



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: CC 21/2013

In the matter between:

THE STATE

and

PAULUS RUBEN

ACCUSED

Neutral citation: *State v Ruben* (CC 21 - 2013) [2016] NAHCMD 382 (5 December 2016)

CORAM: NDAUENDAPO J

Heard: 21 June 2016

Delivered: 5 December 2016

Flynote: Criminal Law – Murder – *alibi* – circumstantial evidence – *alibi* defence false – rejected – every piece of evidence in totality points to the guilt of the accused – guilty as charged.

Summary: The accused was charged with murder in this court. He raised an alibi defence, when he testified that, at the time the deceased was murdered, he was at farm Komkoes and not at Banhoff.

The State's case was based on circumstantial evidence. The accused's alibi defence was proved to be false as witnesses testified that they saw accused at Banhoff between 20h00 to 21h00 on 3 January 2012. It was further testified that between 20h00 to 21h00 on 3 January 2012, the accused was seen entering the room where the deceased's body was discovered the next day.

Held; that defence of an *alibi* was clearly false as witnesses saw the accused on 3 January 2012 at 21h00 entering the room of the deceased.

Held; further that the shoe prints leaving the room of the deceased and jumping over the fence had a distinct feature and were positively identified as those of the accused.

Held; further that having regard to every piece of evidence, the only reasonable inference to be drawn is that the accused caused the death of the deceased with direct intent.

ORDER

The accused is guilty of murdering the deceased with direct intent. He is therefore found guilty as charged.

JUDGMENT

NDAUENDAPO, J

[1] The accused is arraigned in this court on a charge of murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003. In the summary of substantial facts the State alleges that:

'The accused and the deceased were involved in an actual or perceived or romantic relationship and were living together at the deceased's house in Rehoboth (Banhoff station). During the evening hours of the 3rd January 2012, the deceased was at her house and the accused was with her. During the course of that night the accused killed the deceased with an unknown object and ran away. The deceased was discovered lying dead in her bed in the early morning hours of the 4th of January 2012. The deceased died due to blunt force trauma to the head resulting in subarachnoid hemorrhage.'

The accused pleaded not guilty and raised an *alibi* defence. He explained that he was not at Banhoff after 13h00 on 3 January 2012 and he did not commit the offence.

The State is represented by Ms Ndlovu and the accused by Mr Ujaha.

The State called the following witnesses:

Johannes Beukes

[2] He testified that the deceased was his sister. He testified that the weekend of 18 December, he came to the residence of the deceased and overnight there. The next day in the afternoon he went to the location and returned in the evening around 22H00. Before he went to the location he left the accused and the deceased at home. When he returned he did not speak to them, he just made up his bed and slept outside the room. Early in the morning on 4 January 2012, Johannes Godfried" came there and knocked twice at the door of the room of the deceased, but there was no answer. Mr Godfried informed him that he was looking for the accused as he had to drive him to Rehoboth.

[3] Johannes testified that he called the name of the deceased, but there was no answer. He then peeped through a whole and saw the deceased lying on the bed. He then ran to his other sister Johanna Beukes. They returned to the house and Attie Beukes said they must not touch anything they must go and call the elder of the church. The police also arrived. They entered the room and saw that the deceased was dead. In the room he saw a shoe list, a hammer and a glass of water which was broken in front of the bed. He further testified that he observed shoe prints coming out of the room of the deceased, he saw the shoe prints before the police arrived at the scene. The shoe prints went behind the yard in the direction of the tarred road. He further testified that the shoe prints did not go through the gate, but that the person wearing those shoes took a shortcut behind the house and jumped over the fence. He testified that the shoe prints were those of the accused's shoes because they came out of the room of the deceased. He saw the accused wearing those shoes. Exhibit "1" – confirmed that those were the shoes that the accused was wearing. He identified the shoe list (shoe fixer), the hammer and broken glass (exhibits 2, 4 and 4).

Johannes Godfried

[4] Resides at Banhoff station. He testified that on 3 January 2012 the accused, who was his casual driver, drove him to Rehoboth to collect his pension money at the Post Office, but the money was not paid in and they were supposed to return the next day, 4 January 2012 to collect the money. He testified that when the accused knocked off on the 3rd of January he told him to come on the 4th of January so that they could go to Rehoboth, the agreed time was 07H30. On 4 January 2012 early in the morning, after the accused failed to arrive as agreed, he went to knock at the house of the deceased looking for the accused, but he was not there. He found Johannes Beukes who was sleeping outside and asked him where the people were and he said he did not know. He then left and got another driver to drive him to Rehoboth.

[5] He further testified that on the 3rd of January, the accused told him that he wanted to go to Tsumkwe to get *muti* so that if he kills someone the police will not arrest him. He told him not to do that.

