REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 08/2015

In the matter between:

THE STATE

And

BRYAN RICKERTS **ACCUSED**

Neutral citation: *The State v Rickerts* (CC 08/2015) [2016] NAHCMD 30 (25 February 2016)

Coram: LIEBENBERG J
Heard: 09 – 12 February 2016
Delivered: 25 February 2016

Flynote: Criminal Law – Persons, liability of – Intoxication – Defence of non-pathological criminal incapacity raised – Onus on State to prove accused criminally responsible – Presumption that sane person acts consciously and voluntarily – Accused to lay a foundation for such a defence to create a

reasonable doubt on point – Court to decide question of criminal capacity on evidence as a whole.

Summary: Accused charged with murder for the unlawful killing of the deceased. Accused pleaded not guilty and the basis of his defence is that, prior to the incident which led to the deceased's death, he had consumed different types of liquor. His memory was clear up to a point where after he has no recollection until later that day, some two hours after the incident. Accused being the only witness testifying in his defence presented no medical or expert evidence. After considering the evidence about the accused's state of intoxication immediately before, during and after the incident, it was concluded that the accused's defence was not reasonably possible and rejected as false. On the evidence it was established that the accused had acted with direct intent.

ORDER

Count 1: Murder – Guilty (*dolus directus*)

Count 2: Defeating or obstructing or attempting to defeat or obstruct the course of justice – Not guilty.

JUDGMENT

LIEBENBERG J:

[1] The accused stands charged with one count of murder, and defeating or obstructing, or attempting to defeat or obstruct, the course of justice, read with the provisions of s 94 of the Criminal Procedure Act, 51 of 1977. He pleaded not guilty to both counts.

[2] The murder charge relates to an incident that took place on 7 February 2014 at a house in Rehoboth, which led to the killing of Shaun Roderick Beukes, an adult male. The second count concerns the alleged stashing of two knives allegedly used during the commission of the crime, and subsequent thereto on diverse occasions, the uttering of threats towards Brenda van Wyk and Helga van Wyk, both being witnesses for the State. It is alleged that the accused's intention was to intimidate the witnesses not to give evidence at the trial.

[3] The accused filed a written plea explanation in which the basis of his defence is set out namely, that he could not admit or deny having stabbed the deceased because he was 'too drunk to know what happened during the time of the alleged stabbing', thus, not knowing what he was doing. It has been the defence's case throughout that the accused has no independent recollection of the events that led to the deceased's death. Whereas it has not been alleged that the accused suffers from any mental illness or defect, the accused's defence would be that of non-pathological criminal incapacity i.e. the inability to appreciate the wrongfulness of the act and to act in accordance with such appreciation, in this instance, the result of self-induced intoxication. The accused's plea essentially implies that he accepts having brought about death of the deceased without him having any knowledge thereof. Whether or not that is indeed the case need to be established by evidence and the accused's guilt to be proved beyond reasonable doubt.

[4] Given the nature and extent of his defence, the accused, in the absence of evidence to the contrary, was basically in no position to challenge the testimony of State witnesses describing the circumstances surrounding the stabbing and killing of the deceased. In essence, it left the testimony of two eyewitnesses unchallenged, except for a few minor discrepancies pointed out by counsel for the defence during cross-examination. This notwithstanding, the court must still be satisfied that the State witnesses were credible and that the accused's guilt had been duly established. Only then would the court be able to convict.

[5] The two eyewitnesses referred to are, Ms Helga van Wyk (Helga) and Ms Brenda van Wyk (Brenda), both claiming to have been present when the accused unexpectedly stabbed the deceased with a knife.

[6] It is common cause that on the 7th of February 2014 at about 2 o' clock in the afternoon they were sitting in the corner of the yard of Tina Lager, enjoying themselves in drinking traditional home brewed beer, called 'tombo'. Both claim to have been sober at the relevant time as they had not been there for long before the incident happened. The deceased had been lying asleep on the ground next to the house and was within their view from where they were seated a few metres from where he was lying. As for the accused, the witnesses differ as to whether he arrived there first or after them; this is however not material. Both witnesses testified that the accused came from behind the house and came to sit on his haunches in front of them, asking beer and tobacco from them; they refused his request. They could see that he had been drinking but were adamant that he was not drunk. Their conclusion was based on the manner in which the accused had moved around in the yard and how he presented himself. It was not their first time to see him that day as they used to meet at drinking places where they would enjoy themselves in drinking. I will return to their evidence in more detail later.

