

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: CC 9/2017

In the matter between:

THE STATE

v

SIMON DAWID

ACCUSED

Neutral citation: *S v Dawid* (CC 09/2017) [2020] NAHCMD 442 (24 September 2020)

CORAM: NDAUENDAPO J

Heard: 26 May 2020

Delivered: 24 September 2020

Flynote: Criminal Law –Accused charged with murder read with the provisions of the Combating of Domestic violence Act 2003 - Accused pleaded not guilty - No plea explanation – Witnesses saw how the accused bashed the head of the three times against the floor-Medical evidence corroborated the evidence that the head

was bashed three times-State proved beyond reasonable doubt the guilt of the accused convicted of murder with direct intent.

Summary: The accused was charged with murder read with the provisions of the Combating of domestic violence Act 2003. He pleaded not guilty and gave no plea explanation. Mr. Shiimi testified that on that fateful night he heard a child crying and saying “papa I am sorry”. He further heard a loud bang and then silence. He went to investigate and saw the deceased laying on the floor bleeding from the nose and head. He then saw the accused lifting the deceased and bashing his head against the floor on two occasions. He went to call Ms. Roslyn Oarum (Ms. Roslyn) and together they witnessed how the accused again bashed the deceased’s head against the floor. He tried to open the room of the accused, but it was locked from the inside. He went to call Ms. Lena Nangula lipinge (also known as Meme Nangula) and Ms. Roslyn, Meme Nangula corroborated his version. Meme Nangula testified that she called the accused to open the door three times and only after the third time did he open the door. She entered the house and saw that the deceased was no more. The accused testified that whilst he was laying on the bed he heard the deceased crying and saying “It is Shiimi papa”. He testified that he saw Mr. Shiimi lifting the deceased and let loose on the floor and then ran out of the room. He denied that he was the one who killed the deceased.

Held, that Shiimi’s evidence was clear and credible. That he saw how the accused bashed the deceased’s head against the floor.

Held further that Roslyn and Meme Nangula corroborated the version of Mr. Shiimi.

Held, further, that the version of the accused is false beyond a reasonable doubt.

Held further that the accused is guilty of murder with direct intent.

ORDER

JUDGMENT

NDAUENDAPO, J

Introduction

[1] The accused is charged with murder read with the provisions of Combating of Domestic Violence Act, 2003. The State alleges that on or about 5 July 2015 and at or near Katutura in the district of Windhoek. The accused did unlawfully and intentionally kill Athanosius Katholo Reeves Simba, a four year old boy.

[2] The accused pleaded not guilty to the charge and did not disclose the basis of his defense.

The state's case

The State called the following witnesses:

[3] Detective Sergeant Johannes Iyambo testified that he took photographs of the scene and compiled the photo plan.

[4] Ms. Roslyn Oarum testified that she and her boyfriend, Mr. Joel Shiimi, were tenants of the accused and lived in the same yard as him at Mika Shimbuli Street, Katutura. On 5 July 2015, while she lay down in her room, during NBC news time, she heard the accused and Mr. Shiimi speaking to each other in Oshivambo. As she was falling asleep, she heard Mr. Shiimi coming in and shaking her while saying that she must come quickly and see what the accused was doing. She stood up and went to look. Through an open window of a lit room, she saw, the accused lifting up the deceased with his legs and smashing him on the ground, prompting her to exclaim in shock, 'Etse!' meaning 'Oh my word!' She heard another bang sound like something

falling hard on the ground when she returned to her room to dress up properly. She also heard a third similar sound. She saw Mr. Shiimi and Meme Nangula pushing the door but eventually the accused opened the door as it was locked from inside. Both she and Mr. Shiimi loved that little boy (the deceased) and neither of them had, had an argument or quarrel with either the accused or the deceased that night.

