

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case No: CC 4/2021

In the matter between:

THE STATE

v

BEN ASIE JOSEF AWASEB

ACCUSED

Neutral citation: *S v Awaseb* (CC 4/2021) [2024] NAHCNLD 47 (25 April 2024)

Coram: KESSLAU J

Heard: 5-7 September 2023; 29-30 November 2023; 18 March 2024

Delivered: 25 April 2024

Flynote: Criminal Law – Murder – Requirements for private defence restated and applied.

Summary: The accused was arraigned before this Court on a charge of Murder. The accused admitted that he stabbed the deceased once with a knife causing his death. Evidence indicated that the deceased was the aggressor and that the accused acted in lawful private defence.

ORDER

1. Count 1: Murder - The accused is found not guilty and discharged.
2. Exhibit 1 is forfeited to the State to be destroyed.

JUDGMENT

KESSLAU J

Introduction

[1] The accused was arraigned before this Court on a charge of Murder. The indictment reads that upon or about the 10th day of November 2018, and at or near Kuvukiland, in the district of Tsumeb the accused did unlawfully and intentionally kill Frekkie Kawaseb by stabbing him with a knife in the neck.¹

[2] Prior to pleading to the charge, the defence brought an application in terms of ss 77 and 78 of the Criminal Procedure Act 51 of 1977 as amended, (the CPA) for the accused to be referred for psychiatric evaluation in terms of s 79 of the CPA. A family member testified about the mental condition of the accused, and the application was granted. Thereafter, the mental report was received stating that the accused is fit to stand trial and that he, at the time of the offence, was fully aware of his actions and capable to act accordingly.

[3] The accused, represented by counsel, plead not guilty to the charge. An extensive plea explanation in terms of s 115(2) of the CPA was submitted.² To summarize, the accused denied that he unlawfully and intentionally killed the deceased, claiming that he acted in self-defence. The accused formally admitted the identity of the deceased as being Frekky Kawaseb; that on 10 November 2018 he

¹ Exhibit 'A'.

² Exhibit 'B'.

was at the Kuvukiland informal settlement in the town of Tsumeb; that he stabbed the deceased once with a knife; that the deceased died as a result of the stab wound to the neck; that no further injury was sustained on the body of the deceased during transportation from the scene to the mortuary where the autopsy was conducted.

Summary of the evidence

[4] Stefanus Uixab, a resident of Kuvukiland in Tsumeb, testified that both the accused and deceased are known to him. On 10 November 2018 he was standing at the gate of his house. A corridor runs between his and the neighbouring houses. He testified that he observed the accused entering the corridor followed shortly by the deceased. The deceased was also known as 'Bottom'. It was approximately 12h30 during the day.

[5] Stefanus Uixab further testified that he overheard the deceased telling the accused: 'I am looking for you, stand, stand, stand, you are dating my girlfriend, stand, I am looking for you'. The deceased then caught up with the accused and confronted him about having an affair with his girlfriend. The accused denied the accusation. The two were facing each other and within arm's length. It appears that the deceased was very angry. The deceased then said 'I will stab you' whilst pointing at the accused. When uttering this threat he put his left hand into his left trouser pocket. Thereafter, the accused pulled out a long knife and stabbed the deceased once on the right side of his neck. The accused then ran down the corridor with the deceased chasing after him. The deceased was covering the wound to his neck with his right hand while blood was streaming from the wound. The witness identified a knife with a makeshift rubber handle as the weapon used by the accused.³

[6] During cross-examination, the witness testified that the deceased was slightly taller than the accused. He testified that he did not observe the deceased grabbing the accused prior to the stabbing and did not see a knife in the hands of the deceased. He did not hear the accused telling the deceased that he is hurting him. He estimated his distance from them at six metres. He testified that, in the narrow corridor formed between the houses, there is not a lot of room to move. He did not see the deceased throwing the accused with stones after the stabbing. Material

³ Exhibit 1.

differences were pointed out between his oral evidence and his police statement wherein he stated that 'the deceased said that the accused is fucking his girlfriend' and, that he saw the deceased pulling out a short knife.⁴ On these differences he first answered that maybe he forgot, then changed to denying giving these information to the police. He testified that his nephew, Taurus Uixab, also witnessed the incident.