[7] Whilst sitting with them, the accused pulled two knives from the sleeves of his jacket and started sharpening them on each other. The deceased at that point was waking from his slumber where he had been lying and the accused rose and went over to him. According to Helga the accused said to the deceased that he was one of the strong men, while Brenda heard him say: 'I'm killing strong people in this yard'. The deceased was still busy wiping sand from his face and did not react to what the accused had said. The next moment the accused stabbed the deceased once where after he ran out the main gate and disappeared.

[8] The deceased fell to the ground and died on the spot. The cause of death, as testified by Dr Vasin, was a single stab wound to the chest, causing

injury to the heart. The body had a penetrating stab injury to the left plural cavity and to the left atrium of the heart. The length (depth) of the stab wound was at least 75 mm. The medical evidence presented was not placed in dispute.

[9] Sergeant van Wyk and Constable Xamses gave evidence relating to the circumstances under which the accused was found at around 16:00 that same day. Sequential to a report made to the police concerning the accused, they went to the house of Grandmother Saron. This was approximately two hours after the stabbing incident. They were directed to a temporary structure made from corrugated iron, behind the main house. Sergeant van Wyk said he had pushed the door open when he saw the accused lying on the bed. He was awake and after greeting, the accused stood up. He was informed of the purpose of the police visit and after explaining to him his rights, he was arrested and taken into custody. The accused at that stage remained silent.

[10] Constable Xamses confirmed having seen the accused lying on the bed when the door was opened. Both she and Sergeant van Wyk testified about knives that had been found hidden behind the shack. I will return to their testimony in this regard later.

[11] I pause here to observe that the accused's evidence on the circumstances under which he was found, differs markedly from that of the two State witnesses. According to him he had been sleeping when woken by his friend Elton Saron (with whom accused had been staying at the time), telling him that he had killed the deceased. He did not believe him and continued sleeping but was again later woken by Elton, making the same report. This time he stood up and found the police outside; he was taken into custody. The accused's version of Elton having been present when the police were waiting on him outside, was never put to the State witnesses during cross-examination; neither did any of them give evidence about Elton having called the accused to come outside. In view of what had been stated in *President of the Republic of South Africa and Others v South African Rugby*

Football Union and Others[1] the defence was obliged to cross-examine Sergeant van Wyk and Constable Xamses on the presence, or otherwise, of Elton Saron at the shack, in as far as their evidence was in conflict with that of the accused. Unless there is an acceptable explanation for the failure to challenge in cross-examination a point in dispute, this may adversely reflect on the credibility of the accused. In the absence of any explanation proffered by the defence, I assume there is none. Suffice it to say that evidence on this score does not favour the accused's version; and more so in the light of corroborating evidence that the accused was found lying awake on his bed. Either way, on both versions it is evident that the accused had the presence of mind to communicate and appreciate that he was a suspect in a murder case, for which he was being arrested.

[12] Accused was the only witness testifying in his defence, and I turn next to his narrative of the events taking place on that fateful day.

[13] According to him, he and Elton had left the room early that morning and went directly to the house of Asser where they bought and shared a large bottle of 'tombo'. One Margaret sat with them and he recalls their conversation about a ring she intended selling. She and Elton left and after they returned they moved together from there to Tina's shebeen (Tina Lager), where she bought them three beers. There the accused also met with the deceased who had asked him for money, and the accused gave him two Namibian dollars. They had been friends since childhood and used to eat and drink together. After finishing the beer they accompanied Margaret to an area called Sonderwater in search of her boyfriend, a person going by the name of 'Kat'. Whilst still on their way Elton bought a bottle of red wine which they shared and finished between them. Once they had met up with Kat they

[1] 2000 (1) SA 1 (CC) at 36I – 37B: '[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct.'

returned to the shebeen where Elton had earlier bought the wine and this time the accused bought a 5 litre box of wine. He took four glasses from the sales lady and they sat down to drink. At some point they moved outside and the last he can recall was that they had some conversation about donkey meat. The first he could remember thereafter was when Elton came to wake him.

