

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: CC 23/2008

In the matter between:

THE STATE

and

NATANGWE IPINGE NGATJIZEKO

ACCUSED

Neutral citation: STATE *v* NGATJIZEKO (CC23/2008) [2013] NAHCMD 108 (18 APRIL 2013)

CORAM: NDAUENDAPO, J

Heard on: 18-26 January 2012 4-6 June 2012, 28-29 August 2012

Delivered on: 18 April 2013

Flynote: Criminal law—Accused charged with murder and robbery with aggravating circumstances—pleaded not guilty—Defence of mental illness (psychotic) due to substance abuse over the years—Confession—Admissibility requirements met—Mental illness—Diminished responsibility—Convicted of murder *dolus directus* no evidence to support robbery as the victim was possibly dead when robbed—Convicted of theft.

Summary: Criminal law—The accused was charged with murder and robbery with aggravating circumstance. He pleaded not guilty and raised a defence of mental illness (psychotic) as a result of many years of abuse of marijuana. He objected to a confession being admitted on the basis that he was not in his sound and sober senses and that his rights to legal representation was not explained.

Held, that he was in his sound and sober senses when the confession was recorded and that his right to legal aid was explained.

Held, further that at the time of the commission of the crimes he was suffering from diminished responsibility which is not a defence, but a factor to be taken into account when sentencing.

Held, further that the deceased was possible dead by the time the money was stolen from her and therefore no evidence of robbery.

Held, accused convicted of murder with *dolus directus* and theft.

ORDER

1. The accused is convicted of murder with *dolus directus* read with part 1 and part 3 of Act 4 of 2003
2. Not guilty on robbery with aggravating circumstances but, quilty of theft of N\$20.

JUDGMENT

NDAUENDAPO, J: [1] The accused is arraigned in this Court on one count of murder read with part I and III of Act 4 of 2003 and one count of robbery with aggravating circumstances. On the murder charge the state alleges that 'In that upon or about 17

December 2006 and at or near Katutura in the district of Windhoek the accused did unlawfully and intentionally kill Phenny Ipinge an adult female person.

[2] On the robbery charge the state alleges that 'In that upon or about 17 December 2006 and at or near Katutura in the district of Windhoek the accused did unlawfully and with the intent to force her into submission assaulted Phenny Ipinge by pouring water over her body, stabbing her several times with knife(s) and fracturing some of her ribs and did then unlawfully and intent to steal take N\$20 cash money the property of or in the lawful possession of the said Phenny Ipinge.'

And that aggravating circumstances as defined in section 1 of Act 51 of 1977 are present in that the accused was either before, during or after the commission of the offence wielding dangerous weapons, namely knives and/or boiling water and/or inflicting grievous bodily harm to the said Phenny Ipinge.

[3] The Summary of substantial facts states:

The accused, who was born on 10 July 1979, is the biological son of the deceased. The latter resided at Erf number 7463, Shandumbala in Katutura in the district of Windhoek.

On an unknown date prior to Sunday 17 December 2006 the accused travelled from Walvis Bay to Windhoek with the intention to kill the deceased. On 17 December 2006 and at the residence of the deceased the accused boiled water and poured it over the body of the deceased and he fractured some of her ribs. He also stabbed her several times with at least two knives. The deceased died on the scene due to the injuries sustained. Before he left the scene the accused took N\$20.00 cash money which was the property of or in the lawful possession of the deceased.'

Ms Moyo appears for the state and Mr Wessels for the accused.

[4] The accused pleaded not guilty to both charges and submitted a detailed plea explanation in terms of s. 115 of Criminal Procedure Act 51 of 1977. The plea explanation state as follows:

'plea explanation see exhibit

'(A)'

I, the undersigned;

NATANGWE IPINGE NGATJIZEKO

Am charged with the following offences:

1. **MURDER** (read with part 1 and part 3 of Act 4 of 2003)
2. **ROBBERY WITH AGGRAVATING CIRCUMSTANCES** (as defined in Section 1 of Act 51 of 1977)

I plead not guilty to both charges as well as any competent verdict thereto.

