



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case No: CC 13/2013

THE STATE

Versus

TOBIAS NAMWEYA

Neutral citation: *S v Namweya* (CC 13/2013)[2013]NAHCMD 333 (14 November 2013)

Coram: SHIVUTE, J

Heard: 04 – 08 November 2013

Delivered: 14 November 2013

Fly note: Criminal Procedure - Evidence- Failure by accused to testify – Accused not under obligation to testify in his defence – State led direct incriminating evidence against accused - Not appropriate case for accused to safely opt to exercise his right to remain silent – Incriminating State evidence – Calling for an answer – Failure to answer in the face of the weight of uncontradicted evidence – Court may safely conclude that such evidence - conclusive to warrant conviction.

Summary: Criminal Procedure – Evidence – Failure by accused to testify in his defence – Although the accused is not under any obligation to testify in his defence, the State had led direct evidence incriminating the accused. This is not an appropriate case where the accused can safely opt to exercise his right to remain silent. Incriminating State evidence calls for an answer from the accused. Failure to answer in the face of the weight of such uncontradicted evidence the Court may safely conclude that such evidence is conclusive to warrant the accused's conviction.

Fly note: Criminal law - Assault with intent to do grievous bodily harm – Nature of harm not necessarily important – For the crime is not actual causing grievous bodily harm - Essential element – Intention to cause grievous bodily harm.

Summary: Criminal Law – Assault with intent to do grievous bodily harm- Nature of harm is not necessarily important – for the crime is not actual causing grievous bodily harm. The essential element is the intention to cause serious injuries and not the actual injuries that had been caused.

VERDICT

1st Count: Guilty of murder with direct intent.

2nd Count: Guilty of assault with intent to do grievous bodily harm, read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

3rd Count: Guilty of assault with intent to do grievous bodily harm.

JUDGMENT

SHIVUTE J:

[1] The accused appeared before me on an indictment containing one count of murder and two counts of assault with intent to do grievous bodily harm.

In respect of the 1st Count, namely Murder, the State alleges that on 20 September 2009 at Okahandja Park in the district of Windhoek the accused did unlawfully and intentionally kill Monika Wilhelm, an adult female (the deceased).

In relation to the 2nd Count, Assault with intent to do grievous bodily harm read with the Combating of Domestic Violence Act 4 of 2003, it is alleged that on 9 September 2009 at Okahandja Park in the district of Windhoek the accused did unlawfully and intentionally assault Peneyambeko Nangula Tobias by beating her with fists in her face or hitting her with a stone on her head and body, pulling out her hair with intent to do the said Peneyambeko Nangula Tobias grievous bodily harm.

The particulars of the 3rd Count, Assault with intent to do grievous bodily harm, are that on 9 September 2009 at Okahandja Park, in the district of Windhoek the accused did unlawfully and intentionally assault Monika Wilhelm by beating her with fists and/or a stone in the face and over her body with intent to do the said Monika Wilhelm grievous bodily harm.

[2] The accused pleaded not guilty to all charges. Mr Eixab appeared for the State and Mr Mbaeva appeared for the accused on the instructions of the Directorate of Legal Aid.

[3] The State's case can be summarised as follows:

Wilhelmina Kaimbi a community leader and activist of Okahandja Park in the district of Windhoek testified that on 9 September 2009 she was approached by the

deceased who reported to her that she and Peneyambeko Nangula Tobias were assaulted by the accused. The deceased wanted the witness to take her to the hospital. The witness observed injuries on the head and upper lip of the deceased and she was bleeding. The deceased was frightened.

[4] On 10 September 2009 the witness met with Peneyambeko Nangula Tobias. She observed injuries on her head and a swollen eye. Ms Tobias reported to her that she and the deceased were assaulted by the accused and he also threatened to kill them.

[5] Ms Kaimbi continued to tell the Court that on 20 September 2009 she received a phone call that the deceased had been killed. Upon receiving the information, she went to the scene of crime and observed the deceased lying already dead and the accused locked up in a police van.

