CASE NO.: CA 92/2006

NELSON HAILEKA v THE STATE

MULLER, J

30 November 2006

- Appellant was convicted culpable homicide and sentenced to 5 years imprisonment in which 2 years were conditionally suspended.
- State called only one witness who did not observe the stabbing of the deceased.
- Appellant testified that he acted in self-defence after being attacked by the deceased with a knife.
- Court of appeal found that version of appellant may be reasonably possibly true and cannot be rejected. *S v Difford* 1937 AD 370 and *S v Kubeka* 1982 (1) 534(W). Discussed and applied.
- Magistrate erred in rejecting the appellant's version of self-defence and finding that appellant exceeded the bounds of self-defence.
- *Novus actus interveniens* – applicable law discussed.
- Cause of death an abscess in the brain as a result of an infection.
- No medical evidence given and only certain agreements in respect of medical evidence and the *Post Mortem* report before the court *a quo.*
- Held that it is not the probability of a *novus actus interveniens* that is in issue, but whether the magistrate had expert medical evidence on which she could consider whether there was a *novus actus*.
- Held that the magistrate could not make such a decision with the medical evidence, or lack thereof, before her.
- Appeal succeeds and conviction and sentence set aside.

CASE NO.: CA 92/2006

IN THE HIGH COURT OF NAMIBIA

In the matter between:

NELSON HAILEKA **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: **MULLER, J**

Heard on: 14 November 2006

Delivered on: 30 November 2006

APPEAL JUDGMENT

MULLER, J: [1] The appellant was convicted on a charge of culpable homicide in the Regional Court Windhoek on 05 August 2004 and was sentenced to 5 years imprisonment of which 2 years were conditionally suspended. The appellant pleaded not guilty to the said charge and was represented by Mr du Pisani, instructed by Legal Aid Board of Namibia. The appellant admitted in terms of s 220 of the Criminal Procedure Act that he stabbed the deceased on his head, but raised the defence of self-defence.

[2] The appellant gave notice of appeal against his conviction on 19 August 2004 on the following grounds:

"1. The learned Magistrate erred in finding that the State had proved beyond a reasonable doubt that the Appellant:

1.1 exceeded the bounds of self-defence and/or

1.2 should have foreseen the possibility of death ensuing to the deceased and/or

1.3 negligently caused the death of the deceased.

2. The learned Magistrate erred in finding that the deceased was not armed with a knife when stabbed by the Appellant. More particularly the learned Magistrate erred in:

2.1 ignoring, alternatively not attaching due weight to the fact that a State witness, who was not called by the State and who was not present and available at the trial, stated in his statement made to the police, that the Appellant and deceased were fighting with knives;

2.2 finding that the evidence of the Appellant to the effect that the deceased attacked him with a knife, which was the only eye witness account before court of the events preceding the stabbing, was not reasonably possibly true.

3. The learned Magistrate erred in finding that the deceased, being intoxicated at the time of being stabbed, could easily have been overpowered by the Appellant by means other than stabbing the deceased, thereby ignoring, alternatively attaching insufficient weight to the evidence given by the only State witness to the effect that the deceased, in his drunken state, was very unruly and too strong to submit.

4. The learned Magistrate erred in finding that it is reasonably to be foreseen that a stab wound to the head, inflicted in the locality and manner as the Appellant did, would result in death.

5. The learned Magistrate erred in finding that the means used by the Appellant to ward off the attack on himself was not justified.

6. The learned Magistrate erred in finding that the failure to keep the wound of the deceased properly clean, which in fact resulted in it becoming infected and in an abscess forming in the brain of the deceased, was a *novus actus interveniens*."

[3] During the trial which commenced on 28 July 2004 the State called one witness and after handing in the *Post Mortem* report by agreement, it closed its case. The following admission made by Mr du Pisani was recorded and appears on p 35 l 2-5 of the record:

> "I have no objection to the post mortem report being received in evidence as an exhibit. It will not be necessary for the Doctor to testify."

In respect of the doctor, Mr du Pisani apparently consulted with her and certain admissions were recorded. The State did not call her to testify. I shall deal with this issue later herein.

The defence only called the appellant to testify. The matter was then postponed and judgment was given and sentence imposed on 05 August 2004.

[4] Mr du Pisani again appeared on behalf of the appellant in this appeal, instructed by Legal Aid and Mr Muvirimi for the State. Useful heads of argument were provided to the Court by both counsel.

