

CASE NO. CC 07/2003

IN THE HIGH COURT OF NAMIBIA

In the matter between: **STATE**

versus

TUHAFENI BERENDISA KUTAMUDI

CORAM: GIBSON, J.

Heard on: 2005.02.08,2005.02.09,2005.02.10,
2005.02.11, 2005.05.17, 2005.05.18, 2005.05.19, 2005.05.20,
2005.05. 23, 2005.05. 24, 2005.05.25, 2005.05.25, 2005. 05.27.
2005. 05. 30, 2005.06.10

Delivered on: 2005.06.27

JUDGMENT

GIBSON, J.: The accused is charged on three counts of murder. The allegation is that on the 4th and 5th of September 2002, the accused killed Policapus Paulus, Sylvia Ndahafa Franz and Eunice Kambwali, in that order. The alleged killings took place sometime during the night of the 4th and about 7-8am on the 5th of September regarding the final victim Eunice Kambwali. The accused pleaded not guilty, and save for an admission in terms of Section 220 identifying the bodies and acknowledging that the bodies did not suffer any further injuries during transportation he made no further statement.

The State indicated that it wished to lead evidence of an alleged confession made by the accused and place before the Court the Section 119 Plea proceedings. The defence objected against the admissibility of either documents. The ground of objection against the admission of the confession was that the confession was not free or voluntary having been induced by threats and assaults against the accused in the hands of the police.

As regards the challenge to the Section 119 proceedings the accused's objection was on the ground that he asked for legal aid so as to be represented by a lawyer but this was refused, thus the plea proceedings went on without his having had a chance to consult a lawyer.

The State called the magistrate who took the confession, Ms Kephas. Ms Kephas said she recognised the accused and remembered him being brought to her office on the 5th of September 2002, that when he was brought, to her she warned him about his legal rights after telling him that he was before a magistrate, that he need not fear anything. Ms Kephas said she was alone with the interpreter and accused, no one else. She said she assured the accused that he must not fear any threat or further assault or act under any promises which may have been made to him by anybody, and that the magistrate will give him every protection to ensure that he wasn't threatened or assaulted for what he was to tell her. She told him of his right to legal representation, the accused told her that he did not need one. Accused never told her he was threatened or assaulted at any time. She then took the confession. Ms Kephas was shown the document afterward. She recognised the writing on it. She said the accused looked happy and free and relaxed as he related the contents. She said he was right in front of her and showed no signs of any

assaults or injuries on him. She was asked particularly about the accused's neck which was said to have been swollen. She as well as the interpreter in the proceedings said there was no swelling or injury on the neck. Ms Hamukoto's testimony supported the evidence of the magistrate. She said after interpreting and writing down the confession the magistrate had signed it, and she too signed. She also confirmed that there were no injuries on the accused, that the accused never complained of having been assaulted or threatened. She said she did not hear accused asking for a lawyer, if he had she would have remembered it.

Sergeant Ishua told the Court that he was detailed to go and attend the scene of crime on the 5th of September 2002. He got to the scene with Chief Inspector Blaauw and met Constable Shilongo with another police officer and the accused. They were at the gate of the homestead of the scene of crime. Chief Inspector Blaauw approached Constable Shilongo and spoke to him. Chief Inspector Blaauw then asked the witness to take the accused to Oshakati to go and make a confession. He drove alone with the accused who was sitting at the back of the truck. There was no communication between them, and he never talked to him at any other time. Concerning the accused's condition, he said when the accused was asked to get into the truck he simply walked normally and boarded the truck, without any difficulty or any help. He said accused looked well, and free and seemed happy and relaxed, he was quite sober. It was put to him that Constable Shilongo had assaulted the accused. He said nobody assaulted the accused at any time in his presence. When he got to Oshakati the accused again got down perfectly normally and willingly walked to the magistrate's office with him. He said he, the witness did not stay in the office where the magistrate took the accused's

confession. He remained outside. Afterwards he collected the accused and took him to Ohangwena.