Detective Warrant Coetzee

[6] He testified that he has been in Nampol for 19 years and a member of the Serious Crime Unit. His duties entail photographing crime scenes and, finger print investigation. He testified that on 4 January 2012 he attended to a scene of crime at Banhoff station at around 9:15 am. He photographed the scene after it was pointed out to him by Johannes Beukes, he then compiled the photo plan which was produced as exhibit "A". He further testified that Beukes also pointed out to him shoe prints of the police perabellum shoeprints. He testified that on the front side of the shoes, they have horizontal stripes and on the back part of it is having a smooth hill. The shoe prints went at the back of the house and jumped over the fence.

Johanna Beukes

[7] She is a sister to the deceased and resides at Banhoff. She testified that on 3 January 2012 between 15h00 and 16h00 the accused returned from Rehoboth and came to her residence and he played with her child, she asked him where the deceased was and he told her that he did not know. The accused then went to his residence which is not far from her's and he then saw him sleeping outside on a mattress. She later, whilst at another house, saw the deceased passing by on her way to her house that was around 17H00. The next morning her brother Johannes Beukes came to her and informed her that something had happened to the deceased. They proceeded to the house of the deceased. They did not open the door and whilst there Johannes showed her shoeprints, the shoe prints are of perabellum shoes, the shoe prints came from the room where the deceased was found and moved initially slowly and then fast at the back of the house and jumped over the fence. She testified that those shoe prints belong to the accused as they were the shoeprints made by the accused when he visited her home the previous day, no one else made the same shoe prints at her house other than the accused, she testified.

Josephina Eksteen

[8] She was residing next to the deceased, she knew the accused as he was staying with the deceased. She testified that on 3 January 2012 whilst listening to the 20h00 NBC news, an Owambo speaking man by the name of Salmon Endjala (also known as Moses) came to her with a baptismal certificate in the name of Daniel Josef, as she could not speak Oshiwambo, she went to call the accused to come and interpret for her. The accused came and they stood at the fence where he was interpreting from Afrikaans to Oshiwambo and vice versa. After that the accused went to his house and she saw him entering the sleeping room he shared with the deceased. The next day she was called by Johanna Beukes who informed her that something had happened at the house of the deceased. She called the police who arrived at the scene of crime and discovered the body of the deceased. The accused was nowhere to be seen.

[9] Mr Sam Petrus testified that he was residing at farm Komkoes. He was fixing fences and also working in the kraal. He knows the accused from Banhoff for the past two years. On 9 January 2012 he was at the farm when the accused arrived there around 7:30 am. He was in the kraal when the accused greeted him and told him that he was looking for a job. The accused told him that he was working at Rietog, but had an argument with his boss about payment and he was chased from the farm. He then informed the accused that the owner of the farm was not there and he could go to a nearby farm to seek employment. He further testified that the accused informed him that he left his wife at Rehoboth because they had an argument and they are not together anymore. He further testified that the accused informed him that he does not work as a driver for Mr Godfried and that he had crashed Mr Godfried's motor vehicle and that is why he was looking for a job to pay the damages to the vehicle.

[10] He further testified that he saw marks on the neck of the accused and the accused told him that he was cut by the pieces of the wind screen when he crashed Godfried's motor vehicle. He further testified that on 12 January 2012 he went to Mr. Alcock's farm and found the accused there. Whilst seated at the stoep with the accused, Mathew and others drinking white beer, he saw two police vehicles approaching. When

the accused saw the police officers, he ran into the house. One of the police officers entered into the house and came out with the accused.

Rosana Vries

[11] She testified that she was residing at farm Komkoes in 2012. She testified that on 9 January 2012 the accused visited farm Komkoes looking for work. She further testified that on 12 January 2012, they with her boyfriend Sam Petrus visited farm !Naribes. Whilst there the police came there and as they were nearing the house, the accused attempted to run behind the house and then ran back inside the house. The police got him out of the house and arrested him. She further testified that when she saw the accused at farm !Naribes he had scratch marks on his neck and when she asked him what caused the marks he said that he had overturned the vehicle and the glasses from the windscreen caused the scratch marks around his neck and according to her they looked like finger scratch marks. She further testified that there was a difference between scratch marks caused by glass to that of the fingers as those were superficial scratch marks and they were 3 or 4 days old and still fresh. She further testified that she inquired about the deceased and the accused told her that they separated at Oscar's shebeen in Rehoboth.

Katrina Beukes

[12] She testified that she resides at Erf 678 at Banhoff and was a sister to the deceased. She knew the accused as he was staying with her sister, the deceased, as her boyfriend. She last saw the deceased on the 3rd of January 2012. She testified that on 25 December 2011 they had a gathering and saw when accused grabbed the deceased in front on the chest and tore open the t-shirt she had on. She saw Aletta separating them and from there they went back to their house. She further testified that she and accused had a good relationship, but because he had a short temper, they did not go to the deceased's house. Furthermore that, the accused did not want them to communicate with the deceased because according to him, they let the deceased visit

drinking places. She further testified that she saw the accused and deceased together on 3 January 2012 at around 16h00.

