

REPUBLIC OF NAMIBIA

**HIGH COURT OF
WINDHOEK**



NAMIBIA MAIN DIVISION,

JUDGMENT

Case No: CC 3/2022

THE STATE

versus

DEON BOOIS

ACCUSED

Neutral citation: *S v Boois* (CC 3/2022) [2022] NAHCMD 532 (5 October 2022)

Coram: SHIVUTE, J

Heard: 26 July to 5 August 2022 and 7 September 2022

Delivered: 5 October 2022

Flynote: Criminal Law – Murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003 – Evidence – Accused making spontaneous statements – Such statements if unsolicited and voluntarily made amounting to admissible admissions.

Murder – Direct intent – Accused stabbing deceased multiple times on vital organs – By stabbing deceased multiple times with a knife accused acting with a direct intent to kill her.

Summary: The accused is charged with murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003. There were no eye witnesses and the State rests its case on circumstantial evidence and spontaneous admissions made by the accused to his sister that he had stabbed his girlfriend, the deceased. The accused handed over the knife that he used to stab the deceased. The sister and one State witness went to the accused's place to confirm whether the deceased was indeed dead. They confirmed that the deceased was dead. The knife that was given by the accused to his sister was taken for DNA analysis and the blood swab taken from the knife tested positive for the deceased's DNA profile. The court held that the spontaneous admissions made by the accused to his sister were unsolicited and were made voluntarily. Therefore, they are admissible against the accused.

Murder – Direct intent. The accused stabbed the deceased with a knife multiple times on her vital organs. The deceased died due to stab injuries to the heart and lung. By directing the assault to the deceased's vital organs is a clear indication that the accused acted with direct intent to kill her.

VERDICT

Guilty of murder with direct intent.

JUDGMENT

SHIVUTE J:

Introduction

[1] The accused person faces an indictment containing a single count of murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003. It is alleged that upon or about 9 December 2012 and at or near Rehoboth in the district of Rehoboth, the accused did unlawfully and intentionally kill Barbara Ganses, an 18 year old female person with whom he had a romantic relationship.

[2] Although this matter was allegedly committed during 2012, it was only allocated to this court on 8 June 2022. The concerning circumstance of the inordinate delay in bringing the matter to trial has not at all been explained to this court. As to the accused's plea, he pleaded not guilty to the charge and denied that he stabbed the deceased at all let alone to death.

Evidence

[3] Counsel for the accused made admissions in terms of s 115 read with s 220 of the Criminal Procedure Act 51 of 1977 (the CPA). The identity of the deceased and that the accused and the deceased were in a romantic relationship were admitted.

[4] In proving its case the State called several witnesses. Evangeline Eixas testified that she is a sister to the accused. On 9 December 2012 during the evening, she was approached by the accused who told her that she should look after his child as he no longer wanted to live. When the witness inquired why she should look after the child the accused told her that he stabbed his girlfriend and he no longer wanted to live. The accused handed over the knife to her and told her to stab him. The knife had a black handle and was silver in colour. The witness took the knife and threw it away. The witness identified the knife in court and it was marked as exhibit 1.

[5] At the time of the incident, the accused was staying at his mother's place that was about 20 minutes' walk from the witness' place. The witness went together with

Hermien Witbeen to her mother's place to ascertain whether what the accused said was true. When the witness arrived at her mother's place, she found the deceased lying on the floor in front of the bed. She arrived approximately the same time the police arrived. Before she could go closer to the deceased lying in the room she was pulled away. The deceased's body was taken away by the police. The witness went back home and found the accused seated with the child he had with the deceased. The accused informed the witness to call the police. When the police came they took the accused away. The witness gave the knife to police officer Goagoseb the following day.

[6] Through cross-examination, it was put to the witness that the accused told her that he found the deceased at his residence and she appeared to have been stabbed. The witness was adamant that the accused told her that he stabbed his girlfriend. It was further put to the witness that when the accused went to the witness' place, he did not have a knife. The witness responded that he was in possession of a knife. The witness was asked with whom she was when the accused allegedly informed her that he stabbed the deceased. The witness replied that when she came out she was alone. She said the accused told her that he stabbed his girlfriend and that she did not know whether someone else overheard him. She further testified that Witbeen was standing at the window listening. It was again put to the witness that the accused never told her to stab him. The witness was adamant that, that is what he told her.