Constable Shilongo the officer investigating the case said he got to the scene of the crime from Ohangwena where he was stationed at the time. He met the accused at the homestead of the deceased. He said accused told him he killed the deceased and went to show him the traditional knife he used, called omukonda. Constable Shilongo denied that he ever assaulted the accused at any time. He said in particular he never assaulted him when the latter was trying to find the knife. He said the accused readily pointed out where the knife was, told him where the clothes which he had been wearing the night before were. He said when the accused was asked to go and make a confession he readily agreed and never showed any signs of reluctance. He didn't hesitate, he simply walked to the truck and got in. Asked about any injuries on the accused and the swelling on his neck, he said the accused had no injuries on him. He said when he first spoke to the accused the accused

initially denied knowing about the third body ie the old lady Ndahafa. He said he asked him again. Accused said she may have run away, he didn't know where she was. As time went on however the accused admitted that he killed her as well and put the body under the bed where it was later found.

The State next led evidence of the Section 119 proceedings and called Ms Hanhele, the magistrate. Mr Hanhele said she was in the magistrate's Court and heard the Plea proceedings. When the accused came in she advised him of his rights to be legally represented and entitlement to apply for legal aid if he had no money. The accused told her that he wanted legal aid. At that juncture the State applied to have

the pleas taken. The magistrate explained what was involved. The accused then said he would proceed that day and get it all finalised because he had no case. Ms Hanhele said she was concerned and made sure that the accused understood fully what he was saying. She explained the nature of the proceedings and the procedure involved, and explained to him that this was merely an enquiry not the trial itself. She again reminded the accused that he was entitled to remain silent if he wished, that he didn't have to answer questions. The charges were then put she outlined the

elements of the offence to him. Ms Hanhele said as far as she could see there was no difficulty in communication between the accused and the interpreter. She too spoke the language and could follow what the interpreter was saying and putting to the accused. She was satisfied that the interpretation was correct and accurate. The proforma was then produced and put in front of her. She recognised the writing on it. She said she recalled that the accused pleaded guilty to each of the three counts. Under cross-examination here in Court the accused said he asked the magistrate what a lawyer does in proceedings, when this was explained he decided he would proceed without one because he had no case. The accused also put it to the witness in these proceedings, that when he said he had no case and would proceed, the magistrate and the interpreter told him that the case was serious, that he should make sure that he understood what he was doing.

Mr Ipakwana the interpreter then took the stand. He said he recalled that the accused did say that he wanted legal aid after his rights were explained to him by the magistrate. Mr Ipakwana told the Court that the accused did ask what a lawyer does, that the magistrate explained to him what the role of a lawyer was in court

proceedings and, he interpreted everything to him. Mr Ipakwana said there was absolutely no difficulty in communicating with the accused or in his understanding him. I have already indicated that when the accused gave evidence in examination-in-chief he admitted that the interpreter did in fact tell him what the role of a lawyer was, that he did tell him that the charges were serious, that he ought to reflect carefully. But accused said that he had no case and would proceed, in spite of the fact that the interpreter had again reiterated the gravity of the charges he was facing and that there was a case against him. It was then put to the witnesses that accused did in fact apply for legal aid that day and, was granted legal aid. Ms Hanhele explained that this was impossible and most unlikely because the application would have had to be sent some 60 kilometres away to Eenhana, that takes at least a day to get there, which means that the application would not be considered until the following day. So it was unlikely that the grant would have been made on the spot. The State case closed. The accused elected to give evidence under oath after his first lawyer withdrew on account of conflict of instructions. The accused said he visited Ndalafa's house between 7am and 8am that day, on the 5th of September, he wanted just to say good morning as was usual, she was his aunt by marriage. When he called there was no answer so he went in and called again. Eunice was his friend so he went into Eunice's room and pushed open the door which wasn't locked. He saw a curtain drawn but saw her lying down. He called her. When she did not answer he touched her then realised she was dead. He went to Tate Poly's house and called, there was no answer. He went round the back of the house and saw him lying down, he realised that he too was dead. He then went to call the neighbours, in shock. He called on Sakarias and Shilungu. They returned with him and met another

