"Reportable"

CASE NO.: CC 20/2010

IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI

In the matter between:

THE STATE

and

MANDUME MATHEUS KAMUDULUNGE

CORAM: LIEBENBERG, J.

Heard on: 11 – 14; 18 – 19 October 2011
Delivered on: 26 October 2011

JUDGMENT

LIEBENBERG, J.: [1] The accused is an adult male and stands charged with two charges of murder (counts 1 and 2); and one charge of defeating or obstructing, or attempting to defeat or obstruct the course of justice (count 3);

alternatively, violating a dead human body. He pleaded not guilty to all the charges.

[2] The charges are founded on the following allegations set out in the summary of substantial facts:[1]

> *"The accused and the deceased in count 1 resided together in the Ohangwena Villiage (sic) in the district of Eenhana and they were the biological parents of the deceased in count 2 who resided together with them. On Sunday 18 January 2009 and at their residence the accused tied the hands and feet of the deceased in count 1 and also tied a shirt around her neck. The accused stabbed the deceased in count 1 at least 26 times with a knife. The accused also stabbed the deceased in count 2 at least seven times with a knife. Both deceased died on the scene due (sic) injuries caused by the stab wounds. With the intent to defeat or obstruct the course of justice as set out in count 3 the accused poured a flammable substance over the two deceased and set their bodies alight."*

[3] Ms *Kishi*, representing the accused, submitted an oral plea explanation to the effect that the accused's defence is one of an alibi and, according to which, he was not present when the offences were committed, for he had been at the mini market at Ohangwena. Upon his return he discovered that both deceased have been murdered whereafter he went to the police to report the matter. He accordingly denies having killed either Bertha Kashile or Tangeni Kamudulunge, or having set their bodies alight; and put the State to the proof thereof.

[1] Section 144 (3)(a) of Act 51 of 1977

THE EVIDENCE

[4] The following documents were handed in by agreement: the State's Pre-Trial Memorandum (Exh 'B'); the accused's Reply to the State's Pre-Trial Memorandum (Exh 'C'); Amended Minutes of Pre-Trial Conference (Exh 'D'); Psychiatric Report (Exh 'E'); Sketch plan (Exh 'F'); and Photo plan (Exh 'G').

[5] On 19 January 2009 Dr Vasin, a forensic pathologist, performed autopsies on the bodies of an adult female by the name of Bertha Tuleingepo Kashile (herein referred to as 'Bertha') and a seven month old boy called Tangeni Omwene Mudjanima Kamudulunge (herein referred to as 'Tangeni'). The identities of the deceased are not in dispute.

[6] In respect of the body of Bertha the post-mortem examination revealed the following findings:

- 26 stab wounds on the body of which 10 were located on the right anterior chest aspect, 13 located on the left anterior chest aspect and sternum area, and 3 located on the back of the torso;
- 11 of these stab wounds were penetrating injuries to the chest cavity causing an injury to the heart and multiple injuries to both lungs; and bilateral haemothorax, which is blood accumulation in chest cavities – (850 ml in the right side cavity and 750 ml in the left side cavity);

- paleness of the intestines;
- extensive cutaneous (skin) burns with soot deposits in the trachea.

It was concluded that death was caused due to multiple stabbing, exsanquination and burning.

[7] In his testimony Dr Vasin elaborated on his earlier post-mortem findings, saying that the presence of soot in the trachea means that the deceased was still breathing and inhaled the particles (after the fire was started). He was further of the view that any of the eleven penetrating stab wounds to the chest cavity could have been fatal; the most potentially fatal wound being the one to the heart. In his view the injuries were inflicted with a sharp pointed object during which substantial force was applied; the same applying to the body of Tangeni.

[8] The chief post-mortem findings made on the body of baby Tangeni are:

- 7 penetrating stab wounds revealed on the chest;
- stab injuries to the right lung, vena cava superior[2]', oesophagus, trachea, diaphragm and liver;
- haemathorax on the right side – 150 ml;
- viscenal paleness; and
- 2nd, 3rd and 4th degree cutaneous burns over 75 – 80% of the total body surface.

[2] A large vein carrying deoxygenated blood into the heart

As to the cause of death, it was concluded that it was due to multiple stabbing to the chest and internal bleeding. Dr Vasin opined that the burning of the body followed the stabbing when the baby was likely to be dead.

[9] The evidence of Dr Vasin and the conclusions reached pertaining to the post-mortem examinations conducted on the bodies of the deceased persons, forming the subject matter of the two murder charges, were not disputed.

[10] It seems common cause that accused and Bertha had an amorous relationship, from which Tangeni was born. Bertha and the baby lived separately from the accused, who had a room of his own situated at the back of a bar and take-away belonging to, and run by, his elder brother Asser Mathias, and the latter's wife, Ipawa Shihepo. It is also not disputed that the accused returned to his room during the afternoon of 18 January 2009 in the company of Bertha, Tangeni and Ms Laimi Sheehama, who remained at the bar when the accused and Bertha went to the accused's adjacent room.

[11] Mrs Shihepo testified that whilst she was still at the bar, the accused came from his room asking for cigarettes and enquired from her whether she had a plastic container for him to use. Although the accused did not say what he needed it for, she handed him a 5 litre plastic container which he took to his room. She was on the stoep outside the bar when she later saw the accused leaving with the container in a plastic bag, going down the road. He returned some time later with the container and again entered his room. She said she later on decided to go home to prepare dinner and as she walked

past the window of the accused's room she heard Bertha talking and when she looked at her, she saw her standing at the window. The witness narrated to the Court what she heard Bertha saying (probably to the accused), however, this aspect of her evidence constitutes inadmissible hearsay evidence and must be disregarded. When the accused realised that the witness stood outside the window, he came and drew the curtains. She explained that because the accused and Bertha were in a relationship and there was no real argument between the two, she did not deem it necessary to inform her husband about the incident. After dinner they went to bed and shortly thereafter her husband got out of bed to see why the dogs were barking and then called her into the lounge. I shall return to her evidence later.

[12] I pause here to observe that the accused denies that the deceased used the words as testified by the witness in her presence; also that he drew the curtains.

[13] Ms Sheehama confirmed having been in the company of the accused and Bertha and when they reached the take-away, the accused went to his room. She was present when the accused later came asking for a container from Mrs Shihepo, who handed him one. The evidence of these two witnesses, as regards the container handed to the accused, was not challenged – neither that Mrs Shihepo later identified the container (albeit melted and damaged) when found in the accused's room by the police (Exh '1').

