CASE NO.: CC 02/2012

IN THE HIGH COURT OF NAMIBIA:
NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

In the matter between:

THE STATE

and

PAULUS TOMAS **ACCUSED**

CORAM: LIEBENBERG, J.

Heard on: 13, 16 – 20; 23 – 24; 27July 2012
Delivered on: 30 July 2012

JUDGMENT

LIEBENBERG, J.: [1] The accused, an adult male, stands charged with the offence of murder, read with the provisions of the Combating of Domestic Violence Act[1] in that he on the 29th day of November 2010 at Uuthilindindi

[1] Act No 4 of 2003

village, in the district of Oshakati, allegedly killed one Johanna Lazarus (deceased).

[2] The accused is legally represented by Ms *Kishi* while Mr *Lisulo* appears for the State.

[3] Accused pleaded not guilty and in his plea explanation raised an alibi defence, saying that he had been in Oshakati on the 29th of November 2010 in search for employment; that he had spent the night there and only returned to his village home the following day, the 30th of November.

[4] At the outset of the trial and by agreement, a bundle of documents[2] were handed in, the content of which are not disputed. These are: a photo plan and explanatory notes depicting the crime scene and post-mortem examination as compiled by Sergeant Shakuyunga of the Namibian Police; the identification of the deceased's body as per police form Pol 51 being that of Johanna Lazarus; affidavits referring to the removal of the corpse from the scene and the handing over of same to members of the Namibian Police for safe custody; the affidavit and accompanying post-mortem examination report compiled by Dr Perez; and lastly, the record of proceedings held in the magistrate's court, in particular, pertaining to the section 119 proceedings during which the accused pleaded not guilty.

[5] It thus appears from the foregoing that the identity of the deceased, Johanna Lazarus, and the cause of her death, are common factors. What

[2] Exhibit 'E'1-5

however is in dispute is that it was the accused who had killed the deceased as alleged in the indictment.

[6] It seems clear from the post-mortem examination report that the deceased's death was caused by head injury and the following chief post-mortem findings were made: Multiple injuries to the head with fractures of the skull (blunt injuries); fracture of the base of the skull; fracture with depression of the frontal and left temporal bone of the skull; subarachnoid haemorrhage widespread throughout the brain. External injuries (open wounds) to the head of the deceased are clearly visible from the photographs taken during the post-mortem examination. Regard particularly being had to the fractures, there can hardly be any doubt that it would have required considerable force directed at the deceased's head, to inflict injuries of this nature to the skull. In this case, the death of the victim due to head injuries is therefore not surprising and rather appears to have been an inescapable consequence of the assault perpetrated on her.

[7] Whereas there are no eye witnesses who could possibly testify about the incident that led to the death of the deceased, the entire case for the State rests on circumstantial evidence. Mindful of the alibi defence relied on by the accused, the State, in order to connect the accused to the commission of the crime or at least to place him at the scene in relation to time, called several witnesses; however, with mixed success.

[8] Simon Akakuwa (Simon), then fifteen years of age, testified that on the 29th of November 2010 at about 14:30 he was on his way home from school when he saw the accused in the company of one Alutman Paulus Shitaleni (Shitaleni) at the cuca shops in Okau village. He approached them head on and they crossed at a distance of approximately 4 – 5 metres. Besides noticing that the accused was dressed in a blue striped T-shirt, and khaki trousers (Bermudas) he paid no further attention to him and proceeded home where he lives with his aunt Aune. After some time, which he estimates between 17:00 and 18:00, his aunt called him outside saying that there were two persons quarrelling a distance away from their homestead and whether he was able to identify them.[3] He identified the one on his clothes being the accused he had earlier seen at Okau, while the other person with whom he was quarrelling, was identified on her voice as being the deceased, also from their village. He furthermore identified the accused's voice at the time. Under cross-examination he disputed the accused's version put to him to the effect that it was the previous day that he had seen the accused in the company of Shitaleni at the cuca shops.

[9] The evidence of Aune Angula, the aunt to Simon, does not add much to the State case except for saying hat she and Simon corroborate one another pertaining to the incident they witnessed where two persons were quarrelling at a distance; also her identifying those persons on their voices being the accused and the deceased. However, the evidence of these two witnesses relating to time is contradicted by that of the witness Shitaleni, who claims to have been in the accused's company until approximately eight o'clock that

[3] The estimated distance was between 250 – 300 metres.

evening; therefore, he could not have been seen by the two witnesses between 16:00 – 17:00 in the company of the deceased, a short distance away from their home, as both testified.

