

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 11/2020

In the matter between:

**THE STATE**

and

**THEUNS GANEB**

**ACCUSED**

**Neutral citation:** *S v Ganeb* (CC 11/2020) [2021] NAHCMD 119 (23 March 2021)

**Coram:** UNENGU AJ

**Heard:** 18 August 2020; 22-23, 14-16 September 2020; 05-07 October 2020;  
16, 18 20 November 2020 & 01 December 2020

**Delivered:** 23 March 2021

**Flynote:** Criminal Law – Murder – Accused charged with murder read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 – Charge arose as a result of the deceased assaulted by the accused with a knobkierie and panga multiple times – Accused and the deceased were in a romantic relationship – Deceased died as a result of multiple injuries caused by blunt trauma to her body.

**Summary:** Accused was charged with murder arising from an assault on the deceased perpetrated by him causing the death of the deceased as a result of multiple

injuries. The accused and the deceased were in a romantic relationship of boyfriend and girlfriend. Accused raised private defence as a ground of justification. After a trial, the court rejected the evidence of the accused as false beyond a reasonable doubt and accepted the version of the State.

*Held* that the accused was not attacked by an unknown male person and the deceased as he gave out.

*Held* further, that the defence did not meet the requirements of private defence.

*Held* furthermore, the accused hit the deceased with the knobkierie and panga multiple times with direct intention to kill her.

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### **ORDER**

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The accused is guilty of murder with direct intent to kill read with the provisions of the Combating of Domestic Violence Act, 4 of 2003.

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### **JUDGMENT**

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#### **UNENGU, AJ**

[1] The accused is charged with murder read with the provisions of the Combating of the Domestic Violence Act, 4 of 2003. The indictment read with the summary of substantial facts alleges that the accused during the period 9-10 March 2018 and at or near Epako location in the district of Gobabis, the accused did unlawfully and intentionally kill Nora Tsuses, (the deceased) an adult female person by hitting her with a knobkierie or stick and stabbed or cut her with a panga and broke some of her ribs; the deceased died on the scene due to injuries sustained and caused by blunt force trauma. Further, that, at the relevant time, the accused and the deceased were in a domestic relationship as they were involved in an actual or perceived intimate relationship and lived together in a relationship in the nature of a marriage in the Kanaan location in Gobabis.

[2] Mr Itula from the Office of the Prosecutor-General is acting on behalf of the prosecution while Mr Kauari on the instruction of the Directorate of Legal Aid, is representing the accused.

[3] The accused pleaded not guilty and preferred not to disclose the basis of his defence but indicated that he would disclose his defence in the course of the trial. During the cross-examination of Veronika Tsous, Mr Kauari disclosed the basis of the accused's defence and suggested to her that on the 10 March 2018 about 04h00 the accused while sleeping, he heard a knock at the door. He asked who was knocking at the door but received no answer. He put on the light of his cellphone torch and went outside but saw nothing. However, when he was going back to the room, he saw somebody with a panga between him and the door. The accused threw the cellphone to the ground and a scuffle ensued between him and the man. According to Mr Kauari, both the accused and the man fell to the ground, the accused bit the man who then left the panga but he (the accused) was cut with it during the scuffle.

[4] He said, the man exited the house whom he followed to the outside of the house. On his way back to his room while looking for his cellphone which he could not find, still proceeding to his room, another person grabbed him from behind resulting in another scuffle. According to Mr Kauari, the accused who was armed with a knobkierie and a panga he took from the other man, defended himself by injuring his assailant. After the scuffle when he put on the light of the house, he realized that he injured his girlfriend, the deceased.