[5] Ms. Lena Nangula lipinge (also known as Meme Nangula) testified that on the night of 5 July 2015, on Sunday, Mr. Shiimi, who appeared in a state of shock, called her to come and see what the accused was doing. She found the deceased lying on the ground in the accused's house while he (the accused) sat on a bench. She called the accused three times but he did not respond. They could not open the door as it was locked from inside. The accused eventually opened the door of the house. When the accused was out of the house, he said they should leave his child alone. On feeling the deceased, his legs felt a bit warm while his head felt cold, and besides that, blood was coming out of his mouth, from which she realized that he was no longer alive. The accused was arrested by people who had converged to the scene until the police came.

[6] Doctor Mamade Guriras testified that she conducted the post mortem on the deceased. Her chief findings were that the cause of death of the deceased was blunt force trauma to the head. She noted that the deceased sustained 3 distinct skull fractures, one on the left and the other on the right temporal area as well as a depressed skull fracture over the left occipital area (at the back of the head). With the findings made, the deceased did not have a good chance for life, the prognosis was very poor. There were not very good chances that the deceased could speak immediately after sustaining the injuries that were observed. She further testified that to cause those kind of injuries severe force must have been applied.

[7] Mr. Ace Mulemwa Kulatata declared the deceased dead on arrival at the scene of crime, that is, Erf 8800 Mica Shimbuli Street in Katutura, at 10:40 in the evening. He observed that the deceased had dried blood on the mouth and nose. In addition to that, he had slight deformities at the back of the head.

[8] Ms. Stella Fatima Simbo, the mother of the deceased, testified that the accused remained with the deceased when she broke up with him. She last saw the

deceased alive at the accused's residence on Saturday, the day before he was killed. She had been there at the accused's invitation. During that visit, the accused angrily confronted her about the circulating rumor that he was not the father. When she asked to take the deceased along with her, the accused would not let her do that as he (the deceased) was apparently sick. She observed that he was swollen on the throat. The following Sunday night, she learned about the deceased's death from her cousin.

[9] Mr. Albertus Julius, a member of City Police arrested the accused at the scene. Joel Nando Shiimi ("Shimii") testified that on 5 July 2015 he was watching the evening NBC news when the accused called and spoke to him saying that he was drunk and was going to sleep. When accused went to his room, he suddenly heard some shouting, screaming and crying which prompted him to lower the TV volume. He heard the deceased crying, "Aah! Papa sorry, papa sorry." While the deceased was still crying, he heard a bump sound after which he "...did not hear any crying of the child, it was just quiet." He went to investigate what was happening. He peeped through the accused's window and saw the deceased just lying on the ground with blood coming out from his mouth and head. He called out to the deceased, "Ata, Ata, Ata" but there was no response.

[10] When he asked as to what happened to the child (the deceased), the accused only looked at him, bent down, picked the deceased up and dropped (hit) him on the ground. He tried to open the door but he could not as it was locked from the inside. He witnessed the accused hit the deceased on the floor for two other times, one of which he was with was Ms. Roslyn, his girlfriend whom he had awakened. He went to call Meme Nangula who then came to the scene. She called out the accused to open the door which he did after a third call to do so. He did not quarrel with the accused on that day and had no problems with the deceased. There were rumors about the paternity of the deceased. At one point, during an argument between the two, the deceased's mother told the accused that he was not the biological father of the child.

[11] The accused's response then was that he would kill the deceased if it was said that he was not his child. During cross examination it was put to him that he was the one who entered the room of the accused and hit the deceased on the floor, he

denied those allegations and told the court that he was not in the room of the accused. In response to the accused's allegation that he dropped the deceased from a height, he said that he was not nearby the child and the accused was just accusing him. Further, he said that he was never in the accused's room.

Defense's case

[12] The accused, Mr. Simon Dawid, testified that he was residing in Mika Shimbuli Street, Katutura. The deceased, was his son and they were living together for one year and 3 months. He never killed the deceased. He testified that on 5 July 2015, Sunday he was home for the whole morning and after that he and the deceased decided to go to Ms. Marlyn's house.

