

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: CC 6/2010

In the matter between:

THE STATE

and

PETER FARMER

ACCUSED

Neutral citation: *State v Farmer* (CC6-2010) [2013] NAHCMD 95(10 April 2013)

CORAM: NDAUENDAPO, J

Heard on: 16,17,18,19,20 April and 8 June & 9-10 July 2012 & 17 January 13

Delivered on: 11 April 2013

Flynote: Accused charged with murder, possession of a firearm without a licence and possession of ammunition—Pleaded not guilty—On murder charge explained that the deceased was shot accidentally either by him or herself—Court reject's his version find that the deceased was shot deliberately by the accused, conduct of the accused after incident not consistent with somebody who shot deceased by accident.

Summary: The accused was charged with murder, possession of a firearm without a licence, and ammunition. He pleaded not guilty. On the murder charge he explained that whilst in the process of handing the firearm to the deceased as requested by her for safekeeping, a shot went off accidentally which killed the deceased. A tragic accident. On the other charges he explained that he purchased the firearm from a certain Kwere and he believed that Kwere was the lawful owner and Kwere agreed to help him to transfer the firearm in his name.

Held, the behavior of the accused immediately after the shooting incident was not consistent with somebody who shot the mother of his child by accident, (he threatened the witnesses who came to the scene not to come closer, he did not tell them that the shot went off by accident.

Held, plea explanation on murder not making sense, why would the deceased have insisted on the firearm being handed to her whereas there was no relationship anymore, why telling the deceased about the firearm on that fateful night that accused already had purchased a month ago.

Held, admissions to witness how he shot the deceased done freely, voluntarily and whilst in his sober senses

Held, further accused had the firearm had ammunition in his possession for more than a month and failed to have registered in his name.

Held, accused convicted as charged.

ORDER

1. The accused is convicted of count 1 murder
2. The accused is convicted of count 2 possession of a firearm without a licence

3. The accused is convicted of count 3 possession of ammunition.

JUDGMENT

NDAUENDAPO, J

[1] The accused was charged with three counts: count 1 murder, read with the provisions of the combating of Domestic Violence Act 4 of 2003. Count 2 Contravening section 2 read with sections 1, 8, 10, 38 and 39 of Act 7 of 1996. (Possession of firearm without a licence). Count 3 contravening section 33 read with section 1, 8, 10, 38 and 39 of Act 7 of 1996 (Possession of ammunition). The allegations on the murder charge 'is that on or about the 12th day of November 2005 and at or new Keetmanshoop in the district of Keetmanshoop the accused unlawfully and intentionally killed Dolleven Trevona Mckay, a female person'.

Count 2 the state alleges that 'In that during the period 11-12 November 2005 and at or near Keetmashop in the district of Keetmanshop the accused did unlawfully and intentionally have in his possession a firearm, to wit 7.65 pistol with serial number J85519 without having a license to possess such arm .

Count 3, the state alleges that during the period 11-12 November 2005 and at or near Keetmanshoop in the district of Keetmanshop the accused did unlawfully and intentionally have in his possession ammunition at least 40 live rounds for a 7.65 pistol without being in lawful possession of an arm capable of firing such an ammunition.

[2] In the summary of substantial facts the state alleges that: "at some time prior to her death the deceased and the accused were involved in a domestic relationship in that they have a child together. On 12 November 2005 at or near Kronlein in the district of Keetmanshop the accused shot the deceased at least once in her chest with a firearm. She died as a result of a gunshot wound through the left ventricle. The accused did not

have a license to possess the fire-arm as indicated in count 2 of the indictment, neither did he lawfully possess the ammunition as indicated in count 3”.

[3] The accused pleaded not guilty to all the charges. He submitted a detailed plea explanation in terms of section 115 of the Criminal Procedure Act 51 of 1977. The relevant part thereof is as follows:

‘3.3 During the second week of November I was contacted by a certain Mr Kwere who informed me that he heard that I was looking for a firearm and that he was prepared to offer his personal pistol for sale to me for N\$400.

