

1995/08/15

THE STATE VERSUS SIMON GOWASEB

HANNAH, J

CRIMINAL PROCEDURE

Witness statements. - Should be taken down in the witnesses mother tongue and then properly translated. It is bad practice leading to complications if the statement is simultaneously translated into English by the police officer who takes the statement.

IN THE HIGH COURT OF NAMIBIA

In the matter between

THE STATE

versus

SIMON GOWASEB

CORAM: HANNAH, J.

Heard on: 1995/05/29

Delivered on:

JUDGMENT

HANNAH, J: The accused has pleaded not guilty to an indictment which alleges that on or about 16th of September, 1994 he murdered Johannes Damaseb to whom I shall refer as the deceased. At the outset of the trial the accused admitted that the deceased died as a result of a wound caused by the accused's knife but this wound according to a statement made in terms of section 115 of the Criminal Procedure Act, was caused by the deceased's own action. He had picked a fight with the accused and at a point in time when the accused was holding the knife in front of his chest and was telling the deceased to desist the deceased charged at him and impaled himself on the blade of the knife. This version was put to Doctor Agnew, who carried out an autopsy on the body of the deceased, and although she said that it was possible that the wound which the deceased sustained to his chest could have been caused in that way she considered

it unlikely. The injury which the deceased sustained would, she said, have required a deep stab wound requiring a considerable amount of force and she thought it unlikely that the deceased would have impaled himself on the accused's knife while running or charging at him. I would add that another unlikelihood is that the deceased would have charged at a man who was holding a knife up by his chest in a defensive position.

The first eye-witness called by the State was Immanuel Hochobeb, a fifteen year old schoolboy, who at the time of the incident would have been fourteen years of age. The deceased was a relative of his and lived at the house next door. On the day in question Immanuel had come home from school and was playing in front of his house when the deceased with two other persons called Hans and Presley, arrived at the front gate. Presley was carrying some red wine and the three entered through the gate. Then, according to the witness, the accused came from around the house, went up to the deceased and asked him, "What were you talking about yesterday?" The accused, according to the witness, was holding a knife in his right hand and then without more ado he stabbed the deceased on the left side of his chest. This latter piece of evidence was in conflict with that of Dr Agnew who said that the wound sustained by the deceased was just below the right clavicle and I will have something to say about this later.

Immanuel said that the deceased said, "It is alright", that he walked to the fence which borders the property, knocked

into the fence and then fell to the ground. Someone then ran into the house to tell the rest of the family what had happened and they came out. Immanuel was cross-examined at some length but he adhered firmly to the account which he had given in examination-in-chief. He rejected outright the suggestion that was put to him that there had been an incident behind the house during which the deceased attacked the accused and that it was during this incident that the deceased received the fatal wound.

The next witness was Hendrik Gaogoses who preferred to be called Michael and who is aged eleven years and who gave unsworn evidence. He appeared nervous to begin with which, having regard to his age, is understandable but he gained confidence as his testimony continued. His account of the events was very similar to that of Immanuel. He said that he was playing alone at the front of the house on the day in question after school. In cross-examination he corrected this by saying that Immanuel was also present behind the fence of a small garden in the yard. The deceased together with Hans and Presley then arrived and Presley went into the house while Hans went to the back. The deceased stayed in the yard at the front and the accused then came from the back and said, "Do you think that I have forgotten and forgiven you?" and he then stabbed the deceased on the left side of his chest with a brown knife. The deceased then walked to the fence, knocked into it and fell to the ground. Michael said that he told the people inside the house and the accused told them that the deceased had entered the yard already having been stabbed. The accused then helped carry

the deceased.

