



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
JUDGMENT**

**CASE NO: CC 38/2009**

In the matter between:

**THE STATE**

**VS**

**JULIUS DAUSAB**

**ACCUSED**

**Neutral citation:** *S v Dausab* (CC 38/2009) [2016] NAHCMD 19 (31 January 2017)

**CORAM:** SIBOLEKA J

**Heard on:** 13, 14, 15, 18, 19, 20, 21, 22, 25, 26 July 2011; 12, 14 March 2012; 13 April 2012; 16, 21 May 2012; 26 July 2012; 15 January 2013; 7, 8, 9, 10, 11, 17, 18, 21, 22, 23 October 2013; 26 November 2013; 31 March 2014; 5 June 2014; 17 September 2015; 19, 20, 21, 22 September 2016; 24, 25 November 2016.

**Delivered: on:** 31 January 2017

**Flynote:** Criminal law: Double murder – Mens rea in the forms of *dolus directus*

and indirectus established by the prosecution witnesses beyond reasonable doubt.

**Summary:** The accused fired a shot at his girlfriend from a .308/7.62 mm hunting rifle. He fired another shot through the shack door of his in-laws that struck and killed the mother of his girlfriend as she was approaching to open the corrugated iron door and see what was going on.

Held: Guilty on two counts of murder; possession of a firearm and ammunition without a licence on diverse occasions.

---

### ORDER

---

In the result the accused is convicted as follows:

Count One: Guilty - Murder dolus directus, read with Act 4 of 2003;

Count Two: Guilty - Murder dolus indirectus;

Count Three: Guilty – Possession of a firearm without a licence on diverse occasions in contravention of section 1 read with sections 1, 8, 10, 38 and 39 of the Arms and Ammunition Act 7 of 1996: Read with section 94 of the Criminal Procedure Act 51 of 1977 as amended;

Count Four: Guilty – Possession of ammunition on diverse occasions in contravention of sections 1, 8 10, 38 and 39 of the Arms and Ammunition Act 7 of 1996, read with section 94 of the ‘Criminal Procedure Act 51 of 1977 as amended’.

---

### JUDGMENT

---

SIBOLEKA J

[1] The accused is charged on the following counts of the indictment:

**COUNT 1: MURDER, read with Act 4 of 2003**

In that during the period 3 – 4 June 2009 and at or near Okahandja in the district of Okahandja the accused did unlawfully and intentionally kill Paulina Kenamune, a 27 year old female person.

**COUNT 2: MURDER**

In that during the period 3 – 4 June 2009 and at or near Okahandja in the district of Okahandja the accused did unlawfully and intentionally kill Elfriede Kenamune, a 44 year old female person.

**COUNT 3: CONTRAVENING SECTION 2 READ WITH SECTIONS 1, 8, 10, 38 AND 39 OF ACT 7 OF 1996 READ WITH SECTION 94 OF ACT 51 OF 1977 – POSSESSION OF A FIREARM WITHOUT A LICENCE ON DIVERS OCCASIONS**

In that during the period 2 – 4 June 2009 and at or near Okahandja in the district of Okahandja the accused did unlawfully and intentionally and on divers occasions have in his possession an arm, namely a .308/7.62 rifle with serial number 651920 without having a licence to possess such arm.

**COUNT 4: CONTRAVENING SECTION 33 READ WITH SECTIONS 1, 8, 10, 38 AND 39 OF ACT 7 OF 1996 READ WITH SECTION 94 OF ACT 51 OF 1977 – POSSESSION OF AMMUNITION ON DIVERS OCCASIONS**

In that during the period 2 – 4 June 2009 and at or near Okahandja in the district of Okahandja the accused did unlawfully and intentionally and on divers occasions have in his possession an unknown amount of ammunition, namely .308 caliber live bullets, without being in the lawful possession of an arm capable of firing such ammunition.

---

**SUMMARY OF SUBSTANTIAL FACTS IN TERMS OF SECTION 144(3)(a) OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977**

---

At the time of her death the deceased in count 1 and the accused were involved in a domestic relationship as they were involved in an actual or perceived intimate or romantic relationship, and/or they have a child/children together. The deceased in count 1 is the biological daughter of the deceased in count 2.