[7] Paulina Hoases testified that she is a resident of Kuvukiland in Tsumeb. On 10 November 2018 at around 13h00 she heard screaming. She ran outside her yard and observed the deceased bending down with both his hands on his knees where after he collapsed. She then called the police. When the police arrived she pointed the deceased out to them and the blood track leading back into the corridor.

[8] Thabita Hoës, a resident of Nomtsoub in Tsumeb, testified that the accused is well known to her. On 10 November 2018, at around 18h00, he arrived at her house. She told him that someone was killed in Kuvukiland upon which the accused replied that he knew about it and that he killed 'Bottom' by stabbing him with a knife. The accused told her that the reason for his actions, was the fact that the deceased was jealous of his girlfriend. The accused then pulled out a knife and showed it to her. She identified Exhibit 1 as the said knife. She went inside the house to make tea for them. Whilst inside, she called the police and reported to them that 'the person who stabbed is at my house'. After some time passed had passed, and another call to the charge officer, two police officers arrived. They were accompanied by members of the neighbourhood watch. The accused took out the knife and handed it over to the police. Thereafter he was removed by the police.

[9] In cross-examination, she testified that the accused is not normally a talkative person, however, that the accused made this admission to her. When the admission was denied on instructions of the accused, the witness conceded that she could not recall the exact words used by the accused. When it was denied that Exhibit 1 was the knife that the accused showed to her, the witness said 'then I don't know'.

[10] Constable Awarab testified that, on 10 November 2018, at approximately 13h20, he attended the scene together with officer Lameck. They found the deceased laying in a pool of blood. He confirmed the arrival of the scene-of-crime

⁴ Exhibit 'N'.

officers responsible for the investigation and capturing of the incident. He did not notice any weapon with the deceased contrary to the photo depicting a knife next to the left hand of the deceased.⁵

[11] Officer Awarab confirmed that the deceased's body was removed from the scene and transported to the mortuary. He was still on duty at 18h00 that day, when a call was received from Thabita Hoës who reported that the accused is at her house. Officers Awarab and Lameck then drove to her house. There they found the accused drinking tea. He requested to search the accused and found a knife under his clothing. The knife was confiscated and handed over to the Investigating Officer Hendricks. He identified the knife as the one before court.⁶ The officer insisted that he found the knife whilst searching the accused.

[12] Officer Lameck confirmed his presence with Officer Awarab at the scene where the deceased was found. He did notice a knife and a cell phone lying next to the left hand of the deceased. The items were collected by the investigating team. Officer Lameck confirmed the evidence of their visit to the house of Thabita Hoës where the accused was arrested. He also testified that the knife was found after a search and denied that the accused voluntarily handed it over. The knife was confiscated and, without putting it into an evidence bag, placed between two front seats of the police van. He denied that there were any other knives in the vehicle or that the wrong knife was handed to the investigating officer.

[13] Officer Tsuseb testified that he compiled the photo plan.⁷ According to his measurements the deceased's body was found 130 metres from the point where he was stabbed. He denied removing the knife and cell phone found in the vicinity of the deceased. He said that these items were collected by officers from the Nombstoub police station and subsequently booked in there.

[14] Doctor Godwin Zishumba testified regarding an autopsy he performed on the deceased.⁸ He found the cause of death to be hypovolemic shock secondary to a single stab wound. The wound was on the front side of the deceased's neck and

⁵ Exhibit 'L' photo 7.

⁶ Exhibit 1.

⁷ Exhibit 'L'.