3.4 I inspected the pistol and purchased same for the agreed amount of N\$400. At all times, both during and after the transaction, I was made to believe by the said Mr Kwere that he was the lawful and licensed owner of the said pistol and that transfer of the said firearm would be lawfully effected to me through his assistance.

3.5 On Friday the 11th of November 2005 I left Rosh Pinah where I was working at the time and departed to Keetmanshoop with the intention of spending the weekend with my friends, the deceased, Olivia McKay, and our nine months old baby girl.

3.6 In addition to my visit It was also my explicit aim to register the pistol that I purchased from Mr Kwere the coming Monday in my name. In this regard I have made arrangements with Mr Kwere who undertook to provide me with his assistance on Monday in this regard.

3.7 I need to mention that I, at this point in time, already had the pistol and ammunition in my possession, but need to mention further that I was at all time under the distinct impression that I was lawfully entitled to possess the firearm as, in my view I had the full permission of the lawful owner, Mr Kwere, from whom I have purchased the pistol.

3.8 Mr Kwere also undertook to assist me with the transfer of the licence into my name the following week. It was only after the incident and through information I received from my first legal representative that I was made aware of the fact that I was required to have written permission from the license holder in order to be in lawful possession of the said pistol. This knowledge was never known or disclosed to me by anybody as I am a complete layman concerning firearms and the legal requirements surrounding same.

3.9 During a conversation with the deceased in the early morning hours of Saturday 12 November 2005 and after telling her of the pistol I have purchased, she insisted that I hand her the pistol for

safekeeping by her at her house, as I was about to stay with a friend of mine during the weekend at his residence.

3.10 As I was in the process of handing the pistol to the deceased, as requested by her for purpose of safekeeping, a shot unexpectedly went off and fatally injured the deceased. I am at a total loss as to what caused the shot to go off as I was not at all aware that the pistol was loaded. I can also not say whether it was me or the deceased who caused the pistol to go off and fire the shot. All I can remember is that the deceased took the pistol from me and at the same time I heard a deafening shot.

3.11 At the time when I realized what had happened I was in complete and utter shock which caused me to act completely irrational and emotional. I find it extremely difficult to comprehensively recall the sequence of events as they transpired after the incident, but can recall amongst others that I was not at all aware that the pistol was loaded. I can also not say whether it was me or the deceased who caused the pistol to go off and fire the shot. All I can remember is that the deceased took the pistol from me and at the same time I heard a deafening shot.

3.12 I can only state to this Honourable Court that the incident is the tragic result of an unforeseen accident which occurred on this fatal night and something that I am extremely remorseful of and find extremely difficult to cope with every day of my life.

3.13 I respectfully submit that I had no intention what-so-ever to harm or injure the deceased and mother of my child whom I both love tremendously.'

[4] In terms of section 220 of the Criminal Procedure Act 51 of 1977 the accused made the following admissions

1. That the deceased was one Dolleveria Trerona Mckay.
2. The admissibility and contents of the report on the post-mortem examination on the deceased's body as well as the cause of death.
3. That the deceased's body did not sustain any further injuries during the time that it was removed to the mortuary in Keetmanshoop and thereafter.
4. That on the day after the incident I was in possession of a 7.65 mm pistol serial no J 85519 and a magazine containing 9x bullets.

5. That one shot was fired from the said pistol which caused the death of the deceased.

Ms Husselman appears for the state and Mr Kruger for the accused.

THE STATE'S CASE

The summary of the evidence of the state's witnesses is as follows:

[5] **GLEN MORGEN WELLS** testified that on 12 November 2005 at around 3 am he was at a nightclub called 'op die hoekie' in Keetmanshop. He was in the company of the deceased and Isabela. Isabela and the deceased requested him to take them halfway to their house. He agreed to the request and accompanied the deceased and Isabela to their house. On their way, the accused came running from behind towards them and when he reached them, he asked to speak to the deceased. He (the witness) and Isabela excused them and they walked a distance from the accused and the deceased. They stood approximately 10 meters from the accused and the deceased, waiting for the deceased. There were street lights. He testified that the conversation between the accused and the deceased was a normal one, but later it turned into a quarrel.