[6] Gotlieb Matheus Shangeshapwako testified that the deceased in this matter was his wife and she was staying with him at Okahandja Park. On 9 September 2009 at around 16h00 whilst he was sleeping at home his nephew Dan Mwatinghimunhu Mwanyekange woke him up and reported to him that his wife was assaulted by the accused. Shortly afterwards the deceased came to the room. She was bleeding. She sustained injuries on the left side of her head and the face as well as on the upper lip. When he went outside the room, he saw Ms Tobias crying and she had a wound on her head that was bleeding. The witness took the deceased and Ms Tobias to Katutura Hospital. Both ladies had their wounds stitched and they were told to go for regular dressing. After the witness came back from the hospital with the two victims, the accused came to the witness' house and he was aggressive. The witness demanded the money he spent to take the two victims to the hospital from the accused but instead the accused threatened to assault him. The witness ordered the accused to leave his house and the accused left.

[7] The witness continued to testify that on 20 September 2009 whilst he was at work around 16h00 he received a telephone call from his neighbour informing him that the deceased was killed. However, in the morning before the deceased was

killed she telephoned the witness and reported that the accused was threatening to kill her.

[8] Dan Mwatinghimunhu Mwanyekange testified that he is a resident of Okahandja Park. He has known the accused as an ex-boyfriend of Ms Tobias. On 9 September 2009 whilst he was at home he heard a commotion going on outside. He checked and observed people fighting at Ms Tobias' place. When he went outside he found the deceased bleeding from the head. The accused was walking away. Ms Tobias was also bleeding. The witness took some bandages and covered the injuries on the deceased's head. The deceased had injuries on the head and on the upper lip. She was in pain because she was crying. Since it was time for the witness to go to work, he reported the incident to his uncle, the deceased's husband, who was sleeping inside the house.

[9] On 20 September 2009 whilst the witness was at work, he received a telephone call from the deceased who reported to him that the accused was making death threats towards her.

[10] Peneyambeko Nangula Tobias testified that she was a girlfriend to the accused. However, by 9 September 2009 she had already ceased to be his girlfriend. On 9 September 2009 the accused came to her house. The witness inquired from the accused why he kept on coming to her house if the accused had already told her that he did not love her anymore and that their relationship had ended. The accused threatened the witness by saying that he would not let her live on this earth; that he would beat her and kill her. Whilst the accused was still at the witness' house the deceased came and the witness reported to the deceased what had transpired. The witness told the accused that she also did not want him anymore. It was at that stage that the accused slapped the witness on her face. The deceased told the accused not to assault the witness.

[11] The accused turned onto the deceased. The witness closed the door because at that stage the accused and the deceased were at the entrance of the house. Whilst the witness was in the room she heard people shouting that the

deceased had fallen down. The witness went outside and found the deceased lying on the ground bleeding from the head and around the mouth. The accused turned towards the witness, pulled her hair and beat her with a stone which he used to assault the deceased. The accused did not throw the stone at her. Instead, he was holding it in his hand whilst he was assaulting her. The stone was as big as the accused's palm of his hand. The witness was assaulted on her head and on the right side of her cheek. She was bleeding. She and the deceased were taken to the hospital by the deceased's husband and both received stitches and used to go for dressing at the clinic. After the deceased, her husband and the witness returned from the hospital, the accused came to the deceased's place. The deceased's husband asked for the money he used to take the two victims to the hospital, but the accused threatened to assault the deceased's husband the way he, the accused, assaulted the deceased and the witness. The accused was aggressive. In the morning of 20 September 2009, the witness told the deceased that they should go and hide because the accused had been threatening to kill her and the deceased. The witness went to hide. At the time the deceased was killed she was not present.

[12] Kaino Wilhelmina Shipingana testified that on 20 September 2009 in the afternoon she was at the deceased's house celebrating the deceased's birthday. Whilst there, the accused whom she had known before this incident arrived at the deceased's house. The accused asked the deceased where Nangula Peneyambeko Tobias was. The deceased told the accused that she did not know where Ms Tobias was. The accused walked towards the deceased, drew a big knife from his jacket and told the deceased that he was going to kill her. At that stage the deceased was seated. The accused stabbed the deceased several times with that knife on the chest and her back. Whilst the accused was stabbing the deceased, she did nothing apart from blocking the knife with her arms. After the accused stabbed the deceased, he licked the blood from the blade of the knife and walked away smiling. After the accused walked away, the witness saw witness Laban Neshuku following the accused. It was put to the witness in cross-examination that the accused did not lick the knife as he was not a cannibal. The witness maintained that she saw the accused licking blood from the knife. It was further put to the witness that the witness

was in a state of shock and she could not have looked at his face. The witness was adamant that she saw the accused. She knew the accused before this incident as she used to see him walking around the location and the accused knew her.