neighbour on the way. When they got to the homestead he pointed out the two dead bodies. A decision was made to go and report to the police. After the report the police ordered him to return and look after the bodies, ie guard the bodies. He was shocked and reluctant but complied. He waited until the police arrived, three police officers arrived.

The accused then gave the names of the three police officers. There was some confusion about the names. In any event Constable Shilongo said only two police officers were there and not three. When the accused related what happened thereafter, at first he said that the woman constable stayed with him while the other two went to his own homestead 500 metres away. Thereafter there followed a whole series of confused accounts.

Later on the accused said that the police told him they had heard about the killing with the omukonda and asked him about the omukonda. He said after he agreed that he had a omukonda but denied killing, the police asked him about the old lady he said she may have gone to fetch water. Later they went with him to his homestead to look for the omukonda. He said when he got to his homestead and started to look for the omukonda Constable Shilungu slapped him hard. He said he tried to pick it up and they said don't pick it up, grabbed him and took him to the truck.

In another version the accused said he looked for the knife then fell down, then the policeman came and rained blows on his face and neck and he suffered a nose bleed. He denied that he killed the residents. He also denied that he pointed out the body of Unandafa to the police. Describing the departure from the scene, on one occasion the accused said they left and went to Ohangwena. While at Ohangwena

the police took him to a tall building and told him to step out. Then he said at one point he was taken behind a hall where he was beaten. He said after the visit to Ohangwena and the beating he was taken back to the scene of crime where he was left for hours in the back of the truck. Eventually he was taken to Oshakati after a white man came and removed the handcuffs. He said on this version, that after the handcuffs were removed he was asked to get into the car of the white man and was taken back to Ohangwena but they merely passed through to Oshakati without stopping.

The accused claimed that the magistrate had asked him for N\$3 000.00 for a lawyer. None of this had been put to witnesses. He said when he told the Court that he didn't have the money, she asked him if he was assaulted. He agreed and pointed to his swollen neck and told her that Shilongo beat him to get him to admit the killing. He said he also told the magistrate that the police told him if he doesn't tell the magistrate what they wanted him to say they would further assault him. The accused then claimed that he returned to the same office the following day, but did not get the papers or his answers. He admitted that he had told the magistrate that he didn't need a lawyer on the basis that he didn't have a case. He said he remembers the interpreter telling him that there was a case against him. Then he claimed he couldn't understand what was being talked about.

The first question I posed before I ruled in favour of the State admitting the confession, and the Section 119 proceedings was whether the confessions were made freely, voluntarily by the accused when he was in his sound and sober senses, as is specified in Section 217 of the Criminal Procedure Act 51 of 1977 and the numerous cases interpreting that particular provision. In terms of the Criminal Procedure Act, three conditions have to be satisfied before the Court can find that the State had proved the case beyond reasonable doubt, was the confession made

freely and voluntarily and without undue influence.

