

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case No: CC 1/2017

THE STATE

v

JOHANNES JACOBS

Neutral citation: *S v Jacobs* (CC1/2017) [2018] NAHCMD 35 (16 February 2018)

Coram: USIKU, J

Heard: 6 December 2017, 18 January 2018, 22 January 2018 and 25 January 2018

Delivered: 16 February 2018

Flynote: Criminal law – Murder – Accused and the deceased in a domestic relationship – Accused admitting to having stabbed the deceased but those injuries not fatal – State’s case based on circumstantial evidence – Accused’s claim to have been a victim of an assault by the deceased untruthful – Circumstantial evidence not to be considered in isolation – Cumulative effect thereof will be decisive.

Summary: The accused was charged with a crime of murder read with the provisions of the Combating of Domestic Violence Act to which he pleaded not guilty, although admitting to having inflicted wounds on the deceased that he said were non-fatal. Accused claimed to have been a victim of an attack by the deceased.

Accused further claimed that the two fatal wounds were self-inflicted. At the time of the incident, there were no eye witnesses present. There were, however, persons who heard the deceased calling the accused’s name and shouting that she was

dying. State witnesses testified that they saw accused walking away from the direction where the deceased was found lying in a pool of blood. No injuries were observed on the accused's body after his arrest the following day.

Although the state's case was entirely based on circumstantial evidence, the court found that the accused's guilt was proven beyond reasonable doubt.

ORDER

Accused is found guilty of murder with direct intent read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

JUDGMENT

USIKU J:

[1] The accused stands indicted on the charge of murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003. He pleaded not guilty and made certain admissions.

[2] Mr Wessels appears for the accused while Mr Ipinge represents the state.

[3] In the summary of substantial facts it was alleged that at all relevant times the accused and the deceased were involved in a domestic relationship in that they were married to each other and they have children together. It is further alleged that at the time of the deceased's death the deceased had moved out of their residence and stayed with a female friend/acquaintance due to ongoing arguments with the accused, caused by his jealousy and his threats to harm and/or kill the deceased.

[4] On the evening of the Wednesday, 18 June 2014, the accused was on duty as a security officer and stationed at the premises of Blouwes Primary school and hostel in the district of Keetmanshoop. The deceased was also on this premises and

the accused attacked her and stabbed her 12 times with a knife in the chest and back where after he fled the scene. The deceased was transported to the Keetmanshoop state hospital where she died on Thursday, 19 June 2014, due to loss of blood caused by the stab wounds inflicted.

[5] The accused pleaded not guilty to the charge. In terms of section 220 of the Criminal Procedure Act the following were admitted:

- (i) The identity of the deceased, being the accused's wife, Sofia Lucia Jacobs, a female person.
- (ii) The cause of death, being acute loss of blood due to stab wound injuries.
- (iii) The place and date of death being the, 19 June 2014, at the Keetmanshoop State hospital.
- (iv) That the body of the deceased, before the time of her death and when it was transported from the scene of the incident to Keetmanshoop State hospital, and after death, when her corpse was transported from the State hospital to the mortuary, did not sustain any further injuries.
- (v) That accused and the deceased, were involved in a domestic relationship and that they were married to each other, at the time of the incident.
- (vi) That the deceased prior to 18 June 2014, had moved out of the common home at Tses and thereafter resided at a female friend/acquaintance of hers.
- (vii) That there were frequent arguments between himself and the deceased, prior to the incident, on 18 June 2014; which arguments sometimes turned violent.
- (viii) That accused was on duty as a security guard, and stationed at the Blouwes Primary school and hostel on the night of 18 June 2014; the same premises where the deceased stayed with a female friend/acquaintance after she left the common home.

(viv) That the acute loss of blood was as a result of injuries caused by a sharp object to wit: a knife. That accused was present at the time that the deceased was injured.

[6] In terms of section 115, the accused gave an explanation that he wrestled with his wife, in order to gain possession/control of a knife, because he was afraid that she would injure him. That the deceased fought back also trying to gain possession/control of the said knife. That as they were wrestling they fell to the ground from time to time, and the knife had an open blade. That it must have been during that period of wrestling and falling that the deceased was injured by the said knife, unbeknown to the accused injured by the knife.