[10] However, the evidence given by Simon about him seeing the accused and Shitaleni at Okau, was corroborated in material respects by Shitaleni himself, who said that after he had finished work on that day (the 29th) at around 11:00 he accompanied the accused who fetched him from work. It seems common cause that they were friends prior to the incident that led to the accused's arrest. They went to Okau village where they stayed until about 17:00. He recalls having seen Simon coming from school, passing them. They parted company, each going to their respective homes which are closely situated. He retired to bed and was sleeping when awaken by the accused who told him that he came to say goodbye; that he (Shitaleni) had to take a proper look at him as it would be his last time to see him, as he had killed his girlfriend. Also that Shitaleni had to collect his salary for work he had done from the headman; that he could take the accused's clothes and also gave him a Nokia cellphone and returned Shitaleni's necklace (chain) to him which the accused was having. He further said that as from the next day there would be people crying at the accused's as well as his girlfriend's house, as he was going to commit suicide. Shitaleni shared his room with his brother Alutman Paulinus who was present during this incident and overheard the conversation between the accused and Shitaleni. He also gave evidence to that effect. Shitaleni thereafter escorted the accused outside and returned to his bed. About the cellphone, Shitaleni said he mentioned to the accused that

he could not accept the phone after the accused had killed someone as it would bring him into trouble; he therefore in the morning took the phone to the house of his uncle, Kashisha, to whom he gave it.

[11] In cross-examination Shitaleni was adamant that he and the accused had been together on the 29th and disputed allegations that the accused was in Oshakati on that day. It was pointed out to him in cross-examination that the date of the alleged meeting with the accused, as reflected in his witness statement, was changed from *"On Tuesday 30.11.2010"* to read *"On Monday 29.11.2010…"* and when asked who had made the correction, he replied that it had to be the police officer who reduced the statement to writing. He maintained his position in cross-examination that the accused had been visiting him on the said night; also that he made a phone call in their presence to a person whom accused said was his cousin. As regards facts testified on by the witness but which were not mentioned in his witness statement, he explained that he indeed told the police officer who reduced his statement to writing everything; therefore, he was unable to account for the officer's failure to record everything as mentioned by him. The police officer in question was not called to give evidence in respect of the statement.

[12] Alutman Paulinus (Alutman) confirmed having been together with his brother Shitaleni when the accused came into their room that night saying that he had killed his girlfriend and that he were to commit suicide. Also that the accused said he had come to say goodbye, and made the phone call from their room to a family member. According to Alutman the accused was

wearing short khaki trousers, a striped T-shirt and blue striped Adidas sandals. He further said that when the police came to their house the following day, they enquired about shoeprints observed at their house and which he (Alutman) said, was that of the accused.

[13] I interpolate to remark that Alutman's description of the accused's clothing is identical to that testified about by Simon, when he saw the accused earlier that day at Okau; as well as the testimony of the investigating officer, Detective Sergeant Joshua Shakuyungwa, when he arrested the accused two days later.

[14] Lazarus Saavi Tuhafeni (Saavi) is the younger sister of the deceased and according to her, she, after arriving home at Uuthilindindi village during the afternoon of 29 November 2010, handed her SIM card to the deceased who thereafter used it in her own phone. The reason for this, according to Saavi, was because the deceased was not having her own SIM card with her. Saavi, on the other hand, did not have a cellphone of her own and would normally use her SIM card in the phones of either her mother or her siblings. The number of the witness' card is 081 434 1744 and was active at the time; whilst the number of the deceased's SIM card is 081 634 4053. After dinner she and the deceased retired for the night. When already in bed, a text message was sent to the deceased's phone and when shown to Saavi, it read that the deceased had to come to the fence. She was unable to see by whom the message was sent, but the deceased then informed her that it was Iipinge

(the accused) who said she had to fetch her money.[4] After the deceased changed into other clothes, she left at about 20:00, never to return. In the morning, and whilst on their way to fetch water, Saavi and her mother came upon the deceased in the field, lying dead next to the footpath. A panga from their house was lying nearby, while a piece of wood, covered in blood, was seen lying near the deceased's head.[5] There was also a pair of sandals which Saavi identified being hers and after putting these on she left to find help from the house of a neighbour, Mr Absai Martin. The police were then summoned to the scene.

[15] Lahya Naivela (Lahya) a cousin to the accused testified that on the night of 29 November 2010 she was called twice on her cellphone by the accused, but from a different number than his registered on her phone. According to her, her number is 081 217 8635, while the one the accused was phoning from is 081 634 4053. She confirmed these calls from a MTC call list printout made available to the witness according to which phone calls were made to her phone on 29 November 2010 at 22h52 and 23h41, respectively. Lahya testified that although the accused phoned from a different number, it was indeed him she had spoken to on both occasions, during which he told her that he had killed his girlfriend. She asked him whether they had been quarrelling, which he confirmed, but without saying what it was all about. Lahya said she at first did not believe the accused, but when he phoned her the second time she asked him whether he had informed 'uncle Ghadaffi' and

[4] This aspect of her evidence otherwise would have been inadmissible as evidence in that it is hearsay evidence; however, in this instance it was elicited through cross-examination and thus became admissible evidence.
[5] The significance of the piece of wood is that it is alleged to have broken off from the handle of the hoe used to hit the deceased with.

his elder sister Hilma accordingly, which he denied. She then handed over the phone to her mother. Lahya thereafter called 'uncle Ghadaffi' and Hilma but neither knew anything about the earlier reports made by the accused. She was subsequently called in the morning by Hilma who confirmed the earlier reports about the deceased having been killed.