In cross-examination Michael was asked about Immanuel's evidence that the accused had said, "What were you talking about yesterday?" before stabbing the deceased but Michael said that he had not heard that. He was also cross-examined on a statement which he had made to the police on 18th September, 1994 and which started by stating that he had been playing with his friends Immanuel and Setty when the deceased arrived with his friends. He denied telling the police that but if he did, and this seems likely, it may well be that he had been playing with those two persons at some earlier stage. According to the statement he also told the police that the deceased had responded to the accused's question by saying, "What have I done to you?" and the witness said that he had forgotten about that. Another discrepancy between his evidence and his statement was that in the statement he said he could not describe the knife. Michael explained that he could now recall the colour and it is not without interest that the accused, when he came to testify, said that the knife in question indeed had a brown handle. As with Immanuel, Michael was also cross-examined as to whether he was sure the deceased had been stabbed on the left side of his chest and he remained adamant that he had been. He was also adamant that the stabbing had not taken place in the manner claimed by the accused.

The next witness was Hans Geiseb who, according to both Immanuel and Michael, arrived at the house together with the deceased. In his testimony he confirmed that this had

indeed been the case. He and Presley had been on their way to buy wine when they had met the deceased and he had joined them. They bought the wine and returned home and on arrival Presley went inside the house while he, Hans, went around the house to the back to the water tap. While he was going around the house he met the accused coming the other way. This, of course, accords with the evidence of Michael. Then when he returned to the front of the house he found that the deceased had been stabbed. The accused was calling the people in the house saying that the deceased had already been stabbed when he entered. Hans said that the deceased had sustained a wound on the right side of his chest.

Hans also made a statement to the police and in this statement he gave a completely different account of events. He said that at about 15:30 p.m. on the 16th September, 1994 he was together with the deceased, the accused, Jan van Wyck and Petrus Goagosob at the back of the house drinking. The accused and the deceased then started to quarrel about the deceased's refusal to testify on behalf of Van Wyck in a certain case and he, Hans, then went into the house for some water. When he returned he saw the deceased running and then falling. The accused, who had nothing in his hand, then went to the deceased and turned him and it was then that Hans saw blood on the deceased's chest. The accused said that they must take the deceased to hospital. Hans was either unable or not prepared to give any satisfactory explanation for making this statement which, of course, differs from not only the account which he gave to the Court but also differs from the version which the accused

ultimately gave. It is clear that he is a person who has no particular respect for the truth and I will have some comments to make about his statement later.

The next witness was Dorothea Damaseb. She said that she was the deceased's girlfriend until 1993 and knew the accused as a friend of her brother Jan van Wyck. She is seventeen years of age and on the day in question came home from school and saw that the accused and Jan were there. She settled down to read and then Immanuel came and said that men outside were arguing and then she heard the accused calling for them to come and look at the deceased who had arrived having already being stabbed. She went out and saw that the deceased had been stabbed on the right side of his chest. Dorothea's evidence is really more important with regard to what she said she did not see or hear rather than what she said she did see. It was put to her by defence counsel that she was at the time the accused's girlfriend and when the accused's drinking companions at the back of the house had left he had started talking to her through the back window. The deceased then came to the fence between the two properties and asked if the accused was proposing to her. He said that he was and the deceased said that he must not. The deceased then started to swear and an argument ensued. The deceased started to threaten the accused and Dorothea, according to what was put to her, said that if they were going to fight over her she would take the winner. The upshot was that a fight broke out during which the deceased threw bricks at the accused. Dorothea denied that any of this had happened.

In cross-examination defence counsel put it to Dorothea that her evidence was not entirely consistent with the statement which she made to the police although she was never asked to identify her statement and it was therefore not put in evidence. She accepted that she had said that the deceased, the accused, Presley, otherwise known as Alfred, and Hans had come from somewhere at their home and she said that this is what she had been told by Hans and when she came out of the house she saw that they were all there. That of course is common ground. She did not accept that she had said that the deceased and Hans and Presley were at the back of the house just prior to the incident. She said she only saw the accused and Jan.

