

NAMIBIA / JUDGMENT

S v Haoeb (CA 64 of 2004)

[2007] NAHC 44 (19 June 2007)

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COURT

High Court

CASE / FILE NUMBER

CA 64 of 2004

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SUMMARY WALTER HAOEB versus THE STATE “SPECIAL INTEREST” CASE NO. CA 64/2004
DAMASEB, JP et MULLER, J 19/06/2007 In Regional Court, appellant found guilty of murder and assault with intent to cause grievous bodily harm. Court a quo finding that although victim initiated scuffle, was ‘unarmed’ at time and appellant by stabbing him 3 times exceeded boundaries of private defence and therefore found guilty of murder. On appeal, found that court a quo misdirected itself in way it evaluated prosecution evidence and that of defence. On objective facts appellant could have apprehended at the very least grievous physical harm to himself - and use of knife against deceased in circumstances not proved beyond reasonable doubt not to have been reasonable – the state bearing the onus. Murder conviction and sentence set aside, but conviction for assault with intent to cause grievous bodily harm confirmed. Sentence of 1 year for that offence also upheld. CASE NO.: CA 64/2004 IN THE HIGH COURT OF NAMIBIA In the matter between: WALTER HAOEB APPELLANT versus THE STATE RESPONDENT CORAM: DAMASEB JP et MULLER, J Heard on: 21.05.2007 Delivered on: 19.06.2007

APPEAL JUDGMENT:

- [1] DAMASEB, JP: An English football legend once remarked: “Football is not about life or death, it is more than that.” The events that resulted in the death of the person over whose killing the appellant in this matter was indicted, convicted and sentenced to 14 years imprisonment, started off with an argument over a football match. The deceased was the appellant’s uncle. Such indeed is the passion that can be generated by what another football legend, Pele, called rather piquantly as the “Beautiful Game”!
- [2] This is an appeal against the conviction and sentence by the Regional Court sitting at Otjiwarongo. The appellant, the accused in the court a quo, faced two counts before the learned magistrate, to wit: (1) Murder In that on or about the 20th or 21st of October 2000 and at or near Pandu Bottle Store at Otjiwarongo he unlawfully and intentionally killed Engelhardt Haoeb by stabbing him with a knife, (2) Assault with intent to do grievous bodily harm In that upon or about the 20th or 21st of October 2000 and at or near Pandu Bottle

Store at Otjiwarongo he did wrongfully, unlawfully and maliciously assault Obed Soroseb by stabbing him with a knife with intent to do the said Obed Soroseb grievous bodily harm. The appellant pleaded not guilty on both charges. In respect of count 1 his counsel in a plea explanation stated that the appellant is not guilty because he stabbed the deceased out of self defence; and in respect of count 2 he denied ever assaulting Obed Soroseb: In fact, in his plea in respect of count 2 the appellant personally stated that he had no knowledge of the case and that he was hearing it for the first time in court.

- [3] I will now summarise the case led by the State against the appellant. The first witness to testify was David Auibeb. His testimony is that at around 23h00 on the 21st of October 2000 he was at Pandu Bottle Store with the deceased and one Obed Soroseb. The accused came while they were there and an argument ensued between the accused and the deceased about a soccer tournament that had taken place earlier that day. As a result of this argument, the accused took out a knife, grabbed the deponent on his shirt and tore it. Soroseb then tried to make peace and the accused stabbed Soroseb behind the left arm blade. After stabbing Soroseb the accused ran away and the deponent and the deceased gave chase. The accused ran into a yard of a house and the deceased and the deponent stood outside this yard. As they were waiting, according to Auibeb, the deceased started to urinate outside the yard. The accused came running towards the deceased and the two started talking. A quarrel is what Auibeb assumed ensued between the two. The appellant and the deceased then grabbed each other and started wrestling. The appellant then took out a knife and stabbed the deceased on the shoulder, on the back and yet another time - altogether amounting to three times.
- [4] Auibeb testified that at the time that he was stabbed the deceased had no object in his hands with which he could have caused harm to the appellant. Auibeb testified that upon seeing the deceased being stabbed by the appellant, he (Auibeb) threw a stone at the appellant which hit him on the eye whereupon the appellant ran away. According to Auibeb, the police then came and arrested the appellant. Auibeb testified that the reason they chased the appellant after the initial scuffle was because he tore his T-shirt.
- [5] In cross-examination Auibeb elaborated on the argument about soccer as follows: “Question: What precisely about soccer were they arguing about? Answer: The accused did not want to understand that they lost the game and because the accused was drunk he then also became cross.” He added further: “Question: What precisely did the deceased say to the accused person which made him not understand that he lost the match what precisely did he say? Answer: He said that they lost the game may be because the accused has taken some liquor he then became cross.”
- [6] Auibeb denied the suggestions made by counsel for the appellant that the latter came to where they were at Pandu Bottle Store because he was called by the deceased, or that the deceased was angered by the appellant’s suggestion that one ‘Foreman’ was a better player than the deceased.