[14] Mr Asser Mathias said that after he closed the bar he went to the accused's room where he told him to fetch their dinner from the house, to which the accused replied that he would not join them for dinner as he was not hungry. He considered the accused's conduct as strange, for they would normally have dinner together.

[15] After they retired to bed the dogs started barking and when he looked through the window he saw a person leaving the accused's room whilst pulling something. He jumped over the fence of his yard in order to follow the person and when he came closer, he saw that it was the accused pulling a suitcase on wheels. He said the accused was wearing a yellow T-shirt and boxers ('trunkies'). When he looked back, he saw smoke coming from the accused's room and he then rushed back. After calling out to his wife, telling her that the accused's room was on fire, she replied that Bertha was still inside the room. He then went to the accused's room and kicked the door open. Although his sight was limited due to the smoke in the room, he could see Bertha lying naked on her back against the wall. When he could not see Tangeni, he thought that the accused might have put him in the suitcase and decided to follow him. He jumped on his bicycle and followed the accused up to the police station.

[16] Constable Absalom Ndeutapo was on duty and stood outside Ohangwena police station when the accused arrived there at around 23:00 that night. He was pulling a suitcase on wheels, walked past the officer

without saying a word, entered the police station and went behind the counter of the charge office where he sat himself down. He had followed the accused inside and saw him throwing a box of matches onto the desk. When Constable Ndeutapo asked the accused what he was looking for, he responded by saying that he came to give himself over to the police for he had killed his girlfriend and child. Constable Ndeutapo said he then tried to explain to the accused that he has the *"right to defend himself; to look for a lawyer; and to remain silent"* but that the accused was not listening to him but simply continued saying that he had stabbed them with a knife; that he had stabbed his girlfriend around four times and the child about three times; and that the knife was in the room on the right hand side of the door. After making this report Constable Ndeutapo summoned the investigating officer on standby, Sergeant Mukete, to the police station. He noticed that there was another man present in the charge office while the accused made the report and later learned that it was the brother of the accused (Asser Mathias).

[17] In cross-examination Constable Ndeutapo disputed an imputation that the accused did not make a report about him having killed those persons but that he actually reported to the police that he had *found* them murdered. He was adamant that the yellow T-shirt before the Court, marked exhibit '3', is the one the accused was wearing when he came to the police station that night. This aspect of his evidence was corroborated by Sergeant Mukete, whilst both Mr Mathias and Mrs Shihepo said that they saw the accused wearing a yellow T-shirt when he left home shortly before he turned up at the police station. These witnesses equally refuted defence counsel's assertion in cross-

examination that the accused did not arrive at the police station with a suitcase. On this point Sergeant Mukete testified that after interviewing the accused, he requested him to take off the T-shirt, which he did, and it was seized as an exhibit. He went on to say that the accused then took out another shirt from the suitcase he had with him and put that on.

[18] Constable Ndeutapo explained that the suitcase was not seized as an exhibit as it merely contained the personal belongings of the accused. In this regard Mr Mathias said that when he entered the accused's room after the incident, all the accused's belongings had been taken from the room by the accused (supporting the evidence that the accused left with a suitcase in which his clothes were packed).

[19] Sergeant Trophy Mukete confirmed that he was summoned to the police station where he found the accused seated behind the counter. After being informed that the accused turned himself in, or "surrendered" as it was put, he called the accused into his office and asked him why he had come to the police station. Accused then explained that he was experiencing problems with his girlfriend, called Bertha – who is also the mother of his seven months old son – and that he was provoked when a taxi driver had come to Bertha's place. He suspected them of having a relationship and he became angry when she told him that this man was the father of their son, whom the accused believed, he had fathered. When the accused then said that he had killed both of them, Sergeant Mukete realised that he was now incriminating himself and explained to the accused that he could be prosecuted; whereafter

he explained to him his rights to remain silent and his right to legal representation. The accused acknowledged that he understood what was explained to him but notwithstanding, accused continued saying that *"it was his life"*; that the knife could be found next to the door where it fell; that he burned the bodies with petrol he had fetched from Omafu filling station in a 5 litre container which was still in the room. After accused changed shirts he handed the accused over to the officer in charge and asked Mr Mathias to take them to the scene.

[20] The evidence given by the two police officers as regards their observations made in the accused's room, is similar namely, that baby Tangeni was lying on the bed while Bertha was on the floor with her hands (behind her back) and her feet trussed with the same type of cord. The bodies bore burn marks and both persons were dead. They found a melted plastic container, panties and a knife lying on the floor inside the room. The knife was found where the accused said it could be found i.e. upon entry into the room, on the right hand side of the door. Sergeant Mukete examined the bodies and noticed several fresh stab wounds on both bodies. Bertha was naked and there was a white long sleeved blouse (Exh '6'), with one sleeve tied around her neck. After the scene was photographed by a member of the Scene of Crime Unit, the bodies were removed and taken to the morgue. The evidence given by the two police officers pertaining to the observations each had made at the scene was not challenged in any significant manner.

[21] Constable Ndeutapo, like the other State witnesses, was extensively cross-examined on his witness statement and was required to explain the differences between his testimony and what was recorded in the statement – or rather, the lack thereof. The statement was handed into evidence (Exh 'K') and I shall deal with this evidence later.

[22] When asked by the Court when did he realise that the accused was a suspect, Sergeant Mukete said that it was only after the accused admitted to him that he had killed the persons.

[23] The evidence of Warrant Officer Nandenga, who formally charged the accused the following day, did not add anything to the case as the accused elected not to give a statement at the time.

[24] Whereas the defence from the outset intimated to the State that the correctness of the section 119 proceedings would be disputed, the prosecution called the presiding magistrate and interpreter to give evidence on the court proceedings held at Ohangwena on 26 January, 2009.

[25] Mrs Hanhele, the magistrate who presided during court proceedings on that day testified that the record correctly reflects the proceedings before her and that the accused's legal position was duly explained to him before the charges were put to him; that he understood it; and subsequent to the pleas of guilty tendered by the accused on all three charges, she questioned him

pursuant to the provisions of section 112 (1)(b) of the Criminal Code[3], but because the accused raised a defence, pleas of not guilty were entered.

[26] When confronted with the record of the proceedings on that day where it is stated that the court interpreter was a certain E Jonas, Mrs Hanhele advanced the same explanation as Mr Ipwaakena, the official interpreter, namely, that the person (E Jonas), was a casual Portuguese speaking interpreter who interpreted in court that day, but only in matters which were for postponement. Mr Ipwaakena was present in court at the time and when the prosecutor called the accused's case and informed the court that the accused was required to plead in terms of section 119, he (Mr Ipwaakena) stepped forward and acted as the official interpreter. That, both witnesses said, became necessary for casual interpreters were not entrusted to do pleas and trials; hence, it explains why the name of the casual interpreter is reflected in the record and not his. Mrs Hanhele confirmed that to be the position and conceded that it was a mistake on her part not to correct the record accordingly.

