

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI  
JUDGMENT

Case No: CC 14/2022

In the matter between:

**THE STATE**

v

**MAWAYA BERNARD LIONGA**

**ACCUSED**

**Neutral citation:** *S v Lionga* (CC 14/2022) [2024] NAHCNLD 03 (18 January 2024)

**Coram:** KESSLAU J

**Heard:** 8-9 March 2023; 13-15 March 2023; 3 April 2023; 5 May 2023; 2 October 2023 and; 19 October 2023

**Delivered:** 18 January 2024

**Flynote:** Criminal Law – Murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003 – Evidence – Circumstantial evidence – Spontaneous admissions made by the accused.

**Summary:** The accused is arraigned before this court on three counts to *wit* count 1-Murder (read with the provisions of the Combating of Domestic Violence Act 4 of 2003), count 2- Contravening section 2 of the Arms and Ammunition Act 7 of 1996 and count 3 -Contravening section 33 of the Arms and Ammunition Act 7 of 1996.

The accused pleaded not guilty to all three charges. Evidence presented indicated that the accused shot the deceased as a result of text messages he found on the deceased's phone. The accused's version was that he placed the firearm on the table in the house and without him pulling the trigger, a shot went off which struck the deceased in her thigh. The accused disputed admitting to the witnesses that he shot the deceased or informing them about the text messages on the phone of the deceased.

*Held that*, the accused as employee of the security company had authorization to use a firearm when on duty however that he had not authorization to take it home.

*Held that*, the gunshot caused a rupture of a major blood vessels which led to massive blood loss and subsequent organ failure and death of the deceased.

*Held that*, the evidence regarding the count of murder is circumstantial and thus required the court to draw inferences from the proven facts.

*Held further*, that the accused is found guilty of all three counts.

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### ORDER

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1. Count 1: Murder (read with the provisions of the Combating of Domestic Violence Act 4 of 2003) – Guilty (dolus eventualis).
2. Count 2: Contravening section 2 of the Arms and Ammunition Act 7 of 1996: Possession of a firearm without a license – Guilty.
3. Count 3: Contravening section 33 of the Arms and Ammunition Act 7 of 1993: Unlawful possession of ammunition – Guilty.

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### JUDGMENT

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KESSLAU J

Introduction:

[1] The accused is arraigned before this Court on three counts *to wit* Murder (read with the provisions of the Combating of Domestic Violence Act 4 of 2003), Contravening section 2 of the Arms and Ammunition Act 7 of 1996: Unlawful

possession of a firearm without a license and Contravening section 33 of the Arms and Ammunition Act 7 of 1993: Unlawful possession of ammunition.

[2] The allegations in the indictment are that the accused on or about 17 March 2020 and at or near Katima Mulilo unlawfully and intentionally killed Melody Mabita by shooting her with a firearm whilst they were in a domestic relationship as cohabiting partners. The firearm and ammunition used during the alleged murder form the basis for the additional charges in the indictment.

[3] The accused, represented by counsel, pleaded not guilty to all three counts and submitted a written plea explanation.<sup>1</sup> The plea explanation given is that the accused placed the firearm on a table in the house and, without him pulling the trigger, a shot went off which hit the deceased in her thigh. The date of death, identity of the deceased and a domestic relationship were admitted by the accused. Furthermore it was admitted that the accused was in possession of the firearm and ammunition in question however with the defence that he, as security guard, was authorized by his employer to possess same.

[4] Various documents and exhibits were handed into evidence throughout the course of the trial and will be referred to when relevant to this judgment.

#### Summary of the evidence

[5] Evidence from the State witnesses is that on 17 March 2020 around 17h00 to 18h00 a loud noise was heard from the house where the accused and deceased were living. When a relative, Thomas Ponga, arrived at the scene 10 minutes after the noise was heard, he found the lifeless body of the deceased in a seated position on a plastic chair with her arms flung back whilst dressed in a traditional robe. She was in a pool of blood with a gaping wound visible on her upper left thigh. A crying three week old infant was found on the floor. The accused was not present. The witness called the police who arrived and removed the corpse of the deceased.