[16] In cross-examination Lahya was questioned from her witness statement about some omissions in the statement but which were testified on in Court; and other issues which, according to her, were incorrectly recorded – despite her having expressed her satisfaction with the statement under cross-examination earlier. She explained that it could possibly be attributed to lapse of time, but was confident that what she has stated in Court is correct.

[17] The evidence of the witnesses Iipinge Hamushila[6] and his wife Paulina Sakaria is not of importantance to the outcome of these proceedings in that it relates only to the cellphone that was brought to Mr Hamushila in the morning and which subsequently was handed over to the deceased's mother by Mrs Sakaria. It would thus appear from the evidence to have been the same phone the accused had given to Shitaleni the previous evening.

[18] I now turn to summarise the evidence given by the two police officers Constable Hamunyela Haitenge and Detective Sergeant Joshua Shakuyungwa.

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[6] Also referred to by the witness Shitaleni as uncle Kashisha with whom the accused resided at the time.

[19] Constable Haitenge at the scene observed, next to the deceased's body, the blood stained piece of wood; a blue ribbon and further away, the panga. He noticed prints that appeared to have been made by a sandal leading away from the scene going in the direction of a nearby field situated between the deceased's homestead and that of the accused. These prints took them up to a hoe lying in the field, a considerable distance away from the deceased's body. The hoe also had blood stains on its handle (Exh '2'). The police were due to long grass in that area unable to track these prints beyond this point. As a result thereof the investigation was extended to all homesteads in that area and at the house of Alutman, the same prints were observed. Upon enquiry Sergeant Shakuyungwa learned that these were the prints of the accused that had come to the said house the previous evening. Constable Haitenge ended up at the accused's house where he was shown the accused's room by the owner of the house. The accused was not present when Levy jean trousers, allegedly that of the accused were, found outside his room with blood spots on (Exh '1').

[20] The search for the accused continued throughout the night until the following morning when it was reported that he had been spotted at Omubuka village, approximately 10 km from home. The police went there and at the village found the same prints they had been following the previous day. At one stage they saw someone walking in a nearby field who, when called by the police, started to run away. The police gave chase and apprehended the accused who was dressed in a blue striped T-shirt and short khaki trousers. He was bare feet as he had lost his sandals during the chase. According to

Sergeant Shakuyungwa the accused appeared tired, was shivering and unable to speak. When one of the police officers present asked the accused why he had run away he replied by saying: *"It was me who killed that girl"*. Sergeant Shakuyungwa immediately stopped the accused from making any further statements whereafter they proceeded to the police station where the accused was formally arrested and had his constitutional rights explained to him. Whereas the accused according to Sergeant Shakuyungwa was willing to confess, he tried to bring the accused before a magistrate but was unsuccessful as no magistrate was available. It is common cause that the accused when charged, provided a phone number to the investigating officer, which turned out to be that of the deceased. When asked why he had left the phone at Shitaleni's place the accused replied that the "body" of the phone belonged to the deceased. As regards the forensic analysis of the exhibits, Sergeant Shakuyungwa testified that these were returned without being analysed; the reason being that there could possibly have been contamination as the exhibits were not packed separately, but put together when sent for analysis.

[21] It was put to Sergeant Shakuyungwa in cross-examination that the reason why his witness statement is silent about him having been to Shitaleni's house and the report made there to him about the accused having been there the previous night; and the shoe prints observed at that house, is because these things never happened. He confirmed however that, although not mentioned in his statement, he did obtain statements from the two witnesses about the accused having visited them and he personally observed

the shoe prints at that house the following morning. He further disputed allegations about the accused having been assaulted after his arrest in order to force him to confess to the murder.

[22] Hilia Eliakim, employed as Risk Administrator at Mobile Telecommunications (MTC), Windhoek, testified and introduced into evidence data records[7] extracted from their system reflecting information about phone calls and text messages (SMS) made from and to a specific number; the duration of the call; the time and date the call was made or received; the serial number of the respective phones used; and the receiving tower that registered the call. The witness explained that the receiving tower closest to a cellphone in use will not necessarily register the call. This will depend on the number of calls registered by the tower at the given time and once its capacity becomes congested, the call will automatically divert to the nearest available tower in the area. She was unable to provide the radius of reception of a receiving tower, but held the view that a call made from Oshakati will not be registered by a receiving tower situated in the vicinity of Ondangwa airport, as the distance between receiving towers in this instance is simply too far.