The reasons why I admitted the confession and allowed the Section 119 proceedings is that I was convinced beyond reasonable doubt of the veracity of the State witness's account. Looking and assessing the evidence of the State witnesses together with that of the accused person I had no doubt whatsoever that the accused's account of the circumstances of the making of the confession were false beyond doubt. Constable Shilongo's account and his denial of assaulting the accused at any time is overwhelmingly confirmed by the other witnesses, Sergeant Ishua and Constable Hamukonda. Also the objective evidence of the lack of any signs of any injuries upon him such as will be consistent with the beatings as claimed gave certainty to my finding. I was quite satisfied that there was no assault on the accused at any time, that he readily admitted responsibility for the death of the resident of the homestead. The witnesses were verified by the evidence of Ms Kephass the magistrate who took the confession, the lack of the injuries on him, the relative ease and relaxation that was in the accused. Also, the evidence of the interpreter Ms Hamukoto confirmed the account of the police officers, she said the accused never complained of assault. In addition to all this, the accused's own evidence is peppered with innovations and contradictions throughout. The changing account of when he was assaulted, where he was assaulted and how he was assaulted, whether he was taken to Ohangwena first and then returned to the scene of the crime, left baking in the sun and was rescued by a white man. A suggestion that he was taken to the tallest building at Ohangwena and asked to step out and jump all sounded a last minute invention by the accused as he gave evidence. This is also verified by the fact that none of these claims or accounts were put to the witnesses of the State to deal with. This omission is not acceptable to the Court.

Courts have on numerous occasions rightly emphasised the need for one side or other to put its side of the case to the witnesses so that the witnesses have a chance or opportunity to deal with the allegations and so that OF the veracity the allegations is tested.

Having found the State's evidence overwhelmingly believable, and that of the accused false beyond reasonable doubt I admitted the confession.

As regards the complaint that he was denied legal aid in the Section 119 proceedings and did not understand the nature of the explanations, Ms Hanhele's overwhelming evidence was confirmed by the Interpreter. According to Ms Hanhele, Mr Ipakwana interpreted correctly, properly and accurately to the Accused. Even in this proceedings the Accused himself admitted that the Interpreter was painstaking in interpreting what the Magistrate was saying.

When he asked about the role of a lawyer he was told what the role of a lawyer was. When he claimed that he had no case he was told that there was a case against him, that the charges were grave and serious.

While it may have been a mistake by the court to proceed that day rather than postponing the matter for another day to give the accused time to digest what had been said by the court, an irregularity of that nature in this particular proceeding did not result in any unfairness to the accused. It was made clear beyond reasonable doubt that Ms Hanhele took the trouble and fully explained the nature of those proceedings. She explained the meaning of the charges and the essential elements of the charges, and, the interpreter emphasized the seriousness of the charges he was facing.

So there is no doubt from the questions he was putting that the accused understood well what was being put to him. To claim that he didn't really comprehend what was being put is a last minute afterthought on his part. Even after the decision had been taken to proceed with plea taking, the magistrate again warned him that he need not answer, he may remain silent. So if there was an irregularity through an undue haste, it was cured by the painstaking nature of the explanation. The participation of the accused in the process shows that he was following what was going on, and realised that he could even then, either remain silent or choose to have the matter stood down. To claim that he applied for legal aid which was granted there and then is an obvious untruth not worth weighing seriously.

Now the next question that arises in this part of the proceedings and which has come up several times in this Court and other court's in this jurisdiction, is the question whether a denial of legal representation to an accused person even at a preliminary enquiry in contravention of the Constitutional guarantee, in Article 12(1)(e) flaws the proceedings to the extent that the evidence must as of necessity be excluded.

In the case of the *State vs De Wee*, Smuts AJ of this court, considered at great length the question whether evidence obtained in breach of constitutional rights must as a matter of course be excluded. He referred in particular to the case of the *State vs Kapika and Others* 1997 NR 285 where the court ruled that there is a constitutional right for the accused to be informed of his right to a lawyer even at the preliminary stages. But the Learned Acting Judge weighing the question, ruled that there was no absolute exclusionary rule of statements obtained in breach of the constitutional rights, that the court has a discretion. I agree with the statement. For reference see: the cases of *State vs Shikunga and Another* 1997 NR 156 Supreme Court Judgment of Chief Justice

Mohammed (now deceased) followed shortly after by the case of *State vs Kanduvazo*, also a Supreme Court judgment.

