

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 10/2022

In the matter between:

**THE STATE**

and

**PETRUS ABUSEMA**

**ACCUSED**

**Neutral citation:** *S v Abusema* (CC 10/2022) [2023] NAHCMD 344 (21 June 2023)

**Coram:** D USIKU J

**Heard:** 20-21 February 2023: 13–16 March 2023 and 24 April 2023.

**Delivered:** 21 June 2023

**Flynote:** Criminal law – Murder – *Dolus eventualis* – Committed in a domestic setting – Self-defence – Accused exceeded the bounds of self-defence – Court satisfied that there is sufficient evidence present to prove that the accused caused the death of the deceased as he ought to have reasonably foreseen that his conduct of strangling the deceased on her neck would cause death and reconciled himself with such possibility.

**Summary:** The accused stood charged with the crime of murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

Accused pleaded not guilty to the charge and opted to remain silent stating, that the detail of his defence will become apparent in the cause of the trial.

At the commencement of the trial, several documentations were received into evidence by agreement between the state and the defence.

*Held* - the amount of force used in the attack was too severe as it interrupted the flow of oxygen to the deceased's brain resulting in the deceased's death.

*Held further* - there is sufficient evidence to prove that the accused had an intention to kill the deceased in the form of *dolus eventualis*.

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### ORDER

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Accused is found guilty on a charge of murder in the form of *dolus eventualis*.

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### JUDGEMENT

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D Usiku J:

Introduction:

[1] Accused is facing charges of murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

[2] He pleaded not guilty to the charges and opted to remain silent. Counsel for the defence contended that accused's defence of private defence would become apparent during the course of the trial.

[3] At the commencement of the trial, several documents were handed in by agreement between the state and the defence. These are:

(a) Warning statement, Exhibit 'A';

(b) Confession in terms of s 217 of the Criminal Procedure Act 51 of 1977, Exhibit 'B';

- (c) Certified copy of deceased's ID, Exhibit 'C';
- (d) Certified copy of deceased's death certificate, Exhibit 'D';
- (e) Notes on the pointing out of the alleged scene of crime, Exhibit 'E';
- (f) Photos on the pointing out, Exhibit 'F';
- (g) Report on a medico legal post mortem examination, Exhibit 'G';
- (h) Photo plan compiled by D.W.O Arikumbi, Exhibit 'H';
- (i) The pre-trial memorandum, Exhibit 'J'; and
- (j) Reply to the pre-trial memorandum, Exhibit 'K'.

#### The state's case

[4] The state led evidence through several witnesses. Mr Andries Guim holds a rank of Detective Chief Inspector in Nampol, and is stationed at Gobabis Police Station. He testified that, on 18 July 2020, he received information about a case of murder. Alongside with Detective Chief Inspector Jantjies, they drove to Kanaan B, a location in Gobabis. Upon their arrival at Kanaan B at around 16h00, they were directed by members of the scene of crime, to the scene. Inspector Guim started preliminary investigations by asking the father of the deceased what transpired. The deceased was identified as Katrina Hendricks.

[5] Guim went into a corrugated zinc house, in which the deceased's body was lying. He was informed that, the manner in which the body was lying was not how it was discovered. He observed blood on the deceased's mouth and nose. He pulled up the t-shirt the deceased was wearing to see whether the deceased had any sign of assault. He did not observe any sign of assault. Inspector Guim, further observed that the deceased's private parts were wet, and had bloodstains on it. The deceased wore socks.

[6] After Guim had observed the body, it was taken to the police mortuary. Later on, information was received that on the night of the incident, three ladies were drinking a homebrew with the deceased, whereafter each of the ladies left for their homes. Inspector Guim, also learned that during the afternoon hours of 17 July 2020, a male person was seen going into the house of the deceased. This male

person was known to be a new boyfriend of the deceased and was known by a nickname 'Ouboet'.

