



## HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case No: CC 16/2009

In the matter between:

**THE STATE**

versus

**RAFAEL WATERBOER****Neutral citation:** *S v Waterboer* (CC 16/2009) [2013] NAHCMD 148 (4 June 2013)**Coram:** SHIVUTE, J**Heard:** 16 – 17 September 2010, 21 September 2010, 28 September 2010, 21 October 2010, 14 – 25 November 2011, 18 January 2012, 1 March 2012, 1 – 6 November 2012, 21 January 2013 and 28 March 2013.**Delivered:** 4 June 2013**Flynote:** Evidence – Credibility of accused as a witness – Self-defence and intoxication – Accused abandoning these defences and incriminating one of the State witnesses as the person who committed the offence – Later on accused changing his version that he did not know who committed the offence.**Summary:** The accused was charged with the murder of his romantic partner by stabbing her with a knife and assault by threat of one of the

**State witnesses – The accused put up two defences namely, self-defence and intoxication and gave conflicting versions as to the stabbing of the victim – The court found that because accused changed his defences and gave conflicting versions this casts serious doubt on his version and leads to unavoidable conclusion that his versions are a fabrication - Accused is found to be an unreliable and untrustworthy witness – Accordingly, the accused is found guilty of murder with direct intent read with the provisions of the Combating of Domestic Violence Act 4 of 2003.**

**Flynote: Criminal law – Assault by threat – Some elements of the offence inspiring a belief that force is to be applied – Immediate personal violence – Subjective test.**

**Summary: The accused threatened the complainant that he should give way otherwise he would stab the complainant – Complainant believed that the accused was able to carry out his threats and released the deceased – Court found that the accused who was armed with a knife had inspired a belief that he was going to stab the complainant – The complainant believed that the accused was capable of carrying out this threats of violence towards him because he was armed at that stage and he had also stabbed the deceased – In instant case the test to be applied is subjective - One must have regard to the complainant’s state of mind. The accused was found guilty of assault by threat on second count.**

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## **VERDICT**

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In the result the accused is found guilty and convicted as follows:

**1<sup>st</sup> Count : Guilty of murder with direct intent.**

2<sup>nd</sup> Count : Guilty of assault by threat.

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## JUDGMENT

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### SHIVUTE J:

[1] The accused faces an indictment containing two counts namely murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003 and Assault by threat to which he pleaded not guilty. Particulars of the offences are as follows:

Count 1: Murder

It is alleged that on 31 March 2008 at the Omdel location in the district of Walvisbay the accused did unlawfully and intentionally kill Katrina Theresia Van Wyk an adult female.

Count 2: Assault by threat

It is alleged that on the same date, same place in the district of Walvisbay the accused did unlawfully and intentionally assault Bernhardt Aubeb by threatening to stab him to death there and then whilst the accused had an open knife in his hand thereby causing the said Bernhardt Aubeb to believe that the accused intended and had the means forthwith to carry out his threat.

[2] Mr Ujaha represented the accused on the instructions of the Directorate of Legal Aid while Ms Wantenaar appeared on behalf of the State.

[3] The accused raised a plea of self defence in respect of the first count. He made the following admissions in terms of s 115 read with s 220 of the Criminal Procedure Act 51 of 1977. He admitted the date being 31 March 2008, when the incident took place, the place being Omdel location Hentiesbay in the district of Walvisbay, and that the cause of death is as per the Post-mortem Report, Exhibit "E" and, the identity of the deceased. However, he denied each and every allegation in respect of the second count.

The evidence may be summarised as follows:

[4] Fillepine Geises was the first witness called by the State. Her testimony is that on 31 March 2008 she observed the deceased locking the door to her house. Whilst she was at the door she was approached by the accused. She opened the door and both entered into the house. After an hour she heard the deceased screaming. The deceased came out of the house having a stab wound on her right arm. The accused was following her armed with a knife. The deceased ran around her and Aubeb. The accused was chasing her. He grabbed her by the arm and pulled her at the back of the house. When the deceased came back, she was bleeding from her neck. The deceased ran towards the direction of the hospital. Witnesses also ran away. The witness and the deceased were staying at the same residence. The witness was residing in the main house and the deceased was residing in one of the shacks located in the yard of the main house.