Charles Goagoseb

[13] He testified that he is the investigating officer at Rehoboth and nicknamed Rambo. He testified that on 4 January 2012 he attended the scene of crime at Banhoff in the morning at 10:00 am and did not know the deceased. He further testified that they were later accompanied by Johannes Beukes and he identified the body of the deceased. He testified that in the room he saw broken glasses, shoe list, and a hammer lying on the floor. He further testified that Johannes Beukes showed him shoe prints which are similar to those worn by the police officers and that accused was wearing those similar shoes. The shoe prints were in front of the house and went behind the house and then over the fence. He further testified that he did not follow the shoe prints nicely because the goat prints disturbed the shoe prints. He further testified that from there they went to Godfried's house, the accused's employer but he informed them that the accused was not there. He further testified that they searched for the accused for eight days then they received information that the accused was somewhere at the farm Naribis and they drove to Naribis on 12 January 2012. On arrival at the farm, Sergeant Van Wyk went inside the house and came out with the accused. He testified that he arrested the accused and explained his legal rights to him.

[14] He further testified that he observed the accused was wearing the parabellum shoes, normally worn by police officers which made shoe prints similar to those which he observed at the scene of crime and he also observed that the accused had marks on his neck. He further testified that they proceeded to Banhoff and on the way the accused took them to a tree where he wanted to commit suicide. There was a wire hanging on the tree, he told the investigating officer that he wanted to commit suicide and before the pointing out of the tree his legal rights were explained to him. He further testified that the accused appeared sober and Sergeant Van Wyk took the photos of the wire but did not remove the wire.

[115] Dr. Vasin, a medical doctor read into record the post mortem report, which was compiled by Dr. Ramirez after conducting a post mortem on the deceased, but unfortunately Dr. Ramirez left the country and returned to Cuba. The post mortem findings by Dr. Ramirez were the following; conducive injuries on the frontal area of the head, and **the cause of death was a blunt force trauma to the head resulting in subarachnoid hemorrhage**. Dr. Vasin explained that conducive injuries meant injuries which might have been inflicted by a heavy blunt object. Dr. Vasin further testified that the exhibits before court, the hammer, shoe list and the glass when not broken could cause the injuries sustained by the deceased.

[16] Warrant officer Hochtritt, the investigating officer, testified that on the 4th of January 2012, she was with Inspector Goagoseb and Sergeant Beukes when they visited the scene of crime. Johannes Beukes identified the body of the deceased to them. He showed them the shoe prints coming out of the room where the deceased's body was found. The shoe prints went around the house and over the fence and they could not see them further as the goats tempered with the shoe prints. The shoe prints were of parabellum shoes, they were very fresh and the person was walking very fast. In the house they found a shoe list, hammer and a broken glass. On 12 January 2012 they got information that the accused was at farm Naribes. They drove to farm Naribes. She was with Inspector Goagoseb and Sergeant Van Wyk and as they were nearing the farm, they saw people sitting on the stoep and accused stood up and ran into the house. Sergeant Van Wyk went inside the house and came out with the accused. Detective Inspector Goagoseb explained his rights to him and arrested the accused. The accused had parabellum shoes with similar prints that she had observed at the house where the deceased's body was found. The accused was handed over to her and she explained the rights of the accused to him. She also observed scratch marks around his neck. When she asked about the scratch marks he informed her that he had an argument with Bokkie (deceased) and he killed her and when he realized that she was dead he ran away and wanted to commit suicide. They drove back to Banhoff with the accused and on the way back the accused told them to stop at a certain tree. They got off the vehicle and the accused showed them a tree with a wire hanging and he told them that he wanted to commit suicide on the tree. The accused was then taken to the

police station where he was charged and his rights explained. He also informed her that he wanted to make a confession before a Magistrate. The accused is fluent in Afrikaans and they understood each other very well. He later changed his mind and did not make the confession.

Mathias Nicklaas Van Wyk

[17] He testified that he is a Sergeant in police for 12 years and 6 years attached to the criminal investigation unit and he knows the accused from the date he arrested him. He further testified that he got information on 12 January 2012 that the accused was at a farm and they drove with two bakkies to farm Naribes. Constable Munango and Sergeant Van Wyk accompanied him. In the other vehicle, Goagoseb, Warrant Officer Hochtritt were there and when he stopped at the gate of the farm and Constable Munango opened the gate he saw a person running in the door of the zinc house. He further testified that they jumped out of the car and he entered the house and saw the legs of somebody who was hiding behind a wheelbarrow. He called the name Paulus and he came out. When he came out he said 'ja Tiger' and he told the accused the purpose of his visit. He further testified that he then handed the accused to Warrant Officer Hochtritt and after they obtained Statements he handcuffed him.