On at least two occasions during the period 2 – 4 June 2009 the accused obtained a rifle from witness Gerson Kheimseb whilst he does not have a licence to lawfully possess such rifle.

During this period the accused also possessed an unknown amount of .308 bullets.

On Wednesday 3 June 2009 the accused took this rifle and drove to farm Okatuo in the district of Okahandja where the two deceased and witness Simson Kavendja were staying. During the late night hours of 3 June 2009 or the early morning hours of 4 June 2009 the accused shot the deceased in count 1 in her abdominal area and she died on the scene due to injuries caused by the shot wound. The accused called the deceased in count 2 and fired a shot at her through a corrugated iron door. This deceased also died on the scene due to gunshot injuries to her chest where after the accused fled the scene.

---

[2] The accused pleaded not guilty to count 1, 2 and 4 and guilty to count 3 in terms of section 112(2) of the Criminal Procedure Act 51 of 1977, as amended.

[2.1] I will now look at the evidence of the prosecution.

[3] Gerson Kheimseb testified that he knows the accused before court as a long time friend. He also resides in Otjiwarongo. On 2 June 2009 the accused approached him for the first time and asked if he could borrow him the rifle (.308, 7.62 serial number 651920) to shoot a stray donkey on the farm. He agreed and

he gave it to him. The accused asked whether he had ammunition for it and Kheimseb said he did not have. After giving this answer, the accused told him "... that is not a problem for him. There are possibilities for him to get hold of ammunition". This is in accord with the ballistic expert who testified that it is possible for any person to get hold of the 7.62 mm ammunition. The rifle belonged to the witness's uncle, Johannes Drakunab. The accused promised him goat meat as the witness does not eat donkey meat.

[3.1] Kheimseb was interested in the promised goat meat. As it was getting late he smsed and asked the accused where he was. The accused replied saying that he was on his way from Otjiwarongo. He brought back the rifle and stated that he did not succeed in getting the donkey and that he will re-borrow the firearm sometime again once it was confirmed to him they have got it, and have chased it in the kraal. The next morning 03 June the accused came back and told the witness that he received a call that the donkey was in the kraal and he needs the firearm again. He gave him the rifle. The accused was driving a green 3 litre Ford Cortina bakkie with a white canopy. The next morning the police called and told him to come at the police station because the rifle was used in a shooting incident. The accused's evidence in chief is that if the donkey could be put inside the kraal there would be no need for him to borrow the rifle because he could simply ask another person there to shoot it for him. This is not what he told Kheimseb.

[3.2] During cross-examination the accused's instructions to his counsel confirmed Kheimseb's evidence in chief which he repeated during cross-examination to say that:

'The accused borrowed the rifle twice without ammunition in order to shoot a stray donkey on the farm ...'

[3.3] The accused's own evidence is that Kheimseb told him that the ammunition was in the safe and his wife was still at work;

That the accused in fact brought the rifle to hand it back to Kheimseb before he drove to the scene of crime but only found children, both Kheimseb and his wife were not there;

That as a result thereof, he could not leave the rifle with children, that is the reason he took it along to the scene of the crime for safekeeping.

All the above facts vital as they are to the accused's case were never put to Kheimseb during cross-examination to enable him to react to it. This clearly shows that it is a total fabrication of events.

[3.4] In his reply to the States pre-trial memorandum dated 02 March 2009 the accused admitted that on the 02-03 June 2009 he borrowed the rifle from Gerson Kheimseb, and took it along to shoot a stray donkey, but was unable to do so as he had no live ammunition. There was no mention about taking the rifle along only for safe keeping after finding out there were only children, both Kheimseb and his wife were not at home at the time he wanted to hand it back to them.

[3.5] The above evidence credibly indicates that the fact that Kheimseb did not have ammunition for the rifle was not a problem to the accused. His only problem was the people at the farm finding the stray donkey and putting it in the kraal. That is why when he heard that the donkey has been found and was in the kraal he came back to re-borrow the rifle in order to go and shoot it. It was during the evening of that same day the accused re-borrowed the rifle that the two women were gunned down. The examination conducted by the ballistic expert, test firing a 7.62 mm bullet similar to the empty cartridges retrieved at the scene of crime showed that, the empty cartridges were indeed fired from the rifle the accused borrowed from Kheimseb.