[7] After establishing the deceased's boyfriend's name, Guim started to search for him. He discovered where he was residing and went to look for him, but was unable to trace him. On the night of 20 July 2020 around 23h00 to 00h00, Inspector Guim again went to look for him. He found the house locked and started calling out the name 'Ouboet'. He introduced himself by his rank, after which the male person responded and informed him that he was coming. The male person is now the accused person before court.

[8] Guim informed the accused the reason for his visit and further informed him of his legal rights. Thereafter, he was loaded on the police vehicle and driven to the police station where he was detained.

[9] The next morning, 21 July 2020, Guim charged the accused and obtained his warning statement. He informed him of his right to remain silent, his right to engage a private lawyer, his right to a legal aid lawyer, and his right to conduct his own defence. The same rights were explained to the accused in Damara>Nama which language Guim and the accused understood fluently. When accused was asked by Guim whether he understood his rights, he confirmed that he understood his rights. He indicated that, he will apply for a legal aid lawyer, to assist him during court proceedings. (my emphasis)

[10] A warning statement was taken from the accused and after they were done, it was read back to him. Accused confirmed his warning statement and thereafter appended his signature.

[11] Having recorded the warning statement from the accused, Guim enquired from the accused, whether he was able to narrate his statement to an independent person. Accused answered in the affirmative. Arrangements were then made to meet magistrate Iyambo on the 22 July 2020, who recorded a confession from the accused person.

[12] During cross-examination, it was put to Guim that he did not call out the accused. However, he maintained that he called out the name 'Ouboet' and accused person responded.

[13] Guim testified further that accused did not deny to have known the deceased by the name Katrina. He also denied asking the accused where the deceased was, but only asked him whether he knew the deceased who was said to be his new girlfriend.

[14] A question was posed to Guim whether, he had asked the accused when last he saw the deceased, which he confirmed. Accused then explained to him what transpired on 17 July 2020.

[15] Guim maintained that accused related to him that he got on his knees and strangled the deceased, which he recorded.

[16] When it was put to the witness that he did not inform the accused that he was under arrest, and that he only asked the accused to accompany him to the police station, Guim, maintained that he informed the accused of his legal rights, and thereafter told him that he was under arrest. He took the accused to the police station where he was detained.

[17] It was further put to Guim that, the deceased's father did not know the accused, to which he responded in the affirmative.

[18] Guim vehemently denied that the warning statement was recorded on the day he picked up the accused from his home and that he merely asked the accused to sign it. He maintained that the warning statement was obtained on the day when the accused person was charged.

[19] Guim, further denied to have requested the accused to make a confession in front of a magistrate. It was the accused who opted to relate what had transpired, and did so willingly before a magistrate.

[20] It was further put to Guim that he coerced the accused person to make a confession in exchange for him to be granted bail in the amount of N\$1000, which Guim categorically denied.

[21] Guim further denied to have duly influenced the accused by showing him a docket where a person had been charged with a similar case, in which that person was given harsh punishment. He denied having told the accused that, he will make things smooth for him, in order to avoid harsh punishment, if he agrees to make a confession before a magistrate.

[22] Mr Eden Iyambo is a magistrate at Gobabis Magistrate's Court. He testified that on 22 July 2020 that accused was brought to his chambers by Guim to take down his confession. The parties present were himself, Mr Nunuheb the interpreter, and the accused person. Accused appeared calm and had no visible injuries.

[23] Mr Iyambo further testified that, during the proceedings, no other person spoke to the accused person before he took the confession. He explained the accused's legal rights. The right to be represented by a lawyer of his choice at his own cost, and that if he cannot afford a lawyer, he can apply for a legal aid lawyer. The accused was also informed that he is not under any obligation to engage a lawyer. He is at liberty to make a statement without the presence of a lawyer, whereafter accused elected to proceed without the presence of a lawyer.

[24] Mr Iyambo explained the procedure before a confession is taken. That he was in the presence of the magistrate and that he should not fear anything. That he can speak frankly and that should it be necessary, protection can be afforded to him against any irregularity. The accused was informed of his right to legal representation before making any statement. That he has a right to be represented by a lawyer of his choice at his own cost and if he cannot afford one, he may apply for a legal aid lawyer. He is also at liberty to make a statement without the presence of a legal representative. Mr Iyambo further explained that when he questioned the accused whether he understood, accused responded in the affirmative. Accused thereafter elected to conduct his own defence indicating that he was ready to speak.