[7] Hermien Janet Witbeen testified that on 9 December 2012 in the evening she was at home when she heard the first witness screaming. The first witness and her boyfriend were staying in the witness' garage. The witness went around and saw the accused standing in front of his sister, the first witness. She heard the accused telling the first State witness that he stabbed the deceased, his girlfriend. Thereafter, the first witness asked her to go with her to the residence of the accused's mother. When they arrived at the accused's residence, they found the deceased lying on her back. When they called her, she was not responding. When she and the first witness went back home, the accused told them to call the police to take him away because he had

stabbed his girlfriend. When the police arrived the accused went to them out of his own accord after he jumped over the fence and got on to the police van.

[8] When the witness was asked whether there was a time she was standing at the window when the accused and his sister were on her premises, she confirmed that there was indeed a time she was standing at the window of her room but at that stage she only heard the accused's sister screaming. When the accused said he stabbed his girlfriend the witness was at the veranda. It was further put to the witness that the accused never told his sister that he stabbed the deceased. However, the witness persisted that she heard him telling his sister.

[9] Christina Ganses, the mother to the deceased, testified that at the time of the deceased's death the deceased and the accused were living together. However, she observed that although the two had a good relationship, the accused was jealous and did not want the deceased to live with her.

[10] Erina Witbooi, a neighbour to the accused, testified that while she was in bed during the night of 9 December 2012, she was approached by the accused's mother who was staying with the accused and the deceased. She was crying and she reported to her that the accused had stabbed the deceased. She went to the accused's place and found the deceased lying on the floor and she was stabbed. She thereafter reported the matter to the police. It should be noted that the accused's mother is now deceased and was not called to testify to the truthfulness that the accused indeed stabbed the deceased.

[11] Chrisitne Simbara Kamukwanyama, a Forensic Scientist employed at National Forensic Institute, testified that she received a blood sample of the deceased that was brought to her by Constable Tjitombo for analysis. The blood sample contained a concentration of not more than 0.07 grams of ethanol alcohol per 100 millilitre of blood. The blood sample was handed over to Nakalemo for further DNA analysis at the Genetics Department.

[12] Tuyeni Nakalemo, another Forensic Scientist based at Namibian Police Forensic Science Institute, received the blood sample from Kamukwanyama and a black handle knife from Sergeant Mutumba that had blood stains for DNA analysis and for DNA comparison purposes. The knife tested positive for human blood. The witness prepared two reports R1 and R 3 in this matter. The third report was prepared on 5 January 2020 after Warrant Coetzee submitted an oral swab from the accused for DNA comparison with the deceased's reference sample. When received, all the samples were in sealed and tamper proof forensic evidence bags.

[13] Maryn Swartz, Chief Forensic Scientist at the National Forensic Science Institute by then, testified that she compiled a report 192/2012 R 2 with serial no.92/12/2012 after she received an application for scientific examination. The samples received were subjected for DNA analysis. These were the deceased's blood sample, a swab from the blade of the knife, a swab from the finger print lifted from the knife and a swab from the handle of the knife. The deceased's DNA profile was found to be a major contributor on the swab from the blade of the knife, swab from the fingerprint yielded from the knife and swab from the handle of the knife, although there was a mixed profile of at least three individuals. She explained that the minor contributor to this profile is of limited forensic significance. This happens due to several reasons it could be that there are various transfer mechanisms. For instances, primary collection, secondary and tertiary transfer. It could also be that some of the initial DNA from the minor contributor has degraded to such an extent that it cannot just be observed.

[14] The minor contributor was an unknown male. This led to the request for a reference sample from the accused for comparison purposes. However, at the time of compiling this report there was no reference of the accused which would have been compared to the unknown male. The DNA analysis was done on 9 December 2015.