[7] Accused denied that he specifically had an intention, at the time, to stab, injure or kill the deceased, although admitting that he was angry and that he stabbed the deceased approximately five times on her back, after she turned around to walk away. Furthermore, that at that point in time they were no longer wrestling for control/possession of the knife, as he was then in possession of the knife. Accused disputed that the injuries caused, could have been fatal, and could have caused the death of the deceased, because when he so stabbed the deceased as explained, he used very little force and the knife would have hardly penetrated into the body. Those stab wounds could not have caused acute loss of blood resulting in death.

[8] The wrestling, pulling and scuffling for the possession/control of the knife started after the deceased attacked him with the knife which was shortly after he saw a man and a woman caressing and kissing one another. The male person then left and as accused went closer to the woman who remained on the premises, he then realised that it was his wife, the deceased.

[9] The state opened its case by producing, amongst others, the medico-legal post-mortem examination report, by doctor Vermeulen. The "R1" as well as "R2" reports compiled by the Chief forensic scientist Marlyn Swart. These reports were marked as Exhibit "C" and "D" respectively. The photo plan was also handed in compiled by detective warrant officer Thomas Goliath which was marked Exhibit "E". It depicts the area where the incident occurred, and where the deceased's body lay after the stabbing. It also indicates the alleged knife used in the stabbing of the

deceased. The photo plan furthermore indicates the deceased's body photographed at the mortuary before and after the post-mortem examination was conducted by the doctor.

[10] The first state witness Hendricio de Koker testified that at the time of the incident he was aged 17 years and attended school at Blouwes primary school. He knew the accused because they are related. On the night of the incident, he attended a devotion at the school hall. As they were busy closing the dining hall, which is not far from the toilet, he saw the accused standing next to the secretary's office looking around the yard. Accused later on disappeared. Shortly thereafter, he heard a scream coming from the side of the big gate saying 'AH AH Boykie I am dying'. He, accompanied by his friends followed in the direction where the voice was coming from and found the deceased laying on the ground. He also saw the accused looking towards them and walking away. When they spoke to the deceased to inquire what had happened, the deceased informed them that accused had stabbed her.

[11] Leonard Christiaan, another scholar corroborated the first witness's evidence and that after the deceased had told them about the stabbing, they rushed to call the hostel mothers. They did not see any other person within the vicinity apart from the accused person.

[12] Immauel Kaingob testified that he and the accused had been friends for a long time. He also knew the accused's wife, the deceased. According to him, there were always quarrels between the accused and the deceased. He has witnessed some of those quarrels. Accused had at times threatened to hurt or kill the deceased. He further testified that the deceased at times would move out of the common home to go and stay with one, Anna Plaaitjies. On the day before the incident, he met the accused at the school as he had been busy erecting the school fence.

[13] On this occasion, accused complained to him about the deceased not willing to return to their home. He then advised him to leave the deceased alone. The next morning Mr Kaingob travelled to Karasburg for work. Upon his return in the evening, he learnt that the deceased had been stabbed.

[14] On the following day, he visited the accused's house and questioned him about what had happened. Accused explained to him that the deceased had come with another man at the school whilst he (accused) was on duty. The deceased and the men started to kiss each other and entered the school yard. As accused went towards them, the unknown man handed over a knife to the deceased telling her 'there he is coming, finish him off'. When he questioned the accused about the identity of the man, accused responded that he could not identify the man because he wore a balaclava at the time. When he further questioned him where the man had gone to, the latter responded that he saw the man jumping over the fence and running away. Accused also informed him that he only stabbed the deceased once when they fell to the ground during the fight over the knife, and that the rest of the stab wounds were self-inflicted. At that time accused did not appear normal as he was jittering. Accused was arrested on same day and taken by the police.

