

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI
JUDGMENT**

Case No.: CC 11/2015

In the matter between:

THE STATE

and

NDILINAWA GABRIEL

ACCUSED

Neutral citation: *S v Gabriel* (CC 11/2015) [2017] NAHCNLD 59 (27 June 2017)

Coram: **JANUARY J**

Heard: 28 July 2016, 17, 18, 19, 20, 24 October 2016, 23 November 2016, 2
December 2016 and 26 January 2017

Delivered: 27 June 2017

Flynote: **Criminal law** – Murder – Self-defence – Requirements for self-defence –
Not acted in self-defence – Inference – *dolus eventualis* – Criminal law - Murder — Mens
rea — Intention — Type of intention — Determination of — Court to consider nature of
weapon used, position on body where injury inflicted and forced used.

Summary: The court reiterated that, in order for an accused to succeed with self-defence, the following requirements must be met: (a) The attack must be unlawful; (b) the attack must be directed at an interest legally deserving of protection; and (c) the attack must be imminent but not yet completed.

Intention is a state of mind which can be inferred from the circumstances of each case. In determining the type of *mens rea* in a murder case, the court will have to look at the nature of the weapon used together with the position on the body where the injury was directed and the force used. The accused did not act in self-defence.

ORDER

The accused is convicted for murder (*dolus eventualis*).

JUDGMENT

JANUARY, J

[1] The accused is indicted for Murder in that on or about the 4th of December 2011 and at or near Okatwitwi Location, in the district of Eenhana the accused did unlawfully and intentionally kill Petrus Nameto Shuunto a male adult.

[2] The State is represented by Mr Gaweseb and the accused by Ms Mainga.

[3] The allegation according to the summary of substantial facts are that: 'On 04th December 2011 the accused was at Okatwitwi location in the district Eenhana. The deceased was chased by the accused and another person. The deceased then turned

around and accused cut the deceased with the panga on the neck. The accused run away with the panga and left behind his sandals and t-shirt. The deceased died on the scene.’

[4] The accused pleaded not guilty and stated that he acted in self-defence without any further plea explanation.

[5] The State called an eye witness, Salatiel Shinavene who stated that he was on 04 December 2011 at about 20h00 sitting at a cuca shop with one Isaskar when he saw three guys approaching. One of the guys, the accused, was having a panga. At some stage the guys divided and the accused with the panga approached the deceased who in turn walked backwards. The third person went in between the accused and the deceased to separate them. After a while this person got away. The deceased made a jumping movement as if to kick the panga from the accused’s hand. The next moment the deceased was lying on the ground bleeding with a cut wound from the neck. The accused then left the scene with the panga leaving behind his sandals and T-shirt.

[6] In cross-examination this witness stated that he did not see how the deceased was cut although he observed the incident the whole time. He did not see the accused and deceased arguing or fighting. He did not see the deceased pursuing or following the accused.

[7] Isascar Shinavene is the older brother of the first witness. He was seated at the bar with the first witness. He saw three people who came running to the bar from a western direction. The persons that came running were the accused who had a panga, the deceased and a third person. They came to a standstill and the deceased kicked the accused on the hand holding the panga. The accused then cut the deceased with the panga on the left side of the neck. The witness did not see anything in the hands of the deceased. The witness could not state the manner how the deceased was cut. The accused left the scene running away and left behind a T-shirt and his sandals. The witness saw the accused before the incident in the location but he does not know his name.

[8] In cross-examination the witness stated that he did not see the accused being pursued or chased by the deceased. He also did not witness the deceased grabbing or

dragging the T-shirt of the accused. He also did not see that the accused was kicked on the right rib cage. The witness stated in his statement to the police that the deceased and accused were in physical contact and wrestling but in court he denied that and did not see it.

[9] Leonard Ipaka knows the accused as they were working together and the accused at times overnighted at his place. The accused and his brother were renting a corrugated zinc room from this witness. He gave notice to the accused and his brother to leave the room after it came to his attention that the accused cut somebody with a panga. The police contacted him on a certain date. On the following day he found the police with the accused at the entrance of the room. They entered the room and found a panga under a table. It was sharpened by the accused before and belonged to one of their clients. They used to sharpen pangas for clients. The police took the panga. The witness identified the panga in court.

[10] Joseph Penovamati Shiikenkeni knows the accused as he is staying at a neighbouring village. The witness also came to know the deceased. On the day of the incident this witness was together with one Shaanika Erastus drinking homebrew tombo. The accused later joined them and they drank together. The deceased came there and asked the accused about the whereabouts of the deceased's girlfriend. The accused denied having seen the girlfriend. The deceased told the accused that he will put the accused back into his mother whereupon the accused uttered the same words to the deceased. The deceased started pushing the accused whereupon the accused retaliated pushing the deceased. They pushed each other behind a cuca shop.