[13] Ms. Marlyn directed him to sit on a chair. And Mannekie was seated on the bed. Whilst talking, Ms. Marlyn took out N\$100 and sent him to go and buy two beers and a 750ml Monis Granada wine and a small coke. He went to buy the stuff. He returned and he and Mannekie consumed the wine. Whilst enjoying their wine, Marlyn told him that whilst she was staying with Ms. Stella ,the deceased's mother, Ms. Stella told her that he was not the biological father of the deceased and he said to her "you people from Katutura likes stories and why did you not tell me earlier." He then told her that he did not like such things and that he would not come again to her house, he then left. That was around 21h30 to 22h00.

[14] He walked back home and saw Meme Nangula busy packing her stuff, when he came into the yard he saw Mr. Shiimi's lights were on. He greeted Mr. Shiimi and Mr. Shiimi greeted him back. He opened the padlock of his room and he entered. The deceased also entered and he told the deceased to close the door which he did. He lay on his bed. After a few minutes the deceased started crying and he told him that he was making a noise. While the deceased was screaming, he heard the door being shut, the door on the ground is rubbing on the floor. He then saw Mr. Shiimi in the room.

[15] He could not see him entering because he was lying on the bed and there is no door in the sleeping room, it is only a door frame that is visible, if you are in the bedroom you can see in the sitting room. He testified that he saw Mr. Shiimi coming

in when the deceased was crying and he lifted the deceased up, not firmly and the deceased fell to the ground and when Mr. Shiimi saw that he got up from the bed, Mr. Shiimi ran out and locked the door from the outside. When he went to the deceased he saw that the deceased was lying on his stomach. When he came closer to the deceased, the deceased said: "It is Shiimi papa." He was just seated close to the deceased and did not know what to do, he was shocked, he picked up the deceased and he was saying "I am feeling pain" on his right side, the arm and the head."

[16] He testified that Ms. Roslyn was not at the window to see what had happened, it was only Mr. Shiimi. Whilst he was seated there he saw Meme Nangula come to the window and called him 3 times. He got up and when he came to the door it was locked, he opened it and then he saw Mr. Shiimi with the police. They did not ask him anything, they just told him get into the police van. At the police station the police told him that he is charged with murder. In the morning a police officer by the name of Nambahu asked him what had happened and he said he could not remember. She gave him a paper to sign which he did.'

Submissions by Mr. Moyo

The cause of the deceased's fatal injuries

[17] Counsel argued that the evidence before court is clear that it was the accused who inflicted the said injuries on the deceased. In the first instance, Mr. Shiimi's attention was attracted by the deceased pleas to his father who was saying "sorry papa sorry papa" which pleas were followed by a bang like something falling to the ground that were in turn followed by a sudden quietness. Secondly, Mr. Shiimi saw the accused bash the deceased to the ground on at least two separate instances which produced bangs similar to the one he had heard coming from the accused's house, at the material time. Thirdly, Ms. Roslyn confirmed seeing one of the assaults on the deceased by the accused when she was peeping through the window with Mr. Shiimi. Fourthly, the three assaults testified to by Mr. Shiimi are consistent with observations made by Doctor Guriras. Her observations were that the deceased sustained 3 distinct skull fractures over and above other injuries.

The intention of the accused when he assaulted the deceased

[18] Counsel submitted that on the test for the presence of the requisite intention, and in the matter of *The State v Ignatius Petu Muruti*, Case No. CC 10/2011, delivered on 27 January 2012, at para [37], Liebenberg J, stated that:

‘... The test is a subjective one and in order to decide by means of inferential reasoning what the accused thought or foresaw when committing the prohibited acts, the Court looks at objective factors such as the type of weapon used; at which part of the body the attack was directed; the nature and seriousness of the injury inflicted and the objective probabilities of the case.’

[19] Counsel submitted that in this case, it is clear from medical evidence that the accused intended to kill and murder the deceased. He repeatedly bashed the deceased’s head on the ground. Among others, the following serious injuries that left the deceased with no prospects of life, were observed:

- 1.1 Linear skull fractures on both temporal areas.
- 1.2 Depressed skull fracture over the left occipital area.
- 1.3 Right frontal-temporal subarachnoid hemorrhage.
- 1.4 Cerebellar subarachnoid hemorrhage.
- 1.5 Bilateral lung contusions.