At page 127 Smuts, AJ said. "I also accept that the Supreme Court has held that in cases where irregularities even involving the constitutional right a court is vested with the discretion to determine whether or not these irregularities would result in the failure of justice which tainted a conviction prejudiced the accused and are of such a fundamental nature that the evidence may be excluded." The Learned Acting Judge further cites the case of the *State vs Attorney General, Cape Provision* 1996 SA(1). The *State vs Melanie and Others* 1996(1) SACR 335 E, a judgment of this Court by the then Judge President Strydom, of *Stare vs Bruwer* 1993 NR 219.

In the Cape Province case, cited above the Learned Judge said, and I paraphrase the paragraph, ... "That what the Constitution demands is that the accused be given a fair trial... ultimately fairness is an issue, which has to be decided upon the facts of each case. At times fairness might require that evidence unconstitutionally obtained be excluded but there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, be admitted."

Quite clearly therefore the matter is one for the discretion of the court and depending on the facts and the circumstances, the confession or statement or evidence may be admitted or rejected. In exercise of that discretion I rule to include or admit the Section 119 proceedings. Those are the reasons, which I reserved in the judgment in admitting the two exhibits.

Continuing with the main trial, the state called Doctor Amutenya who conducted the post-mortem examinations on the three bodies. Doctor Amutenya produced the

respective reports he prepared at the time to refresh his memory of his findings. As regards the body of Paulus Policapus. He said there were numerous cuts and stab wounds but these included four penetrating wounds about ten centimetres deep. As a result of these wounds the lungs had collapsed, the four deep wounds were in the chest, the neck and the abdomen.

The doctor gave full details and illustrated the wounds from the sketch plan attached at the back of the report where they were positioned. I shall not go into those because they are all part of the record. He then said of the wound in the stomach death would have followed immediately through blood loss. He said that from what he found, namely that the intestines had been pushed out, the victim must have been alive and breathing at the time it was inflicted. Of the nature and position of the wounds and the intention or mind of the attacker, the doctor said that a wound above the heart is fatal if deep enough. \nd from such an infliction by an attacker the deduction may be made of the presence of an intention to kill against the accused.

The doctor next referred to the post-mortem on the body of Eunice Kambwali. He said there were five wounds, ten centimetres deep. One was on the left side of the chest and four at the back. He deduced from those at the back that the victim tried to flee. In addition he found undigested food, which showed that the victim had consumed some food within four hours of her death. This evidence would tend to support that of Theresia Hamwele who said she parted company with Eunice between 07:00 and 08:00 that morning before she met her death. The report is exhibited in the proceedings and I need not set out any further details of that.

The last body the doctor referred to was that of Sylvia Ndahafa a 65-year-old woman. In that body he found multiple stab wounds, in the chest, the abdomen and the neck. In one wound, the jugular vein and the carotid artery had been cut. Both lungs had collapsed. He said the wounds were very deep.

The doctor said the deaths were caused by a sharp instrument in all three cases. He said the sharp instrument resembled a spear in that both edges were sharpened on either side. The State produced a number of exhibits which are on record. The knife, 'the omukonda' has two sharp edges on either side, is exhibit 1. The trousers and belt found in the accused's house has some blood on it, ie the trousers. According to Constable Shilongo the blood was submitted for tests at the Forensic Science Laboratory and the result was that the blood on the trousers was of the same blood group as that of the deceased, Eunice. The Forensic Scientist's report is Exhibit J in the proceedings.

The knife found on the premises fits in with the description of Doctor Amutenya as to the nature of the weapon used. It tends to confirm the evidence of Constable Shilongo, in that it had been hidden away and out of sight obviously to avoid detection.

The next witnesses were neighbours. The three neighbours of the deceased and the accused. Titus Shaumana said he'd known the accused as a neighbour for years he wasn't brought up with him. That the accused resided with the deceased in that homestead but latterly had built his own house not very far from the scene of the murders. He said on the day before these events the accused was at his home, they parted some time during the evening, it was then that the accused told him that he was angry with the deceased Ndahafa. He said the accused left and he went to bed,

then about half an hour later at about 22:00 he heard a dog barking, then heard some cries, a man's voice was saying, I am stabbed. Also a women's voice was heard saying, Tuhafeni what are you doing? The witness said both sounds came from the direction of the scene of crime. He was able to recognize the voices as those of the deceased.

