

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI
JUDGMENT

Case No: CC 7/2021

In the matter between:

THE STATE

v

MENAS THOMAS HIFANYE

ACCUSED

Neutral citation: *S v Hifanye* (CC 7/2021) [2023] NAHCNLD 64 (19 July 2023)

Coram: KESSLAU J

Heard: 4 July 2022; 6-8 July 2022; 11- 14 July 2022; 20 July 2022;
22 July 2022; 3-6 October 2022; 30-31 January 2023; 1- 3 February 2023; 20
February 2023; 16 May 2023; 23 June 2023; 5 July 2023

Delivered: 19 July 2023

Flynote: Criminal Law- Trial- Murder r/w Act 4 of 2003- Rape r/w Act 8 of 2000-
Housebreaking with intent to rob and aggravated robbery- defence of an *alibi*- extra-
judicial admissions made to police officers- contradictions in police statements and
their effect- credibility and reliability of witnesses- circumstantial evidence- evidence
of shoe prints- DNA evidence- proof beyond reasonable doubt.

Summary: The accused is arraigned before this Court on charges of count 1: Housebreaking with the intent to rob and robbery with aggravating circumstances as defined in Section 1 of the Criminal Procedure Act 51 of 1977 as amended (CPA); Count 2: Murder (read with the provisions of the Combating of Domestic Violence Act 4 of 2003); Count 3: Murder (read with the provisions of the Combating of Domestic Violence Act 4 of 2003) and; Count 4: Contravening Section 2(1)(a) of the Combating of Rape Act 8 of 2000: Rape (read with the Combating of Domestic Violence Act 4 of 2003).

The State case relied mostly on circumstantial evidence and direct evidence in the form of DNA evidence. The accused raised a defence of an *alibi* which was contradicted by his roommate called as a state witness. There was also evidence that accused was seen in the vicinity of the complainant's homestead where the offences were committed. Evidence of shoe prints which were at the cuca-shop where accused spent some time on the night of the incident, before and after he was seen jumping the fence in the direction of the complaint's house were also found in the room where the complaint and the deceased' were attacked.

Held firstly: that the contradictions in the evidence presented and surrounding circumstances of how admissions were obtained created doubt in the mind of the court whether they were freely and voluntarily made.

Held further: that differences in evidence presented should be considered against the totality of evidence while taking into account the nature of contradictions, the number of contradiction, importance and bearing on other part of witness' evidence.

Held further: that due to the minor nature of deviations between the police statements as far as their contents are concerned compared to the evidence presented from the same witnesses, a negative inference cannot be inferred.

Held further: that when dealing with circumstantial evidence the court must not consider every component in the body of evidence separately and individually in determining what weight should be accorded to it, but rather have to consider the cumulative effect of all the evidence when deciding whether the accused's guilt has been proved beyond reasonable doubt.

Held further: that the evidence of the shoe print of the accused was supported by other evidence available for the court to rely on.

Finally held: that the DNA results not only confirm that the identification by the victim Jakobina is reliable but also undeniably places the accused on the scene of crimes.

ORDER

1. Count 1: Housebreaking with the intent to rob: Not Guilty however on Robbery with aggravating circumstances (as defined in Section 1 of the Criminal Procedure Act 51 of 1977) - Guilty.
2. Count 2: Murder with direct intent, in respect of Ndapuka Linus, (read with the provisions of the Combating of Domestic Violence Act 4 of 2003) - Guilty.
3. Count 3: Murder with direct intent, in respect of Thomas Ndapuka Malakia, (read with the provisions of the Combating of Domestic Violence Act 4 of 2003) - Guilty.
4. Count 4: Contravening Section 2(1)(a) of the Combating of Rape Act 8 of 2000: Rape (read with the Combating of Domestic Violence Act 4 of 2003) - Guilty.

JUDGMENT

KESSLAU J

Introduction

[1] The accused is arraigned before this Court on charges of count 1: Housebreaking with the intent to rob and robbery with aggravating circumstances as defined in Section 1 of the Criminal Procedure Act 51 of 1977 as amended (CPA); Count 2: Murder (read with the provisions of the Combating of Domestic Violence Act 4 of 2003); Count 3: Murder (read with the provisions of the Combating of Domestic Violence Act 4 of 2003) and; Count 4: Contravening Section 2(1)(a) of the Combating of Rape Act 8 of 2000: Rape (read with the Combating of Domestic Violence Act 4 of 2003).

[2] The summary of substantial facts presented by the State in terms of Section 144 (3) (a) reads as follows:

'At the time of their deaths, the deceased as per counts 2 and 3 were in a domestic relationship with the accused; in that the accused was a cousin to the deceased in count 2 and the uncle to the deceased in count 3. Whereas at the time of the incident the complainant in counts 1 and 4 was the grandmother of the accused. During the evening hours of 14 February 2019 and the early morning hours of 15 February 2019 and at or near Okafitukakatanyange village in the district of Outapi the accused broke into and entered into the shack of Jakobina Nausiku Johannes, the complainant in count 1. The accused then assaulted and robbed the said Jakobina Nausiku Johannes of money. After assaulting Jakobina Nausiku he then raped her as per count 4. Thereafter the accused turned on Linus Ndapuka and Thomas Ndapuka Malakia, the deceased as per counts 2 and 3, and assaulted them and killed them. Thereafter the accused fled the scene. The deceased as per counts 2 and 3 died at the scene due to head injuries and contusion of the brain as a result of the assault.'¹

[3] The accused, represented by counsel, pleaded not guilty to all charges and his plea explanation in terms of Section 115 (1) of the CPA forms part of the evidence.² It states that the accused is denying being near the scene of crime on the day of the incidents. Furthermore that he is relying on an *alibi* defence of which the details were not disclosed. The accused did admit a domestic relationship with the complainant in counts 1 and 4 and the two deceased in counts 2 and 3.

[4] The State presented evidence in the form of various witnesses. Furthermore the alleged murder weapons, being two wooden sticks, and clothes confiscated from the accused upon arrest were received into evidence. Documentary proof of the chain of custody of the above items were presented which resulted in scientific reporting on the items found. The accused testified under oath.

[5] In final arguments the State argued that the charges were proved beyond reasonable doubt and requested a conviction on all charges.

¹ Exhibit 'C'.

² Exhibit 'B'.

[6] Defence counsel submitted that the *alibi* presented by the accused, who has no *onus* of proof, was reasonably possibly true and should be accepted. Furthermore that the witnesses failed to identify the accused as the assailant as they were unable to point out any distinctive features. Also that the victim on the charge of rape denied sexual intercourse and could not tell the court what her assailant was wearing. It was submitted that by allowing the DNA results into evidence the accused was severely prejudiced in his defence.³

[7] Counsel for the accused also submitted that the offense of housebreaking was not proved as no evidence was presented that the house was properly closed prior to the incident. Furthermore a contradiction was indicated between the oral evidence and the indictment on the amount involved in the robbery. The police investigation was described as a kidnapping of the accused and alleged admissions made to them were not recorded. Finally the court was implored to exercise caution when allowing evidence from the witness lileni as it was suggested by counsel that two assailants were present and that lileni was the one pointing out clothing hidden under his bed whilst claiming it to be the property of the accused.