[15] The next witness Ms Anna Maria Plaaityies testified that the deceased was her cousin and they grew up in one house. She regarded her as a sister. Her further testimony is that accused used to abuse the deceased a lot. He would financially abuse her by taking her money. On the night of the incident, accused visited her house and asked for his children. She informed him that the children were asleep. She then advised him to stop involving their children in their arguments. Accused left thereafter. She later learned about the deceased having been stabbed by the accused that evening. She accompanied the deceased to the Keetmanshoop State hospital.

[16] Elsie Lambert testified that the accused is her younger brother. During June 2014 she resided close to the Blouwes primary school and hostel. On the evening of 18 June 2014 she had just taken a bath and was going to throw away the water outside. She heard someone calling out 'Boykie' twice. Because she knew the deceased, she recognised the voice as that of the deceased. She decided to go towards the direction where the voice was coming from and met accused on the way. When she confronted accused about what had happened, accused informed her that he was attacked and continued to walk on.

[17] She later found the deceased laying in a pool of blood which shocked her. The next day, she visited the accused at their home and there she saw accused

handing over the knife which he had allegedly used in the stabbing of the deceased. She identified the knife as an exhibit before the court.

[18] Mr Immanuel Bapello testified that he was the investigating officer. On the evening of 18 June 2014, he was called out to attend to a scene. He received information about the accused's involvement in the stabbing. A search was conducted that evening but accused could not be found. On the following day, 19 June 2014, he received a call from one Immanuel Kaingob informing him that the accused was at his residence and inviting him to go there. They left for the accused's residence and upon arrival he questioned the accused about the incident. According to the witness, accused informed him that he stabbed the deceased after having found out that she had an affair with another man. Accused then informed him that he stabbed the deceased with a knife. When he asked him where the knife was, accused went and collected the knife which he handed over to him. The total length of the knife's blade was 14.5cm and its total length 26cm.

[19] According to the witness, accused did not explain about the deceased's injuries neither did he mention that the deceased had attacked him. He did not observe any injuries on the accused at the time of his arrest. The knife was later on booked in the Pol 7 after a number had been allocated to it. The witness identified the knife as Exhibit "E" in the photo plan. This knife was forwarded to National Forensic Science Institute for analysis and it tested positive for human blood.

[20] In cross-examination, the witness conceded that he did not explain the accused's legal rights prior to the accused informing him that he had stabbed the deceased with the knife.

[21] Ms Elizabeth Yon testified that she was employed as a nurse at the Keetmanshoop state hospital. On 18 June 2014, whilst on duty, she was called to attend to a woman who had been severely injured. Upon arrival on the scene she observed deep wounds on the body of the deceased who was bleeding profusely. Although she could not recall the exact number of the wounds, she confirmed to have seen wounds on the deceased's chest, back and on her thighs. The deceased was admitted at the Keetmanshoop state hospital that evening.

[22] Mr Jean Jacques Roos a police officer at Tses police station during 2013 testified that on 29 May 2013, the deceased called him and complained about having been assaulted by the accused. Also that accused had threatened to kill her. Accused was located and arrested on 1 June 2013, whereafter, he was charged but the deceased later on withdrew the charges against the accused. He did, however, issue accused with a warning in terms of section 23 (1) (b) of the Combating of Domestic Violence Act 4 of 2003 which accused duly signed after it had been explained to him by the witness. The Formal Warning was admitted into evidence and marked as Exhibit "F" before court.

[23] Ms Debora Jacobine Kido, a daughter of the accused and the deceased also testified. According to her, the deceased and accused used to fight each other and they would beat each other with sticks and brooms. She explained that accused was jealous and would always complain about the deceased coming home late from work which was caused by double shifts. She referred to an incident during 2014 when she visited their home for a weekend and found the deceased with a blue eye after accused had allegedly assaulted her. She did not ask the deceased why she had been assaulted. At the time of the incident she was at a boarding school and was aged about 15 years old. She had no knowledge about the deceased having been engaged in extra marital affairs.