The following morning the deceased, Eunice Kambwali arrived, he mentioned to her what he'd heard the previous night. He said Eunice left immediately. Then later that morning, and not long afterwards, he got news of the incident. He related his encounters with the accused earlier in the day the previous day, that he had met the accused at a shebeen and noticed that the accused was carrying an omukonda in his waist band, he said he had never seen the accused with an omukonda before. He said though it was under a T-shirt he couldn't mistake it. He described the omukonda as having a wire handle of either yellow and white wires.

He was asked about exhibit 1 in court. He said he couldn't be sure that that was the weapon he saw.

It was put to him on behalf of the accused that he did indeed meet the accused at the shebeen in the morning and also in the afternoon. But at that stage, the defence said that it was in the early part of the afternoon, not as late in the evening as 9pm or 10pm. The witness agreed that he'd seen the accused twice, and said he couldn't forget it because it was the first time he'd ever seen him with the omukonda. He said however that the accused looked normal, even as he related the dispute with Ndahafa.

Theresia Hamwele was called and said she worked at the shebeen where she saw

the accused with another man the day before, on the 4th of September. She said that the accused was wearing a T-shirt. At one point the accused put his hands on his hips, as he did so she noticed that he was wearing an omukonda in his waist band. The accused quickly pushed the T-shirt down, but she couldn't have mistaken the knife. Theresia said Eunice was her friend, in fact they spent the previous night together. She said after she closed the shebeen they went to another cuca shop. It was there that she saw the accused again with the last witness, Mr Shaumana.

The following morning she and Eunice called at Shaumaaa's house. Shaumana told them about the cries from the deceased's residence he'd heard during the night. Eunice immediately left for the homestead. Theresia said that was last time she saw of her. Later that morning she learnt of her death and the other deaths.

Handaleni Nangula was another witness called. She said she had been gathering firewood in the morning about 07:00 or 08:00. She said she heard screams of a woman. She said she didn't recognize the voice but, it came from the direction of the deceased's house.

Then Daniel Kashiyalwa was called. He said on the 5th he was at home when the accused arrived and asked him to come along. He accompanied the accused. On the way they were joined by another man. They got to the scene of the crimes and, as the accused opened the gate he drew their attention to some blood nearby. They then found the body of Policapus on which he noticed a deep cut on the neck.

They went to another room where the accused pointed to a woman's leg. They asked who it was, the accused said it was that of Eunice. They asked the accused where Ndahafa was? He said she may have gone out to fetch water. This evidence

is important; the witness had no grounds to be gained from making it up. In my view it tends to confirm the evidence of the accused's initial denial of Ndahafa's death to the police. It also confirms Constable Shilongo's evidence. Clearly the witness couldn't have invented it.

Constable Shilongo was again called, in the main trial. He said he left his office to investigate the murder. When he got to the scene he found the accused at the gate. He noticed some blood and saw some drag marks. He followed the blood and the drag marks that led to a hut. Just behind the hut he saw the body of a man.

He saw some more drag marks which led to another hut. He followed these and found a woman's body, he didn't go in at that time. He went back to the accused and asked him where he is staying? The accused said he slept at the homestead that night, and told him that the deceased annoyed him so he killed them with a traditional knife. He asked where the knife was, the accused said it was at his home together with the clothes he'd been wearing. They went to the accused's house where the accused pointed out the white T-shirt on the floor, but underneath which was a knife. The trousers was in another room; it seemed to be hidden under some bedding then he noticed bloodstains on both legs of the trousers, at thigh level. He noticed also some small bloodstains on the T-shirt.