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<sup>1</sup> Exhibit "A".

[6] Rice Cerrin Makena, a neighbour to the accused, testified that she did not hear the shot being fired however the accused, on the fateful day, approached her whilst she was outside her house and told her "I shot my wife". According to her observation the accused appeared angry and mentioned to her that he found text messages on the phone of the deceased. The accused thereafter left in the direction of his place of employment carrying a shotgun.<sup>2</sup> The witness proceeded to the house of the deceased and observed the police removing a baby and the covered body of the deceased. She did not enter the house and found the first witness, Thomas Ponga, still on the scene. During cross-examination this witness insisted that the accused made the admission of shooting his wife and denied that he told her that the gun went off by itself.

[7] Boswel Monde Lyonga testified that the accused is his elder brother. He testified that when he heard of the incident he went to the house of the accused in Macaravan Katima Mulilo. The deceased's body was already removed. In the presence of the police he telephoned the accused who told him that he is at a location called Mafuta. He and the police drove to Mafuta but the accused was not there. He telephoned again in the presence of officer Trust, and when he asked the accused why he did it, referring to the shooting, the accused replied that he found text messages in the phone of the deceased. The witness asked the accused to forward the said messages however nothing came of it. This witness deviated after this part of his evidence from his statement and the State successfully applied for the witness to be declared a hostile witness. The credibility of the witness was thus compromised.

[8] Mushakwa Likezo Armstrong testified that he and the accused were employed as security guards at Shilimela Security Katima Mulilo. He said that on the morning of 17 March 2020 he collected a firearm and two bullets from the premises of Meatco where another security officer had left it for him to use during his posting. In the afternoon after his shift he returned the firearm and two bullets to the premises of Meatco for the next guard called Michael to use. The accused, who was posted at the Meatco premises, received this firearm and two bullets from the witness. The witness further testified that the accused was issued with a different firearm than the

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<sup>2</sup> Exhibit 1.

one he left there for Michael to use. He identified the firearm left in the care of accused as Exhibit 1. The evidence of this witness was left undisputed.

[9] Michael Mukwaka testified that he is employed at Shilimela Security Katima Mulilo. On 17 March 2020 he was reporting for duty on the night shift at the premises of AMTA. He was told by the supervisor, Ester, to collect the firearm that he was supposed to use from Meatco. On his way to collect the said firearm and about 200 metres from Meatco, he met the accused carrying the said firearm<sup>3</sup> and two bullets. He asked the accused for the firearm however the accused handed him two bullets and proceeded to walk on with the firearm. Michael returned to his posting and after a while decided to report to Ester that he did not receive the firearm from the accused. When he called Ester he was informed that the said firearm was used by the accused to shoot his wife. In cross-examination he testified that the accused was authorised to use the firearm whilst on duty however that the accused was not on duty at the time and was authorized to use a different firearm. He furthermore insisted that they were not allowed to take the issued firearms home. It was put to him that the accused handed him the bullets as well as the firearm which the witness denied.

[10] Ester Mupandeni testified that she is a 'corporal' at the Shilimela Security Company. She confirmed that the accused was stationed at Meatco as security guard during the day shift on 17 March 2020. She explained that the firearm in question<sup>4</sup> was shared between two other guarding sites with the Meatco premises being the point of exchange between the two. She testified that none of the security guards was authorized to take any of the firearms home and was only authorized to use these when on duty.

[11] Ambrosius Kanangure testified that he is the area manager for Shilimela Security Company. On 17 March 2020 at around 19h00 he was driving when he met the accused. The accused was walking with a shotgun. He confronted the accused on why he was walking with the firearm and was told by the accused that he was on his way to drop it at the office. He then received the firearm from the accused and

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<sup>3</sup> Identified as Exhibit 1.