[25] He warned the accused that he was not obliged to make any statement and if he opts to make a statement, it will be reduced into writing and may later be used as evidence against him. Accused maintained that he understood and elected to make a statement.

[26] Mr Iyambo testified that, accused informed him that he was not assaulted or threatened to make a statement. Nor was he threatened that action will be taken against him should he decline to make a statement.

[27] During the proceedings, Mr Iyambo observed that the accused had a scratch on the face just below his left eye, which the accused explained that it was occasioned as a result of a fight he had with a man from the location.

[28] According to Mr Iyambo, accused narrated to him that on 15 July 2020, he had an argument with his girlfriend, thereafter he took his clothes and went to his friend's house. He slept at his friend's house and the next day, reported for work. Whilst at work, a group of ladies including the deceased were dropped off at his workplace. On the following day he went to the deceased's place. The deceased questioned him about an unsaved number she saw in his phone. He responded that he did not know. He thereafter left for his grandmother's house. Again when he returned to the deceased's place, she again asked him about the unsaved number. He told her that the number belongs to one Fiola, whereafter he left the house out of frustration.

[29] On 17 July 2020, the accused returned from work, and went to drink with his friends. He thereafter went to the deceased's place and found the deceased with her child. She informed him that she was taking the child to her mother. The deceased returned and they retired to bed. In the meantime, a text message came through her phone, asking her when she was going to the memorial service. She did not reply. Another text message came in saying, 'I am standing in front of your house, come out'. The deceased stood up and went outside leaving the accused in bed. She returned and joined the accused in bed after which they had sexual intercourse. They remained in bed whilst accused was busy on his phone, the deceased grabbed it from him. She in return slapped him on the side of his face. The accused turned around and grabbed the deceased by the neck, threw her down on the bed and threatened to assault her. Whereafter, he took his sandals and left.

[30] After Mr Iyambo recorded the statement, he read it back to the accused through the interpreter. Accused confirmed the content thereof and appended his signature.

[31] During cross examination, Mr Iyambo reiterated that the accused was brought to his chambers by Guim, and not by court orderlies as claimed by counsel for the accused. He also denied a version that Chief Inspector Guim was not part of the process.

[32] On the issue that accused person was forced by Guim to make the confession, Mr Iyambo refuted such allegations, pointing out that accused was not

coerced into making the confession. He was not aware of the claim that accused was promised bail by Guim.

[33] It was put to the witness that the accused grabbed the deceased by the neck after the deceased attacked him. Mr Iyambo disputed that version maintaining that accused informed him that he grabbed the deceased by the neck after she slapped him.

[34] Mr Iyambo maintained that, the content of the confession constitutes what was narrated to him by the accused.

[35] Ms Betta Kau the biological mother of the deceased testified. On 18 July 2020, she was not feeling well and did not wake up early. Her husband woke up early to do laundry. Whilst she was sleeping, her husband told her to go and check on the deceased. It was already afternoon when she woke up to hang a shirt on the fence. She noticed the deceased's room open. She entered the deceased's room and observed someone on the bed whereafter she called her several times. She did not respond. She got closer to the bed, and observed the deceased lying down on her stomach facing on the ground. Her both arms were twisted behind her body. Blood was coming out from her nose and she had marks on her face. She touched her forehead and feet and found them cold.

[36] Thereafter, she left the room to request her husband to go and look at the deceased. She informed him about her observations and started to cry.

[37] The deceased's father called the police and their neighbours. The police arrived shortly, and entered the room in which the deceased was lying on the bed. They remained outside.

[38] Ms Kau last saw her daughter on a Friday, after she knocked off from work. She spoke to her whilst she was in bed, enquiring why she was in bed. She informed the deceased that she visited the clinic and was informed that her blood pressure was high. She advised the deceased not to go out, but rather, to take bath and sleep. Nevertheless, the deceased went out, but did not stay long.