[5] It was put to the witness that if the witness had seen the accused chasing the deceased with a knife, she was supposed to state it in her statement to the police. The witness replied that she was telling the truth that she saw the accused chasing the deceased whilst he was armed with a knife.

It was further put to the witness that the accused never chased the deceased whilst armed with a knife. The witness replied that she saw him doing so.

[6] It was put to the witness that during the fight inside the shack, the deceased pulled and pushed the accused first; she picked up the knife; the accused was struggling and in the process the deceased was stabbed. The witness responded that she would not know what transpired inside the shack. She only heard the deceased screaming.

[7] Hafeni Shonena, a neighbour to both the accused and the deceased, testified that the accused and the deceased were in a romantic relationship. Their relationship had a lot of problems because the accused suspected the deceased of having had affairs with other men and the, accused used to go to the witness to ask for advice regarding their relationship.

[8] On 31 March 2008 between 09h00 and 10h00, the accused passed at Shonena's cucashop on the way to the deceased's house. He was in a hurry. The witness followed the accused and saw the accused and the deceased at the door of the shack. Shonena went to the first witness who was washing at the main house. The accused and the deceased went inside the shack. They started to quarrel. Shonena went to the shack where the accused and the deceased were. The deceased was sitting on the bed and the accused was standing asking the deceased why she was going out with a young boy. After they had exchanged some words, the witness advised the accused not to fight the deceased. The accused seemed to have understood and promised the witness that he would not fight.

[9] Whilst he was at his place, he heard a woman screaming. The witness went back to the shack where he left the accused and the deceased. He found the accused having a knife in his hand and he wanted to stab the deceased on the neck. The witness asked the accused what he wanted to do. The accused said that he was just scaring the deceased and that he would not stab her.

[10] The witness telephoned the police twice and reported that the accused was at his girlfriend's place and that he wanted to stab her. The police promised to come. Whilst the witness was phoning the police, the deceased came out of the shack saying: 'Waterboer why are you stabbing me?' The accused was following the deceased and she went to get assistance from the lady who was washing (the first witness). When the accused was following the deceased he was holding a knife in his hand.

[11] There was another man outside and he inquired from the accused why he wanted to stab the deceased. The accused told the man that he should leave the lady alone because he was putting himself into trouble. The witness observed the deceased bleeding from the arm. The man to whom the witness referred to earlier wanted to grab the knife from the accused and the accused warned him to get out of his way or else he would stab him. The man who was helping the lady who was washing and the lady ran away. The witness wanted to get the knife from the accused and the accused warned him and threatened to stab him if he did not leave him alone. The witness told the accused not to put himself into trouble by stabbing the deceased. The accused grabbed the deceased. The deceased again asked the

accused why he was grabbing her. The accused told the deceased: 'Today I will stab you to death'. The accused pulled the deceased by the neck and pulled her between the shack and the main house in the corner. He again stabbed the deceased quickly and then broke the knife's handle while the knife was stuck in her neck. The accused ran away with it.

[12] The witness went to look for transport to take the deceased to the hospital. The deceased was bleeding and was trying to stop the blood with a face cloth. She started to bleed from the mouth as well as from the nose. She collapsed and took a deep breath and died. The knife was still stuck on the right side of her neck. The witness informed the police that the deceased was no more. The people who were in the car that was supposed to take the deceased to the hospital went to inform the nurse. The nurse came and confirmed that the deceased was dead.