[3.6] From the whole evidence on this matter it is highly improbable that after being told by Kheimseb that he did not have ammunition for it, the accused would still have proceeded to borrow it twice in order to shoot a stray donkey at the farm without him having acquired the ammunition elsewhere to carry on that exercise. This conduct coupled with what he told Kheimseb on the possibility of

him acquiring ammunition elsewhere credibly shows that he got the ammunition of the 7.62 hunting rifle from elsewhere. It is further clearly apparent from the whole evidence that there was no donkey that had to be shot, he was in fact referring to the two deceased women.

[4] Ndjambi Simson Kavendja testified that he was 39 years old at the time of the incident. He is a resident of Ovitoto since birth. At his house he was living with the following people; his deceased girlfriend Elfriede Kenamune, the accused's girlfriend Paulina Kenamune and five children. At the time of the incident Kavendja and Elfriede were staying together for eight years.

[4.1] On the day of the incident 04 June 2009 the accused came at 20h00 in the evening when the children were already asleep. He had a bag and a suitcase belonging to his girlfriend. There was moonlight, the visibility was good. He came with a green Ford Cortina with a white canopy, registration number 141 Otjiwarongo. He told his girlfriend that he was tired and that she should make a bed for him in the backside of his vehicle, which she did. She took blankets from her room and they went to sleep. The accused appeared to be normal without any problems. Kavendja and his girlfriend Elfriede were still sitting at the fireplace. Later the two also went to sleep.

[4.2] Kavendja testified that at around 00h00 Elfriede, his deceased girlfriend woke him up which he did. Elfriede put on the lamp and started walking towards the door to open it. Before she could do that a gunshot came through the shack door, striking her. She screamed and fell down next to the bed.

[4.3] According to Kavendja, when the deceased put on the lamp, the inside of their shack was illuminated and that was when she started walking towards the door to open it. Kavendja further testified that the zinc door of his shack had holes through which the accused may have looked through and saw her approaching. The accused called Kavendja and told him to come out which he

did. As he opened the door he saw that the accused was standing with a rifle in his hands. This is how he knew it was him who shot through the door of his house. He did not see anyone else. Kavendja only saw the accused and his vehicle, that is all. Kavendja saw that the shot went in through the shack house door and out through the back side of the zinc house. The accused told him that he does not have anything with him. At gun point he said he should help him push the car to start in reverse. He complied and when he was pushing the vehicle he saw the accused's girlfriend laying on her tummy with arms stretched out next to the vehicle. He ran to Kandari who called the Police.

[4.4] Kavendja waited at Kandari's place until four police officers came, that was when he noticed that the accused's girlfriend was also dead. Kandari whose actual names are Sagarias Gaeb corroborated the evidence of Kavendja getting to his house, asking him to call the police. The next morning Kavendja went to call Oscar to open his house as he was left in charge of the scene of crime by the police. He wanted to remove the pots from the hut. There was a white bowl with water outside, he took it and poured out the water. An empty case (cartridge) fell out and he covered it. This empty cartridge was next to the door of his shack. He later gave it to the police. Alfred Nanub was with him and he confirmed this evidence.

[4.5] During cross-examination Kavendja testified that sometime back before the incident the accused stayed together with his deceased girlfriend in Otjiwarongo. According to him at all times even before the incident when the accused visited his girlfriend they slept at the backside of his bakkie. During the night of the incident he did not hear people talking outside his shack. He explained what he meant by the words "... making him to move while pointing a gun at him". Kavendja said he meant that the accused while walking backwards directed him to move and help him push his vehicle to start at gunpoint. The accused was pointing the rifle at him walking backwards till he reached the door of the vehicle and in the process saying, "help me".