[39] Ms Kau, identified the deceased's identity card as well as her death certificate which were handed in as exhibits before court. According to her, the deceased's death has left an impact on their family.



[40] During cross examination, Ms Kau maintained that she found the deceased lying on her stomach on the bed with her face downwards. She disputed the allegations that the deceased was lying on her back. No one touched the deceased's body until the arrival of the police.

[41] Mr Ludwig Nunuheb, is a senior legal court interpreter and has been in that position for the past 20 years. He is stationed at Gobabis Magistrate's Court. He met the accused person during 2020, when he was brought to Gobabis Magistrate's Court by Guim to give a confession to a magistrate.

[42] He further testified that his role was to interpret to the accused person from khoe-khoegowab to English and vice versa.

[43] The magistrate welcomed the accused person and introduced himself to him and the interpreter. He explained the accused's legal rights in detail, whereafter accused informed the magistrate that he will conduct his own defence. During the proceedings, accused appeared normal in a sober state, and had no visible injuries. He was responsive and responded in khoe-khoegowab language which both understood fluently. There was no misunderstanding between them. Accused related what transpired.

[44] The accused related to the magistrate what had transpired as the magistrate was recording his version. After the recording of the confession, it was read back to the accused person paragraph by paragraph in khoe-khoegowab language. Accused confirmed the content of the confession and thereafter signed same.

[45] During cross-examination, it was put to the witness that he did not read back the confession to the accused in its entirety, which claim was refuted by the witness.

[46] Chief Inspector Gariseb testified that he was requested by detective Chief Inspector Jantjies to attend to an alleged murder scene for the purposes of the pointing out on July 2020. He agreed to attend to the pointing out of the alleged crime scene.

[47] On the same date, at about 09h50 during the morning hours, Guim arrived with a suspect. He introduced the suspect as Petrus Abusema. He further informed him that the suspect wanted to do a pointing out of the alleged crime scene. The suspect is the accused before court.

[48] Gariseb introduced himself to the accused and showed him his appointment certificate. He further explained to him his legal rights. The right to remain silent and further that anything that accused says or points out, will be recorded and photographed, and may be used as evidence against him before a court of law. He also informed him of his right to legal representation by a lawyer of his own choice at his own cost, if he was able to afford one, and if not he may apply for a legal aid lawyer.

[49] Gariseb further testified that after he had explained the accused's legal rights, he asked him whether he understood what was explained to him. Accused confirmed that he understood. They spoke in the Damara/ Nama language, which they both spoke fluently, because it is their mother tongue. The accused offered to point out the alleged crime scene and indicated to him that he will apply for a legal aid lawyer at a later stage.

[50] His observations were that the accused appeared to be sober, in his full senses, normal and that he was not intimidated nor was he in any way forced to do the pointing out.

[51] Gariseb further testified that accused was not assaulted, threatened or influenced by anyone to point out the alleged crime scene. He did not have any injury. This version corroborates Mr Nunuheb's testimony.

[52] The officers present when they drove to the alleged crime scene, were Gariseb, Detective Sergeant Hauseb, Detective Sergeant Bernatus, their driver, and the accused person. The driver remained in the vehicle as the rest of the officers went to witness the alleged crime scene.

[53] Gariseb's role was to ensure that there was no communication between the driver and the photographer as they drove to the alleged crime scene. The only communication, was when the accused was pointing out the alleged crime scene.

[54] Again, the accused's legal rights were explained to him. He was warned, whereafter, he indicated that he will proceed with the pointing out. Detective Sergeant Hauseb took pictures of the pointing out. Whereafter they returned to the police station. Upon arrival at the police station, Gariseb read back the notes on the pointing out to the accused, which he confirmed and signed. A photo plan of the alleged pointing out of the crime scene was thereafter compiled.

[55] During cross-examination, Gariseb confirmed that he interpreted the pointing out to the accused and he had no problem with the manner the pointing out was conducted.

[56] He refuted a claim by the accused that he never explained his legal rights. He explained further that the accused informed him that he will apply for a legal aid lawyer at a later stage.

