

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: CC 11/2012

In the matter between:

THE STATE

and

GERSON URI-KHOB

ACCUSED

Neutral citation: STATE *v* URI-KHOB (CC25-2010) [2012] NAHCMD 78 (26 MARCH 2013)

CORAM: NDAUENDAPO J

Heard: 12 December 2012

Delivered: 26 MARCH 2013

Flynote: Criminal law—Murder and assault GBH to—Accused pleaded guilty, however state not happy with admissions—Plea of not guilty entered—Accused stabbed deceased eight times—Convicted of murder with dolus directus—And common assault.

Summary: Criminal law—The accused was charged with murder and assault with intend to do grievous bodily harm. He pleaded guilty, but the state did not accept the plea. A plea of not guilty was entered. The accused beat the deceased with an iron

pipe and when she fled into the house, he pursued her and stabbed her eight times. The cause of death was an incised neck injury. Complaint Gaises tried to stop the beating and in the process hit on the lip with the piece of iron pipe. Held, from the conduct of the accused, he had direct intention to cause the death of the deceased. Held, although Gaises was not part of the fight, the accused foresaw the possibility that if he continues to beat the deceased he may hit Gaises and he reconciled himself with that possibility, he is therefore guilty of common assault.

ORDER

1. The accused is convicted of murder with direct intend.
2. Common assault.

JUDGMENT

NDAUENDAPO J [1] The accused is arraigned before this Court on one count of murder and one count of assault with intent to do grievous bodily harm.

On the murder count the state alleges that ‘on or about 11 February 2011 and at or near Goreangab dam in the district of Windhoek the accused did unlawfully and intenationally kill Lydia Uri-khos, an adult female person’.

On the assault count, the state alleges that ‘on or about 11 February 2011 and at or near Goreangab dam in the district of Windhoek the accused did unlawfully and intentionally assault Beverly Michelleon Gaises by hitting her with a piece of iron on her mouth with the intent to cause her grievous bodily harm.’

The accused is represented by Mr Visser and Ms Wanternaar represents the state.

The accused pleaded guilty to the murder count and tendered a written plea explanation in terms of section 112 (2) of the Criminal Procedure Act 51 of 1977. That plea explanation was not accepted by the state and a plea of not guilty was therefore recorded in terms of section 113 (1) of Act 51 of 1977. On the assault count the accused pleaded not guilty and stated that he was not aware of the allegations against him.

The state then continued to lead the evidence of the state witnesses. I now proceed to summarize their evidence.

[2] Beverly Michellon Gaises

She is the biological daughter of the accused and the deceased. She is 15 years of age. She testified that on 11 February 2011 she was busy watching television when the accused arrived at home. He took a piece of a metal pipe and left it at the door. She took it outside. The deceased came with a bowl of water and went outside to throw the water. The accused followed the deceased outside and she suddenly heard her screaming. She went outside and saw the accused was beating the deceased with a piece of metal pipe. She went between them, to prevent the accused from beating the deceased, she faced the deceased, and when she turned to face the accused, she was struck with the piece of metal on her lip. She testified that whilst standing between them, the accused continued beating the deceased. She further testified that she saw the deceased, running inside the house and tried to push the door close so that the accused could not enter. The accused followed the deceased and she saw the accused taking a knife from his pocket and entered the house. She ran to the neighbour to call for help and when she returned she saw the accused coming out of the house, trying to cut his throat with a knife and went behind the house. She entered the house, and saw the deceased in a pool of blood and dead. She further testified that she was taken to the hospital where the lip injury that she sustained was stitched.

She further testified that her parents used to fight and that her mother obtained a protection order against the accused.

[3] Dr Vasin was the next witness for the state. He is a forensic medical officer stationed at central hospital Windhoek. The post mortem on the deceased was conducted by Dr Jimenez Germanus a Cuban doctor who could not give evidence as he was in Cuba. Dr Vasin was called by the state to come and explain the post mortem report. The chief post mortem findings were: inter alia: 3 incised wounds of neck, injury to soft tissues of neck, trachea etc.

According to the report, the cause of death was a 'incised neck injury' which was a deep cut to her neck which went through her neck muscles, trachea and major blood vessels. The report also shows that she was stabbed at least 8 (eight) times.

Defence's case

[4] The accused testified in person. He testified that the deceased was sleeping out and when he complained, she obtained a protection order against him and he left the common home. He testified that on 10 February 2011 he overnight at their house at her request. In the morning he told the deceased that he was going. She did not have money and she took N\$300 from his pocket. In the afternoon he returned and he was informed that the deceased was at a shebeen. She later came home and he asked for his money that she took in the morning. She denied having taken the money. She then took a glass and hit him with it. And according to the accused that is when everything started. He picked up a knife that was lying there and he stabbed the deceased and she fell down. From there he tried to cut his throat as he was afraid. He further testified that he did not intend to kill the deceased and did not know how many times he stabbed her. That was the case for defence.

[5] Ms Gaises testified that she clearly saw how the accused beat the deceased with the iron piece metal several times on her body. She tried to stop the beating by going to stand between the deceased and the accused and in the process she was hit on the lip by the accused. She also testified that she saw how the deceased ran into the house

and tried to close the door to prevent the accused from entering the house. She also saw how the accused removed a knife from his pocket and managed to enter the house. When she returned from the neighbor, she saw the deceased lying in the pool of blood. According to the post mortem report the deceased had eight (8) incised wounds on her body and that the cause of death was an “incised neck injury”.

The accused not only inflicted injuries to the body of the deceased with a piece of iron pipe, but after she fled, he pursued her into the house where he stabbed her 8 (eight) times with the knife. She was stabbed on the upper part of the body and the fatal wound was inflicted on the neck (a vulnerable part of the body). The accused knew that the weapons used (piece of iron pipe and the knife) were dangerous weapons which would cause fatal injuries to the deceased and from the above mentioned conduct of the accused, there is no doubt in my mind that the accused had the direct intention to cause the death of the deceased. I am satisfied that the state prove the guilt of the accused beyond reasonable doubt. In the result I found the accused guilty of murder with *dolus directus*.

[6] On the charge of assault with intent to do grievous bodily harm, the evidence of Gaises was that she was hit on the lip with a piece of metal pipe when she tried to stop the accused from beating the deceased. According to the (J88 medical examination report) she sustained a laceration of left upper lip.’ From the testimony of Gaises and the J88 it appear that the evidence does not support the charge of assault with intend to do grievous bodily harm. Mr Visser submitted, correctly in my view, that she was not part of the fight and the accused had no intention to hit the complainant. However, I agree with the submission by Ms Wanternaar that the accused must have foreseen the possibility that by continuing beating the deceased whilst the complainant (Gaises) was between them trying to stop the beating, he may hit the complainant and he reconciled himself with that possibility. In the result I found the accused guilty of common assault.

ORDER

[7] In the result

1. The accused is convicted of murder with direct intend.
2. Common assault.

G N NDAUENDAPO
Judge

APPEARANCE
FOR STATE

B WANTERNAAR
OFFICE FOR THE
PROSECUTOR-GENERAL

FOR ACCUSED

MR VISSER
OF STERN & BERNARD LEGAL
PRACTITIONERS