[4.6] Kavendja denied the presence of an unknown person who was allegedly speaking Oshihero to his deceased girlfriend, Elfriede. He said he did not see the accused shooting but because when he opened his shack door at his request he saw him standing holding a rifle, he thought it was him who did the shooting. Kavendja was drawing water with a donkey cart during the day before the evening of the incident that was the reason why he went to sleep tired such that Elfriede had to wake him up. The two spare tyres of the accused's bakkie were inside his shack. At the time of the incident Ovitoto police did not have a vehicle. The police officer Johannes Diergaardt corroborates him in that regard. The station had two police officers when one was on leave, the other was on duty. Kavendja phoned him on the evening of the incident, but there was no answer.

[4.7] Although his deceased girlfriend was brewing Tombo at home, Kavendja said he does not drink alcohol. Kavendja experienced shock from all the shootings that took place at his residence. That is the reason why he ran away when the accused's vehicle started, and he did not see which direction he took. Neither could he know whether he drove fast or not. Kavendja said there is no toilet at his shack, they use the bushes when nature calls. According to Kavendja it was during the accused's third visit to his residence when the incident happened. During the pushing of the vehicle, the accused pushed with his back while he held the firearm such that the barrel still pointed at him.

[5] Sagarias Gaeb testified that he is always referred to as Kandari. He is a resident of Okandjira in Ovitoto where he owns a shop, situated 200 meters away from his residence. On the day of the incident just after midnight he was awoken by a knock at the window of his room. He saw that it was Ndjambi – the vividly shocked Simon Kavendja told him about the double murder at his residence, and requested him to call the police which he did. From this witness's house, it is possible to see Kavendja's residence. There was no answer at Ovitoto Police, Windhoek gave him the telephone number for Okahandja Police and he informed

them about the incident. From this witness's shop there is a stretch of 40 kilometers gravel road, connecting the Okandjira to the main Okahandja – Windhoek tarred road. Gaeb slept further, till the next morning. When he arrived there many people were standing in front of the house. He saw a hole in the door of Kavendja's shack where the firearm was fired into.

[5.1] During cross-examination Gaeb stated that the scene of crime is 400 meters from Ovitoto Police Station. He said on the day of the incident he called the officer on his cellphone because there is no landline telephone at the station, but there was no answer.

[6] Johannes Diergaardt is a police officer who was stationed at Okahandja at the time of the incident. On 4 June 2009 he received a report on the incident at Ovitoto, and he drove there. At the scene of crime Simon Kavendja the owner of the shack showed him a long empty cartridge of a hunting rifle covered with a bucket. He picked it up and saw that it was a 7.62 RIMI empty ammunition cartridge. He latter gave it to W/O Maletzky at 21h00 that same day at Okahandja Police Station. Kavendja told him he covered the cartridge in order to show it to the police, and it was indeed the reason why he showed it to him. Diergaardt spent the whole day in Ovitoto attending to all problems, and providing water to the officers there. Ovitoto Police Station is a complete house, divided into a charge office and rooms. It is manned by two officers. When one is off-duty the other one remains at the station. At times there is nobody because they are usually picked up by private persons to attend to complaints. He transported the accused from Otjiwarongo to Okahandja.

[7] D/W/O. Deon Garoeb of Okahandja received information about the shooting at Okondjira in Ovitoto. He took along Const. Brinkman and Sgt. Tjikuru and they drove to the scene. In Ovitoto, Kandari and Kavendja took them to the scene of crime where he found a female laying on her stomach outside the shack. She had a wound on her right thigh, and was already dead. Kavendja took

the officer inside the shack where he saw another female with a wound in the chest, also dead.

[7.1] D/W/O Garoeb removed children who were inside the shack. They waited for Johan Green the photographer and W/O Maletzky the investigation officer, who later found and joined them at the scene. D/W/O. Green observed the tracks of only one vehicle which Simon Kavendja explained to him was the accused's bakkie. There were no tracks of another vehicle at the scene. He again went through the scene with officers Green and Maletzky while photos were being taken. They worked on the information they received saying the suspect was the boyfriend of the first deceased. They got the registration number of the accused's vehicle and started looking for the Ford Cortina with the help of other local men but they did not find it.