[23] The accused testified in his defence and denied his alleged involvement in the killing of the deceased; though confirming that he and the deceased at the time were in a romantic relationship. It is his testimony that he left home (Uuthilindindi village) at 06:00 on the morning of 29 November and only returned again at 22:00 on the 30th. He had gone to Oshakati in search of work at a construction site but which was unsuccessful. He said he met with

[7] Exhibit 'H¹' and 'H²

one David Nashilongo on the day of his arrival in Oshakati and they were in each other's company throughout until they parted ways at around 13:00 the following day. He slept at home the night of his return to the village but left again early in the morning (06:00) to meet with one Andreas at Ombuga village so that they could go to the cuca shops at Okau. They were still on their way there when they met with the police who then arrested him and assaulted him by hitting him with open hands and with the barrel of a firearm on his forehead. He was also kicked with shod feet. This notwithstanding, he did not admit having committed the crime under investigation. In cross-examination he said that he did not disclose his alibi to the police as he decided to do so in Court. This obviously deprived the State of the opportunity to have the alibi investigated. Although the accused admitted being the owner of khaki trousers and a blue striped T-shirt which, he says, he used to wear, he denied having worn same on the day in question as testified by three of the State's witnesses. He further disputes evidence about him having been seen in the village together with the deceased during the said afternoon; that he was in the company of Shitaleni during the day and visited his home in the evening during which he confessed to the killing of the deceased; that he phoned Lahya during the night and admitted having killed his girlfriend; that he ran away when noticed by the police; and that he, after being apprehended, admitted the killing of the deceased to the police.

[24] During cross-examination it emerged that the testimony given by the accused in Court, in some respects, differs markedly from his explanation as contained in the defence's reply to the State's pre-trial memorandum. It must

be said that this document, as well as the minutes of the pre-trial conference subsequently held, were drawn by the accused's erstwhile legal representative, Ms *Koch*, who subsequently withdrew as counsel and was replaced by Mr *Kishi.* With the commencement of proceedings it was put on record by his counsel that the defence adheres to the said documents, which was also confirmed by the accused. I shall deal with this aspect of the proceedings in more detail later.

[25] The accused called David Nashilongo who gave evidence in his defence to the effect that the accused was in Oshakati on the 29th of November 2010 and in his company until about 20:30 when they parted company. According to the witness he thereafter had no further contact with the accused as he left for Windhoek the following morning. When confronted in cross-examination with contradictions between his evidence and that of the accused pertaining to time and place, he was adamant that his version was the truth.

[26] Where an accused, as in this case, relies on the defence of alibi, there is no duty or onus upon the accused to prove the truth of the alibi, as the onus remains on the State to rebut the accused's defence.[8] What the State is required to do is to present evidence that would prove that the accused committed the offence charged and that his alibi defence is false beyond reasonable doubt. The approach the trial court has to follow is to consider the alibi in the light of the totality of the evidence; regard being had to the credibility of the respective witnesses testifying for the State and the defence, and the reliability of such evidence. The court is not required to consider the

[8] *R v Biya*, 1952 (4) SA 514 (A); *S v Khumalo en Andere*, 1991 (4) SA 310 (A) at 327G-I.

alibi defence in isolation. If the alibi in the light of all the evidence adduced might reasonably be true and the accused is otherwise unconnected to the offence charged, then the court must acquit.

[27] The State presented the evidence of four eye witnesses who claimed to have seen the accused on the 29th of November 2010 at different times at Okau and Uuthilindindi villages, respectively. The first incident was during the afternoon at Okau when Simon on his way home from school closely passed the accused and Shitaleni. Not only did he recognise him on his face, but was also able to describe in Court the clothing the accused was wearing at the time i.e. short khaki trousers and a blue striped T-shirt. The accused was well-known to him prior to this day for approximately two years as they in the past played soccer together in the village. In these circumstances, it seems highly unlikely that Simon could have mistaken the accused for someone else – particularly where Simon's evidence is corroborated concerning his sighting of the accused at Okau on that day.

[28] Shitaleni's evidence corroborates that of Simon in that he (Shitaleni) confirmed having been in the company of the accused (since 11:00 that morning) and when they met with Simon coming from school and passing them at Okau. Shitaleni thereafter remained in the accused's company until they parted ways in the evening, going to their respected homes. Unless these two witnesses have testified about a different date, there can be no doubt whatsoever that it was the accused person who was either seen at Okau by Simon or in whose company Shitaleni was on that day.

[29] However, the accused again met with Shitaleni that same night in their house when he *inter alia* informed him and his younger brother, Alutman, that he had killed the deceased. This in my view clearly rules out any possibility that the State witnesses are confusing the events of the 29th of November with any other day as alleged by the accused.

[30] Alutman not only corroborates the evidence of Shitaleni in all respects pertaining to the events that took place in their room that night, but he was also able to describe in Court the accused's clothing, giving the same description as Simon, except for adding that the accused was also wearing sandals. The wearing of sandals by the accused when coming into their room as testified is, to some extent, corroborated by the evidence of Sergeant Shakuyungwa who enquired from the witnesses about the shoe prints he observed at the said house the following morning; and which, in his view, were identical to those observed earlier, leading away from the scene of crime. The attire of the accused when arrested the following day corresponds with the testimony of the other witnesses who had seen him on the 29th, two days prior to his arrest. Not one of these witnesses was present during the arrest and therefore would have been unable to give evidence about the accused's attire on that occasion; hence, excluding the possibility of them being confused about his attire on the said day, as alleged by the accused. It is not disputed that he owns such clothing (except for the sandals) – only that he was not wearing it on the day in question. Thus, despite the accused's denial of having worn the said attire on the mention dates, there is evidence

before Court of three independent witnesses who had seen the accused dressed in the said attire at the relevant times.