[13] It was put to the witness that he was never inside the shack. The witness replied that he was there. It was again put to the witness that there was no such conversation between the accused and the deceased as he testified. The witness responded that the conversation took place. It was further put to the witness that counsel's instructions are that the stabbing of the deceased in the neck took place inside the shack. The witness replied that it took place outside and he witnessed it. Counsel for the accused put it to the witness that he was under the influence of alcohol because he drunk 8 *nappies* of Owambo liquor. The witness responded that the accused did not appear to be under the influence of alcohol. His movement and the way he spoke did not show that he was drunk. He was also very strong because he was able to pull the deceased.

[14] Engeline van Wyk testified that she is a daughter to the deceased. The deceased and the accused were involved in a romantic relationship. However, their relationship was a violent one. They used to fight and the accused used to beat the deceased. At one stage the deceased ran to her with a swollen foot because, the accused assaulted her with a brick. The deceased opened a case against the accused and she withdrew it. One day the deceased was at the witness' house when the accused came looking for her. The witness refused the accused entry and the accused broke the door forcing it to open. When he entered the house he assaulted the deceased and removed her from the house by force. He was

threatening to kill her. The witness testified that she was at work at the time her mother was killed. It was put to the witness that the deceased was trying to stab the accused. During the struggle the deceased was stabbed. The witness replied that she did not believe it. It was further put to the witness that Shonena was the person whom the accused referred to as a young boy having an affair with the deceased. The witness replied that it was not true.

[15] Bernhardt Aubeb, the complainant in the second count, testified that on 31 March 2008 he was on his way to Shonena's cucashop when he was called by Phillipine who was washing her blanket. She requested him to assist her to spin her blanket. Whilst there, he heard noise from the shack. The deceased was screaming. She came running from the shack and she went behind him and held him. The accused came after her armed with a knife. He stopped the accused and reminded him that he was warned by the police not to come to the deceased. The accused said the witness should give him the way otherwise he would stab him too or take him along. The accused came close to the witness and the deceased. The witness let go of the deceased because he believed the accused would stab him. When the accused approached them he was violent. The deceased was bleeding from a hand. The witness stopped a car. The accused grabbed the deceased and went to the back of the house between the house and the shack.

[16] The witness was talking to the man in the car. After he finished talking to the man, he saw the deceased running to the main gate. She was bleeding from the mouth. The accused was following her. However, he turned and went to the opposite direction.

[17] Through cross-examination the witness was asked whether the accused merely told him to move out of his way, and that he did not threaten or approach him in an aggressive manner. The witness replied that the accused was not aggressive but the deceased came out bleeding and he had a knife in his hand that was the reason the witness concluded that the accused wanted to harm him. The witness was further asked whether the accused waved the knife against him. The witness responded that he did not wave the knife against him but the accused said if the witness is not out of his way he would stab him too.

[18] After witness Aubeb finished testifying, the matter stood down. Upon resumption, the accused decided to terminate the services of his legal representative, and Mr Ujaha withdrew as an attorney of record.

[19] Mr Wessels was instructed by the Directorate of Legal Aid to represent the accused. Mr Wessels brought an application in terms of s 167 of the Criminal Procedure Act 51 of 1977 to recall three witnesses due to the fact that the accused insisted on changing his defence and counsel wanted to put the new version to the witnesses. The application was granted accordingly.

[20] Mr Wessels made formal admissions on behalf of the accused in terms of s 220 Act 51 of 1977 as follows.

'(a) I admit that I was warned by the police to stop abusing my girlfriend Katrina Theresia Van Wyk and to stop beating her. This warning was given to me on 17 March 2008.

(b) I admit that the second warning was extended to me on 18 March 2008.'

[21] Mr Bernhard Aubeb was recalled. It was put to him that the deceased called the accused whilst she was standing at the window of the shack saying: 'Waterboer come and help me.' The witness replied that she did not hear the deceased calling the accused. It was further put to the witness that there was an Oshiwambo speaking man who came out of the shack during the process. The witness said he did not see the man. It was again put to the witness that the accused entered the house and was grabbed by the deceased around his body whilst she was screaming for help. The accused assisted the deceased to move out of the house, and at that stage the deceased was bleeding heavily. The witness replied that he did not witness the accused assisting the deceased or the deceased holding the accused.