- [7] Under further cross-examination Auibeb conceded that there was infact a conversation between the appellant and the deceased about the skills of one person called 'Foreman' compared to the deceased. When asked in cross- examination why they chased the appellant after the initial scuffle, Auibeb's answer was that they did so in order for him (Auibeb) to give his shirt to the appellant to mend. He was adamant that the purpose was not to beat the appellant.
- [8] Auibeb conceded though that it would have been better to take the T-shirt to the appellant the following day. Mr Tjitemisa pressed that the deceased's party had chased the appellant with stones-in-hand and with the aim of assaulting him. Auibeb maintained that they were bare-handed. (What I find strange about this answer is that on Auibeb's own version the appellant had just stabbed Soroseb with a knife. That they could be pursuing the appellant whom they knew had a knife without themselves having any offensive weapon on them is, not to put too fine a point on it, most improbable.)
- [9] Mr Tjitemisa enquired whether upon catching up with the appellant he (Auibeb) handed over the T-shirt to the appellant for mending. Auibeb's answer is remarkable and I quote the exchange verbatim. "Question: You were not anymore interested in handing over the T-shirt? Answer: I thought that we were meet him tomorrow." (My underlining) When asked further whether he said anything to the appellant about the T-shirt when the appellant emerged from the yard wherein he was hiding, Auibeb testified that he did not. (Why they then chased the appellant if the purpose was not to harm him is a mystery and Auibeb's explanation for why they did is false and the appellant's version is to be preferred.)
- [10] It was put by Mr Tjitemisa in cross-examination that his instructions were that at the time when the accused person inflicted the wounds on the deceased Auibeb and the deceased were assaulting the appellant. Auibeb denied that he and the deceased were beating or attacking the appellant.
- [11] In further cross-examination Mr Tjitemisa asked the following question and got the answer as shown: "Question: You testified that at the beginning of the evening in question the accused wanted to stab the deceased and you stopped them fighting, isn't it. Answer: Yes. Question: Why did you not stop them again when they were wrestling. Answer: I have no answer Your Worship." [My underlining]
- [12] Auibeb admitted that the deceased had in the process of the scuffle, the chase and whatever else happened that evening, lost his 'Polo Falcon'- brand shoes. He denied however that the issue was ever mentioned that evening as the chase took place.
- [13] At page 64 of the record the following exchange took place between Mr Tjitemisa and Auibeb: "Question: Now you said that you consumed alcohol that evening is that correct? Answer: That is correct. Question: And now despite this could you still perceive everything that was happening around you? Answer: Some of the things I really did not see them properly." [My underlining]

