

REPUBLIC OF NAMIBIA

HIGH COURT OF  
WINDHOEK



NAMIBIA MAIN DIVISION,

JUDGMENT

Case No: CC 21/2020

**THE STATE**

versus

**ROBERT FUNNY USEB**

**ACCUSED**

**Neutral citation:** *S v Useb* (CC 21/2020) [2022] NAHCMD 75 (24 February 2022)

**Coram:** SHIVUTE, J

**Heard:** 9 -12 August 2021, 15 -17 November 2021

**Delivered:** 24 February 2022

**Fly note:** Criminal Law – Murder – Accused disputing having killed deceased – Accused claiming not knowing how deceased sustained injuries – Direct evidence – Eye witnesses seeing accused in possession of a knife – Eye witnesses seeing accused stabbing deceased with a knife – Witnesses and accused knowing each other prior to incident – No mistaken identity – Court finding state witnesses credible – Court rejecting Accused’s version – Such not supported by evidence or probabilities – Version far-fetched and mere denial – Improbable – Not reasonably possibly true.

Criminal Procedure – Murder – Evidence – Accused and last state witness claiming incident taking place at dark place – Last State witness not present when incident taking place – Such version not put to witnesses who were present – Grossly unfair and improper to leave evidence unchallenged – Only to later argue that it should be disbelieved.

**Summary:** The accused stands indicted on a charge of murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003. He disputed having killed the deceased. His version was that he had no knife and he did not know how the deceased sustained injuries. There is direct evidence from five eye state witnesses who saw the accused in possession of a knife. Four witnesses saw the accused running after the deceased and stabbing her twice with a knife. Although the fifth witness did not see, the actual stabbing, she heard the deceased telling the accused not to stab her. The accused and state witnesses knew each other prior to this incident. There is no way that the state witnesses could have been mistaken of the accused's identity. The state witnesses corroborated each other in material respects and the court finds them to be credible. The court rejected the accused's version on the bases that it is not supported by evidence or probabilities and is far-fetched. It amounts to a denial that is so improbable and cannot be reasonably possibly be true.

The accused and the last state witness testified that where the incident took place was dark. When the incident took place, the last state witness was not present as he came to the scene after the deceased was already stabbed. Although the accused is claiming that the incident took place in the darkness such version was not put to the eye witnesses during cross-examination. It was grossly unfair and improper to not challenge the witness' evidence through cross-examination and afterwards argue that they must be disbelieved.

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**VERDICT**

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Guilty of murder with direct intent.

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## JUDGMENT

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SHIVUTE J:

[1] The accused person stands indicted in this court on a charge of murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003. It is alleged that on 29 March 2019 in the district of Outjo, the accused unlawfully and intentionally killed Selma Khamuxas, a 19 year old female, with whom he was in a domestic relationship. He pleaded not guilty to the indictment.

### The State's case

[2] The first witness called by the State was Goddy Lambert who testified that the deceased and the accused were in a romantic relationship. On 29 March 2019 they were at Gugu Bar in the district of Outjo. He was with the accused, Charles and the deceased. Charles asked the witness the whereabouts of one Alvin Gaiseb. Charles said he was longing for Gaiseb. The deceased said she was also longing for Gaiseb as she had not seen him for quite some time.

[3] The accused became jealous of what the deceased said and asked the deceased why she was always mentioning Gaiseb's name. The accused and the deceased went outside the bar to have a talk. The witness went home. He only came back to the bar around 19h00 in the evening. By then this incident had already happened.

[4] Jackson Aukhumb, the second State witness testified that on the date in issue, he was with his brother Silvanus, his sister and his aunt at Gugu Bar drinking. While there, the deceased came and asked him to give her money. After he gave her the

money, the accused asked the witness whether he was involved in a relationship with his girlfriend, referring to the deceased. The witness replied that they were not in a relationship. The accused told the witness that he was taking him for a joke. When the accused approached the witness, he was armed with an open knife. The witness was told by his brother to leave the place. Whilst they were leaving the bar, chaos broke out. They did not return to the bar as they kept going. The incident took place around 19h00.

[5] The third witness called by the State was Selma Nowases. She testified that on 29 March 2019, she was at Gugu Bar. The deceased came to the place where the witness was seated. The deceased came running from outside the yard and the accused was behind her. The accused started to stab the deceased and the deceased fell in front of the gate. When the deceased came running, she was looking for help because she was crying. However, before she told them anything she was stabbed by the accused with a knife on the shoulder and underneath her breast. The witness observed the accused stabbing the deceased two times.