[57] Gariseb was not aware about Guim, having promised the accused bail. The accused also informed him that he was not influenced or threatened by anyone prior to him making the pointing out of the alleged crime scene.

[58] Dr Leonard Kabongo, is a chief medical officer, employed by the Ministry of Health and Social Services. He is currently based in Erongo Region. During 2020, he was stationed at Gobabis State Hospital.

[59] Dr Kabongo conducted the post-mortem examination on the deceased's body and compiled a medical report. The Dr's findings were blood clots on the side of the deceased's wind pipe. Her chest was filled with air, which indicated lack of oxygen. The deceased's heart and lungs stopped functioning as a result of lack of oxygen. He also found a whitish discharge in the deceased's vagina.

[60] According to him, death would generally occur within a very short time if there is no supply of oxygen to the brain. The heart will stop immediately. The deceased had blue lips and nails which suggested that she experienced lack of oxygen. The cause of death of the deceased was as a result of cardiopulmonary arrest due to hypoxia caused by possible asphyxiation.

[61] Counsel for the state submitted that the accused denied to have had the intention to cause the death of the deceased when he grabbed her by the neck. He admitted to have pressed the deceased by the neck. This version was corroborated by the magistrate who recorded the confession from the accused.

[62] Accused denied having known that the deceased died. He only learned of the deceased's death when inspector Guim informed him.

[63] Counsel for the state further relied on the doctor's evidence. The doctor who conducted the post-mortem examination on the body of the deceased, testified that death would occur within a very short time if there is an interruption in the supply of

oxygen to the brain, because the heart will stop immediately. The doctor found blue lips and nails which suggested that the deceased experienced lack of oxygen. His evidence remained undisputed.

[64] Furthermore, counsel for the state submitted that there was no proportionality between the attack by the accused vis-à-vis the deceased's action towards him. The deceased merely slapped accused on the cheek, which was insignificant. There was no imminent threat, nor was the accused in danger. The strangling of the deceased to death as a result of a mere slap on the cheek, exceeded the bounds of private defence.

[65] Although accused testified that he had no intention to cause the deceased's death, the area where the attack was directed, which is a neck, is very sensitive. Accused ought to have foreseen that when pressure is applied to that area, it can lead to death. Counsel submitted that accused had the necessary *mens rea* to kill the deceased.

[66] It is common cause that there were no eye witnesses. The court had to rely on circumstantial evidence. The deceased and accused were in a romantic relationship. The accused does not dispute to have been present on the scene, neither did he deny to have grabbed the deceased by the neck. Whilst in the presence of the deceased, accused confirmed to have observed the deceased exhaling. That would appear to have been the deceased last breath before the accused's exit.

[67] In conclusion, the state submitted that accused be found guilty of murder. In the same light, it was the state's submissions that that the accused's version could not be reasonably possibly true. Accused's conduct during and after the attack was improbable. He made no efforts to see the deceased after the events, considering the fact that he was still involved in a romantic relationship with the deceased at the time.

#### Defence's Case

[68] At the closure of the state's case, accused testified. He was the only witness for defence.

[69] His testimony is that on 17 July 2020, he was at his grandmother's house. They gathered there to prepare for his grandmother's funeral. After the gathering, the accused, his brother, and his ex-girlfriend left. His brother went to his place, whilst he and his ex-girlfriend went to his house. Upon arrival at his house, his ex-girlfriend took some items and left.

[70] Accused remained at his house until midnight after which he locked his house and went to the deceased house. Upon arrival at the deceased's house he sat on the bed whilst the deceased was with her daughter. She informed him that she was taking her daughter to her mother. She later on returned and they went to bed.

[71] Whilst they were in bed, the deceased received a text message from an unknown number asking her whether she arrived at home. The deceased did not respond to the text message. Again a second text message came through allegedly saying 'I am standing in front of your house'. It was after the second text message that the deceased stood up and went outside. Accused remained in bed. When the deceased returned, accused noticed that she did not have her cell phone. She informed him that she left her phone on the charger whilst escorting someone half way.