[8] Robert Karondore is a police officer, working for ten years at the Scene of Crime Unit at Otjiwarongo. On 4 June 2009 W/O Maletzky asked him to come to the police station to take photos of a green Fort Cortina vehicle registration number N 141 OT and its contents which were as follows: a mattress, blankets, a firearm, a bullet projectile and the accused. He saw blood on the canopy and on the blankets. He compiled a key to the photo plan.

[9] Melvin Sydney Adams testified that at the time of the incident he was the Commander of the Quick Response Unit in Otjiwarongo. He was doing patrol duties with twelve members. They were using two vehicles. During the night D/Insp. Kharaxab, the Unit Commander of the Investigation Unit asked him to pick up W/O Uirab from his house. In that process he was informed about the shooting incident in which the accused was allegedly involved and fled the scene on his way to Otjiwarongo. He later removed children from the accused's residence and took them to W/O Uirab's house for safety. He knows the accused as a truck driver and owner of a green Fort Cortina with a white canopy. The

accused used to park his truck at the police station and he also knew him as Nama Damara.

[9.1] This witness previously visited the accused's residence. In all, he knew the accused very well. Adams and all his members on duty drove to the Okakarara turn off. He placed the officers around that T-junction and waited for the accused's vehicle as per briefing he got from the police. They waited for hours at Okakarara junction but the accused's vehicle did not drive past. One of these witness's team members knew that the accused's father was farming along the Okahandja road near Success, 70 kilometers from Otjiwarongo. They decided to go there. Adams was the driver of the front vehicle. As they drove for about 20 kilometers from the Okakarara junction he observed the accused's Ford Cortina approaching.

[9.2] Adams made a U-turn and so did his co-officers in the other vehicle, they followed the accused's vehicle normally without stopping it. The traffic was heavy – mostly consisting of trucks heading towards Otjiwarongo. Adams was also aware that the accused was armed – that is why they just followed his vehicle in the direction of Otjiwarongo. The accused's Ford Cortina followed a truck and this witness's vehicle was following behind the truck. Suddenly the accused decided to overtake the front truck at a curve and a blind rise. In addition to that he overtook in full view of an oncoming truck. By the time Adams overtook the truck in front of him the accused's Ford Cortina was long gone. It was nowhere to be seen.

[9.3] They did not know whether he took the Okakarara route or he drove straight on towards Otjiwarongo. For this reason Adams directed the second vehicle to look for the accused along the Okakarara road while his vehicle drove straight along the Otjiwarongo road. Adams drove very fast doing 170 to 180 k/m per hour to track the accused's Ford Cortina which was in front of him but he could not see it all. He called D/Insp. Kharuxab and asked that they should stage

a road block at traffic circle entering Otjiwarongo which they did. That was how the accused was arrested and Kharuxab told Adams he was at the police station.

[9.4] Adams testified that he was a VIP Police instructor, he knows what a car chase is all about. It means chasing after another vehicle while travelling at more than 120 kilometers. The accused did not chase after another car.

[9.5] During cross-examination Adams stated that although they did not specifically look for a white sedan that morning, no such a vehicle drove past before he spotted the accused's bakkie and thereafter.

[10] Johan Green is a police officer, who at the time of the incident was working for twelve years as a Scene of Crime officer, stationed at Okahandja. He attended the scene of crime on 4 June 2009 with the investigation officer Maletzky. They came at night and again returned the next morning. They found the first deceased lady outside the ghetto room and another lady inside next to the door. They both had gunshot wounds. He took photographs that night and resumed the photo taking the next morning. The various points were shown to him by Simon Kavendja, the owner of the shack where the incident took place. Kavendja also gave him an empty cartridge at the scene, pointing out to the police officer where he picked it up. It appeared that Kavendja did not know that he was not supposed to touch or pick it up, but should just have left it there and show it to the police when they visited the scene. Green also found an empty cartridge of a 7.62 R1 M1 AA 30 at the scene, making a total of two empty cases found at the scene.