[18] He testified that Warrant Officer Hochtritt explained the rights to accused, they then drove close to Rehoboth because Warrant Officer Hochtritt told him that accused wanted to show them something at Banhoff. After they stopped, the accused told them that he wanted to show us the place where he wanted to commit suicide and he then took them to a tree a few meters from the house where he wanted to commit suicide and before the pointing out Warrant Officer Hochtritt explained the rights to the accused. He further testified that accused showed them the wire from which he wanted to hang himself. He testified that he took photos with his private camera, but he could not develop them because of a virus. He further testified that he saw marks on the neck of accused which were four to five days old and after that they drove to Rehoboth and the accused was locked up.

Evelyn Kainus

[19] She testified that she was a resident of Banhoff. On 3 January 2012 after knocking off from work at 17:00, she went home and later on took her church documents to the house of Josephine Eksteen. When she arrived at the house of Eksteen, she saw her standing with the accused and Moses. They were standing at the fence. The deceased's house was adjacent to Eksteen's house, she stood approximately 3-4 metres from where they were. Eksteen told her that she was busy with the accused and Moses and that she should return the next day. She testified that it was dark when she went to Eksteen's house, but she could clearly see them as there was sufficient illumination from the electrical lights.

DEFENCE'S CASE

[20] The accused testified that he knows the deceased. They were involved in a romantic relationship for five months before she died. He testified that on 3 January 2012 he went with Johannes Godfried to Rehoboth and later in the afternoon returned to Banhoff. After parking the car of Mr Godfried he went to the deceased's house. Whilst at the house, Mathew Hamunyela called him and informed him about a job at a farm 20km from Rehoboth. He then packed all his clothes and left. The deceased was not present when he left. The time he left was around 13h00. He stayed in Rehoboth until 16h00 and then he got a lift in a truck which dropped him at the road. He then text Mathew to get direction to the farm that was around 17h00. He then found his way to the farm and found Sam Petrus who directed him to Mathew. He discussed nothing with Petrus, he denied having told Petrus that he was coming from Rietog and that he had problems with his employer. He then proceeded to the farm where Mathew was. He met a woman who offered him a job to fix fences. The salary was N\$700 per month. According to him on 3 January 2012 he was offered the job.

[21] He worked there for 2 weeks until one day whilst they were seated at a stoep, the police arrived. They were drinking beer and when the police arrived Mathew asked him to go and hide the beer in the house. Whilst in the house a police officer came and told

him to come out. The police told him that something happened at Banhoff and he told them that he left his lover and she was fine. He got onto the police van and on their way back to Banhoff the police took him to a tree and they asked him if he wanted to commit suicide from that tree because there was a wire on a tree and he denied that he wanted to commit suicide.

[22] He further denied that his legal rights were explained to him when a warning Statement was taken from him. He denied having told Mr Godfried that he wanted to go to Tsumkwe to get muti so that if he kills someone he will not be arrested by the police. He further testified that the meeting with Josefina Eksteen was in November 2011 when he was interpreting to her in the presence of Oshiwambo speaking guy and not in January 2012 as testified by Eksteen. He denied that he was responsible for the death of the deceased.

[23] Daniel Joseph was called by the accused to testify. He testified that he knew both deceased and accused. He testified that in November 2011 he asked accused to interpret for him from Oshiwambo to Afrikaans to Eksteen regarding a baptism card. He testified that he remembers that it was November, because early December he took his leave and went to the North. He went to the North on 5 December and returned on 7 January 2012. He denied that he was with the accused, and Ms Eksteen on 3 January 2012.

[24] The State then applied for its case to be reopened and to call Ms Alcock in the light of the evidence by the accused that he was employed by her on 3 January 2012 and not 9 January 2012. Although opposed, the application was granted in the interest of justice. Elizabeth Alcock testified that she and her husband own farm Naribis 366. She knows the accused. He came to the farm on 9 January 2012 looking for a job. She remembers the date 9 January 2012 because she checked on the calendar, it was a Monday. After she spoke to her husband, the accused was employed on 9 January 2012.