I have been explained the procedures to follow in terms of Section 115 and 220 of the Criminal Procedure Act.

I tender this plea freely and voluntarily and am fully aware of my rights and hereby state as follows:

1. *I confirm that I am fully aware of the allegations in the charges preferred against me.*

I further confirm that I am fully aware of and have been informed by my counsel of my rights, namely:

- 2.1 *That I am presumed innocent until proven guilty beyond a reasonable doubt.*

2.2 *I hereby confirm that nobody has influenced me in any manner whatsoever to make this plea.*

2.3 *I also confirm that I am aware of the serious nature of the charges preferred against me.*

3. *In amplification of my plea I wish to state the following:*

AD COUNT 1

3.1 *I deny that I intentionally killed my mother, Phenny Ipinge.*

Although I had, prior to the incident, certain ill feelings against the deceased and in fact, on a number of occasions, had some thoughts and ideas of injuring the deceased and/or killing her, I considered those thoughts to be part of hallucinations and paranoiac delusions towards her. I deny that I ever took a wilfull and/or conscious decision to in fact injure or kill the deceased.

3.2 *I submit that I have suffered from a mental defect caused by many years of substance abuse and in more particular marijuana and I believe that I was psychotic when I committed the alleged offences I stand accused of.*

3.3 *Apart from the fact that I submit that I was disillusioned, I submit that I, at the time of the commission of the alleged offence, I was not able to properly appreciate the wrongfulness of my deeds and acts and State is put to the proof of the contrary.'*

AD COUNT 2

3.4 *I specifically deny that I-*

a) *Unlawfully and with the intend to force the deceased into submission assaulted Phenny Ipinge in the manner described in the charge sheet with the intend to steal N\$20 in cash from her.*

b) *I repeat what I have stated supra in respect of my mental illness, paranoid dissolutions and my psychotic behavior at the time of the committing of the alleged offence.*

c) *I deny that I had the capability to make a willful and conscious decision to either rob or steal the monies referred to in Count 2 from the deceased.*

3.5 *Although I seem to recall certain events of the date of the incident, the 17th of December 2006, I am often not sure whether the events I so remember of fragments of my imagination, whether it is part of nightmares and dreams that re-occur to me or whether they are in fact true reflection of events.*

4. ADMISSIONS IN TERMS OF SECTION 220

In respect of both charges referred to supra, I admit the following_

4.1 *I was in Windhoek in Katutura in the district of this Honourable Court on the 17th day of December 2006.*

4.2 *At the time I was resident at the house of my mother to wit Erf 7463, Shandumbala, Katutura.*

4.3 *I admit that the deceased, my biological mother Phenny Ipinge, was seriously assaulted by me and although I do not know the exact particulars of the incident I do not deny that I have pored*

*boiling water over her and I do not deny that I have stabbed her with a
knife or knives repeatedly.*

*4.4 I admit that the deceased died from multiple injuries that she sustained
from the stab wounds and I admit that she also suffered from
second and third degree burns.*

*4.5 I admit that the death of the deceased occurred on the 17th of December
2006.*

*4.6 I admit that the corpse of the deceased did not sustain any further injuries
during the time that she was transported from the scene of the
crime to the mortuary in Windhoek where a post-medical legal post
mortem was conducted on her.'*

STATE'CASE

Hereinbelow is the summary of evidence of witnesses for the state.

[5] **Aretha Kandundu** She is a Detective Constable in the Namibian Police Force. She attended to the scene and compiled the Sketch plan and the photo plan. She observed the body of the deceased lying in the living room covered with a blanket.

Timoteus Shoombe

[6] He is a neighbour of the deceased. On 17 December 2006 around 18h00 he was seated in his yard and he heard somebody calling his name. He stood up and went to the deceased's yard where the screaming was coming from, knocked at the sitting room door and there was no answer. He then went back to his yard and sat outside. While seated he saw the accused coming out of the yard and greeted him by his name. He had a small bag in his hand. The accused left and after that he decided to go back to

the house of the deceased again. Again there was no answer to his knock at the door. He went to another neighbor Loide Ekandjo and told her about the screams and noise and that he saw the accused. Together they proceeded to the house of the deceased tried to open the sitting door, but locked with a security chain hinged inside the door. They saw blood flowing towards the door and observed a body laying covered with the blanket. [7] **Ms Ekandjo** corroborated the evidence of Mr Shoombe. She accompanied him to the house of the deceased. When they opened the door she saw the deceased lying in a pool of blood.