Summary of evidence

[8] The victim in counts 1 and 4, Jakobina Johannes, testified that she is residing at Okafitukakatanyange village. During the time of the incident she shared her house with relatives being two young boys, Ndapuka Linus (deceased in count 2) and Thomas Ndapuka Malakia (deceased in count 3). She has reduced eyesight but in court identified the accused as her grandson. She had to walk to about 1, 5 metres to the accused dock for this observation. She testified that the reason for her being at court is because the accused killed her two children.

[9] Jakobina Johannes testified that on the particular day she did gardening and afterwards extracted marula juice. The two boys staying with her would normally assist with carrying the marula fruit back home, however on this day they did not. When reaching the house around sunset she was informed by the two boys that they

³ *S v Hifanye* (CC 7/2021) [2022] NAHCNLD 106 (6 October 2022).

were playing with Hifanye and for that reason did not come to assist her. She told the boys to cook while she went to bed to sleep.

[10] She woke up to someone searching her waist where she tied her purses. A light, appearing to be a torch, was on and she saw the shape of the person searching her body upon which she recognised him as the accused and called out his name 'Hifanye'. They were in close proximity of about half a metre. The accused warned her not to wake the children or he will kill her. She was then hit by the accused twice on her head with a stick causing her to fell unconscious or in her words 'maybe dead'. She testified that the stick used, was a hoe handle which was used for cooking porridge.⁴ She testified that normally at bedtime the door of the room is secured by tying it with a rope.

[11] Jakobina testified further that hours later, and when it was already morning, she regained consciousness. She then noticed the two deceased bodies of her relatives next to her bed. She crawled to the entrance of the homestead where she alerted some passing by schoolchildren. She then lost consciousness again and only became aware of her surroundings in the hospital. She testified that she suffered injuries to her head, left shoulder and her right ear. Her evidence was further that she was robbed of the two money purses that was tied around her waist containing a total of N\$ 250. She said that she went to bed fully clothed with the same clothes that she wore during the day. She could not remember the date but recalled that it happened during the raining season. She denied being informed of, or examined for, a sexual assault. She could not remember speaking to the accused in the hospital.

[12] In cross-examination the witness admitted to drinking traditional beer made from marula fruit. She could not remember how much she drank but that 'she drank like a thirsty person'. She denied being intoxicated testifying that afterwards she was still able to assist others with their duties. She insisted that the door was tied with a rope which the accused untied to gain access to their room. She also testified that when calling out the name of the accused 'Hifanye' he responded by confirming his identity. She could not identify the clothes he had on at the time. She testified that the accused, as a child, stayed in her house and left as a young adult to look for

⁴ Exhibit 1.

work. She had not seen him for several years. She confirmed that, according to her, no sexual assault happened.

[13] When considering the lack of a proper source of light, the possibility of the witness being intoxicated, the accused's prolonged absence from her house and finally her reduced eyesight it requires that the evidence of Jakobina Johannes be approached with caution.

[14] Victoria Naushiku Nghipandwa testified that, upon receiving a report on 15 February 2019 of the attack, she went to the hospital. Here she found the complainant and Agnus Nakashana. Whilst waiting with the complainant to get medical attention, two boys arrived at approximately 13h00-14h00. She identified one of them as the accused. She testified that the accused went to the complainant and said 'granny'. The complainant replied 'it is Hifanye' upon which the accused said 'yes'. She then saw the accused giving N\$ 30 to Agnus. She cared for Jakobina in hospital for a week. She confirmed that the complainant received treatment for wounds to her head, left shoulder, neck and a torn ear.

[15] In cross-examination it was denied that the accused visited the hospital. She testified that she knew the accused as a child while he was living with his grandmother Jakobina. She recognized him when his grandmother said his name Hifanye. It was put to her that Jakobina did not recall speaking to the accused in the hospital upon which the witness replied that 'at the time Jakobina was in a problem and in pain'. Differences between her oral evidence and police statement were pointed out.

[16] Carlos Andreas, now 17 years old, testified that on 15 February 2019 he was on his way to school with others when they heard Jakobina calling for help. When entering the homestead he found the victim sitting on the ground covered in blood with her right ear injured. Jakobina said that they were attacked at night and that the two children died. He testified that the complainant's upper body was naked and she was wearing a small sleeping dress. One of the children in his company then went to call Monika.

[17] Monika Johannes testified that Jakobina Johannes is her aunt. After a report was made to her she went to her homestead. Upon arrival, she found the complainant with a naked upper body and wearing a small skirt. She was laying on the ground and the witness observed wounds to the complainant's head and ear. She looked inside the room and saw that the two boys were dead. The police was phoned, they arrived and transported her aunt to the hospital. She said her aunt was unable to speak due to the fact that she was unconscious however it appeared that she was in a state of panic and pain.

[18] Agnes Kaviiamo testified that when she heard of the incident she went to the homestead of the victim. She found the victim laying on the ground being unresponsive and with her head covered in blood. She then accompanied the complainant to the hospital. At the hospital she observed two head wounds and a torn ear. She confirmed the presence of Victoria and Ndapewa at the hospital. Whilst waiting with the complainant, two men arrived. One was wearing a white t-shirt and light brown short pants. He had a trimmed beard, He proceeded to where the victim was who lifted herself and said 'Hifanye'. She asked this man his relation to the complainant and was informed she was his grandmother and that he is the son of her first born son. He asked who will look after his grandmother in hospital and was told by Ndapewa that she will assist. He then handed N\$ 30 to the witness and said he will return to Oshakati. Ndapewa asked the telephone number of the man and saved it in her phone mistakenly under the name Hilifa. When they returned to the village, and told the others about the visit from the grandson whom by then they referred to as 'Hilifa the son of Ndayema', someone then asked 'was it not Hifanye?'

[19] They got information that Hifanye was arrested and, when calling the saved number, were told that the owner of the number is arrested. She identified the hospital visitor as the accused. She saw the accused at his first appearance in court wearing the same clothes she saw in the hospital. In cross-examination she said she cannot remember details on the other man as she was paying more attention to the accused who was sitting next to her while having a conversation. It was pointed out to her that the victim did not testify about the visit of the accused to the hospital and that the witness Victoria testified that the accused responded at the time when his grandmother said Hifanye. Furthermore that Victoria did not mention the man crying.

It was denied that the accused visited the hospital with the witness adamant that she saw and talked to him there. It was put to the witness that the accused was already arrested at 12h00 on the 15 February 2019. When showed the photo plan with a picture of the accused in the clothes he was arrested in, she conceded that the shirt was white and black. She also testified that she attended many court appearances of the accused after his arrest.

[20] Joel Amutenya testified that on the 14 February 2019 at around 18h00 to 19h00 he passed the Namwater dam and noticed an unknown man there. The man was wearing a blue overall trouser and jacket and on his head a balaclava which at first was not covering his face. He had slippers on. When he was about 8 steps away, he greeted the man, who greeted back while avoiding face contact. The unknown man also pulled down the balaclava to cover his face. It was before sunset with clear visibility. The witness was in the company of a certain Shipuke who said the person is unknown to her. He told her that they should take note of his shoe prints as the man is unknown in the village. The unknown man stood up and walked into the bush. He described the print as small horizontal lines covering the complete shoe.