[31] Joining in with the events of the night of 29 November is the evidence of Lahya, the accused's cousin. She testified about two phone calls she received from the accused that night during which he told her that he had killed his girlfriend. Corroboration for these calls made to the witness is found in the MTC call register according to which she received on her cellphone[9] two calls made from the deceased's phone or SIM card, first at 22:52 and again at 23:41, both calls registered at the Okau receiving tower of MTC. Though the witness was unable to say from whose phone these calls were made, we now know that it was done by means of the deceased's SIM card, reflecting her number. Bearing in mind that on both occasions there were conversations going on between the accused and Lahya about this girl and what he did to her, it seems inconceivable that she could have mistaken his voice with that of someone else – least of all, with that of the deceased. It must be remembered that according to the evidence of Saavi (deceased's sister), the deceased borrowed hér SIM card earlier that evening; which seems to show that she either did not have her own SIM card, or for some reason, was unable to use it – the latter seemingly the more unlikely as according to the MTC records, it was indeed used that same evening.

[32] The evidence given by Shitaleni, Alutman and Lahya is damning in the sense that by the time reports about the death of the deceased were made by the accused, the death of the deceased as such, had not yet been

[9] No 264812178635

discovered. This only happened the following morning when the deceased's sister and mother came across the deceased lying in the field. Logic dictates that if no one else had any knowledge of the deceased's death taking place on the night of the 29th , except for those so informed by the accused himself that same night, how could these persons otherwise have known about it even before it was discovered the following day? These are independent witnesses who appear to have had no grudge against the accused. On the contrary, according to Shitaleni the accused handed a cellphone to him that night[10] and told him that he could collect his outstanding salary from work and also take his clothes as he was planning to commit suicide. There is indeed before Court the evidence of independent witnesses testifying about the phone that was eventually handed over to the deceased's mother. Contrary to this evidence is the accused's version that it was on another day that he had brought the phone there in order to have it charged. If the latter were indeed the case, it does not explain why the phone was returned to the deceased's family if there were no prior arrangements made with Shitaleni to do so or why he failed to collect it the following day.

[33] I can think of no reason why the Court must disregard the evidence of these witnesses as none was shown to be unreliable. Opposed thereto is the evidence of the accused which merely amounts to a blunt denial of each and every incident testified on by the State witnesses.

[34] I now turn to consider the evidence of Aune Angula as corrobotated by Simon about the alleged sighting of the accused at Uuthilindindi village during

[10]The owner of this phone is unknown though.

the afternoon of 29 November 2010. It seems obvious from Aune's evidence that the reason why she called Simon outside was for him to identify the two persons whom they saw quarrelling some distance away from the house. Also that Simon at first identified the one person on his clothes as being the accused as it corresponded with what he had seen the accused wearing earlier in the day at Okau. Because of the distance of about 300 metres, he was unable to identify these persons on their faces. As these persons were talking loud, he thereafter identified them on their voices as the accused and the deceased. Aune also claims to have identified them on their voices – albeit after Simon informed her that the one was the accused. Their conclusions seem to have been fortified by the fact that the female person after they separated, walked in the direction of the deceased's house.

[35] It seems to me that when the Court considers the evidence of identification given by these two witnesses, that a cautious approach should be followed for various reasons. Firstly, neither witness was capable of making a facial identification of these persons because of the distance; the recognition of clothing cannot in itself constitute positive identification, though it might be a factor to be considered together with other evidence adduced in that respect on identification. Secondly, a court required to assess evidence of voice identification must treat such evidence with caution[11] and in the absence of prior acquaintance such evidence is considered to be extremely poor evidence.[12] In my view, more so where the witness' voice identification, as in this instance, is made during a quarrel between two persons and the

[11] *S v M,* 1972 (4) SA 361 (T) at 364F
[12] *R v Mavuso,* 1969 (2) PH H 168 (Swaziland)

identifying witness unable to state what exactly has been said during the altercation. Thirdly, there is the contradicting evidence of Shitaleni about the accused having been in his company throughout that day and therefore could not have been where the two witnesses claimed to have seen him busy quarrelling with the deceased in the afternoon. The evidence is also contradicted by the defence witnesses.

[36] For the foregoing reasons and in my view, little weight should be given to the voice identification of the accused by the witnesses Aune and Simon during the course of the afternoon, as there is a strong possibility that they wrongly could have identified the accused and the deceased at the time. In all probability this was brought about by the distance of 300 metres between the witnesses and those persons whom they claimed to have identified and which, in any event in my view, would have made identification beyond reasonable doubt, virtually impossible over that distance. I do not consider their evidence as such to be false, but merely unreliable when considered with the rest of the evidence. Furthermore, this evidence must not be considered in isolation, but has to be evaluated together with the totality of evidence adduced during the trial.