[15] Warrant Officer Adolf Gowaseb testified that on 10 December 2012, he was instructed to go with Constable Julius, a driver, to collect witnesses in connection with

this matter. He went to the house in Rehoboth opposite the community hall where the accused's sister was residing. The accused's sister handed a knife - exhibit 1 – to him and reported that it was used by her brother to stab the deceased, the accused's girlfriend. The knife was taken to the police station and it was handed over by the witness to Warrant Officer Goaseb. The witness identified exhibit 1 in court.

[16] Jack Francois Jerry Julius corroborated the evidence of Warrant Officer Gowaseb that they went to collect witnesses in connection with this case from Block E. He further confirmed that he witnessed Eixas handing over the knife to Warrant Officer Gowaseb who in turn gave it to Warrant Officer Goaseb at the police station. This witness also identified exhibit 1 as the knife that was given to Warrant Officer Gowaseb by the accused's sister.

[17] Levies Johannes Albertus Coetzee, an Inspector in the Namibian Police, compiled a photo plan of the scene of crime and read it into the record. Upon their arrival at the scene of crime, they found the accused's mother who pointed out the scene to them. The witness was with Sergeant Van Wyk and Constable Samuel. The accused's room was in a mess and blood stains were on the bed and the floor. He also prepared a key to the photo plan. He was shown the points where the deceased was stabbed. The witness further testified that he received a knife that was allegedly used during the commission of the crime from Warrant Officer Morgenroth to be sent to the Scientific Science Laboratory for analysis. The witness had also personally obtained oral swab from the accused to be sent to the laboratory for analysis. Apart from the above mentioned exhibits, he had completed the application for scientific examination and listed the exhibits that were forwarded to the laboratory, namely the knife and the deceased's blood sample. The exhibits were handed over to Sergeant Mutumba. The accused's oral swab was sent to the laboratory on 17 March 2016 as an additional exhibit as it was only taken on 13 June 2016.

[18] Chief Inspector Richard Goagoseb, the initial investigating officer in this matter, testified that he went to the scene of crime on 9 December 2012 after he received a

report that the deceased was stabbed in Block E. He found the deceased person lying next to the bed and she was not breathing. The deceased was taken to the hospital for the doctor to certify that she was indeed dead. Whilst the witness was on the way to the police station, he received a short text message from Sergeant Windstaan that the accused was at a certain house in Block E and that he wanted to kill himself. He went to that house and arrested the accused. The accused had cut wounds on the right side of his neck. Whilst the witness was with the accused at the charge office the following day, he received information that the knife that was used in the commission of the crime was at a certain house in Block E. He sent Warrant Officer Gowaseb and Constable Julius to go and fetch it. This knife was later given to him and booked in Pol 7. The witness identified exhibit 1 as the knife he was given by Warrant Officer Gowaseb. Later on the witness was transferred from Rehoboth and Warrant Officer Morgenroth took over the investigations.

[19] When it was put to the witness through cross-examination that the accused never wanted to kill himself and he never had cut wounds, the witness responded that he did not ascertain whether the accused had cut wounds but he saw some blood on his neck. He also did not make any note that he observed injuries on the accused.

[20] When the witness was asked to explain how he arrested the accused, he said he found the accused outside the house and he went to him in order to arrest him. After the arrest, he could not remember whether he took the accused to the private vehicle he was driving or he called the police from the charge office to come and load the accused in the police car.

[21] Inspector Onesmus Nangolo Tjitombo testified that, he took photographs of the deceased during the post mortem examination on the instructions of the late Doctor Vasin. The witness testified that the deceased was pregnant with twins. The photo plan of the post mortem examination was admitted in evidence as exhibit V. The witness further testified that he received the deceased's body from Sergeant Van Wyk of Rehoboth and transported it to Windhoek Police Mortuary. Thereafter, he identified it to

Dr Yuri Vasin, the medical doctor who conducted the post mortem. Doctor Vasin also submitted it to the National Forensic Science Institute. The witness identified the application for scientific examination for a blood sample of the deceased for the determination of alcohol level. The application for scientific examination dated 19 December 2012 was marked as exhibit W.