[72] The deceased joined the accused in bed and they had sexual intercourse. After they were done they each dressed up and continued lying in bed. In the meantime, accused took his phone and started browsing through it. The deceased confronted him asking him about the person he was chatting to. She grabbed his cell phone from him and the accused in turn grabbed it back from her.

[73] A physical confrontation occurred between them whereafter accused warned the deceased to stop, threatening to assault her. The deceased stopped.

[74] Accused further testified that, he held the deceased by the neck, in order to stop her from fighting him. She was still beating him on his chest.

[75] It is further the accused's testimony that when he left the deceased's room, she was still breathing, he confirmed that the deceased gave a deep exhale in his presence. He cannot however tell with certainty whether he left her alive or not.

[76] After the alleged date of the incident, his ex-girlfriend joined him at his house and they left for his grandmother's house, for burial arrangements. The accused later returned to his house, took a shower and went back to his grandmother's house.

[77] The accused confirmed to have received information that the police were looking for him. He decided to stay at his house, hoping that the police will come to him. Later in the evening, whilst sleeping, he heard a knock at his door and opened, whereafter he saw chief inspector Guim who introduced himself to him and asked him to identify himself.

[78] Guim asked him about the deceased's whereabouts. He informed him that he did not know where the deceased was. Guim informed him about the deceased's death and asked whether he was aware of it.

[79] It is accused's further evidence that Inspector Guim promised to give him bail in the amount of N\$1000 if he makes a confession. He agreed assuming that Guim, wanted him to confess to the deceased's murder.

[80] The accused further testified that whilst in the office, photographs were taken. He was handed a warning statement and was instructed by Guim to sign it. It was never explained to him what he was signing, but merely asked whether he needed legal representation, whereafter he responded that he will apply for legal aid. Neither was he afforded the opportunity to apply for a legal aid lawyer.

[81] Accused also testified that whilst in the cells he was handed another document for the purposes of the pointing out of the crime scene, and was asked by Guim to go and point out the house where he had been on a Friday evening.

[82] Accused denied to have informed Inspector Gariseb that he throttled the deceased. Claiming that he only held her by the neck. He confirmed to have been the last person to be seen with the deceased, and feels bad and guilty for what happened to her.

[83] During cross examination, accused denied to have been in a romantic relationship with the deceased, maintaining that the deceased was only his "side chick".

[84] According to him, the deceased only slapped him once on his left cheek and did not sustain any injury.

[85] When confronted about how long he held the deceased by the neck, accused responded that he could not exactly remember how long, because he did not keep track of the time. All he remembers was that he did not hold her for too long.

[86] When it was put to the accused that, when the deceased exhaled that was her last breath, and she died thereafter, accused could not confirm whether it was indeed her last breath.

[87] The accused was further confronted about why he did not visit the deceased the following day, and maintained that he was busy with his grandmother's burial arrangements. He denied that it was because of the deceased's death.

[88] It was the state's contention that the cause of death was due to lack of oxygen, caused by external compression, and that the accused was the only person who held the deceased by the neck. Accused could not offer any explanation.

[89] The accused maintained during his testimony that his life was in danger and claims that it was not his intention to cause the deceased's death, because he did not use that much force.

[90] According to the accused his reason for giving a confession was because he was promised bail by Guim. However, when confronted about that version, he claimed he did not disclose it to the magistrate who took the confession, because Guim had advised him not to do so. That version was however not put to Guim, when he testified.

[91] It was further put to the accused that he feels guilty for killing the deceased, to which he responded that he felt guilty only for having grabbed the deceased.

[92] In their submissions, the defence relied on private defence. Accused testified that the deceased grabbed his cell phone from his hand, whereafter she attacked him by slapping him. He reacted by grabbing the deceased by the neck and pressed her down as she was fighting him. Accused's intention when he held the deceased by the neck whilst pushing her down, was for the deceased to stop fighting him. Counsel referred to *S v Uulenga*,<sup>1</sup> where the court reinstated the requirement for private defence as follows:

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<sup>1</sup> *S v Uulenga* (CC 01/2017) [2021] NAHCNLD 15 (24 February 2021).