- [14] The next witness to be called for the State was one Obed Soroseb who was with the deceased and Auibeb on the fateful night at Pandu Bottle Store. Soroseb confirmed that the appellant found him, the deceased and Auibeb at Pandu Bottle Store whereafter an argument ensued between the appellant and the deceased about the game of soccer.
- [15] Soroseb testified that the accused then grabbed the deceased's shirt. Auibeb intervened to separate the duo whereupon the accused grabbed and tore Auibeb's T-shirt. It was when he (Soroseb) tried to intercede to make peace that the appellant "scratched" him (Soroseb) with a knife on the shoulder. The appellant then ran away. Soroseb confirmed that the deceased and Auibeb chased the appellant until he ran into a yard. On Soroseb's version, the appellant came out of the yard and upon being asked by the deceased as to why he stabbed him (Soroseb), apologised for doing so and then made peace with Soroseb. Soroseb testified that he then left with one 'Bobby' who offered to take him to the hospital to have the injury attended to. As he left, he heard people scream about a fight and upon looking back saw the deceased on his knees, saying he was stabbed. Soroseb testified that he saw the deceased and the accused grab each other before the former fell down, but he never saw the actual stabbing, nor did he see how exactly the fight started. As regards the appellant stabbing him, Soroseb testified that the knife did not penetrate his skin because he had a jacket on as a result of which the knife pierced through the jacket and the shirt he was wearing at the time. He admitted on cross-examination that the wound inflicted on him was not serious.
- [16] The next witness for the State was the arresting police constable, one Benjamin Tjizu who, on the fateful night, was on patrol duty when he noticed stones being thrown onto the street he was driving on. He approached a group of people near Pandu Bottle Store. He saw a young man lying on the ground. As he drove on he saw David Auibeb and the appellant, Auibeb holding stones in his hands. He ordered him to drop the stones and retrieved a knife from the appellant. At that moment, the deceased came and fell in front of the police vehicle. He noticed that the deceased was bleeding profusely. He took him to the hospital. Tjizu stated in cross-examination that his observation that night was that the appellant was 'retreating and (Auibeb) was the one who was going forth like somebody who ... want to throw the accused with the stones'. Tjizu did not rule out the possibility that the appellant had injuries on his eye on the fateful night.
- [17] The appellant testified on his own behalf and called two witnesses. On the fateful night he was in the company of Adolf Haoeb and Sethi Gaeseb at the shopping centre near Pandu Bottle Store. As they reached Pandu Bottle Store he was called by Soroseb who said the deceased was calling for him. Some discussion then ensued about the football prowess of the deceased compared to one 'Foreman'. After some hesitation he suggested that Foreman was a better player than the deceased who, at hearing this, became incandescent with anger at the suggestion and threw him on the arm with a stone, forcing him to fall down. He stood up and left, following his two companions. The deceased then came charging at him and started assaulting him with fists. He took flight but was cornered near Pandu Bottle Store and ran into a passage fronting a yard as the beating continued. The trio chasing and beating

him were the deceased, Soroseb and Auibeb.

- [18] When he went into the passage his two companions told him that his pursuers wished to make peace with him. He came out of the passage and shook hands with the deceased as a sign of peace. This did not please Auibeb who criticised the deceased for making peace with a man who was responsible for the appellant losing his 'Polo Falcon' shoes. As Auibeb said this he gave a bottle to the deceased who, using it, hit the appellant on the eye. This forced him to sit down. Auibeb then threw him with a stone. Adolf Haoeb then tried to stop the deceased from assaulting the appellant when he (Adolf) was hit with a stone by Auibeb and fell down and lost consciousness. The deceased and Auibeb then rushed to him and, according to him, 'It was then that I thought that I had a knife in my pocket. I then took out the knife. From there they stop there. Because now I was injured I also rush to them. They were three and I stab one of them'. (My underlining)
- [19] The appellant was emphatic that he stabbed the person only once and made a complete denial that he ever stabbed Soroseb at the Pandu Bottle Store at the very beginning of the events that night. He maintained that he only drew the knife after he was hit on the eye and persisted that after he stabbed one of his attackers, the other two continued to pelt him with stones. He testified that Soroseb was present at all relevant times that night. In cross-examination, the appellant denied ever grabbing and tearing the T-shirt of Soroseb. He said that he had no idea why the trio chased him.
- [20] In cross-examination, the appellant was asked why he did not produce the knife to defend himself when the initial assault commenced. He said he had forgotten about the knife at the time. When asked why he did not run away instead of stabbing someone, his answer was "Because I do not run away from them"? He then added: "From the shopping centre when they were chasing me they manage to come and corner me so I saw that I couldn't run away from them"? (In my view this sufficiently explains the first part of his answer). He stated in cross-examination that he did not know how the deceased may have sustained the other two wounds considering that he stabbed him only once.
- [21] The next defence witness was Adolf Haoeb. He too confirmed being with the appellant on the fateful night when the latter was called by one of the deceased's party. He and Sethi had left for a dance when they received a report that the appellant had been attacked. They went to investigate and established that the appellant was hiding in a yard. Haoeb testified that he was then requested by the deceased to go and call the appellant so that they could make peace. This he did, and as the deceased and the appellant were busy making peace, Auibeb objected in the way already stated by the appellant. Appellant was then hit on the eye by the deceased. At about the same time, Auibeb struck him (Adolf) on the head with an object making him to lose consciousness. He therefore did not observe the stabbing of the deceased. He also bore no knowledge of the initial argument about football and how the appellant ended up in the yard. In cross-examination it was not disputed that he (Adolf Haoeb) lost consciousness after being struck by Auibeb.