⁸ Exhibit 'G'.

measured 40mm by 70mm. It penetrated the muscles of the neck and punctured the upper lobe of the lung. Major blood vessels situated on the left side of the neck were severed which would have resulted in massive bleeding. It was the doctor's opinion that, even if immediate medical care was provided, little could have been done to save the deceased's life. His opinion was further that the knife before court was possibly the weapon used to inflict the wound. From his observations he deduced that once the knife penetrated it was removed with a cutting movement resulting in opening the wound. He said that a lot of force was used, however, depending of the sharpness of the knife, less force would result in the same injury. That was the evidence presented by the State.

[15] The accused, who is of small physical built, testified in his defence. The accused is of small physical built. He said that he is illiterate and does not know his age. During November 2018 he was living in Kuvukiland in Tsumeb at his brother's house. He was employed as a cleaner. He knew the deceased as his maternal cousin. On 10 November 2018 he went to work. Upon his return, he was informed that the deceased was looking for him and was angry. He took bottles, which he collected for selling, and proceeded to Soweto. He still had his knife with him that he earlier used, at his place of employment, to clean animal heads. On his way, whilst entering a corridor between houses, he was found by the deceased and another person called Festus. Festus told the deceased 'here is the person you are looking for' and disappeared. Trapped in the corridor, the deceased grabbed the accused forcefully on his left arm. At the time, his arm was still healing from a previous accident. The deceased told him that 'you are giving away my girlfriend to other men and now she has dumped me'. The accused asked the deceased to let go of his arm because he was in pain. The deceased then said: 'you think you are the only one that can use a knife'. The deceased then took out a knife of approximately 10-15cm in length.

[16] The accused further testified that he felt scared and thought the deceased is going to stab him. He then removed his own knife from his belt. He stabbed the deceased once and ran further down the corridor. The deceased, with blood pouring from his neck, followed him whilst throwing stones at him. The deceased eventually fell down at a communal tab. A group of children then started throwing the accused with stones yelling at him that he killed a man. The accused then ran into the

direction of the airport, spent some time in a park and finally went to the house of Thabitha. He testified that, before he reached her house, he had cleaned the blade of the knife. He testified that the police arrived, searched him and he then handed the knife to them. He denied that the exhibit before court is his knife, testifying that his was 10 to 20 cm in length with a double sided cutting edge and with the handle wrapped in a white cloth. Finally, he testified that he would not have stabbed the deceased if he had not taken out the knife, because he believed the deceased was about to stab him.

[17] The accused did not do well during cross-examination. He conceded that the police discovered the knife when he was searched and that he did not hand it over himself. Further, that he might be confused and that exhibit 1 is possibly the knife found on him. He agreed with the State that the neck area of a human is a sensitive area, however, denied that when he stabbed the deceased he knew he could cause serious injuries. The accused reiterated that he was afraid and scared when threatened by the deceased, however, contradicted himself in that the deceased at that point had not produced a knife yet. He also changed his versions regarding the presence of a knife in the hand of the accused, alternating between having seen the knife and not having seen it. He agreed with the State that the lungs and heart are located in the chest cavity of a human being and that the injury on the deceased was inflicted on a delicate part of the body, however, denied that he realised at the time that he could injure any of the organs whilst stabbing, stating that he was in fear. The accused also mentioned that the deceased, on a prior occasion, attacked him with an axe. He said that he left that out of his testimony because he forgot to mention it. The accused conceded that he did not report himself to the police, however, hinted that he went to the house of Thabita Hoës because of the close proximity from her house to the police station. The accused agreed that Thabita was already aware of the stabbing of the deceased and confronted him upon his arrival. He then confirmed to her that he stabbed the deceased and showed her the knife. Finally, he conceded that he did not inform the witness that he acted in self-defence.