He asked the accused where the old lady Ndahafa was. Accused said she had run away. However, as time went on the accused opened up and said that he'd killed her as well and her body was under the bed in the room where Eunice was. Constable Shilongo said that he took some photographs which are before court. He said there was a clean knife as is seen on the photograph on the body of Policapus which was

other than the exhibit in court.

Constable Shilongo said he examined the accused and noticed that there were no signs on him of his having been assaulted with a stick or anything else. But he noted the multiple stab wounds on all the three bodies. He identified exhibit 1, the knife exhibit 2, the trousers, and explained the photo plan. That's all on the record I need not go into it.

It was put to him that the accused denies that he admitted killing the residents and denies that he wore a T-shirt, or that the trousers with bloodstains was found in his house. He said this was not his nor was he wearing them the previous day, I have already referred to the bloodstains on the trousers and the submission for forensic tests, the confirmation of the common blood group between the trousers and the blood taken from the accused.

The accused gave evidence, on oath. He said that on the 4th of September he wore a tracksuit bottom and a shirt not the T-shirt as claimed or the trousers. He said that he went to the shebeen in the morning and drank some tombo with Shaumana. Then he slept all day and late afternoon he went back to a shebeen and drank again with Shaumana. On this occasion he said he was with Shaumana until pass 21:00. And that when they left Eunice and Theresia were still at the cuca shop. He said he walked back with Shaumana towards his home and parted company with him at the latter's house. He said he got home about 22:00. It was all quiet there was no noise there were no cries. He said he never heard any noises or cries during the night either but he said he couldn't deny what the other witnesses told the Court about the screams. If they did occur he didn't hear them. It is common evidence that whereas the accused's house is merely five hundred

metres from the scene of the crimes, that of Shaumana, and other witnesses was even further away.

He said in the morning he got up to fetch water and passed through Ndahafa's home. There was no answer. He went into Eunice's house there was no answer, but behind a curtain. He noticed that she was lying dead. He went out to the old man's house, Policapus. Behind his hut he found his body. He too was dead. He noticed the drag marks and went to call neighbours when they came he decided to report the matter to the police.

Three police men including Constable Shilongo arrived. He gave a confusing description of names of the police officers. Quite clearly the third police officer whose name was variable was an invention; to what extent or what reason it is unclear. He said that the omukonda before the court is not his, neither is the trousers. He denied that the barefoot footprints which the police saw and which led from his room to the scene were his he said on that day he was wearing tackies. He maintained his denial of the killings, or telling Shaumana of the dispute with Ndahafa.

The accused challenged the contents of confession. He said the police dictated the contents to him. In regard to the summary of the contents, he accepts the killing of Policapus after a quarrel between him and Ndahafa and describes the quarrel as arising from a dispute concerning the omukonda. He tells a story that Policapus borrowed his omukonda when he went to attend a funeral, but later for three months refused to surrender it. However he admits that he had been using Policapus' omukonda, though a smaller one. He said he had misplaced it and that

was the cause for the dispute.

He said the day before these events he'd collected his omukonda. He said when the quarrel erupted Ndahafa, hit him with a stick. Policapus went and collected a panga from his room and tried to stab the accused. The accused managed to run away and ran five hundred metres and back to his home where he collected the omukonda. He tried to stab Policapus with it but it was too short. So he hit him with a stick whereupon Policapus fell down. As he fell he lost the panga, the accused thus got the chance to stab Policapus while he was on the ground. He said he stabbed him more than once. When Ndahafa tried to intervene and beat him with the stick, he turned and stabbed her as well. Both died immediately. The following morning about 07 or 08 Eunice arrived. He was still very angry, so he stabbed her to death as well.

The confession contains details in it that would be unnecessary to include if it was an invention. No witness could have invented such details because of their nature. Further some of these details are consistent with what the accused's account was. The story of the quarrel over the omukonda also explains why the accused, who had never been known to carry an omukonda in the daytime, would have been hogging that omukonda around that day.