[37] I have alluded to the evidence of the State witnesses independently giving evidence and that there is no legal ground why their evidence should not be relied upon. None of these witnesses were shown to be untrustworthy; they further corroborate one another in material respects. Furthermore, the circumstances under which the respective witnesses met with the accused on

that day are such that the possibility of mistaken identity can safely be excluded. The sum total of the evidence of these witnesses places the accused at Okau village and Uuthilindindi village as from the morning until late at night on the 29th of November. During this period he, by virtue of their testimony, not only interacted with the respective witnesses, but even admitted to the killing of the deceased. What is evident from their testimony, as well as that of the accused, is that there was no enmity between the witnesses and the accused as they were either acquaintances or friends, and even related. In these circumstances it seems unlikely that any of these witnesses would have had reason to implicate the accused and connect him with the murder.

[38] The Court was urged to take into account the discrepancies pointed out in the witness statements of Shitaleni and Sergeant Shakuyungwa compared to their oral testimony in Court and it seems apposite to once again repeat what has been stated in this jurisdiction in that respect. Mainga, J (as he then was) in the oft quoted case of *Aloysius Jaar*[13] said that:

> "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 down statements are never called and confronted with the contradictions that

[13]Unreported Case No CA 43/2002 delivered on 19.12.2009.

> 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." (emphasis provided)

Also that police officers tend to focus the statement on what *they* consider to be more relevant;[14]and what is set out in a police statement is more often than not simply the bare bones of a complaint and during oral testimony flesh is added thereto.[15]

[39] On the other hand is the evidence of the accused and that of his witness showing that he on 29 November was in Oshakati and therefore could not have been in the company of the State witnesses during those periods, as alleged. It is therefore the accused's view that it could not have been him whom the State witnesses saw on that day, and also disputes having confessed to the commission of the murder, both to the witnesses and the police. If shown that the accused's alibi, when weighed up against the evidence of the State witnesses, is reasonable possible, then the accused must be acquitted.

[40] When the Court considers the evidence given by the defence witness David Nashilongo against that of the accused, there are material differences relating to place and time between their respective versions, which remains unexplained. It is further evident that the discrepancies in their evidence are

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[14]*Simon Nakale Mukete v The State*, (unreported) Case No CA 146/2003 delivered on 19.12.2005.
[15]*Hanekom v The State,* (unreported) Case No 68/1999 (date of delivery unknown).

not bona fide mistakes made by any one of them, but rather appears to have the making of fabricated evidence. It seems inconceivable that they can differ on whether or not they spent the night of 29 November in each other's company playing pool throughout the night at Okatana Service Station; and whether or not they were still together the following day until they parted ways. Corroboration in their versions (only) lies in the date they met in Oshakati i.e. the 29th, that they were together seeking employment at a building site, and that they went up to Okatana Service Station. When asked in cross-examination why the date was clearly remembered Nashilongo explained that he recalls going to Windhoek the following day, being the 30th. I do not consider this explanation to strengthen his evidence on that point in any way.

[41] After due consideration of the evidence of Nashilongo, opposed to that of the accused and full regard being had to the corroboration and discrepancies in their respective versions, it seems to me that, for the following reasons, the evidence of these two witnesses had either been concocted, or the events testified about having transpired on a different date, or a combination of both.

[42] I already referred to the accused's reply to the State's pre-trial memorandum and pertaining to the calling of a witness by the name of Haipinge, it is clear that he in the interim has changed course and switched the names of the witness he intended calling, disputing that he ever intended calling a certain Haipinge. I find this explanation suspect, for it is stated in his

written reply that this person is a bar tender who works at Mumbara's Cuca Shop at Uuthilindindi village, excluding any misunderstanding between him and his counsel. It is further stated in the reply that *"The accuseds' (sic) will tell the Court that between the 29th and 30th of November 2010 he spent most of the time at Okavu location near Oshakati"*. However, that was never his testimony for he claims to have spent the night at Okatana situated in Oshakati and therefore could not have been at Okavu situated 'near Oshakati'. The accused's evidence in this regard is contradicted by Nashilongo, his own witness. There is however more.

[43] If the evidence of Lahya, supported by the call register of MTC, pertaining to calls made to her by the accused during the night of the 29th were to be believed, then it can be inferred from the register that the accused was operating his phone by means of the SIM card of the deceased; which calls were registered by the Okau-Kamasheshe receiving tower: Provided that the calls were not automatically diverted to that tower from another tower in that area. Taking into account that these calls were registered late at night, this seems unlikely, and places the accused in the vicinity of Okau and not Oshakati. Between the two calls a further nine calls were made to various numbers, all operation through the Okau-Kamasheshe tower and thereafter two more, before the first call registered by a tower in Oshakati was at 05:38 on the 30th. On the 30th of November and until 18:13 when the first call was again registered at the Okau-Kamasheshe tower, no less than forty-two calls or SMS's were either made, sent or received and registered by towers in the Oshakati area. Between 18:14 and 18:24 three more calls interchanged

between towers at Oshakati and Okau-Kamasheshe, whereafter all fifty-one calls made thereafter until 11:27 on the 30th, were received by the Okau-Kamasheshe and Ompundja towers respectively, the latter being the closest other tower to Okau. It would also appear that the time the last call was registered (11:27) by means of the deceased's SIM card, is consistent with evidence that the accused was arrested during the morning of the 01st of December.