[21] Joel further testified that the next day, when he learned about the incident he ran to the homestead of the victim. He recognised the same shoe print from the unknown man and informed the police. They followed the print in reverse-order which led them back to the dam where he saw the man the previous day and where the print went into the bushes. They also followed the print forward where it exited the homestead, jumped a fence of the mahangu field and went into the direction of the Okalongo location. In his description to the police he told them that the man was acting suspicious and that he had a small trimmed beard. He also reported the clothing he wore and that he was of average height. He identified the unknown man as the accused before court. The 'slippers' he identified from a photo⁵ as a pair of sandals or flip-flops. He testified that the overalls depicted in Exhibit 'Y' is similar to the ones worn by the accused.

⁵ Exhibit 'Y' page 13.

[22] In cross-examination it was put to the witness that he only made a statement describing the unknown man on 16 of February 2019 thus a day after the arrest of the accused. His statement did not mention that he looked at the face of the unknown man. Furthermore that visibility was not mentioned in the statement. It was put to him that the description of the unknown man can fit many young men. He testified that at no stage was he asked to attend an identity parade.

[23] Ehergardis Aupoko is the owner of a cucashop selling food and homebrew in the Okalongo location. At around 15h00 while preparing food outside, a man which she later identified as the accused, passed her shop into the direction of the dam which is behind the mahangu field of Jakobina. Her shop is facing the mahangu field of Jakobina which is approximately 100 metres away while her house is approximately 250 metres further. She said the accused passed 7 steps from where she was. He was dressed in blue overall pants and jacket with a blue balaclava covering his face with only his eyes visible. He had slippers on. At around 21h00-22h00 the same night she saw the accused jumping the fence of the mahangu field before stopping at the adjoining cucashop of the late Sofia Aluvilu. Their shops had a shared veranda. She said it was the accused she saw earlier passing her shop as he wore the same blue overall with the jacket of it tied on his waists, a white vest and a balaclava in his back pocket.

[24] Ehergardis testified that the moon was shining and that visibility was clear. An additional lamp was hanging from the veranda roof. The accused requested traditional beer/epwaka at Sofia's shop and paid with N\$ 50. Sofia came to her to get change for the money and told her she is afraid of the unknown man. In the meantime the accused left with Shaumbwako, another client, to buy cigarettes. When they returned the witness, in the presence of both Sofia and Shaumbwako, asked the accused, 'who are you'? He answered that he is Thomas coming from Angola and that he has been at his granny Ngaela's house.

[25] She testified that she was in close proximity with the accused during the conversation. She furthermore identified the clothes as per the photo plan as the ones worn by the accused. She said that the accused had a short beard. The

slippers worn by the accused were identified as being similar to the sandals as per the photo plan. Equally she did not attend any identification parade.

[26] In cross-examination it was pointed out that in her statement she referred to a 'hoody' worn by the culprit and that she did not mention that the jacket was tied around his waist the second time. Also in her statement she did not mention the beard or that he jumped a fence.

[27] Servasius Ausiku Shaumbwako testified that on 14 February 2019 he was at the cucashops of Ehergardis and the late Sofia. The accused arrived at around 21h00 from the direction of a mahangu field. He was wearing blue overall pants, white vest and a jacket tied around his waist. A balaclava was tucked in his back pocket. He described the shoes worn by the accused as a pair of black flip-flops. The accused requested epwaka from Meme Sofia and paid with N\$ 50. This witness then requested money from the accused to buy a cigarette. The two of them walked to David's shop where the accused bought five cigarettes for the witness. They returned to Sofia's and started to drink epwaka. The moon was shining and at David's as well as Sofia's shops there were candle light whilst Ergerhardis had a light hanging from the veranda roof. Because of suspicions, the accused was asked his name by the ladies. He said he is Thomas and he gave the witness his cell phone number. The ladies proceeded to question the accused and he then removed the balaclava from his back pocket and put it on his head without covering his whole face.

[28] They drank for a while and then the accused left. The witness spent approximately 30 minutes in the company of the accused. The next day, after hearing about the attack, he went to the homestead of Jakobina and noticed the same shoe track worn by the accused the previous night. He described the print as having horizontal lines. Reporting his observation to the police they then went to compare the print at the cucashops. It was the same and was followed from the homestead up to the cucashop passing through a mahangu field. In cross-examination it was pointed out that he did not describe any distinctive facial features of the unknown man.

[29] Inspector Albertina Linyekwa Andreas stationed at the Outapi police testified that she met the accused on 15 February 2019 in the police charge office. At 13h00, when she left for lunch and whilst passing the counter in the charge office, she was informed that there are family members enquiring about the assault at Okafutikakanyange village. She asked how she can assist and, with only the counter of 60cm separating them, the accused introduced himself as Menas the grandson of the lady assaulted at the village. He said he came from Oshakati to visit his grandmother in the hospital and was told she had passed away. A woman standing next to him at the counter then said 'no the lady is alive and admitted in hospital'. The accused then left. She said the accused was wearing a black and white Nike T-shirt and a light brown short trouser. Instructions put to her by defence counsel were that the accused never visited the police station or enquired about his grandmother. The earlier instruction, that the accused was already arrested at 12h00, was not repeated to this witness.

[30] Thom Vetumbuavi, a police officer stationed at Outapi, was instructed on 15 February 2019 to visit the scene of crime. Upon his arrival other members were already there, some following footprints and some at the house. He observed the complainant laying unconscious outside and with assistance loaded her in a police vehicle. When scene of crime members were done photographing the scene, he entered the room and found the two bodies of the deceased. They were moved to the outside where he observed multiple head injuries on both. Inside the room he found a broken hoe handle on the ground and a Mopani stick on the bed with both having suspected blood stains on them. He transported the bodies to the hospital where they were declared dead and then proceeded to the mortuary at Okahao. He said the bodies did not sustain further injuries during transportation. He booked the two sticks into evidence and identified them in court.⁶ The Mopani stick was measured to be 62 cm in length. According to the witness the blood stains are still visible on the sticks referring to darker stains on them. In cross-examination the witness could not say if the sticks were analysed to determine if these stains were in fact blood.

⁶ Exhibits 1 and 2.

[31] Doctor Maria Nandjembo testified that she compiled the post mortem reports on both the deceased boys at the Okahao mortuary⁷. Regarding the deceased Linus Ndapuka (count 2), she found multiple fractures of the occipital and parietal bones, contusion of the brain lobes and that the cause of death was a head injury. The fractures were extensive and included fractures of the nasal and aural cavities. The second deceased Thomas Ndapuka Malakia (count 3) similarly died of a head injury caused by fractures of the occipital and parietal bones. In her opinion they were beaten with a heavy object multiple times and with a lot of force. They had no chance of surviving the attack. Her evidence was left undisputed.

