

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI
JUDGMENT

CASE NO: CC 03/2015

In the matter between:

THE STATE

and

JASON MICHAEL

ACCUSED

Neutral citation: *S v Michael* (CC 03/2015) [2017] NAHCNLD 15 (3 March 2017)

Coram: JANUARY J

Heard: 28 July 2016

Delivered: 03 March 2017

Flynote: Criminal law — Murder — Self-defence — Requirements for self-defence — Exceeded bounds — No eye witnesses — Inference — *dolus eventualis* –

Criminal law Murder — Mens rea — Intention — Type of intention — Determination of — Court to consider nature of weapon used, position on body where injuries inflicted and number of times injuries inflicted.

Summary: The court reiterated that, in order for an accused to succeed with self-defence, the following requirements must be met: (a) The attack must be unlawful; (b) the attack must be directed at an interest legally deserving of protection; and (c) the attack must be imminent but not yet completed.

Intention is a state of mind which can be inferred from the circumstances of each case. In determining the type of *mens rea* in a murder case, the court will have to look at the nature of the weapon used together with the position on the body where the injuries were directed and the number of times the accused inflicted the injuries. The accused excessively exceeded bounds of self-defence. Convicted for murder.

JUDGMENT

JANUARY J

[1] The accused is charged with murder. The allegation is that upon or about 09 November 2013 and at or near Ohamaala village in the district of Eenhana, the accused did unlawfully and intentionally kill Jonas Ndafenongo Johannes an adult male person.

[2] The summary of substantial facts set out the circumstances as follows:

'During the early evening hours on the 09th November 2013, the accused and other witnesses were at Flamingo Bar, Ohamaala Village in the district of Eenhana. After some time the deceased left the bar together with Ndapuuza and they walked to the direction of the deceased's house. The accused followed the two and at an open place in the bush few a meters from the deceased's mahangu field, the accused stabbed the deceased 25 times on the back, chest, abdomen, pelvic and upper limbs

with a knife. The deceased died at the scene due to multiple stab wounds to the chest.'

[3] Mr Gaweseb is representing the State in this trial and Mr Aingura is representing the accused. The accused pleaded not guilty. Mr Aingura handed to court a plea explanation in terms of section 115(2) of the Criminal Procedure Act 51 of 1977 (the CPA) which is marked Exhibit "R". The plea explanation reads *inter alia* as follows:

'3. I plead not guilty to the charge against me and wish to give the following explanation in terms of section 115(2) of the Act, which explanation forms the basis of my plea of not guilty.

4. I deny that I unlawfully and intentionally killed Jonas Ndefenongo Johannes (hereinafter referred to as the "deceased"). My plea of not guilty is based on the following facts:

4.1 On or about the 09th of February 2013, I was at Ohamaala village, which village is in the district of Eenhana. At around 21h00 I went to Flamingo Bar, which is also known as Pohandili Shebeens. I went there alone.

4.2 When I arrived at Flamingo Bar, I found a number of people outside of the bar, amongst them the owner of the bar whose name I cannot recall, Ndeshipanda, and the deceased, who were sitting together. I approached them and the deceased stood up. I greeted them and the others replied politely but the deceased replied in a rude and sarcastic way and he walked away and stood further from where the rest were sitting.

4.3 I then sat on the empty crate on which the deceased was sitting upon my arrival. Ndeshipanda then placed her hand around my shoulder and she told me that she doesn't want the deceased because the deceased did bad things to her. Subsequent thereto, the deceased approached us and asked what I was doing with his

woman and he punched me with a fist on my left cheek. I stood up and pushed him away from me. I asked the deceased what was going on and he replied that he will put me in my mother's before sunset. The deceased ran away leaving Flamingo bar.