<sup>4</sup> Identified as Exhibit 1.

took it to his office. The said firearm was later handed over to the police. He identified the same as Exhibit 1 before court. He confirmed the previous evidence that security guards are not authorized to carry the firearms when off duty. He explained that two to three bullets are issued to the guards depending on their duty station. During cross-examination it was put to him that the accused was in the process of taking the firearm to the next posting when they met.

[12] Detective Inspector Trust Siseho testified that after the incident was reported on 17 March 2020 he visited the scene. He found a crowd had gathered on the scene including the witness Thomas Ponga. The accused was not present. He confirmed that a baby was found on the scene. Furthermore he confirmed that the deceased was found seated on a plastic chair in a pool of blood. He observed an open wound on her left upper thigh. He furthermore testified that he observed no table in the room. The baby and deceased were transported to the hospital where the deceased was declared dead.

[13] The next morning officer Trust was called by the witness Ambrosius who informed him that the firearm used was in his possession. He collected the firearm from the office of Ambrosius and testified that it is the same as Exhibit 1 before court. He confirmed the evidence of the witness Boswel Monde Lyonga that they travelled to Mafuta location to find the accused however failed to find him there.

[14] Officer Trust further testified that two days after the incident he was informed that the accused is being deported from Zambia. He travelled to the border post and received the accused from custom officials. He then arrested the accused and after his legal rights were explained to him the accused elected to remain silent. On instructions put to him during cross-examination that there were two tables, one plastic and one wooden, in the house of the accused he answered that he observed neither. He also confirmed that he received no bullets from Ambrosius when the firearm was handed to him.

[15] Detective Warrant Officer Mafwila Edward of the Scene of Crime Unit in Katima Mulilo testified that he visited the scene and compiled a photo plan.<sup>5</sup> The

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<sup>5</sup> Exhibit "R".

photos depicts a one room house made of corrugated iron.<sup>6</sup> The deceased is seen in a seated position laying backwards on a black plastic chair with her legs tugged under a light blue plastic chair in front of her. To her left side is a wooden door. She is depicted in a pool of blood. A gaping wound is visible on her left upper thigh.<sup>7</sup> The officer testified that the house consisted of one room which was divided by a curtain into a living and sleeping area. He testified that he observed no table inside the house however added that he did not enter the sleeping area behind the curtain. The officer also attended the autopsy and took pictures thereof which included a photo of pieces of bullet removed from the wound. In cross-examination he conceded to a possible contaminated scene as members of the community arrived before the police at the house.

[16] Doctor Amisi testified that he conducted an autopsy on the body of the deceased. His findings were noted in a post mortem report.<sup>8</sup> The chief post mortem finding was a 10 centimetres by 6 centimetres open wound on the left thigh of the deceased which was approximately 11 centimetres deep. Fragments of the bullet or pellets were removed from the wound. The gunshot caused a rupture of major blood vessels situated in the leg which in turn led to massive blood loss and subsequent organ failure and death. The doctor testified that a rupture of these major blood vessels will lead to death within two to five minutes due to the massive blood loss. It was further his opinion that the shot was fired from a close distance, adding that a piece of plastic from the bullet casing was also found in the wound. During cross-examination he conceded that according to his experience in conducting autopsies the wound is not typical or a common way for causing the death of another.

[17] At this point the State closed its case and the defence brought an application for a discharge in terms of s 174 of the CPA which application was dismissed.<sup>9</sup>

[18] The accused testified confirming that he was employed at the time with the Shilimela Security Company in Katima Mulilo. He testified that on 17 March 2020 he was stationed at the Meatco posting during the day shift. He had with him a shotgun

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<sup>6</sup> Exhibit "R" photo 1.

<sup>7</sup> Exhibit "R" photos 2-7.

<sup>8</sup> Exhibit "J".

<sup>9</sup> *Lionga v S* (CC 14 2022) [2023] NAHCNLD 40 (5 May 2023).

and two bullets. He confirmed that during the afternoon another guard handed to him another shotgun and two bullets meant for a colleague Michael who was guarding the AMTA site. After his shift was over he left the premises with the firearm and two bullets that was meant for Michael to use. On his way he met Michael and handed the firearm and two bullets to him whilst informing him that he will join him later at the AMATA site to take a shower. Michael, who was at the time not in full uniform yet, handed the firearm back to him and told him to drop it off at the AMTA site when he came for his shower. The accused agreed and left with the firearm to his house to collect a change of clothes before his shower.