Marian Swartz and **Aune Kaupitima** testified that they were employed by the National Forensic Institute Laboratory and they were responsible for the examination of the exhibits found at the scene in order to determine whether the blood found on those exhibits was of human origin and to establish the blood grouping. Testified that the blood on the exhibits was of human origin and it was found that it belonged to ABO, the grouping which was the deceased blood group.

[8] **Chief Inspector Ipinge** he is the brother of the deceased and he went to the scene where he saw the deceased lying on the living room floor in a pool of blood. He further testified about his relationship with the accused, his nephew and that it was such that if he had any problem he could easily have approached him. He was not aware that the accused was abusing drugs.

[9] **Raphael Simasiku** testified that he is employed by the Namibian Police and that he was called to the scene. When he entered the house he observed that the body of the deceased was lying in blood and water. He also saw 2 knives at the scene.

[10] **Mr Shikwambi** he is a constable and he arrested the accused on 19 December 2006 at the Ghetto in Babilon at 17hoo. The accused was seated with a friend wearing a blood stained t-shirt, his right hand was bleeding and covered with a plastic. He introduced himself as a police officer and explained to the accused that he had a right to remain silent, a right to have a lawyer of his own choice or legal aid appointed lawyer. The accused was shocked, depressed and lonely. He arrested him and took the

accused to Katutura Police Station and from there to Katutura hospital where he was admitted.

[11] **Dr Fenny Shidhika** testified about the treatment regime received by the accused whilst in hospital. He was given a broad spectrum of antibiotics and pain killer. The accused was discharged on 22 December 2006.

[12] **Dr Kambandje** testified about the content of the post mortem report. The Post mortem examination on the deceased was conducted by Dr Gomez who returned to Cuba. Kambandje testified that the deceased had suffered multiple stab wounds on the face, chest, abdomen and back. She also suffered second and third degree burn wounds, rib fractures, liver rupture and lung rupture. She was stabbed 39 times.

[13] **Dr Mthoko**

She is a Psychiatrist by profession and attached to the Windhoek Central Hospital Psychiatric department. She conducted a psychiatrist observation on the accused during the period 21 June 2010 to 23 July 2010 (exhibit 'O') and compiled a report in terms of sections 79 of Act 51 of 1977. Her findings were:

*'Disorder": **Not mentally ill***

Psychoactive substance induced psychosis (at the time of the alleged crime)

79 (4) (c) He is fit to stand trial. He is capable of adequately following court proceedings and postulating a defence.

79 (4) (d) At the time of commission of the alleged crime, the accused did suffer from a mental disorder as supported by history of using psychoactive substances. Although he understood the nature of what he was doing, his intention was the consequence of a delusion, and therefore his ability to appreciate the wrongfulness of the alleged offence and act in accordance with such appreciation was diminished.

The treatment/disposition fairest to the accused and safest to the community would be for the court to proceed according to its findings.

The above is the unanimous opinion of the constituted panel.'

[14] A report in terms of s 79 of Act 51 of 1977 in respect of the accused was also compiled by Dr Japhet. The examination was carried out between the period of 21 April 2009 to 28 May 2009. He could not testify as he left the country and the content of the report was read into the record by Dr Mtoko. The findings of the report state:

'3. **FINDINGS**

3.1 *The accused mental condition is stable after he abstained from smoking marijuana. He is able to understand court proceedings to the extent that he is adequately able to conduct his own defence.*

3.2 *According to the available particulars, the accused at the time of the commission of the alleged offence he was having a mental defect as supported by the findings that he has been smoking marijuana for many years and he was psychotic when he committed the alleged offence. Because of Psychosis, his Cognitive Function was greatly impaired and as such,*