[22] It was counsel's instructions that the accused person was planning to take the deceased to the hospital but witness Geises shouted that the accused had stabbed the deceased. After hearing the allegation, the accused person ran to the police station. The witness responded that he did not hear Geises uttering those words and he did not see the accused running to the police station.



[23] It was put to Ms Geises who was also recalled that during cross-examination earlier on it was put to her that the accused did not intentionally injure the deceased but the deceased was fatally injured inside the shack in the course of a physical fight between the accused and the deceased. The deceased was the one who called the accused to help her and at the same time the door was open, an Oshiwambo speaking person came out of the shack before the accused entered. The witness replied that she did not hear the deceased calling the accused for help and that it was not correct that Shonena, the Oshiwambo speaking person, left the shack before the accused entered. The accused person was in the room and Shonena joined him. At the time the deceased was injured, the accused was the only person who was in the room with the deceased. The witness was asked whether she saw the accused coming out of the room assisting the deceased. The witness answered that the accused was the one who was chasing the deceased out of the shack. It was again put to the witness that after the witness shouted that the accused stabbed the deceased, the accused ran to the police. The witness responded that she did not utter those words and she did not see the accused running to the police station.

[24] The defence wanted Mr Shonena to be recalled. However, the police were unable to locate Mr Shonena. .

[25] The accused was placed on his defence and called no witnesses. The accused testified that on 31 March 2008 he visited his nephew's place. They were drinking. He was not certain how much he drank but he consumed a lot of beverages namely one bottle of 750 ml Clubman and about four beers. At around 11h00 in the morning he went to his aunt's house at Henties Bay. Whilst he was there, he heard the deceased screaming through the window calling 'Waterboer come and help me.' The accused inquired why the deceased was calling him because she had reported him to the police the previous day. She insisted that the accused should go and help her. When the accused was entering the premises, he saw Shonena, the state witness, running out of the deceased's shack.

[26] When the accused entered the house the deceased came towards him crying for help. She held him around his body and the accused felt that she was warm. The accused pushed her away. He saw that the deceased was covered with blood. He assisted her by holding her and took her outside the house in order for him to get

a taxi to take her to the hospital. At the time he went to the deceased's shack he did not see witnesses Geises and Aubeb, because they were not on the premises. He only saw Geises and Shonena standing on the premises making phone calls at the time he was taking the deceased out of the house. When the accused led the deceased out of the house the deceased screamed loudly. He then left her and proceeded to the police station. The accused testified further that he abandoned the deceased because Geises and the others had a grudge against him in the past and he thought that they would falsely accuse him. That was the reason why he decided to report himself to the police. This version is contrary to what was put to state witnesses Geises and Aubeb that the accused ran away to the police station because Geises had shouted that the accused stabbed the deceased.

[27] Due to the fact that the accused was allegedly giving conflicting instructions to his counsel, Mr Wessels decided to withdraw as attorney of record. Mr Uirab was appointed to represent the accused. However, due to the fact the he allegedly received conflicting instructions again he also withdrew as an attorney of record.

[28] After Mr Uirab withdrew, the accused indicated that he was going to conduct his own defence and that he was not going to add anything to his testimony. It was put to the accused that when he went to the deceased's shack he accused her of sleeping with young boys. The accused replied that it was a lie. It was put to him that according to his instructions to Mr Ujaha, the deceased had a relationship with Shonena. The accused said it was not his instructions but, whenever he went to the deceased's house he would find Shonena on the deceased's bed. As to the question whether he was a friend to Shonena the accused said he did not know Shonena and that they were not friends. He did not discuss with Shonena issues concerning his love life. It was put to the witness that Geises heard the deceased screaming inside the shack and when she came out she was bleeding and the accused was chasing her. The accused responded that, that was a lie.