[5] At the outset, I deem it necessary to refer to the factual history of this matter and record the facts that are common cause:

a) The deceased was stabbed on his head by the appellant with a knife on 07 December 2004;
b) The appellant was the only witness who testified what happened between him and the deceased during the stabbing of the deceased until the witness Mr Mokalele arrived at the scene;
c) Mr Mokalele witnessed that the deceased was the aggressor and that he attacked the appellant, but did not see that the deceased had a knife;
d) After the appellant had left, a taxi was called to take the deceased to the hospital, but he refused to get into the taxi;
e) The deceased went home;
f) The deceased died on 26 December 2004; and
g) The cause of the death was an according to the *Post Mortem* Report "head injury skull fracture, abcesss intrabrain"

[5] The crucial dispute regarding the stabbing of the deceased and the defence of self-defence was whether the deceased also had a knife or not. The appellant

testified that the deceased had a knife and attacked him with it. Although the knife (of the deceased) was not found afterwards and was not seen by the witness Mokalele, Mr du Pisani submitted that the evidence of the appellant should be accepted in this regard. He further submitted that on the strength of the principle laid down in the case of *S v Blom* 1939 AD 288 in respect of circumstantial evidence to the effect that the inference to be drawn based on the circumstances must be the only inference that can be drawn, with exclusion of any other possible inference. Mr du Pisani suggested that there may also be other inferences that can be drawn in respect of the missing knife of the deceased and that the evidence in that was regard not so decisive as to exclude any other possibility. After perusing the evidence of the appellant it seems to me it is a possibility that the deceased may have had a knife and that the knife was taken away by another person, or got lost that night. Only the appellant testified, but it is clear that there were indeed other people present when the incident occurred. However, none of them were called by the State to testify. It appears from the record that the police did take a statement of one of those persons, but he was not called, presumably because of unavailability. There is no explanation why any of the other persons present was not called to testify.

[6] When Mr Mokalele arrived at the scene, he saw the deceased attacking the appellant, but without a knife. It is strange that if the deceased had a knife and was already stabbed by the appellant, that he did not use it and that Mokalele

did not see the knife. I am also not absolutely convinced the way the appellant described the altercation between him and the deceased before Mokalele, arrived is what really happened. However, even if I do entertain certain doubts, about this evidence, it cannot be held that the appellant lied in that regard. I am mindful what Greenberg JA said in *S v Difford* 1937 AD 370, a consideration that was thereafter followed and remain a useful guideline still today:

> "*"It is not disputed on behalf of the defence that in the absence of some explanation the Court would be entitled to convict the accused. It is not a question of throwing any onus on the accused, but in these circumstances it would be a conclusion which the Court could draw if no explanation were given. It is equally clear that no onus rests on the accused to convince the Court of the truth of any explanation he gives. If he gives an explanation, even if explanation be improbable, the Court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal."*

S v Difford, supra, p 373; *R v Vlok and Vlok* 1954 (1) SA 203 SWA at 207 B-C.

The test laid down in *S v Kubeka* 1982 (1) SA 534 (W) when there is reasonable doubt about the accused's guilt or not, is not whether the court subjectively disbelieves him. The court does not even have to reject the State's evidence in order to acquit him. It is simply that if there exists a reasonable possibility that his evidence might be true, he has to be acquitted.

[7] After considering all the evidence, I am not able to support the finding of the magistrate that the appellant did not act in self-defence. In my opinion the evidence of the appellant in respect of stabbing of the accused should have been accepted and the magistrate erred in rejecting it. An appellant's evidence of that incident is the only direct evidence of what happened and is to some extent supported by Mokalele, who witnessed the deceased attacking the appellant. That evidence should have been accepted, as well as the appellant's version of self-defence.

[8] The magistrate found that the appellant exceeded the bounds of self-defence. If she accepted that the appellant acted in self-defence, it could only be on the appellant's evidence. Even if there were separate incidents and the stabbing occurred only during the second incident, the appellant's evidence is the only evidence of what happened. Mokalele did not witness the stabbing of the deceased. On what basis can it then be said the appellant exceeded the bounds of self-defence? His evidence was that he was attacked by a armed around with a knife and had to defend his life. In my opinion the magistrate erred in this regard.