The next state witness was Jan van Wyck who is nineteen years of age. The deceased was his cousin and the accused was a friend although not a close one. He said that during the morning of that day he, the accused and Presley drank wine behind the house and in cross-examination he added that Hans had also been present for a while but had left before the drinking began. When the three-bottle can, as the wine container is apparently called, was finished he and the accused went to the shops to buy sweets and on their return to the house the accused went to the back while he, Jan, went inside. By this time it was the afternoon. He then prepared food in Dorothea's room and nothing untoward happened. There was no conversation through the window between Dorothea and the accused as defence counsel suggested nor was there any quarrel between the accused and the deceased. If there had been he would have heard it, he

said. Some time passed and he then heard the accused call, "Come and look. The man came in having been stabbed. He then bumped himself against the fence and fell." Jan said he went outside the house and saw the deceased behind the house next to the fence. He had blood on his chest. Other matters dealt with by the witness in his evidence were that the accused had no radio that day, that they did not purchase more wine when they went to the shop for sweets and that they had only drunk one three-bottle can. As with Hans, his statement to the police was put to him and it emerged that, as in the case of Hans, he also told the police that the deceased was one of those drinking with the accused and others at the back of the house and that there had been a quarrel between the accused and the deceased. His explanation for saying this to the police was that he was confused but I suspect that there is a much more likely explanation which I will come to later.

The last State witness was Jonas Damaseb who lived next door and who is the father of the deceased. He is a mechanic and on that Friday was working on vehicles at the front of his house. He said that the deceased had gone to work as usual and as he usually returned from work between 15:00 and 16:00 he surmised that the incident must have occurred as the deceased returned. He usually returned through the front of the house but if he had bought drinks he might use the back. This would, of course, tie in with the evidence of Hans who said that he and Presley had met the deceased while on their way to buy wine. Jonas said that he had worked at the front of his house the whole day and he had had no contact

whatsoever with the accused prior to the incident. In particular he denied purchasing a radio cassette from the accused that day saying that this had happened over a month earlier. He said he was alerted to the incident by the deceased's girlfriend and when he went around his house he saw the accused and asked him where the deceased was. The accused told him that the deceased had arrived already having been stabbed, had then knocked into the accused and was lying by the fence. Jonas went and looked and saw blood on the deceased's chest and then went about arranging some transport.

Coming now to the evidence of the accused, he said that all the State witnesses with the exception of the doctor were lying. They were neighbours and related to one another and had conspired together to make out a case against him. He said that when he arrived at the house that Friday morning he had found five people drinking behind the house. They were Jan and his brothers or cousins and he could not put names to them. He had brought two tape-machines and some clothes with him and in his evidence-in-chief he said all of them then went out and he sold the clothes for more than N\$60 and with this they bought two three-bottle cans of wine. They then went back to the house and drank the wine leisurely and when the wine was finished they sat there because, to use the accused's words, "The man with the money was not there." He then said to Jan, "Call the man so that I can sell one the radio-tapes" and Jan said, "Call him yourself." The man, who the accused said was the deceased's father, apparently then arrived and said he would give him

N\$20 now for the tape-machine. The N\$20 and the tape-machine then exchanged hands and the accused gave the money to Hans, who was also there, in order to buy some more wine.

Hans left and the others went inside the house leaving the accused alone outside.

I pause in the narrative to say that this account started to fall apart under cross-examination. Under cross-examination the accused said that he already had N\$60 on him when he arrived at the house and they all went to the shops and used this to buy wine. Perhaps he had forgotten his earlier testimony that he had raised N\$60 or more by selling clothes. When reminded of his earlier testimony he said that he had indeed sold clothes for N\$60 and it then emerged that there had been two shopping expeditions and they had bought and consumed not two three-bottle cans, as he had said earlier, but four. The accused seemed to me rather uncomfortable throughout this part of the cross-examination as well he may have been. His evidence was also inconsistent as to the sequence of events which, he claimed, occurred. He said that he had sold the radio-tape to Jonas at about 13:30 p.m. and that they had finished the last of the four three-bottle cans of wine at or about 15:30 p.m. This, of course, did not accord with his evidence-in-chief that when the wine was finished they sat there because the man with the money, meaning Jonas, was not there. After the Court had pointed out the problem presented by this evidence the accused changed his testimony and said that the radio-tape was sold at about 15:30 p.m., not 13:30 p.m. 13:30 p.m. he said, was the time when they made plans to sell the