[32] Doctor Ananias, stationed in Outapi, testified that she completed rape kit examinations on both the victim Jakobina and the accused.⁸ When examining the victim she found multiple wounds on her head and lacerations and bruises on various parts of the vagina. In her opinion it was caused by forced sexual intercourse. She testified that these injuries will also be sustained if rape is committed on an unconscious person. Furthermore that trauma may cause a victim to be confused and, depending on the level of trauma, can include amnesia or forgetfulness. On examination of the accused she found multiple lacerations on his face, shoulders, arms and left thumb. She also noted a laceration on his penis which in her opinion can be caused by forced sexual intercourse. These injuries were in her opinion recent as the human body will normally start to self-heal immediately.

[33] Doctor Ananias further said she took various swabs from both the victim and accused which were then forwarded for analyses. The results, as indicated by the forensic lab,⁹ determined the presence of human semen on the external anal swab, rectal swab, vulva swab, vestibule swab, vaginal vault and cervical Os of the victim. In her opinion there can be no doubt that sexual intercourse took place due to the internal location of the cervix in the vagina. She also testified that Doctor Fatoki, who examined the complainant Jakobina on 22 March 2019, has left service and that his findings were of multiple lacerations to the scalp and a mutilation of the right ear.¹⁰ In her opinion Jakobina was attacked with a heavy object like a brick or stick able to

⁷ Exhibits 'M' and 'G'.

⁸ Exhibits 'T' and 'U'.

⁹ Exhibit 'Y', pages 15 and 16.

¹⁰ Exhibit 'S'.

break through the skin. When the two sticks were shown to her in court, she said it is possibly the weapons used. In cross-examination she testified that the vaginal wounds were sustained within hours or a day before her examination. She conceded that the injuries can be caused by other causes such as falling however added that there will be no semen present in those instances.

[34] Julia Hamalwa, a police officer attached to the Gender Based Violence Unit, confirmed that she provided Doctor Ananias with the two rape kits for the victim and accused. She was present when the examinations were done. She confirmed the serial numbers on both and that they were sealed and handed to Officer Irmaly of serious crime unit. Her evidence stood undisputed.

[35] lileni Ndatjila testified that he knows the accused and that they are friends from a time they met in prison. During February 2019 the accused arrived at the house in the Onumbu location in Outapi where the witness and his uncle were staying. The accused requested and they allowed him to share their room. A few days later the witness and the accused found casual labour in the form of offloading a truck. At 13h00 they were done and were paid N\$ 140 each for their effort. The accused left and only returned to their room at midnight. When asking the accused where he was, the accused answered that he 'spent his night in a shack at the location'.

[36] lileni further testified that the next day, 15 February 2019, he and accused went to the open market. On their way at a certain tree they met people discussing the attack on the complainant and her grandchildren. The accused joined in the conversation saying he also heard that. The witness could not understand how the accused knew that as they have not met anyone on their way there to inform them. At the open market the accused bought N\$ 10 epwaka and paid with a N\$ 200 note. He left the witness drinking while visiting a barber shop. The accused had a beard which was then upon his return shaved. The witness asked why did you shave your beard upon which the accused answered he will grow it back in the future. The accused then bought another epwaka for N\$ 10 and paid with N\$ 100. The witness asked him why he is not using the change to pay for the drink with the accused answering that he does not want 'big' money in his pocket. At around 11h00 in the

morning the witness wanted to rest and left the accused at the open market. He returned around 14h00 to 15h00 and found the accused still at the open market. The accused then informed him that the attacked lady was his grandmother and the two deceased were his relatives.

[37] Whilst still at the open market a police officer by the name Kasheeta arrived in the company of a female officer. After introductions the accused indicated that he knew one of the officers. The witness and accused were asked to get into the police van. They were alone in the back of the vehicle. At Omamwandje police station the accused was told to get out with the witness remaining in the police van. The witness observed that a group of officers were talking to the accused some distance from where he was. He could not hear the conversation. He said that the accused was not restrained or handcuffed. He observed the police measuring the shoes and bare feet of the accused. They also looked inside the front of his trouser. The accused at the time was wearing laced shoes. He testified that he witnessed no assault on the accused. The accused was put back into the vehicle and the police then questioned him.

[38] lileni testified that when asked what the accused was wearing the previous day, he told them of the blue overall trouser and jacket, a beanie and slippers. He was asked to take the police to the place where the accused slept and he complied and directed them to their room. This time they were transported in separate vehicles. Upon arrival he unlocked the room and pointed out the property of the accused. It included the clothes worn by the accused the previous day being the blue overall trouser, jacket and a pair of 'slippers'.

[39] At this point the witness left the room he however remained at the door and could hear the conversation. He testified that when questioned by the police the accused admitted that he assaulted 'those people'. He was asked how many did you leave dead and the accused said 'one child was dead, one child was left struggling and the old lady was left struggling'. He testified that the accused was not assaulted by the police during the questioning.

[40] The witness lileni identified the shared room as per the photo plan.¹¹ When presented with the photos of items sent for analysis, he identified the Adidas flip-flops depicted as the 'slippers' of the accused. Furthermore from the photos he identified the overalls depicted as similar to the outfit worn by the accused the day when they offloaded the truck.¹²

[41] In cross-examination the witness said he noticed the accused's return at 00h00 on his cell phone which was the only source of light. He was woken up by the sound made by the door whenever opened. He insisted the accused was still dressed in the blue overalls. He insisted that, even though he is the only witness in this regard, he heard the accused joining in the conversation at the tree about the double murder. On a question that the police abducted them from the open market the witness replied that they climbed into the police vehicle on police instructions. It was put to the witness that the accused only had one pair of shoes which was not the Adidas flip-flops. The witness confirmed that he was the person who informed the police on the clothing worn by the accused the previous day upon which he heard the police say to each other 'this is the person'. It was put to the witness that the accused is denying being present at the room during the pointing out of the clothes and when the alleged admissions were made. When confronted with differences between his witness statement and oral evidence the witness said that he gave his statement in Oshiwambo and could not recall if it was read back to him. He also eloquently added that the writing of the statement is the work of the police and that he as a witness testified in court on what he could remember.

[42] Detective Warrant Officer Irmaly testified that on 15 February 2019 he was called to the scene of crime to compile a photo plan.¹³ He observed and took photos of the two dead bodies, a Mopani stick, a broken hoe handle, the place where the surviving victim allegedly was found and two knitted traditional purses. The same afternoon he was called to where the accused was arrested and took pictures of the shack, the blue overall pants with a jacket and a white Old Mutual T-Shirt. The clothing was suspected to have blood stains on it. The accused was photographed

¹¹ Exhibit R photo 16.

¹² Exhibit 'Y'.

¹³ Exhibit 'R'.

inside the shack.¹⁴ All pictures contain a digital print indicating the date and time of taking them. Upon closer inspection suspected blood stains were noticed on the underwear¹⁵ of the accused which then led then to the suspicion and subsequent investigation of rape.

[43] The officer on 18 February 2019 attended the post mortem examinations of the two deceased and took pictures which also formed part of his photo plan. Blood samples were taken by the doctor from the two deceased boys however the doctor mistakenly wrote the same Post Mortem number on both and the NPSFI laboratory requested additional samples as they could not proceed with evaluation due to this error. A second set of blood samples were obtained from the parents of the deceased and submitted.

