

~~100451A7B~~ vs STANLEY GURISAM

Muller A.J.

CRIMINAL LAW

MURDER

Deceased found with knife in his hand - knife of deceased compatible with fatal wound - knife of accused not.

State failed to prove beyond reasonable doubt that accused caused fatal stabwound and to exclude that fatal wound could have been self inflicted by deceased during struggle. Accused found not guilty and discharged.

IN THE HIGH COURT OF NAMIBIA

In the matter between

THE STATE

versus

STANLEY GURISAM

CORAM: MULLER, A.J.

Heard on: 1994/10/20,25; 1994/11/23

Delivered on: 1994/11/23

JUDGMENT

MULLER, A.J.: The accused was charged of the murder of Stefanus Maans in respect of the incident that occurred on the 12th February 1994 in Otjiwarongo.

Mr Makando represented the State and Mr Mtopa defended the accused, instructed by the Legal Aid Board.

The accused pleaded not guilty and a written plea explanation in terms of section 115 of the Criminal Procedure Act 1977 was handed in which reads as follows:

"The accused denies that he unlawfully and intentionally killed one Stefanus Maans on the 12th February 1994 on the following grounds:

- (1) That the deceased threatened, harassed and provoked the accused.
- (2) That the deceased attacked the accused first and the accused in response to that attack attacked that deceased in self-defence.
- (3) That in the struggle or fight that ensued the accused did not intend to kill the deceased when the deceased suffered fatal injury."

The evidence presented to this Court except for the crucial incident do not differ much between the State and the Defence. It is fairly common cause what happened during the course of the day until the time that the deceased and the accused met each other at the specific bottle store in which vicinity the alleged stabbing occurred.

The State presented the evidence of Dr Tietz, who conducted the post mortem on the body of the deceased as well as that of Baren Camm, Charles Meintjies, John Fisch and two police officers, namely Constable Hoeb and another police officer, Mr Goagoseb.

The accused testified under oath and called one witness, his elder brother namely John Evans Gawaseb.

I shall refer in the first instance to the medical evidence of Dr Tietz. The post mortem was conducted by Dr Tietz on the 15th February 1994 on the body of the deceased and he observed the following wounds. There was one penetrating wound above the

left clavicle and a further penetrating wound just to the left side of the chest in line with left nipple and a further wound which was not much more than a scratch on the right hand side of the chest. The second wound was the most serious wound and was in fact the fatal wound which caused the death, which was described by the doctor as a penetrating wound into the heart. This wound also cut through one of the ribs which is an indication of the force he used on the object which penetrated the chest of the deceased. The doctor had the opportunity to observe the exhibits namely EXHIBITS 2 and 3, which were two knives. EXHIBIT 2 is a flimsy sort of knife which can be described as a vegetable knife normally used to skin vegetables whilst EXHIBIT 3 is a heavier type of pocket knife which locks when it is opened and with a very sharp point. According to the doctor it is very unlikely that EXHIBIT 2, the vegetable knife could have caused a fatal wound in the chest of the deceased which penetrated his heart and could have penetrated through the rib which was severed. On the other hand, the doctor found it possible and probable that the wound was caused by an object similar as EXHIBIT 3. It is common cause that EXHIBIT 3 was the knife which belonged to the deceased which he had and used in threatening people earlier that morning, and which was eventually found in his hand or next to his hand where his body was found. According to the doctor, if the deceased received immediate medical attention where cardiac surgery was immediately available he could possibly survived, otherwise not. The doctor also commented in respect of information given to him on the possibility that either of the wounds could have been self-inflicted and he described it as highly unlikely that the fatal wound and the wound could have been self-inflicted. This observation and opinion he attempted to motivate by describing that the person who had a knife in his own right hand or left

hand would have found it difficult to inflict those wounds and in particular the fatal wound. It was however not covered with the doctor in his evidence whether self-inflicting could also have meant inflicted in the course of a struggle by the deceased having his knife in his own hands and when a struggle occurred in respect of that knife. Consequently, I do not know whether such a possibility would have been excluded by the doctor. I shall deal with the way the witnesses described that the wounds were inflicted when I deal with the respective evidence.