- [22] The next witness for the defence was one Sethi Gaeseb. He was also with the appellant on the date named in the indictment and confirms that the deceased beat the appellant with a bottle on the eye and that Adolf was struck unconscious by Auibeb. He ran away when this happened and did not observe anything further. The findings of the court a quo
- [23] The learned magistrate convicted the appellant on both counts. That Court correctly rejected the appellant's version that he stabbed the deceased only once. The medical evidence admitted in evidence by agreement and never contested in any shape or form by the appellant who was legally represented, makes it very clear that the deceased had three stab wounds to his body: on the forehead, the right shoulder and lower back. The cause of death was external haemorrhage due to the stab wounds. The State established that the body did not sustain any further injuries as the deceased was transported to the hospital.
- [24] The Court a quo found in favour of the appellant that he was being pursued by the deceased and his party when he ran into the yard, for a reason other than the one proffered by Auibeb (i.e. that it was in order to hand to him the shirt he had torn.) The Court was also satisfied that the appellant emerged from the yard upon being called in order to accept the olive branch offered by the deceased.
- [25] The Court also chose to approach the evidence of a crucial prosecution witnesses (Auibeb) with caution on account of previous inconsistent statements. It arose in this way. It emerged in cross-examination that Auibeb had said the following to the police in a sworn statement: "I and the deceased followed him up to one house, the suspect went into that house and we went back to Pandu bottle store. On the way the deceased was urinating and the suspect found him there. I was waiting for the deceased to finish urinating too. I then start to urinate, I saw the suspect talking to the deceased but I did not catch up the words. I saw the deceased the suspects grabbed each other arms and struggling. I hear the deceased said to me the suspects had stabbed him. At that time the deceased was lying on the ground and the suspect sit on him. Then I came there I picked up a stone and hit the suspect with it on the face. The deceased want to stand up when the accused stabbed him again and he fled the scene. The deceased was stabbed on the head and the shoulder. I followed the suspect and wanted to throw him with that stone again and I saw a police car passing, is stopped them and told them about the incident." (My underlining)
- [26] When Auibeb testified in court he said that at the time he threw the appellant with the stone, the appellant was standing in front of the deceased person after inflicting the third wound. He stated in cross-examination that the version he gave in court should be preferred over the one he gave in the statement to the police as at the time he gave the statement he was confused by the passing away of the deceased. No wonder the learned magistrate chose to treat his testimony with caution! (But for the reasons I have already stated and those I will show later on, he should have gone further and rejected his testimony as entirely unreliable.)