[44] He confirmed previous witnesses' evidence that rape kits were compiled. He testified that all evidential materials were individually sealed and forwarded to Inspector Shipiki for safekeeping and submitting at the NPSFI. The instructions to the laboratory were firstly to determine if the stains on the blue overall pants, jacket, t-shirt and shoes were human blood and secondly if it matched the blood of the deceased boys and/or the suspect.

[45] Detective Chief Inspector Jeremia Shipiki confirmed the evidence from the previous witness regarding the chain of custody over the exhibits which were forwarded to the NPSFI. The exhibits were all sealed when he received them. His evidence was left undisputed.

[46] The Chief Forensic scientist at the NPSFI and an expert on DNA analysis, Mr Liswaniso, confirmed that the sealed exhibits were received with an application for analysis. These exhibits were sealed in a tamper proof bag which will indicate as void when it is opened. He testified that he compiled the first report and explained that, with the initial scientific testing, traces of human blood were found on the blue overall pants and jacket that was submitted as well as the underpants of the

¹⁴ Exhibit 'R' photo 22 (Date stamp 18h16 on 15/02/2019).

¹⁵ Exhibit 'R' photo 23 (Date stamp 18h16 on 15/02/2019).

suspect.¹⁶ Additional DNA samples were requested for the deceased persons as the doctor did not differentiate between the samples. From the rape kit provided in respect of the victim, there were indications of human semen on the anal, rectal, vulva, vestibule, vaginal vault and Cervical Os swaps. He testified that they proceeded with DNA testing on the swaps from the vulva, vestibule, cervical Os and vaginal vault. Representative samples were tested based on scientific experience. The result was contained in his final report, the evidence of which was allowed as it appeared to be essential information to get to the truth.¹⁷ It confirmed that DNA of the accused was present in all of the tested swaps and that the probability of finding an individual apart from the accused who fit this DNA profile is 1 out of 1,28 Nonillion.¹⁸

[47] In cross-examination he confirmed that the human blood found was not analysed and the origin remains unknown. He said in conclusion the accused cannot be excluded from a contributor to the DNA found.

[48] Chief Inspector Alweendo testified that on 15 February 2019 he attended the reports of murder at the house of Jakobina. He arrived with Warrant Tjimuhiva at around 07h00 in the morning followed by an investigation team. Community members were present and one pointed out a print which they followed from the entrance of the homestead to the shack inside. It was the print of a flip-flop. A few metres from the door of her shack, Jakobina was lying unconscious. He observed head injuries with blood stains on her clothes. In the vicinity were two knitted purses on the ground. At the entrance to the shack he observed a hoe handle which he suspected to be used during the attack.¹⁹ Inside the shack he found the bodies of the two young boys. Both suffered severe injuries to the head. Another bigger stick, suspected to have been used as weapon, was seen laying on the bed.

[49] Officer Alweendo and his colleague transported Jakobina to the Outapi state hospital, a distance of approximately 5 km from the scene. Upon returning to the scene they received information leading to the accused being a person of interest. When he and Warrant Tjimuhiva entered the open market they spotted a man fitting

¹⁶ Exhibit 'Y' pages 10 to 14.

¹⁷ Exhibit 'GG'.

¹⁸ 1 out of 1 280 000 000 000 000 000 000 000 000.

¹⁹ Exhibit 1 identified.

his description. The accused was drinking traditional beer with a person who became known as lileni. After introducing themselves by presenting appointment certificates and explaining that they are investigating a serious case they requested the two men to accompany them for questioning.

[50] Both men denied knowledge of the crimes. They were then taken to the Okapalone police substation for further questioning where they met officer Amakali. Officer Amakali introduced himself and explain to the accused and lileni that they have the right to remain silent. Thereafter the accused and lileni were separately questioned with officer Alweendo interviewing lileni and officer Amakali the accused. While interviewing lileni there was an indication that the accused is prepared to show them the clothes he wore the previous day.

[51] They departed in three different vehicles and arrived at a shack that was then unlocked by lileni.²⁰ The shack was too small for all to enter and thus some officers entered with the accused while officer Alweendo remained with lileni at the open door of the shack. He could observe the inside of the room and was within earshot. He saw the accused handing over blue overalls and a pair of flip-flops. He heard officer Amakali requesting the accused to tell the truth. The accused then confirmed that he went to the house of Jakobina to get money and had no intention to injure anyone. Furthermore that he entered with a stick and when Jakobina asked who he is, started beating them. After the accused said this, his rights were explained and he was arrested.

[52] In cross-examination it was denied that the accused, who was handcuffed at the time, pointed out the clothing in lileni's room. It was put to the witness that it was lileni who did the pointing out. Furthermore it was denied that the accused uttered the admissions. The witness conceded that, before questioning only the right to remain silent was explained and, that after the admissions were made by the accused all of his other rights were explained. It was also disputed that the accused willingly took them to the shack in contrast to earlier instructions that the accused was not present at the shack during the pointing out.

²⁰ Exhibit 'R' Photo 16.

[53] Officer Leonard Amakali, with the rank of Warrant Officer at the time also confirmed the reports of murder received and of them attending the scene. Community members were found present however outside the homestead. Upon entering the homestead he observed the injured and unconscious victim Jakobina close to her shack. It appeared from markings on the ground that the victim was either dragged there or crawled herself. Apart from suspected blood stains and faeces on her clothes, he could observe that her private parts, which were not covered, had dried fluid stains on and suspected sexual assault. Two knitted purses were observed in her vicinity. He confirmed the hoe handle at the entrance of the room, two dead boys laying inside with head injuries and a thicker Mopani stick on the bed. The sticks were covered in suspected blood stains. He observed the print of a flip-flop inside the room which he described as having horizontal lines across. They followed this print for a distance of approximately 300 metres to a nearby cucashop.

[54] Officer Amakali then returned to the scene and based on the empty purses observed, enquired about the financial income of Jakobina which then led to the accused being a person of interest. The information of an unknown man that was spotted the previous day in the vicinity wearing a blue overall, flip flops and balaclava was also received. Thereafter the accused and lileni were found and brought to where Officer Amakali was. They were separated and he interviewed the accused. They spoke in Oshiwambo. He introduced himself and the purpose of the interview and explained his legal rights. He observed that the accused was carrying a blue balaclava in his hand. He told the accused he is investigating two murder counts, robbery with aggravating circumstances, attempted murder and that he is suspecting sexual assault. The accused then indicated that he wish to make a verbal statement.

[55] The officer testified that the accused admitted that he went to the house of Jakobina to get money from her. Furthermore that he assaulted her with a stick and took N\$ 30 from the purses on her body. Also that the two boys, Thomas Malakia and Linus Ndifuka, woke up and he then assaulted them both with a stick on their heads. He left the boys motionless whilst Jakobina was still moving. The accused did not mention any sexual assault to the officer.