[44] Because of the interchange of calls received and registered by different towers within a specific area, it appears to me that the Court is not, in the light of what has been stated in *R v Blom*[16], entitled to draw the inference from the evidence set out in the foregoing paragraph, that the accused was indeed within the immediate vicinity of the tower that registered the calls made at a specific time. However, I do not think that such evidence is completely without effect because where it has been shown that a *number of calls* were registered over a period at only one tower, it seems to me reasonable to infer from such evidence that the person who made or received calls or SMS's during that period, in all probability, was in the said area. One such period would be between 21:59 on the 29th and 05:32 on the 30th during which at least thirteen calls were registered at Okau-Kamasheshe tower. This probability is consistent with the evidence given by the State witnesses to the effect that the accused was seen at Uuthilindindi village on the night of the 29th of November; thus, in the area where the deceased was murdered. It is inconsistent with the accused's version about him having spent the night in Oshakati. Another such period refers to the forty-two calls or SMS's

[16] 1939 AD 188

registered in and around Oshakati on the 30th from 07:12 until 18:13. Not only does it tend to show that the accused was indeed in Oshakati on this day as he claims, but it would also contradict his version that he left town round about lunch time. Given the time periods testified on by the defence witness and those reflected in the call register, it raises the question in one's mind as to whether the defence witnesses did not meet in Oshakati on the 30th of November 2010 and not on the 29th as testified? In the light of the unexplained contradictions in the defence case and the unconvincing evidence of Nashilongo pertaining to these specific dates, the latter seems to be a real possibility. This would obviously leave the accused's alibi defence without corroboration.

[45] On the accused's own version he did not raise his alibi defence to the police upon his arrest; which could have been to his advantage if properly investigated at the time. At no stage prior to the pre-trials, a period of over two years, was any mention made by the accused about his alibi defence; and I fully endorse the sentiments expressed in *S v Thebus and Another*[17] *per* Lewis, AJA who, in a similar situation, remarked as follow at 583e-g:

> "[13] What is more telling, in my view, is that the version was raised only at the trial, some two years after the incident. …. It is equally not possible that the first appellant himself, having so cogent an alibi when arrested and charged, did not advise the police or the prosecution that this was the case. The only inference that can be drawn from his failure to advise the police, and

[17] 2002 (2) SACR 566 (A)

> from the other witnesses' failure to do so, is that the alibi had no truth in it at all."

The right of an accused to remain silent has always been acknowledged by the courts; more so, since the advent of the Constitution through which a fair trial is guaranteed by Article 12 (1)(f) – a right that the courts have interpreted to also include the process of bringing an accused person to trial i.e. during pre-trial proceedings.[18]

[46] However, as shown above, although an accused person has the right to remain silent and is not obliged to disclose the basis of his defence during pre-trial proceedings and even the trial itself, the decision to do so, depending on the circumstances of the case, may not be without consequences for the accused, as the court will be entitled to draw inferences adverse to the accused's case from such failure. In the circumstances of the present case I find it difficult to believe that the accused, when falsely accused of a murder he did not commit, would not have spoken out and advised the police, the prosecution or the court *a quo* at the first occasion afforded to him to do so. Thus, regard being had to the evidence adduced pertaining to the accused's alibi defence, it seems reasonable to draw an inference from the accused's failure that his alibi defence came as an afterthought. This is something the Court obviously may take into account when assessing the evidence adduced at the trial.

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[18] *S v Malumo and Others (2),* 2007 (1) NR 198 (HC) at 211F; *S v Kapika and Others (1),* 1997 NR 285 (HC) at 285H-I.

[47] When considering the accused's alibi defence in the light of the totality of the evidence adduced, full regard being had to the merits and demerits of the evidence given by the State and the defence witnesses respectively, as well as the probabilities, the Court is convinced that the alibi defence of the accused is not reasonably true and accordingly, is rejected as false beyond reasonable doubt.

[48] As mentioned, in the absence of any eyewitnesses, the State case entirely rests on circumstantial evidence; excluding the incriminating admissions made by the accused to State witnesses, being direct evidence. Evidence about shoe prints that were found at the scene of crime but later disappeared in a nearby field, in my view, adds little value to the State case. Although evidence of shoeprints is admissible, the courts have laid down rules that it must be cautious when relying upon such evidence especially where it is the only evidence against the accused and the cogency of such evidence must depend upon all the circumstances of the case. For example, whether or not, the imprint in question has any distinctive characteristics or pattern.[19] In the absence of expert evidence that would satisfy the requirement of identification of an accused person merely on foot- or shoeprints and where the evidence was the mere opinion of a police officer (as in this instance) without disclosing the facts he relied on to come to his conclusion i.e. relying on a distinctive characteristic or a pattern, such evidence is insufficient and falls short from proper identification of the accused person on his foot- or shoeprints. In these circumstances the court will therefore not convict on

