

**IN THE HIGH COURT OF NAMIBIA**

**CASE NO. CC 02/2010**

In the matter between:

**THE STATE**

**versus**

**CYPRIEN SIBONGILE MUTANGA**

**CORAM: SIMPSON A J**

Heard on: 2011.05.09

**Delivered on: 2011.05.09**

**JUDGEMENT**

**SIMPSON A J.** [1] The Accused is charged with the offence of murder, the offence with of assault with intent to do grievous bodily harm, the offence of assault by threat and also the offence of defeating or obstructing or attempt to defeat or obstruct the course of Justice.

[2] The facts in this matter are as follow:

The Deceased and the Accused had a domestic relationship prior to the death of the Deceased.

[3] On the evening of 05 June 2009 and at the Gemeente Settlement

in the district of Windhoek the Accused was searching around for the Deceased. Upon being directed to a shack the Accused armed with a knife or a sharp object, barged into his shack and started to attack the Deceased who was inside this shack.

[4] When one of the Witnesses, that is Michael Gorbartjof, tried to come to the assistance of the Deceased, the Accused stabbed him on his arm where after the attacked on the Deceased continued.

[5] During the attack, the Accused stabbed the Deceased, jumped on her head, throw her body on the ground, hit her head against the motor vehicle and also against the ground, hit her on her head with a brick, pulled her body around and hit her with fists.

[6] At some stage a Witness, Magret Gawanas, tried to assist the Deceased and the Accused then threatened to stab Magret Gawanas and also chased her around.

[7] The Deceased died on the scene as a result of head injuries. The Accused then fled the scene and disposed of the knife or sharp object and he also tried to discard or cleaned the clothes that he wearing during the attack on the Deceased.

[8] These facts that I now read through in this Judgment is a summary that was given by the State, the summary of substantial facts of Witnesses.

[9] The Accused pleaded not guilty in this matter and denied all the

allegations against him.

[10] The State called several Witnesses to prove its case whereby the defense also called the Accused and the sister of the Accused in their case.

[11] It is common cause that on 05 June 2009 the Deceased was killed. It is also common cause that this happened during night time. It is common cause that the cause of death was head injuries this is as per the post mortem report and the evidence that was adduced by Doctor Simasiku Kabanje.

[12] It is common cause that the Deceased collapsed at the corner of  
Shangai and Zedekia Ogambo Street.

[13] It is common cause that the Deceased sustained bruises, lacerations and abrasions.

[14] It is also common cause that the Complainant in the assault with intend to do grievous bodily harm, Michael Gorbartjof was stabbed with an object on the arm.

[15] How these injuries were brought about is to be pointed out by the Witnesses called during the trial.

[16] Now this will sound like a repetition but the Court will describe

each and every Witness that testified to point out the discrepancies and the differences that they testified about.

[17] The State called the scene of crime officer Sergeant Sisami who testified that the points were pointed out by Magreth Gawanas. These points were being the room from where the Deceased and a certain Michael Gorbartjof came from, the same room which the Accused entered. Also the points as to where the Deceased were stabbed and assaulted. Also the points as to the bloodstains or the blood marks as well as the points where the Deceased collapsed. Sergeant Sisamu testified that these points were pointed out by Magret Gawanas.

[18] The State then called Erna De Klerk the mother of the Deceased, who testified that she identified the body. This Witness also testified that the Deceased was the girlfriend to the Accused but

about a month before her death.

[19] This Witness testified that she was together with her daughter the Deceased at a shebeen. After a while the Deceased had a call and sometime later a sms. This was a friend of the Deceased wanting her to visit her. This Witness testified that she then halfway the Deceased to her friend's house.

[20] After a while this Witness received a call and was told to come to

Gemeente Resettlement where her child the Deceased was laying.

[21] This Witness Erna De Klerk then went to where the Deceased was laying.

[22] The State then called Bernice Adams who testified in clear terms how she witnessed the incident.

[23] She testified that at the time of the incident she stayed at Residence 124, Zedekia Ogambo Street, together with her boyfriend Edward Fish.

[24] On 05 June 2009 she was with her boyfriend and her two kids in

their room. And at about 21h00 and 22h00, they were listening to music.

[25] At some point someone came knocking at the door it sound like a banging, someone trying to get in. This person was looking for Jamis. The boyfriend then responded, that is now Edward Fish, responded that there was no person with such name staying in that room. The person then left.

[26] This Witness also testified that this person then went to the ghetto next to their room. She heard him entering the room, heard him pulling someone out whereby she heard Jamis screaming.