[13] Laban Neshuku, a police officer in the Namibian Police Force, testified that the deceased was his neighbour. He also knew the accused by seeing him in their residential area. On 19 September 2009 the witness was approached by the deceased and Ms Tobias who requested him to protect them because they were assaulted by the accused and the accused was still making death threats towards them. The witness stayed with the two women until the time he escorted them to the deceased's place and told them to lock whilst inside the house. The witness reported the matter to a Warrant Officer Haipinge.

[14] The following day the witness went to the deceased's house to see how they were doing. The witness stayed with the deceased and Ms Tobias on 20 September 2009 until the afternoon when the witness went to watch television. In the afternoon before the witness went to watch television, he saw the accused walking around the location but he was very far from him. Around 17h00 Ms Tobias left them. Whilst the witness was watching television, he was informed by a neighbour, one Shakuno, that the accused was busy stabbing the deceased. The witness went outside and saw the deceased on her way to his (witness's) house. The accused was busy inflicting the last stab wound on her back. The witness only observed the accused stabbing the deceased once on her back and she fell down near the witness's house. After the accused stabbed the deceased on her back he stuck the knife into the ground and walked away. The witness went back to his house to collect his service firearm and handcuffs in order to arrest the accused. He followed the accused and told him to stop and surrender the knife that he was carrying but the accused did not comply with the order. The witness fired warning shots but still the accused did not comply. Eventually the witness grabbed the accused, disarmed him of the knife and managed to arrest him. After the accused's arrest he was taken back to the scene. They found the deceased already dead. The witness identified Exhibit "1" as the

knife that was used to stab the deceased and recovered from the accused. At the time the witness was following the accused he never lost sight of him.

[15] Kornelia Fotolela Hangula testified that she knew the accused as well as the deceased because they were staying in the same location. The witness further testified that during September 2009 she was approached by the deceased who was bleeding from the head and had a swollen eye and reported to her that she was assaulted by the accused. The deceased came to report to the witness because the witness is a community leader. The witness took the deceased to the police station and left her there. On 20 September 2009 she saw the accused walking waving a knife and he was walking backwards. Members of the community were following him and he was telling them that whoever wanted to die should come and apprehend him. The witness also saw the deceased lying in a pool of blood motionless and some people who were crying. The witness called the police. When the police arrived they found the accused already apprehended by police officer Neshuku.

[16] It was put to the witness that she was mistaken about the accused's identity and that it was not the accused she saw. The witness replied that she could not be mistaken about the accused's identity because the accused was her good friend. At one stage the accused assaulted one Peneyambeko, a different person from Ms Tobias and accused went to hide at the witness' house.

[17] Gothardt Gaseb testified that during 2009 he was a police officer and on 20 September 2009 he was on duty. Whilst on duty, he received a report of murder at Okahandja Park. Upon the report, he drove to the scene of crime. He found a female body lying in a pool of blood. He was given a knife that was used to kill the deceased and booked it in as an exhibit. The witness identified Exhibit "1" as the knife he was given at the scene of crime.

[18] Doctor Yuri Vasin explained the post-mortem report that was conducted by Doctor Estrada who had since returned to his country of origin. According to the post-mortem examination, the chief post-mortem findings were as follows:

Cutting and perforating wound; perforation of right anicle and left inferior lung lobe; hemothorax of 600ml; pale liver and kidneys.

The cause of death was a stab wound on the chest. The post-mortem report was produced in evidence as an exhibit. In total the deceased sustained seven stab wounds. The doctor who conducted a post-mortem examination had also observed an old wound that was healing on the deceased's head and a small left parietal subjugalal haemorrhagic infiltrate that was 2 x 1cm on the deceased's head as well.

[19] The state submitted the following documents with the consent of the defence namely:

(a) An affidavit in terms of s 212 (7) Act 51 of 1977 by Warrant Officer Alfred Obed Haraseb indicating that he is the one who removed the deceased's body from the scene of crime to the mortuary. On 21 September 2009 he identified the body to the doctor who performed the post-mortem examination. He further stated that the body did not suffer further injuries from the scene of crime to the mortuary. The affidavit was marked as Exhibit "C".

(b) A medical report in respect of Peneyambeko Tobias marked as Exhibit "D". According to Peneyambeko Tobias's medical report, she had a laceration below the eye and a laceration at the back of her head.

That was the summary of the State case.

[20] The accused person exercised his right to remain silent. He called no witnesses and closed his case.