[18] Mandaha Hausiku testified as a defence witness. He testified that his house is located along the corridor where the incident occurred. From inside his house, he overheard loud voices which sounded like people quarrelling. He did not understand the language they used. When he exit his house, he saw the deceased picking up a

stone and throwing it into the direction of another person who was running down the corridor. The person fled around a corner in the corridor and he saw the deceased picking up another stone and chasing after him. This witness then walked in the direction the parties went and found the deceased lying next to the tab. The deceased was bleeding and, in his opinion, busy dying. When he returned to his house he noticed that the bleeding trial started from the spot where he first saw the deceased picking up a stone. That concluded the defence case.

[19] The State, in closing, submitted that the requirements for self-defence to succeed was not met, as there was no imminent attack on the accused. Furthermore that the accused had the intention to kill when regard is taken of the weapon used, the nature of the injury caused and the part of the body targeted by the accused. Counsel for the accused argued that the State failed to prove beyond reasonable doubt that the accused did not act in self-defence and did not prove that the accused, in the circumstances, exceeded the bounds of self-defence.

The law applicable

[20] It is trite law that the State bears the onus to prove the alleged offense beyond reasonable doubt, which does not mean prove beyond a shadow of doubt.⁹ Furthermore the cumulative effect of all the evidence together has to be considered when deciding whether the accused's guilt has been proven beyond reasonable doubt.¹⁰

[21] The learned writer, C R Snyman, defines the offence of murder as 'the unlawful and intentional causing of the death of another human being'. He listed the required elements as follows: '(a) causing the death (b) of another person (c) unlawfully and (d) intentionally'.¹¹ However, private defence may justify an otherwise unlawful killing.

[22] For private defence to succeed, certain requirements must be met. Firstly there must be an unlawful attack upon a legal interest, which had commenced or was imminent. Secondly the defence must be directed against the attacker,

⁹ *Miller v Minister of Pensions* [1947] 2 All ER 372 (KB); *S v Van Wyk* 1993 NR 426 (SC).

¹⁰ *S v HN* 2010 (2) NR 429 (HC).

¹¹ C.R. Snyman *Criminal Law* 6 ed 2014 at 437.

necessary to avert the attack and the means used to defend oneself must be necessary in the circumstances.¹² The test is an objective one and requires the court to put itself in the position of the accused at the time of the incident.¹³

[23] In *Mwanyekele v State*¹⁴ it was said that:

‘It is axiomatic that the act of defence may not be more harmful than necessary in order to ward off the attack but much depends upon the varying circumstances in each case in deciding the question whether the bounds of self-defence have been exceeded. In the consideration of this question the courts adopt a robust approach.’

[24] In *Ntanjana v Vorster and Minister of Justice*¹⁵ the following was said:

‘The very objectivity of the test however, demands that when the Court comes to decide whether there was a necessity to act in self-defence it must place itself in the position of the person claiming to have acted in self-defence and consider all the surrounding factors operating at the time he acted. The court must be careful to avoid the role of armchair critic wise after the event, weighing the matter in the secluded security of the courtroom . . . Furthermore, in judging the matter it must be ever present to the mind of the Judge that, at any rate in the particular circumstances of the case, the person claiming to act in self-defence does so in an emergency, the creation of which is the work of the person unlawfully attacking. The self-defender is accordingly entitled to have extended to him that degree of indulgence usually accorded by law when judging the conduct of a person acting in a situation of imminent peril.’

[25] In *Ntsomi v Minister of Law and Order*¹⁶ the following was stated regarding the weapon used during private defence:

‘As both *Snyman* and *De Wet and Swanepoel* point out, it would be nonsensical to require equilibrium between weapons used. An assailant selects his method of attack and picks his weapon. A victim can only employ the weapon that happens to be at hand.’

¹² *S v Naftali* 1992 NR 299.

¹³ *Raymond Landsberg v The State* CA 25/94 Unreported High Court of Namibia (Judgment delivered on 1994.12.02).

¹⁴ *Mwanyekele v State* (CA 15/2013) [2013] NAHCMD 301 (25 October 2013).

¹⁵ *Ntanjana v Vorster and Minister of Justice* 1950 (4) SA 398 CPD at 406 A-D.