One of the State witnesses, namely the first witness, Baren Camm described to the Court how he and the deceased went on the particular morning to look for a person called Boeta. The deceased and this Baren Camm were apparently friends. The purpose of the visit to Boeta was that the deceased wanted money which Boeta apparently owed him. When they met Boeta the deceased was only handed N\$10 which didn't satisfy the deceased and he promised to get Boeta. The two then walked further and met Boeta again. They also met the accused and another friend of the accused. When Boeta was again asked for more money the deceased got cross and wanted to fight Boeta. He ran away. The deceased then asked the accused and his friend who wanted to help Boeta. They denied that they wanted to be involved in any way but the deceased was cross and, in the words of Camm, he just wanted to fight. He tried to restore peace and asked the deceased to leave them alone. At a later stage the deceased and Camm went to the bottle store called Camaro's bottle store which is actually a shebeen, if I understand the evidence correctly. There they saw two persons sitting in a motor car who were Charles Meintjies and John Fisch. According to Camm they talked

to these people and he was sent into the shebeen to buy wine. Camm didn't see how the incident occurred between the deceased and the accused, because when he came out of the shebeen, he encountered the brother of the accused, which he then thought was his cousin at the gate and was accused by this person that they were worrying his cousin. This person wanted to search him for a knife. In the process a fight ensued between the two of them. Afterwards they apparently made peace and together helped Fisch pushing his motor car. According to Camm, he was told by Meintjies and Fisch what had happened outside, namely that the accused hit the deceased with a cap on his chest whereafter they saw blood. Camm started looking for the deceased, didn't find him, and eventually met police officer, Constable Hoeb, with whom he went to the place where the deceased was found and to the place where the accused and his brother lived.

During cross-examination Camm conceded to questions put by Dr Mtopa that earlier that day the deceased threatened an old man with a knife. Although he denied that the person was robbed, this was apparently what happened because this old man was waiting at the charge office when they eventually arrived there after the stabbing incident. He also confirmed that the deceased had a knife and that it was EXHIBIT 3 which he used the morning and used to threaten the deceased and to threaten Boeta and later the accused that day.

Charles Meintjies and John Fisch virtually gave identical evidence. Their version to the Court was that they were sitting in the car that Fisch drove, approximately in front of the shebeen, parked under the tree. This was their lunch hour but

they denied that they were drinking, or came there to drink or buy liquor. According to them the deceased and Camm arrived there, he talked to them and in particular to Meintjies where they were sitting in the car with Fisch behind the steering wheel. They differed in their evidence in respect of where the deceased first came to stand while talking to them, whether it was on the driver's side or the passenger's side, but mainly their evidence were the following, namely that the person, Camm, walked forward to the shebeen while the deceased talked with Meintjies at the car. According to both of them the accused and his brother then arrived, walked past the car, whilst the elder brother walked towards the shebeen where Camm went. The accused approached the deceased and the deceased also walked forward and they met each other somewhere in the vicinity of the left front corner of the car. It is clear from their evidence that they had an unobstructive view to see what occurred between the two, namely the deceased and the accused.

Both of them described the incident in exactly the same manner, namely that there was no struggle or argument between the two persons, although, according to Meintjies, the accused and deceased spoke to each other, but he couldn't hear what they said. The deceased was unarmed while the accused had EXHIBIT 1, a blue cap in his right hand with which he hit the deceased three times in the same place on the left hand side in the deceased's chest. Neither of them saw any weapon or knife in either hand of the accused. According to Meintjies he said when this occurred, which he described as "one and a half yards from me, next to me, I saw blood". The description of Fisch was that when the deceased was beaten on the left side of the chest, blood spurted and the deceased ran and the accused picked up a

stone. They apparently then drove away because they were afraid that their car may be hit in any stone throwing that might have occurred. Meintjies was not certain when the car was started. In his evidence it appeared that the car may have been started even before the stabbing occurred. He said, when the car was started accused came and just beat him on the chest. In any event, they apparently drove off. They said they drove directly home.

The evidence of the police officers were the following. Sergeant Hoeb testified that he was on duty that particular day, which was a Saturday, 12th February 1994 and whilst patrolling in his car he had a radio call and a report of an assault case which led him to this particular Camaro's Bottle Store. He was taken to a man lying on his stomach some block and a half from the bottle store. He said I saw that he had an open pocket knife in his hand. This was EXHIBIT 3. He discovered that this person didn't have any pulse any more and was already dead. Warrant Officer Goagoseb was informed of the incident and he arrived later and also took photos. On his way Sergeant Hoeb met Camm which he picked up and who also told him about the fight between the deceased and the accused and he was shown where the accused lived. When they arrived at the house the brother was apparently aggressive and they had to calm him down. He also found EXHIBIT 2, the kitchen knife at this house when it was handed over to him by the accused, and the accused also explained to him that he had already washed the knife. He also confiscated other objects like the sunglasses which apparently belonged to the deceased which was found near the scene where the body of the deceased was found. He also conveyed the body then further to the mortuary where it was handed over. According to him, he

found the knife, EXHIBIT 3, firmly in the hand of the deceased and it was open. Certain words were uttered by the brother of the accused at his house, namely words to the extent of "he got what he was looking for". Sergeant Goagoseb confirmed that he was the person who took certain photos at the scene particularly where the body of the deceased was found and according to him a knife was found near the right hand of the deceased, which also appears on EXHIBIT G7. According to Warrant Officer Goagoseb it was not difficult to find the body of the deceased, because he followed blood spots, which he described as blood that spurted, up to the place where the deceased apparently went over a fence and was found

lying on his stomach. According to him the sunglasses was full of blood and he also examined the knife and found it open and full of blood.