[19] Upon entering his house he found the deceased in the kitchen area sitting in a plastic chair with their one month old baby sleeping on the floor. He placed the firearm on the table with the barrel facing towards the door without checking if it was loaded. He assumed it was not loaded as they were normally only issued with two bullets per guard which he already handed to Michael. He then went behind the curtain into the sleeping area to collect his clothes. At this stage he heard a gunshot and opened the curtain. He observed that the firearm fell from the table towards the direction where his late wife was sitting. He noticed blood coming from her leg. She was still seated in the chair and did not say anything.

[20] The accused testified that he was in shock and did not know what to do. He then picked up the firearm and left in the direction of the Amta premises to deliver it to Michael. He did not find Michael at the site and proceeded to their main office to leave the firearm there however the office was closed. After reporting to Ester he walked to her house to deliver the firearm to her and was found on his way by Ambrosius.<sup>10</sup> He handed the gun to him and Ambrosius then urged him to inform his elders of the incident. The accused then went to his uncle's homestead situated in Namibia however close to the Zambian border. After telling his uncle, the late Fanuel Simasiku, what happened his uncle said they should return to the scene to see what transpired. On their way they met Officer Titus who then arrested him. The accused testified that all of these happened in one day and denied the evidence that he was arrested two days after the incident after his deportation from Zambia.

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<sup>10</sup> In contradiction to instructions put to the witnesses that the firearm and bullets were returned to one of the guards.



[21] The accused denied meeting the neighbour Rice Cerrin Makena or making any admissions to her regarding the incident. He furthermore denied shooting the deceased saying that he paid 'lobola' for her and that they were in a relationship from 2016 until her death in 2020. Furthermore he testified that based on a recommendation letter from a previous employer he was allowed to take firearms home. He testified that he received training in the safe handling of firearms and with every handing over the firearms were to be opened and inspected. He testified that by placing the firearm on the table it was left in a safe place and convenient for him to reach on his way out.

[22] During cross-examination it was pointed out that the particular firearm that the accused took home was issued to be used by another guard. The accused insisted that he was authorized to use the said firearm however conceded that it was not the case on that particular day. The accused could not offer any explanation as to how the two tables were not seen by any of the witnesses. He insisted that the firearm went off by itself. The accused conceded that he did not call for help after his late wife got shot.

[23] The accused denied that he fled to Zambia after the incident and when confronted with the fact that same was admitted and noted in his evidence during the formal bail application he said the magistrate made an error on the record.

[24] When the accused was confronted with his evidence during the bail application when saying that 'what he did was wrong and a mistake' and that he 'shot his wife', alleged that the State falsely added these words on the court record. The accused furthermore denied the record of proceedings during the bail application in the lower court in that he questioned officer Trust saying that: 'I will not flee, I went to Zambia to inform my family members, I am the one who even told the neighbour to check up on my wife as I had shot her. She was with 2 kids and still alive?'<sup>11</sup>

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<sup>11</sup> Exhibit 'Q' Proceedings recorded on 13 October 2020, page 7, lines 24-25.

[25] When the State pointed out to the accused that in his plea explanation<sup>12</sup> he stated that 'I placed the firearm on the table and the shot went off . . .' which indicated that he was present at the time and different to his evidence that he was behind the curtain, the accused insisted that the two versions are identical. The accused furthermore insisted that he told his version of the gun being placed on the table to the police and in the lower court proceedings.

### The law applicable

[26] It is trite law that the State bears the onus to prove the alleged offenses beyond reasonable doubt, which does not mean proof beyond a shadow of doubt.<sup>13</sup> Referring to the burden of proof the following from *R v Mlambo* 1957 (4) SA 727 (A) at 738 finds application:

'In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused.