[56] Thereafter the accused agreed to take them to the room where he stayed at the time and they then arrived at the house of lileni. lileni was transported in a separate vehicle and directed them to the shack. Upon arrival at the room lileni unlocked the door and they entered. The accused was again reminded of his legal rights and he indicated that he understood. Consent was given by both lileni and the accused for a search. On a question where the clothes were that the accused wore the previous day, lileni removed a plastic bag from underneath the bed which the accused took from him and wanted to hand it over to the officer. He was told to place it on the bed. After opening the plastic bag he found inside a blue overall jacket and trouser, an Old Mutual T shirt and a pair of brown Adidas flip-flops with matching prints to those found on the scene and cucashop. The clothes appear to have stains which he suspected to be blood. He arrested the accused and his legal rights were explained again. The accused indicated he understood and wished to make another verbal statement. The witness lileni, Sergeant Itete and Warrant Officer Irmaly were either present or within earshot to hear what the accused said.

[57] According to the witness the accused told them that he assaulted Jakobina and the two boys Linus and Malakia. He also said that the next day he followed the victim to the Outapi State hospital. A search was done on the body of the accused and they observed suspected blood stains on his underwear. The clothing was then confiscated. The exhibits before court were identified by the witness as the items so confiscated. During cross-examination it was denied that the accused was aware of the financial situation of Jakobina and furthermore that the victim herself did not testify in that regard. It was also put to the officer that the accused had no choice but to accompany the police officers from the open market to where he was questioned even though he was not arrested yet. Furthermore that the accused denied making any statements or admissions. It was pointed out to the witness that it was lileni who took them to the shack and who pointed out the clothes.

[58] Officer Theofillus Kashinyenga, the investigating officer in the case, confirmed the evidence of previous witnesses and his evidence did not take the matter any further.

[59] Officer Teacher Otto Kamatsi, confirmed that he was part of the team that departed to the house of the victim Jakobina after a report was received. Furthermore that the victim was found unconscious, badly injured and with revealed private parts. Next to her he saw two knitted purses. He confirmed the flip-flop prints found on the scene and its description. He also confirmed the piece of stick found at the entrance, the severely injured and lifeless bodies of two boys and a Mopani stick on the bed. The flip-flop prints were followed however eventually it was lost amongst other tracks. He confirmed that he was present when the accused and witness lileni arrived for questioning. He was present when officer Amakali informed the accused of the purpose of questioning and his legal rights in Oshiwambo. He heard the accused said that he understood and that he waived his right to have a lawyer present. The accused denied involvement and at this stage the witness left to join the questioning of the witness lileni.

[60] Officer Kamatsi confirmed the evidence of witness lileni who told them about his and the accused's movements the previous day. He confirmed that witness lileni then directed them to the shared room which was unlocked upon arrival. He confirmed that once again the legal rights were explained to the accused who indicated that he understood. They then entered the shack. He saw that witness lileni pulled a plastic bag from under the bed which was opened by Officer Amakali. Inside was a blue overall two piece, t-shirt and flip flops. He confirmed that the items were handed to the scene of crime officer Irmaly. He testified that officer Amakali repeated the explanation of rights to the accused and then arrested him. The accused waived his legal rights and indicated that he wished to say something.

[61] According to this witness the accused then told them that on 14 February 2019 he went to the house of the victim Jakobina and at the entrance found a stick. He then entered and found Jakobina and the two boys asleep. Jakobina woke up and asked 'who are you?' He did not answer her and beat her with the stick on the head. One of the boys woke up and was beaten on the head followed by the second boy. He took money from the purses that Jakobina was carrying around her neck. The accused indicated that the amount taken was N\$ 30 which he then changed to be N\$ 25,55. The accused further told them that afterwards he returned to the shack of lileni where he found him sleeping. Furthermore that the next day he visited the

victim at the hospital. The accused confirmed to them that the clothes seized were his property. The witness indicated that he also saw a blue balaclava.

[62] Counsel in cross-examination indicated that the alleged admissions were not recorded. On this the witness replied that the information was recorded in their witness statements and furthermore that Officer Amakali noted same in his diary which unfortunately got lost. Finally it was put to the witness that the accused denied making any admissions. That was the case for the state.

[63] The accused elected to testify without calling any witnesses. He testified that he was called on 12 February 2019 whilst in Ruacana by a certain Simon who knew of a job opportunity and then on the 13 of February 2019 travelled to Outapi. While waiting to be collected by Simon and his boss he met lileni at the open market. He arrived with N\$ 900 in his wallet, bought food for N\$ 300 and joined lileni who offered him accommodation at his shack. On 14 February 2019 he spent the morning in the company of lileni and joined him in the job of offloading trucks for which each was paid N\$ 250. They were done by 17h00 and then returned to lileni's shack, took soap and went to shower for N\$ 2. They then went to a bar and stayed until 23h00 after which they returned to lileni's shack and slept.

[64] The accused testified further that the next morning Simon was still not forthcoming and he and lileni went to the open market where he went to a barber for a haircut. He overheard a discussion about the old lady who was injured at Okafutikakanyange village with a similar name to his grandmother. They stayed at the open market until 12h00 playing cards and then went to an Indian shop. Thereafter they went back to the room of lileni and on their way met police on the street. They stayed 30 minutes at the room, left to visit a bar and then returned to the open market. The police then found them there. He recognized one of the officers whom he knew from before as a member of the police force. When the police told them to get into the vehicles they complied. The accused testified that from the open market he and lileni were transported in separate vehicles. He confirmed that he was questioned however specifically by Officer Manyangapo 'who made notes in a book with a red pen'. The accused testified that he denied knowledge of the crimes upon which the officer said: 'you small boy don't spoil us, tell us what you know'.

Thereafter he was handcuffed in the '8style' meaning one hand is taken over the shoulder whilst the other from the lower back before handcuffs are applied. He was slapped by the police and, when he said he last saw his grandmother in August 2017, was beaten with a cane.

[65] The accused under oath denied visiting the shack of lileni after the initial questioning and said that he was taken directly to Outapi police station where he was charged. Here he met Officer Amakali for the first time who then beat him with a cane. The pain caused him to say 'yes it is me' without indicating any details. More threats followed from the police after which he was transferred to Etai police station. He testified that the witnesses lied when saying that they were taken to the house of lileni and about the clothing being handed over there. The accused denied any involvement in the offences and said that at all times he was with lileni. He testified that lileni was lying in court when testifying to the contrary. Defence counsel asked the accused regarding the fact that Jakobina identified him by name on the night of the attack upon which the accused had no comment. Defence put to the accused that he is charged with rape on which the accused answered 'no'. When the fact that 'forensic evidence found semen on the victim' was put to the accused he replied that: 'I do not know what to say, it is a long time since I met that old lady.'

[66] The State during the cross-examination of the accused pointed out that when lileni testified his contrasting evidence regarding how they met; the compensation received after the casual employment; that the offloading was done by 13h00; that they were transported in one vehicle from the open market and; that they thereafter were taken to the house of lileni was not disputed. The accused confirmed that at the open market during the next day he went to the barbershop for a shave he however could not remember that this part of his evidence was disputed on his instructions when lileni testified. The accused denied that they were taken by the police to the house of lileni however, when the State pointed out that the digital stamp on the photos²¹ indicates that he was photographed at 18h16 on 15 February 2019 in the shack of lileni with the underwear²² worn by him showing, the accused had no comment. Similarly he had no comment to the fact that the DNA analysis found

²¹ Exhibit 'R' photos 22 and 23.