[24] Dr Andries Vermeulen testified that he conducted the post-mortem examination on the body of the deceased and compiled a report of his findings on the 20 June 2014. The Chief post-mortem findings made by him on the body were, multiple stab wounds x 12 mainly on the chest and back, penetrating wounds into left heamothorax, x 2, rib fracture at no 5 on the left, Heamothorax – 1000ml left, wounds into left heart verticle. That as a result of his observations, he concluded that death occurred about 12 hours prior to his examination and that the cause/causes of death was/were acute loss of blood.

[25] He further testified that the deceased had 12 multiple stab wounds of which two were penetrating which caused the death of the deceased. Those penetrating stab wounds were unlikely to have been self-inflicted, as they would require external force to have been applied taking into account their depth. More specifically that the

stab wound under the deceased's armpit which was too high up, could not have been self-inflicted.

[26] Accused at the end of the state's case chose to testify under oath. His testimony is that on 18 June 2014 he was on duty at the Blouwes primary school and hostel. Whilst patrolling within the school yard he saw a female person with a man coming towards the school gate. The two kissed each other. He had not recognised who these two individuals were. He then moved closer to the gate in order to warn them off and this is when he recognised the woman as his wife. However, before they separated, he heard the man telling the deceased 'finish him off' as the man rushed off.

[27] According to the accused, the deceased approached him with a knife and attacked him. He ducked the first attempt and they began to wrestle for the possession/control of the knife. During the scuffle they fell several times. Accused finally overpowered the deceased and because he was very angry he decided to stab her in the back more than five times. He has no idea where the rest of the stab wounds came from. He had no intention to kill the deceased. After the deceased was stabbed she shouted out his name three times and asked him to forgive her for having connived with people to attack him at his work place. Accused then walked out of the school yard and this is when he met his sister who asked him what had happened to which he responded that he was attacked and went to his home.

[28] Accused denied having threatened to kill the deceased. Further that if such threats were ever made, they were not said with an intention to kill the deceased. He had an intention to divorce his wife, the deceased. Accused confirmed to have spoken to witness Immanuel Kaingob on 17 June 2014. He admitted to having threatened to harm the deceased but not to kill her. His plan was to institute divorce proceedings on 19 June 2014. Accused, however, denied having told Kaingob that he only stabbed the deceased once during the scuffle over the knife. He does not dispute to having handed over the knife he had used in the stabbing to the police the next day.

[29] In their submissions the state attacked the accused's version which is contradictory to that of witness, Kaingob, with regards to the stabbing of the

deceased, in that the stabbing is said to have been only once as the deceased and accused fell to the ground, during the scuffle over the knife. Accused on the other had denied the one stabbing only, as he had told witness Kaingob about having stabbed the deceased in the back several times. The state further submitted that the earlier threats made towards the deceased be taken into account, when considering the accused's intention to kill the deceased.

[30] It was further submitted by the state that the circumstantial evidence presented to court was very strong if regard is to be had to the fact that even after the stabbing, accused took no steps to assist the deceased who had been severely injured, but simply walked off to their home. In rebuttal the defence had submitted that the stab wounds on the back were not the leading cause of the deceased's death. Also that the accused's defence is not that the deceased inflicted the fatal stab wounds herself, but that she was the architect of her own injuries. Thus the deceased was the cause of the stab wounds, because if she had not attacked him with a knife, then she could not have died. It was therefore her own fault. The defence further submitted that accused could only be found guilty of attempted murder, alternatively he be found guilty of assault with the intent to do grievous bodily harm.

[31] It must be noted that although the accused admitted to the police to having stabbed the deceased, such cannot be admissible in evidence as those admissions were obtained unprocedurally because there was no prior explanation of the accused's legal rights.

