

"SPECIAL INTEREST"

CASE NO. CC 20/2006

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

JOHANNES N NANDJEDI

CORAM: DAMASEB, J.P.

Heard on: 2006.05.11

Delivered on: 2006.05.12

JUDGMENT

[1] DAMASEB, J.P.: Mr Nandjedi, you are charged with the murder of your 79 year old father by hitting him with a hoe handle at the back of the head. You were 18 years old at the time the alleged offence took place. When you were called upon you pleaded guilty to the charge. When questioned in terms of Section 112 you said that your father came upon you with a kierie and a panga and hit you with the kierie because you had

beaten a dog for eating your doves. Your father raised a panga at you whereafter the two

of you grabbed each other and fell. As your father was trying to rise you picked a hoe handle and hit him behind the back. The Court therefore entered a plea of not guilty in view of the explanation of a possible private defence.

[2] The evidence falls within a narrow compass: only two persons were called by the State who say they saw what happened. The first was Ipinge Nandjedi, a biological brother of the accused and son of the deceased. He testified that when on the faithful day he came home from the field he found the accused beating a dog-a fact which angered the accused's father. The deceased then said he was going to beat the accused for beating the dog. Ipinge said he went inside the room but returned when he heard a struggle between the accused and the deceased. And upon coming out dispossessed the deceased of the panga and a kirie and put them about two metres from where the two were fighting. He testified that the deceased wanted to cut the accused with the panga.

[3] According to Ipinge, when he dispossessed the deceased of the panga and the kirie the accused was on top of the deceased, and

that he [Ipinge] removed the accused from the deceased whereupon the accused picked a hoe handle and struck the deceased therewith. He testified that the deceased was trying to stand up when he was struck by the accused. He testified further that the deceased had nothing in his hands when he was first struck by the accused. It was put to Ipinge in cross-examination that he was nowhere near where the fight took place, and that he only came at the scene after the accused had already struck the deceased. He maintained he was there and separated the fight. When questioned by the Court he said that although he had removed the panga and kirie from the deceased and placed them against the hut, the deceased knew where these objects were. He also stated that when the deceased first confronted the accused with the knob kirie and panga, the accused had no weapon on him.

[4] The second witness was Aina Amalovu. She knows both the accused and the deceased. She confirmed that the dispute started between the accused and the deceased over the beating of a dog by the accused. She says when the deceased wanted to know from the

accused why he beat the dog the accused grabbed the deceased around the body whereupon the deceased raised a panga against the accused 'to scare the accused', as she put it. She says the accused then threw the deceased on the ground; sat on the stomach of the deceased and was strangling the deceased. Ipinge then came and took the accused off the deceased and, as Ipinge was moving away, the accused took the hoe handle and struck the deceased who was trying to stand up at the time. She testified that the deceased still had his kirie and panga in his hands as he was trying to stand up. She persisted in cross-examination that she was physically present and saw the fight. It is curious though that she talks of a strangling of the deceased by the accused although Ipinge does not mention any strangling although he says he was the first to be on the scene.

[5] The accused testified on his own behalf. He maintained that no one else was present when he and the deceased began the fight. He testified that the deceased came and told him he was going to beat him for beating the dog; and that the deceased had a panga and a kirie. He stated that the deceased had in fact beaten him

with the kirie whereupon he grabbed the deceased and they both fell down. It appears that he got to his feet first before the deceased, and as the deceased tried to stand up (still holding the knob kirie and panga in his hands) he struck the deceased the fatal blow. The accused explained: "I hit him because he came and just started hitting me. He hit me with the kirie and raised a panga against me".

[6] The accused testified that Ipinge only came after he had hit the deceased already and denied the version of Ipinge and says he never witnessed the fight nor did Amalovu. When asked if he could have run away he said: "I could not I was afraid". The accused, it is common cause, is a crippled person who walks with a very pronounced uneasy gait. The possibility that this may

have influenced his subjective appreciation of the kind of harm that he apprehended has not been displaced beyond reasonable doubt. He said he even cried for help and no one came to assist him, and that he had no intention to kill his father whom he loved.

[7] In cross-examination he said he did not consider himself to be under threat from the father when he beat him. He also testified that he knew that if, for example, he beat a dog in the way he beat his father, the dog would die. And he said he knew he was hitting the father on the head and added, in an incongruous touch, that that is not where he wanted to beat the father, and that he wanted to strike on the arm or the back.

[8] Two state witnesses, both of whom say they witnessed the fight, gave completely conflicting versions on perhaps the most crucial issue in this case: Did or did the deceased not have the panga and knob kirie in his hands at the time that the accused

struck him with the hoe handle behind his head? Ipinge says the accused had nothing, while Amalovu says he had the panga and kerie as he was rising after falling down.

[9] A common feature of the testimony of all three witnesses, however, is that, not only did the deceased threaten to beat the accused, he proceeded to raise his panga (also carrying a knob kerie) against the accused. The accused says he was in fact beaten by the deceased with the knob kerie – a fact which Ms

Miller for the State seems to accept as true. True, the accused has given potentially mutually destructive versions in his testimony about why he beat the deceased and what danger he apprehended at the time he struck the deceased. On the other hand, he said he was afraid of the deceased in view of the threat and the beating,

while on the other hand he said he hit the deceased because he just came and hit him, and that at the time he struck the deceased he was not in danger.

[10] Counsel for the State submits that I must convict the accused of murder, alternatively of culpable homicide, based on

this latter statement alone. I am afraid that is not the proper approach to the burden of proof. The State bears the burden throughout to establish the guilt of the accused beyond reasonable doubt, including whatever defences he may raise. The possibility that the accused apprehended mortal danger to himself from someone who had already beaten him with a knob kerie and threatened the use of a panga he still had in his hands as he rose from a fall, is not a fanciful possibility on the facts of this case.

[11] The State bore the burden of establishing beyond reasonable doubt that the explanation that the accused was afraid of the deceased, is not only reasonably possibly true but also false beyond reasonable doubt. That the State has failed to do. Also, faced with the very conflicting versions of prosecution witnesses as to what exactly the deceased's actions and movements were at the time, a reasonable doubt arises. The fact that prosecution evidence potentially favourable to the accused is disowned by him - *in casu* suggesting that none of the two prosecution witnesses

witnessed the event, is no warrant for not giving him the benefit of the doubt arising from such evidence pointing to his innocence rather than to his guilt.

[12] The evidence of both prosecution witnesses, although their presence on the scene is denied by the accused, shows the deceased to have been the aggressor at the point in time when the accused was bare-handed. That as a result of the aggression towards him the accused may have subjectively felt the need to protect himself against the deceased by using lethal force remains a strong possibility on the facts of this case.

[13] I am left with no alternative but to resolve the benefit of the doubt in favour of the innocence of the accused, and he is found not guilty of the crime and is hereby acquitted.

DAMASEB, J.P.

ON BEHALF OF THE STATE

Ms

Miller

Instructed by:

Office of the Prosecutor-

General

ON BEHALF OF THE ACCUSED

Ms

Hitula

Instructed by:

Legal Aid