²² Exhibit 3.

traces of his semen in the vagina of the victim. On a question regarding the scientific evidence of human blood on his underwear he had no comment. The conclusion reached by the accused was that all of the witnesses were untruthful.

[67] It appears that, whenever faced with a difficult question, the accused opted to reply with no comment. In contrast, his evidence was detailed on irrelevant conversations he had with bystanders.

The law applicable

[68] Defence counsel in cross-examination spent extended time on the differences between oral evidence and written statements of the witnesses. When facing such differences, the test is firstly, whether these deviation or omissions from the statements are material and secondly, whether there is a logical reasonable explanation provided for it. It is important to note that a witness statement remains only the skeleton or starting point on which a decision to prosecute is made.²³ It would be unreasonable to expect a witness to repeat word for word the statement, on which normally limited time is spent, written in another language and by another person.²⁴

[69] Regarding the credibility and reliability of witnesses, in the light of contradictions in oral evidence, it was said in *Absalom v S*²⁵ that from experience witnesses rarely give identical evidence. Furthermore that contradictions *per se* do not render such evidence unreliable.²⁶ Differences in evidence presented should be considered against the totality of evidence while taking into account the nature of contradictions, the number of contradiction, importance and bearing on other part of witness' evidence.

²³ *S v Thomas and Another* 2022 (2) NR 404 (HC) page 414 par 52; *S v Nicodemus* [2019] NAHCMD 271 (CC 15/2017) (6 August 2019).

²⁴ *S v Bruiners en 'n ander* 1998 (2) SACR 432 (SE) A.

²⁵ *Absalom v S* (CA 112/2016) [2017] NAHCMD 251 (04 September 2017).

²⁶ *S v Auala* (no 1) 2008 (1) NR 223 (HC).

[70] The fact that there is no direct evidence regarding the murder and rape counts will require of this court to draw inferences from the circumstantial evidence. In that regard Liebenberg J in *S v HN*²⁷ cautioned against a court speculating and stated:

'Where the court is required to draw inferences from circumstantial evidence, it may only do so if the 'two cardinal rules of logic' as set out in *R v Blom* 1939 AD 188, have been satisfied. These rules were formulated in the following terms:

“(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.

(2) The proved facts should be such that they exclude every reasonable inference from them save the one 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.”

[71] It is trite law that the State carries the burden of proving the allegation contained in each charge against the accused beyond a reasonable doubt which means evidence should carry a high degree of probability. This however does not mean proof beyond the shadow of a doubt.²⁸ Furthermore when dealing with circumstantial evidence the court must not consider every component in the body of evidence separately and individually in determining what weight should be accorded to it, but rather have to consider the cumulative effect of all the evidence when deciding whether the accused's guilt has been proved beyond reasonable doubt.

[72] The witnesses identified the accused as the culprit however through dock identification which is suggestive and of lesser evidential value than for instance if an identity parade was held.²⁹ Witnesses should thus be tested on any distinctive details which allowed them to make the identification.³⁰ Furthermore the aspect of identification should be approached with caution as there is always a possibility of honest mistaken identity. In *S v Shipanga and Another*³¹ the position was stated as:

'The general approach may be said to amount to this: Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility,

²⁷ *S v HN* 2010 (2) NR 429 (HC) at para 57.

²⁸ *Miller v Minister of Pensions* [1947] 2 All ER 372.

²⁹ *S v Nakale* 2011(2) NR 599 SC.

³⁰ *R v Shekelele and Another* 1953 (1) SA 636 (T).

³¹ *S v Shipanga and Another* 2015(1) NR 141par 15.

and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities'

[73] In *S v Imene*³² it was stated that although the evidence of shoe prints should be treated with caution, it is admissible in cases where there is other evidence available for the court to rely on.

[74] The *alibi* defence offered by the accused was that at all times he was in the presence of the witness lileni whilst the alleged crimes were being committed. The accused does not bear the burden of proving that his *alibi* is true.³³ The Court is required to assess his *alibi* in the same way as any other defence, namely whether it can be accepted as being reasonably possibly true or whether it should be rejected as obviously false. If the details of the *alibi* are only disclosed, as in the present instance, at the late stage when the accused testifies, the value to be accorded to the *alibi* may be adversely affected. There is no prejudice to an accused who disclose his *alibi* at the earliest possible opportunity even during or prior his arrest.³⁴

[75] The admissibility of extra-judicial admissions into evidence is regulated by section 219A(1) of the CPA which states:

'Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him at criminal proceedings relating to that offence. . . .'

³² *S v Imene* 2007(2) NR 770.

³³ *S v Malefo en andere* 1998 (1) SACR 127 (W); *R v Biya* 1952 (4) SA 514 (A); *S v Mhlongo* 1991 (2) SACR 207 (A).

³⁴ *S v Zwayi* 1997(2) SACR 772.

In *S v Dausab*³⁵ it was said that legal rights, including the right not incriminate oneself, should be explained to a suspect/accused before such admission would be allowed into evidence.³⁶

Applying the law to facts before court

[76] I will now consider the totality of evidence presented by the State to determine firstly if the elements of the offences were proved beyond a reasonable doubt and secondly if the State succeeded to link the accused to the offences.

[77] The *alibi* defence offered by the accused in his reply³⁷ to the State's pre-trial memorandum states that he was 'nowhere near the scenes' prompting the State to call witnesses who testified that they saw him the next day enquiring about the incident at the police station and visiting his grandmother in hospital. This was strongly denied by the accused. The full details of the *alibi* only became clear when the accused testified that he was at all times when the crimes were committed in the presence of the witness lileni. However, when lileni testified for the State, this version was not put to him. In contrast, lileni testified that from 13h00 up to 00h00 on the fateful day the accused left his presence. Therefor the *alibi* defence raised by the accused can safely be rejected as false.

[78] Turning now to the alleged extra-judicial admissions made by the accused. The accused denied making these detailed admissions with the added allegation that whatever he said was done under duress. Evidence on the content of the admissions varied substantially from witness to witness. Furthermore witness lileni omitted this material information from his statement.³⁸ The accused was a suspect from the time he was found at the open market and thus his rights should have been explained. Considering the evidence that the accused spent much of his morning drinking traditional beer, the additional question arises of his state of sobriety at the time of volunteering information.

³⁵ *S v Dausab* 2014(3) NR 652 (HC).

³⁶ *S v Kapia and Others* 2015 (4) NR 1094 (HC); *S v Mbang* (CC 19/2012) [2014] NAHCNLD 5 (31 January 2014).

³⁷ Exhibit 'E' par 5.3 and 5.4.

³⁸ Exhibit 'EE'.

[79] Officer Alweendo's statement³⁹ made no mention of the multiple explanations of rights at different stages of the investigation. The medical report⁴⁰ completed for the accused indicates multiple injuries to his body in particular to both his shoulders and arms, right side of his chest, abrasions on the lips and right side of his face. The doctor even concluded that the accused was in a fight.

