be in a domestic relationship for purposes of the Act. It follows that on the strength of the accused’s evidence, such relationship existed between him and the deceased at the time of committing the offences under consideration.

### Conclusion

[36] In the result, the court finds as follows:

Count 1: Murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003 – Guilty.

Count 2: Housebreaking with intent to murder – Not guilty and discharged.  
Attempted murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003 – Guilty.

Count 3: Attempted murder – Not guilty and discharged.

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JC LIEBENBERG  
JUDGE

APPEARANCES

STATE

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ACCUSED

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