- a) *He was not fully capable to appreciate the wrongfulness of his act,*
- b) *He was not fully capable of acting in accordance with an appreciation of the wrongfulness of his act.*

*The accused is currently in good remission. He should be regard as **FIT TO STAND TRIAL WITH DIMINISHED CAPABILITY***

4. ***The accused is no longer mentally ill. HE IS FIT TO STAND TRIAL WITH DIMINISHED CAPABILITY'***

Dr Mthoko further testified that the impact of diminished capability means that when he acted he was not fully capable, so his capability was diminished, he was not hundred percent able to control himself. The capacity was reduced by the mental illness which he was suffering from 'so in killing the mother he knew that he is harming the mother yes, but his knowing is under the influence of the delusion.' His mental capacity was diminished because of those delusions and he was not fully really controlling his own thoughts.

[15] **Valencia Van Der Westuizen**. She is the investigating officer and was present when the accused was arrested by constable Shikwambi on 18 December 2006. The accused was taken to Katutura Police Station and from there to Katutura hospital where he was admitted for treatment because his hands had deep cut wounds.

On 20 December 2006 she visited the accused in hospital to charge him and the doctor on standby declared that he was in his sound and sober senses so she took down the warning statement. She explained the charges levelled against him, explained his rights to remain silent and that he does not have to give a statement. She explained his right to engage a lawyer of his own choice and if he could not afford a lawyer of his own choice he could apply to legal aid for a lawyer. She did not write down the part of legal aid but she explained it to him. The accused informed her that he wanted to make a confession and that he did not want a legal representative. She went back to the office to arrange with her superior for somebody to take a confession. Chief Inspector De Klerk agreed to take the confession at 14H00. She and Detective Kavari collected the accused from the hospital and took him to their office where the confession was taken down by Chief Inspector De Klerk.

[16] **Reasons for admission of the confession (trial within trial)**

After the court heard evidence in the trial within a trial I ruled that the confession made by the accused to Chief Inspector De Klerk admissible and stated that my reasons will be provided at the end of the trial. Hereinbelow are my reasons.

The accused objected to the admissibility of the confession on two grounds:

- (a) That the accused was not in his sound and sober senses when he made the confession.
- (b) That his rights to legal representation (legal aid) was not properly explained.

Chief Inspector De Klerk testified that he was a member of Namibia Police Force for the past 22 years. The accused was brought to him on 20 December 2006 by Detective Kavari with Sergeant Van Der Westhuizen at the CID (criminal investigation) department offices in Katutura. He sat down in the office with the accused. He identified himself by means of his appointment certificate and informed him that he was a justice of peace officer. He explained to him that he had nothing to fear and that he could speak frankly with him. He asked him whether he was threatened or forced to make any confession and he said no. He explained his right to legal representation and that he could get his own lawyer or could apply for legal aid before making a confession and that he would be granted the opportunity to do so if he needed to engage the services of a lawyer.

He then opted not to engage a lawyer. He also warned him that he is not obliged to make any statement but if he chooses to do so, that will be taken down in writing and be used as evidence in a court of law. He asked the accused whether he understood the warning and he said he fully understood it. He asked whether he was threatened or assaulted in any way to make a confession or whether any promises were made to him or whether he would suffer any prejudice if he informed him about any such assault or threats and to all those questions he answered in the negative. He also asked him whether he was in his sound and sober senses and he answered yes. He again asked the accused whether he was prepared to make any statement and then he answered in the affirmative. He observed that the accused was in his sound and sober senses from the way he was answering questions, from his speech and appearance. He testified that he would not have taken the statement if the accused was not in his sound and sober senses. The accused then gave the full account of events. Which he wrote down. They

spoke English and there was no misunderstanding as the accused was very conversant in English.

He testified that because of the injuries to his hands which were bandaged the accused was unable to put his signature on the document and he put a thumbprint. After he recorded the statement, it was read back to the accused in the presence of Detective Kavari and he then put his thumbprint on the document (pro forma) and at the end of each page and it was countersigned by Detective Kavari.

