

NOT REPORTABLE

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

CASE NO: CC 01/2013

In the matter between:

THE STATE

Versus

JOEL PETRUS

ACCUSED

Neutral citation: *State v Petrus* (CC 01/2013) [2016] NAHCMD 93 (5 April 2016)

CORAM: SIBOLEKA J

Heard on: 02, 03, 04, 09 March 2015; 10 June 2015; 28 August 2015;
8, 17, 21, 22 September 2015; 27, 28 October 2015; 25, 26, 27
January 2016.

Delivered: on: 5 April 2016.

Flynote: Criminal law: Murder – *mens rea* – *dolus directus* – intention to kill

instantly – inferred from the extent and magnitude of the fatal wounds inflicted and the parts of the body where they have been occasioned.

Summary: There is no eye witness. From the accused's own account, he had an intimate romantic relationship with the deceased. They resided together. On the day of the incident he detected an SMS message on the deceased's cell phone in Oshiwambo, relating to the following in English: 'My love, I will come end of the month'. An argument ensued, persisted. He retired to the bedroom and the deceased allegedly followed him holding a panga. She lashed a blow at him, but he blocked it and took possession of the weapon. Out of anger he hit her on the neck two times in quick succession, only intending to hurt her, but when blood spat on his trouser he realized he used the sharp side of the weapon. Two deep lung penetrating stab wounds were found on the upper back thoracic cage of the deceased.

Held: The accused attacked the unarmed deceased with a panga. He cut her more than once in quick succession on the neck, stabbed her twice on her upper back. These are very sensitive parts on the human body. These fatal blows clearly shows the accused's intention to kill the deceased instantly, which he in fact did, directly causing her death on the scene.

Held: Guilty of murder with direct intent.

VERDICT

In the result the accused is convicted of murder with direct intent, read with the provisions of Act 4 of 2003.

SIBOLEKA J

[1] At the trial of the matter Mr Kuutondokwa appeared for the prosecution and Mr Isaacks for the accused on the instruction of the Legal Aid Directorate.

[2] The accused is charged with the following count of the indictment:

Murder, read with the provisions of Act 4 of 2003.

In that during the period 04 - 05 August 2012 and at or near Gobabis in the district of Gobabis the accused did unlawfully, and intentionally kill Maria Erastus, an adult female person.

SUMMARY OF SUBSTANTIAL FACTS IN TERMS OF SECTION 144(3)(a) OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977

At all relevant times the accused and the deceased were involved in a domestic relationship as they were in an actual or perceived intimate or romantic relationship.

During the evening of Saturday 4 August 2012 or the early morning hours of Sunday 5 August 2012 the accused and deceased were together in a shack situated in the Epako Compound in Gobabis. The accused attacked the deceased by stabbing her twice in her back with a panga or other sharp object and he hit her at least four times with a panga in her face and neck area. The deceased died on the scene due to severe blood loss caused by the injuries sustained. The accused covered the deceased's body with a blanket/duvet and he locked the shack from the outside and fled the scene.

[3] The accused pleaded not guilty to the charge, and through his counsel filed a plea explanation in terms of section 115 of the Criminal Procedure Act 51 of 1977. The explanation reads as follows:

“I am charged with the offence of murder read with the provisions of the Domestic Violence Act.

I wish to tender a plea of Not guilty to the charge on the basis that I did not have the intention to kill the Deceased.

I was advised by my legal practitioner on record, which advice I verily believe, that I have the right to remain silent and that I am not obliged to tender a plea explanation, which right I understand.

Having understood my right, I wish to tender the following plea explanation:

5.1 The Deceased was my girlfriend of approximately two (2) years prior to the incident and we were staying together at one place at the time of the incident.

5.2 On the fateful day, that is 5 August 2012, I was at home with my girlfriend, the Deceased.

5.3 At around 16h00 I left our residence and went to certain friends of mine to enjoy together. I left the deceased with her brother, Tangeni, at the residence.

5.4 I consumed alcohol to wit a few beers and one liter wine referred to as “Castelo” with friends of mine.

5.5 Much later I returned home and found Tangeni and the Deceased present.

5.6 Whilst at home, the Deceased received a call on her cell phone and she left the house to answer the call. This made me suspicious.