[21] Counsel for the State argued that with regard to the first count of murder it is clear that the deceased died as a result of stab wounds that were inflicted on her body. During the trial the defence raised the issue of mistaken identity of a person who inflicted those stab wounds on the deceased. The eye witness Shipingana who was with the deceased testified that it was the accused who stabbed the deceased to death. Her evidence was corroborated by police officer Neshuku who witnessed the accused inflicting a stab wound on the deceased's back. Neshuku arrested the

accused and retrieved the knife that was used to stab the deceased. Kornelia Fotlela Hangula also saw the deceased lying in a pool of blood and at the same time she saw the accused waving the knife. She further testified that she could not be mistaken about the accused's identity. Although the evidence regarding the identity of the accused should be approached with caution, counsel for the State argued that the identity was not an issue in this matter. Counsel further argued that the accused had threatened to kill the deceased before the incident and when he stabbed her to death he first told her that he was going to kill her. Therefore, the court should convict the accused as charged because he had the required intention which is direct intent.

[22] With regard to the two counts of assault with intent to do grievous bodily harm, counsel argued that the state had proved its case beyond all reasonable doubt. The post-mortem report showed that when the doctor conducted a post-mortem examination on the deceased's body he observed a wound that was in the process of healing on the deceased's head. Counsel argued that the accused had the intent to cause serious injuries on the two women. This can be inferred from the type of weapon used.

[23] Counsel for the State criticised the accused for having decided to remain silent in the face of the evidence led by the State establishing a *prima facie* case. Counsel contended that in the absence of the evidence contradicting the evidence of the State witnesses, the State case becomes conclusive. Counsel submitted that the State had proved its case beyond all reasonable doubt in respect of all counts and the court should find the accused guilty as charged. Counsel referred me to the matter of *S v Katari* 2006 (1) NR 205 which states as follows of which I have taken into consideration:

"When the state has established a prima facie case against an accused which remains uncontradicted, the Court may, unless the accused's silence is reasonably explicable on other grounds, in appropriate circumstances conclude that the prima facie evidence has become conclusive of his or her guilt."

[24] On the other hand, counsel for the defence argued that the State had failed to prove the charges against the accused. Concerning the second count of assault with intent to do grievous bodily harm, counsel contended that the doctor did not explain the extent of the injuries sustained although there were allegations that the complainant was bleeding. The stone that was allegedly used was not produced in court. In respect of the third count, counsel argued that the doctor testified that there were minor injuries on the deceased's head. In the absence of the stone that was used, counsel submitted that the accused person can only be convicted of common assault. Counsel argued that there has been a mistaken identity as it was not the accused who committed the three counts. He criticised the testimony of Shipingana who said the deceased fell at her house that was contradicted by the testimony of Neshuku that the deceased fell near Neshuku's yard. According to counsel these are material contradictions. Furthermore, counsel argued that the accused did not lick the blood from the blade of the knife as was alleged by Shipingana. If Shipingana saw the accused licking the blood from the knife's blade why was he not seen by Neshuku? Instead Neshuku saw the accused stabbing the knife on the ground. Because the two witnesses who alleged to have been at the scene of crime did not see the same thing it cannot be said without doubt that it was the accused who inflicted the injuries on the deceased. Furthermore, counsel argued that the fact that the accused was seen with a knife did not necessarily mean that the accused was the person who killed the deceased. Counsel argued that after all no fingerprints were lifted from the knife and no identification parade was held. Because of the aforesaid arguments counsel urged the court not to convict the accused as the State had allegedly failed to prove its case beyond a reasonable doubt.

[25] That the deceased was killed with a knife is not an issue. The issues for determination is whether the State had proved beyond reasonable doubt that it was the accused who killed the deceased on 20 September 2009 and whether he has also assaulted the deceased and Ms Tobias on 9 September 2009. Furthermore, if it is found that the accused has assaulted Ms Tobias and the deceased, the court should also resolve whether the accused did so with the intention to cause grievous bodily harm to the persons.