[19] See *S v Imene*, 2007 (2) NR 770 (HC) at 772D-G and the cases cited therein; *The South African Law of Evidence*, Second Edition, - Zeffertt & Paizes at 334.

footprint evidence alone unless satisfied that the print has enough unusual features to convince it beyond reasonable doubt that it bears a unique resemblance to that of the accused.[20]

[49] However, although the shoeprint evidence in itself is insufficient for identification, it is not in the present instance the only evidence against the accused which links him to the murder. The shoe prints were again observed the following day at the home of Shitaleni and were reported on (and confirmed in evidence) to be that of the accused who had come there the previous night. The shoe prints were further similar to those observed at the scene of the murder and at the village where he was arrested the following day. More over, the accused confessed to the murder shortly after it was committed and even before it was discovered. In the light of other evidence adduced, besides that referring to the shoeprint identification, it seems to me that the value of shoeprint evidence observed at the scene is largely overshadowed by such other evidence connecting the accused directly to the commission of the crime; thus, significantly reducing the need for reliance on the shoeprint evidence for identification of the culprit.

[50] The Court in its final analysis of the evidence, despite having rejected the alibi defence of the accused, still has to consider whether the accused's version, in view of the totality of the evidence, is reasonably true. In other words, in the light of all the evidence adduced at the trial, has the State succeeded in proving the accused's guilt beyond reasonable doubt? After consideration of all the evidence, due regard being had to the merits and

[20] *Zeffert & Paizes* (*supra*) *at 335.*

demerits of the State and defence witnesses as well as the probabilities of the case, the answer is a resounding 'yes'. There is sufficient – in my view overwhelming – evidence before the Court proving the accused's guilt beyond any doubt and his conviction on a charge of murder thus, is inevitable.

[51] Whereas the accused's testimony has been rejected as false, the Court is deprived of the assistance of important information pertaining to the circumstances which led to the murder of the deceased – information the accused alone could have placed before Court. In circumstances where an accused's account has been rejected as false, the Court in *R v Mlambo*[21] *per* Malan, J (dissenting) held the view that the court may draw an inference that the accused committed the assault with intent to kill, rather than with a less serious form of *mens rea.* It seems worthwhile to repeat what I occasioned to say in this respect in *The State v Gerald Kashamba*[22] at p 17:

> "[39] The Court, having rejected the accused's evidence regarding the shooting incident, does not have the benefit of reliable evidence on the subjective state of mind of the accused, in other words, to determine what was going on in his mind the time when he fired the shot. (*S v Mokeng,* 1992 NR 220 (HC)) In deciding that, the Court considers objective factors such as the type of weapon or instrument used; at which part of the victim's body was the assault directed; and the nature of the actual injury sustained by the victim. (*S v Beukes* 1988 (1) SA 511 (A)) From these indicators the Court will then draw certain inferences."

[52] When applying the aforementioned principles to the present circumstances I take into account that the assault was directed at the head of

[21] 1957 (4) SA 727 (A)
[22] Unreported Case No CC 05/2008 delivered on 03.04.2009

the deceased resulting in her death. It can be inferred from the serious nature of the injuries reflected in the post-mortem examination report that substantial force was required to inflict the injuries shown i.e. several skull fractures, inclusive of the skull base. In the absence of any evidence to the contrary, and regard being had to evidence that the shoeprints observed at the murder scene led the police officers directly to a bloodstained hoe lying in a nearby field, it can reasonably be inferred that this was the murder weapon. Although the hoe was not subjected to any forensic analysis to determine the nature of the substance found on it perceived to be blood, there was evidence about a piece of wood that broke off the handle of the hoe found next to the body which was also bloodstained. Although the time of death is unknown, it is obvious that the victim was left at her own mercy until she succumbed. In these circumstances, the Court concludes that the accused acted with direct intent (*dolus directus*) when killing the deceased.

[53] The last remaining issue for consideration is to decide whether or not the provisions of the Combating of Domestic Violence Act find application. A domestic relationship under the said Act is defined in extremely wide terms and includes two persons being of different sexes who are or were in an actual or a perceived intimate or romantic relationship (s 3 (1)(f)). Whereas the accused in the present instance admitted that the deceased was his girlfriend (a fact not disputed), this in terms of the Act, constitutes a romantic relationship. Hence, the provisions of Act 4 of 2003 find application, a factor that ought to be given some weight and could even be an aggravating factor in sentencing.

[54] In the result, the Court's judgment is as follows:

On a charge of Murder, read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003, the accused Paulus Tomas, is found:- Guilty.

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LIEBENBERG, J

ON BEHALF OF THE ACCUSED	**Ms. F Kishi**
Instructed by:	**Dr Weder, Kauta & Hoveka**
ON BEHALF OF THE STATE	**Mr. D Lisulo**
Instructed by:	**Office of the Prosecutor-General**