They then heard a gunshot and they immediately focused their attention on the deceased and the accused. He saw the deceased falling down and the accused standing in front of her. He then suggested that they must go and call the elders as the house of the deceased was not far from where they were.

They did that and returned with the elders to the scene. They found the deceased lying on the ground and the accused sitting in front of her and telling them in a threatening manner not to come closer. He showed no emotions. They left to a nearby family member's house and also called the Police. They returned to the scene and found the deceased lying there and the accused absent. During cross examination it was put to the witness that "the accused version is, when the deceased was struck by a bullet, she was falling down and he grabbed her and he prevented her from falling down. He went

to the ground together with her, will you dispute his version? The witness replied by saying: "no my Lord." I did not see the accused person lowering together with the deceased, at the time when she fell down.

[5] The next witness was **Isabela Bezuidenhout**. She was 15 years old at the time of the incident. The deceased was her cousin and she knew the accused as the former boyfriend of the deceased. She testified that on 12 November 2005 they were at the club 'op die hoekie- Keetmashoop. They were playing pool and the accused was also at the club. She testified that at the club the accused called the deceased once but she did not respond because by that time the deceased and accused were no longer in a relationship. According to the witness the deceased did not care about him nor did she go to him.

On their way home, the accused came running and approached them and told them (Isabel and Glen) that he wanted to talk to the deceased in private. They heeded the request and she and Glen walked a distance away from them and stood, waiting for the deceased. She testified that they heard them (accused and deceased) quarrelling, but did not know what they were quarrelling about. Their voices were loud. Their body language also showed that they were quarrelling. She then saw the accused holding the deceased and she heard a gunshot and she saw the deceased falling. She saw that clearly as the accused and the deceased were standing underneath the street lights and there was moonlight. After the gun shot went off, they went and called the elders and they came back to the scene. As they were approaching the scene, the accused told them not to come closer. They turned back and went to phone the police. When they returned to the scene again, the accused was seated next to the deceased and then he got up and walked away.

During cross examination she testified that the accused was holding the deceased and she was a bit wrestling and the hug (as suggested by defence counsel) could not have been a loveable or in good faith. According to the witness she could see that the

deceased did not want to be in his arms. She was resisting. She also testified that the accused did not show any emotion when the shot went off.

[7] **FRITZ BAMPTON** testified that he was a friend of the accused and the deceased. On 11 November 2005 the accused came to visit him and his girlfriend Salome for the weekend from Rosh Pinah. While seated at the fire, the accused informed them that their relationship with the deceased had ended and that 'hurt' him. He was heartbroken and according to the accused it was the deceased who ended the relationship. He also testified that he saw the accused taking out a gun from the bag he brought from Roshpinah. He also took two parcels containing bullets and he tucked the firearm between his clothes at his waist. He told him that he was going to the club. And before he went out of the door, Salome requested him not to go and shoot her cousin (the deceased).

According to Bampton "the accused then said that, he is going to shoot her. But before he left, he was smiling and said he was only making a joke. Bampton also testified that he saw the same gun previously with the accused when he returned from the Windhoek Agricultural and Industrial show between September and October 2005. After the shooting incident the accused came and told him: "Ou Fritz I have made some shit- I shot that woman.' He further testified that the accused told them that from the club he followed the deceased as she was on her way home. He stopped her and the deceased told him that she was no longer interested in him and that she met someone else in Windhoek and that she was on her way to Windhoek. He then hugged her and took out the gun. He then pressed the gun against her chest in front and asked her whether she was not afraid that he was going to shoot her. He then shot her. He held her, but she became heavier and he let her down. He sat on her stomach and pressed her throat. After he finished he drew a circle in the ground and wrote 'I love my family. Bampton testified that the accused was sober when he narrated how the deceased was shot. He did not threatened or influenced the accused to tell them the events of that night. He did it freely and voluntarily.