[5] Thereafter, certain documents, including the post-mortem report were handed up by mutual consent of the prosecutor and the defence's counsel and were received into record of proceedings as exhibit "G". The prosecutor called Dr Leena Ndinelago Ashipala who conducted the post-mortem examination on the body of the deceased on the 16 March 2018 to testify. Dr Ashipala recorded in her post-mortem examination report that the deceased's body was identified to her by Sergeant Swartbooi at the Gobabis Police Mortuary as the body of Nora Tsuses, a female adult person of about 43 years old; was informed that the death took place on 10 March 2018 at Epako Kanaan three days prior to her examination. Her main chief findings on the body of the deceased were multiple contusions and abrasions on the arms , elbows on the back and right forehead; 2 separate lacerations on the right elbow about 1 cm each; diffuse

subgaleal hemorrhage; subcutaneous contusions going into the muscles on the back, chest, arms and face; 7 cervical vertebrae fracture; left side rib fractures of 7<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> (flail chest); right side rib fractures 9<sup>th</sup> and 10<sup>th</sup>; left massive subdural hematoma; left subarachnoid hemorrhage; left side lower lobe contusion and spleen laceration with hematoma.

[6] The doctor concluded that as a result of her observation, the death occurred 2 days before her examination and that the cause or causes of death was/were blunt force trauma poly-trauma which she explained during her testimony as multiple causes of death resulting from multiple injuries to the body of the deceased sustained in the assault by the accused. Dr Ashipala further testified that she performs many autopsies on a daily basis at the Forensic Institute of Pathology in Windhoek. According to her, the deceased applied multiple blows with considerable force to the body of the deceased. She further testified that the deceased could have gone into a coma while being beaten by the accused, supporting the evidence of the accused that the deceased did not scream or shout for help while he was beating her.

[7] Mr Itula, on behalf of the State, called several witnesses to testify. Veronika Xuros Tsous testified that she knew the accused as her neighbour. She was living in a house only separated by a fence from the house of the accused in the location of Gobabis. She testified that between 9 and 10 March 2018, the accused called her and told her that he and his girlfriend fought the previous night and she did not wake up. She advised the accused to go to the Police but the accused went down the street in the direction of his sister's house, instead. Not long thereafter, the witness saw Police vehicles at the house of the accused loading the body of the deceased in a vehicle wrapped in a plastic bag. She further testified that she knew the accused and the deceased living together in one house but did not have children. According to her, the accused's version that he did not reside together with the deceased, is not true.

[8] Josefine Afrikaner testified that she knows the accused. He is her own mother's brother and is her uncle. She testified that she also knew the deceased, Nora Tsuses who was the girlfriend of the accused. Josefine testified that on the morning of 10 March 2018, the accused went to her house and after greeting her, the accused asked her to accompany him to his house. This was approximately 08h00. While walking, the accused told her that he had killed his lover. After saying that to her, she started crying

and asked him why he did that. She knew the girlfriend Nora Tsuses who stayed with the accused at his house. Josefina further testified that they were picked up by the Police and drove to the house of the accused where they found a crowd of people standing around the house which was cordoned off by the Police. According to her, the accused and the deceased lived together as boyfriend and girlfriend but did not know if they had children together. The accused did not tell her about the scuffle between him and the unknown man.

[9] Another witness Susanna Afrikaner confirmed the evidence of the previous witnesses that the accused and the deceased lived together in one house as girlfriend and boyfriend. In addition, Susanna told the court that the accused phoned her from the Police Station that he would not go to work because he had injured his girlfriend but did not tell her about the unknown person who attacked him and the deceased jumping on him.

[10] I am surprised that Mr Kauari in his cross-examination only emphasized the issues of the accused not living in one house as boyfriend and girlfriend with the deceased and that they were residing in separate houses in different sections of the location which the witnesses denied. This was done deliberately to mislead the court to believe the accused's version that the deceased and an unknown man arrived at his house in the early morning hours of 10 March 2018 unexpectedly and attacked him. The version that the deceased did not live with him in one house, is far from the truth. His own maternal nieces and a neighbour have no reason to lie under oath that the deceased lived with him in the same house as his girlfriend if she did not.

[11] Ritha Seibes, another niece of the accused who stays in Epako and employed at the Epako High School Hostel in Gobabis also testified for the State. She testified that between 14 and 15 March 2018, the accused called her to go to the Police Station where he was in custody. She went there and found the accused who asked her to bring him clean clothes to wear when he will appear in court. Ritha did as was requested and took for him clean clothes, roll on, soap, two white towels and underpants. In addition, the accused asked her to collect his tools among them a panga which had a black spot on and take them to her house. In the process of collecting the tools, she also wanted to take a towel to go and wash but left it when she saw blood dripping from the towel.