[27] The defence called the accused and two police officers, the evidence of the latter dealing only with the recording of witness statements by them and which proved the authenticity of the statements subsequently handed into evidence by the defence.

[28] The accused testified that he on that fateful day fetched Bertha and Tangeni from their home and brought them to his room. He confirmed that

[3] See section 121 (1) of Act 51 of 1977

they were accompanied by Ms Sheehama but they parted ways whereafter she went into the bar. Soon thereafter Bertha asked him to go and buy French fries and he then left on foot for the mini market, which is situated quite a distance from his room. Upon his return he found the door of his room open and there was smoke on the inside. He did not enter and from the door he observed Bertha lying on the floor, bleeding. He could not see Tangeni because of the smoke. He became afraid and decided to go to the police to make a report. With his arrival at the police station he found his brother Asser telling the police officer that *"someone is coming and has killed people"*. Despite his attempts to persuade the police officers that he had only come to report the murder of his girlfriend and child, he was disbelieved and taken to the cells. The following morning he was formally charged by Warrant Officer Nandenga, who explained him his rights, whereafter he opted not to make a statement.

[29] With his appearance in court the next day, he said the charges were put to him without anything being explained to him about the proceedings or his rights. He pleaded not guilty and denied the allegations contained in the charges against him. He specifically denies what was recorded by the magistrate about "voices" which made him commit the offences and neither did he say that he wanted to kill himself. I pause here to observe that this obviously laid the basis for having the accused referred in terms of sections 77 and 78 of the Criminal Code for psychiatric observation during pre-trial stages, and the report handed in by agreement (Exh 'E'). The report was prepared by Dr Mthoko, a registered psychiatrist; and according to her

findings the accused was found not mentally ill and fit to stand trial; neither was he suffering from a mental illness at the time the alleged offences were committed.

[30] In cross-examination the accused disputed the evidence of State witnesses about him having arrived at the police station with a suitcase; that he made any self-incriminating statement about the murders to any police officer that night; and that Exhibit '3', the yellow T-shirt, is his. He furthermore disputes the evidence about him having borrowed a container with which he left and later on returned as described; also about him throwing a box of matches onto the desk inside the police station.

WITNESS STATEMENTS

[31] In cross-examination of the State witnesses, counsel for the defence, in an attempt to discredit them, extensively cross-examined Asser Mathias, Ipawa Shihepo, Constable Ndeutapo and Sergeant Mukete from their witness statements, in order to point out differences between their testimonies in Court and what they have earlier stated in their statements. The authenticity of the statements was duly proved and the statements were received into evidence.

[32] Ms *Kishi* summarised in respect of each witness what she considered to be material differences. In respect of the witness Ipawa Shihepo it was submitted that there is a material difference between the testimony of the

witness and her statement in that there is nothing in the statement about her identifying the accused as the person who was busy leaving the accused's room, as she has testified. This was the only discrepancy pointed out in respect of this witness.

[33] Regarding the alleged deviation by Asser Mathias from his affidavit, Ms *Kishi* was constrained to concede that there are no material differences between the affidavit and the witness' testimony in Court.

[34] The inconsistency in respect of Constable Ndeutapo is about the stage when the accused was told to stop making a report and when his rights were explained to him. The difference, so it was argued, lies therein that Ndeutapo said that when the accused started to incriminate himself, he stopped him and explained him his rights to remain silent, and the right to be legally represented; whereas the statement reads that after he *listened* to the accused's story he arrested him and warned him of his rights. The same applies to Sergeant Mukete who testified that, after the accused told him what he had done, he stopped him and explained him his rights; whereas nothing of this appears in his statement. These are the only differences pointed out by the defence for consideration by the Court. The accused, although unable to identify the police officers who dealt with him that night, disputes the evidence that he had either seen or made any statement to Constable Ndeutapo or Sergeant Mukete.

[35] The statement of Mr Mathias was reduced to writing on 19 January 2009 by Sergeant Frederick; whilst that of Mrs Shihepo was recorded by Sergeant Iahuki, on the same day. Both confirmed that they communicated with the respective witnesses in the Oshiwambo language, during which they themselves translated the statements into the official language (English) and *vice versa*. Judging from the manner in which the statements were recorded and having had the benefit of hearing their testimony in Court, I am satisfied that Sergeant Aihuki has displayed a proper command of the English language. However, the same cannot be said of Sergeant Frederick, who had to rely more than once on the assistance of the official interpreter in Court, whilst being under cross-examination. It is therefore not surprising that witnesses, often, when confronted under cross-examination with inconsistencies in their witness statements, complain that what has been recorded in their statements differ in some respects from what they narrated to the recording officer; or, as would often appear, that not everything narrated to the person reducing their statements to writing, had been recorded. It seems apposite to repeat what Mainga J (as he then was) stated in *Aloysius Jaar v The State*[4] at page 12 – 13:

> *"A court of law should be careful in discrediting a witness because his evidence in chief slightly departs from the statement a witness should have told the police, especially in this country where it is a notorious fact that the majority of the police officers who are tasked with the duties to take statements from the prospective witnesses and accused persons are hardly conversant in the English language and more so that police officers who take*

[4] Unreported Case No CA 43/2002; 2004 (8) NCPL 52 (HC)

down statements are never called and confronted with the contradictions that an accused or a witness may have raised in cross-examination.

It has been said more than once in this court that a statement made by an accused or witness to a police officer is of skeletal nature and in evidence in chief a witness may elaborate on the statement."

See also *Hanekom v The State*[5] and *Simon Nakale Mukete v The State*[6].

[36] In *Mukete,* Maritz J (as he then was), said the following at page 21:

"It is the experience of the Court that witness statements drafted by police officers are often not all-inclusive. Police officers tend to focus the statement on what they consider – rightly or wrongly – to be the more (or most) relevant facts relating to the offence under investigation. The failure to include all the details of a series of events does not in itself mean that those events did not take place or that they have been a recent invention by the witness – especially not if the witness gives an explanation for their omission and that explanation is not gainsaid by anyone."