An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case.'<sup>14</sup>

[27] 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 lists the elements of the crime of murder as the following: '(a) causing the death (b) of another person (c) unlawfully and (d) intentionally'.<sup>15</sup> A voluntary action or omission, causing the death of another person, qualifies as the cause of death if it is both the factual and legal cause of death.<sup>16</sup>

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<sup>12</sup> Exhibit "A".

<sup>13</sup> *Miller v Minister of Pensions* [1947] 2 All ER 372 (KB).

<sup>14</sup> *S v Van Wyk* 1993 NR 426 (SC).

<sup>15</sup> C.R. Snyman *Criminal Law* 6 ed 2014 at 437.

<sup>16</sup> *Ibid* page 438.

[28] The accused is furthermore charged with a contravention of section 2 of the Arms and Ammunition Act 7 of 1996 as amended (The Act), which prohibits the possession of any firearm unless holding a license to possess such firearm. The section also refers to some exceptions to the offense. The relevant exception in cases when firearms are provided in the context of a security company can be found in section 8 of the Act.

[29] Section 8 of the Act allows for the possession of a firearm by someone other than the licensee<sup>17</sup> with the consent of the licence holder. The relevant circumstances applicable to this matter is provided for under s 8 (2) stating that:

'Any person . . . may, with the consent of the holder of a licence to possess an arm, and under the authority and subject to the conditions of a permit in writing issued by a person acting under the authority of the Inspector General, have such arm in his or her possession for any purpose other than a purpose mentioned in subsection (1), including the rendering of services on behalf of another person, without holding a licence.'

[30] Regarding count 3 the accused is charged with the illegal possession of ammunition in contravention of s 33 of the Act which states that:

' . . . no person shall be in possession of any ammunition unless he or she is in lawful possession of an arm capable of firing that ammunition.'

[31] Whenever the court is tasked with the drawing of inferences from circumstantial evidence, the two 'cardinal rules of logic' which should be considered, as established in *R v Blom*,<sup>18</sup> are:

'(1) The inference sought to be drawn must be consistent with all the proven facts; if it is not, the inference cannot be drawn; (2) The proven facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct'.

[32] Further to that, it was stated in *S v HN*<sup>19</sup> that:

'When dealing with circumstantial evidence, as in the present case, the court must not consider every component in the body of evidence separately and individually in

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<sup>17</sup> Exhibit "N".

<sup>18</sup> *R v Blom* 1939 AD 188 at 202-203.

<sup>19</sup> *S v HN* 2010 (2) NR 429 (HC).

determining what weight should be accorded to it. It is the cumulative effect of all the evidence together that has to be considered when deciding whether the accused's guilt has been proved beyond reasonable doubt. In other words, doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation, but those doubts may be set at rest when it is evaluated again together with all the other available evidence. There is thus no onus on an accused to convince the court of any of the propositions advanced by him and it is for the State to prove the propositions as false beyond reasonable doubt.'

[33] In *S v Engelbrecht*<sup>20</sup>, the position, when a court is confronted with mutually destructive versions, was summarized in the headnote as follows:

'Where in a criminal case the Court is faced with versions by the State and the defence which are mutually destructive, the Court must properly apply its mind. This involves, inter alia, weighing up the probabilities of each version. Where this leads to doubt in the court's mind as to proof of the guilt of the accused, such accused should be given the benefit of the doubt and acquitted'.

[34] In *S v Khoikhoi*<sup>21</sup> it was stated as follows with regard to intention and the inferential reasoning to be adopted:

'Whereas the court rejected the accused's evidence pertaining to the circumstances surrounding the stabbing of the deceased, the accused's intention must be determined by way of inferential reasoning. The test is subjective and by looking at the evidence related to his outward conduct at the time, the type of weapon used, at which aspect of the body it was directed to, the nature of the injuries inflicted and the objective probabilities of the case, the court is able to draw inferences consistent with the proven facts.'