5.7 When she returned inside, I asked to see her cell phone but she refused to give it to me. I grabbed it from her and saw a SMS in Oshiwambo that could loosely be translated as *“My Love, I’ll come end of the month”*.

5.8 When I confronted her about it, an argument between myself and the Deceased ensued.

5.7 In order not to continue with the argument I left the house and went and sit outside nearby the house.

5.8 It later became late and I returned home where I only found the Deceased; the same

argument erupted between us.

- 5.9 I decided again to leave the argument and retired to the bedroom.
- 5.10 Shortly after that, the Deceased entered the place where she was holding a “panga” in her hands. She hit me with it and I blocked the blow with my arm, causing me pain.
- 5.11 I then disembarked from the bed to defend myself and we started to wrestle for the “panga”.
- 5.12 I managed to remove the “panga” from the Deceased and I hit her as far as I could recall, two times in quick succession, in the area of her neck, because I was angry with her for hitting me as well as the message found on her cell phone earlier. The reason why I could not remember how many times I hit her was because I was a bit intoxicated.
- 5.13 I thought that I was hitting her with the flat side of the blade as my intention was only to hurt her.
- 5.14 When the Deceased fell, I felt something wet on my pants and when I looked at my hands I saw blood; I realized only then that I must have hit the deceased with the sharp part of the blade.
- 5.15 I covered her body with a duvet as I thought she might get cold and I locked the house and rushed to my friends with whom I enjoyed earlier to seek help as I had no money for a taxi to take the Deceased to hospital.
- 5.16 None of my friends help me and one of them suggested that I sleep there and wait until the next morning, which I did.
- 5.17 Early the next morning I learned that there is a mob of people with sharp objects looking for me and I decided to go to Windhoek to go inform my relatives, which I did.
- 5.18 I was arrested in Windhoek.”

The accused tendered the following formal admissions in terms of section 220 of Act 51 of 1977 and were admitted in this court and recorded accordingly. They are as follows:

“The following facts may be recorded as formal admissions in terms of section 220 of Act 51 of 1977, as amended

6.1 The Deceased and I were in a romantic relationship prior to the incident.

6.2 The incident occurred on 05 August 2012, in Gobabis, Namibia.

6.3 The Deceased was Maria Erastus.

6.4 On 5 August 2012 I hit the Deceased with a panga.

6.5 The Deceased sustained injuries, in the form of open wounds and that she succumbed to these injuries, admitting the postmortem report.

6.6 The Deceased body did not sustain any injuries when she was transported from the scene of crime to the police mortuary.

6.7 I pointed out the house where the incident occurred as well as where I put the key to the house to the police and such pointing out was done freely and voluntarily.

6.8 The content of my warning statement pertaining to this matter is admitted.

6.9 That I covered the deceased with a duvet and locked the door.

6.10 That I relate what happened to Christaan Hamunyela.

6.11 The contents and admissibility of the photo plan as well as the Section 119 proceedings in the lower court.”

[4] Here is part of the then undefended accused’s plea in terms of section 119 of Act 51 of 1977 in the Magistrate’s Court:

He pleaded guilty and was questioned in terms of section 112(1)(b):

“Q: did you there and then injure and killed the deceased, one Maria Erastus?

A: Yes, I injured her – I don’t know if I killed her.

Q: tell the court how did you injure him/her and what led to you injuring her?

A: I used alcohol on that day. There were a fight between me and the deceased. I then cut and injured her with a panga on her neck by chopping postea; by cutting her with the panga. It was used 2 times. I locked the room where the incident took place and I left. I left her inside. I don’t know if she was still alive. I left her on the ground. She sustained open wounds on her neck.

Q: the charge sheets covers that you had intent to kill the deceased when you injured her as you indicated above. Is that correct?

A: no I used alcohol.

Q: what alcohol did you consume?

A: Beer and Castello.

Q: Were you able to distinguish between right and wrong at the time of the incident?

A: No, I was not aware of that.

Q: Why do you say so?

A: Because I consumed alcohol.

Q: What was your relationship to the deceased?

A: She was my girlfriend.”

[4.1] However, when the accused testified under oath during his evidence in chief his counsel exhaustively and strenuously tried to get him repeat his plea explanations in terms of section 115 and 119 related to his use of alcohol at the time of the incident without success. The accused vehemently and forcefully testified that he does not consume alcohol and he did not drink it on the day of the incident. He only drank a cool drink that is all.