[37] What is clear from the above cited authorities is that the court should follow an holistic approach when adjudging the credibility of a witness who is confronted with discrepancies between the witness' *viva voce* evidence and what has been recorded in the witness statement made to the police. The court should indeed follow a cautious approach when a discrepancy is detected, but it should not only look at the differences between the statement

[5] Unreported Case No CA 68/1999
[6] Unreported Case No CA 146/2003

and the evidence in court, but must also have regard to the circumstances under which the versions were given, but must also try to determine what the witness actually meant to say. In my view, not too much should be made of the specific words appearing in the statement and ascribe its general meaning thereto, for it might not correctly reflect what the witness intended to say as the true meaning might have gone lost in translation. This may be brought about by various factors over which the witness has no or very little control for example, language and cultural differences between the witness and the person reducing the statement to writing; that person's poor command of the English language when recording the statement; the witness not being asked to give a detailed statement; the witness' emotional state of mind when asked to give a statement and so forth. What the court must decide at the end of the day is whether the evidence given by the witness is reliable and despite shortcomings, defects or contradictions, whether the truth has been told.[7]

[38] It is trite law that in order to discredit a State witness on the basis of his/her affidavit, it would not be sufficient to merely show a difference between the two statements, but that there is indeed a *material difference* before any adverse inference could be drawn.[8] As regards the witness Ipawa Shihepo, I consider the discrepancy pointed out on the identification of the accused, to be material; and if regard is had to the *viva voce* evidence given by this witness on this point, then it would appear that she in all probability was wrong when she said that it was indeed the accused who had left his room, in circumstances (as testified on by her husband) where she would not have

[7] *S v Mafaladiso en Andere,* 2003 (1) SACR 583 (SCA) at 593e-594h
[8] *S v Bruiners en 'n Ander,* 1998 (2) SACR 432 (EC)

been able to positively identify the accused. To that end her evidence is unreliable; however, the contradiction becomes immaterial when considered against the rest of the evidence, because it is *not* in dispute that it was indeed the accused who had left his room at the time. Hence, it makes no difference as to whether or not the witness positively identified the accused at the time. However, as regards the evidence about the suitcase she saw with the accused, I am not convinced that she would have been able to identify it (as she claims), in the same circumstances where her husband was unable to do so from the same vantage point and him having to go closer to see who it was, and what the person was having with him.

[39] With regard to the aforementioned principles, in my view, it would make no difference that the two police officers recorded their own statements, for they were neither required to make these statements in all its detail. Defence counsel's submission that the *viva voce* evidence of the two witnesses (on their explanation of the accused's rights), compared to their witness statements, differ substantially, is incorrect. On the contrary, their evidence in Court corresponds in all material respects, except for the minor differences pointed out earlier.

[40] Although the explanation to an accused about his rights is crucial and should be given as soon as it is reasonably possible to prevent that person incriminate him/herself, I am, on the facts of this case, unable to conclude that (i) Constable Ndeutapo *wilfully* allowed the accused to make a full statement

before he stopped him and explained him his rights; (ii) Sergeant Mukete never explained the accused's rights, despite his testimony to that effect, simply because it is not recorded in his statement. Ndeutapo said that, despite the explanation given to the accused, he simply continued narrating what happened, without paying any attention to the explanation; while Mukete said that the accused acknowledged that he understood his rights, but notwithstanding, continued making a full report. I find the differences referred to not to be such that it impacts on the credibility of any of the State witnesses, thereby making their evidence unreliable. On the contrary, the witnesses Mathias, Ndeutapo and Mukete largely corroborate one another on the demeanour of the accused, what he did and what was said by him at different stages that night. The gist of their evidence is that the accused had come to hand himself over after allegedly having committed an offence.

STATEMENTS MADE BY ACCUSED TO POLICE OFFICERS

[41] I turn to consider the admissibility of the statements – which the accused denies having made – at the charge office in the presence of Mr Mathias, Constable Ndeutapo and later to Sergeant Mukete *before* any rights were explained to him.

[42] It is common cause that the accused entered the charge office and, according to the State witnesses, he then went behind the counter where he threw down a box of matches on the desk, before sitting down. According to Mr Mathias the first words said by the accused were: *"This is my life"*. The

accused then said that he had killed his wife (girlfriend) and child. According to Mr Mathias the police officer asked him with what he had killed them to which he replied that he had used a knife, but that he had left it in the room. Both witnesses Mathias and Ndeutapo were adamant that the accused did not come to make a report about him finding his girlfriend and child murdered, but, that he admitted having killed them himself. The same statement was later made to Mukete in his office but there the accused elaborated on the circumstances giving rise to the stabbing incident.

[43] On the State's case there is nothing showing that the extra-curial statement made by the accused in the charge office was not freely and voluntary made, or made whilst he was unduly influenced – neither is this alleged by the accused, for he denies having made the statements at all. On his version he only came to report the murders. The requirements set out in section 219A of the Criminal Code, have thus been satisfied.

[44] It is trite law that an accused person is entitled to be given a fair trial, which includes the pre-trial proceedings and that judicial officers are under a duty to adequately inform an accused person of his/her constitutional rights.[9] It has further been said in this Court[10] that Article 12 of the Namibian Constitution means that the entire process of bringing an accused person to trial, and not only the trial itself, needs to be tested against the standard of a fair trial; which obviously would include actions taken by police officers affecting the accused, before the trial. Whereas the accused was not

[9] *S v Malumo and Others*, 2010 (1) NR 35 (HC)
[10] *S v Malumo and Others (2)*, 2007 (1) NR 198 at 211

informed of his rights by Constable Ndeutapo before the accused made the first report, would the inclusion of evidence about the content of the self-incriminating statement made by the accused, deprive him of a fair trial?

[45] It is the State's case that the report made by the accused was spontaneous and did not come as a result of an investigation or interview conducted with him. It is the accused's evidence that he indeed went to the police station to make a report and as stated earlier, which he made freely and voluntarily. Besides the accused's awkward behaviour upon his arrival at the police station, it could not have been expected by the police officer (Ndeutapo) on a question what he was looking for, that the accused would make a self-incriminating statement; and the moment he did, he was stopped and were his rights *inter alia,* to remain silent, explained to him. The Court in *S v Lange and Others*[11] considered the admissibility of a self-incriminating statement the appellant had earlier made to a doctor during a medical examination when asked what he had done (after he had swallowed small pieces of glass) and found the appellant's reply to be a spontaneous response to a legitimate question, and that no grounds existed to exclude such evidence. A case on point is *S v Van der Merwe*[12] where the relevant aspect of the judgment appears in the headnote as follows:

> *"The accused was charged with murder. During the State's case the investigating officer testified that he had encountered the accused at the crime scene. He asked the accused for an explanation, whereupon the*

[11] 1998 (1) SACR 1 (SCA)
[12] 1998 (1) SACR 194 (OPD)

accused handed him a fire-arm and made an exculpatory report about the events leading to the death of the deceased. Before the accused made the report, the investigating officer had not realised that he was talking to a possible suspect, and he therefore gave the accused no caution whatsoever. However, after he had heard the accused's report he cautioned him in terms of the Judges' Rules, and arrested him. At no stage was the accused advised of his rights in terms of the Constitution Act 200 of 1993. When the investigating officer was asked to testify about the content of the accused's report, defence counsel objected to the admissibility of the evidence.