[27] This Witness then testified that she looked through the windows and she could see two people at the fence. She testified that the visibility was good. The girl that was beaten, was Jamis and the guy that was beating her was her boyfriend Boetie. Jamis, being the Deceased and Boetie being the Accused. Whilst looking this Witness that is Bernice Adams, heard a voice from next door shouting, I will speak now in Afrikaans as the words came out



"Boetie, los die kind, sy bloei" being translated as "Boetie leave her she is bleeding.

[28] This Witness testified that she did not recognize the person who said" leave her she is bleeding". But she testified that it was a woman's voice.

[29] This Witness also testified that she saw the Accused beating the Deceased with the hands. The Accused then dragged the

Deceased to the tree, whereby he beat her. As the Deceased fell,

the Accused tried to pick up a brick and he wanted to beat her

with the brick. She then further testified that a certain Magret

came to stop the Accused and then he try to stab her (the said

Magret). The Accused then beat Jamis with a brick on the face.

She testified that the Accused had a knife, but she could not

describe the knife.

[30] This Witness, that is Bernice Adams, then also saw the Accused hitting the Deceased with a brick on the face. The Deceased try to walk and fell down. She then saw the Accused being on top of the Deceased. The Accused took the Deceased by the head and beat her onto the ground. The Accused stood up and he walked back, he again came back and jumped on her head with both feet.

[31] The Accused then approached this Witness to ask for a face cloth. When he did not get a face cloth he went back to the Deceased and jumped on her head again for the second time.



[32] The Accused then picked up the Deceased by the legs and carried her out. The head was hanging downwards. The Accused put the Deceased next to a car that was parked in the yard. At the car he could not pick her and she fell down and the Accused again jumped on her head.

[33] The Accused then pulled her to the street, whereby he jumped on her head again. He pulled her by the legs until the corner of the street.

[34] As this Witness then testify the two guys then started chasing the Accused, whereby one of them was the boyfriend of this Witness,  
Edward Fish.

[35] The State then called Edward Fish who testified that on 05 June 2009, he was in his room and heard a noise coming from outside outside. He then heard rough knocks on the door, kicking the door, shouting the name Jamis.

[36] This Witness then answered that there is no such person with that name staying there. This person then went to a ghetto next to their room room. He kicked the door open and he entered.

[37] The girl then came out screaming. This Witness then stated that he saw the Accused and the deceased fighting outside. They were under the tree in front of the ghetto. He saw the girl, that is now the Deceased, was stab bed in the back. He stated he do not know what was used to stab the Deceased with. The Accused then picked up a brick and hit her on the face, the Deceased then fell down. This happened under the tree. He stated that the visibility was clear. The Accused picked up the girl (the deceased) and then she fell. The Accused then came looking for a face cloth.

[38] The Accused then went back to the Deceased, sat on top of her, start hitting her head on the ground. The Accused jumped on top of her head.

[39] The Accused then picked the Deceased up by the legs and carried her outside the gate. This Witness Edward Fish then further testified that he did not see what happened further as he went back into his room to lock the room because there were two children or two kids inside. After locking the room he observed that the Deceased and the Accused was outside in the road.

[40] The Accused tried to pick up the Deceased but she fell. The Accused then pulled the Deceased to the direction of Shangai Street. He also hit the girl on the trunk of a tree.

[41] This Witness and another person then chased the Accused with stones until he then ran away through the river.

[42] The State then called Michael Gorbartjof, also the Complaint in the assault matter. He testified that on 05 June 2009 he was together with the Deceased, on the night when she was killed. They were together in the shack, also called the ghetto. Whilst there, someone came and kicked the door open. This person entered and drew a knife from his pocket and then struck one blow in his direction. After this Witness was struck, he fell on the bed and the person then stormed the Deceased. As the Witness testified he then grabbed this person from behind. Whilst he tried to lock this person from behind, the Complainant was stabbed on the right arm.

[43] This Witness then left and went to their house. This person that was kicking open the door of the ghetto, is the Accused before Court he was identified also by Michael Gorbartjof.

[44] This Witness testified that the Deceased was wearing a white jersey and a black skirt.

[45] The State then called Magreth Gawanas, the same person who also pointed out the scene to the police.

[46] This Witness testified that she went to Blue Note and the Accused was standing in the door. After being at Blue Note, this Magret went back home. Whilst in the room, the Accused came, whereby he asked where Jamis is. She told him she do not know the whereabouts of Jamis.

[47] This Witness further testified that Seun, that is also then Michael Gorbartjof, came there and went into the yard of Erf 124. Magret then testified that she saw Jamis together with Seun, Michael

Gorbartjof, in the ghetto. After a while the Accused came knocking at the door. She told him that it is the wrong door. Serolda then called the Accused to point out as to where Jamis is. The Accused to pushed the ghetto door open and pulled Jamis.