- 4.4 Subsequent thereto, the owner of Flamingo bar went to bath and I remained with Ndeshipanda, and the bar owner's wife. I then asked Ndeshipanda if they had discussed anything with the deceased and she replied that they did not. I then left the premises of the bar heading home.
- 4.5 Whilst I was walking home I was hit with a stick on the back on my right side and I fell to the ground face down. At the time, due to the fact that it was very dark, I did not and could not recognize the person that was attacking me. As will become apparent herein below, I only got to recognize that it was the deceased after I had already stabbed him. Whilst on the ground I started screaming for help but the deceased sat on top of me and started beating me with fists. We were then struggling and I managed to turn around and held the deceased by the hands. During this scuffle, the deceased bit me on my left hand and on my thighs and continued punching me in the face and all over my body. I was trying to fight back by throwing punches but could not effectively do so as I was laying on the ground and deceased was on top of me. I then took out a knife from my pocket with my right hand and I stabbed the deceased about 3 times in the buttocks and/or thigh area but the deceased was persistent with his assault on me. I then continued stabbing the deceased, indiscriminately until the deceased stopped punching me. I then pushed the deceased off me and I closely examined his face and that is when I realized that it was the deceased.
- 4.6 I then left the deceased and went back to the Flamingo bar and found the owner of the bar and I informed him that I had stabbed the deceased and that I needed his help. The owner of Flamingo

bar chased me away and I went back to the scene. I found the deceased laying on the ground and was crying. I took the stick which I assumed was what the deceased hit me with, which stick was on the ground next to the deceased. I removed the stick and threw it away and I sat down next to the deceased with the intention to assist him to breathe as the deceased was by then struggling to breathe.

- 4.7 I then left the scene heading to another bar to seek help but before I could reach there I heard police cars in the direction of the scene and I went back and handed myself over to the police.'

[4] The plea explanation includes formal admissions in terms of section 220 of the Criminal Procedure Act. The document reflects the following:

'4. I confirm that the provisions of section 220 of the Criminal Procedure Act 51 of 1977 (the Act) have been explained to me by my Legal Practitioner, more in particular that it will not be necessary for the state to lead evidence in relation to facts already admitted and that I cannot later withdraw and or dispute facts already recorded as admissions in terms of the above mentioned section.

5. I am prepared to make the following admissions in relation to the charge and the facts of this matter, which admissions can be recorded as admissions in terms of section 220 of the Act. I admit

- 5.1 That the identity of the deceased is Jonas Ndefanongo Johannes.
- 5.2 That the body of the deceased did not sustain any further injuries from the scene up to the mortuary where post mortem examination was conducted.
- 5.3 The admissibility and contents of the plea in terms of section 119 of the Act 51 of 1977 as set out in the Court proceedings of Ohangwena Magistrates Court case 1012/2013.

- 5.4 The admissibility and contents of the report on the completion of medico legal examination by Dr. Bala Antonio Bangabutu dated 12 November 2013.
- 5.6 The admissibility and content of the affidavit in terms of section 212(4) of Act 51 of 1977 by Dr. Bala Antonio Bangabutu dated 12 November 2013.
- 5.7 The admissibility and content of the affidavit in terms of section 212(4) of Act 51 of 1977 by Dr. Rachel Ndeuyamunye Nikanor dated 12 November 2013.
- 5.8 The admissibility and content of the affidavit in terms of section 212(4) of Act 51 of 1977 by Dr. Sabv S Qnar dated 14 November 2013.
- 5.9 The admissibility and content of the affidavit in terms of section 212(4) of Act 51 of 1977 by Dr. Sabv S Qnar dated 14 November 2013. (This seems to be a repetition of the above)
- 5.10 The admissibility and content of the photo plan and keys thereto compiled by D/Sgt T Nafidi dated 9 May 2014.
- 5.11 On the 9th November 2013 and I was at Flamingo Bar during the evening hours
- 5.12 On the 9th November 2013 I stabbed the deceased with a knife.
- 5.13 That the deceased died at the scene due to multiple stab wounds to the chest.