[14] It emerged during cross-examination that the distance between their room (the shack) and Tina Lager is approximately 300 m, while the distance between the shebeen where they had been drinking for the last time and Tina Lager where the deceased was killed, is approximately between 700 and 800 m. The accused was unable to tell how he had reached any of these places. Counsel during his closing submissions argued that it is quite possible that the accused got assistance from somewhere when going to Tina Lager. Counsel's contention is not supported by the evidence presented and amounts to mere conjecture. On the contrary, Helga saw the accused entering through the main gate on his own and unaccompanied. In the absence of evidence showing otherwise, the court must, on the evidence, find that the accused had covered both these distances on his own and without any assistance. Furthermore, that he had the presence of mind to figure out his way in reaching his destinations, during which he had to cover considerable distances, especially when going to Tina Lager's.

[15] Documentary evidence presented into evidence was in the form of the accused's warning statement recorded by the police on the 8th of February 2014, and court proceedings of the 16th of April 2014 when the accused appeared before a magistrate in Rehoboth. He then pleaded in terms of s 119 of the Criminal Procedure Act, 51 of 1977 (CPA), on the same charge of murder, to which he pleaded guilty. The admissibility of statements made by the accused, as reflected in the respective documents, was not in dispute.

[16] Regarding the warning statement, the residential address given by the accused differs from the address where he had been living at the relevant time and, when asked to explain, accused said that he had provided his mother's address as the people renting her house would know where to find

her. He did not explain why he simply did not furnish his then current residential address instead of that of his mother. The significance thereof, as argued by the State, lies therein that the accused by so doing tried to avoid his arrest. There is no factual basis supporting counsel's contention because the only evidence as to where the accused had been residing at the relevant time, was his own, namely, that he was staying with Elton. Furthermore, by then he was already arrested and in custody. Therefore, in my view not too much should be read into the address the accused had provided the police on his arrest.

[17] As regards the admissions made by the accused pursuant to the court's questioning in terms of s 112 (1)*(b)* of the CPA after pleading guilty on the murder charge, the accused explained that this came as a result of his late mother having advised him to 'just get it over'. He said he did not know whether he had committed the offence and just wanted to have the case finalised. This much is evident from his decision to accept short notice and by making his intentions clear not to waste the court's time. Despite his right to be legally represented during those proceedings having been explained to him, he elected to plead in the absence of his legal representative. He pleaded guilty and admitted having stabbed the deceased, Shaun Beukes, once with a knife. He denied having been forced or coerced into pleading guilty. The accused said he had no right to stab the deceased and knew that his actions were unlawful; also that he foresaw the possibility of death when stabbing the deceased with a knife in the chest. On a question as to why he stabbed the deceased, he responded by saying that he does not know, as both of them were drunk. When asked in cross-examination as to how he knew that the deceased was drunk at the time if he, himself, had no independent recollection of the incident, he explained that he assumed that to have been the case as the two of them used to drink together.

[18] Evident from these proceedings is that even if the accused's mother had advised him to just get the matter over with, this cannot be seen as inducement to plead guilty to an offence he did not commit, or was uncertain of having committed. He tendered information to the court unknown to her, or

anyone else who might have shared information with him; information about the incident only known to him. Accused admitted that not only did he realise that the deceased could be killed, but also that he appreciated the wrongfulness of his act for which he could be punished. The same applies to his answer that both of them were drunk which, undoubtedly, implies that he observed the deceased having been drunk at the time. This was indeed the case if regard is had to evidence about the deceased having 'slept' on the ground next to the house and, in particular, evidence pertaining to the deceased's blood alcohol level which, on examination, was found to have been 0.44 g per 100 ml of blood.

[19] When looking at the admissions made by the accused in the court below and, in particular, the nature and extent thereof, it seems difficult to reconcile same with the explanation proffered by the accused in this court that he actually had no recollection or knowledge of what he was being accused of, and that he merely pleaded guilty to the charge in order to satisfy his mother's wishes. The accused's plea of guilty and accompanying admissions or plea explanation, may, in the absence of reliable evidence to the contrary, have far reaching consequences for his defence as it strikes at the heart thereof i.e. that he lacked criminal capacity.