[12] The witness also told the court that the accused did not tell her that he was attacked by people at his house but only told her that he hurt his girlfriend and she did not wake up. He did not tell her that he was attacked by a stranger and the deceased because he was not attacked. It is an afterthought he hatched after the fact which explains the fact that if he was really attacked and that there was a fight outside his house in the yard, his neighbours would have heard the noises and came out to assist him. In this instance though, neighbours heard nothing and did not know about what happened at his house until the morning after the accused himself raised the alarm of the murder of his girlfriend which he admitted to his nieces and a neighbour Veronika Tsous.

[13] Ritha Seibes collected and took the panga to her house which she later handed to the Police. The panga was handed in court as exhibit "1". The Police also collected a towel full of blood from the scene of crime wrapped in a plastic bag. The towel was produced as evidence in court and marked as exhibit "2". Witnesses Cecilia Tsous and Piet Johnny Shilongo also testified in the matter. It is the testimony of Mr Shilongo that he was called on Saturday morning by the accused and told him that he had killed his girlfriend, the deceased. Thereafter, he phoned Cecilia Tsous and conveyed the news to her as was told by the accused.

[14] Meanwhile, Police Officer Sagarias April also testified in the proceedings. He was called to the house of the accused. On his arrival at the house, he called Detective Constable Japuiria who entered the room with him. Next to the bed, they found the body of the deceased lying on her back covered with a bedsheet up to the neck. When he removed the sheet from her body, he realized that the deceased was dead. He explained to the accused his rights to legal representation, his right to apply for legal aid in case he was unable to appoint a lawyer of his own choice and warned the accused to remain silent, not to make any statement or comment before arresting him. With the assistance of the accused, the witnesses took photos of the scene, collected a knobkierie and a broken stick which were later used in court as exhibits "3" and "4" respectively. A Photoplan and Key to Photoplan were prepared and produced in court as exhibit "O".

[15] On the other hand, the accused is the only witness who testified in defence of his case. According to him, the deceased was not with him at his house between 9

and 10 March 2018. She stayed in Herero block because he chased her away and she was warned by the Police to stay far from him. He testified that on or about 9 to 10 March 2018, while sleeping in his house alone, someone knocked at the door. He woke up, went to the door, opened it, but did not see the person who was knocking. He could not see the person because it was dark where his house is. He testified that he went outside in the direction of the toilet on the right hand side of the house, still saw nothing. However, when he turned back to enter his house, he saw a male person on his left side with whom he started scuffling. In the process, they fell to the ground. When they stood up, he realized that the person had a panga with him and that he was injured on his leg.

[16] The accused testified further that while still scuffling each other, he bit the attacker on both his hands, grabbed the panga from him and chased him out of the yard. The accused, returned to his house, closed the gate but while going to the door of the house with the panga in his hand, another person jumped on him. He said that he punched the person down and the person fell to the ground. Thereafter, he hit this person with both the panga and knobkierie but not to kill. The accused further testified that while busy with this person, the unknown man returned with a bow and arrow and a panga to help the person he was fighting with; that, that person prevented him from escaping to go to the Police. This lasted until 6 o'clock in the morning when he realized that the second person he was fighting with, was his girlfriend, the deceased. He denied telling Mr Shilongo and witness Tsous that he beat and killed his girlfriend but admitted speaking to Veronika's husband whom he asked to look after his house.

[17] It is clear from the cross-examination of the accused by Mr Itula that the deceased did not come to the house early in that morning as alleged by the accused, but that she was in the same house with the accused. Similarly, it became clear that the deceased was clobbered with the knobkierie all over her body, from the head to the toes while lying motionless on the floor in the room in the darkness. She did not scream for help. As indicated above, there are people living in the neighbourhood of the accused's house who could have heard the scuffle between the accused and the unknown man, but did not. In my view, neighbours did not hear the fight because there was no fight between the accused and the unknown man.

[18] With regard to injuries found on the body of the deceased, the accused admitted having inflicted all these fatal blows. The post-mortem examination report, in

particular photographs on exhibit “J” depict and are a testimony of the fact that the deceased suffered multiple serious wounds to her body inflicted by the accused, a clear indication that the accused beat the deceased with the purpose of killing her.