[11] This witness and Shaanika followed the accused and deceased after a while. Shaanika tried to separate the two. Shaanika went in between the two and separated them. When Shaanika moved away, the deceased kicked the accused in the stomach with shoed foot. The accused went backwards because of the kick, withdrew a panga from his waist in the trousers and cut the deceased on the neck. The deceased was just standing when he was cut. The deceased fell down and died. The accused thereafter left the scene walking away. The t-shirt of the accused was in the hands of Shaanika after the accused left.

[12] Onesmus Kamati is a police officer and one of the members who visited the scene of crime on the night of the incident. On arrival they found a group of onlookers at the scene. One person identified himself as Erastus Shaanika, the brother to the accused. He handed a t-shirt to the police and showed out sandals also belonging to the accused. This officer observed the body of the deceased on the ground with a cut wound on the left side of the neck and a bandaged left hand. The police searched for the accused but could not find him. They searched for weapons too but found none. The witness identified the t-shirt and sandals in court.

[13] Ben Shikutamba Shilongo is an investigating officer and also attended the scene on the night of the incident. He corroborates the previous police officer on what the police found at the scene. When the preliminary investigations were done at the scene this witness transported the body to Oshakati police mortuary. He was assisted by two police officers at the mortuary to offload the body. He handed the body to Cst Joseph Muningilwa Shilongo. The body did not sustain any further injuries.

[14] Patrick Hamunyela is another police officer having done duty as a charge office Sergeant. On the 06th December 2011, he received instructions from his shift commander to go and search for the accused together with three other police officers. He went to the location to search for the accused but did not find him. He later received information where the accused was and went to the place. He found the accused in a room with two other persons and arrested the accused. The accused was taken to the charge office where he spent a few hours whereupon he was taken to Ohangwena police station.

[15] Dr. Armando Peres Ricardo is a medical doctor and a senior medical officer in forensic services. He did not conduct the post mortem examination. The doctor who conducted the post mortem examination is presently out of the country. Dr. Ricardo read the post mortem report into the record. The post mortem examination was done on 06th December 2011 by Dr. Ariel Benitez Peres. The chief post mortem finding was an incised wound of 12 cm in the left side of the neck cutting the jugular vein and carotid artery, fracturing the 2nd and 3rd vertebrae (the cervical). The wound went from left to right and from up to down severing the sternocleidomastoid muscle. The cause of death is a neck injury. The doctor opined that moderate to strong force must have been used.

[16] Leticia Kauripanda Nauyoma is a police officer and the investigating officer in the case. When she had received the case docket, the accused was already arrested. She called the accused to her office, formally charged him and took down a warning statement from the accused. She recovered the panga from Leonard Ipakwa, received the sandals and t-shirt and booked the items as exhibits. This witness tried to locate the person who tried to separate the accused and deceased on the night of the incident but was unsuccessful to trace the person.

[17] The accused testified in his defence and did not call any witnesses. He stated that on the date of the incident he came to his workplace in Okatwitwi location where he was doing welding. A customer brought a panga to him to be sharpened. The customer instructed him to return the panga after being sharpened. When the accused returned the panga he could not find the customer. He found his friends busy drinking and joined them. He tucked the panga in his waist. The deceased approached him, called him and confronted him about his girlfriend. The accused who was seated stood up. The deceased grabbed the accused on his t-shirt and pushed him backwards. The accused got rid of the t-shirt undressing himself. The deceased then kicked the accused on the right side of the ribs. The accused stumbled and almost fell. Accused took out the panga and cut the deceased because the deceased was still coming towards him. The accused denied that there was a separation by a third person as he did not see it. He further testified that he did not have the intention to cut the deceased on the neck but thought to cut him on the shoulder.

[18] The accused testified that he cut the deceased because he did not know what the deceased's intention was. He wanted to cut the deceased on the shoulder because the deceased stormed towards him. He stated that he did not want to kill the deceased intentionally. He just cut him to stop from him coming towards him. He then stated that he cut the deceased because of anger nothing else. The accused also wanted the deceased to let go of him.

[19] Not many of the facts are in dispute. It is common cause that three persons approached the cuca shop. The witnesses differ whether the persons were running, walking or jogging. I do not consider the different manners how the three persons

allegedly came to the cuca shop as material. It is further common cause that the deceased confronted the accused about his (the deceased's) girlfriend. An argument ensued whereupon the deceased started pushing the accused to the back of the cuca shop. The witnesses are further ad idem that at some stage the third person separated or tried to separate the accused and the deceased. When the third person moved away, the deceased kicked the accused in the stomach or right rib cage. The accused moved backwards either as a result of the kick or to lessen the force of the kick. The accused took the panga which was in his waist and cut the deceased on the neck whereupon the deceased fell down and passed away. The deceased had no weapon on him.

