

“SPECIAL INTEREST”

CASE NO.: CC 02/2006

IN THE HIGH COURT OF NAMIBIA

In the matter between

THE STATE

and

THOMAS HADIBO

Accused

CORAM: Damaseb, JP

Heard on: 19 April 2006

Delivered on: 20 April 2006

JUDGMENT

DAMASEB. JP: [1] The accused faces two counts: murder and attempted murder. The murder count charges that:

“[O]n or about 28 November 2004 and at or near Okakwa village in the district of Ohangwena the accused did wrongfully, unlawfully and intentionally kill Nikodemus Velishawo Ndatewapo, an adult male human being.”

The attempted murder count charges that:

“[O]n or about 28 November 2004 and at or near Okakwa village in the district of Ohangwena the accused did wrongfully assault Julia Kambekele with the intent to kill her.”

[3] The accused offered a plea in terms of s112(2) wherein he admits inflicting 'mortal wounds' on the deceased causing his death; that his conduct was wrongful and unlawful; that on the fateful day the deceased was rude to him and repeatedly insulted him and also made insulting remarks about his mother; that the deceased wanted to fight him and pulled him outside a room and that, whilst outside, he took out an Okapi knife to try and scare the deceased away but the deceased kept coming towards him wanting to fight; that he then stabbed the deceased three times to the chest without the intention to kill; that everything happened fast; and that he only accidentally stabbed Julia Kambekele when she came between him and the deceased.

[4] The accused made the following admissions in terms of s220 of the CPA:

- a) That he admits the evidential value of the post-mortem report in respect of the deceased;
- b) That he admits the evidential value of the medical legal report in respect of Julia Kambekele;
- c) That he admits making, and the evidential value of, his warning statement made on 30th November 2004;
- d) That he admits the deceased died as a result of the stab wounds.

[5] The cause of death recorded on the post-mortem report is: "stabbing to the chest". The post-mortem report shows the deceased received one stab

wound to the chest and two stab wounds to the abdominal area. The stab wound to the chest is described as 20mm in length.

[6] In the warning statement he gave to the police, the accused said the following, amongst others:

“On 28-11-2004 I arrived at about ±17:00 at Okakua cucashops. I found the deceased person there. I don't know the deceased name but I know only his face. The deceased started to insult me that he will beat me and mentioning my mother's anus. He kept on threatening and insulting me at Ms Julia cucashop. First it happened outside the cucashop. Ms Julia was advising the deceased to leave the place and to leave me in peace. At one time I went inside Ms Julia's cucashop. The deceased whom I only know by face followed inside. He kept on saying Thomas you are useless and today I will beat you. The quarrel became very much serious as I told the deceased to stop mentioning my name. The deceased went outside the cucashop he took off his shirt. When I saw all this, I stood up and took out my pocket knife out of the pocket and kept it in right hand. The deceased person came rushing straight to me. I did not properly see what he was holding in his hand. When he reached me at the entrance of the cucashop. I pushed him away from me and stabbed him quickly three times on the left hand side of his chest with my okapi knife as he kept on coming back. The owner of the cucashop Ms Julia came between us to separate us but she accidentally got stabbed near her left ear and left shoulder she was seriously injured. The deceased ran a short distance until outside the fence of the cucashop. He fell down and people tried to assist him but said this one is already dead. I sat down and was with the owner of the cucashop Ms Julia. I stabbed both people with a knife.”

[7] Only one witness, Julia Kambekele, testified for the State and the accused did not testify or call witnesses. Kambekele is the owner of a Cuca shop. On the fateful day she was sitting at her Cuca Shop with the accused when the deceased arrived and started causing trouble with the accused, suggesting the accused had insulted him. She made clear that the accusation against the accused was baseless. Kambekele also testified that the deceased was the one who provoked the accused whereafter the duo ended up alone inside while the witness was outside. She then heard a commotion inside and went to investigate. As she tried to enter the Cuca shop she met the deceased in the doorway. As she thus approached she felt 2 knife blows to her head, and a third one to her hand. The wounds, to the hand are described in the medical report as follows: *“Defensive abrasive wounds on left arm and hand”*; and the wound to the head as follows: *“Large open scalp wound across the head.”* There is no dispute that it was the accused who stabbed Kambekele. She testified that at no point did she ever come between the accused and the deceased as the two fought. This is in sharp contradiction with the version of the accused that she actually did. In view of the fact that his version is prejudicial to his case while that of Kambekele is exculpatory on the charge of attempted murder, I will accept the version of the State witness.