[29] The accused was asked as to who stabbed the deceased. He replied that he did not know and that he did not see a knife. It was further put to the accused that his instructions were that the deceased started to push and pull the accused and that she picked up the knife, the accused was struggling and in the process the deceased was injured. The accused answered that he did not observe that, that was according

to Mr Ujaha. It was further put to the accused that in the Magistrate's Court he pleaded not guilty and the accused admitted that he stabbed the deceased but had no intention to kill her and that he was heavily intoxicated. The accused replied that he was told by the police when he was in custody that he did not kill the deceased. That was what he told his legal representative in the Magistrate's Court.

[30] Counsel for the State argued that the accused raised a defence of self-defence, in the same vein he also stated that he was under the influence of intoxicating liquor. Instructions were put to witnesses that the accused drank 8 *nappies* of Owambo liquor and then he turned around and gave instructions that he drunk a bottle of 750 ml of Clubman and lots of beverages. Thereafter, he shifted to a defence of total denial and implicated Shonena to have stabbed the deceased. It is doubtful if the accused had drunk intoxicating liquor that morning considering conflicting instructions he gave to his lawyers. Shonena was also adamant that the accused did not appear to be drunk. The accused denied the presence of Geises and Aubeb but he told his counsel to recall them and put instructions to them. Counsel for the state submitted that the state had proved its case beyond a reasonable doubt because the accused stabbed the deceased to death after he threatened to kill her earlier on.

[31] On the other hand the accused argued that he is not guilty because he did not commit such a deed. The accused submitted that he did not agree with what his legal representative Mr Ujaha said that he stabbed the deceased. All the statements given by the witnesses were wrong. The first and second witnesses for the State were not telling the truth and were not present. Aubeb told a lie by saying the accused threatened him as the accused never saw him on the day in question. The accused argued again that he never stabbed the deceased because he did not set his foot on the deceased's premises. All what the state witnesses said was a fabrication.

[32] Having summarised the evidence and submissions by both the State and the defence, I will now proceed to consider whether the State has proved its case beyond a reasonable doubt in respect of both counts. I propose to deal with the count of murder first.

[33] The accused's version in amplification of his plea of not guilty when he pleaded in terms of s 119 of the Criminal Procedure was that: 'Accused will admit he stabbed the deceased with a knife but had no intention to kill her. According to him at the time he was heavily intoxicated.' However, when the accused pleaded in this court, he raised a defence of self defence.

[34] During the trial the accused terminated the services of his initial legal representative. He was provided with another counsel by the Directorate of Legal Aid. When the second counsel came on board, the accused instructed him to put another version to the witnesses concerning his defence. As a result and as mentioned before, two of the witnesses were recalled and it was put to them that the accused was called by the deceased to help her. Before the accused entered the deceased's room an Oshiwambo speaking person by the name Shonena came from the deceased's room. When the accused entered he found the deceased already injured because she was bleeding. This version was disputed by both witnesses.

[35] Strangely enough when the accused was placed on his defence, he testified that at the time he went to the deceased's shack he did not see State witnesses Geises and Aubeb because they were not on the premises. He only saw Geises and Shonena at the time he was taking the deceased out of the house. This version was contrary to the earlier one that before he entered the deceased's room he saw Shonena emerging from there. Again the reason for Geises and Aubeb's recall was for the accused to put his version to these witnesses concerning the allegation that the accused saw Shonena running out of the deceased's room before the accused entered. It is evident from the record that the accused was giving conflicting versions and as a result his second counsel withdrew. As mentioned before, the third counsel was appointed but he too withdrew for the reasons stated already.

[36] In cross-examination the accused was asked as to who stabbed the deceased to death and he replied that he did not know who stabbed the deceased and that he did not even see the knife that was used to stab the deceased. The version given by the accused that he did not see the knife is contrary to the earlier version that was put to the State witness Geises that during the fight inside the shack, the deceased was the one who pulled and pushed the accused first, and picked up the knife, that the accused was struggling and in the process the deceased was stabbed. It is

obvious that the accused has changed from one defence to another and it is not all too clear which defence he is raising.