[4.2] From his own evidence under oath it is very clear that the version relating to the use of alcohol in both plea explanations is false beyond reasonable doubt. In the light of the above I take it that at the time of the incident the accused fully appreciated the wrongfulness of what he was doing.

[5] I will now look at the prosecution evidence.

[6] Thomas Erastus is the father of the deceased. He testified that at the time of the incident he was residing in a corrugated iron house with the deceased's mother at Gobabis. He knows the accused as his son-in-law, he was staying together with the deceased Maria Erastus, and they both resided at his place in Gobabis. He was a shift worker at his work and he only came home during month end.

[6.1] On the day of the incident he arrived home at 06h00 in the morning. He knocked at the accused's shack, but nobody opened for him. He called the accused and the deceased's names as well as their cell phone numbers, there was no reply. They all know and have each other's cell phone numbers for easy contact. Even when he is out in the field with work they used to talk to each other telephonically. He called Tangeni Nehale and was told the deceased had earlier on gone to collect some firewood, but that she was supposed to be back already.

He took a spade and broke the door, walked inside with Tangeni following him. The entrance door leads to the middle part used as a sitting room. The other side is his sleeping room and on the other is the deceased's sleeping room. When the two entered, they saw a blanket in the doorway leading to the deceased's room. He lifted the blanket up at one side and saw that it was covering the deceased's whole body. She was laying on her back dead. He also saw a panga nearby the deceased. He went outside and stopped a police van that was driving past. He informed them what happened at his house. The accused and the deceased had a good relationship. He treated the accused the same way he did to the deceased. The accused was not answering calls on his cellphone. He also did not call to explain what had happened.

[6.2] During cross-examination he could not dispute or confirm whether the accused had some airtime credit on his cell phone or not. Neither could he dispute whether his cell phone could have been off, that being the reason why he did not see and answer the calls.

[7] Susana Alweendo testified that she is a sergeant in the police attached to the Criminal Investigation Department at Gobabis. On the day of the incident she attended the scene of crime, she found the deceased covered in a blanket. She lifted the blanket and saw that there was blood on the face, and a panga was laying in the vicinity. She cordoned off the scene to avoid tempering from members of the public.

[8] Dr Jobarteh attended to the deceased and compiled a medico-legal post mortem report, (exhibit D). His findings are that the deceased had no chances of surviving when regard is had to the injuries she sustained. She had two lungs penetrating stab wounds to the upper back of the thoracic cage and diaphragm. In addition to the above she also had three deep sharp cuts measuring 6, 7 and 8 cm in length respectively on the left side of her neck, severing major blood vessels resulting in severe fast bleeding. The doctor described the neck as a

very critical part of the body. Her teeth got broken during the attack, and she died at the scene as a result of severe hemorrhage.

[8.1] According to the doctor the brain which controls everything is connected to the human body through the spinal cord which is about one and a half centimeter in size. The neck injury the deceased sustained to her lateral spines on the left side stopped everything including breathing and the heart functions. The doctor further testified that one of the injuries on the deceased's neck cut through the petrous bone which looks like a bulge behind the ear. This injury disconnected the skull and the brain from the brain stem thereby severing the transmission of all functions and consciousness to all parts of the body.

[9] Johannes Namulo testified that at the time of the incident he was unemployed, he was only hanging out at his mother's cuca shop together with the accused. When one of them had some money they used to drink tombo together. On the day of the incident around 00h00 at night the accused knocked at his door asking for a sleeping place, because he had had an argument with his girlfriend. He was not able to assist, because he was with his female friend in bed. He referred the accused to Nakashona, a nearby neighbor.

[10] Natango Nakashona testified that he is a resident of Damara Block at Gobabis for 14 years. He knows the accused from Uuwongo Village in the Ohangwena Region, as well as a resident of Gobabis. At the time of the incident in 2012 on a Friday at \pm 11h00 during the day, the accused approached him asking for a N\$50 note to buy a meal as there was nothing at home, but he had no money, they parted. That same day at night the accused came back to him saying he has beaten up his girlfriend, but was afraid to report the incident to the police. He was looking for a place to keep up for the night. He could not get help, because he was with his girlfriend. He took the accused to his older brother, Twiindileni Nakashona, and he cannot confirm whether he got help or not.