Continuing now with the narrative, the accused said that while seated outside at the back of the house he started talking to Dorothea through the window of her room and while he was talking to her the deceased came around the house next door with a bucket to fetch water. There was then an exchange between the accused and the deceased concerning the accused's conversation with Dorothea. I do not propose to go into the detail of the alleged exchange save to say that, according to the accused, the deceased was apparently jealous of the fact that the accused was making advances to Dorothea who had previously been the deceased's girlfriend. As Dorothea testified that her relationship with the deceased ended in 1993 and as Jonas testified that the deceased had a current girlfriend who had had his child this jealous attitude of the deceased is, to say the least, surprising. The accused said that the exchange finished with Dorothea saying that she would take the winner and the deceased saying that the accused would see and the deceased then left. The accused then said that his remaining radio-tape then fell to the ground and would not play and he took out his knife and started to loosen some screws. Eventually the deceased arrived through the front of the yard and started to throw bricks or stones at him. This, he said, was in full view of Jan, Immanuel, Hans and Dorothea and one of the bricks struck him on the head causing him to bleed so profusely that he could not see. He washed his face at the nearby tap and while he was doing this the deceased approached and kicked him. As the deceased approached he

had put the open knife in his back pocket, a curious action for a man under attack. They then wrestled with one another and the knife fell from his pocket. They then parted and the accused said he picked up the knife. The deceased then approached him again and at that point the accused said he was holding the knife in his left hand at about waist level with the handle pointing upwards at about 45° and the blade pointing towards his own body. He said to the deceased, "Stop what you are doing" but the deceased continued towards him and went into the knife. He then explained that in fact he raised his hand, the knife hand, and pushed the deceased back and as he pushed the deceased back the knife went into his body. The deceased then ran to the fence, tried to climb it but fell back. The accused admitted that when the deceased's father arrived he had told him that the deceased had already been stabbed when he arrived but explained that he had said this because he was frightened of what Jonas might do.

The account given by the accused differed from the statement made in terms of section 115 of the Criminal Procedure Act by his counsel in one very significant respect. In that statement it was stated in clear terms that the accused, having picked up his knife, held it in front of his chest with the blade pointing at the deceased and that the deceased then charged at him and ran into the knife. In his evidence the accused said that at no stage did he hold the knife in this manner. I will comment on this change in his story shortly.

Before concluding this rather lengthy summary of the evidence I must mention that the accused said in answer to questions from the Court that on his arrival at the police station after his arrest the same day he informed the Duty Sergeant, Sergeant Mahile of his injuries and on the following day he also mentioned them to Constable Zambi . He said some cream was applied to his injuries when a Mobile Clinic arrived at the police station some days later. The accused complained during his evidence that he had no witnesses to the incident which occurred between himself and the deceased and it seemed to me not only to be fair to him but to be in the interests of justice that both Sergeant Mahile and Constable Zambi should be called by the Court in order to see whether they could recall what took place in September, 1994 at the police station. Both police officers were therefore called but both denied even having been stationed at the police station in question in September, 1994 let alone having received a complaint from the accused. In the case of Sergeant Mahile, he said that he was in the Task Force in September, 1994 and was not transferred to Wanaheda Police Station until December of that year and in the case of Constable Zambi he said he was at the Police College in September, 1994, having joined the Police Force on the first of that month. He only took up duties at Wanaheda Police Station on 15th December, 1994. Both officers said that the accused has been held in custody at Wanaheda Police Station while awaiting trial and he has therefore known the two police officers since December, 1994 and if their evidence is to be accepted the accused told a blatant lie when he informed the Court that he had

complained to them of his injuries in mid-September, 1994. If their evidence is to be accepted he simply plucked their names out of the air in order to support his account not appreciating that the Court itself might decide that the police officers should be called. The Court also heard evidence from Sergeant Kock who testified that it was he who was the duty sergeant on the evening of 16th September, 1994 and he recalled booking the accused in at the police station. He said the accused did not complain of any injuries nor did he appear to be injured at all.