[6] The witness' uncle by the name Assa inquired from the accused why he was stabbing the deceased instead of just beating her up. The accused turned to the witness' other uncle known as Elvis and the accused wanted to stab Elvis. However, the witness pushed Elvis away. Assa fought with the accused. The incident took place around 19h00. It was put to the witness that whilst the accused and the deceased were going home, the accused was confronted by the witness' two uncles. The witness replied that her uncles only intervened after the accused had stabbed the deceased. It was further put to the witness that the accused did not know how the deceased was stabbed. The witness responded that by the time the fight took place between Assa and the accused, the deceased was already stabbed.

[7] Hanseline Nowases, the fourth witness, testified that she was at Gugu Bar seated in the yard when she observed the deceased running. The accused was following her and he stabbed her under the breast and on the shoulder. After the accused stabbed the deceased, her uncle asked the accused why he was stabbing the

deceased instead of just beating her up. The accused made a stabbing motion with a knife towards her uncle. Her uncle assaulted the accused. Whilst the fighting was taking place, the deceased was already dead.

[8] It was put to the witness that the accused was in the company of Mafeti and the deceased walking together going outside the bar. The witness replied that she did not see the accused walking together with Mafeti and the deceased. It was further put to the witness that her uncles Assa and Elvis attacked the accused whilst he was leaving the bar with the deceased, because her uncles did not want the accused to go together with the deceased. The witness replied that, that was not what happened. Her uncle fought with the accused after the accused stabbed the deceased.

[9] The fifth witness called by the State was Cynthia !Hoeses, a friend to the deceased, who testified that she was at Gugu Bar with the previous witnesses. The accused and the deceased were also there. Whilst there, the accused called the deceased outside. She observed the accused pulling the deceased. When the deceased reached the gate she fell down. The deceased did not provoke the accused in anyway. When the accused was pulling the deceased, there were no other people at the spot where they were. She heard the deceased saying to the accused: 'Do not stab me'.

[10] Assa Khoreseb, the sixth witness, testified that he was at Gugu Bar on the date in issue, around 19h00, when he observed the accused assaulting his girlfriend, the deceased whilst they were outside. The accused kicked his girlfriend. She came running to the witness and told him that he should help her because the accused was beating her. The accused came and grabbed her and stabbed her with an Okapi knife. The deceased was stabbed on her upper body until she fell down. When the deceased fell down, the witness' brother asked the accused whether he saw what he did. The accused wanted to stab the witness' brother, Elvis. After that, the witness started to assault the accused with fists and the accused fell down.

[11] He assaulted the accused because the accused had stabbed the deceased and the witness was telling him not to stab the deceased. The witness assaulted the accused at the spot where the deceased fell down. It was put to the witness that whilst the accused and the deceased were going home, the witness confronted the accused because he did not want the accused to go with the deceased. This was disputed by the witness. It was also put to the witness that the accused did not assault the deceased outside the yard. However, the witness insisted that the accused assaulted the deceased by kicking her and by stabbing her. It was further put to the witness that the accused did not have a knife. The witness replied that he saw the knife. It was again put to the witness that he, the witness, could be the one who killed the deceased when he attacked the accused. The witness responded that he assaulted the accused after the accused had killed the deceased.

[12] The seventh witness, Elvis Khamuxab, testified that on 29 March 2019 he was at Gugu Bar with Assa and two ladies. Whilst there, the deceased came running to them and she was asking for assistance. The accused came and took her outside whilst he was stabbing her to death and she fell down. She was stabbed underneath her breast with an Okapi knife. The witness testified that he did not attack the accused. It was further not correct that he and Assa did not want the accused to go with the deceased.

[13] The last witness called by the State was Erwin Habiseb. His testimony is that he picked up an Okapi knife in the street at the gate of Gugu Bar where he found a crowd of people. He saw a person lying on the ground whilst he was passing and he also saw a knife and took it. The knife had some bloodstains. However, he only realised that the knife had bloodstains when he reached his house, because it was allegedly dark at the scene. Upon his arrival at home, he cleaned the knife by washing it. He wanted to use it because he had no knife at home. The person whom he observed lying was a female person. The knife was lying about two metres away from her. He also observed people who were fighting, throwing each other with fists. He picked up the knife at around 19h00.