[5] The State handed up to court the following documents as Exhibits without objections from the defence. The markings are indicated in brackets: the indictment (A), the summary of substantial facts and list of witnesses (B), the State's pre-trial memorandum (C), the Defence's reply to the pre-trial memorandum (D), the pre-trial conference

memorandum (E), the case record from the lower court (F), the photo plan by D/Sgt Nafidi (G), the identification of the body by D/Insp. Rehabeam (H), the identification of the corpse by Tilie Hamukoto (I), [the exhibits were pre-marked by the public prosecutor with a list of exhibits. I have alerted the prosecutor that "I" is not used as exhibit number but kept is as a number not to confuse the numbering.], The affidavit in terms of section 212(4) of the CPA by Rachel Nikanor (J), the affidavit in terms of section 212(4) of the CPA by Dr. Bangabutu ("K"), the post mortem report [PM 196/2013] ("L"), the J88 medical report by Dr. Sabu Onar ("M"), the copy of ID of the accused ("N"), the copy of ID of Jonas N Johannes [the deceased] (O), The identification statement by Tilie Hamukoto ("P"), the next of kin statement by Tilie Hamukoto ("Q"), a folding stainless steel pocket knife ("Exhibit. 1), a red T-Shirt (Ehibit 2"), a dark blue/black trousers with brown belt ("Exhibit 3") and a Dark blue/black underwear ("Exhibit 4").

[6] Tilie Hamokoto is the mother of the deceased. She knows the accused from a neighbouring village. On the day of the incident, the accused brought his cell phone battery to be charged by the deceased because the deceased had a device to charge cell phone batteries. The accused did not stay long and left after he requested the deceased to charge the battery.

[7] This witness was later on the same date in the evening already asleep in her hut when she was called by a person, Naufiku. The witness was informed that the deceased was at a certain tree and that he was stabbed with a knife. She went to the scene and inspected the deceased with the light of a cell phone. She talked to the deceased and the deceased was alive and could still talk. I ignore the response of the deceased as it amounts to inadmissible hearsay. The witness could see blood from the body of the deceased.

[8] The deceased was before this incident injured on his right hand when he was a security guard and a gun he was having accidentally fired a shot that injured his right hand. The right hand was still in a state of recovering and the deceased could not use it. The accused at the time used his left hand. He was left handed. The witness identified the deceased on photos 3 and 4 of exhibit "G", the photo plan. She also identified exhibits 2 and 3 as the clothes of the deceased.

[9] Vade David testified that he goes by a nickname of "Ortav". He knows the accused and the deceased as they grew up together. This witness arrived at a cucashop, Flamingo Bar of a person named Mekondjo, on the evening of the 9th November 2013, the date when the incident happened. The witness found some customers and the owner Mekondjo at the cucashop. Amongst the customers were two daughters of the first witness, the deceased and a girl named Ndapwaundja. The accused at some point in time also turned up at the bar. At some point the deceased and Ndapwaundja left the cucashop. About 10 minutes thereafter, the accused also left the cucashop/bar and followed the deceased and Ndapwaundja. The accused returned after some time and informed Mekondjo that he had injured someone. This witness visited the scene where the incident occurred. He identified the scene as depicted in photos 3 and 4 in exhibit "G" and the cucashop in photos 1 and 2.

[10] This witness did not see a fight that night at the cucashop and more particularly no fighting between the accused and the deceased. The witness testified that the accused and deceased were never together at the bar. They were at separate places about 10 to 15 meters apart. The witness was outside the cucashop when he observed the accused standing under a Maroela tree and the deceased and Ndapandula sitting firstly and later leaving. They were later followed by the accused after some time. According to this witness the area outside the bar was illuminated by a light powered by a car battery. The witness knows persons with the names Ndeshipanda and Ndapwaundja. They are different persons.

[11] Wilhelmina Ndishileni Kandjungu testified that she is a relative to the accused. The accused is her uncle. In 2013 she was staying with the accused. There are no ill feelings between her and the accused and they are having a good relationship. On 09th November 2013, the accused came into her sleeping room and informed her that he inflicted an injury to Ndafenongo, the deceased. The accused told the witness that he stabbed the deceased with a knife because they were allegedly fighting. The accused told her that he put the deceased underneath him. The deceased alleged said that if the accused releases him he (the deceased) will put the accused in his mother or words to that effect. The accused then took the knife and inflicted 3 to 4 stab wounds on the rib side. The accused told her that he was going to hand himself over and was not going to run away. The accused never revealed any of the defences as contained in his plea explanation. This witness does not know a person with the name Ndeshipanda. She knew the deceased.