The accused testified and described how he went alone that morning to town to look for a video cassette for his friend. In town he met Camm and the deceased. The accused testified, and I have to accept, that he was only living in Otjiwarongo for a few months before the incident occurred and didn't know the people and apparently not the town very well. He didn't know the deceased at all. He also confirmed that money was asked from him when he bought a cooldrink. He handed the change of approximately N\$3,20 over to Camm and the deceased. He then went home and met Boeta on the way. They walked towards Boeta's house. Boeta was carrying groceries and at his house he wanted to wash himself but then Camm and the deceased arrived there. They asked for Boeta and asked him for money which Boeta apparently owed, or which he described it as "which one owed the

other". The deceased wasn't satisfied and the deceased took out his knife with which he threatened Boeta, whereupon Boeta jumped over the fence and ran away. The accused also identified this knife in the hands of the deceased as EXHIBIT 3. They were followed by deceased and Camm and he wanted to stab Boeta. Unfortunately apparently, for the accused he intervened and this then directed the attention of the deceased towards him because the deceased thought he was taking Boeta's side, and he also was chased by the deceased with the open knife. They ran away and apparently got separated.

The accused ran home where he reported the incident to his brother and he apparently wanted to lay a charge. The two persons, who were known to his brother, of which Camm was apparently the brother of his girlfriend. Accused's brother John, who was busy working on the geyser in the roof when he heard the story, decided that they should rather go and first talk to these two people. They found them at Camaro's Bottle Store, namely the deceased and Camm, who were sitting in front of the bottle store. He didn't see Charles Meintjies or Fisch, although there may have been a car parked in the vicinity. When they approached Camm and the deceased they stood up and came towards them. The deceased said something to the effect of "here comes the cunt's child again", referring apparently to the accused. According to the accused he walked a bit forward, and then saw that the deceased was coming to them with an open knife, which was again identified as EXHIBIT 3. The deceased also picked up a stone and threw a stone at the accused, which he ducked and which missed him. The deceased stormed forward and lost his balance and in the process, according to the accused, he grabbed his hand which had the knife from behind him and they

apparently struggled over possession of the knife. He said at that stage he was scared for his life and he also saw blood on the body of the deceased in the vicinity of his chest and neck. The deceased then apparently reversed somewhat, the accused picked up his cap which he lost in the process, but then the deceased stormed at him again, and according to him, he then took his knife, EXHIBIT 2, from his pocket and stabbed at the deceased. According to him, he stabbed him on the right hand side of

his chest, that's in the vicinity of the third wound which was described by the doctor as not more than a scratch. He said he did so because he anticipated that he will be stabbed by the deceased and he defended himself and didn't intent to stab him or kill him or injure him. He apparently ran home to his brother's place but in the process while he was struggling with the deceased his brother also had a struggle or a fight with Camm. He confirmed that he washed the knife and handed it over to the police officer and also the cap. The accused, when confronted by Mr Mkando with the evidence of Fisch and Meintjies, who testified that they saw clearly that there was no struggle before the deceased was hit or stabbed on his chest, asked the question, namely that if they say so they must also have seen the blood on the cap. I shall deal with this aspect later.

The evidence was concluded after the postponement this morning when John Gawaseb, the brother of the accused testified. He confirmed that he was working at home at approximately 12:45 when the accused arrived there and complained about the chase and the attempt to stab him by the deceased. He also noticed,

when he got down from the roof, that the accused was tense and out of breath. On the description of the two people he suspected who it was and then accompanied his younger brother, the accused, to talk to these men and to make sure that it wasn't just a story told by the accused which wasn't true, before any charge was laid. John handed in a rough sketch which assisted the Court to understand the set-up around the bottle store. According to him, when they arrived there from the direction of Point 7 on the plan, a car, which he described as a white Cressida, was parked at the main gate of the premises at Point 8. They walked in the street and he noticed that Meintjies approached the car, coming from the bottle store with plastic bags containing what was probably liquor. Meintjies got into the car on the passenger side. He couldn't recognise through the tinted windows who the driver was, but noticed a person behind the steering wheel. Meintjies asked him what are you, who are not drinking, doing here, meaning that John was a person who does not drink, and asked him what he was doing in the vicinity of the bottle store. According to him, when Meintjies got into the car, the driver took off and he drove away. This occurred before any incident occurred between the two of them and the deceased and Camm. When the car drove off they walked further in the direction of the bottle store and was approached by the deceased, who apparently stormed at the accused with an open knife in his hand. He intervened and separated them and according to him it appears that his brother, the accused was a bit cocky, but he sent him away and he was under the impression that he ran away.

