

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case No: CC 22/2017

THE STATE

v

JACOB HOXOBEB

Neutral citation: *S v Hoxobeb* (CC 22/2017) [2018] NAHCMD 332 (22 October 2018)

Coram: USIKU, J

Heard: 15, 16 October 2018

Delivered: 22 October 2018

Flynote: Criminal Procedure – Assault by threat – What constitutes such offence – Reliance on evidence of eye witnesses – Accused’s mere denial of the assault – Corroborative evidence by witnesses – The victim of the assault’s unavailability to testify as she is dead.

Summary: The accused was charged with the crime of murder with direct intent as well as assault by threat on the second count read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

After the charges were put to him, he tendered a guilty plea on the first count of murder but pleaded not guilty on the second count which relates to a charge of assault by threat also read with the provisions of the Combating of Domestic Violence Act.

ORDER

Accused is found guilty as charged on the second count.

JUDGMENT

USIKU J:

[1] The accused herein stood charged with the crime of murder on the first count as well as a charge of assault by threat on the second count read with the provisions of the Domestic Violence Act 4 of 2003.

[2] When the charges were put to the accused, he tendered a guilty plea on the first count and a statement in terms of section 112 (2) of the Criminal Procedure Act 51 of 1977 duly signed and confirmed by him was handed in. In that statement the accused admitted to having stabbed the deceased at least 16 times with a knife. He further admitted that at the time of the stabbing, he and the deceased were involved in a domestic relationship.

[3] The deceased was the mother of their three children. A Post-Mortem examination report and the Photo Plan were handed in and became part of the evidence before court without opposition from the defence.

[4] Accused, however, tendered a plea of not guilty to the second count which relates to a charge of assault by threat, also read with the provisions of the Combating of Domestic Violence Act.

[5] Ms Ndlovu appeared on behalf of the State, whilst Mr Engelbrecht appeared on behalf of the accused on instructions from the Directorate of Legal Aid.

[6] Having tendered a plea of not guilty to the charge of assault by threat, the state proceeded to lead evidence of at least three witnesses.

Background

[7] The deceased and the accused had been involved in a domestic relationship and lived together at a house in the Kaanan Location at Gobabis.

[8] On 4 December 2016 the deceased was assisted by the police and moved out of their residence. The accused confirmed that the deceased moved out of their home because she no longer wanted to live with him.

Evidence led

[9] Mr Sebastian Gariseb testified that he had known the accused and the deceased very well. On 5 December 2016 he had knocked off from work and went home. Whilst he was inside his house, at about 17h30 in the afternoon, the accused and the deceased arrived there. Accused requested him to make a call to his father in order for him (accused's father) to bring some firewood. Sebastian could not assist the accused because he did not have a phone at the time.

[10] Whilst the accused and the deceased stood at the house, an argument erupted between them. Sebastian could not explain what the argument was all about but saw accused picking up an axe which lay next to his house. Accused went towards the deceased and attempted to strike the deceased with it. The witness went in between the deceased and the accused, whereafter the deceased moved backwards to avoid being struck with the axe.

[11] In the meantime, the witness took the axe from the accused and took it inside the house. The witness calmed the couple down and they agreed, whereafter they forgave one another and moved away. Sebastian returned to his room and continued to play his music inside.

[12] Few minutes later, the witness heard a commotion of people screaming which forced him to go outside in order to investigate what was going on. He saw the deceased laying on the ground and observed a stab wound on the deceased's body. He also observed a young girl standing in their yard. In the meantime police arrived on the scene and the accused was arrested and taken away. The witness testified that one could see what was happening in the opposite yard because the yards are separated by a fence made of diamond mesh.

[13] Another state witness also testified. At the time of the incident she was a minor aged about 11 years old. She had known the accused because they are related. She also knew the deceased as the accused's girlfriend at the time. The young witness confirmed that prior to the stabbing, the deceased and the accused were involved in an argument, whilst inside the yard of her aunty, a certain Maureen who was staying with Sebastian at the time.

[14] Her testimony is further that the deceased and the accused had been arguing and accused had asked the deceased to return to his house whereby the deceased refused. The accused responded by saying that he knew why the deceased was not willing to return to the house and it was because she was involved in a relationship with another man. According to her, after that conversation the accused went towards the yard where he got hold of a knife and started to stab the deceased continuously. She went to alert her mother who was resting inside their house.

[15] About the incident of the axe, her testimony is that the accused wanted to strike the deceased with the axe which he had picked up next to the house. She demonstrated before court how the accused walked towards the deceased after he had lifted up the axe. When the deceased saw that movement, she pleaded with the accused to stop. In the meantime, Sebastian intervened and took away the axe as the deceased went behind Sebastian in an attempt to hide herself from the attack by the accused.

[16] Though the young witness was a distance away from where the accused and the deceased were at first, she could clearly see what was happening, there was no obstruction to prevent her from seeing. The accused and the deceased were still in the yard of Sebastian before they moved to where the stabbing incident occurred.

[17] Mr April's testimony concerned the corrections which he had made on the statement of the young witness. According to him, he made an error as to who removed the axe from the accused. He accepted to have made an error not to have requested the author of the statement and her guardian to co-sign for such an error.