[9] It is significant that the appellant was from the beginning charged with culpable homicide and not murder. The essential elements of that offence is the negligent killing of another person and intent to kill is not an element. It should have been proved that the appellant's conduct was negligent and the

reasonable man – test has to be applied. The appellant's conduct has to be weighed up against what a reasonable man would have done in the circumstances and what he would have foreseen. Although such a person is not required to forsee the specific manner of the death, the South African Appellate division held with regard to intent that the foreseeable manner of death occurring must coincide substantially with the actual manner in which death did come about. *S v Goosen* 1989 (4) SA 1013 A at 1026I.

With regard to the question of the accused acting in self-defence the author Milton said the following on p 381, 3rd edition, volume II of *South African Criminal Law and Procedure*:

> *"Thus where X, acting in self-defence, uses excessive force in repelling Y's attack or uses deadly force when it was not necessary to do so, he will be guilty of culpable homicide only if it is proved that he 'ought reasonably to have realized that he was acting too precipitately and using excessive force.'"*

(Also *S v Ngomane* 1979 (3) SA 859 (A) at 863H and *S v Ntuli* 1975 (1) SA 429 (A) at 436 F-H.)

On the only evidence before the Court, namely that of the appellant, the magistrate could not make a finding that the appellant's conduct was contrary of that of a reasonable man under the same circumstances.

[10] The medical evidence is another issue. One would have expected of the State to call an expert medical witness. It is one thing to have the *Post Mortem* report handed in by agreement in respect of factual evidence, i.e. the number of stab wounds, etc. It is, however, quite another thing to rely on issues that can only be provided by expert opinion. Although consulted by Mr du Pisani too, the doctor was not called to testify. Certain matters to which the doctor had to testify was put on record by agreement, but is not clear from the record that it was not agreed that the stab-wound was the primary cause of death and the abscess a secondary cause. From the record it appears that the following discussion ensued and that it may be assumed that certain issues were placed on record, but not all.

> "**Court:** Okay, Anything else that you wish to say?
> **Mr du Pisani**: I just wish to clarify it a little bit and my Learned Friend can confirm or correct me in this regard, what the doctor said is that the abscess that she noted on her report as one of the cause of death was in fact inside the brain and that was caused, as my Learned Friend stated, by infection attributed to secondary causes and not the stab wound itself.
> **Court**: Uh-hmm.
> **Mr du Pisani**: As the Court pleases.
> **Court**: So the abscess should be regarded as secondary to the main being the stab wound, is that what you're saying?

Mr du Pisani: Your Worship, actually as I understood the doctor, what she said is that the skull fracture it is very possible that the, well that was caused by the stab wound and if there was no skull fracture (intervention)

Court: Uh-hmm, then?

Mr du Pisani: That there could not have been an infection in the brain. So the skull fracture in itself was not a danger or dangerous alone-standing but it was, it made the infection possible and ultimately it was the infection which killed the, or the abscess which caused the death.

Court: What do you say?

Mr Tjiuoro: Your Worship, actually it is a matter for submission, I believe, but in any case we have a secondary, the main secondary. The primary cause, Your Worship, one would say is the stab wound; the abscess, yes, is secondary to the skull fracture because it is deterioration of the wound that caused the death. So (intervention)

Court: Should you not agree on that thing then you probably have to call the evidence the medical evidence but the way I understand it is that this stab wound, I mean, j, the fracture of the skull is the primary cause.

Mr Tjiuoro: Was caused by the stab wound. Is said to be the primary cause even the way she put it here, then having been stabbed and I mean due to the lack of proper medical care this person or the deceased, developed the abscess. So as to say had it not been the stab wound or the skull fracture probably this person could have developed the abscess because there would be no wound actually in the brain even if, is that what I understood you to mean?

Mr du Pisani: Correct, Your Worship.

Court: Okay. So can we then do way with the doctor's evidence?

Mr du Pisani: Yes, Your Worship. I was just concerned about the issue of primary and secondary causes of death. The causes of death are stated here and they are all equal but as you set it out, without the skull fracture it could not lead to the other cause. So, that regard, we' re all in agreement, Your Worship.

Court: Okay.

Mr du Pisani: And it was pointed out by the doctor and you correctly summarized that the abscess, in fact, eventually was the result of the wound not being cleaned.

Court: Hmm"

[11] It seems that the parties were in agreement that he cause of death was an abscess that developed inside the head of the deceased as a result of an

infection. The question is whether the cause of this was the stab-wound inflicted by the appellant. It is necessary to refer to the relevant dates. The deceased was stabbed by the appellant on 07 December 2004 and he refused to go to the hospital on that day. Apparently sometime later in December 2004 he went to the hospital and the infection was discovered. He died on 26 December 2004. It seems to be a possibility that the infection developed as a result of the wound not kept clean. This was referred to and relied on by Mr du Pisani as a *novus actus interveniens,* which intervened the chain of causation to the effect that the appellant could not have been held responsible for the death of the deceased.