[20] In this case the accused's defence is that, due to intoxication, he has no recollection of the events articulated in count 1, the murder charge. In *David Hangue v The State*[2] the Court at para 14 said:

'It must immediately be said that, had the appellant's defence simply been that, due to his intoxication, he had no recollection of the events that gave rise to the charges (as suggested by the first two statements made from the Bar in terms of s 115 of the Act) it may well have fallen short of a defence based on a lack of criminal capacity or automatism of a non-pathological nature. The mere 'lack of recollection, attributable to a past state of intoxication, is not necessarily indicative' of such a state of intoxication.[3]' (My emphasis)

[2]Case No SA 29/2003 delivered 15 December 2015
[3]As Barwick CJ noted in *R v O'Connor* [1980] HCA 17 para 20.

[21] It is settled law that the degree of intoxication may impact on a person's criminal accountability when a crime is committed whilst that person is under the influence of liquor. In *S v Chretien*[4] the court recognised that various degrees of intoxication may arise which could affect a person's criminal liability and found that persons who are so inebriated that their muscular movements are involuntary and without knowing what they are doing, will not be held criminally liable, as they are not acting in the legal sense of the word. Where a person is intoxicated to the extent that he does not appreciate the wrongfulness of his act, or is unable to act in accordance with such appreciation, such person will equally not be held criminally liable for his actions.

[22] The burden is on the State to prove beyond reasonable doubt that the accused in this instance had the required criminal capacity when he committed the murder i.e. that he acted voluntarily. In order to prove that the act was voluntary, the State is entitled to rely on the presumption 'that every man has sufficient mental capacity to be responsible for his crimes: and that if the defence wish to displace that presumption they must give some evidence from which the contrary may reasonably be inferred.'[5] The presumption of mental capacity is only provisional as the legal burden remains on the State to prove the elements of the crime, but until it is displaced, it enables the prosecution to discharge the ultimate burden of proving that the act was voluntary. Lord Denning further reasoned that:

> 'In order to displace the presumption of mental capacity, the defence must give sufficient evidence from which it may reasonably be inferred that the act was involuntary. <u>The evidence of the man himself will rarely be sufficient unless it is supported by medical evidence which points to the cause of the mental incapacity</u>. It is not sufficient for a man to say "I had a black-out".'
> (My emphasis)

[4]1981 (1) SA 1097 (A)
[5]An excerpt from the speech of Lord Denning referred to in *Bratty v Attorney-General for Northern Ireland* (1961) 3 All ER 523 at 534

[23] From the above it is clear that where the accused has raised the defence of temporary non-pathological criminal incapacity, the State, in discharging the onus of proving that the accused had the required criminal capacity at the relevant time, is assisted by the natural inference that a sane person who engages in conduct which would ordinarily give rise to criminal liability, does so consciously and voluntary. The accused would therefore be required to lay a proper foundation to, at least, create a reasonable doubt for consideration that the accused lacked the requisite criminal intent, capacity or ability to act. Medical evidence or otherwise in support of such defence must be carefully scrutinised and, only after having considered all the facts of the case, the court will decide the question of the accused's criminal capacity.

[24] In this case no medical or other expert evidence was presented in support of the accused's contention that he temporarily lacked criminal capacity due to intoxication. The only support for his contention is partly to be found in the evidence of the witnesses Helga and Brenda who said that they could see that 'the accused was drunk, but not too drunk'. Except for the mere say-so of the accused that he was intoxicated to the point where his memory failed him, the defence had not presented any other evidence, medical or otherwise, that supports the basis of the accused's defence. In view thereof, the court is bound to assess the accused's evidence and determine whether, in the context of the evidence as a whole, it was reasonably possible that the accused at the relevant time lacked criminal capacity, as he claims. In order to come to that conclusion regard must be had to the evidence about the accused's state of intoxication immediately before, during and after the incident as testified on by himself and the relevant State witnesses.