In final submissions Mr Grobler, for the accused, made various criticisms of the prosecution witnesses. He pointed to the fact that the evidence of Immanuel and Michael that the deceased had been stabbed on the left side of his chest was inconsistent with the evidence of Dr Agnew and other witnesses. He pointed to the fact that both boys gave a different account of what the accused had said to the deceased immediately prior to the alleged stabbing. He pointed to the fact that Michael said he was playing by himself when the deceased and the other two arrived whereas Immanuel said, "We were playing" indicating that they were playing together. He pointed to the fact that Michael's evidence of what he said when he went inside to report the incident was not consistent with that of Dorothea and he submitted that on the basis of the medical evidence it is most unlikely that the deceased could have walked to the fence at the back from the front of the yard as the two boys claimed happened. He submitted that the account given by the two boys was implausible and against all the

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I have considered these and other criticisms levelled by-counsel at the evidence of the two boys but in my judgment they fall far short of showing that either of the two boys was deliberately lying to the Court. Their evidence that the deceased was stabbed on the left side of his chest was in all probability a simple mistake. The incident, as they described it, must have been over very quickly and would have been a traumatic experience for both of them. That they should be mistaken in some details is perfectly understandable. The same can be said of their evidence as to what the accused said to the deceased. It is quite likely that more was said and that one or other of them only caught part of it. As for Michael saying that he was playing by himself that can be readily explained as faulty recollection. In fact he told the police in his statement that he was with Immanuel and another person. Also what was said to Dorothea could have been of little importance at the time. Either Michael or Dorothea could well be mistaken with regard to this. And as for the point made concerning the deceased walking to the back fence not only do we not know the distance involved but the doctor said that the deceased could have lived a few minutes after being injured. She most certainly did not say that the deceased could not have walked a few metres. If there is any substance in the account of the accused then Immanuel and Michael were part of a general conspiracy to concoct an entirely false story of what happened. And having seen them both in the witness box that was not the impression received from their reaction

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to questions and their general demeanour. The impression I had was that they were doing their best to relate events as they had seen them occur about one year ago. Although their evidence may be unreliable on certain details on their general account their evidence can, in my judgment, be regarded as trustworthy. And the unsworn evidence of Michael was, of course, corroborated by Immanuel in all its important respects.

Defence counsel was on surer ground with his criticisms when dealing with Hans and Jan because what both those witnesses said in their police statements as to the deceased being present behind the house drinking with the accused and themselves and the quarrel breaking out between the accused and the deceased while the two were together drinking was obviously false. No one who has given evidence in this case, not even the accused, has said that the deceased was behind the house drinking wine with the accused. The false statements made by the two witnesses clearly show a propensity to lie. However, although criticism of them is justified it does not necessarily follow that their evidence must be rejected, although obviously it must be approached with caution. One explanation for their false statements, and it seems to me a probable one, is that they were made with a view to helping the accused. They laid the ground for the accused to say that the quarrel referred to in the statements led to a stabbing and for the accused to come up with some exculpatory explanation for it. What seems to me significant is that their testimony to the Court dovetails with the testimony of both Michael and Immanuel. Mr Grobler

said that Hans must have seen the deceased fall at the fence at the back of the house while he was drinking at the tap but that is not necessarily so. Much depends on the precise geography of the yard and the location of the tap.

Moving on now to Dorothea there was not much criticism which defence counsel could level at her although Mr Grobler did point to the discrepancies between her statement to the police and her evidence. As I have said, her statement was not put in evidence but even if it had been one must exercise a certain degree of caution when dealing with statements such as those produced in the present case. Each one states that it was made in English but I very much doubt whether they were. It seems more likely that the police officer taking the statement down translated into English what was said and this, in my view, is a bad practice. One knows nothing of the police officer's skill in translation and to what extent the translation is accurate. And even if the witnesses did make their statements in English, which I doubt, English, of course, is not their mother-tongue and again the way is left open for errors to creep in. The proper practice is for witness statements to be taken down in the witness's mother-tongue and for statements then to be properly translated. Both Dorothea and the deceased's father, Jonas, struck me as credible witnesses and it is clear that if their evidence is correct then the accused must be lying and that brings me to the accused.