[48] According to this Witness, Seun, that is now Michael Gorbartjof, pulled Jamis away from the Accused. The Accused then stabbed

[49] Michael Gorbartjof on the left hand. According to this Witness,

the Accused pulled a knife from his waist. Magret then saw the Accused pulling the Deceased out and started beating her. He beat her and then stabbed her on the back. The Accused then pulled her up to where the stones are and then banged her head against the stone.

[50] This Witness then tried to pull the Accused away from the Deceased when the Accused then drew a knife, what was also described as an Okapi, and she move back.

[51] The Accused then took the Deceased to the place where there were stones, but not the same place, it was a different place, and also beat her against the stones. The Accused then ran around asking for water.

[52] This Witness testified that she found the Accused with the



Deceased in the yard of Erf 123. He held her up high, but when he saw the Witness, Magret, he threw her down and then chased Magret around with a knife. He also uttered the words "I will not leave you. "That is referring now to Magret Gawanas. "I will return for you" Magret then ran to her sister's room. They then watched the commotion from the window of the sister's room.

[53] The Accused then removed the jersey from the Deceased and moved out from Erf 123. He carried her out to the road that is, Zedekias Ogambo Street. He grabbed her on her legs and pulled her by the legs until the junction of Zedekias Ogambo Street and Shangai Street. He then took a stone and threw it on the head of the Deceased. According to this Witness he also stabbed the Deceased twice on her left eye.

[54] According to this Witness, there was light and also indicated that Deceased was wearing a white jersey with a black skirt. According to this Witness, the Deceased was dragged on a tar road.

[55] The State then called Lucia Gawanas who testified that on the night of 05 June 2009 her sister Magret came running to her room saying that Boetie stabbed Jamis. When she opened the door,

Boetie came running behind Magret. This Witness testified that she peeped through the window and saw the Accused carrying the Deceased on his shoulders. This Witness also testified that there

was light to see the events. She also testified that she saw the Accused dragging the Deceased on one leg on the tar road.

[56] The State then called Serolda Gomachas. This Witness testified that she was sitting in the room with a certain Banda and Henry when they heard a noise from outside. They went out to look what was going on. They then started screaming as the Accused was beating and kicking the Deceased. This Witness and Magret then ran to the next yard and try to stop the Accused from beating the Deceased. This Witness also testified that the Accused threatened her and Magret. He said" do you also want?"

[57] According to this Witness, the Accused threw the Deceased down next to her door and chased Magret. The Accused returned, picked up the Deceased and threw her head against the vehicle that was parked in the yard. This Witness and Banda stopped the Accused. The Accused then said that he will take Jamis to the hospital. The Accused then dragged the Deceased from the vehicle up to the outside of the yard. He held her on the leg and dragged her. This Witness testified that at the corner, the Accused jumped twice on the head of the Deceased.

[58] The State then also called the doctor who conducted the post-mortem examination who testified that the cause of death was head injuries. The doctor also pointed out the injuries on the different parts of the body.

[59] That was basically the evidence that was adduced by the State.

[60] On the other hand, the Accused testified that he went to Serolda to look for the Deceased. He then went to the shack, where he

heard the voice of the Deceased. He then knocked and then opened the door. Michael Gorbartjof came running out of the room. The Deceased also came running out of the room. The Accused further testified that the Deceased ran up to the junction of Zedekia Ogamb and Shangai Street where she fell down. When the Accused wanted to approach the Deceased, a group of men appeared and threw bottles and stones at him. The Accused then ran away. The Accused stated that the visibility was not good as it was dark. The Accused stated that he never assaulted, he never beat or kicked or stab anyone as alleged in the indictment.

[61] The defence then called the sister of the Accused, Vivian Mbanga,

who testified that on 05 June 2009, the Accused was together with the Deceased, in the Accused's room.

[62] The purpose of this evidence is to counter the evidence before Court that the Deceased was together with the mother of the Deceased the whole day on 05 June 2009.

[63] That was basically the evidence adduced by the defence.

[64] It is clear from the evidence adduced by the State, that there are several Witnesses who testified as to the incident on the faithful night. It is also clear that there are differences from the Witnesses as to how many times the Accused beat the Deceased, as to how many times the Accused picked up the Deceased, as to how many times the Deceased fell on the ground. Also how many times, where on the scene the Deceased was stabbed and also how many times and where did the Accused jumped on the head of the Deceased.

[65] It is quite clear that there are indeed discrepancies, but these discrepancies are of not such a nature that will discredit the States case in its entirety.

[66] The evidence is, by the State Witnesses is clearly overlapping each of one another's evidence. The evidence is clear from the photo plan, as well as the post-mortem report that the Deceased sustained severe injuries all over her body.

[67] Furthermore the evidence of the State Witnesses is of such a nature that each Witness clearly testified that the visibility or the lumination was good. The Accused could be identified positively by these eye Witnesses.