[26] When the deceased was attacked by her killer there was an eye witness Ms Shipingana who described how the deceased was stabbed with a knife several times. Before the assailant attacked her he told her that he was going to kill her. Ms Shipingana testified that the person who stabbed the deceased with a knife was the accused. It was not her first time to see the accused; she knew him before this incident. Her evidence was corroborated by the testimony of Mr Neshuku who saw the accused effecting his last stab on the deceased's back. Apart from the evidence of the two witnesses, the accused was seen by Ms Hangula at the scene waving a knife. Neshuku effected an arrest on the accused and confiscated the murder weapon from the accused immediately after the fatal assault on the deceased. All these witnesses knew the accused before this incident. Ms Hangula testified that it was impossible for her to be mistaken about the accused's identity because the accused was her good friend who even spent a night at her house when he was hiding after he had assaulted a certain woman who is not involved in this case. The accused was known by the witnesses. Therefore, there was no issue of mistaken identity and it follows that there was no need to hold an identification parade. Counsel for the defence argued that Shipingana and Neshuku's testimonies should not be believed, because they allegedly contradicted each other concerning the point where the deceased fell down after she was stabbed. Neshuku's evidence was collaborated by the testimony of Hangula that the deceased fell down at Neshuku's place. It is therefore my finding that Shipingana could have been mistaken as to the point where the deceased fell down as she testified that she was very much terrified when she saw the deceased being stabbed. Furthermore, I do not agree with counsel for the defence's argument that the contradictions he pointed out were material. Where the deceased fell after she was stabbed is certainly not at all material to the determination of the real issues I have identified above.

[27] Although the accused is not obliged to give evidence, I am of the view that this is not an appropriate case where the accused can safely opt to exercise his right to remain silent. Direct evidence had been led that incriminated the accused and this evidence calls for an answer. There was no evidence placed before me contradicting the version of the State apart from counsel for the defence putting questions to the

State witnesses that they were mistaken about the identity of the person who committed the crimes and the bold denial that it was not the accused who committed these offences. However, the State refuted this bare denial with credible evidence. In the face of the weight of such direct evidence that has not been contradicted, the Court may safely conclude that such evidence is conclusive to warrant the accused's conviction. I am therefore satisfied that it was the accused who stabbed the deceased to death. The accused had stabbed the deceased for no apparent reason. He directed most of the injuries on the vulnerable part of the body namely the chest. The accused inflicted seven stab wounds with a lethal weapon. Before the accused inflicted the injuries on the deceased, he declared his intention to kill the deceased and he indeed executed his intention and this rendered him to be guilty of murder with direct intent. I convict him as charged on the first count.

[28] As for the two counts of assault with intent to do grievous bodily harm, both the deceased and Ms Tobias were assaulted with a stone by the accused. There was no mistaken identity concerning the culprit because the accused was well known by Ms Tobias as they had an intimate relationship that had ended before these incidents and it is clear from the evidence that their relationship was the root cause of these incidents. I am therefore satisfied that there is no way Ms Tobias can be mistaken about the accused's identity. All the injuries inflicted on Ms Tobias and the deceased were directed on their heads and around their faces. Both women were bleeding and they both sustained swollen eyes. When the doctor was conducting a post-mortem report an old wound that was in the process of healing was observed although the post-mortem examination was conducted 11 days after the initial assault. This is an indication that the deceased suffered serious injuries when she was assaulted by the accused. The accused had threatened to kill Ms Tobias before he assaulted her by telling her that he would beat her up and he would not allow her to live on this earth. Although Ms Tobias suffered lacerations below the eye and at the back of her head, for the court to determine the accused's intention when he assaulted his victims the court has to infer it from the circumstances of the assault which include the following:

- (i) The instrument used to inflict the injuries;
- (ii) The part of the body on which those injuries were directed;
- (iii) The application of force in the assault, and
- (iv) The nature of injuries.

The nature of the injuries suffered may be taken into account but the nature of harm is not necessarily important for the crime is not actual causing grievous bodily harm but the essential element is the intention to cause grievous bodily harm. Even slight injuries could constitute an assault with intent to do grievous bodily harm. What the state needs to prove is the intention to cause serious injuries and not the actual injuries that had been caused.

[29] Having considered the nature of weapon used, the application of force, parts of the bodies on which the injuries were directed, I am satisfied that it was the accused's intention to cause grievous harm to the deceased and Ms Tobias when he assaulted them. The state has proved its case beyond a reasonable doubt in respect of the second and third counts and the accused is convicted accordingly.

[30] In the result the accused is found guilty as follows:

1st Count: Guilty of murder with direct intent.

2nd Count: Guilty of assault with intent to do grievous bodily harm read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

3rd Count: Guilty of assault with intent to do grievous bodily harm.

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Judge

APPEARANCES

STATE : Mr Eixab
Office of the Prosecutor-General

ACCUSED: Mr Mbaeva
Instructed by Directorate of Legal Aid