[8] Cross-examination of Kambekele only confirmed that the deceased started the trouble with the accused; that before the deceased arrived at

the scene there was no animosity or trouble between the accused and her; and that she could think of no reason why the accused would harm her intentionally.

[9] At the end of the State's case Mr Basson applied in terms of s174 of the CPA for discharge in respect of the attempted murder count on the basis that the accused never intended to stab Julia Kambekele and that the stabbing was an accident. I refused the application on the basis that since it was established that the blows which landed on Kambekele were intended for the deceased, it is immaterial that the intention was to harm the deceased and not Kambekele. This is in accordance with the doctrine of *aberratio ictus*: See Snyman "*Criminal Law*" (4th edn) pp 195-200 and the authorities there collected.

Mr Basson then closed the defence's case without calling witnesses. The Court therefore does not have the benefit of the accused's explanation of the events - especially the degree and effect of the provocation by the deceased on him - on the fateful day.

[10] Mr Basson seemed to suggest in his submission on the count of murder that the provocation suffered by the accused was of such a degree as to negative the subjective intention necessary to sustain a charge of murder. He relies for the proposition on *S v Mokeng* 1992 NR 220. As Mr Basson

himself rightly contended, the *Mokeng* case recognizes that whether or not provocation operates to negative intent, is a question of degree. All that we have by way of direct evidence in this case is that the accused was repeatedly provoked by a person, described in the evidence as a young boy, at a place where alcohol was being consumed. He then used a knife to inflict 3 “*mortal wounds*” on the deceased on a vulnerable part of the human anatomy. He then continued with the stabbing three more times but missed the deceased and struck Julia Kambekele instead. Had these blows not struck Kambekele, the accused would have stabbed the deceased 6 times with the Okapi knife which, no doubt, is a very lethal weapon.

[11] In *S v Dlodlo* 1966 (2) SA 401 (A) at 405 G-H, the following is stated:

“The subjective state of mind of an accused person at the time of the infliction of a fatal injury is not ordinarily capable of direct proof, and can normally only be inferred from all the circumstances leading up to and surrounding the infliction of that injury. Where, however, the accused person’s subjective state of mind at the relevant time is sought to be proved by inference, the inference sought to be drawn must be consistent with all the proved facts, and the proved facts should be such that they exclude every other reasonable inference save the one sought to be drawn. If they do not exclude every other reasonable inference then there must be reasonable doubt whether the inference sought to be drawn is the correct one.”

[12] The accused chose not to take the Court in his confidence and to shed some light on what, subjectively, went on in his mind at the time that he

inflicted the knife wounds on the deceased. That is his right of course. But faced with the situation where a very lethal weapon was used repeatedly on a vulnerable part of a person's body, and not having the benefit of the accused's version on oath of how the provocation affected his judgment, the only reasonable inference that can be drawn on the proved facts is that he had subjectively appreciated the possibility that the stabbing of the deceased would be fatal. This is strengthened by the proven fact that the accused was determined to inflict 3 more knife wounds on the deceased which instead struck Kambekele. As was said in *S v Sigwahla* 1967 (4) SA 566 (A) at 571A: "... *there is nothing in the case to suggest subjective ignorance or stupidity or unawareness on the part of the [accused] in regard to the danger of a knife thrust in the upper part of the body.*" I face the same situation here. No suggestion has been made under oath or through cross-examination of Kambekele that the accused considered himself to be under some mortal danger from the deceased, except the evidence he was provoked and that the deceased wanted to fight him. I am accordingly satisfied, beyond reasonable doubt, that the State proved the necessary legal intention to kill in the form of *dolus eventualis* and the accused is accordingly found guilty of murder as charged on count one.

[13] As far as the count of attempted murder is concerned, the evidence of Julia Kambekele is that she was not between the accused and the deceased when she was stabbed. I am therefore unable to determine if the accused had foreseen that Kambekele would be struck by the knife and reconciled himself to that possibility. Equally, because of the nature of Kambekele's evidence which does not explain at all how it may have happened that the knife struck her, I am unable to determine if the stabbing of her was done negligently. Accordingly, the State has failed to prove the charge of attempted murder in respect of Julia Kambekele. The accused is thus acquitted on count 2.

DAMASEB, JP

ON BEHALF OF THE STATE:

Instructed By:

General

Ms S Miller

Office of the Prosecutor-

ON BEHALF OF THE ACCUSED:

Instructed By:

Aid

Mr B Basson

Directorate of Legal