ANALYSIS OF THE EVIDENCE

[25] The accused faces one count of murder. The deceased's cause of death was a blunt force trauma to the head resulting in subarachnoid hemorrhage. The prosecution's case is based on circumstantial evidence. The accused denied that he caused the death of the deceased. He raised an *alibi*. He testified that on 3 January 2012 at around 13h00 he left for Rehoboth to look for a lift to go to a farm where Mathew told him about a job opening. From Rehoboth he departed to the farm around 17h00 and eventually made it to the farm at around 17h30 and he did not return to Banhoff until he was arrested and brought by the police on 12 January 2012. The body of the deceased was discovered in the early hours of the 4th January 2012 and whoever murdered her must have done so during the night of 3 January or early hours of the 4th of January 2012. Johannes Godfried testified that the accused was his casual driver and on 3 January 2012 in the morning they drove to Rehoboth to collect his pension money, but the money was still not paid in and they were informed to return the next day, 4th of January 2012. When they returned back to Banhoff it was agreed with the accused that they will return to Rehoboth on 4 January 2012 early in the morning to collect the pension money. On the 4th of January 2012 Mr. Godfried waited for the accused to come to his house as agreed so that they could go to Rehoboth, but after the accused failed to pitch up in the morning he went to his house, knocked at the door of the room and there was no answer, the accused was nowhere to be found. The accused testified that he left Banhoff on 3 January 2012 around 13h00 without informing Mr. Godfried that he got a job at a farm and that he will not be driving him to Rehoboth the next day. Why did he not do that? His leaving was sudden and unplanned. Can an inference be drawn that he failed to do that because of what he did to the deceased?

[26] The version of the accused that he left Banhoff on 3 January 2012 at around 13h00 is in stark contrast with the evidence of Josephine Eksteen who testified that she saw the accused at his house and later at the fence of his yard with Moses Joseph at around 20h00. Moses Joseph denied that it was on the 3rd of January 2012 when he was with the accused and Eksteen at her yard. Counsel for the accused argued that the court cannot rely on "the evidence adduced that the accused was seen at the house at around 20H00, because there are two versions before the court. For example, if the

court have to evaluate the evidence of Josephina Eksteen and Moses D Joseph, there are severe contradictions as to when both met with accused. The court is faced with two separate versions on this issue.' Although there is contradiction as to when the two witnesses met the accused, Eksteen's evidence is more reliable than that of Moses Joseph. Eksteen can remember the time vividly as she was watching NBC news when Salmon Endjala (Moses Joseph) came at her house and she went to call the accused to come and assist with interpreting a document from Afrikaans to Osiwambo and vice versa. Salmon Endjala also known as Moses Joseph denied that he was at Eksteen's yard on 3 January 2012 at around 20h00. He admitted that the accused had interpreted for him previously but denied that it was on 3 January 2012. He admitted that he does not read nor write and went to school up to grade one. He further admitted not knowing dates and time and that the meeting took place in 2012, more than three years ago and that he may be mistaken about the dates. Eksteen's evidence is more reliable because she gave a Statement the following day i.e. 4th of January 2012 after the body of the deceased was found. So the meeting with the accused and Moses Endjala which took place on the 3rd of January 2012 was still vivid in her mind. Her evidence was also corroborated by Evelyn Kainus who testified that she saw Eksteen, the accused and Moses Joseph standing at the fence on the night of 3 January 2012. She testified that although it was dark, there was sufficient illumination to recognize the accused and Eksteen. Johanna Beukes also testified that the accused came to her house at Banhoff between 15h00 and 16h00 on 3 January 2012 and was playing with her children, he later went to his house and saw him sleeping on a mattress outside and that was around 17h00.

[27] Johannes Godfried also testified that they returned from Rehoboth with the accused on 3 January 2012 around 17h00. Katrina Beukes also testified that she saw the accused and the deceased together around 16h00 on 3 January 2012. Katrina Nanus also testified that after coming from the shebeen around 16 – 17h00 on 3 January 2012, she saw the deceased going into her bedroom. All those mentioned witnesses corroborated each other that the accused was still at Banhoff well after 13h00 on 3 January 2012. The accused's version that he left Banhoff at 13h00 or between 16h00 and 17h00 as it was put to the witnesses by his counsel is clearly false and

stands to be rejected. Eksteen made a good impression on the court, she remembered the events vividly and her testimony was supported by the Statement she made the following day. The court accepts her version that she saw the accused on 3 January 2012 around 20h00 at his house.

[28] In his evidence in chief, the accused testified that he received the call from Matheus about the job offering whilst in Banhoff, whereas during the cross-examination of Godfried, it was put to Godfried that the accused was contacted by Joseph in Rehoboth and was talking to Joseph whilst in Rehoboth. The accused clearly contradicted himself and if the accused knew already whilst in Rehoboth, he would have told Godfried that he found a job and would not be available the following morning even before their arrival in Banhoff from Rehoboth. Counsel for the State submitted correctly that there are contradictions because there was never a job offer anywhere by Joseph or Matheus. When the accused was asked why it was now Matheus who called him and not Joseph as he testified, the accused responded that it was a mistake on names. Counsel correctly submitted that this was not a result of a mistake as the accused could not have been mistaken about a fact so fundamental to his defence, but in fact shows that the accused was making up his story as he went on.