[20] In addition to medical evidence, it is clear that the accused was haunted by the circulating rumor that the deceased was not his biological son and that he harbored a fear that that rumor was probably true. That is evident, among other things, from the following:

1. He says that his friend, one ‘Spina’, was having a relationship with the deceased’s mother and it is how everything started.

2. According to him, he found Ms. Stella, deceased's mother, in compromising position with the said Spina before the deceased was born and it was also when she got pregnant.
3. Apparently, Ms. Stella once went to the police to say the child was not his.
4. According to the deceased's mother, he angrily confronted her about the paternity rumor a day before the incident.
5. Just before the deceased was killed, Ms. Marylyn apparently brought up the issue of the deceased's paternity and that led the accused to immediately leave her place and vowing never to return.
6. According to Mr. Shiimi, during an argument, some two years earlier than the incident, the deceased's mother told the accused that the deceased was not his child and the accused vowed that he would kill the child if it was said it was not his own.

[21] In his defense, the accused tried to implicate Mr. Shiimi as the murderer and alleged that he entered his room and dropped the deceased from a height leading to deceased's injury on the right side of his body. That allegation can only be false for the following:

- (a) In the first instance, it does not make any sense that Mr. Shiimi would all of a sudden attack the deceased in the absence of any evidence that he had had any quarrel with either the accused or the deceased on that day.
- (b) At any rate, Mr. Shiimi and the accused had exchanged cordial greetings before the incident.
- (c) According to the accused, Mr. Shiimi came because the deceased was crying, a fact that is consistent with Mr. Shiimi's claim that he was attracted to the accused's house by the child's cries or pleas to his father where he was saying "sorry papa, sorry papa" before those pleas ceased following a bang, like something was falling down.

[22] Secondly, the accused gave two versions about Mr. Shiimi's presence in his house which versions he could not reconcile besides being improbable.

- (a) One version that he put through instructions to witnesses Ms. Roslyn, Meme Nangula, and Mr. Shiimi, was that he heard a sound of commotion from the sitting

room of his house, where after asking about what had happened, the deceased said it was Mr. Shiimi who had pushed and/or dropped him from the top of something where he fell and hurt his right of the body.

(b) Another version was that he saw Mr. Shiimi coming into the house.

(c) Mr. Shiimi could not have entered into the accused's house as it was locked from inside. He admits opening the door himself when Meme Nangula called him to do so.

(d) This version was not put to Mr. Shiimi.

(e) If he saw Mr. Shiimi attacking the deceased then there would not have been any reason for him to ask the deceased about what had happened.

The accused had no explanation as to why, as a loving father, he failed to:

(a) Confront Mr. Shiimi when he was seen by him allegedly attacking the deceased.

(b) Inform the police that it was Mr. Shiimi who killed the deceased.

Credibility of witnesses

[23] (a) Counsel argued that the state witnesses were credible and gave their evidence truthfully. For example, the quartet of Roslyn Oarum, Meme Nangula, Ms. Stella Fatima Simbo and Mr. Joel Nando Shiimi did not hesitate to concede that the accused was a loving father to his son.

(b) On the other hand, the accused was clearly not a credible witness and did not give his evidence truthfully.

[24] In the circumstances counsel submitted, with respect, that the State has proved beyond reasonable doubt that the accused person murdered the deceased. It is therefore prayed that he should be found guilty as charged.

Submissions by Mr. Lutibezi

[25] Counsel submitted that the accused testified that he was with his son on the day in question, whilst at a certain house, he was informed that the child was not his.

He testified that he saw Mr. Shiimi lifting/smashing the deceased's head on the floor, with a loud bang. Accused is a single witness, the others are boyfriend and girlfriend. There were other people who rented at that house, but they were not called. The accused testified that he had an impaired relationship with Mr. Shiimi. The evidence of Mr. Shiimi is possibly not reliable. There was bad blood between accused and Mr. Shiimi. The accused on that night had some drinks. His explanation that Mr. Shiimi entered the house is reasonably possibly true. The accused was informed that it was not his child, so the accused could have been provoked. *S v Willem Visagie, SA 59/2018* delivered on 7 May 2020, p 57.