[11] Reinhold Shivute Nakashona testified that at the time of the incident he was residing at Damara Location in Gobabis. He knows the accused from Uuwongo Village in the North, and later as a resident of Gobabis. On the day of the incident at night, Natango brought the accused to spend a night at his room. He helped and all three slept on one bed. During the course of their sleep, the accused made some noises like a person who was about to cry. He asked him why he was doing that. The accused told him that he did something very big, but he was not in a position to tell him what it is. Twiindileni was under the influence of alcohol and fast asleep. He did not notice when the accused joined them in bed during the night. In the morning he asked the accused to identify himself which he did. It was during that conversation that the accused told Twiindileni he has killed his girlfriend with a knife. But Twiindileni said that was not part of what he has to listen to, and he went to the neighbor's house. Twiindileni asked the accused whether he was going to report the matter to the police, but the accused said he was going to tell his family in Windhoek. The accused sold his phone to Twiindileni for N\$50, he got the money and left. The accused would get back the cellphone on the repayment of the money. Twiindileni Nakashona confirmed this evidence under oath. He added that the accused told him he fought with his girlfriend the previous night but he is not sure whether she was okay.

[11.1] During cross-examination he repeated what he testified in his evidence in chief that the accused did not tell him he was fighting with the deceased, neither did he mention that the deceased hit him on his arm with a panga. In the morning while all three were still inside the room where they accommodated him, he said he has stabbed the deceased with a knife. Twiindileni told the accused to go and hand himself over to the police, but the accused preferred to go to Windhoek and inform his family.

[12] Kristian Hamunyela testified he knows the accused, they are relatives. He is currently a truck driver in Windhoek. On 5 December 2012 the accused came to his house and told him that he had an argument with his girlfriend and in the

process she took a panga and hit him with the blunt side of it. He grabbed it from her, cut her three to four times, but he did not say on which side of the neck. When he asked the accused why he cut the deceased so many times on the neck, he could not furnish an answer. The accused told him that he is not sure whether she was still alive or not. Later he said she died where after he covered her with a blanket, locked the door of the room and came to Windhoek to inform him what happened. Hamunyela did not see or observe any mark or scratch on the left arm where the accused said he was hit with a panga by the deceased. He told the accused there was nothing he could do about the matter apart from informing the police so that he could be detained which he did and the accused was arrested.

[12.1] During cross-examination he stated that even if he does not know how much force the deceased may have used, by his own knowledge he knows that if he is hit with a stick or metal there will be a mark showing that he has been beaten.

[13] Petrus Ludwig Kuahee testified that he is the Scene of Crime Officer at Gobabis. He collected the panga, the blooded trouser and a T-shirt which Tangeni said were worn by the accused the previous day. These were sent for forensic examination.

[14] Tangeni Nehale testified he resides at Kwasa Location in Gobabis. He knows the accused. His and the accused's shack (zinc house) are 8 to 10 meters next to each other inside his father's yard. On the day of the incident at 22h00 he was at home with the accused, the deceased. The latter was preparing food. The two men went to their friends, leaving her alone cooking. They came back almost at the same time. The accused had two 750 ml Draught beers, one bottle was open the other one still closed. Tangeni did not want to eat, he went back to his friends. The accused and the deceased remained behind and started eating. The deceased never used alcohol, while the accused was eating and drinking there.

Tangeni also drank a little bit from the beer before he left. The following day, the Sunday, Tangeni's uncle Thomas Erastus came to fetch the stuff he uses at work which were kept in the accused's room. He knocked but there was no answer, he forced the padlock open and found the deceased laying there dead. The accused was not there. Tangeni started crying. The crime scene was photo taken.

[15] Joel Petrus is the accused. He testified that he was residing with Twiindileni Nakashona in Gobabis. At the time of the incident the deceased was his girlfriend and they were staying together at his father-in-law's house for a period of two years.