Mr Grobler was constrained to concede that the accused was not one of the best witnesses. This, in my view, was a

euphemistic way of putting it. As I have already said, the accused's case, as set out in the section 115 statement, was quite clear. Having picked up the knife he held it in front of his chest with the blade pointing at the deceased who then charged at him running into the knife. Having regard to the injuries sustained by the deceased the doctor considered this unlikely and, as I said earlier, it is unlikely that anyone would be so foolish as to run at a man holding a knife in the manner just described. It seems to me that the accused realised this, particularly after hearing the doctor's evidence, and he therefore tailored his evidence to meet that of the doctor. He said that he picked up the knife and turned and as he turned the deceased came at him again and he pushed him away with his knife arm therefore using some force. I do not agree with Mr Grobler that this was merely an extension of his story. It was an alteration and it indicates to me that the accused is prepared to say whatever suits him regardless whether it is false. I have already dealt with the accused's shifting evidence when dealing with events earlier on that Friday, which again reflects poorly on his credibility as a witness, and I will not repeat that. But I have not commented on his evidence concerning the injuries which he claimed he suffered and which are fairly central to his account of events. I have no hesitation in accepting the evidence of Sergeant Mahile, Constable Zambi and Sergeant Kock and it follows from this that I find the accused was lying when he told the Court that he had informed the police of his injuries. Mr Grobler, as I understand it, did not seek to argue to the contrary but he invited the Court not to make

too much of the fact that the accused lied. I agree with counsel that simply because an accused lies to the Court about one aspect of his case it does not necessarily follow that he has lied on all aspects. But, as I have indicated, the injuries which the accused claims he sustained are fairly central to his case. The deceased, he said, was hurling bricks at him and one of these struck him on his head. The deceased, he said, also beat him on the head with a brick. If this had happened one would expect quite a serious injury or injuries and one would expect a person in the position of the accused to make the most of those injuries after his arrest. Clearly he did not and I conclude that not only did he have no injuries but that his account of being assaulted by the deceased with bricks is false. His whole account crumbles to the ground. Having considered all the evidence I am satisfied beyond any reasonable doubt that Immanuel and Michael were telling the truth when they said that the accused came up to the accused in the front of the yard and stabbed him in the chest. The accused obviously harboured some grudge against the deceased and when he saw him that afternoon he decided to settle matters. Having regard to the weapon used and the part of the body which was stabbed there can be no real doubt that the accused intended to kill the deceased and accordingly he is convicted of murder.



Immanuel

IN THE HIGH COURT OF NAMIBIA

In the matter between

THE STATE

versus

SIMON GOWASEB

CORAM: HANNAH, J.

Heard on: 1995/05/29

SENTENCE

HANNAH, J: Simon Gowaseb you have been convicted of murder and I now have to decide what sentence you should serve. I accept that at the time when you stabbed the deceased you were to some extent under the influence of intoxicating liquor and I take that into account in determining sentence. However, apart from that fact, this was a cold-blooded murder. You harboured some kind of grudge against the deceased and when you saw him on the afternoon of 16th September, 1994, you stabbed him in the chest without giving him a chance. Obviously the sentence must be a substantial one. Also, I cannot lose sight of the regrettable fact that stabbings leading to death are so common in this country. It seems to me that many people, you included, have scant regard for the sanctity of human life. This is a matter of great concern to society and the courts must reflect the concern of society in their

sentences. I bear in mind your age. You were only 20 or 21 at the time of the offence. But it is a pity that you have not shown some genuine remorse for your actions. The inconsistent statements made in the letter produced to the Court as Exhibit "G" do not impress me. I note that you have four young children but that cannot stand in the way of a proper sentence being imposed. Bearing in mind your age and the fact that you are a first offender I will suspend part of the sentence and in determining that sentence I take into account the fact that you have been in custody for almost one year.

The sentence is one of 15 (fifteen) years imprisonment of which 3 (three) years are suspended for a period of 5 (five) years on condition that the accused is not convicted of an offence of which violence to the person of another is an element and for which a sentence of imprisonment without the option of a fine is imposed and which is committed during the period of suspension.

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