[12] This witness emphatically denied that the accused told her that deceased is the one who put the accused underneath or uttered the words to the accused.

[13] Dr Antonio Bangabuta is the doctor who conducted the Post Mortem marked as exhibit "L". The most important findings are reflected as a history of being stabbed to death, 20 stab wounds and 4 incised injuries to the chest, abdomen, pelvic and upper limbs. The wounds are numbered from 1 to 20 and the incised wounds from 1 to 4 respectively. The Dr reported and testified to the effect that 6 of the 20 wounds were into the chest cavity with fatal consequences. According to the numbering of the wounds on the post mortem report, the fatal wounds were; numbers 1, 2, 3, 5, 6 and 11.

[14] These wounds penetrated underlying muscles and vital organs respectively as follows: the upper lobe of the left lung, the lower lobe of the right lung, the dome of the

hemi diaphragm laterally, another wound penetrating the lower lobe of the right lung, another wound penetrating the lower right hemi diaphragm and right suprarenal gland, the anterior hemi diaphragm with a penetrating injury to the right lobe of the liver, the lower lobe of the left lung, mediastinum, posterior pericardium and left ventricle of the heart. The doctor concluded that the cause of death was multiple stab wounds to the chest.

[15] Oscar Mekondjo Angula is the owner of Flamingo Bar. He knows the accused for many years as a person from his neighbouring village. On 09th November 2013 the accused approached him and reported that he had injured someone. This witness never received a report of any fighting at his bar on the 09th November 2013 or afterwards.

[16] Inspector Joseph Rehabeam is the investigating officer in the matter. He received a report that someone was knifed to death at Ohamaala village and departed to the scene. Upon arrival at the scene he found many spectators and police officers. He observed the body of a male person lying on the ground face down. He also saw a male person who was handcuffed. The body was identified to this witness as the deceased and the handcuffed male as the accused. He inspected the body finding it in a pool of blood and observed wounds on it. The body was identified to him by the mother of the deceased. The scene was photographed and thereafter the body was removed to the Oshikango police mortuary. Insp. Rehabeam informed the accused that he was suspected of having committed a crime of murder. The witness warned the accused of all his relevant rights in relation to legal aid, legal representation of his own choice, his right to silence and that whatever the accused choose to say may be used as evidence in a court of law.

[17] Mr. Aingura objected to the admissibility of the content of what the accused said and a trial within a trial was held in relation to what the accused said to Insp. Rehabeam. This court was also at the time informed that the warning statement of the accused was also in dispute. The court ordered that combined trials within the trial should be held. Rulings were made and the reasons handed down on 18 May 2016.¹ I ruled the warning statement as inadmissible and the statement to Insp. Rehabeam as admissible.

[18] Consequently to the trial within the trial, Insp. Rehabeam testified to what the accused informed him. The accused stated that he stabbed the deceased because the deceased provoked him by punching him at Flamingo bar earlier that day. Apparently the deceased approached the accused later on his way home. The deceased at that time had a stick and knife in his hands. The deceased started to attack the accused with the stick. The accused managed to take the knife from the deceased and started to stab the deceased many times. The accused did not know where he stabbed the deceased and did not know how many times. When the deceased was powerless the accused took the knife and stick along. He threw away the stick at an unknown place.

[19] The accused further told Insp. Rehabeam that he went back to Flamingo bar to inform the owner of the bar about the incident. The bar owner told the accused to leave the cucashop. The bar owner said to the accused: 'Just go back to your darkness, Go back to you darkness where you have been!'.

[20] The accused went home and was arrested. The accused was swollen on his forehead and had fresh wounds on his upper left hand. He informed Insp. Rehabeam that the wounds were caused by the deceased when they were fighting. The accused was handed over to Sgt. Matali to be taken to hospital for treatment and a J88 medical report was completed by the doctors.