Bampton also testified that the accused was pressing the gun against his head and said that he was going to shoot himself/threatened to commit suicide. He also threatened to shoot the police officers. He later went to phone the police and informed them that the accused was at his house.

Dirk Farmer

[8] Before he testified, the court warned the accused in terms of s 204 of the Criminal Procedure Act 51 of 1977, as there was a possibility that he may incriminate himself. He testified that the accused is his second cousin. On 12 November 2008 at 8 am constable Ralph and Tsorogwe came to him and told him that the accused shot his girlfriend and that he must go and talk to the accused to hand himself. He drove to the house where the accused was. He found him lying on the bed with his hands behind his head and the gun on his chest. The accused asked him to give the firearm to his brother who was on his way to RoshPinah. He told him the firearm was used in the shooting incident and he asked him to make sure that the firearm was handed to his brother. He took the firearm and drove to his sister's house. He found Clayton and handed the firearm to him and asked him to hide the firearm in the veld (bush)a safe place. He again returned to the accused. He took the accused to the house of the McKay family and from there to the police station.

Quinton Losper

[9] The deceased was his schoolmate they were together in grade 11 to 12 from 2003 to 2004. In 2004 and at Berseba he witnessed how the accused kicked the deceased and how she fell down. She (the deceased) was with the child when she was kicked.

[10] Dr Adigwe

He testified that he was the district surgeon from 1997 -2006 in Keetmanshoop. He contacted the post mortem examination on the deceased Mckay and compiled a post

mortem report. The cause of the death was a 'gunshot wound through left ventricle'.

Chief post mortem findings were:

- Bullet entry wound 4.5cm medial to left nipple
- Rupture of left ventricle
- Exist wound just bellow lower of scapula'

According to the witness this path indicates that the person who shot the deceased was probably taller than her. During the bail application the accused admitted that he was taller than the deceased.

Salome Mckay

[11] The deceased was her cousin and she knew that the accused and the deceased were involved in a relationship. On 11 November 2005 the accused came from RoshPinah to visit them and whilst they were seated at the fire, she told the accused that the deceased went to the club 'op die hoekie'. The accused told them that the deceased had ended the relationship.

Whilst drinking beer, the accused went inside the house and called Fritz Bampton. She later stood and went inside the house and saw the accused leaving. As he was leaving, She told the accused not to go and shoot the deceased', the accused said he is going to shoot her, but later said he was not going to do it. She knew that the accused had a gun as she saw him cleaning the gun at a farm in October 2005. In the morning hours the accused returned and told Fritz 'I caused some shit I shot that woman. She overheard that and she asked him what he meant and he told her, that she shot the deceased' She smell(t) the gun and It smelled like a matchbox. He also told them in detailed what transpired and how he shot the deceased. The witness corroborated the evidence of Fritz Bampton.

[12] **Maria McKay**

Mother of the deceased. She knew that the relationship between accused and deceased had ended. On 8 November 2005 the accused phoned her and told her that the deceased ended the relationship. She told him that those things do happen and he must give the deceased a chance.

[13] **William Nambahu**

He is a ballistic expert and employed by the National Forensic Institute. He testified that he conducted trigger force tests on the firearm which caused the death of the deceased and in his expert opinion the firearm required normal amount of force to pull the trigger both in a cocked and safe state and therefore the possibility that it will discharge upon slight touching of the trigger was virtually impossible.

[14] **Fabianus Rikambura**

He testified that the firearm was found after the police approached Dirk Farmer. He also testified that he found the two boxes of ammunition in the house of Fritz Bampton who informed him that its was brought by the accused. When the firearm was discovered an additional 9 rounds were found in the fire-arm

[15] **Nico Genis**

Testified as to the date on which the firearm was stolen from the security company where he was employed and those dates coincided with the dates on which Firtz and Salome saw the accused with the firearm.

That was the case for the state.

The accused did not testify and exercised his right to remain silent.

Submissions by counsel for the state

[16] She submitted that in the absence of any eyewitnesses [as to the actual shooting]; the State's case rests entirely on circumstantial evidence; excluding the incriminating statements made by the accused to Fritz and Salome, which amounts to direct evidence.