[25] Due to the defence raised by the accused he was unable to challenge evidence that he brought about the death of Shaun Beukes by stabbing him once with a knife. Evidence to that effect came from State witnesses Helga and Brenda and except for some insignificant discrepancies in their respective versions, there is no legal basis on which their evidence should not be relied on. Although they themselves had consumed some beer prior to the incident which led to the deceased's death, they were sober and thus capable of

making the observations they had narrated to the court. Both appeared to the court to have given an honest account of what they had witnessed and, in the absence of any contradicting evidence, I find them to have been credible witnesses.

[26] Having come to this conclusion, it means the following had been established: That the accused had stabbed the deceased with a knife, resulting in death; which happened at Tina Lager's house; and was witnessed by Helga and Brenda. The extent of their evidence is such that they were able to give evidence about the accused's general appearance and more specifically, his state of sobriety immediately before, during and after the stabbing incident. In this regard their evidence requires further scrutiny.

[27] Both witnesses said the accused appeared to have been intoxicated ('drunk'), but not excessively ('too drunk'). According to their evidence he arrived at Tina Lager's and was moving around inside the yard freely and on his own. He approached them at one stage and came to sit on his haunches in front of them, asking them for beer and tobacco. Although differing on the exact words uttered and at which stage, the witnesses corroborate one another as far as the accused having said that he would kill 'strong persons' in that yard, or words to that effect. During this brief encounter they observed that the accused's speech was not slurred when speaking to them and that he had spoken as usual. He had removed two knives from the sleeves of his jacket which he sharped on each other. He rose from a squatting position he was in and went up to the deceased and stabbed him. He was seen running away, leaving through the main gate.

[28] Two hours later he was found awake in a shack situated approximately 300 m from where he had earlier been. According to the undisputed evidence of Sergeant van Wyk the accused was lying on the bed from where he rose when the officer entered the room. Nothing in his evidence suggests that the accused was intoxicated when arrested and his rights explained to him; neither was he cross-examined on this aspect, despite the accused

subsequently testifying that he was still somewhat under the influence (‘wind-dronk’).

[29] The last the accused can recall is that he had been at a shebeen situated between 700 – 800 m from Tina Lager’s place and, in the absence of evidence to the contrary, as well as Helga’s evidence that the accused arrived there on foot and on his own, it seems reasonable to infer that he went there on foot. This conclusion is fortified by the accused having been able to run home from there immediately after the incident, covering a further 300 m. From the afore-going it would appear to me that the accused’s movement immediately before and after the stabbing incident was focussed and controlled.

[30] The accused during his testimony gave a detailed account of his actions as far as it concerns place, persons in his company, the quantity and types of liquor bought and consumed by each, and even what their last conversation was about before he suffered from memory loss. No mention was made about his gait, or inability to move around unassisted prior thereto; neither that he had become drowsy as might be expected. He described a situation where his brain had simply ‘cut out’ due to him having consumed different types of liquor and it was only some time later, when woken by Elton, that he regained consciousness.

[31] The condition of the accused at a time shortly before the incident, as narrated by himself, is irreconcilable with his condition as observed and testified on by Helga and Brenda. On their respective versions the accused, though somewhat intoxicated, was not walking with the gait of someone who was staggering drunk; neither did his speech sound like that of a drunk person. He was able to sit on his haunches without falling over and stood upright without any difficulty. The accused had a sense of direction when he at first approached them asking for beer and tobacco, from where he turned to the deceased whom he identified as one of the strong people in the yard. He removed two knives from the sleeves of his jacket and started to sharpen them on each other. This in itself would require some control and skill of the

hands. After he had stabbed the deceased he was capable of running home, again showing his sense of direction at the time. It appears to me from the accused's conduct at the time he acted by stabbing the deceased, that he knew very well what he was doing. This conclusion manifested itself in the accused's guilty plea during the stage of pre-trial and accompanying explanation as to how the offence was committed.

[32] The appellant's evidence is unsupported and when considered together with evidence as to how the accused conducted himself immediately before, during and after the stabbing incident, then his failure to present evidence of a medical nature or other convincing evidence on these important aspects, impacts adversely on the question whether he established any evidential basis for his defence of non-pathological criminal incapacity. I have therefore come to the conclusion that the State discharged the burden of proving that the accused had acted with the required criminal capacity when causing the death of the deceased. In the light of the evidence as a whole, the accused's explanation is not only improbable, but is false beyond reasonable doubt and falls to be rejected where in conflict with that of the State witnesses.