[29] The accused also testified that after he left Banhoff he arrived at the farm Komkoes on the 3rd of January 2012 at around 17h30, whereas witnesses Petrus and Vries all testified that the accused arrived at the farm in the morning of 9 January 2012. Their evidence was also corroborated by the owner of the nearby farm Naribes, Mrs Alcock, also testified that the accused came at the farm on 9 January 2012 when she offered him a job. The evidence by the accused that he left Banhoff on 3 January 2012 at 13h00 and went to farms Komkoes and Naribes on the same date is clearly false beyond a reasonable doubt and stands to be rejected.

[30] The evidence of the shoeprints was that it was the accused's shoeprints that were observed by Johannes and Johanna Beukes and later by the police officers in the morning of 4 January 2012 coming out of the room where the deceased's body was found moving around the house and jumping over the fence. They described the prints

as horizontal lines similar to those shoes worn by police officers. The witnesses who saw the shoe prints testified that according to their observation the shoe prints showed that the person was in a hurry when he walked behind the house and jumped over the fence. Johannes Beukes testified that the accused wore those pair of shoes that left the prints every day. The accused was found with shoes whose prints were similar to the ones left at the scene when he was arrested. Johanna Beukes also testified that when she saw the shoe prints at the scene of crime, she knew they were the accused's shoe prints as the accused left the same shoe prints at her house when he came there the afternoon of 3 January 2012. Counsel for the defence argued that the evidence that the shoe prints belong to the accused is not reliable because no comparisons were made by the police officers and no expert was called to prove that the shoe prints belong to the accused. I disagree with that. Evidence of shoe prints is admissible provided that it is reliable and it is not the only evidence against the accused person.

[31] The witnesses, Johannes and Johanna Beukes described the shoe prints having a distinct feature, namely, horizontal lines and similar to those shoes worn by the police. Warrant Officer Hochtritt who arrested the accused found him wearing those similar shoes with the horizontal lines. The only reasonable inference that can be drawn is that the accused is the one whose shoes left those prints. Although the accused denied that the shoe prints found on the scene are those left by his shoes, the evidence was overwhelming and the court is satisfied that it was indeed his shoe prints that were found on the scene. The questions that arise are: (i) Why was he in a hurry that morning when he left the deceased room (ii) Why did he not leave the yard through the gate instead of jumping over the fence? Are the answers not that the accused was fleeing from a scene of crime caused by him?

[32] Mr. Petrus also testified that the accused informed him that he crashed Mr Godfried's motor vehicle and that is why he was looking for a job to pay the damages to the vehicle. The accused related the same story to witness Vries when he was asked about the scratch marks on his neck, he informed them that he sustained those scratch marks when he crashed the vehicle of Mr Godfried. That story of the crash of the

vehicle and then sustaining the marks on the neck is clearly a lie. Mr Godfried never testified that his vehicle was ever crashed by the accused and therefore he could not have sustained those scratch marks from the crash as it did not happen. Vries testified that those marks looked like marks caused by fingers (superficial) and the only reasonable inference to be drawn is that he sustained those marks from the deceased as she was fighting back against the attack against her by the accused.

[33] The accused was arrested on 12 January 2012 at farm Naribes. The evidence of Paulus, Vries, Sergeant Van Wyk and Warrant Officer Hochtritt was that as the police were approaching the stoep where the accused and others were seated, the accused stood up and initially attempted to run behind the house, but when he saw that the police were about to surround the house, he instead ran inside the house and hid behind a wheelbarrow. The question that arises from the conduct of the accused is this: How did he know that the police would be after him unless he had done something to the deceased? Why would an innocent man run away from the police and hid in the house behind a wheelbarrow when he saw them? The only possible answer to that question is that he was running away because he knew that he had committed an offence and he had to run and hid to avoid being arrested by the police. Witness Warrant Officer Hochtritt testified that after warning the accused, he freely and voluntarily without any undue influence having been brought to bear upon him told her that they were attacked by someone and he ran away when he realized that the deceased was dead. The accused then changed his version and made another admission that he had an argument with the deceased and ran away when he realized that he had killed her and wanted to commit suicide but did not succeed. Counsel for the accused argued that the police officers who testified in court contradicted themselves as to whether the accused's rights to legal representation were explained or not and who explained the rights of the accused. It is further submitted that the police officers failed in their investigations because no forensic analysis were done at least to link the accused to the offence. Sergeant Van Wyk testified that when he arrested the accused, he explained his rights to him. Warrant Officer Hochtritt also testified that when the accused was handed over to her she explained his rights to him. Again at the

police station and before taking the warning Statement, she explained the rights of the accused to him. I am satisfied that the rights were explained to the accused.