[19] The defence of the accused as put to the witnesses by his counsel that he acted in self-defence, is far from meeting the requirements of self-defence or private defence. On his own version, the accused failed to tell the court why he thought that his life was threatened and that the threat was imminent and had to repel it in the way he did. In his own evidence, the accused testified that he punched the deceased to the ground after she jumped on him. He also admitted that the deceased did not have any weapon with her which she could have used to harm him. More important is his evidence that he started beating her with the knobkierie and panga while she was lying on the ground defenseless offering no resistance against the assault on her.

[20] At the conclusion of the defence’s case, the matter was postponed for counsel to prepare written heads of argument for submissions. Mr Itula, for the State prepared detailed written heads which he expanded on with oral submissions. It is not the same with Mr Kauari though. According to him, he understood that only counsel for the State was required to prepare and file written heads of argument. This is regretted. Written heads of argument are not only for the benefit of the court but also for the benefit of both the defence and counsel for the State. At present, court has only the assessment and evaluation of the evidence in writing presented from Mr Itula and nothing from Mr Kauari.

[21] It is trite law in criminal proceedings that the State has the burden to prove its case against the accused beyond a reasonable doubt. The accused has no *onus* to prove any allegations preferred against him in the indictment. But has a duty to rebut evidence presented against him by the State. In that regard, the accused person must present evidence before court which evidence must cast doubt in the mind of the court and persuade the court to give him the benefit of the doubt to find him not guilty and discharge him. In the present matter, the accused raised private or self defence as a ground to justify his conduct. In this regard, I indicated that for private or self defence to succeed as a ground of justification, it has to comply with certain requirements. I found that there was no attack from the deceased side which entitled him to defend himself. His version that he was attacked by an unknown male person and the



deceased is false beyond a reasonable doubt. This is something he thought after he had committed the crime.

[22] Even if it is accepted that the accused was attacked by an unknown male person, he was still not justified to beat the deceased in the manner he did. She did not attack him. He said the deceased jumped on him without using any weapon against him. He successfully punched her to the ground immediately after she jumped on his back. She then did nothing to him while on the ground. The attack, if there was any, in my view, has stopped and as such there was no attack to defend himself. The same applies to his version that the deceased came from somewhere to his house in the early morning of 10 March 2018. It is not true.

[23] The versions of witnesses called by the State are correct and true versions. The accused lived together with the deceased in his house as boyfriend and girlfriend until on the fateful day. I was also impressed by the manner in which the witnesses testified. They were free and straightforward when testifying. They also did not fumble in the cross-examination by Mr Kauari. Therefore, I accept their evidence as credible and truthful. The witnesses did not have any motive to lie in their testimonies. The accused is a relative, an uncle to some witnesses and a best friend of others.

[24] I must mention here that only the accused and the deceased were present when the incident occurred. However, the deceased is now deceased, therefore, not available to tell the court her side of what happened. The accused is the only person alive who experienced and knows well what happened. I rejected his version of the event as false beyond a reasonable doubt, after assessing the evidence of witnesses as a whole and found that the evidence of the State excluded any reasonable possibility that the explanation given by the accused was true. In my opinion, the accused without any justification, assaulted the deceased and caused multiple injuries to her body which caused her death immediately. In her testimony, the doctor said that the accused must have used considerable force when hitting the deceased on the head with the knobkierie for the three layers of the head to suffer the trauma of the blows causing bleeding in all three layers.

[25] In that regard, I agree with Mr Itula that the State has proven beyond a reasonable doubt that the accused knew what he was doing to the deceased, that he had direct intention to kill the deceased.

[26] In the result and for reasons advanced in the judgment, I find the accused guilty and convict him of murder with direct intent to kill read with the provisions of the Combating of the Domestic Violence Act, 4 of 2003.

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E P UNENGU  
Acting Judge

## APPEARANCES:

STATE:

T T Itula

Office of the Prosecutor-General, Windhoek

ACCUSED:

N Kauari

Instructed by Directorate of Legal Aid, Windhoek