[11] D/W Reinhardt Christiaan Maletzky testified he is attached to the Investigation Unit in Okahandja and the investigation officer of this matter. After he received the shooting report at Okandjira in Ovitoto he drove in one vehicle with the photographer W/O Green. They had information that the suspect was driving a green Ford Cortina bakkie with the registration no. N 141 OT when he

left the scene of crime. He did not see the accused's vehicle on his way from Okahandja to the scene of crime at Okandjira in Ovitoto. This is despite the fact that he arrived at the scene in the early hours of the morning at the scene. At the scene he found D/Sgt. Garoeb and his team already there. He met Simon Kavendja, and Kandari, a well known shop owner there. Simon Kavendja also known as 'Jambi' informed him that it was the accused who was also known as Namanama who shot the two ladies dead and fled the scene in his green Ford Cortina bakkie which has a white canopy. Maletzky contacted Insp. Kharuxab for assistance in tracking down the accused seeing that he was a resident of Otjiwarongo. Kharuxab later called back to say the accused's vehicle was spotted heading for Otjiwarongo, and later his arrest was confirmed to him.

[11.1] The ladies were shown to him by Simon Kavendja, one outside, the other inside Kavendja's shack. He corroborates Sgt. Garoeb on the injuries inflicted on the two victims. Sgt. Green showed him where he found the 7.62 empty cartridge not far from the entrance door to Simon Kavendja's shack wherein the second deceased was shot as she was approaching the door to open it. Maletzky also observed a hole through which the bullet went in through the door of the shack and exited at the back of it. W/O Green cut out the metal parts of the door where the bullet made a hole and another part at the rear where it exited. Reserve Const. Diergaardt also gave him a second empty cartridge which Simon Kavendja found at the scene of crime. Later on 9 June 2009 Maletzky and W/O Green again visited the scene. It was on this day that Simon Kavendja showed him the spot where he picked up the second empty cartridge. According to Maletzky the scene of crime is situated on a sandy terrain. They only found the tracks of one vehicle there. The nearest police station from the scene of crime is Okahandja which is about 45 kilometers away.

[11.2] After Insp. Kharuxab informed Maletzky about the arrest of the accused in Otjiwarongo, he quickly drove there to take charge of the situation as the investigation officer. When he arrived at Otjiwarongo police station the accused

was handed to him; so was the .308 hunting rifle serial no. 651920 which was seized from the accused. Maletzky observed that the accused was on his nerves. He looked anxious and was smoking a lot, the jean trouser he was wearing had blood stains on. Maletzky inspected the green Ford Cortina bakkie which was also parked at the police station. In the loading box he saw a blood stained mattress and some bloodstained disorderly placed blankets laying around. It appeared like somebody was laying there in the loading box. There was also some blood spots on the loading box itself. Maletzky directed the photographer to take photos of them, which he did. One of the tyres of the accused's vehicle was totally worn out.

[11.3] When W/O Maletzky took down the warning statement the accused elected to remain silent. He said he will tell his counsel what had happened. Correctly in line with our law he was not taken to point out the scene of crime. The evidence of Maletzky and Insp. Kharuxab is that the accused did not tell them about the presence of the vehicle of an unknown assailant at the scene of crime. This evidence is entirely in accord with the instruction he gave to his counsel which was put to W/O Maletzky saying: I quote verbatim at page 583 from line 10 of the record:

“But I am telling you the accused person informed you of nothing, you took his statement. He said I will make my statement to my lawyer. He informed his lawyer of that second vehicle. He does not need to inform you? --- My Lord he should, if he is a truthful person he should have informed the police ... that I am not a guilty party, there was a third or second vehicle there on the scene but why did he hide certain things for us.”

[11.4] During cross-examination Maletzky said the accused was so anxious that he could not even stand properly on his feet. He was just moving too much around. The way the accused was acting was such that the officer could clearly see that something was wrong, he did something which was wrong.