She argued that, in order for the state to secure a conviction on count one it has to prove beyond a reasonable doubt that the accused acted with the required mens rea. i.e that he fired the shot in the first place (which is placed in dispute) and once that is proved, whether he did so with the intent to kill and in the event that it is unable to prove the latter whether he did so negligently.

She also contended that, the accused' failure to testify deprived the court the opportunity to assess evidence which he alone could have placed before it, to wit his subjective state of mind. Therefore the court is required to draw inferences from the proved facts in accordance with the guidelines asset out in *R v Blom 1939 AD 188*.

She referred this court to the case of *S v Theron 1968 (4) SA 61 (T) at 63D –H* the Full Bench of this Division said this:

“In the present case, although other witnesses were called by the defence, the accused himself did not testify. The magistrate in his judgment and the State in this appeal relied heavily on the omission. The general rule is that, the onus being on the State, it must initially produce prima facie proof of the commission of the offence, that is it must go as far as it reasonably can in adducing such evidence of the facta probanda constituting the offence as calls for an answer from the accused. If he remains silent the prima facie proof may become conclusive proof (see Gardiner and Lansdown (supra) vol 1 at 466, where the authorities are collected). That the factum probandum is one that is peculiarly within the knowledge of the accused, like for example his state of mind, is an important factor to be taken into account in the State's Favour’

See also *S v Letsoko and Others, 1964 (4) SA 768 (AD) at p. 776C: F* where it was held that:

'It would not be correct to say that an inference of guilt can be drawn from his failure to testify. The true position is that, in case resting on circumstantial evidence, if there is a prima facie case against the accused which he could answer if innocent, the failure to answer it becomes a factor to be considered along with other factors; and from that totality the Court may draw the inference of guilt. The weight to be given to the factor in question depends upon the circumstances of each case.'

The court in R v Mlambo 1957 (4) SA 727 (A) held that the court may draw an inference that the accused committed the assault with the intent to kill, rather than with a less serious form of mensrea.

She submitted that the state proved that the shot, which went off and caused the death of the deceased, was not discharged accidentally. This was proved by means of the Doctor's testimony regarding the path of the bullet coupled with the fact that accused is taller than the deceased as well as the expert evidence by Nambahu that given the state of the weapon the possibility of an accidental discharge can be ruled out. The defence did not provide any scientific (ballistic) evidence in order to refute their versions and neither was it shown that they were unreliable witnesses.

In light of the above she submitted that since the court did not have the opportunity of hearing from the accused what was going on in his mind at the time of the shooting, the court needs to consider the objective factors such as the type of weapon or instrument used; at which part of the body of the deceased was the shot directed as well as the as the nature of the actual injury sustained by the victim. Form these indicators the court must draw certain inferences.

See: S v Gerald Kashamba an unreported judgment of the above honourable court delivered on the 03/04/2009 by Liebenberg AJ. (as he then was) and the authorities cited therein.

Submissions by counsel for the accused

[17] Counsel's main submission was that the state failed to prove that the shooting incident, leading to the fatal injury of the deceased, was not the result of a tragic accident, possibly caused by the deceased herself, in the process of receiving the firearm from the accused. In this regard, he contended, the state had no credible eye witness to contrast the version presented by the accused in his plea explanation and as such the version of the accused should be accepted, especially where it can be reasonable and possible be true.

[18] *In S v Shikunga and another 1997 NR 157 it was held that 'Evidence of accused's behavior after an event can serve as indication as to state of mind at time of event'.*

The behavior of the accused immediately after the shooting incident was inconsistent with somebody who accidentally shot the deceased or who's ex-girlfriend was shot accidentally. One would have expected the accused to call for help (like phoning the ambulance or the police). The deceased was not only his ex-girlfriend, but the mother of his nine months old baby and if indeed she was shot by accident his behavior immediately after the shooting incident would have been more caring and compassionate. (He took a bottle and wrote on the ground 'I love my family'). He never told the witnesses Glen Wells and Isabel Bezuidenhout who were with the deceased shortly before she was shot and who came to the scene that the deceased was shot by accident and or the gun went off by accident. Instead he threatened them not to come closer to the scene. After the incident he walked away and went to the house of Bampton. He never informed Bampton that the deceased was shot by accident or Salome McKay the cousin of the deceased. He informed them 'I made shit- I shot that woman'. The behaviour of the accused after the shooting incident clearly shows that the deceased was shot deliberately and not by accident.