[33] It was submitted on the accused's behalf that he never intended to kill the deceased with whom he had been friends. The contention however is not supported by the facts. According to the witnesses Helga and Brenda the accused had clearly made his intentions clear namely, that he was looking for strong people in that yard and that he was going to kill them. He identified the deceased to fall in this category of persons, approached him and, without warning, stabbed him on the left side of his chest. The blade of the knife used caused a deep penetrating injury to the chest cavity and the heart. The application of such injury, according to the medical evidence, required moderate force. It was furthermore directed at the left side of the chest which is generally regarded to be a vulnerable aspect of the human anatomy as vital organs are situated in that area. An injury to the heart would therefore have been foreseeable.

[34] In this instance the court rejected the accused's evidence as false and is thus deprived of the assistance of important information such as knowing his intentions when he acted. In the absence of direct proof of the accused's intention, the court may determine the accused's intention at the time of the commission of the act through inferential reasoning by looking at circumstances surrounding the events. In other words, his intention is determined by indirect proof.

[35] As stated, the accused, prior to executing the act that lead to the deceased's death, made his intention clear. He went up to the deceased and, making use of a knife, inflicted a fatal injury to the heart, resulting in instant death. These facts culminate in a single conclusion and that is that the accused had acted with direct intent (*dolus directus*) when he so acted.

[36] On the evidence presented I am satisfied that the State discharged the onus by proving beyond reasonable doubt the unlawful killing of the deceased by the accused.

[37] Count 2 arose as a consequence to the murder and involves two separate incidents, the first being the alleged hiding of two knives alleged to have been used in the commission of the murder, whilst the second allegedly occurred when the accused, on diverse occasions, threatened State witnesses.

[38] I will first deal with the incident where two knives were found behind the shack where the accused was found on the day of the incident. Constable Xamses described the circumstances as follows: She and her colleagues were searching around the shack when she came upon a black handled knife lying on the ground close to the corrugated structure. She had only seen one knife which is depicted on photos contained in the photo plan (Exhibit 'E'). The handle of the knife is of black colour and blood was observed on the blade. Sergeant van Wyk confirmed the evidence of Constable Xamses and further testified about his discovery of a second knife hidden under a plastic bucket. According to him the position of the two knives, as depicted in photos 15 and

16, is how they were found. From these photos it is clear that the two knives were found virtually lying next to each other which, in my view, begs the question why Constable Xamses saw only one knife and not both. Furthermore, had the second knife been found hidden under a bucket by Sergeant van Wyk, then the same bucket must partly have covered the knife found by Constable Xamses, which was clearly not the case. As for the bucket itself, it is not depicted in photos 12 – 14 which shows the back of the shack where the knives were found. When asked by the court why the bucket was nowhere to be seen on these photos, Sergeant van Wyk was unable to comment.

[39] What is clear from the above is that there is contradicting evidence pertaining to the circumstances under which the two knives were found. In fact, in my view, there is room for finding that the scene had been rearranged for purposes of capturing the position in which the knives were allegedly found; knives which *inter alia* form the basis of the charge in count 2. In the absence of any reasonable explanation why the scene had been tampered with, evidence relating to the circumstances under which the knives were found, would be unsafe to rely on, and should rather be ignored or given little weight.

[40] State counsel argued that the mere finding of the knives behind the shack in which the accused was later found, and him earlier having been seen in possession of two knives, is sufficient proof of the knives having been used in the commission of the offence. I do not agree.

[41] The two witnesses who had seen the knives with the accused were unable to identify same from the photos in the photo plan. Although one of the knives had what appears to have been blood on the blade, the type and origin thereof is unknown. Though there may be reasonably strong suspicion that the knives found might have been used in the commission of the offence, this is not the only reasonable inference that could be drawn from the proved facts, especially where there is proof that the scene had been tampered with. In the circumstances I am unable to come to the conclusion that a link

between the knives found and the commission of the murder had been established.