[12] The two issues that arise, namely what was the real cause of the deceased's death and whether was a *novus actus interveniens* could have been clarified by the expert evidence of the doctor. I have already mentioned that the agreements between the State and defence regarding the exclusion of that evidence fell short and that a crucial issue was not agreed upon. By failing to lead evidence thereon with the State bearing *onus*, the magistrate was not put in a position to make a decision of what is essentially opinion evidence. The doctor could have cleared up relevant questions, namely the nature and extent of the infection, how was it caused, whether it was related to the stab-wound or whether deceased failed to keep it clean, whether he would have lived if he received proper medical care timeously, or whether the deceased's death was a direct result of the stab-wound. Without such evidence the magistrate had no

basis to make a proper decision. It may very well be that there was another inference to be drawn in respect of causation, namely that something else may have intervened between the appellant's initial action and the death of the deceased, i.e. a *novus actus interveniens.*

[13] Normally the intervening incident that the breaks the chain of causation and constitutes a *novus actus interveniens* has to be an abnormal one and not one foreseen by the person injuring another. Originally certain decisions, such as *R v Holland* (1841) 2 Mood and R 351 held that subsequent medical treatment or maltreatment of himself cannot be regarded as a *novus actus interveniens.* Milton in his work *South African Criminal Law and Procedure, supra,* considered the old English decisions in the light of the advances of medical science, as well as later English decisions and South African cases on this issue. After analysing these cases the learned author made the following submissions:

> "It is submitted that:
>
> (i) The *Gardiner & Lansdown* (or Holland) rule can no longer be regarded as applicable.
>
> (ii) If the wound is *not* 'intrinsically dangerous', a refusal or disobedience of treatment (or application of improper treatment) by Y constitutes a *novus actus* if, having regard to his environment, [278] such refusal, disobedience or improper treatment can be regarded as (grossly?) negligent or (what perhaps means the same thing) abnormal,[279] and itself hastens death.[280]
>
> (iii) On the basis of *R v Loubser* and *S v Taylor* (but contrary to *Rooi* and *Mubila*) the rule may be the same even where the wound is 'intrinsically dangerous,[281] but not if the wound is so dangerous that it is 'mortal': likely to cause death even if

> available treatment is obtained. [282] The following example makes it clear that this should be the case: X inflicts a dangerous wound on Y, who, though an educated man living in a civilized community, refuses, (for religious or malicious reasons) to undergo a blood transfusion which would certainly save him, and dies. Y's refusal ought to be treated as a *novus actus* just as much as if he were to commit suicide. [283] If abnormality is a dominant criterion, it cannot necessarily be predicated upon a non-dangerous wound. The conjuction of circumstances may be so startling, even if the case of a dangerous wound, that that conjuction should be labelled 'abnormal'."

[14] Without elevating the submissions of Milton to general principles that should be followed, I do make the following observations from the cases analysed by Milton and the situation pertaining to this appeal, namely that it seems that the courts came to the conclusions they did in those cases on medical evidence presented at the trial and, secondly, that important facts such as the seriousness of the stab-wound inflected by the appellant, whether it could lead to an infection and later and abscess developing, whether the infection was caused by the deceased's failure to clean it or to receive medical treatment and remoteness of the stab-wound and the eventual cause of death, were not sufficiently examined and evidence in that regard put before the magistrate to be considered. In my opinion, the question is not whether there was a *novus actus interveniens,* but whether the magistrate could evaluate that possibility in the light of the lack of the factual and medical evidence. In the light of the circumstances this has to be answered in the negative.

[16] It is not necessary to deal with every ground of appeal in detail. Considering all these issues and the evidence put before the magistrate, I am convinced that he magistrate materially erred in convicting the appellant of the offence of culpable homicide.

[17] In the result, the appeal succeeds and the conviction and sentence of the appellant are set aside.

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MULLER, J

ON BEHAL OF THE APPELALNT:	**Mr LH du Pisani**
Instructed By:	**Directorate of Legal Aid**
ON BEHALF OF THE RESPONDENT:	**Mr A Muvirimi**
Instructed By:	**Office of the Prosecutor-General**