¹ S v Michael, unreported, CC 03/2015 NACNLD 36 Released/Delivered on 18 May 2016

[21] The J88 medical report, Exhibit "M", reflects that the accused was seen by Dr Sabu S Omar at Engela State Hospital. The accused reported: '.to be assaulted and sustained multiple superficial wounds on facial areas. Extremities upper one and Rt thigh laterally (Bite)'. The description of the wounds by the doctor is "Open debrilated wound on Lt Upper arm lateral aspect". The description of bruises and abrasions is: 'Multiple bruises of facial area and extremities a bite bruise on Rt lateral thigh.'" On the depiction of the body in the J88, 3 (three) bruises are indicated in the face, a wound on the left upper arm and a bite bruise on the right upper leg.

[22] Inspector Rehabeam received an open pocket knife with a brown handle from Cst. Ashipala which was allegedly confiscated from the accused. The witness could observe blood on the blade and handle of the knife. The knife was booked in as an exhibit. The witness revisited the scene and could observe struggle marks on the ground as if persons were fighting there. The witness searched for the stick but could not find it. Insp. Rehabeam attended the Post Mortem examination. He confiscated the clothes of the deceased consisting of a T-shirt, the trousers, underpants and a brown belt and booked it as exhibits. (25) twenty five cut wounds were observed on the body of the deceased. The clothes were produced in court and holes could be observed on it.

[23] The last witness for the State is Sgt Salatiel Nakanyala Ashipala. This witness was on duty On the 09th of November 2013 when he received a phone call regarding a person being stabbed with a knife. He was the police driver and departed to the scene at Ohamaala village with two other police officers. On arrival they found the person in a pool of blood lying on his stomach. The witness did not disembark from the vehicle. Whist he was sitting in the police vehicle, the accused approached and opened the vehicle door. The witness identified himself as a police officer with his appointment certificate and explained the accused's rights in relation to his rights to silence, legal representation and if he chose to say something that it will be written down. The

accused admitted that he stabbed the deceased. The accused was then arrested. The accused told the witness that the knife was in his pocket. Cst Ashipala searched the accused and found the knife. It was a big knife. The knife was eventually handed to Insp. Rehabeam. The witness identified the knife, Exhibit 1, in court.

[24] The knife was inspected by the court. It is a stainless steel pocket knife with the blade measuring about 90 mm from the tip to where it is fixed to the handle. The handle has a longer part measuring about 115 mm on the longer part and measuring 105 mm on a shorter part with a stainless steel ring about 30mm from where the blade is fixed. On both sides of the blade are two brownish wooden panels affixed to the stainless steel handle by small screws. It can be described as a flick-knife. There is a small button on the handle that allows the blade to flick open when pressed. The blade and part of the handle are stained with a substance that appears to be dried blood. The blade measures about 23mm at the widest side affixed to the handle and tapers down to a very sharp point where the cutting edge and the rest of the blade connects. The knife, when used as a weapon is very dangerous.

[25] The accused opted not to testify in his defence neither did he call any witnesses. Mr Aingura during cross-examination of State witnesses put various instructions from the accused to such witnesses. I considered the instructions of the accused but due to the fact that the accused did not testify it is not evidence. I therefore find it unnecessary to repeat it in this judgement. Mr Aingura submitted that Insp. Rehabeam is a single witness on what the accused informed him. He further submitted that the court should draw a negative inference from the fact that the State did not call two other police officers in whose presence the accused told Insp. Rehabeam on what happened. He also submitted that likewise this court should draw a negative inference because the State did not call the lady who was accompanying the deceased.

[26] It is trite that the defence may also call witnesses and especially witnesses that the State did not call. It is a mystery why Mr Aingura did not call the witnesses he complains about. I am not prepared to draw a negative inference from the State's failure to call the witnesses neither from the defence's failure to call them.