Held, that the Court had a discretion to admit evidence about the accused's report, which discretion had to be exercised in accordance with the guidelines laid down in ***S v Hammer and Others*** *1994 (2) SACR 496 (C) at 499d-e.*

….. ……..

Held, further, that because the investigating officer had been bona fide unaware that the accused was a suspect when he asked him for an explanation, and no pressure or influence had accordingly been exercised on the accused to impart information, the accused would not be denied a fair trial because of the fact that he had made a report before he was acquainted with his rights.

Held, therefore, in the light of the above and other factors, that evidence of the accused's report to the investigating officer had to be admitted in the exercise of the Court's discretion."

[46] I respectfully associate myself with the *dictum* pronounced in the *Van der Merwe* case and I am satisfied that the instant case is not such where the accused was tricked or deceived by the police into making admissions he would not otherwise have made. Accordingly, I can find no grounds for excluding the evidence given by the State witnesses regarding the self-

incriminating admissions the accused made in the charge office. Although the situation concerning Sergeant Mukete might be somewhat different because by then the accused had already been arrested by Ndeutapo as a suspect, it is the State's case that the accused's rights were duly explained to him by the time he was interviewed by Mukete. This included the right to remain silent. Mukete said he again explained to the accused his rights during the interview which the accused indicated he understood; yet, he continued making the report in which incriminated himself. The accused denies having made any of these reports to either of the witnesses, which is a dispute of fact. However, should the Court find that the accused indeed made these reports; it seems obvious that he waived his rights to remain silent and to be assisted by a legal representative when making self-incriminating admissions to Sergeant Mukete. I pause here to observe that, despite the accused disputing having made the statements as testified on by the State witnesses, particularly to Ndeutapo and Mukete, whom he claims not to have seen that night, he was unable to identify any other police officer to whom he had made a report about the murders.

SECTION 119 PROCEEDINGS

[47] The defence initially challanged the correctness of the section 119 proceedings held at Ohangwena on 26 January 2009 and claims that, contrary to what is reflected on the record, the accused pleaded not guilty on all charges and denied the allegations contained therein. However, during the evidence of the magistrate the admissibility of the section 119 proceedings

was attacked on a different front namely, that the accused, before pleading, was not informed of his rights; as this is not borne out by the record. The contention is based on the following passage, where the record reads:

> *"Ct expl accd legal position. Accd understands and elects to use Oshiwambo, will call no witnesses, has no objection to a short notice, Accd will be conducted [contacted] at Ohangwena in the house of Asser Mathias."* (sic)

The *crux* of the objection lies therein that the record does not reflect what exactly was explained by the court to the accused.

[48] Section 76 (3)(a)[13] in peremptory terms states that the court shall keep a record of the proceedings[14] (or shall cause such record to be kept) and it is a well-established principle that from the record itself, it must be clear what the nature of the explanations given to an accused is; and whether the accused understood the import thereof.[15] The record *in casu* merely reflects that the court explained to the accused his "legal position", without stating the nature of the explanation given, and what the plea process entails. This clearly falls short of an explanation which informs the unrepresented accused of his rights and what was required from him when asked to plead in terms of section 119. However, despite the defective record, the magistrate gave evidence and narrated to the Court what was explained to the accused, which clearly satisfies the requirements. The testimony of the magistrate was not attacked

[13] Act 51 of 1977
[14] See also *S v Haibeb,* 1994 (1) SACR 657 (Nm) at 663i-j
[15] *S v Kau*, 1995 NR 1 (SC) at 12B-D

and shown to be incredulous. Whereas the defective record was amplified by the magistrate's evidence the objection became baseless.[16]

[49] As to the right of legal representation, this was explained to the accused already on 20 January 2009 when he opted to conduct his own defence. Ms *Kishi's* submission that the court *a quo* failed to explain to the accused that he had the right to remain silent after he pleaded, has no merit, for that would only become necessary after the accused has pleaded not guilty and must be informed that he/she is not obliged to disclose the basis of his/her defence, or to answer questions put to the accused by the court. Where an accused, as in this instance pleaded guilty, the court *"shall question him in terms of the provisions of paragraph (b) of section 112 (1)"*. Where the accused has pleaded guilty to a charge, what purpose would it serve to thereafter inform him/her that he/she now has the right to remain silent? Section 112 (1) is designed to protect an accused against a wrong plea of guilty and it would be superfluous to inform an accused at that stage of a "right to remain silent", as, in my view, there is no such right which first has to be explained to the unrepresented accused before the court puts questions to the accused to determine whether or not the accused satisfactorily admits the elements of the offence and the commission thereof.

[50] Resultantly, I rule the section 119 proceedings admissible in evidence.

[51] The gist of these proceedings is that the accused pleaded guilty to two charges of murder and one charge of attempting to defeat or obstruct the

[16] *S v Wellington*, 1990 NR 20 (HC) at 25G-H

course of justice, whereafter he made the following admissions: Count 1 – that he stabbed Bertha Kasile on the chest with a knife several times; that whilst he so acted he realised that he could cause her death; that he appreciated the wrongfulness of his act but had no intention to kill her as he, prior to the incident, heard voices telling him to kill someone or himself; because of which he was under medical treatment. Count 2 – that he stabbed Tangeni Omwene Kamudulunge with a knife several times on the chest because of the voices he heard telling him to kill someone; and that he appreciated the wrongfulness of his act. Count 3 – that after killing the two abovementioned persons, he poured petrol over them and set them alight; but that he actually intended setting himself ablaze. The court, not being satisfied that the accused is guilty of the offences to which he has pleaded guilty, acted in terms of section 113 and entered pleas of not guilty in respect of all three charges. Hence, the State bears the onus of proving the offences against the accused. However, the making of admissions by the accused is not without consequence, for any allegation made by the accused, other than one incorrectly admitted, shall stand as proof of such allegation in any court.