[14] Certain documents were handed in as exhibits by consent of the parties. Among them was a report on a medico-legal examination. The chief post-mortem findings were as follows:

- (a) The right side of the chest had a stab wound in the clavicular region, at the level of the Medio clavicular lines; 8 cm above to the nipple. The skin perforation of 3 x 1 cm is oriented obliquely and had button – hole shape. Both ends of the wound are acute.
- (b) The weapon used followed a path cutting the skin, the subcutaneous tissue and muscle penetrating the thoracic cavity through the 2<sup>nd</sup> intercostal space, traversing the upper lobe of the right lung and the aortic arch.
- (c) The wound depth from skin to surface is estimated at 12 cm.
- (d) The direction of the wound path with respect to the standard anatomical position is from front to back, from right to left and slightly top-bottom.
- (e) There was hemothorax of 1500 ml and hemopericardium of 60 ml and generalised visceral pallor.

[15] The doctor made the following observations:

- A stab wound of 3 x 1 cm wide,
- An incised wound of 1, 5 x 1 cm located in the anterior part of the left shoulder;
- An incised wound of 4 x 2 cm located in shoulder side face;
- An incised wound of 0, 5 x 0, 5 cm located on the left arm, and
- An incised wound of 0, 5 cm of diameter on left pectoral region.

The cause of death was hypovolemic shock due to multiple stab wounds.

### Defence case

[16] After the State closed its case, the accused testified under oath and called one witness. Robert Funny Useb, the accused, testified that on 29 March 2019 he and Mafeti went to Gugu Bar. They finished a 1 litre bottle of Gordon liquor. They arrived at the bar around 10 o'clock in the morning. They moved to another place and after sometime they came back to Gugu Bar between 18 -19h00. Mafeti got drunk and he left the accused without informing him. After Mafeti left, the accused's girlfriend, (the deceased) whom they found at Gugu Bar after they returned, came to the accused and advised the accused to go home. Whilst the accused and the deceased were on their way leaving Gugu Bar, Dave and Tuyu came out and approached them.

[17] Dave is also known as Elvis Khamuxab and Tuyu is Assa. They asked the accused why he could not go back alone and why he should be accompanied by a lady. They grabbed the deceased. The accused told them to leave her alone. The accused and Assa pushed each other and fought. Elvis, Assa's brother and the person who picked up the knife also started a fight with him. The deceased intervened by trying to separate them. From there, the accused did not know what happened to the deceased. It appears the accused lost his consciousness and he only gained it whilst he was in the hospital. The accused testified that he did not see the two State witnesses Selma and Hanselline as he was busy defending himself. At the spot where the accused was attacked by the two men, there were no street lights. It was dark and one could not see clearly. Gugu Bar is situated at an informal settlement. The bar only had lights inside but not outside.

[18] It was further the accused's testimony that he did not have an Okapi knife. He did not run after the deceased and he did not stab the deceased. He also did not know how the deceased sustained the injuries. There was no disagreement between him and the deceased. They were simply walking to his room. It is not correct that he had an argument with Elvis after he allegedly gave money to the deceased. The accused did not see them exchange money. He was not jealous because of Elvis who was the



deceased's ex-boyfriend. The accused only heard that the deceased had passed on after he was released from the hospital.

[19] It was put to the accused that he, Lambert and Aukhumb (the first two witnesses) knew each other and there was no way they could have been mistaken of each other. The accused replied that they knew each other well. The accused was also asked why he gave instruction to his counsel that Aukhumb was not at Gugu Bar whilst in his testimony he said Aukhumb and Lambert were also at Gugu Bar drinking. The accused confirmed that Aukhumb was at Gugu Bar. The accused further testified that he never went to the second State witness whilst he was having a knife and he never said the second witness was taking him for a joke. He also did not ask the second witness whether he was in a relationship with his girlfriend (the deceased). The accused was asked whether he knew the third to the fifth witnesses. He responded that he knew the witnesses by seeing them but he did not see them at Gugu Bar the day of the incident.

[20] The accused called Patrick Guxab known as Mafeti. In a nutshell, this witness' testimony is that he collected the accused from home so that they could go for a drink. The accused dressed up in the witness' presence and he did not have a knife. They first went to Facebook Bar. From there, they went to Gugu Bar. Whilst they were sitting inside the bar, the deceased arrived in the company of other people. They joined them and they drank together. When the witness realised that he was drunk he left the bar, leaving the accused behind in the company of the other people they were drinking with. The witness further testified that he and the accused were cousins. He left Gugu Bar at around 11h00. It was again the witness' evidence that whilst they were at Gugu Bar they were drinking with the first State witness, Lambert, who joined them together with the accused's girlfriend. That concludes the summary of the evidence.