The witness further testified that although the pro forma form (which he used when taking the confession) reads "Deponent is informed that he has a right to legal representation of his choice *and it goes on by saying 'if he wants to make use of legal representation he will be afforded such an opportunity before making any statements'*". He informed the court that it is a procedure from any detective taking down a warning statement or a confession from an accused person to also explain to him that if he cannot afford the services of a lawyer on his own he can apply to legal aid for legal representation and he informed the accused about that. *The proforma further states: 'Do you want, to obtain legal representation? The answer by the accused was 'no'.*

He further testified that he is attached to the Namibia Police Drug Law Enforcement Unit which deals with the combating of illicit drugs-cannabis, mandrax, cocaine for 18 years and he comes across people who are addicted on a daily basis and that he was familiar with the symptoms. They differ from person to person but generally they have slurred speech or they stutter or they do not communicate properly, the body shivers, they are uneasy and irritated (withdrawal symptoms). He did not observe any of those symptoms from accused.

The witness was extensively cross examined on his explanation of the right to legal representation, but he stood his grounds that he explained both the right to private lawyer and legal aid.

It was also put to the witness ' on that score I have instructions from the accused person that he was confused at the time but if he was explained his right to a private lawyer of his own choice, he would have declined because he simply had no funds to appoint a lawyer my instructions are that if any mention was made and any explanation was given in respect of a lawyer that could assist him that is not going to charge him money and that the state will pay for that lawyer, he would most certainly have jumped for that offer'. **The witness answered:** 'My lord that was explained to him and he opted not go for legal aid or own legal representation.'

It was also put to the witness after he testified that the statement was read back, that "but you could not have read to him anything about legal aid because nothing was noted? **Answer:** 'That was not written down my lord but I did inform him about that.'

Counsel for accused admitted that it is not disputed that Detective Kavari was present when accused affixed his thumbprint on exhibit S on request of Chief Inspector de Klerk and that Kavari signed as a witness

[17] **ACCUSED'S TESTIMONY: (TRIAL WITHIN A TRIAL)**

The accused testified that on the day of his arrest he was taken to Katutura Police Station and from there admitted to Katutura hospital, 3 days after the incident. Whilst in hospital, he spoke to family members who told him how his mother was killed, read in the newspapers about the case, heard nurses talking to one another about the case and policemen talking about the case. He picked up some of the things that he told Chief Inspector De Klerk from those sources. He testified that he was not force to go to Inspector De Klerk's office to make a statement. He did it out of his own volition.

He further testified that what he told Chief Inspector De Klerk came from himself, other information he picked up from nurses, newspapers ect. He was shocked, traumatized and he was not clear minded. He was asked by his lawyer 'why did you not get assistance of a lawyer, why did you not get the police to phone a lawyer to come and see or make a phone call or ask your family? **Answered:** 'When, they have explained

to me as if I have to come up with my own funds to get a lawyer since I have no funds on my own I had no money to pay/appoint a private lawyer.'

Court: 'De Klerk also explained legal aid and legal aid no funds are needed'. He testified that, that was not done otherwise he would have grabbed it with both hands. He would not have made a statement if he was told about legal aid lawyer.'

The Court asked him where there were any misunderstanding when he was talking to Chief Inspector de Klerk. He said, 'I do not think there was any misunderstanding.'

The court asked him: You were asked whether you were satisfied that you were in sound and sober senses:

Answer: 'yes'

[18] Submissions by counsel for the state

Counsel for the state submitted that the accused rights to legal representation and legal aid was explained by Shikwambi, Van Der Westhuizen and by Chief Inspector de Klerk. Those witnesses were credible as opposed to the accused who fared badly under cross examination. She further submitted that the accused is an intelligent young man who went up to college level both within Namibian and in Europe. He was even trained in the defence force and missed pass out by two months when he was suspended for a case for which he later appeared in court. Accused is therefore no stranger to the court and definitely not a stranger to the legal system, she contended.