[68] The defence indicated during cross-examination as well as during evidence-in-chief that there were no drag marks visible on the photos and this was also confirmed by the crime of scene officer.

[69] It was however stated by the State Witnesses, that the

Deceased was dragged on the tarred road.

[70] It is also pointed out by the defence, that there were discrepancies in the statement, that is now specifically the statement of Edward Fish, the police statement, and the evidence that he gave in Court.

[71] I must also point out that the police statement of a Witness is merely to guide a Prosecutor in prosecution to determine if a case is to be made out against an Accused or on what charges an Accused needs to be charged. An Accused may omit to say anything to the police, but will testify on those important issues in Court. I hereby refer to S v Bruinders South African Criminal Law Report 1998.

[71] The defense also adduced evidence and also during cross-examination of State Witnesses that it was dark.

[72] The defense also adduced evidence and also during cross-examination of the State Witnesses, that the Accused is left handed and it would be impossible for him to stab someone with the hand that he is not writing with. But the Court must just point out that no evidence was adduced that the Accused has a



handicap or was impossible for him to use his right hand as he is left handed , nor was there any such observation by this Court made that the Accused has a handicap.

[73] It is indeed so that the sister of the Accused came to testify that

the Accused was the whole day together with the Deceased, and that is contrary to the mother of the Deceased who testified that she was together with her daughter the whole day. The Court must also just point out that this incident did not happen during daytime; so the counter that was there between these two Witnesses is irrelevant because the incident occurred during night time.

[74] So when the Accused also testified, he stated that the State Witnesses, that is Bernice Adams, Magret Gawanas, Lucia Gawanas and Edward Fish were not friend of the Deceased. And if that is indeed the case, the Court can say that these State Witnesses are impartial or Witnesses who does not have any involvement in this matter. So if these Witnesses are impartial Witnesses, the Court does not see any reason why they will come to Court and lie to this Court as to the incident.

[75] Several Witnesses came to testify that they could see the incident the visibility is very good and also the lumination. That is viz a viz the evidence of the Accused who testified it was dark. This evidence of the Accused is then outweighed by the evidence of the State Witnesses with regard to the lumination.

[76] So with regard to the count of murder, it is quite clear that the

Witnesses testified as to how the Deceased was assaulted, stabbed and kicked by the Accused. And the Court is convinced that the State indeed proved its case beyond reasonable doubt with regard to this count. The Court therefore find Accused guilty on murder on count 1.

[77] With regard to count 2 also, Michael Gorbartjof clearly testified as to how the injury was sustained on his arm. And this was in the process when he tried to assist the Deceased not to be injured.

This Witness also clearly testified that he went to the hospital and that there was no problem between him and the Deceased, as well between him and the Accused. Therefore the Court is also convinced that the State indeed proved its case beyond reasonable doubt on count 2; that is assault with intend to do grievous bodily

harm on Michael Gorbartjof. Accused you are therefore also found guilty on the offence of assault with intend to do grievous bodily harm.

[78] With regard to count 3 that is assault by threat, it is quite clear

that this Witness Magret Gawanas was chased with a knife, as she also describe it as an Okapi knife, by the Accused. It also clear from Lucia Gawanas, that the Accused chased Magret Gawanas and wanted to stab her with the knife. And all the elements as to that aspect is indeed clear to this offence. However there is one element that was not placed before this Court, that the Complainant, that is Magret Gawanas, had to believe that the Accused intended to carry out this threat. And the failure to put this element, the believing that the Accused intend to carry out this threat the Accused, the Court cannot find beyond any doubt that the threat was indeed carried out. So on count 3 assault by threat Accused is found not guilty.

[79] I can just add, the same events that occurred with Magret Gawanas also occurred with Lucia Gawanas as she testified, that she and her sister Magret Gawanas, were chased by the Accused as he wanted to stab them. And even with Lucia Gawanas there

was no believe put before this Court that the Accused wanted to carry out his threat.

[80] With regard to count 4 that is defeating or obstructing or attempt to or defeat or obstructing the cause of justice, it is clear from the evidence of the State that is Edward Fish as well the Accused

person that he was, stones were thrown at him and then he ran away into the river. And because of this it is quite clear that the Accused person never returned himself or gave himself up to the police to report the incident. Unfortunately there is no evidence before this Court that the Accused try to conceal or destroy any of the evidence with regard to this incident. And it is the duty of the State to prove all the elements of the offence before a person can be convicted. So with regard to count 4 that is defeating or obstructing the cause of justice, the Accused is also found not guilty.

SIMPSON AJ

ON BEHALF OF ACCUSED

MR MOYO

Instructed by:

ON BEHALF OF ACCUSED:

MR ISAACKS

Instructed by:

DIRECTORATE OF LEGAL AID