He then concentrated on Camm which he saw putting his hand in his pocket and suspected that he also had a knife. They struggled and even fought and eventually Camm let him look into his pockets and he found that he didn't have a knife. He doesn't know what happened to the other two, the accused and the deceased, but later found his brother on the way home walking in the same direction as they came when they approached the bottle store.

In the mean time after his fight with Camm, they apparently made peace and they also helped another person to push a motor vehicle. He also described how the police arrived at his house, stopped a distance from the house and shouted at him to which he retaliated saying he is not a dog to be shouted at. When the police approached them, he noticed Camm sitting in front of the police vehicle and he then said "he got what he was looking for", referring to Camm, which he thought laid a charge against him for the fight between the two of them. He was also apprehended together with the accused and taken to the police station. According to him, his brother handed EXHIBIT 2, which was his own kitchen knife, to the police, that's the one that he used to stab the deceased. He also identified EXHIBIT 1 as the cap which his brother, the accused, had on that day, and had on after the incident and which was handed over to the police at the police station. According to him there was no blood on the cap that he noticed and said that there was no opportunity for the accused to wash the cap. It was on his head and not wet.

That concluded the evidence presented in this Court. Arguments were addressed on the basis of provocation, self-defence, lack of mens rea, that's the intent to kill, or whether such intent was proved.

The evidence before me presents me with a severe difficulty which I believe the State didn't overcome and consequently didn't prove beyond reasonable doubt that the accused murdered the deceased. It is common cause that the deceased was a trouble maker on that particular day. He was spoiling for a fight. He carried a knife which is according to my observation of EXHIBIT 3 a vicious object, a dangerous weapon. This knife he already used early that morning to apparently rob an old man. Then he didn't hesitate to also use that knife to threaten Boeta and later the accused. There's no doubt that EXHIBIT 3 was during all relevant times in the possession of the deceased. There is no other evidence in respect of EXHIBIT 2 than that that weapon was in the possession of the accused and no other knife. It is clear from the evidence that the two different versions, namely that of the State witnesses Meintjies and Fisch and that of the accused, supported to a certain extent by his brother, are irreconcilable.

The one version excludes any possibility of the other. Mr Mkando submitted that Fisch and Meintjies were independent persons, not related to the deceased or the accused. But I have a very big problem with their evidence. On their version there was no struggle before the deceased was hit by the accused with a cap in his hand, apparently with a knife concealed in it. The deceased walked forward towards the accused and then stood still with his hands along his thighs. This is certainly not in line with his behaviour during the course of that day. It is further common cause that the deceased was drunk, angry and ready for a fight during the course of that day and that he carried a knife which he didn't hesitate to take out and use to threaten people.

According to Meintjies and Fisch they didn't see any weapon in the hands of the accused. They only, but clearly, saw him hitting the deceased on his chest in the vicinity where the wounds were found eventually. Both saw blood. It was even described as blood spurting from the wounds. This is also supported by what Sergeant Goagoseb found and the doctor, according to the type of the wounds and in particular the fatal wound, namely a stab wound directly into the heart of the deceased. There is no evidence that the cap was ever washed, on the contrary, according to John's evidence, it couldn't have been done, when taking the period of time into consideration and the accused had it on his head. There can be no possibility, in my opinion, that three stab wounds could have been caused by a knife concealed in the cap and with blood spurting from the wounds without any drop of blood on the cap. That is clearly not possible. What does this mean? This indicates that Fisch and Meintjies may not have seen what happened, and that the evidence of the accused and John may be correct that they were not there at the time. A further problem that I have with their evidence, is that their version doesn't account for the deceased's knife which was found in his hand full of blood. It is clearly improbable that the accused would have taken out his knife only when he ran away after he had been stabbed.