[80] Considering the contradictions in the evidence presented on the content of the admissions made, the omission of mentioning that rights were explained in the statement of Officer Alweendo, the omission of the content and manner of explaining legal rights, the omission of the admission from the statement of witness lileni and the injuries noted afterwards on the body of the accused, it created reasonable doubt in my mind on whether these admission were made freely and voluntarily. Therefore those parts of evidence will not be relied on for purposes of this judgment.

[81] Turning to the reliability of the witnesses in the light of their contradictions. I will consider that the deviations pointed out between oral evidence and the witness statements, apart from the ones discussed in paragraphs 77-79 above, were of minor semantic details in language and choice of words. The witnesses, of whom many received limited or no education could not read or write English. The statements were then translated into and noted by police officers in English. In all instances English was not the first language of the police officers/authors. Logic dictates that if they made an error translating they would make the same error when repeating the information to the witness for confirmation and signature. Due to the minor nature of deviations I cannot draw a negative inference from same. In general the witnesses made an honest impression.

[82] On count 1, housebreaking with the intent to rob and robbery with aggravating circumstances (as defined in Section 1 of the CPA), Jakobina Johannes testified that she told the two deceased boys to close the door and said normally it was done with the tying of a rope. No evidence was presented if indeed the door was closed prior to them going to bed. From the photo plan it cannot be established, without

³⁹ Exhibit 'HH'.

⁴⁰ Exhibit 'U' on page with diagram.

speculating, if the rope was untied or cut.⁴¹ From the evidence however it is clear that Jakobina Johannes was unlawfully attacked with a weapon and whilst unconscious robbed of the N\$ 250 that she carried on her body in the two knitted purses. There is no reason why her evidence should be rejected on the amount involved. Furthermore her evidence cured the defect in the charge sheet in that regard. The offense of robbery with aggravating circumstances was proved beyond reasonable doubt.

[83] On counts 2 and 3, being the murders of Ndapuka Linus and Thomas Ndapuka Malakia, the medical evidence indicated that they were beaten multiple times on their heads with a heavy object resulting in various bones being fractured and massive bleeding on their brains. It can safely be inferred that either of the two stained wooden sticks that were found in close proximity to their bodies was used during this attack on these young boys. Considering the choice of weapon, the ages of the deceased, vulnerable parts of their bodies targeted and, the severity of the injuries inflicted there is no doubt in my mind that the attacker had the direct intention to kill them.

[84] On count 4, the contravention of section 2(1)(a) of the Combating of Rape Act 8 of 2000: Rape, the victim Jakobina Johannes denied any knowledge of a sexual act involving the culprit. However on the suspicion of the officers the possibility was investigated and from both the medical and scientific evidence it is clear that a sexual act was committed with the complainant. From the fact that she was unaware of such and the injuries sustained, it can be inferred with certainty that no consent was given. The only reasonable inference I can draw is that the victim, whilst being in an unconscious state, was raped by the culprit.

[85] I will now determine if the evidence prove beyond a reasonable doubt that the accused was involved in any of these offences and if the dock identification of the accused as such should be accepted.

[86] The evidence presented regarding the presence of the accused the next day at the Outapi police station and hospital is irrelevant to the offences. It does however

⁴¹ Exhibit 'R' photo 5.

serves to disprove the initial general *alibi* that was offered by the accused at the pre-trial stage. These witnesses at the police station and hospital were in close proximity to the person, spent time in conversation with him, they all confirmed that he had a trimmed beard and for the most part confirmed the clothes worn. The information provided to the witnesses at the hospital included the name Thomas and that he is the grandson to the victim. The telephone number provided to them by this person was later answered confirming the arrest. There is no doubt in my mind that it was the accused enquiring about his grandmother at the police station and visiting the hospital.

[87] Turning now to the aspect of identity of the unknown man on the fateful night. The witnesses when cross-examined all mentioned the distinctive trimmed beard, clothing, shoes, and balaclava of the accused prior and shortly after the attack. The evidence of witnesses on the print left by the culprit's shoe was consistent and furthermore was a match to the shoes found in the room where the accused slept. On the suggestion from defence counsel that there were two culprits, there is no basis for that as all evidence suggests otherwise. Not only did the shoe prints indicate that only one person was involved but also all the witnesses testified that they saw the unknown man on his own during the relevant times. All were adamant that it was the accused.

[88] The evidence of lileni, who started his evidence with the undisputed fact that he and the accused are friends, was that the accused left his presence at 13h00 dressed in a blue overall trouser and jacket, balaclava and flip-flops. The accused only returned at 00h00 that night. A person dressed similarly was seen the same afternoon by Ehergardis Aupoko passing her shop in the direction of Jakobina's house. She could only see his eyes but, based on his clothing and shoes worn, deducted that it was the same person she saw later the evening drinking at the next-door shop. Servasius Shaumbwako confirmed her evidence. They were both in close proximity in reasonable lighting and spent time in conversation with the person. Cigarettes and drinks were shared. Both confirmed his clothing, balaclava, shoes and the trimmed beard. The name provided to them was Thomas, the middle name of the accused. Both were certain it was the accused.

[89] Joel Amutenya was certain that it was the accused he saw at the dam behind Jakobina's house that afternoon. He spent limited time with the accused however was suspicious of his behaviour of covering his face with the balaclava and thus paid more attention. He confirmed the clothing and shoes worn at the time. The prints, consistent with the shoes confiscated from the room where the accused slept, led from the dam into the homestead and room of Jakobina Johannes and from there to the drinking place of Ehergardis. All the witnesses testified that the accused wore shoes leaving a similar print on the day in question.

[90] While approaching the evidence of Jakobina Johannes with caution, it cannot be ignored that she identified the culprit that night with determined certainty by name as the accused whilst in very close proximity. She gave her statement after the arrest of the accused and thus had time to reflect. Being his grandmother, who also raised the accused, she would normally be the last person to falsely implicate him as the culprit. I find her evidence in this regard reliable. Finally the DNA results confirmed that the accused's semen was present on the vaginal swabs taken from Jakobina Johannes with the estimated probability of it belonging to someone else determined at 1 in 1,28 nonillion. This DNA result not only confirm that the identification by the victim Jakobina is reliable but also undeniably places the accused on the scene of crimes.

[91] In conclusion I am satisfied that the State proved beyond a reasonable doubt that the accused committed these offences and in the result he is convicted as follows:

1. Count 1: Housebreaking with the intent to rob: Not Guilty however on Robbery with aggravating circumstances (as defined in Section 1 of the Criminal Procedure Act 51 of 1977) - Guilty.
2. Count 2: Murder with direct intent, in respect of Ndapuka Linus, (read with the provisions of the Combating of Domestic Violence Act 4 of 2003) - Guilty.
3. Count 3: Murder with direct intent, in respect of Thomas Ndapuka Malakia, (read with the provisions of the Combating of Domestic Violence Act 4 of 2003) - Guilty.

4. Count 4: Contravening Section 2(1)(a) of the Combating of Rape Act 8 of 2000: Rape (read with the Combating of Domestic Violence Act 4 of 2003) - Guilty.

E.E. KESSLAU
JUDGE

APPEARANCES

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FOR THE ACCUSED: Mr. L.S. Kabajani
Instructed by Legal Aid