[22] Gillian Morgenroth who is a Warrant Officer at Rehoboth Police Station, testified that she took over the investigation of this case from the initial investigating officer. She obtained witness' statements and booked out a black handle knife and handed it over to Inspector Coetzee to be sent to the laboratory. The witness further testified that two of the witnesses she obtained statements from are now deceased namely, one Rose who was a nurse at St Mary's Hospital in Rehoboth and one Magdalena Boois the mother to the accused. The two death certificates of the deceased persons were admitted in evidence as exhibits.

[23] Warrant Officer Immanuel Osona testified that he compiled a photo plan on behalf of Inspector Tjitombo because he was transferred to Otjiwarongo. The photo plan in question is the one for the post mortem examination testified to by Inspector Tjitombo.

[24] Aron Beukes testified that he transported the deceased's body from the scene of crime to St Mary's Hospital. The body did not sustain further injuries whilst it was being transported.

[25] Apart from calling witnesses, the State handed in several documents as exhibits. Among them was a report on a medico-legal post mortem examination. According to the chief post mortem findings, the cause of death was multiple stabbings. The doctor further made the following observations:

- (a) Four fresh wounds, inflicted by a sharp pointed object were revealed on the body;

- (b) Two penetrating stab wounds to the chest;
 - (c) Stab injury to the heart and right lung, and
 - (d) Systemic visceral pallor. The doctor further observed two male fetuses 21 and 18 cm respectively into the uterus with estimated gestation age of 15 -16 weeks.
- This evidence concludes the State case.

Defence case

[26] The accused, Deon Boois, gave evidence under oath and called one witness. He testified that he was in a domestic relationship with the deceased from which one son was born. The boy was two years old at the time of the deceased's death. The deceased was also pregnant by the accused when she died. On 9 December 2012, he was invited by his friend Steven to go to his house and watch movies. This was around 18h00 in the evening. They consumed alcohol whilst they were watching movies. The accused went back home at about 23h00. As he approached the house, he noticed that the door to the house was open. When he entered, he noticed the deceased's body lying in front of the bed. Goods in the house were in disarray. He felt her pulse and called her twice but she did not respond. He saw some blood spots on the deceased's face and on the blankets.

[27] He took his son and ran to his sister's place by the name Claudia Eixas the first witness for the State. He informed his sister that he saw his girlfriend who appeared to be stabbed and she was not breathing. While he was busy talking to her sister, a female person arrived. He further stated that when he went to his sister's place, only the two of them were present. He did not know when the other person came that was standing behind him. That other person he was referring to was the second State witness, Hermien. He could not tell at what stage Hermien appeared as he was facing the opposite side. Whilst they were standing, his sister called out the name of the person who was standing behind him that is when he realised that there was a person behind him. Hermien and the accused's sister went to the house of the accused's mother

where the accused was staying with his girlfriend to determine whether what the sister heard was correct. The accused and his son remained at the sister's place.

[28] When they came back, the accused asked his sister whether the girlfriend is dead and she confirmed it. After some time, the police arrived there and arrested him. When the police arrived, the accused was seated in the house and the then Warrant Officer Goaseb called him to go to the police station. The accused disputed that he told his sister that he stabbed his girlfriend. He disputed that he handed over the knife to his sister as he did not have any knife. He also disputed that he attempted to commit suicide. He further testified that he only saw the knife exhibit 1 in court for the first time and he did not know to whom it belonged. He again disputed that he had blood or cut wounds on his neck.

[29] The accused was asked whether he was with his witness Steven when he returned home. He responded that Steven did not accompany him. The accused was further asked why he did not report the matter to his mother with whom he was staying instead of walking for about 20 minutes to inform his sister. The accused replied that his mother was not at home.

[30] The second witness for the defence, Steven Khaubeb confirmed that he invited the accused to his house for them to watch movies and that they consumed alcohol together. After they were done around 22h00 or 23h00, the accused went home and he only heard the following day that the deceased was dead and the accused was arrested.