[52] There is another issue that deserves consideration and that is the admissibility or otherwise of evidence given by Mrs Shihepo about her overhearing the deceased saying to the accused shortly before her demise that he could do whatever he wanted to her as she would not stop him. Normally this would be inadmissible under the rule against hearsay evidence, unless it falls under one of the exceptions to the rule. One such exception would be the eliciting of evidence from a witness that would otherwise have

been inadmissible.[17] *In casu,* Ms *Kishi*, in order to discredit the witness Shihepo during cross-examination, confronted her with what was stated in her statement made to the police, which was subsequently handed into evidence through the police officer who recorded it (Exh 'O'). Contained in the statement appears the following passage:

> *"While I pass by the room of Matheus but I didn't go in I saw Bertha through the window standing at the window. I saw her chest and breasts as she was not wearing anything on her chest. I heard Bertha said just do what you want to do but it is not on my will."* (sic)

This information contained in the statement was elicited through its production by the defence and I can think of no reason why it should be excluded as evidence. The question remains however, what weight should be given thereto in the light of the evidence as a whole?

Although it does not implicate the accused in the offences committed subsequent thereto, it does tend to show that the relationship between the accused and Bertha shortly before her passing, was troubled. Beyond that, one would not be able to go without conjecture or speculation.

THE ACCUSED'S ALIBI

[53] When assessing an alibi defence raised by an accused, MJ Strydom, J in *S v Malefo en Andere*[18] identified the following five principles as the correct

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[17] See *The South African Law of Evidence (2nd Ed)*: Zeffert & Paizes at 909 and the cases cited.
[18] 1998 (1) SACR 127 (W) at 158a-e

approach: (a) There is no burden of proof on the accused to prove his alibi. (b) If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt. (c) An alibi must be assessed on the totality of the evidence and the court's impression of the witnesses. (d) If there is identifying witnesses, the court should be satisfied not only that they are honest, but also that their identification of the accused is reliable. (e) The ultimate test is whether the prosecution has furnished proof beyond a reasonable doubt – and for this purpose the court may take into account the fact that the accused had raised a false alibi.[19] I respectfully endorse the *dictum* pronounced in *Malefo* and I shall follow the approach set out therein when assessing the circumstances of this case.

[54] It is trite that the late disclosure of an alibi standing alone, does not conclusively justify the unfavourable inference of guilt on the part of the accused; however, it is a factor that can be taken into consideration when assessing the evidence of the alleged alibi in determining the weight to be placed on the alibi evidence.[20] In *Thebus* Moseneke, DCJ at para 68 observed:

> *"The failure to disclose an alibi timeously is therefore not a neutral factor. It may have consequences and can legitimately be taken into account in evaluating the evidence as a whole. In deciding what, if any, those consequences are, it is relevant to have regard to the evidence of the accused, taken together with any explanation offered by her or him for failing*

[19] Quoted from Schwikkard Van der Merwe at 30 11 24
[20] *Thebus and Another v S*, 2003 (2) BCLR 1100 (CC) at para 67

to disclose the alibi timeously within the factual context of the evidence as a whole."

[55] The State enquired from the accused in para 5.3 of the State's Pre-Trial Memorandum what his defence would be, should he elect to plead not guilty, to which the reply was *"I did not commit the crime"*. The first time an alibi was raised as defence was during the pre-trial conference on 14 April 2011 between counsel for the accused and the State, respectively, when the accused claimed that he had gone to the mini market to buy chips for the deceased and upon his return, found the deceased persons already murdered. It seems to me that two reasons were advanced as to why the alibi defence was not raised sooner; firstly, the accused was overwhelmed when he was unexpectedly accused of having committed the offences when he reported it to the police; and secondly, that he had the right to remain silent; hence, he was under no duty to disclose his defence.

[56] There can be no doubt that an accused has the right to remain silent and need not explain his innocence or disclose the basis of his defence before and during the trial. However, as was pointed out in *Thebus*, there are consequences if an accused relies on the defence of an alibi and only reveals that at a late stage. Depending on the circumstances of the case, the late disclosure could impact on the weight given to the evidence regarding the alleged alibi and may even adversely effect the accused's credibility if the explanation for the late disclosure is found to be unsatisfactory of unconvincing.

[57] The accused *in casu*, (on his own version) seemingly accepted the accusations of him being the perpetrator in the murders of his girlfriend and child without making any effort to protest his innocence. According to him he was still having the French fries in his hand when he arrived at the police station and the mere production thereof to the police officers present, would at least to some extent, have given credence to his proclaimed innocence. Instead, he said he ate it in the cells the following day. Neither were any of the police officers cross-examined on whether or not the accused was seen in possession of French fries when he came to the police station; and the only probable explanation for counsel omitting to question on the issue, is because it only became known when the accused was cross-examined. His buying of the French fries was the sole reason why the accused claims he could not have committed the offence and forms the basis of his alibi defence. The evidence on this point certainly does not support the accused's version and although he is under no duty to prove his alibi, the mere production of the French fries to the police that night, would certainly have given credence and weight to his story. In the absence thereof, there would simply have been no reason why he took it along to the police station in the first instance, for he could not have expected or foreseen the possibility of being wrongly incriminated for murders he did not commit, and to be locked up. Unless of course, he went to hand himself over as the State witnesses claim he did.

[58] In addition, nothing was mentioned about the accused raising the defence of an alibi during pre-trial proceedings and it was only during the pre-

trial conference between the parties on the 14th of April 2011 that the accused's alibi surfaced. The accused proffered no plausible explanation for failing to disclose the alibi defence timeously.

[59] In the present circumstances I am alive to an accused person's right to remain silent and not to incriminate himself; however, in the present instance I am satisfied that the accused's failure to timeously disclose his alibi defence, *is* a factor that should be taken into account when the Court evaluates the evidence as a whole; and when so doing, it will be considered along with his evidence and the absence of any explanation for the delay, other than him being falsely incriminated.

EVALUATION OF THE EVIDENCE

[60] It is an indisputable fact that the killing of Bertha and Tangeni were unlawful acts, committed during which they were stabbed with a sharp object on the upper body several times; whereafter a flammable substance, most probably petrol, was poured on them and set alight. Furthermore, that in respect of both, the cause of death was due to multiple stab wounds to the chest and subsequent bleeding. What must be decided is who is responsible for committing these murders.

[61] Not only does the Constitution guarantee an accused a fair trial, but the presumption of innocence until proven guilty according to the law is firmly entrenched in Article 12 (1)(d). This casts upon the State the burden of

proving every element of the offence for which the accused stands charged and furthermore, it is required to prove the absence of any defence raised by the accused, for example, in this case, an alibi, beyond reasonable doubt.