[11.5] Near the body of the first deceased who was laying outside Simon Kavendja's shack, Maletzky saw what he said was not a balaclava, but an orange hat mostly worn by people during winter. Maletzky also found a projectile in the loading box of the accused's vehicle. Simon Kavendja covered his girlfriend's body with a blanket so that the children who were sleeping inside the shack should not see their mother laying there dead. Maletzky testified that he did not see any tampering with the scene of crime. Witnesses clarified, where, when and how they found the exhibits. He said it was Simon Kavendja who gave the empty cartridge to Const. Diergaardt who was visiting Ovitoto Police Station at the time. Const. Diergaardt handed the cartridge to him. That was when Maletzky drove to the scene of crime and Simon Kavendja showed him the spot where he picked it up. According to Maletzky, a crime scene can be revisited at any time once such a need cropped up. Maletzky did not take the plaster of Paris matching the accused's shoe with any footprint on the scene because according to him it was only the accused who was at the scene.

[11.6] According to Maletzky, if the accused had informed the Ovitoto police about the sedan vehicle which according to him was at the scene, Ovitoto would have contacted Okahandja police who in return would immediately have alerted police officers at Okahandja, Hochfeld, Okoyetu, and Osire to see whether they could get hold of the suspected vehicle, but he did not do so.

[12] William Onesmus Nambahu is a ballistic expert, meaning he is a Chief Forensic Scientist. On 23 June 2009 he received the following exhibits through the scene of crime officer, Windhoek, D/W/O Kathena: 1 x 7.62 millimetre rifle, serial no. 651920; 1 x 7.62 millimetre bullet; 2 x 7.62 millimetre spent cases; 1 x 7.62 millimetre spent projectile; and 1 x metal plate respectively. He kept them in the ballistic strong room from where he collected them. He checked the exhibits as per attached form and found that they were all received as indicated on the accompanying form. He first took the spent projectile that he received with the



exhibits and placed it under the microscope. He found that its grooves were damaged and therefore not suitable for analysis purposes.

[12.1] Nambahu took 1 x 7.62 millimetre bullet and test fired it at the shooting range. Hereafter he compared the empty case of the bullet he test fired with the two empty cases he received from the police. He found that the linings on the two empty cases matched those on the bullet he test fired. He was satisfied that the two empty cases were indeed fired from the 7.62 millimetre rifle that he received together with the exhibits on this matter. He accordingly recorded the results of his test on the ballistic identification chart.

[13] Dr. Simasiku Kabanje testified on behalf of Dr. Rafael Ray Estrade, a Cuban specialist in forensic medicine, whose contract came to an end and has gone back to his home country. This doctor conducted the post mortem on the 27 years old first deceased Paulina Kenamune. The doctor's chief post mortem findings were that the deceased had a gun shot that entered her body on the left lateral abdomen and exited on her right buttock. It was this gunshot injury that caused her death.

[13.1] Regarding the second 44 years old deceased Elfriede Kenamune, the chief post mortem findings were that she had a gunshot that entered and exited her body on the chest. This shot crushed the left lung oracle and ventricle thereby causing her death.

[14] Julius Dausab is the accused on this matter. He was born in Okahandja. He testified that he and his deceased girlfriend with whom he had two children had agreed to get married. He was residing in Otjiwarongo where he also worked as a truck driver. He stayed with his deceased girlfriend and all children attended school with his financial support. During school holidays in May 2009 his deceased girlfriend took all four children for holiday in Ovitoto at her mother's

residence at Okandjira. The accused's girlfriend is the daughter of Simon Kavendja's girlfriend Elfriede Kenamune, the second deceased on this matter.

[14.1] While in Ovitoto the deceased's girlfriend and her mother told the accused that a healer said the accused's previous girlfriend has be witched Paulina Kenamune so that she will die if she came back to the accused's residence in Otjiwarongo. On hearing this he went to his employer asking them to cancel his trip to South Africa and also to help him financially. He took his mother and uncle to Ovitoto to attend to the story of witchcraft. The accused paid for the healer's services. On his way back to Otjiwarongo he first found one stray donkey along the road. Later he saw an elderly man struggling with donkeys. He gave him a lift back to where he saw a male stray donkey. The old man asked the accused if he was interested to buy it. He agreed to buy and slaughter it to sell the meat, a process that cannot be done along the road.