### Submissions

[21] Counsel for the State argued that the accused was in possession of a knife when he confronted witness Aukhumb and asked him whether he was in a relationship with

his girlfriend. The accused was further seen by the third and fourth witness stabbing the deceased. These witnesses never deviated from their versions during cross-examination. They demonstrated that they are credible witnesses. There was also evidence from the fifth witness who heard the accused calling out the deceased and she again heard the deceased telling the accused not to stab her. She observed the deceased falling at the gate although she did not see the actual stabbing. Furthermore, the sixth and seventh witnesses almost gave an identical version when they saw the deceased running towards where they were, seeking for assistance. They both observed the accused stabbing the deceased with a knife.

[22] When the sixth and seventh witnesses inquired why the accused was stabbing the deceased, the accused wanted to stab the seventh witness. There is overwhelming evidence against the accused. Therefore, the accused's version that he did not stab the deceased and that he did not know how the deceased sustained injuries could not reasonably be possibly true. Concerning the witness who testified on the accused's behalf, he was not present when the stabbing incident took place. Although this witness was saying that the accused did not have a knife, such witness never performed a physical search on the accused.

[23] Notwithstanding the accused's testimony that he and his witness left Gugu Bar for another drinking place and came back between 18 – 19h00, this version had been disputed by his witness who said he left around 11h00. The accused further said he was left sitting alone at the bar whilst his witness said he left him in the presence of the deceased. The accused and his witness contradicted each other in material respects and this is an indication that Patrick Guxab was not at Gugu Bar with the accused on the date in issue. Counsel for the State further argued that there were eye witnesses who witnessed the murder. Therefore, their versions should be accepted because they are credible witnesses. They correlated each other; they were consistent. All the State witnesses knew the accused before and visibility was not an issue. Therefore, they could not have been mistaken about the accused's identity.

[24] According to the post-mortem report, the deceased was stabbed at the regions of the body that are very sensitive. By aiming at those parts of the body, the accused had an intention to put the deceased to death. The accused used a dangerous weapon namely; a knife. Therefore, he should be found guilty of murder with direct intent.

[25] On the other hand, counsel for the accused argued that witness Cynthia !Hoeses did not witness the actual stabbing. Therefore, her evidence did not take the State's case any further. Furthermore, there was no link between the knife picked up by Erwin Habiseb and the knife that was used to kill the deceased. The witness saw people fighting with fists and this corroborates the accused's version that he was attacked by Assa. Concerning the testimony of Aukhumb, it is disputed by the accused that he confronted him and witnessed a conversation between the accused and the deceased. The witness never witnessed the accused killing the deceased. Again, it is disputed by the accused that he stabbed the deceased with a knife.

[26] With regard to Lambert's evidence, counsel argued that he did not witness the stabbing of the deceased. Concerning the testimonies of Selma Nowases, Hanselline Nowases, Elvis Khamuxab and Assa Khoreseb that they saw the accused stabbing the deceased, these have been disputed by the accused.

[27] It was further argued by counsel for the defence that the accused was not in possession of a knife and that this position had been corroborated by Mafeti who was in the company of the accused when they went to Gugu Bar. The accused was leaving the bar with the deceased when he was attacked by Elvis and Assa as they did not want the deceased to go with the accused. They assaulted the accused until he became unconscious. As a result, the accused did not know how the deceased was killed. The visibility in the area where the incident took place was bad because it was dark as there were no street lights. She further argued that there was no disagreement between the deceased and the accused. Therefore, there was no cause for the accused to be jealous. Both counsel referred me to authorities to which I have had regard.

### Analysis

[28] The accused testified that he did not have a knife. There was no argument between him and the deceased. He did not stab the deceased and that he did not know how the deceased sustained the injuries. The accused testified that the deceased might have been killed by Assa, Elvis and Habiseb who picked up the knife.

[29] Although the accused is disputing any involvement in this case, there is evidence from Lambert who testified that the accused became jealous of the deceased when she stated that she was longing for one Gaiseb as she had not seen him for quite some time. The accused scolded his girlfriend (the deceased) for allegedly always mentioning Gaiseb's name. There is also evidence from Aukhumb that after he gave the deceased money, the accused approached him armed with a knife and asked him whether he was involved in a relationship with the deceased. The accused in his defence conceded that Aukhumb was at the bar, but he initially gave instructions to his lawyer that Aukhumb was not at Gugu Bar. The instruction that Aukhumb was not at the bar this was evidently aimed at counteracting Aukhumb's evidence that when the accused approached him he had an Okapi knife. The same applies to the accused's denial that he saw Selma and Hanseline Nowases at the bar, because these two witnesses saw him stabbing the deceased with a knife.