[34] Counsel for the State correctly submitted that the admissions made to Warrant Officer Hochtritt are admissible as the accused was properly warned before he made the admissions to Hockritt. He was also warned by Investigating Officer Goagoseb before Warrant Officer Hochtritt spoke to him. Counsel further submitted that the admissions made to Warrant Officer Hochtritt are corroborated by what the accused said in his warning Statement produced as exhibit "G". Warrant Officer Hochtritt testified that the accused informed her that he wanted to make a confession before a magistrate. This was after being formerly informed of the charge of murder against him. They spoke Afrikaans (and the accused understands Afrikaans well) and the accused knew what he meant by wanting to make a confession and if it was not him who killed the deceased he would not have had any confession to make before a Magistrate.

[35] The witnesses Sergeant Van Wyk, Warrant Officer Hochtritt etc. testified that on their way to Banhoff, the accused voluntarily directed them to a tree and when they got off the vehicle, the accused showed them the tree and a wire hanging on the tree, where he attempted to commit suicide. As indicated the pointing out was unsolicited and voluntary. Counsel for the accused told the witnesses that it was them who told the accused to point out the tree and the wire. That is clearly without substance. There were many trees around there and how would the witnesses had prior knowledge about that specific tree, without them having been told by the accused himself. It was the accused who pointed out that tree to them and the only reasonable inference to be drawn from his attempted suicide is because of the offence that he committed.

[36] Mr. Godfried testified that on the 3rd January 2012 the accused informed him that he wanted to go to Tsumkwe and get *muti* so that if he kills someone the police would not arrest him. Counsel for the State argued that these words were said the day before the deceased was found dead and she argued that it was not a coincidence that the accused was talking of killing someone just before she was killed. Counsel for the State further contended that these words uttered by the accused a day before the deceased

was found murdered showed that the accused had given thought to the possibility of killing someone. The fact that the accused did not mention who he intended to kill does not make the evidence lose weight as it shows that he had the death of somebody on his mind. I fully agree with that submission, otherwise why would he mention that out of the blue if he had not given thought to killing someone? Should the court not draw an inference that when the deceased was found dead a day after the accused uttered those words that he indeed carried out what was on his mind? Counsel for the State referred this court to the case of *S v Holshausen*¹, where the Court admitted evidence of a recording where the accused expressed an intention to kill the deceased. The deceased was killed two days later. In admitting the evidence the court said:

"...It excludes from the scope of the hearsay rule a Statement such as that under discussion which was made by a party to the litigation, and which was not tendered or received to prove the truth of any of the matters Stated therein, but only to prove that he had given to the possibility of killing the deceased. I do not think that the evidence of the monologue is hearsay."

In the case of *S v Shaduka*² the court found the evidence of a witness who had heard the accused threatening to kill the deceased a month earlier relevant in determining whether the accused intentionally killed the deceased or not.

[37] Counsel further argued that although Godfried testified that the accused did not mention who he wanted to kill, this tends to show that he had murder on his mind that day and it cannot be coincidence that the deceased is found having been killed the next morning.

[38] The accused's defence is one of an *alibi*. In the case of *S v Malefo en Andere*³ the court summarized the correct approach to the assessment of an alibi defence as follows:

'1. *there is no burden of proof on the accused person to prove his alibi;*

¹ *S v Holshausen* 1984 (4) SA 852 (A) at page 858

² *S v Shaduka* SA 71/2011, at page 28 paragraph 49

³ *S v Malefo en Andere* 1998 (1) SACR 127 (W) at 157i-158d

2. *if there is a reasonable possibility that the alibi of an accused person could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt;*
3. *an alibi must be assessed, having regard to the totality of the evidence and the impression of the witnesses on the court;*
4.
5. *the ultimate test is whether the prosecution has proved beyond reasonable doubt that the accused has committed the relevant offence and for this purpose a court may take into account the failure of an accused to testify or that the accused had raised a false alibi.'*

[39] The accused testified that he left Banhoff at 13h00 on 3 January 2012 and went to Rehoboth and left Rehoboth at 16h00 to go to the farm where he was called by Mathew. The accused clearly was not telling the truth when he said he left Banhoff at 13h00, as he was seen last by Josefina Eksteen at around 20h00 on 3 January 2012 going back to the room which they shared with the deceased. Johanna Beukes also saw the accused at his house around 17h00 on 3 January 2012. Evelyn Kainus also testified that she saw the accused on 3 January 2012 in the evening in the yard of Eksteen standing with her. He testified that he arrived at the farm at 17h30. During cross-examination it was put to the witnesses that he left Banhoff at 16h00 – 17h00. Mathew testified that he saw the accused on the 9th of January 2012 early in the morning and not on the 3rd January 2012 as testified by the accused. Mathew's version was corroborated by Rosalia Vries and the owner of the nearby farm Mrs Alcock who offered the accused a job. His *alibi* is clearly false and stands to be rejected. The prosecution's case is based on circumstantial evidence. According to *R v Blom*⁴, when relying on circumstantial evidence, two rules need to be considered,

'That the inference sought to be drawn must be consistent with all the proved facts. The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.'