[42] Turning next to threats allegedly made to the State witnesses, Albertus Sneiders, the life partner of Brenda van Wyk, testified about an incident when he met with the accused at a shebeen. It was on 10 January 2015 and after the accused had been admitted to bail. The accused in a rude and disrespectful manner enquired into the whereabouts of Brenda and Helga and by using vulgar language said he would kill them. He did not say why he would do that. Sneiders left and, after meeting up with Brenda, went to report the incident to Sergeant van Wyk. Although Helga was also told about the accused's threats, she did not go to the police herself as she, by then, was drunk and afraid of being arrested. Sergeant van Wyk confirmed that a report was made to him and which ultimately led to the accused being rearrested.

[43] The accused denied these allegations and said that he at the relevant time had not known who the witnesses for the State were; therefore he had no reason to intimidate any person.

[44] Neither of the witnesses against whom the alleged threat was directed (Helga and Brenda) gave evidence to that effect and whether they were intimidated at all, this despite evidence that Albertus and Brenda reported the incident to Sergeant van Wyk. It was argued for the State that even if the witnesses were not actually intimidated in any way, then the accused still ought to be convicted for having attempted to obstruct or defeat the course of justice. The charge enumerates six possibilities his actions were aimed at achieving when uttering the words complained of. In summary these are: His conduct may frustrate or interfere with the investigation; it may protect him from being prosecuted for a crime connected to the death of the deceased; that he knew Helga and Brenda were State witnesses; that they may be intimidated not to testify; and lastly, that he foresaw that Albertus to whom he had uttered the perceived threat, will convey it to the two witnesses.

[45] In the particulars of the charge it is alleged that on diverse occasions between 25 December 2014 and 11 January 2015 the accused had threatened the three State witnesses. Besides the incident of 10 January 2015 which Albertus testified about, there is no evidence before the court about any similar incidents which happened during the said period. If that were indeed the case, then it seems surprising that no evidence to that effect had been led which, in itself, might reflect adversely on the credibility of those witnesses complaining of having been intimidated on diverse occasions. Furthermore, besides reporting the incident to the police, there is no proof of any of the witnesses having been intimidated, least Albertus to whom the accused had directly spoken. He testified that he became angry and walked away. Nothing was said that he felt intimidated not to testify at the trial. It appears to me that the same applies to Helga and Brenda, neither one of them complaining that they felt intimidated by what the accused had said to Albertus.

[46] Except for disputing that he ever had uttered words to the effect that it was intended to intimidate any of the witnesses, the evidence of Albertus remained intact. His testimony, however, requires further scrutiny. Albertus gave single evidence and his testimony must therefore be approached with caution. Bearing in mind that he is the main and only witness implicating the accused as regards the perceived threats, it was surprising to hear during cross-examination that he had only given a statement to the police more than ten months after the alleged incident. No explanation was proffered by the State explaining the delay. It seems to me inevitable to infer that it was not regarded serious enough by the investigating officer or the police to obtain a statement sooner; a view consistent with that of the other complainants. To this end, the seriousness of the alleged incident, in my opinion, is watered down substantially.

[47] Turning to the content of the alleged threats, it is evident from the evidence of Albertus that after enquiring about the whereabouts of the witnesses, the accused in a vulgar way said he will have sexual intercourse with them and kill them. The accused did not say why he wanted to do them

harm. Though the possibility that the accused intended intimidating the witnesses cannot downright be excluded, there is no clear evidence supporting such inference. The accused is adamant that he at that stage was unaware of who the witnesses for the State would be and his evidence on this point had not been refuted, therefore, it must be accepted.

[48] For the foregoing reasons I have come to the conclusion that the charge contained in count 2 had not been proved beyond reasonable doubt.

[49] In the result, on the evidence presented the court finds as follows:

Count 1: Murder – Guilty (*dolus directus*)

Count 2: Defeating or obstructing or attempting to defeat or obstruct the course of justice – Not guilty.

_____

JC LIEBENBERG

JUDGE

APPEARANCES

STATE	J Eixab Of the Office of the Prosecutor-General, Windhoek.
ACCUSED	M I Engelbrecht Engelbrecht Attorneys, Windhoek. Instructed by the Directorate: Legal Aid.