[19] There was evidence that the relationship between the accused and the deceased had ended and that the accused was heartbroken. That was denied by the accused that the relationships had ended. The mother of deceased testified that the accused phoned her on 8 November 2005 and told her that the deceased had ended the relationship.

The accused told that to Fritz Bampton and Salome McKay. Isable testified that the deceased did not want anything to do with the accused. That night when they were at the club, she (deceased) refused to go to the accused when he called her. Both Glen and Isabella witnessed the incident (although not the actual shooting) and that the accused and the deceased were quarrelling and according to them (at least Isabel) before the fatal shot went off, the deceased wrestle/or refused to be hugged by the accused person. She did not want to be in his arms. Isabel testified that when the deceased fell down, the accused did not lower her to the ground. Glen and Isabel also testified that the accused in a threatening manner refused them to come closer to the deceased after the shooting incident.

[20] Counsel further submitted that one of the critical discrepancies which affects the credibility of the witness Glen and Isabel are their respective contradictory versions with regard to the way in which the deceased fell to the ground and how the accused and deceased behaved immediately and after the incident. They also materially differ in their versions as to the accused's demeanor and at what time and how he left the scene.

In S v Mafaladiso and others 2003 (1) SACR (SCA) it was held that "the juridical approach to contradictions between two witnesses and contradictions between the version of the same witness (such as, inter alia, between her or his viva voce evidence and a previous statement) s in principle (even if not in degree), identical. Indeed, in neither case is the aim to prove which of the versions is correct, but to satisfy oneself that the witness could err, either because of a defective recollection or because of dishonesty. The mere fact that it is evident that there are self-contradictions must be approached with caution by a court. Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and what is the precise nature thereof. In this regard the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination, that there may be language and cultural differences between the witness and the person taking down the statement is seldom, if ever, asked by police officer to explain their statement in detail. Secondly, it must be kept in mind that not every error by a witness and not every contradiction, or deviation affects the credibility of witness. Non-material deviations are not necessarily relevant. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradiction and the quality of the

explanations – and the connection between the contradictions and the rest of the witness' evidence, amongst other factors, to be taken into consideration and weighed up. Lastly, there is the final tasks for the trial Judge, namely to weigh up the previous statement against the viva voce evidence, to consider all the evidence and to decide whether it is reliable or not and to decide whether the truth has been told, despite any shortcomings ' (At 593e – 594h) (my underlining)

In my respectfully view those contradictions are not material. They testified that after the shot went off the deceased ended on the ground, the behavior of the accused was uncaring. The behavior of the deceased at the club was that she did not care about the accused, at the place where she stood with the accused; she did not want to be in the arms of the accused. They quarreled before they heard the gunshot. I observed them when they testified and they made a good impression on me. They were credible witnesses.

[21] The explanation (in his plea) that the accused wanted to hand over the firearm to the deceased when the shot went off that killed the deceased does not make sense and in my view was an afterthought and a concoction by the accused in an attempt to extricate himself from unlawfully and intentionally causing the death of the deceased. By the time that he allegedly wanted to hand the firearm to the deceased for safe keeping, the relationship between them had ended. It was the deceased who ended the relationship. That night at the club, the deceased ignored the accused when called by him and when he followed her, he knew that. Why would she had insisted on the accused to hand over the firearm to her for safe keeping? The explanation by the accused that 'after telling her of the pistol I have purchased she insisted that, I hand her the pistol for safe keeping by her' does not make sense. The evidence by Fritz Bampton and Salome McKay was that the accused had the firearm already in October 2005 and the accused could not have told the deceased that he had just purchased the firearm as he already had the firearm from October 2005. Why also telling her about the firearm that specific night whereas he had the firearm already in October 2005? I therefore reject the version of the accused as false. The accused failure to testify

denied the court the opportunity to have those questions answered by the accused and there are certain consequences that arise from his failure to testify.