[62] The State case entirely rests on circumstantial evidence – except for the admissions made by the accused – and where the Court in such instance is required to draw inferences from the evidence adduced, it must ensure that it satisfies the requirements set out in the oft quoted case of *R v Blom*[21] namely, that the inferences sought to be drawn must be supported by the proved facts; and that the proved facts should exclude every reasonable inference from them, save the one sought to be drawn. In its assessment of the facts the Court will have regard to the evidence as a whole, inclusive of the merits and demerits of the State case and that of the defence, as well as the probabilities of the case; and only when satisfied that the accused's version is not only improbable, but false beyond reasonable doubt, it may convict.

[63] From the outset it must be said that despite the discrepancies in their evidence discussed earlier herein, I do not find any of the State witnesses incredulous to the point that their evidence is unreliable. The fact that their versions do not corroborate one another in all the detail does not make them unreliable witnesses. Where Mrs Shihepo gave evidence about her observations of the accused when leaving the room in circumstances which are doubtful, the Court should treat such evidence with caution, but on the other hand, where her evidence is corroborated by reliable evidence from other witnesses, then there is no reason why not to accept such evidence as

[21] 1939 AD at 188

the truth. Despite the accused's accusations that the State witnesses fabricated incriminating evidence against him, there is no proof thereof besides the evidence given by the accused himself. Neither is there anything showing that any one of these witnesses had reason to falsely incriminate the accused – more so, where two of them are family and related to him.

[64] The accused was seen late at night leaving his smouldering room in which the bodies of the deceased persons were discovered shortly thereafter. With him he had a suitcase with clothes, going in the direction of the police station where he, according to independent witnesses, admitted having killed his girlfriend and son, before handing himself over. In his possession he had a box of matches which he threw down on a desk in the charge office. Despite the accused denying that he came there with a suitcase and matches handing himself over, there is evidence that the accused, at the request of Sergeant Mukete, changed into another shirt, as the one he had been wearing, had spots on, believed to be blood, and that he took out a shirt from the suitcase he had with him. The yellow T-shirt he allegedly had been wearing is before Court and the witnesses are all in agreement that it is the same one they saw wearing that night. Also the box of matches was handed in as proof of the accused having thrown it down on the desk in the charge office. According to the accused the shirt he was wearing got stolen from his cell and those he wore during the trial, was his which had been in his brother's house during the fire in his room. However, Mr Mathias specifically testified that the clothes accused wore at the trial are those which he took along in the suitcase; that nothing of his possessions remained behind in the room that

night and that nobody from their house had taken him any clothes whilst being in custody. This evidence was not challenged or denied by the accused; neither did the accused explain how these clothes afterwards came into his possession if it was not taken to him by his family, for he had remained in custody since his arrest.

[65] The importance of evidence that the accused arrived at the police station with a suitcase with his possessions (clothing) lies therein that these must have been packed and removed prior to the room catching fire. In the absence of any explanation as to why the clothes had already been packed and not inside the room when he left earlier, it would certainly refute allegations that the room was already ablaze upon the accused's return and that he did not enter the room thereafter. The explanation that the clothes had all along been inside his brother's house clearly came as an after thought and was never put to Mr Mathias who gave evidence to the contrary. Despite the different versions as to the colour of the suitcase as described by different witnesses, their evidence was not shown to be unreliable and I accordingly find that when the accused entered the police station on the night in question, he had a suitcase with clothes with him.

[66] Also found inside the room was a plastic container which the accused earlier in the day borrowed from Mrs Shihepo for reasons unknown to her. Her evidence on this point was corroborated by Ms Sheehama and their evidence was not challenged. Mrs Shihepo shortly thereafter saw the accused leaving and later returned with the container. According to the

evidence of Dr Vasin there was an evident smell of petrol on the body of the baby. Both bodies had severely been burned and whereas both were naked at the time, it would certainly support an inference that petrol was poured over them and set alight. Although it cannot with certainty be said that the petrol came from the container found inside the room, it is, in my view, a real likelihood to be the case as, in the absence of evidence showing the contrary, no other reasonable explanation exists as to what the accused needed the container for other than to collect petrol in. After all, he was seen leaving and later returning with the same container. This inference is fortified by the evidence of Sergeant Mukete when testifying that the accused told him that he went to buy petrol from Omafu filling station. The presence of the burnt container in the room; the accused's evasive reply to the question what he needed it for; a petrol odour on the baby's body; the burning of both bodies and the accused shortly thereafter seen in possession of a box of matches at the police station, are all factors pointing directly at the accused as the person responsible for setting ablaze the bodies of the victims. Viewed together with the rest of the evidence it seems to me to be an inescapable conclusion, and I accordingly so find.

[67] The Court has already ruled on the admissibility of the statements made by the accused at the police station in the presence of his brother and Constable Ndeutapo and Sergeant Mukete, respectively. The alleged reports made by the accused, must be viewed in context with his demeanour at the time and on his own version the following transpired. After realising that his girlfriend and child were murdered he decided to go to the police to make a

report *without* informing anyone at home about the incident – despite the fact that the room was still on fire and burning when he left. He claims that he could not enter his brother's premises because the gate was locked (which was confirmed), but for some inexplicable reason he was unable to jump the fence like his brother did when he decided to follow the person he saw leaving the house; neither did he raise the alarm by calling out for help. His explanation that he is unable to call out loud since he was shot on the side of his neck is, to say the least, unconvincing. He sees his brother on a bicycle on his way to the police station, without making any attempt to inform him of the horrific discovery he had just made back home. After entering the charge office, he goes behind the counter, sits down and makes a report to the effect that he had killed his girlfriend and son. Is this the behaviour of a person who has come to the police station to make a report about a gruesome scene involving his loved ones he has stumbled upon? In my view, certainly not. Such conduct is rather consistent with that of a person who has come to hand himself over to the police. Surprisingly, and not even on his own version, is there evidence that the accused was overwhelmed by emotion when realising that his girlfriend and son were killed; unlike his brother who said he broke down in tears when he reached home in the company of the police and again, when testifying in Court.

[68] There was no pressure on the accused to incriminate himself at any stage, neither upon his arrival in the charge office, nor to Sergeant Mukete shortly thereafter. It was not alleged that he acted under duress; he simply denied having made any incriminating statement. The existence of these

statements were duly proved by three witnesses, the one being the brother to the accused with whom he had a good relationship and who had no motive to falsely incriminate his own brother. If there might exist any doubt as to the credibility of the two police officers, merely for being members of the force who might have an interest in the outcome of the trial, then certainly, it does not apply to Mr Mathias, whom I find to be a credible witness in all respects. Even before the accused made the incriminating admissions, he realised that the accused was responsible for what happened back home and decided to follow him to the police station and report the incident. Not only did his evidence remain standing, but it also materially corroborated the evidence of Constable Ndeutapo as regards the accused handing himself over. The accused's explanation that he had only come to make a report is not consistent with his demeanour that night, and on reliable evidence placed before the Court, it was shown to be untruthful.