Concerning the killing of the first two victims the effect is that the accused raised a defence of self-defence. A person in imminent danger of assault, or threat of assault is entitled to anticipate the attack, or fight back if he is attacked, if he believes that he is in danger, even if that belief be unreasonable. However in warding off an attack or acting in self-defence the victim must not use excessive force, and he is

not entitled to assault the attacker if the attack has ceased. Quite clearly therefore as far as the evidence of the attack on Polycapus is concerned, if you go by the confession, Polycapus no longer posed a threat to the accused because he had lost the panga, and was down. If the version is accepted from the accused as true the accused would still be guilty.

Similarly, in attacking Ndahafa the accused used excessive force, that is if he is believed, because Ndahafa was only hitting him with a stick. So there was no justification in law for attacking the two victims with the omukonda, nor in the manner in which it is described as resulting in the multiple stab wounds that Doctor Amutenya found. With regard to Eunice, there's absolutely no excuse in reason or law why he should have killed her. He said he did so because he was angry, and this was SDme hours later. It is clear he just attacked her to kill her.

The claim that the confession which was taken down in writing was what Constable Shilongo told him has no substance. The admissions contained in the confession are not the only ones. For example there is the admission four days later after he had time to reflect before Ms Hanhele. This was in spite of the warning about his rights, and warning about the gravity of the charges. This notwithstanding, the accused admitted the killings, without any justification on his part. The accused's admission in the confession is confirmed also by the objective evidence found by the doctor. Further as verified by witnesses, concerning his carrying of the omukonda the day before. Had Constable Shilongo been bent on in venting an untrue story he would easily have made use of the other knife found on the body of Polycapus rather than embarking on a search for a traditional knife. He can only have mounted the search for a traditional knife because the accused had told him of its existence and

whereabouts its use.

Accordingly I find the State's evidence overwhelming. Against the State's evidence, there is a denial after denial of any kind of involvement or responsibility by the accused, except when he made the admissions and confessed to the crimes before the magistrate, and in the Section 119 Plea proceedings. The accused quite clearly lied and at times did not do so very efficiently. The defects in his story are clear, that the story he told was quite implausible is also clear. And was proved beyond reasonable doubt to be false. Therefore I find that the accused committed those acts which resulted in the death of the three victims.

So what of the intent? Did the accused have the intention to kill or foresee that death may result from his actions in attacking these three victims? In the absence of an admission by an accused that he intended to kill the victims the State is only able to urge such a conclusion by the Court from an examination of all the evidence and the circumstances, the nature of the killing, and the weapon used, in order to find out whether the facts proved show beyond reasonable doubt that the accused had the intention to kill or that he foresaw that death would result?

In this case the evidence of Doctor Amutenya carries considerable weight and beyond reasonable doubt. The finding of the four deep penetration wounds on Policapus on the part of the body that is invariably life threatening when the inflicted wound is deep enough, shows that there was an intention to bring about the death of the victim.

A similar intent exists, in the finding of the stab wounds on the body of Eunice,

which were deep and penetrating straight into the heart, and resulted in a loss of blood of over 650 millilitres. In the case of Ndahafa, again, the Doctor said he found multiple stab wounds, including wounds round the neck, head and chest. In particular, the cut around the right ear that went to the bone, severed the jugular vein and the carotid artery, which are essential vessels that carry blood to the brain, was fatal even to the simple man.

Looking at those stab wounds, the area of the body, the weapon used there can be no doubt and I'm satisfied beyond reasonable doubt that the accused intended to kill his victims.

I find therefore that the accused is guilty as charged on all the three counts.

ON BEHALF OF THE STATE

Ms R Gertze

Instructed by:

Office of the Prosecutor-

General

ON BEHALF OF ACCUSED

Mr Dos Santos Directorate of Legal

Instructed by:

Aid