¹⁶ *Ntsomi v Minister of Law and Order* 1990 (1) SA 473 CPD at 529 C-D.

[26] In *S v T*¹⁷ it was stated that the legal position is that, where a person who is being attacked and does not find himself in a life threatening situation, but who can only escape mutilation or serious bodily injury by using a deadly weapon against his attacker, may do so, and if necessary even kill the attacker.

[27] In *Raymond Landsberg v The State* (supra), after considering various court decisions,¹⁸ the approach and principles applicable in deciding the issue of self-defence were summarised as follows:

'What the State must prove when self-defence is an issue where an accused is charged with the crime of murder.

First leg of enquiry:

Whether the conditions and or requirements of the defence have been met, which includes the question, whether the bounds of self-defence were exceeded. Here the test is objective but the onus is on the State to prove that the conditions or requirements did not exist or were exceeded.

The Court however, must put itself in the position of accused at the time of incident.

The second leg of enquiry, where the State discharges the above onus, is whether or not the accused genuinely believed that he was acting in self-defence and that he did not exceed the bounds of self-defence.

Here the onus is still on the State but the test is subjective.'

Discussion

[28] The accused denied that he used the knife that was handed in as exhibit before this court. The knife he described had a double edge and similar in length to the one before court. Thus, as was rightfully conceded by counsel for the defence, the question of whether it is the correct knife before court will not change the outcome of this matter. The accused himself conceded that he might be mistaken and that it is the same knife.

[29] I will proceed to determine if the requirements were met to allow the accused's claim of self-defence. The evidence from the accused and eye-witnesses was that the deceased was approached by an angry deceased. The attack on the

¹⁷ *S v T* 1986 (2) SA 112 OPD at 128D.

¹⁸ *Leonard Naftalie v The State*, 17/09/92, NmHC, unreported; *The State v Whitham*, 17/09/92, NmHC, unreported; *State v Shimooshili*, 30/10/92, NmHC, unreported.

accused was unlawful and it commenced with the physical grabbing of his already injured arm. This attack was accompanied by a verbal threat from the deceased. The attack had thus commenced with the further imminent threat of being stabbed with a knife.

[30] The accused contradicted himself on whether the deceased had produced his knife at this stage, however, the onus remains on the State. The witness, Stefanus Uixab, in his witness statement, mentioned that the deceased had a knife out. This version was confirmed in the State's pre-trial memorandum¹⁹ which alleged 'that the deceased displayed a knife and was holding the accused on his arm'. The final photos taken of the deceased depicts him with a knife visible next to his hand, thus increasing the probability of the deceased having removed his knife from his pocket. The accused directed his defence against his attacker with the weapon at his disposal.

[31] The State argued that the accused overstepped the boundaries in that he targeted a sensitive area of the deceased's body and, furthermore, used excessive force when stabbing the deceased. On that point, I need to remind myself that the accused was in an emergency situation with little time to calculate his reactions. He was closely held by the deceased and his options were limited as for the area of the deceased's body to counter the attack. It is convenient to argue after the fact, whilst not in the same situation, that the accused was required to find an alternative area to stab the deceased or that he used too much force.

[32] I find that the action of the accused was necessary in the circumstances to divert the attack from the deceased. The actions of the deceased, after he was fatally injured, to chase after the accused whilst throwing stones at him, is an additional indication that the deceased, in all probability, was highly motivated to cause harm to the accused. Objectively seen, when considering all the surrounding circumstances, I cannot find that the accused exceeded the boundaries of self-defence.

[33] In conclusion, the following orders are made:

¹⁹ Exhibit 'D'.

1. Count 1: Murder - The accused is found not guilty and discharged.
2. Exhibit 1 is forfeited to the State, to be destroyed.

E.E. KESSLAU
Judge

APPEARANCES

FOR THE STATE: L S Matota
Of the Office of the Prosecutor-General, Oshakati

FOR THE ACCUSED: M B-J Adams
Of the Directorate of Legal Aid, Grootfontein