- [27] The learned magistrate also had occasion during his summing up to comment as follows: “The conflicting versions given by the State and defence witnesses respectively are, to say the least, most confusing.”
- [28] The court also went on to reject the appellant’s version that Adolf was struck unconscious as ‘concocted in order to favour the accused’s defence’ and that the deceased was ‘unarmed’ at the time the appellant stabbed him; holding that the injuries were more likely inflicted while the appellant and the deceased were holding each other. Herein the court a quo found corroboration for Auibeb’s story. The court also found that the deceased must have grabbed the appellant first whereafter they started wrestling each other. This, the Court found, entitled the appellant to act in private defence, but because the deceased was, as the court found, ‘unarmed’ at the time, it found that inflicting 3 stab wounds on the deceased was disproportionate to the harm threatened and therefore found the appellant guilty of murder.
- Misdirections
- [29] The learned magistrate misdirected himself in the way he approached the issue of private defence and in the way he evaluated the evidence of the prosecution witnesses and that of the defence. I will start with the latter. This Court has in the past¹ said as follows about the situation where the Court is faced with mutually destructive or conflicting versions of the prosecution and the defence: “Quite clearly, the weighing of the State’s case against that of an accused as was the case here and in Munayi’s² case ... is an improper approach which amounts to a serious misdirection. This is so because the onus of proving a criminal case against an accused person rests upon the State. In contrast, an accused person enjoys a constitutional presumption of innocence pursuant to art 12(1)(d) of the Constitution.”
- [30] The appellant’s version is that he was chased by the deceased and his party after an initial assault on him. He hid in a yard and was invited back to make peace only to be beaten when he left his safety. In his presence, his companion (Adolf) was knocked down unconscious by a companion of the deceased and he continued to consider himself to be in danger. All indications are that he was correct in saying Adolf was knocked unconscious and the magistrate’s finding to the contrary (as also correctly conceded by counsel for the State) is a misdirection: Tjizu’s evidence makes clear that he found a young man lying on the ground when he got to the scene and later saw the deceased come and fall near the police car. The person on the ground could only have been Adolf; and even if I am wrong in that, the State failed to prove it was not Adolf. Auibeb quite clearly sought to understate his role in this incident if one finds that he in fact 1 S v Shaanika 1999 NR 247 at 252 I, per Silungwe, J. 2 S v Munayi 1986 (4) SA 712 (V) at 715A and 715 F-G. knocked Adolf unconscious. If any one tried to concoct anything, it was he – not the defence witnesses as found by the court a quo.
- [31] If the court a quo approached the evidence in this way it could not have found that the appellant exceeded the boundaries of self-defence; at the very least it could not have been satisfied that the State proved beyond reasonable doubt that the appellant exceeded the boundaries of self-defence. In making an assessment of the reasonableness of a defender’s ‘defensive’ conduct a trier of fact must take all the surrounding circumstances into account

and not split the event up into 'fractions of a second'. (As to which see *R v Jack Bob* 1929 SWA 32 at 34; *Cele v R* 1945 NPD 173 at 176.)

- [32] Would a reasonable person have acted in the way that the appellant did? The appellant made clear in his testimony that he had tried to run on the previous occasion but the deceased and his companions caught up with him. He therefore found it pointless to run away again. He maintained that he felt threatened by the deceased and his two companions – one of whom had knocked his companion unconscious. Looking at the facts objectively, could a reasonable person in the appellant's position not have thought at this point that since Adolf had just been killed - or seriously injured at the very least - the same fate may befall him?³ I think he could have. ³ A person is justified in killing an attacker not only if his life is in danger but also if he stands to suffer grievous bodily harm: *S v Jackson* 1963 (2) SA 626 (A) 628 E-H and 629 A-D.
- [33] I take the view that the Court a quo misdirected itself in finding that the deceased was 'unarmed' when the appellant stabbed him. The appellant had maintained that he stabbed the deceased when the latter hit him with an object on the eye and whilst being attacked by the deceased and at least one of his companions. That version has in my respectful view not been displaced beyond reasonable doubt. The court ought more carefully to have scrutinised the role of prosecution witnesses, especially and keep that in mind in assessing the reasonableness or otherwise of the harm the appellant perceived he was under in acting to 'defend' himself with the knife.
- [34] The evidence shows that the deceased and Auibeb chased the appellant at the initial stage. Auibeb's version that they had no offensive weapon I have already found to be false. While the evidence shows, and the Court so found, that the appellant emerged from the yard he was hiding in upon being called by the deceased, Auibeb testified that the appellant came 'running' towards the deceased as the latter was urinating. Clearly, Auibeb sought thereby to impute aggression on the part of the appellant (against the weight of the evidence) and to minimise the role the deceased and Auibeb played in the events that night. Auibeb also lied under oath in his statement to the police when he stated the appellant was sitting on the deceased when he (Auibeb) threw him with an object on the eye. This again shows how eager this witness was to exaggerate the role of the appellant and minimise their own violent role in the incident. Auibeb was less than truthful about the true reason for the initial argument, first suggesting that the appellant refused to accept that they lost a soccer match, only to later leave open the possibility that the deceased may have been angered by the appellant's suggestion that 'Foreman' was a better player.
- [35] The evidence on behalf of the appellant also shows – evidence which was not disproved beyond reasonable doubt – that Auibeb remonstrated with the deceased for making peace with the appellant and gave an object to the deceased to use against the appellant. This, like the others, is an important factor in evaluating the reasonableness or otherwise of the appellant's perception of the harm he considered himself to be under before using the knife against the deceased. Add to this the fact that Auibeb, yet again, was the person who