[27] I have considered the evidence of the various witnesses that testified and do not find any material discrepancies. I do however find discrepancies and inconsistencies in what the accused told the witnesses of what had happened and what he informed the court in his plea explanation. I am summarizing the inconsistencies not to unnecessarily prolong this judgement.

[28] The accused told Wilhelmina Ndishileni Kandjungu that he stabbed the deceased because they were fighting. Accused told her that he had put the deceased under. When the deceased uttered words to the effect that if the accused would release him he will put the accused in his mother, the accused took a knife and stabbed him 3 to 4 times on the rib side.

[29] The accused informed Insp. Rehabeam that he stabbed the deceased because the deceased provoked him by punching him at Flamingo bar earlier that day. Apparently the deceased approached the accused later on his way home. The deceased at that time had a stick and knife in his hands. The deceased started to attack the accused with the stick. The accused managed to take the knife from the deceased and started to stab the deceased many times. The accused did not know where he stabbed the deceased and did not know how many times. When the deceased was powerless the accused took the knife and stick along. He threw away the stick at an unknown place.

[30] The accused pleaded self-defence in his plea explanation. He stated that he met with the deceased and a girlfriend, Ndeshipanda at Flamingo bar. He greeted them. The deceased allegedly answered in a rude manner and walked away. The accused went and sat with the girl and had a conversation. The girl later put her hand around his shoulder. The deceased approach and punched the accused. The accused stood up and pushed the deceased away. Deceased allegedly ran away. The accused also headed home. On his way home he was hit with a stick on the back. He could not recognize the person who hit him. He only recognized the deceased after the stabbing. He was under the deceased and the deceased was punching him with fists and bit him on the left hand and thigh. The accused managed to turn around trying to fight back with fists. He eventually took out a knife from his pocket and stabbed the deceased three times first on the thigh and/or buttocks. The deceased persisted with the attack and the accused continued stabbing the deceased indiscriminately until he stopped punching.

[31] The requirements of private defence as stated in the case of *S v Goliath* 1972 (3) SA 1 (A) are as follows: In order for the accused to succeed with private defence, the following requirements must be met:

- (a) The attack must be unlawful;
- (b) The attack must be directed at an interest legally deserving of protection;
- (c) The attack must be imminent but not yet completed.

[32] The accused had injuries on his body and I find in his favour that there was a fight. The injuries are in my view of such a nature that I cannot find any justification for the 24 stab wounds inflicted. The doctor who did the post mortem examination testified that force was used to inflict the stab wounds. Considering the type of knife used the excessive brutality, the fact that the deceased was disabled in the right hand and the minor injuries on the accused I conclude, that even if the accused acted in self-defence initially, he had excessively exceeded the bounds of self-defence.

[33] After having evaluated the evidence as a whole I find that there was a *prima facie* case for which it was incumbent for the accused to rebut. He is the only person who can tell the court what happened. In view of his opting not to testify I find that the State proved a case beyond reasonable doubt.

[34] This court needs to determine the form of *mens rea*. The accused did not testify but raised self-defence. There is not any eye witness to the incident to prove direct intention to kill the deceased. He may however still be convicted for murder if he had the legal intention of *dolus eventualis*. That is when an accused foresees the possibility that death might ensue but continues with his unlawful conduct in reckless disregard of the result of his unlawful conduct. Subjective foresight may be proved by inference.² I have already found that the accused excessively exceeded the bounds of self-defence. I find that considering the knife that I have already described herein before, the total wounds inflicted, the nature thereof and the evidence that strong force was used, I conclude that the accused did foresee the possibility that the accused could be fatally injured and he recklessly nevertheless proceeded and inflicted the stab wounds with the knife causing the death of the deceased.

[35] In the result:

The accused is convicted for Murder.

HC JANUARY

² *S v Sigwahla* 1967 (4) SA 566

Judge

APPEARANCE

FOR THE STATE:

Mr Gaweseb

Prosecutor General's Office

FOR THE ACCUSED:

Mr Aingura

Of Aingura Attorney

(Instructed by Legal Aid)