[32] It is a well-established principle that the accused bears no onus at all to prove his innocence. The test throughout remains on the state to prove its case beyond a reasonable doubt. In this present case, there is no dispute that the deceased and the accused were the only people present, because there were no eye witnesses to the killing. Thus with regard to the actual killing of the deceased, the state's case rests entirely on circumstantial evidence from which the court, through inferential reasoning may draw inferences, as long as the inference sought to be drawn is

consistent with all the proven facts, and that those facts are such that they exclude every reasonable inference from them, save the one to be drawn.¹

[33] Further, it is trite that the approach the court must follow when dealing with circumstantial evidence is not [to] consider every component in the body of evidence separately and individually in determining what weight should be accorded to it, but to consider the cumulative effect of all the evidence when deciding whether or not the accused's guilt has been proven beyond reasonable doubt.²

[34] It has been the accused's contention during the whole trial that the deceased had injured herself, although his defence is not too clear as to how the deceased inflicted the injuries by herself, with the knife. Accused at the same time does not deny to having stabbed the deceased with the knife on the back, although claiming that those injuries on the back could not have caused the deceased's death. Two of the state witnesses testified that after hearing screams they went towards where these screams were coming from and found the deceased laying in a pool of blood, as accused walked away towards the school gate. In my view those cries by the deceased were as a result of the brutal assault on her by the accused, which the latter does not even deny. Accused had admitted to having stabbed the deceased at least five times on the back because he was angry. State witnesses who found the deceased laying in a pool of blood also heard the deceased calling out the accused's name more than once. Their evidence on that score has not been challenged.

[35] Also evidence by the doctor who conducted the post-mortem examination on the deceased's body found multiple injuries on different aspects of the body, including two fatal wounds which the doctor said could not have been consistent with self-inflicted injuries. The murder weapon was found at the accused's house and not on the scene where the body of the deceased lay in a pool of blood if it is indeed true that she inflicted those injuries by herself as claimed by the defence. Accused in his own words admit to having stabbed the deceased. The deceased was stabbed multiple times and not only once.

¹ *R v Blom* 1939 AD 188.

² *S v HN* 2010 (2) NR 429 (HC).

[36] In my view, all the injuries inflicted on the deceased were caused by the accused, having been the only one who had accosted her in the school yard on the night of 18 June 2014. There is further evidence of accused having visited the place where the deceased resided prior to the stabbing, that too goes to show that accused was angry that evening and was the one that confronted the deceased and not that the latter attacked him as he claimed. The deceased had already moved out of their common house, because of the abuse she had been subjected to by the accused. All what accused has testified was to mislead the court, in order to escape a conviction. The court is satisfied that it has been proven beyond reasonable doubt that accused unlawfully caused the death of the deceased.

[37] Coming to the issue whether accused had acted with a direct intent, it is not in dispute that accused had used a knife in the stabbing of the deceased. Having rejected accused's claim of not having inflicted the two fatal stab wounds, one in the chest and the other one under the armpit. It is a notorious fact that a chest is a vulnerable part of the human body where the most vital organs are located. From the medical evidence it is evident that external force was used which led to the fifth rib on the left being fractured. What is clear from these injuries is that the assault was directed to the chest which is considered to be an exceptionally vulnerable aspect of the human anatomy. Accused had confirmed to having stabbed the deceased more than five times on the back, which shows that even when the deceased was no longer a threat towards him, he went on with the stabbing unperturbed.

[38] The only reasonable inference is therefore that the accused had acted with the subjective intention to kill the deceased. It has also been confirmed that prior to the deceased's stabbing on 18 June 2014, accused was heard making threats to either harm or kill the deceased as testified to by witness Kaingob.

[39] There was further evidence of previous threats having been made by accused to kill the deceased. Accused was arrested and detained, on those earlier threats although the deceased withdrew the charges after which a warning was issued in terms of the provisions of the Combating of Domestic Violence Act 4 of 2003. Accused had confirmed such formal warning by appending his signature threat.

[40] Having regard to all the circumstances of this particular case, and when applying the principles regarding the approach when it comes to circumstantial evidence, the only reasonable conclusion to come to is that accused has acted with direct intent when he killed the deceased, his wife. Accused and the deceased were married to each other, and they were no doubt, in a domestic relationship as defined in the Act.

[41] In the result the accused is found guilty of the crime of murder with direct intent, read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

D N USIKU
Judge

APPEARANCES**STATE:**

Mr lipinge

Of Office of the Prosecutor-General, Windhoek

ACCUSED:

Mr Wessels

Instructed by Directorate of Legal Aid, Windhoek