She argued that the accused alleged that he was not in his sound and sober senses at the time of the recording. He however, remembered that the information he gave to Chief Inspector De Klerk, he was the source for some of it, some of it he read from the newspaper, some of it he gathered from family members who visited him at the hospital, some of it was from other inmates and some of it came from the police as well as the nurses' discussions which he overheard whilst lying in hospital. She submitted that the

question which begs an answer is whether the accused was indeed so debilitated in his reasoning capacity that he can be said not to have been in his sound and sober senses at the time of such recording by Chief Inspector De Klerk.

She argued that first and foremost, the accused was withdrawn from hospital for the recording of the alleged confession. He, himself says he went to the CID offices voluntarily and also confirms the recording of such confession to have been done freely and voluntarily.

Chief Inspector De Klerk's observations are to the effect that accused was indeed in his sound and sober senses at the time of the recording.

She argued that Dr Kemble testimony removes any fears that any of the drugs given to the accused whilst in hospital could have affected the accused reasoning capability /powers at the time of the recording of the confession. She therefore urged the court to admit the confession.

[19] Submissions by counsel for the accused (trial within trial)

Counsel for the accused submitted that when it comes to the requirement of 'sound and sober senses' we are dealing with the wording of the act and if the court finds that the accused person was not in his sound and sober senses, that is the end of the inquiry and the confession can never be admitted. He argued that the accused was abusing marijuana for many years and by the time when he gave the confession it was 3 days after the incident and not having used it for 3 days. The effects of the marijuana and the medication which was given to him in the hospital resulted in him not being in his sound and sober senses.

Counsel further argued that there is no reason to prefer Chief Inspector De Klerk's evidence above that of the accused on the issue of legal representation. The question

should be, whether the accused person's version is so improbable that the court can rule it to be false? Counsel contended that accused said it was not explained, the written confession indicates no such explanation.

According to counsel the court should at least have doubt as to the correctness of the evidence of Chief Inspector De Klerk as far as legal aid is concerned. He argued that it was strange that De Klerk did not merely write on the pro-forma form where there is ample space the fact that he also warned the accused and explained to him the right to legal aid. In conclusion counsel submitted that the court should find that the accused person was not in his sound and sober senses when making the confession and was not properly informed of his rights pertaining to legal representation. On the issue of legal representation the court has a discretion to either allow or disallow, but on the issue of whether the accused was in his sound and sober senses the court has no discretion and if it finds such then it must disallow the confession.

[20] **Requirements for admission of a confession**

In terms of section **217 (1) of Criminal Procedure Act 51 of 1977** it must be shown that the confession was made by the accused freely and voluntarily, while he was in his sound and sober senses, and without having been unduly influenced thereto. In terms of our constitution and the case law the accused must also be informed of his rights to legal representation before making a confession.

On the requirement of '*sound and sober senses*' *Hofman and Zeffert Law of evidence 4 ed at 216* say 'This requirement means only that the accused must have known what he was saying: It does not matter that he spoke under the influence of drink or nervous excitement as long as his mind was not so disturbed as to deprive him of reason. In *S v Masia* 1962 (2) 541 (A) head note It was held: 'A confession made whilst the accused was affected to some extent by liquor which he had consumed, but whilst he was nevertheless sufficiently *compos mentis* to know and appreciate what he was saying, was made whilst he was in his 'sound and sober senses' within the meaning of that expression in section 244 (1) of Act 56 of 1955 and is therefore admissible

evidence' In the *Commentary on the Criminal Procedure Act of Du Toit et al* 217 referred to Lansdaown & complell (869) "it need not be shown that the accused was in a state of quite serenity free of physical or mental discomfort' The test is whether the accused was in sufficient possession of his understanding so as to have known what he was saying (*R v Blytn* 1940 AD 355)

The requirement of Freely and voluntarily

R v Barlin 1926 AD 459 at 462 the court held that: a statement is freely and voluntarily made if 'it has not been induced by any promise or threat proceeding from a person in authority.'