[15.1] On the day of the incident he was at work and they got paid. He bought beers for his friends and a cool drink for himself as he did not drink alcohol. At 18h00 he came home, Tangeni was there with the deceased. Her cellphone rang and she went outside to answer it. He asked her for her phone to see who was calling her, but she did not want to give it to him. He grabbed it from her. He checked the sms messages and found one saying "... my love I will come end of the month". He did not feel good about it. When he asked her whether the messages caused her not to give over the phone to him, she insulted him. She did not want him to read the message because it was not sent to him. An argument ensued and in the process the deceased started insulting his mother.

[15.2] The deceased said he cannot prevail over her as if she was residing in his father's house. He got out of the house to a nearby beer outlet, and consumed a cool drink. At 19h00 he came back to sleep. The deceased was still continuing with the cellphone story, she went to the kitchen. In the meantime he went to lay in bed, but was not sleeping. He saw her approaching with a panga in her hand. He jumped from bed and asked what she was doing. She hit him on the arm with the blunt side of it. He grabbed it and they started to wrestle for possession of it.

[15.3] The accused overpowered and took it away from her. He was then scared and frightened because he mistaken a hit with a cut. He thought it was better to revenge and he started hitting her with the flat part of the panga, but in that process and without knowing it, he was actually cutting her with the sharp side of it in short succession. He just saw blood flowing from her and she fell on the ground. He saw that he had cut her three times. It was cold, he covered her with a duvet, closed the door and left her. This is not truthful, because Thomas Erastus, the owner of the place and father of the deceased found the accused's shack locked. He knocked several times but there was no answer. He had his work tools in there. He had to brake in only to find the deceased covered in a duvet dead. The accused's counsel correctly conceded in his written submissions that the door was locked.

[15.4] It is on the above basis that I reject the accused's evidence saying he does not know who inflicted the two deep lung penetrating stab wounds on the upper back of her body. The evidence clearly shows that after the accused had finished assaulting the deceased he locked her inside and nobody else had access to her till Thomas broke in and found her dead. I am therefore satisfied that the prosecution has established beyond reasonable doubt that it is the accused who inflicted all the injuries found by the doctor on the deceased's body.

[15.5] The accused testified that he did not know whether she was still alive or dead. He went out to look for N\$50 from friends to take her to the hospital far away from the location. According to the accused's uncle Kristian Humunyela, the accused informed him that before he left his shack, the deceased was already dead. The accused's own friends, Johannes; Natangwe, Shivute and Twiindileni testified that he approached them that night only asking for a place to sleep which they provided him. He told them he was arguing with his girlfriend and he injured her.

[16] The prosecution counsel submitted that the intention to kill has been established when the accused covered the body of the deceased with a duvet, locked the door of the shack and walked away. According to this counsel, the accused knew that the deceased was already dead. This conduct was made to conceal the body so that nobody sees what has happened.

[17] On the other hand the accused's counsel submitted that it has not been established that the accused intended to kill the deceased and in his view the court should find him guilty on Culpable Homicide.

[18] From the accused's own account of what transpired, in front of him stood an unarmed, defenseless lady, his own girlfriend. He cut her on the left side of the neck three times in succession, as a result of which she fell down. These three deep cut wounds, on the deceased's neck, which is one of the most delicate parts on the person's body shows that he did not only intend to injure her very seriously, but to kill her outright. As if these injuries were not enough, the accused still proceeded to inflict two deep lung penetrating stab wounds on the upper back of her thoracic cage, which is another delicate part on the body of a person. He covered her with a duvet, locked her inside and went to sleep elsewhere. He never asked for help to take her to the hospital. Dr. Jobarteh who performed the post mortem testified that when regard is had to the aforesaid injuries the deceased had no chances of surviving at all. The depth of the three neck wounds measured 6, 7 and 8 cm in length, while the two upper back stab wounds penetrated the lungs. This clearly shows that the accused used substantial force to achieve the injuries of that extent and magnitude.

In view of all the evidence placed before court on this matter and in particular the extent of fatal injuries and the parts of the deceased's body the accused has inflicted them, I am satisfied that his intention to kill her has been established beyond reasonable doubt.

In the result the accused is convicted as follows:

Murder, *dolus directus*, read with the provisions of Act 4 of 2003: Guilty as charged.

A M SIBOLEKA

Judge

APPEARANCES

STATE : Mr J. T. Kuutondokwa
Office of the Prosecutor-General, Windhoek

ACCUSED : Mr B. Isaacks
Instructed by Directorate of Legal Aid