[26] Counsel for the accused submitted that the state did not prove beyond a reasonable doubt that the accused is the one who murdered the deceased. The accused consumed alcohol, slept for a few minutes *S v Nikodemus Lukas* delivered on 29 August 2019. Contradictions are irrelevant, they cannot be used to convict the accused. He consumed alcohol and was provoked and therefore was negligent. For four years he was looking after the child, consumption of alcohol provoked all that, it shows that he acted with negligence.

Analysis of the evidence

[27] Mr. Shiimi testified that on that fateful day he was watching the 20h00 NBC news when he heard shouting, screaming and crying. He immediately lowered the volume of the TV and further heard the deceased crying saying sorry papa, sorry papa and he then heard a loud bang and quietness. He went to investigate. He saw the deceased lying on the floor, with blood coming out of his mouth and head. He called the deceased by his name "Atta, Atta", but there was no response. He asked the accused as to what happened to the deceased, he did not respond, he just stood up picked up the deceased, hit his head against the floor. He tried to open the door of the house of the accused but it was locked from inside. He then went back to his room to call Ms. Roslyn to come and see what the accused was doing the deceased.

[28] With Ms. Roslyn they saw the accused hitting again the head of the deceased against the floor. He also went to call Meme Nangula to come and witness what the accused was doing. Together with Meme Nangula, they came and called the

accused to open the door. The version of Mr. Shiimi was corroborated by Ms. Roslyn and Meme Nangula in material respect. Meme Nangula testified that she saw the deceased lying on the floor and they tried to open the door from outside but it was locked from inside. She called the deceased three times and only after the third time did he open the door. She looked at the deceased and realized that he was no more.

[29] The evidence of Mr. Shiimi was clear and credible in all material respects. He had no reason to do harm to the deceased as suggested by the accused. They liked the deceased. The version of the accused that it was Mr. Shiimi who came into the house and inflicted those injuries on the deceased are false. The house of the accused was locked from inside when they tried to enter the house. It took Meme Nangula three times to call the accused before he could open the house. There is no way that Shiimi could have entered the house and locked it from inside. The evidence was that once you enter the house you have to lock it from inside. At no point at the scene or at the police station did the accused inform anyone that he saw Mr. Shiimi entering the room and inflicted those injuries to the deceased. Nor did he tell the police when they arrived at the scene that the guilty person is Mr. Shiimi. If he was innocent, that would have been the natural reaction. Mr. Shiimi testified that he overheard an argument between the accused and the deceased's mother when the mother told the accused that he was not the biological father of the deceased and the accused responded by saying that if that is so he will kill the deceased. What the accused did on that fateful night was to live up to his promise. That fateful night when he returned from Ms. Marlyn's house, he was clearly upset after hearing from her that Stella, the mother of the deceased, told her that he (the accused) was not the biological father of the deceased. That night he decided that he would kill the deceased as he promised to do. He bashed the head of the deceased three times against the floor.

[30] That piece of evidence is also corroborated by the medical evidence of Doctor Guriras who conducted the post mortem on the deceased. Her chief findings were that the cause of death of the deceased was blunt force trauma to the head. She noted that the deceased sustained 3 distinct skull fractures, one on the left and the other on the right temporal area as well as a depressed skull fracture over the left

occipital area (at the back of the head). The doctor further testified that with those kind of injuries the deceased's chances of survival were zero. The doctor also testified that to sustain those kind of injuries severe force must have been applied. It is evident from the testimony of Mr. Shiimi, the medical evidence and the concrete floor against which the deceased's head was bashed, that the accused had the direct intention to cause the death of the deceased.

[31] I am satisfied that the state proved the guilt of the accused beyond a reasonable doubt and the accused is found guilty of murder with direct intent read with the provision of the Combating of Domestic violence Act.

G N NDAUENDAPO

Judge

APPEARANCES

FOR THE STATE

Mr. E. Moyo
Of the Office of the Prosecutor General
Windhoek

FOR ACCUSED

Mr. Lutibezi
Of Kwala & Associates
Windhoek