[18] At the close of the State's case the accused also testified. His testimony is that on 5 December 2016 he was in Kaanan Location. He was not in the company of the deceased because they had already been separated by the police on the previous day. He knew Sebastian who was at the time having a relationship with his younger sister, Maureen. He also knew the young state witness because she is related to him.

[19] His further testimony is that when he arrived at the house of Maureen, he did not find anyone there. He entered the house alone because it was open. Accused denied that Sebastian was present at the house. He further denied having spoken to Sebastian. He did not request Sebastian to make a call to his father. Neither was he in possession of an axe. Accused vehemently denied to have threatened the deceased with an axe.

[20] According to the accused, he did not utter words to the effect that he was going to injure the deceased. He denied having been involved in an argument with the deceased whilst in the yard where Sebastian and Maureen resided. His further evidence is that the deceased followed him and started to quarrel with him she did not enter the yard of Maureen but stood a distance away.

[21] Accused denied having told the deceased that the reasons why she was refusing to return to his house was because she was in a relationship with another man. The reason why the deceased was moved by the police from his house was on allegations that she had a new boyfriend and was taken to her sister's house on 4 December 2016. He had been aware of such a relationship.

[22] In cross-examination, accused confirmed that the deceased had left his house on her own accord. He persisted, however, that the deceased never entered the yard where Sebastian and Maureen had been staying. Accused also confirmed that

at the time of the incident both Sebastian and Maureen were employed. They were staying in the same house and no one else stayed with them.

[23] Whereas the young state witness's testimony is that she saw Sebastian at his house as well as the deceased and the accused, the latter denied that there was someone at the yard of Sebastian and Maureen's house. Accused testified further that Sebastian lied about having removed the axe from him whilst he was about to strike the deceased. He confirmed to having inflicted injuries on the deceased that resulted in her death.

Analysis of the evidence

[24] It is now common cause that the deceased and the accused were involved in a domestic relationship. It is further common cause that the deceased was killed by the accused on 5 December 2016. That fact was confirmed by the two state witnesses as well as the accused himself when he tendered a plea of guilty on the first count. The first state witness, Sebastian's testimony is that the accused and the deceased had arrived at his residence on 5 December 2016. The young state witness also confirmed to have seen the deceased and the accused together in the yard of Sebastian.

[25] Though at the time she was young and only aged about 11 years, she was able to recollect in detail what she saw, as well as what she heard. Her evidence with regard to the accused having lifted an axe towards the deceased is corroborated by that of Sebastian.

[26] Sebastian did not only see the accused lifting up the axe and going towards the deceased in a threatening manner, but was the person who went in between the deceased and the accused and removed the axe from the accused, whereafter, he took possession of the axe and took it inside the house. That was also what the young state witness testified about. The fact that the axe was not photographed and taken as an Exhibit does not mean that it was not used. Witnesses testified about what they saw.

[27] Accused's testimony is that he was angry at the time and that could be the reason why he was not able to properly observe as events unfolded. He did not see

any of the state witnesses and his claim is that the deceased did not enter the yard of Sebastian and Maureen. That clearly is a lie because he was seen at the yard by both Sebastian and the young state witness. They both knew him and could not be mistaken about the accused's identity.

[28] Contrary to his testimony that he found the house of Sebastian unlocked, Sebastian's testimony is that after he had knocked off, he went to collect the key for their house from Maureen, whereafter he went straight to their house. The accused and the deceased arrived and knocked at the door which he then opened. The accused's version of having found the house unlocked cannot be reasonably possibly true. There would be no reason why Sebastian and Maureen could have left their house unlocked when they left for their respective work places, afterall, there were no other persons who stayed with them at their house. On that score, accused lied about the house not having been locked. It was Sebastian's evidence that he opened for the accused when he knocked and was accompanied by the deceased.

[29] The young state witness saw the deceased and the accused together at Sebastian's yard, prior to them moving out whereafter she saw the accused picking up a knife which he used in the stabbing of the deceased.

[30] It was the defence's contention that the corrections made on the statement of the young state witness was not a normal mistake but an afterthought in order to support Sebastian and the young state witness' testimony. That issue was fully explained by Mr April who recorded the statement. Though he did not request the witness and her guardian to co-sign the statement that does not detract from the witnesses' evidence, which is clear and satisfactory. The defence has conceded to the fact that statements of witnesses recorded by the police are just skeletons which do not contain all details. The two state witnesses gave detailed testimonies with regard to the axe being used in the threatening of the deceased before the stabbing occurred.

[31] This Court found that there were no inconsistencies in the state's case, thus the state's case was not demolished in its entirety and as a result it was proven that threats of violence were made by the accused towards the deceased on 5 December 2016. These were made by means of an axe and it must have induced fear in the

deceased that she would be assaulted. Accused had uttered words to the effect that he would injure the deceased as testified to by Sebastian who was in close proximity with both the deceased and the accused at the time.

[32] The use of threats culminated in the killing of the deceased within the same location not far away where the threats had been made towards the deceased. Indeed the deceased died as a result of multiple stab wounds inflicted on her by the accused.

[33] Accordingly, a case of assault by threat has been proven beyond reasonable doubt against the accused, as a result of which accused is found guilty as charged on the second count.

D N USIKU
Judge

APPEARANCES:

FOR THE STATE: Ms Ndlovu
Office of the Prosecutor-General, Windhoek

FOR THE ACCUSED: Mr Engelbrecht
Instructed by Directorate of Legal Aid, Windhoek