The evidence by Van Der Westhuizen was that it was the accused who told her that he wanted to make a confession. The accused also confirmed that he was not forced to make the confession and that he did it freely and voluntarily. Van Der Westhuizen also testified that the doctor at the hospital told her that the accused was in his sound and sober senses. She observed that. De Klerk testified that he specifically asked the accused whether he was in his sound and sober senses and he replied in the affirmative. He also observed that he was in his sound and sober senses. He was also not unduly influenced to make the confession. Dr Kemble testified that none of the drugs given to the accused whilst in hospital could have affected his reasoning capability at the time of the recording of the confession. On the issue of legal representation, the arresting officer Shikwambi, testified that he explained his rights to legal representation including legal aid. Van der Westhuizen also explained the right to legal representation to the accused including legal aid. Chief Inspector De Klerk also testified that he explained legal representation including legal aid before taking down the confession. The accused informed him that he did not need a lawyer. Chief Inspector de Klerk was a credible witness and he had no reason to lie to the court. On the other hand the accused was not credible; he was vague in his answers and did not make a good impression on me. For all those reasons I ruled the confession to be admissible.

Chief Inspector De Klerk was then recalled and read the confession into the record. The accused stated in the confession that'

[21] Confession by Accused

I want to say that I killed my mother, because she was a witch. She caused things to happen to me, like the time when I went to Zimbabwe without me knowing that I was going there. There I end up in prison for theft for eleven months and when I came back my mother was surprised as she did not expect me to come back. While I was in prison in Zimbabwe I normally got strangled at night and wake up very tired in the morning. I also went to Cape Town and there I got crazy and became a Zombie.

When I got back in Windhoek and I went to my mother place and my spirit told me that I should not stay there. I went to stay with my father but he told me that I should stay with my mother, but I went to Walvisbay and stay with my family of my mother.

I arrived two weeks ago from Walvisbay. It was my intention to kill my mother when I came from Walvisbay, because the bad thing was not stopping. On this Sunday in question when the incident occurred, I was just at house I then decided to kill my mother, because I was sure that she was causing things to happen to me. About 16:00 I put water in the pot and boiled it on the stove. After the water boiled I took the pot full of boiling water and walked towards my mother where she was sitting in the sitting room and I just poured this water onto her. I was also having a knife in my pocket which I brought from Walvisbay for the sole reason/purposes to kill my mother with it. I took the knife out of my pocket and started to stab her several times, mostly on the chest and in the neck. During this stabbing process the knife slipped and I also cut myself in both hands.

After I realized that I injured myself I stopped the stabbing. My mother who was now laying on the floor begin to call for help from the neighbor and I step with my feet on her face and she went silent. And lay still. I took a blanket and covered her. Realized that may be she was dead as she was not moving. I went to her bedroom to look for toilet

paper to stop my own bleeding and also for money as I wanted to flee. I only got a N\$20. I then walked out of the house and walk to the bushes nearby SWAWEK, opposite the Okahandja service road and I slept there for the night. The following day I went to this friend in Babylon and he told me to go to hospital, and I went from there, but I did not go to the hospital. I went to a nearby mountain and laid down under a tree. At about 17:00 that day (Monday) I went back to my friends place in Babylon where the police find me and arrested me. I always told my family that I could not sleep or get rest, but they did not listen and I gland has to do this. My mother could also read my mind and dreams and for that reason I also didn't want to sleep.

After producing the confession the state closed its case the accused also closed his case without testifying or calling witnesses.

The legal principles

S. 209 of the Criminal Procedure Act 51 of 1977 provides that:

'An accused may be convicted of any offence on the single evidence of a confession by such accused that he committed the offence in question, if such confession is confirmed, in a material respect or, where the confession is not so confirmed, If the offence is proved by evidence, other than such confession, to have been actually committed'

The confession in detail sets out how the accused arrived 2 weeks (before the incident) from Walvis bay with the intention to kill his mother, boiled water and poured the water over the deceased body and then stabbed her several times with the knives. Shoombe testified that he heard his name been called and somebody screaming, saw the accused immediately coming out of the yard. He went to investigate and saw the body of the deceased in a pool of blood, stabbed several times.