On the other hand, I have to consider the evidence of the accused, which I must say, didn't make a bad impression on me even considering the circumstances of tension that he was in as a person standing trial for a serious offence, and his brother

who made a very good impression on me, whom I believe, testified honestly, directly and clearly about the events of that particular day. Here we have a situation where a trouble maker continued to harass people and tried even to stab the accused. Nobody can fault what he did by going to his brother and complain to him. It is also understandable what his brother did by saying let's rather clear up the situation and find out what actually happened before we take the matter further, because he knew the people.

That brings me to their version of what happened at Camaro's Bottle Store. I believe that John is probably right and correct in his evidence that the Cressida drove off before the incident occurred. I've already referred to the hesitation of Meintjies in his evidence about when the car was started. If I accept their version and reject that of Meintjies and Fisch I have to determine whether the accused inflicted the stab wounds which eventually caused the death of the deceased. John could have, but didn't attempt to support his brother's evidence of the crucial incident. That supports my relief that he innocently tried to testify what actually happened that day. So we are back to the evidence of the accused of what happened.

To some extent he is supported by John in the sense that the deceased stormed at the accused with an open knife and he then intervened but after that concentrated on Camm. That also coincides with Camm's evidence that the two of them had a fight and even Camm didn't see what happened between the accused and the deceased. What happened further between the deceased and the accused have to be evaluated on the accused's evidence and

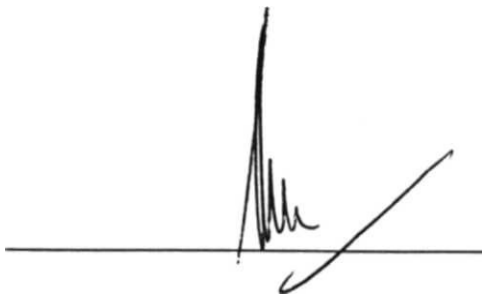
other supporting evidence if there are any. According to the accused, when the stone was thrown at him and the deceased lost his balance, he grabbed him from behind, grabbed the hand which had the knife in and that they struggled with the knife.

I know, and that was submitted by Mr Mkando, that the doctor excluded as highly unlikely that the wounds of the deceased were self-inflicted. However, for the reasons that the doctor gave, it is clear to me that the doctor considered that question to be wounds inflicted by a person himself by stabbing himself. I agree that is probably unlikely but self-inflicted wounds in the sense that the knife held by the person himself in a struggle could have caused the wounds, doesn't seem to me to be so unlikely.

The accused testified that he saw blood on the deceased and that there was then some sort of interval before he was attacked again and in which incident he then used his own knife, and I'll come to that a bit later. But according to John's evidence and the accused's evidence the deceased had his knife which is a sharp object, open in his hand. I can't exclude the possibility that some of the wounds in that struggle may have been caused during that struggle by the deceased's own knife. There is some support for this possibility namely that the deceased was found with the same knife in or near his hand and the knife was full of blood. No other version provides for such possibility than the one of the accused namely that the deceased's knife was probably used and caused the wounds in the struggle or even that he accidentally in that struggle stabbed the deceased.

In respect of the other wound, the accused testified that he inflicted the wound on the right hand side. He may lie about that and may take the chance to select that injury because the doctor said that was not much more than a scratch. I do not know, but what I do know is that in all probability, and as the doctor said, it is highly unlikely that EXHIBIT 2, namely the knife that the accused had, could have caused the fatal wound, because that flimsy knife could not have penetrated the rib, severed it and went in so deep into the heart without breaking. So, with the physical evidence of the knives, there is a large extent of support for the version of the accused, and as I have mentioned, I cannot accept the evidence of Meintjies and Fisch in the light of the cap which didn't have any blood on it and we know that the blood spurted. It even caused a trail which could be followed by Warrant Officer Goagoseb.

In all the circumstances I must entertain, and I do entertain, serious doubts of whether the accused caused the fatal wound and injuries to the deceased. He may have stabbed him, he may have scratched him with his knife, he may not have been in such a danger as to be justified to use a knife, but without knowing which stab wound caused the death and without being able to exclude the possibility that the deceased may have been stabbed in that struggle by himself with his own knife, I cannot convict the accused on this charge. I have also considered the possibility of convicting him for stabbing once at the deceased of the offence of assault with the intent to do grievous bodily-harm, but I also have doubts whether that has been proved.

A handwritten signature in black ink, appearing to be 'Muller', is written over a horizontal line. The signature is stylized with a tall, narrow vertical stroke on the left and a series of loops and a long diagonal stroke extending to the right.

MULLER, ACTING JUDGE

In the circumstances the accused is found not guilty and is acquitted.

FOR THE STATE

MR S.S. MAKANDO

FOR THE DEFENCE

DR A.M. MOTOPA

Instructed by

Legal Aid