[35] Considering the circumstances of the matter it would be necessary to revisit intention in the form of *dolus eventualis* which C R Snyman defines as follows:

'A person acts with intention in the form of *dolus eventualis* if the commission of the unlawful act or the causing of the unlawful result is not his main aim, but: (a) he subjectively foresees the possibility that, in striving towards his main aim, the unlawful act may be committed or the unlawful result may be caused, and (b) he reconciles himself to this possibility.'<sup>22</sup>

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<sup>20</sup> *S v Engelbrecht* 2001 NR 224 (HC).

<sup>21</sup> *S v Khoikhoi* (CC 01/2014) [2015] NAHCMD 51 (10 March 2015); See also *Shaalukeni v The State* (HC-MD-CRI-APP-CAL-2020/00114) [2021] NAHCMD 406 (10 September 2021).

<sup>22</sup> C.R. Snyman *Criminal Law* 6 ed 2014 at 161.

[36] Snyman proceed to explain the two requirements for the existence of *dolus eventualis* describing the first as the cognitive part of the test and the second as the conative (or volitional) part of the test.<sup>23</sup> He adds that ‘there is almost never direct evidence of the existence of the second (conative) part of the test to determine *dolus eventualis*. A court almost always bases its finding on whether the second part of the test has been complied with on deductions or inferences from the facts.’<sup>24</sup>

#### Applying the law to the factual findings

[37] The undisputed evidence before this court is that the accused was in a domestic relation with the deceased being his wife. It is also undisputed that on the date in question the deceased died as a result of a gunshot fired from a firearm that the accused took home. The version of the accused is that the firearm went off by itself and that it was a tragic accident. Regarding counts 2 and 3, the accused’s version is that he had the necessary authorization to be in possession of the firearm and from that it follows that he was also allowed to possess the said ammunition. If found to be reasonably possibly true the version of the accused should be accepted which would result in him being found not guilty.

[38] Starting with the allegation of the accused that the court proceedings held in the lower court during the bail application were incorrect as so far as the record keeping of his evidence and that the State afterwards inserted or changed the record. The defence of the accused was unknown to the Magistrate and the State up to when he pleaded in this court. By then all the documentation were prepared and disclosed to the defence. Therefore this allegation can safely be rejected as false as it is unfounded.

[39] Turning to the version of the accused that he placed the firearm, unaware that it was loaded, on the kitchen table. Firstly one would expect this version of an accident to be disclosed at the earliest of opportunities for the police to investigate same. This version however only featured during the defence case when the

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<sup>23</sup> C.R. Snyman *Criminal Law* 6 ed 2014 at 162.

<sup>24</sup> C.R. Snyman *Criminal Law* 6 ed 2014 at 164.

accused testified. It also appears that the version changed throughout as the case progressed. The latest version, that the gun went off whilst he was in a different area of the house, came therefore as a surprise. The plea explanation mentioned that he placed the gun on the table and the shot went off hinting that the placing of the firearm and the firing of the shot happened simultaneously. That version would also have made more sense than the gun going off by itself whilst mid-air. Be that as it may, there was no such version given to the police upon his arrest as he elected to remain silent. Furthermore the version did not feature when he gave evidence in his bail application or when he gave a provisional plea in terms of S 119 of the CPA on the charge of murder.

[40] The 'table version' is further not supported by witnesses as none of them saw any table being present on the scene being it wooden or plastic. The deceased was found with a plastic chair positioned between her legs and there is therefore no room for a table to have been in front of her. It is highly unlikely that a bystander would steal two tables whilst leaving all the plastic chairs and then went further to reposition the chairs. It appears that this version of the accused came as an afterthought when he realised that the wound suffered to the upper thigh of the deceased would not have been possible if the gun was fired whilst on the table. In that scenario the shot would then have struck a higher part of her body as a table is generally higher than the level of where the wound was found. The version that the gun flew from the table and went of mid-air defies logic and is highly unlikely.