[37] Although the accused raised the defences of self defence and intoxication, I do not even intend to discuss the defences raised because they are neither here nor there as the accused in his latest version testified that he did not know who stabbed the deceased.

[38] As already noted, State witness Geises testified that the accused and the deceased entered the deceased's shack. After an hour the deceased came running from the shack bleeding on the hand. The accused was running after her armed with a knife. The deceased sought protection from her and Aubeb. The accused dragged the deceased at the back of the house and when the deceased came back she was bleeding from her neck. The version of Geises was corroborated by Aubeb in some respects namely that the deceased came running from the shack bleeding and that the accused was chasing her armed with a knife. The deceased sought protection from them but the accused grabbed her and pulled her to the back of the house.

[39] The version of the two witnesses above was corroborated by Shonena's version. However, Shonena's version went further that he saw the accused threatening to stab the deceased with a knife inside the shack. It was Shonena's version that after the deceased ran out of the shack, when the accused grabbed her whilst he had a knife in his hand, the deceased asked the accused why he was grabbing her. The accused threatened to stab the deceased with a knife to death. Shonena further witnessed the accused stabbing the deceased on the neck when she was pulled to the back of the shack in a corner between the main house and the shack.

[40] The versions of the three state witnesses who witnessed the event pointed to the accused as the person who stabbed the deceased with a knife. Although the accused indicated that his intention was just to scare the deceased when advised by Shonena not to stab the deceased, it is clear that the assurance amounted to empty words meant to fool the witness.

[41] The account that the accused did not know who stabbed the deceased is highly improbable. The accused by changing his defence and giving conflicting

versions as to how and who stabbed the deceased cast serious doubt on his version and leads to unavoidable conclusion that his versions are a fabrication. This is also an indication that the accused is an unreliable and untrustworthy witness.

[42] There is overwhelming evidence that the accused is the one who stabbed the deceased. The State witnesses corroborated each other in this regard. Medical evidence revealed that the deceased had sustained a wound on the arm and neck. According to the medico-legal post-mortem examination the cause of death was severe haemorrhage – blood loss – hypovolemia; brain and generalised anoxia, due to the total penetrating stab wound on the left side of the neck. The accused's evidence that it was Shonena who killed the deceased is false and is rejected.

[43] There is overwhelming probability that the accused killed the deceased because of sheer jealousy as she did not wish to continue with the relationship and he accused her of having romantic relationship with other men.

[44] I have no reason to doubt the State witnesses' version. They corroborated each other in material respects and I found them to be reliable witnesses. I am therefore satisfied that the State had proved its case beyond a reasonable doubt in respect of the first count and I found the accused guilty of murder. As to the form of intention, there is ample evidence that the accused had threatened to stab the deceased to death and indeed carried out the threats. He stabbed her on a sensitive part of the body, namely the neck. I am of the opinion that he had direct intent to kill the deceased.

[45] Coming to the second count, there is evidence from Shonena and Aubeb that the accused threatened to stab Aubeb whilst chasing the deceased armed with a knife. Aubeb believed that the accused was able to carry out his threats against him and also hurt him too because he saw the deceased bleeding. There is no evidence contradicting the version of the State as far as this count is concerned. I am therefore satisfied that the accused by threatening to stab Aubeb whilst armed with a knife had inspired fear in his mind and he rightly believed that the accused was able to carry out his threats of personal violence as it was evident that the accused was a violent man who had already stabbed the deceased. In the instant case, the test to be applied is subjective and one must have regard to the complainant's state of

mind. The mere denial that the accused did not threaten to stab the complainant is rejected. For all the above reasons, I am satisfied that the State has proved its case beyond a reasonable doubt and the accused is found guilty of assault by threat.

[46] In the result the accused is found guilty and convicted as follows:

1<sup>st</sup> Count: Guilty of murder with direct intent read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

2<sup>nd</sup> Count: Guilty of assault by threat.

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N N Shivute  
Judge

APPEARANCES

STATE : Ms Wantenaar  
Office of the Prosecutor-General

ACCUSED: In Person