In his plea explanation the accused stated that 'he was suffering from a mental defect caused by many years of substance abuse and in more particular marijuana and 'I

believe that I was psychotic when I committed the offences'. Counsel for the state submitted that considering the nature of the defence advanced by the accused, which calls upon the court to make a determination on the capacity of the accused to formulate the necessary intention to commit the alleged offence and also to appreciate the wrongfulness of the alleged offences and act in accordance with such appreciation, it was imperative that the accused must have placed his mental state before court through his testimony for the court to be able to evaluate it against the evidence of the psychiatrist. The accused declined to take the court into his confidence and tell his version of what transpired on that fateful day. Counsel further argued that psychosis is a pathological mental illness and that shifts the burden of proof on the accused to establish the existence of such mental illness. See *S v Nyoya* 2006 (2) NR 643 (h)

In S v Shivute 1991 NR 123 (HC), O'Linn J held that the 'fact that there was a strong prima facie case at the end of the state's case is important because in such a case (his failure to give evidence, whatever the reason may be for such failure, in general ipso facto tends to strengthen the state case because there is nothing to gain say it. See *Hoffman and Zeffert* (op cit at 498); *Hiemstra* suid *Afrikaans strafreg* 4th ed at 333. This approach is especially applicable where the accused's state of mind is in issue, because it is not easy for a court to come to a conclusion favorable to the accused as to his state of mind unless he has himself given evidence on the subject' se *R v Mohr* TPD 105 at 108, applied in *R v Deetlefs* 1953 (1) SA at 422 and *S v Kola* 1966 (4) SA 322 at 327f

The two psychiatric reports by Doctors, Japhet and Mthoko of which the contents are identical stated that the accused was suffering from diminished sense of responsibility at the time of the commission of the crimes.

s. 78 (7) of the Criminal Procedure Act 51 of 1977 states: 'if the court finds that the accused at the time of the commission of the act in question was criminally responsible for the act but that his capacity to appreciate the wrongfulness of the act or to act in

accordance with an appreciation of wrongfulness of the act was diminished by reason of mental illness or mental defect, the court may take the fact of such diminished responsibility into account when sentencing the accused.'

Counsel of the accused, rightly, conceded that diminished responsibility is not a defence, but relevant in respect of the sentence because it reduces culpability. *The learned author Adelene Africa in her article 'Insanity and diminished capacity before court' states that. 'In terms of this provision, (referring to s 78 (7) of the Criminal Procedure Act 51 of 1977) the accused may be suffering from some form of mental illness but the level of impairment experienced does not fulfill the requirements for the legal test of insanity. The pathology is then considered to be a mitigating factor in the degree of responsibility. A defence of diminished responsibility does not afford the accused complete exculpation, but may result in a reduced sentence instead of indefinite confinement to a state psychiatric hospital.*

Having regard to the totality of the evidence I am in agreement with the finding of Dr Mthoko that the accused at the time of the commission of the crimes was suffering from some form of mental disorder as a result of abuse of marijuana and that although he understood the nature of this crimes, his ability to appreciate the wrongfulness of the crimes and act in accordance with such appreciation was diminished.

Dr Mthoko testified that the accused knew that he was killing the mother when he committed the crime and he therefore had direct intent to kill the mother

In the result the accused is convicted of murder (read with part 1 and part 3 of Act 4 of 2003) with *dolus directus*.

[22] As far as count 2 is concerned, the accused in his confession stated that 'I step with my feet on her face and she went silent and lay still. I took a blanket and covered her. I realised that may be she was dead' I went to her bedroom to look for toilet paper to stop my own bleeding and also for money as I wanted to flee. I only got N\$20'. There is no evidence to support a conviction on a charge of robbery as the mother of the accused

may have been already dead by the time he stole the money. She was stabbed 39 times and it is possible that she was dead by the time he took the money.

In the result

1. The accused is convicted of murder with *dolus directus* read with part 1 and part 3 of Act 4 of 2003
2. Not guilty on robbery with aggravating circumstances but, guilty of theft of N\$20.

G N NDAUENDAPO

JUDGE

APPEARANCES

THE STATE:

**Ms MOYO
OF THE PROSECUTOR GENERAL OFFICE**

ACCUSED:

**J H WESSELS
OF STREN & BARNARD**