Submissions by counsel

[31] Counsel for the State argued that the State had discharged its burden of proof. The accused informed his sister that he stabbed his girlfriend and that he no longer wanted to live. Her evidence was corroborated by the version of Witbeen. The accused gave a knife to his sister and the blood on the knife was found to be that of the deceased. Concerning the evidence of the accused's witness, it could not confirm that

the accused found the deceased already stabbed. The accused made spontaneous admissions that were voluntary whilst he was in sound and sober senses and those admissions are admissible. Therefore, it should be found that the accused handed over the murder weapon to his sister as well as stabbed the deceased.

[32] On the other hand, counsel for the defence argued that no evidence was led by the State that the accused stabbed the deceased with a knife whilst they were inside his room and that the deceased died on the scene due to injuries to her heart caused by the stab wounds as alleged in the State's summary of substantial facts. Although the first witness for the State alleged that the accused told her that he had killed his girlfriend whilst she was only with the accused and Hermien was standing at the window, her version was contradicted by Hermien who testified that she was present when the accused was telling her. Hermien testified that she called the police and when the police arrived the accused jumped the fence and embarked onto the police van. This part of her version was contradicted by the arresting officer. This witness did not see the accused giving the knife to his sister and did not hear the accused telling his sister to stab him because he no longer wanted to live. If it is true that she was present, she should have heard the rest of the conversation. Although the accused's oral swab was taken, no DNA profile of the accused could be linked to this matter.

[33] Counsel further argued that the accused's version remained unshaken during cross-examination as he was clear and consistent. His version was that he never told his sister that he stabbed the deceased or that he handed the knife to her nor did he harbour an idea to commit suicide. It was again counsel's argument that the versions of the accused's sister and that of Hermien were not consistent, credible and reliable as they contradicted each other and they could be mistaken about the report they received from the accused. Both counsel referred me to several authorities which I have considered.

Evaluation of the evidence and applicable law

[34] The State in this matter rests its case on circumstantial evidence as well as spontaneous statements allegedly made by the accused. This court is alive to the trite principle that the burden of proof lies with the prosecution and the standard required is that of proof beyond reasonable doubt. There is no duty whatsoever on the part of the accused to prove his innocence.

Circumstantial evidence

[35] In considering circumstantial evidence, the observations of the Full Bench of this court in *S v Hotel Onduri (Pty Ltd) & another* 1993 NR 78 (HC) at 82 I – J to 83 A – C are apposite:

‘In *R v Sibanda* 1963 (4) SA 182 (SR) Beadle CJ the then Chief Justice of Rhodesia in an appeal said at 188 F-G:

“It seems to me that this is one of those cases where, although each individual item of evidence is quite insufficient to convict the appellant, the cumulative effect of all this evidence proves the appellant’s guilt beyond doubt. I approach this case therefore as was done in the case of *R v De Villiers*, 1944(AD) 493 at 508, where the Appellate Division, approved the following statement of Best on Evidence:

“Not speaking of greater numbers; even two articles of circumstantial together, you will find them pressing on the delinquent with the weight of a millstone...It is of the utmost importance to bear in mind that, where a number of circumstances point to the same conclusion the probability of the justness of that conclusion is not the sum of the simple probabilities of those circumstances, but is the compound result of them.”

This approach was also approved in *R v G* 1956 (2) P H H H 266(A) where the court said:

‘The cumulative effect of a number of pointers converging from different angles was very much than the mere total of their weight taken in isolation.’

[36] There is evidence from the accused's sister and witness Witbeen that the accused told his sister that he had stabbed his girlfriend, the deceased. The accused's sister testified that the accused handed over the knife that was used in the commission of the offence to her. When the knife was taken for DNA analysis the bloodstains on the knife were found to be those of the deceased. This cannot be a mere coincidence. Furthermore, after the accused allegedly told his sister that he stabbed the deceased, the accused's sister and Witbeen went to the place where the accused and the deceased were residing and confirmed that the deceased was indeed lying dead. The accused also testified that when he checked the deceased's pulse she was not breathing.