In S v Boesak 2001 (1) SA 912 CC the court held that: the right to remain silent has application at different stages of a criminal prosecution. An arrested person is entitled to remain silent and may not be compelled to make any confession or admission that could be used in evidence against that person. It arises again at the trial stage when an accused has the right to be presumed innocent, to remain silent, and not to testify during the proceedings. The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence. What is stated above is consistent with the remarks of Madala J, writing for Court, in Oswam and Another v Attorney-General, Transvaal, when he said the following:

'Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilty beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice.'

[22] According to Bampton the accused informed him that 'he made shit, he shot that woman'. He also informed Bampton in detail how he followed the deceased on her way home and how he stopped her from walking home. He told him that the deceased told him she had found another boyfriend in Windhoek and that she was going to see him. He told Bampton how he pressed the gun against her chest and pulled the trigger.

What the accused told Bampton does not amount to a confession, it was not an unequivocal acknowledgement of guilt, the equivalent of a plea of guilty before a court of law, but admissions. Counsel for the accused, submitted that this evidence is clearly incriminatory of nature and any admission thereof will affect the accused's fair trial rights protected under the constitution to wit the right not to incriminate himself, the right not to become a witness in his own trial and the right to remain silent. I disagree. His

admissions to Bampton was done freely and voluntarily. The accused volunteered the information. He was in his sound and sober senses when he made the admissions according to Bampton.

[23] The state presented evidence calling for answers and in the absence of answers from the accused, the evidence presented, is in my view, sufficient to prove the guilt of the accused. From the proven facts, that the relationship between the accused and the deceased had ended, that the accused was heartbroken, that the deceased did not want to be in the arms of accused, the quarrelling between the deceased and the accused before a gunshot went off and the fact that the bullet entered the deceased on the right of her left nipple (where the heart is located), the evidence by the doctor that the bullet entered the lower left chamber of her heart and exited at her back, evidence that the person who shot her was taller than her and that the barrel of the gun was pointed towards her, coupled with the behavior of the accused immediately after the deceased was shot and the admissions to Fritz Bampton and Salome McKay all point to one inference to be drawn from the proven facts and that is: that it was the accused who shot the deceased because he did that he had the direct intention to murder her.

In the result taking into account, the totality of above mentioned factors I am satisfied that the state proved beyond reasonable doubt that the accused unlawfully and intentionally caused the death of the deceased.

As far as count 2 and 3 are concerned, the evidence by Fritz Bampton and Salome McKay was that they saw the accused with the said firearm already in October 2005. Salome saw the firearm at the farm whilst the accused was cleaning it. He therefore did not possess the firearm in the second week of November 2005 as explained in his plea. By the time when he shot the deceased, he had the firearm for more than a month and thus he had ample time to have registered the firearm in his name, but he failed to do that. Mr Kwere from who he allegedly purchased the firearm was also not called to testify.

Domestic relationship

It is common cause that the accused and the deceased were, involved in a romantic relationship from which a child was born and therefore I agree with counsel for the state that the requirements of a domestic relationship as set out in section 3 of the Combating of Domestic Violence Act 4 of 2003 have been satisfied and is accordingly applicable.

In the result I am satisfied that the state prove beyond reasonable doubt that the accused is guilty of count 2 and 3.

Order

1. The accused is convicted of count 1 murder with dolus directus.
2. The accused is convicted of count 2 possession of a firearm without a licence.
3. The accused is convicted of count 3 possession of ammunition.

G N NDAUENDAPO

JUDGE

APPEARANCES

THE STATE:

MS HUSSELMANN

OFFICE OF THE PROSECUTOR GENERAL

ACCUSED:

**MR KRUGER
OF KRUGER & VAN VUUREN INC.**