[20] This court needs to consider if at the critical moment of executing the cut with the panga, the accused's version is reasonably possibly true that he acted in self-defence. I caution myself against arm chair reasoning in the calm atmosphere of this court.

[21] The requirements of private defence as stated in the case of *S v Goliath* 1972 (3) SA 1 (A) are as follows: In order for the accused to succeed with private defence, the following requirements must be met:

- (a) The attack must be unlawful;
- (b) The attack must be directed at an interest legally deserving of protection;
- (c) The attack must be imminent but not yet completed.¹

[22] I agree with Hoff J (as he then was) where he states in *S v Mwanyekele* and refer with approval to authority reflected hereunder:

[24] It is axiomatic that the act of defence may not be more harmful than necessary in order to ward off the attack but much depends upon the varying circumstances in each case in deciding the question whether the bounds of self-defence have been exceeded. In the consideration of this question the courts adopt a robust approach.²

¹ *S v Naftali* 1992 NR 299 (HC).

² 2014 (3) NR 632 (HC) at 636 C.

[25] In *Ntanjana v Vorster & Minister of Justice* 1950 (4) SA 398 (C) at 406A – D Van Winsen AJ stated the following:

“The very objectivity of the test, however, demands that when the Court comes to decide whether there was a necessity to act in self-defence it must place itself in the position of the person claiming to have acted in self-defence and consider all the surrounding factors operating on his mind at the time he acted. The Court must be careful to avoid the role of armchair critic wise after the event, weighing the matter in the secluded security of the Courtroom. . . . Furthermore, in judging the matter it must be ever present to the mind of the judge that, at any rate in the particular circumstances of this case, the person claiming to act in self-defence does so in an emergency, the creation of which is the work of the person unlawfully attacking. The self-defender is accordingly entitled to have extended to him that degree of indulgence usually accorded by law when judging the conduct of a person acting in a situation of imminent peril.”

[26] In *Ntsomi v Minister of Law and Order* 1990 (1) SA 512 (C) at 529C – D Van Deventer AJ stated the following:

“As both Snyman and De Wet and Swanepoel point out, it would be nonsensical to require equilibrium between weapons used. An assailant selects his method of attack and picks his weapon. A victim can only employ the weapon that happens to be at hand. An offender who uses an object such as a stone to attack a policeman who is armed only with a H shotgun is certainly not entitled to expect the policeman to lay his shotgun neatly aside and to take up the challenge to a fight with a stone in his hand.”

[27] In *S v T* 1986 (2) SA 112 (O) at 128D MT Steyn J stated that the true legal position is that where a person who is being attacked does not find himself in a life-threatening situation, but who can only escape mutilation or serious bodily injury by using a firearm against his attacker, he may do so and if necessary even kill the attacker.

[28] In my view, in the final analysis, and as was stated in *Ntsomi* (supra), the question is not whether there were other methods of defence which might have been successful in averting the unlawful attack but whether the method in fact adopted can be justified in the circumstances.’

[23] In my evaluation of the evidence, I find that even though the deceased kicked the accused in the stomach or rib cage the evidence indicate that the deceased after the kick was just standing and not attacking. There was therefore no imminent attack at the time

that the deceased was cut with the panga. Even if I am wrong in this finding I get the impression that the accused is exaggerating an attack if he was attacked at all. He for instance testified that the deceased was storming onto him whereas none of the witnesses testified to that nor was it put to them that the deceased stormed. The accused also testified that he cut the deceased because of anger, nothing else. In my view, the inflicting of the cut with the panga is more an act of retaliation after the accused was kicked as he stated that he was angry. I find no justification that he used the panga.

[24] The accused denied that he intended to kill the deceased. It is trite that many accused seldom admit to the intention to kill. None of the witnesses heard any communication from the accused that he wanted to kill the deceased. He may however still be convicted for murder if he had the legal intention of *dolus eventualis*. That is when an accused foresees the possibility that death might ensue but continues with his unlawful conduct in reckless disregard of the result of his unlawful conduct. Subjective foresight may be proved by inference.³ I have already found that the accused did not act in self-defence. I find that considering the panga which is a lethal weapon used on a human being, the wound inflicted, the nature thereof and the evidence that strong force was used, I conclude that the accused did foresee the possibility that the deceased could be fatally injured and he recklessly nevertheless proceeded and inflicted the cut wound with the panga causing the death of the deceased.

[25] In the result:

The accused is convicted for murder (*dolus eventualis*).

H C JANUARY

JUDGE

Appearances:

³ *S v Sigwahla* 1967 (4) SA 566(A).

For the State:

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Of Office of the Prosecutor-General, Oshakati.

For the Accused:

Ms Mainga

Of Inonge Mainga Attorneys, Oshakati.