'In order for the accused to succeed with private defence, the following requirements must be met:

- a. Attack must be unlawful;
- b. The attack must be directed at an interest legally deserving of protection;
- c. Attack must be imminent but not yet completed.'

[93] Counsel for the defence further submitted that, there was an unlawful attack directed to the accused by the deceased and that the attack was in progress at the time when he pressed the deceased down whilst holding her by the neck. He was therefore entitled to defend himself or take steps to ward off the deceased's attack.

[94] Furthermore, counsel for the defence submitted that accused's uncontradicted version fulfils the first leg requirements of private defence.

[95] Whether the accused exceeded the bounds of self defence, counsel submitted that the accused did not only press the deceased down, but he was telling her to stop attacking him at the time that he pressed her down. To that end counsel submitted that it is consistent with accused's version of not having had the intention to kill the deceased.

[96] In conclusion, counsel for the defence submitted that the evidence of the state did not prove the existence of a confession upon which a competent court will convict. He further submitted that the court is faced with the accused consistent and uncontradicted version which is reasonably possibly true. On this score, counsel referred to the test in *S v NH*,<sup>2</sup> citing the principle held therein:

'Whether the state's case has been proved beyond reasonable doubt when measured against the accused's conflicting version'.

[97] Counsel for the defence prayed that the accused be found not guilty and be acquitted on the charges preferred against him.

### Discussion

[98] The court will now evaluate the evidence presented before it. There is no dispute that the deceased's body was discovered inside her room on 18 July 2020

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<sup>2</sup> *S v NH* 2010 (2) NR 429 (HC) para 113-114.



by the deceased's mother, who immediately reported the matter to the Namibian Police, which led the police launching an investigation surrounding the deceased's death.

[99] Chief Inspector Guim was able to gather information about a male person having been seen going into the house of the deceased during the afternoon hours on 17 July 2020. The male person was known to be the deceased's new boyfriend and was known by the nickname "Ouboet".

[100] Having established the deceased's alleged new boyfriend, Guim started to search for him. He could not find him immediately, but was later on traced to his house after a visit there on the night of 20 July 2020.

[101] The accused was arrested and charged on 21 July 2020. During the police interrogation, the accused offered freely to narrate his version to an independent person, after which he was taken before a magistrate and gave a confession after his rights were fully explained to him.

[102] It is common cause that there was no eye witnesses who saw the deceased being attacked by the accused person. The state therefore had to rely on circumstantial evidence.

[103] In dealing with the reliance of a conviction of an accused on the basis of circumstantial evidence, our courts have invariably adopted and religiously follow the two cardinal principles laid down in *R v Blom*,<sup>3</sup> where the learned J Watermeyer JA (as he then was) stated, that in reasoning by inference there are two cardinal rules of logic which cannot be ignored:

(a) 'The inference sought to be drawn must be consistent with all proven facts. If not, the inference cannot be drawn;

(b) The proven facts should be such that they exclude every reasonable inference from them save the ones to be drawn.

If they do not exclude other reasonable inferences, then, there must be a doubt whether the inference sought to be drawn is correct.'

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<sup>3</sup> *R v Blom* 1939 AD 188 at 202.

[104] The deceased was found dead in her room on 18 July 2020 by her mother. The accused does not deny to have been in the deceased's company on the night of 18 July 2020. Furthermore, it has been confirmed by the accused himself when he testified that there was a physical confrontation between himself and the deceased as a result of a text message that came through on his cell phone, whereby the deceased confronted him about the person he was chatting with on his phone. That confrontation led to the deceased grabbing the accused's cell phone and the latter in turn grabbing it back from the deceased.

[105] The defence conceded that the accused held the deceased by the neck in order to stop her from fighting him as she was still beating him on his chest.