knocked Adolf unconscious in full view of the appellant. Constable Tjizu makes clear that he saw Auibeb with stones-in-hand when he arrived at the scene as if charging at the deceased. In my view had the Court approached the evidence in this way it would have evaluated the appellant's defence of private defence favourably, as indeed I do.

- [36] Had the Court a quo found, as it should have, that the deceased wielded stones and in fact assaulted appellant with one of them and that the deceased and his companions were attacking the appellant at the time, it would have come to a different conclusion, bearing in mind that a defender is not expected to 'gamble' with his life by resorting to flight. (See *R v Mnguni* 1966 (3) SA 776 (T) at 779 A-B; *R v Patel* 1959 (3) SA 121 (A) at 123 A-C.) In my view the fact that the appellant lied about how many times he actually stabbed the deceased becomes of little consequence as he was entitled to use the knife to ward off the harm he thought he was under.
- [37] In deciding whether recourse to force (and in what form) was necessary in the circumstances, the test is whether the defender's assessment of the circumstances would have been shared by a reasonable man – and in so doing the court must guard against the attitude of the proverbial armchair critic who is wise after the event: *R v Patel* supra at 123D. Would a reasonable man in the position of the appellant not have reacted in the way the appellant did? The State, in my view, failed to prove beyond reasonable doubt that the appellant exceeded the boundaries of self-defence and I refrain from taking an arm-chair approach about what the appellant ought to have done in the circumstances, especially in view of the uncontested evidence at his trial that he found it pointless to flee as he had previously done so to no avail.
- [38] The accused is therefore entitled to an acquittal on the charge of murder.
- [39] There can be no doubt that Soroseb was stabbed by the appellant. There is no indication at all that Soroseb acted in any violent manner towards the appellant. Had it not been for the rather thick fabric of the clothing he wore, the injuries may have been serious. The intent to cause grievous bodily harm was clearly present and the court a quo correctly convicted the appellant on count 2. That conviction is confirmed. The Sentence
- [40] On count 2, the appellant was sentenced to one year imprisonment to run concurrently with the sentence of 14 years for the count of murder. The sentence of one year in respect of count 1 is in order and I see no basis for interfering with it.
- [41] In the result it is ordered as follows: a) The conviction for murder on count 1 is set aside as is the sentence of 14 years imprisonment. b) The conviction and sentence in respect of count 2 are upheld. The appellant was sentenced on 20th May 2003. He has therefore served the 1 year prison term in full and is set free forthwith.

DAMASEB, JP I agree

MULLER, J ON BEHALF OF THE APPELLANT: L CHAMPHER INSTRUCTED BY: DIRECTORATE
OF LEGAL AID C/O KRUGER, VAN VUUREN & CO ON BEHALF OF THE RESPONDENT: A
LATEGAN INSTRUCTED BY: OFFICE OF THE PROSECUTOR-GENERAL

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