[69] If the police officers, for reasons unknown, decided to falsely incriminate the accused, then there was no reason why the accused, when appearing in the magistrate's court, had any reason to plead guilty to the same charges he is now facing. After admitting to stabbing his victims to death, he gave an exculpatory explanation justifying his actions. Besides the reasons advanced for having committed the murders, the accused's explanation about how he went about the killing is consistent with his first report and subsequent statement made to the two police officers. These are incriminating admissions made freely and voluntarily by the accused at different stages,

and when considered in relation with the rest of the evidence, the effect thereof is condemning.

[70] In the Court's assessment of the accused's evidence it is evident that his version stands uncorroborated and is riddled with contradictions. Crucial issues testified on by State witnesses were not challenged during cross-examination and when the Court enquired from the accused whether he gave instructions to his counsel in that respect, he proffered the implausible explanation that he did not know that he could consult his counsel in Court during proceedings. His *viva voce* evidence contradicts earlier statements he had made to different witnesses at different stages and these previous inconsistent statements were not satisfactorily explained by the accused. Despite his denial of having committed the offences, he gave information to the police about the knife used during the commission of the offences and where it would be found inside the room; which information turned out to be correct. In his evidence the accused denied having entered the room and claimed to have remained standing at the door. However, had that been true, then he could not have known about the knife lying on the right hand side upon entering the room; that the baby was lying on the bed and has died (as he reported to the police that he has killed his girlfriend *and* his child); and neither would he have been able to retrieve his property from the blazing room.

[71] When looking at the accused's demeanour, it would appear that he has been acting out of character since earlier that night when he declined to have

dinner with his brother and acted strangely when borrowing the container. There is also the evidence of Mrs Shihepo about the incident between the accused and the deceased during which words were uttered by the deceased that the accused could do whatever he felt like doing. As stated, although not too much should be made of this incident as the reason why the deceased had made the remark remains unknown, it does tend to show that there was tension between the two of them shortly before the deceased persons were murdered. This is fortified by the explanation the accused gave to Sergeant Mukete about the deceased's involvement with a taxi driver, who she had said, was the father of Tangeni. Although this evidence was disputed by the accused, it would certainly constitute a motive for the killing of both the deceased.

[72] When assessing the accused's evidence about his immediate actions upon discovering the murders, I find it surprising – even if he went into shock as he claims – that he did not raise the alarm and tried to find help to extinguish the fire in an attempt to save his loved ones and his belongings. His explanation for omitting to do so is unconvincing and smacks of the conduct of someone who is untouched and unperturbed by the scene he is walking away from. His conduct, in my view, is rather consistent with that of a person who appreciates the wrongfulness of his actions and then goes to hand himself over to the police.

[73] After assessing the totality of the evidence adduced by the State as well as the defence, the question that must now be answered is whether there is a

reasonable possibility that the accused's alibi, and ultimately his version, could be true, or did the State furnish proof beyond a reasonable doubt that it was the accused who committed the offences under consideration? As regards the court's approach when assessing the accused's version, the following was said in *Shackell v S*[22]:

> *"A court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably be true."*

See also *S v Haileka*[23]*; S v Naftali*[24] and the cases cited therein.

[74] When applying the principles laid down in the above captured cases I am convinced that there is no reasonable possibility of the accused's alibi being true; neither his version of the events on that fateful night and his subsequent explanations to this Court. The accused's version has been shown beyond reasonable doubt to be false and stands to be rejected in it entirety; whilst sufficient proof was furnished to find that the accused committed both murders, whereafter petrol was poured over the bodies and set alight. I accordingly so find.

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[22] [2001] 4 All SA 279 (SCA) at 288e-f
[23] 2007 (1) NR 55 (HC)
[24] 1992 NR 299 (HC)

[75] With regard to the circumstances under which the body of Bertha was found with her hands and legs trussed with a cord and the sleeve of a blouse tied around her neck, it seems reasonable to infer that this was done to put her out of action and to overcome any resistance she might offer and that the stabbing took place subsequent thereto. The converse thereof would certainly not make sense. It also seems logical that petrol was thereafter poured over the bodies and set alight and that the accused at this stage left the room for his own safety. In the light of the evidence, it also seems reasonable to accept that the accused, after obtaining the container from Mrs Shihepo, fetched petrol in it. In the circumstances of this case, there is sufficient circumstantial evidence from which the Court may reasonably infer that the accused planned the commission of the offences in advance. He clearly acted with intent in the form of *dolus directus* when committing the murders.

[76] Turning to count 3, it does not appear to me that the accused intended to obstruct the course of justice when he poured the petrol over the bodies and set them alight, for he thereafter proceeded to the police station where he made a report about the incident and that he had killed both by stabbing them with a knife, which could be found in the room. It is quite possible that the accused – as he narrated to the magistrate – intended committing suicide using petrol to set himself alight, but lacked courage to go through with the plan. It is equally possible that he just wanted to finish off his victims by setting them alight – especially where there is medical evidence that Bertha

was still alive after the fire was started, as there were signs of soot in her trachea. In the latter instance he would have lacked intent to commit a separate offence. Unfortunately the Court does not have the benefit of hearing from the accused what his intentions were at the time; while the Court is required to draw inferences from the proved facts. As shown above, more than one inference may be drawn from the facts proved, which makes it impossible to draw the single inference that the accused, when setting ablaze the bodies of the deceased persons, had the required intent to commit a further crime; either to obstruct the course of justice or to violate a dead body. In these circumstances he should be given the benefit of the doubt.

[77] Lastly, although the accused was not married to Bertha, and despite her having her own room nearby, but separate from that of the accused, they were living together (from time to time) in a relationship in the nature of a marriage, and had one child born from this relationship. That satisfies the requirements of a domestic relationship as set out in section 3 of the Combating of Domestic Violence Act, 2003 (Act No 4 of 2003), which finds application.

[78] In the result, the Court finds the following:

Count 1: Murder, read with the provisions of the Combating of Domestic Violence Act, 2003 – Guilty.

Count 2: Murder, read with the provisions of the Combating of Domestic Violence Act, 2003 – Guilty.

Count 3: Defeating or obstructing or attempting to defeat or obstruct the course of justice and the alternative thereto – Not guilty.

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LIEBENBERG, J

ON BEHALF OF THE ACCUSED	**Ms. F. Kishi**
Instructed by:	**Kishi Legal Practitioners**
ON BEHALF OF THE STATE	**Mr. R. Shileka**
Instructed by:	**Office of the Prosecutor-General**