Spontaneous statement made by the accused

[37] The legal position is that if an accused made spontaneous admissions without the police officers soliciting for them, then such admissions are admissible provided they are made voluntarily. The accused allegedly volunteered to tell his sister that he had stabbed the deceased to death. He even handed over the murder weapon to the sister with which he wanted the sister to stab him as he no longer wanted to live. The conversation between the accused and his sister in which the accused said he stabbed his girlfriend was overheard by witness Witbeen. The witness testified that she overheard the conversation whilst she was at the veranda. Section 219A of the Criminal Procedure Act 51 of 1977 makes provision for the admissibility of admissions made by an accused as follows:

'Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him at criminal proceedings relating to that offence...'

[39] The accused disputed that he informed his sister that he stabbed the deceased. He also disputed that he gave the murder weapon to his sister. It was further argued on his behalf that if it was true that witness Witbeen was present when the accused was

telling his sister that he stabbed his girlfriend this witness could have heard the rest of the conversation. When the accused's sister was asked as to who was present when the accused was telling her, her response was that when she came out of the room she was alone. She did not know whether someone else overheard him. She further testified that Witbeen was standing at the window listening. Witbeen testified that she was at one stage standing at the window when she heard the accused's sister screaming but she came around to the veranda.

[40] Witbeen corroborated the version of the accused's sister that the accused stated that he stabbed his girlfriend. The accused confirmed that Witbeen came whilst he was talking to his sister but he did not know at which stage she arrived. Although no eye witnesses testified that the accused had stabbed his girlfriend, there is evidence that he indeed told his sister that he stabbed his girlfriend. The accused's version is that he said he found his girlfriend in the room and appeared to have been stabbed or that she was already stabbed when he returned home from his witness' place. Both Eixas and Witbeen were asked through cross-examination whether they heard the accused saying that he stabbed his girlfriend or they heard him saying he saw his girlfriend who appeared to have been stabbed. Both witnesses were adamant that the accused said he stabbed his girlfriend. Although Eixas could be mistaken as to where Witbeen was when the accused said he stabbed his girlfriend, both witnesses could not have been mistaken of what they heard.

[41] Eixas is the accused's sister, the accused went to her and handed over his son to her in order to look after him. Eixas and Witbeen had no reason to falsely implicate the accused that he said he had stabbed his girlfriend. Furthermore, it is highly improbable for the accused's sister to falsely implicate him that he handed the knife to her and by coincidence that knife happened to test positive for the deceased's DNA profile.

[42] Having weighed the evidence in its totality, the court is satisfied with the evidence of Eixas and Witbeen. They are credible and trustworthy witnesses despite a few

shortcomings in their versions which are not material. The accused's assertions that he did not stab the deceased and that he did not tell his sister Eixas that he stabbed the deceased and that he never handed over the murder weapon to his sister, are mere denials that cannot possibly reasonably be true in the circumstances and are rejected. In applying the above stated principles pertaining to spontaneous admissions, this court finds that the spontaneous admissions made by the accused are admissible as they were made voluntarily. Although no eye witness testified, the individual items of evidence may seem insufficient to convict the accused. However, if these pieces of evidence are considered together in their totality, the inference that could be drawn is that their cumulative effect is such that the State has proved beyond reasonable doubt that the accused is the one who murdered the deceased.

[43] The deceased was stabbed multiple times. She sustained two penetrating stab wounds to the chest, stab injury to the heart and lung that caused her demise. These are vital organs of the body. For the accused to direct his assault to the vital organs of the deceased multiples times, is a clear indication that the accused wanted the deceased dead. Therefore, he acted with a direct intent to kill.

[44] In the premise, the court arrives at the following verdict:

Guilty of murder with direct intent.

N N Shivute
Judge

APPEARANCES:

THE STATE:

Mr Gaweseb
Office of the Prosecutor-General, Windhoek

ACCUSED:

Mr Andreas
Directorate of Legal Aid, Windhoek