⁴ *R v Blom* 1939 AD 288

[40] Counsel for the State correctly submitted that the circumstances of this case are such that when each little piece of evidence is put in its place every other reasonable inference is excluded leaving only the inference that the deceased was assaulted by the accused resulting in her death. He lied about the date and time when he left Banhoff. He also lied about the date and time when he arrived at farm Naribes where he was offered employment. The shoe prints of the accused were seen leaving the room where the deceased's body was found moving in a hurry behind the house and jumping over the fence instead of going through the gate. When he saw the police on 12 January 2012 approaching the farm where he was, he ran away and went to hide inside the house behind a wheelbarrow. He admitted to Warrant Officer Hochtritt that he had an argument with the deceased and ran away when he realized that he had killed her. He pointed out a tree where he wanted to commit suicide, he admitted to Warrant Officer Hochtritt that he wanted to make a confession to Magistrate, he told Godfried that he wanted to go to Tsumkwe to get *muti* so that if he kills somebody he will not be arrested by the police, from all the above mentioned facts, the only reasonable inference to be drawn is that it was the accused who murdered the deceased.

[41] Counsel for the State argued that it is not a requirement that the State must prove a motive for the killing of the deceased as was said in the case of *S v Mlambo*⁵. However, the evidence led in this case proves that he accused had a problem with the deceased's drinking. The deceased's sisters testified that the accused had complained previously about the deceased's drinking.

[42] On the 3rd of January 2012, Katrina Namses testified that she went with the deceased to a shebeen where they had drinks. Later on, they went back home and she saw the deceased going to the house and into her bedroom between 16h00 and 17h00 hours.

[43] When the accused came back from Rehoboth, the deceased was not yet home. Joanna testified that she went to the deceased's home looking for her and only found

⁵ *S v Mlambo* 1957 (4) SA 727 (A) at page 737

the accused. The accused confirmed this as he testified that the deceased was not home when he arrived. The accused further testified that he did not feel good about her absence. He was also not happy with her drinking as he testified that she used to drink a lot. This may not have gone down well with the accused prompting the assault leading to her death.

[44] Counsel for the State argued that the accused's intention when he assaulted the deceased can be inferred from the type of weapon or instrument used, the part of the deceased's body the assault was directed at and the nature of the actual injury by the deceased.

In the case of *R v Mlambo*⁶ 1957 (4) SA 727 at page 737 C-E, the court said,

“Proof of motive for committing a crime is always highly desirable, more especially so when the question of intention is in issue. Failure to furnish absolutely convincing proof thereof, however, does not present an insurmountable obstacle because even if motive is held not to have been established there remains the fact that an assault of so grievous a nature was inflicted upon the deceased that death resulted either immediately or in the course of the same night. If an assault – using the term in its widest possible acceptance – is committed upon a person which causes death either instantaneously or within a very short time thereafter and no explanation is given of the nature of the assault by the person within whose knowledge it solely lies, a court will be fully justified in drawing the inference that it was of such an aggravated nature that the assailant knew or ought to have known that death might result. The remedy lies in the hands of the accused person and if he chooses not to avail himself thereof he has only himself to blame if an adverse verdict is given.”

[45] Counsel for the state argued that the medical evidence shows that the deceased suffered blunt force trauma to the head which caused her death within a reasonably short time as by the morning, she was dead whereas around 5 pm the previous day she had no injuries when she was with Katrina Namses. The head is considered to be a vulnerable part of the body and it is within any reasonable man's knowledge that a person may die if she is assaulted in that area.

⁶ *R v Mlambo* 1957 (4) SA 727 at page 737 C-E

[46] In the matter of the *State V Gerald Kashamba*⁷ delivered by Liebenberg ,J on 3 April 2009, the accused shot his wife resulting in her death. At paragraph 39 of the cyclostyled judgement, Liebenberg, J discussed whether the accused had the required intent when he shot the deceased to death,

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

[47] Having regard to the above, the type of weapon(s) that were used i.e. the hammer and the shoe list, the part of the body where the deceased sustained injuries, the inescapable conclusion is that the accused who caused her death had the direct intention to kill her.

[49] I have considered the totality of the evidence, and I am satisfied that the *alibi* defence raised by the accused is false beyond a reasonable doubt and stands to be rejected. In my view, the State proved beyond a reasonable doubt that the accused is guilty of murdering the deceased with direct intent. He is therefore found guilty as charged.

⁷ *State V Gerald Kashamba* Case No. CC 05/2008 delivered by Liebenberg ,J on 3 April 2009

G N NDAUENDAPO

Judge

APPEARANCES

FOR THE STATE

Ms Ndlovu
Of the Office for the Prosecutor General

FOR ACCUSED

Mr R. Ujaha
Of Mukonda & Company
Instructed by the Directorate of Legal

aid