[41] The behaviour of the accused afterwards does little to add to his version that this was an accident. On the contrary he left the scene with the weapon, leaving the deceased to bleed to death and with a one month old baby on the floor. Thereafter he fled to a different country and was only arrested two days later after his deportation. The version presented by the accused can thus safely be rejected as false beyond any reasonable doubt.

[42] The State having the onus to prove the charges beyond reasonable doubt called various witnesses in support of the allegations of murder, unlawful possession of a firearm and unlawful possession of ammunition. One of the witnesses was

declared a hostile witness as he deviated from his statement. His credibility therefor is questionable and his evidence will only be accepted if corroborated by others.

[43] Starting with the count of the illegal possession of a firearm and the unlawful possession of ammunition flowing from that. It is the evidence of all witnesses employed at the Security Company that they had authorization to use the firearms when on duty and that they were not allowed to take firearms home. The evidence from Michael is that the accused did not hand the firearm intended for him over when they met. The accused had access to four bullets on that day of which only two were recovered. At least one bullet was loaded in the firearm which he took home. The accused himself conceded during cross-examination that he was not authorized to be in possession of the said firearm at his house on that day. It follows that he was also not authorized to have any ammunition with him. I am therefore satisfied that the State proved the charges in counts 2 and 3 beyond reasonable doubt.

[44] The evidence regarding the count of murder is circumstantial and will require this court to draw inferences from the proven facts. The evidence of the neighbour Rice Makena that she spoke to the accused after the incident was not challenged when she testified. The only part of her evidence that was challenged was the admission made by the accused that he shot his wife. The same admissions made by the accused was further corroborated by the brother of the accused Boswel Lyonga. Finally the accused when he testified in his bail application admitted speaking to his neighbour and repeated these statements of being responsible for shooting his wife labelling it as a mistake, rituals or witchcraft.<sup>25</sup> Both the neighbour and brother of the accused corroborated each other on the reason for the shooting being messages found by the accused on the phone of his late wife. The unsolicited spontaneous admissions of the accused that he shot his wife because of messages found on her phone appears to be reliable evidence.<sup>26</sup> His behaviour after the incident as discussed already is a further indication of his guilt. I am therefor satisfied that the State proved beyond reasonable doubt that the accused committed the offense of murder.

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<sup>25</sup> Exhibit "Q" proceedings held on 13 October 2020, page 2 lines 15 to 27.

<sup>26</sup> *S v Boois* (CC3/2022) [2022] NAHCMD 532 (5 October 2022).

[45] The last aspect to be determined is the form of intention that the crime of murder was committed with. The location of the wound on the upper thigh of the deceased was in close proximity of her private parts. The doctor who had many years of experience doing autopsies was of the opinion that this was not a typical wound often found in murder cases. His opinion was furthermore that the shot was fired at close range so much so that parts of the casing was also present in the wound together with the pellets.

[46] The crime was in all probability committed out of jealous anger due to the messages found on the phone of the deceased. The location of the wound in close proximity to the private parts of the deceased is an indication that in all probability the main aim of the accused was to punish the deceased. Having been trained in the use of firearms and with a few years' experience of working as a security guard it follows that he was also aware that a shot with the said firearm and at close range can possibly cause a fatal injury. Even though it may not have been the accused's main aim, he surely reconciled himself with that fact. Therefore the State proved murder with intent in the form of *dolus eventualis*.

#### Order

[47] In the result the court finds as follows

1. Count 1: Murder (read with the provisions of the Combating of Domestic Violence Act 4 of 2003) - Guilty (*dolus eventualis*).
2. Count 2: Contravening section 2 of the Arms and Ammunition Act 7 of 1996: Possession of a firearm without a license – Guilty.
3. Count 3: Contravening section 33 of the Arms and Ammunition Act 7 of 1993: Unlawful possession of ammunition – Guilty.



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E.E. KESSLAU  
JUDGE

## APPEARANCES

FOR THE STATE: V T Shigwedha  
Office of the Prosecutor - General, Oshakati

FOR THE ACCUSED: L Tjiveze  
Directorate of Legal Aid, Rundu