[106] According to the doctor who conducted a post-mortem examination on the deceased's body, the cause of death was found to have been as a result of cardiopulmonary arrest asphyxiation, which the doctor explained to be as a result of lack of oxygen caused by external compression. The accused was the only person who admitted to have held the deceased by the neck during their physical confrontation. Although he testified that he did not use much force, the doctor's testimony was that generally death would ensure within a very short time if there is lack of supply of oxygen to the brain, because the heart will stop functioning almost immediately.

[107] The doctor further found that the deceased's lips and nails had turned blue which suggest that she experienced lack of oxygen to her brain resulting in death.

[108] The accused immediately disappeared from the deceased's room during the night of the incident and did not return the following morning until he was arrested on 20 July 2020, almost two days after the death of the deceased.

[109] The court considered the totality of the evidence in order to ascertain whether all the particular prerequisites for the crime charged are present and whether the guilt of the accused has been proven beyond a reasonable doubt, including the evidence by the accused person whether an inference of guilt may be drawn.

[110] It is common cause that the accused was arrested after information was received that he was seen the previous evening at the residence of the deceased.

The accused on his part does not dispute to have been at the deceased's residence on the night in question. He admitted to have been involved in a physical confrontation with the deceased, after the latter had confronted him about a text message that came through on his cell phone.

[111] In addition to the physical confrontation the accused did not place in dispute the fact that he grabbed the deceased by the neck after she had beaten him on his chest during their physical confrontation. As alluded to, there were no eye witnesses, and the court has to rely on circumstantial evidence. It is trite that when dealing with circumstantial evidence, as in this case, the court must not consider every component in the body of evidence separately and individually in determining what weight should be accorded to it.<sup>4</sup>

[112] It is the cumulative effect of all the evidence together that has to be considered when deciding whether the accused's guilt has been proven beyond reasonable doubt. In other words, doubt 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.<sup>5</sup>

[113] In other words, a court does not base its conclusion, whether it be to convict or to acquit on only part of the evidence, what needs to be borne in mind, however is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence, some of the evidence might be found to be false, or it might be found to be unreliable and some of it might be found to be only possibly true or unreliable, but none of it may simply be ignored.<sup>6</sup>

[114] Asphyxiation is defined as a state or process of being deprived of oxygen which can result in unconsciousness or death/suffocation. The accused admitted to have held the deceased on her neck, a vulnerable part of a human body. The accused's conduct to strangle the deceased leading to the interruption of the respiratory system caused the deceased's death.

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<sup>4</sup> *S v Thomas and 4 others* CA 123/2003 (23 May 2007).

<sup>5</sup> *S v Hadebe and others* 1998 (1) SACR 422 SCA at 426 E-G.

<sup>6</sup> *S v Hadebe and others* 1998 (1) SACR 422 SCA.

[115] However, whereas there appeared to be no direct evidence to suggest that the accused had direct intention to cause the deceased's death, he ought to have foreseen or to have anticipated the potential or actual result of his actions.

[116] In *S v van Wyk*,<sup>7</sup> the court held as follows:

'In order to prove the requisite intention to kill, it is not necessary to establish that the accused desired the death of the deceased or was certain that death would ensue from the assault of the deceased. It is sufficient if the accused subjectively considers that death is a possible consequence of his unlawful actions but proceeds with such actions reckless as to whether death will ensue or not or as it is sometimes stated reconciles himself with the possibility that death may ensure'

[117] Accordingly, the accused having been aware about the vulnerability of the human neck, he ought to have foreseen that his action of strangling the deceased would result in asphyxiation. He reconciled himself with such possibility.

[118] Having regard to the totality of the evidence, the court is therefore satisfied that the accused is guilty of the crime of murder in the form of *dolus eventualis*. He is accordingly convicted as charged.

### Conclusion

[119] In the result, it is ordered:

Accused is found guilty on a charge of murder in the form of *dolus eventualis*.

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D N USIKU

Judge

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<sup>7</sup> *S v van Wyk* 1993 NR 426 SC 439.

## APPEARANCES:

STATE: Mr F. Nyau  
Of Office of the Prosecutor General, Windhoek

ACCUSED: Mr E. Shiikwa  
Of The Directorate of Legal Aid