[30] Selma further observed the accused charging with a knife towards her uncle. The versions of Selma and Hanseline that they saw the accused stabbing the deceased with a knife were again corroborated by the versions of Assa Khoreseb and Elvis Khamuxab. Their versions were further corroborated by Cynthia Hoeses who said that although she did not see the actual stabbing, she heard the deceased telling the accused not to stab her.

[31] There is no doubt that the deceased was stabbed as this has been corroborated by medical evidence. Furthermore, an Okapi knife with bloodstains that was lying about two meters from the deceased was picked up by Habiseb. Although Habiseb said he did not see the bloodstains at the time he picked up the knife because it was allegedly dark.

This aspect of his evidence obviously was aimed at covering his tracks because he removed the knife, a crucial piece of evidence in a very serious crime, from the scene.

[32] Although the accused's witness said the accused did not have a knife, this witness evidently did not do a body search on the accused. The accused and his witness contradicted each other. The accused testified that when he and Mafeti left his house they went to Gugu Bar around 10'oclock in the morning. Thereafter, they moved to another bar and they only came back to Gugu Bar between 18 – 19h00. However, this is in contrast with what Mafeti testified. Mafeti's version was that from the accused's residence, they first went to Facebook Bar. From there they went to Gugu Bar. He then left Gugu Bar around 11h00. The above contradictions cast doubts as to whether the accused was indeed in the company of Mafeti that fateful day. Even if the court accepts that Mafeti was in the company of the accused, when this incident happened, Mafeti had already gone.

[33] Another point of criticism from counsel for the defence is that where the incident happened it was dark. This was testified to by the last witness for the State who picked up the knife as well as by the accused. The last witness for the state was not present when the incident took place. I pause to state that if it was true that it was dark to the extent that witnesses were not able to see what was going on, one wonders how this witness managed to see the knife that was lying two meters away from the deceased. How was he able to see people fighting with fists and a female body lying on the ground? As earlier stated, this witness was trying to save his own skin, because he interfered with the investigations. Furthermore, the issue that it was dark was not raised with the witnesses who were present. It is standard practice for a party to put to an opposing witness its defence or the facts which concern that witness and which will be relied upon, in order to afford the witness the opportunity to give evidence about those issues.

As this Court observed in *S v Smith* 1954 (3) SA 434 (SWA):

'It was grossly unfair and improper to let a witness' evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved.'

[34] It was argued by counsel for the defence that it had not been proven beyond reasonable doubt that there was a link between the weapon picked up by Habiseb and the commission of the offence. Having assessed the evidence in its totality and having considered the circumstances and probabilities pertaining to the fact that the knife was found two metres away from the deceased; that no evidence that someone else was seen in possession of a knife apart from the accused and that the knife had bloodstains on it, it is more probable that the knife picked up by Habiseb was the murder weapon.

[35] The accused was seen in possession of a knife by five witnesses. Four of them saw him stabbing the deceased. The accused and the witnesses were not strangers to each other as they knew each other prior to this incident. There is no way that the State witnesses could have been mistaken of the accused's identity.

[36] Having duly considered the merits and demerits of the State's case, the accused's version as well as the probabilities, I have come to the conclusion that the State witnesses who witnessed the incident gave their evidence in a straight forward manner and did not deviate from their versions. They corroborated each other in some material respects and I find them to be credible witnesses.

[37] By saying he did not stab the deceased; that he did not see how the deceased sustained injuries and that the deceased might have been stabbed by Elvis, Habiseb and Assa, the accused's version is not supported by evidence as well as by the probabilities of the case. I find the version of the accused to be a denial that is so improbable to be reasonably possibly be true. Although the accused was assaulted by Elvis and Assa this was after the accused had stabbed the deceased to death. The accused's version is rejected on the bases that it is not supported by evidence and is far-fetched.

[38] This Court is satisfied that the accused stabbed the deceased because of jealousy after she stated that she was longing for one Gaiseb and because she was given money by Aukhumb. The accused stabbed the deceased with a lethal weapon namely a knife. She sustained five stab wounds. The deceased was stabbed on the chest which is a vulnerable part of the body. The deceased was further stabbed as per the post-mortem report. By stabbing the deceased several times with an Okapi knife the accused evidently had the intention to kill her. The intention is direct. In the final analysis, the court is satisfied that the State has proved its case beyond a reasonable doubt.

[39] In the result, the following verdict is made:

Guilty of murder with direct intent.

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NN Shivute  
Judge

## APPEARANCES:

THE STATE:

Mr Ian Malumani  
Office of the Prosecutor-General

ACCUSED:

Ms Meriam Kandoni  
Directorate of Legal Aid