[14.2] The accused asked the old man if the stray donkey cannot be taken to a kraal at Farm Success as he knew the owner from whom he can ask for a firearm to shoot it. When he drove back to Ovitoto, he again met the elderly man with donkeys, as he had not yet reached Farm Success. Kheimseb borrowed him the rifle. He was told that the ammunition was in the safe and Kheimseb's wife was still at work. The accused later again drove to Kheimseb's home to look for ammunition or to hand back the rifle, if he still did not get ammunition, but both man and wife were not there. There were only children in whom he could not intrust the custody of a rifle. This evidence has been credibly displaced by the accused's own plea of guilty to count 3 in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 as alluded to infra in the evidence of Gerson Kheimseb.

[14.3] The accused drove and arrived at Ovitoto, Simon Kavendja's residence at 20h30. All children were already asleep inside Kavendja's shack. His girlfriend, her mother and Kavendja were sitting around the fire. He told his in-laws he has

to return to Otjiwarongo in order to drive out early the next morning, but his girlfriend asked him to sleep over, to share two or three things, and he agreed.

[14.4] The accused's deceased girlfriend prepared bedding in the backside of his bakkie and the two went to sleep there. His in-laws also went to sleep inside the shack house. The accused felt unwell in his stomach and he walked into the bushes for the first time to relieve himself. He returned and was chatting general things with his girlfriend. While they were still awake a white vehicle came and stopped at the residence of his in-laws. It stopped there for a while and nobody came out.

[14.5] After a while it drove away to a certain distance. According to the accused, it was his girlfriend who in the first place asked him to sleep over, and she was then requesting him to drive back to Otjiwarongo. The accused told her it would be better if he drove off at 03h00 in the early hours of the morning as there were animals on the road. The accused again left for the bushes to relieve himself. It was in June, and it was cold. He had a running stomach. He only had a trunky on, he left his long trousers on the bedding.

[14.6] The canopy door of his bakkie was standing open with the help of a stick. As he was sitting in the bushes relieving himself, the same vehicle returned, and stopped in front of Kavendja's residence. A short man got out wearing a long garment (jacket). The unknown man walked inside the yard, stood there and called out his girlfriend's name. In Oshihero, he asked what she was doing in the vehicle. The man said the accused's girlfriend and her mother already told him she was no longer with the accused. It appeared to the stranger that was just meant to get hold of his money. The accused could not properly hear the answers from his girlfriend to the unknown man, because she was inside the canopy of the bakkie. The unknown man started swearing very ugly saying " ... this bastard, the vagina' son". The accused's girlfriend swore back to the unknown man, but her replies were not clear from where she was sitting. The

accused experienced this strange verbal exchange of words for the first time. It lasted ± three to four minutes and he only heard a gunshot.

[14.7] The accused realized that there was danger where he was sitting relieving himself in the bushes. From where he was still sitting he saw the unknown man walking to the door of his in-law's house. The accused shifted from his position and came behind his in-law's house from where he could clearly hear the exchange of words between the unknown man and the mother of his girlfriend. The stranger was saying "... Nanjenje in Oshisherero meaning you will see – when you were eating my money you lied to me and you said I can marry your daughter but you were just lying to me". The accused's mother-in-law replied by saying that it was not necessary to argue over something that could be resolved by discussion. The accused does not know whether the unknown man kicked or hit the door, but he could clearly hear that the door was a bit roughly handled. The reply from his mother-in-law was followed by the second gunshot, the stranger got back to his vehicle and drove off. The mother-in-law screamed.

[14.8] The accused's evidence is that he was already standing behind the house at the time of the exchange of words between the stranger and his mother-in-law leading up to the second gunshot. Now he again testified that when the stranger drove off he stood up. It means standing up from where he was sitting relieving himself. This is a material contradiction in his own evidence. The accused ran to his vehicle and saw that his girlfriend was shot. He explained what he saw when he ran to his bakkie moments after his girlfriend was shot. I quote verbatim at page 1336 line 20 of the record:

"Okay, you stood up first thing you did was to run to your vehicle okay proceed.  
--- That is correct my Lord. Okay --- My Lord so when she was shot my Lord due to the fact that the canopy was opened that she was then struggling to open the club or the back of the vehicle, so as she opened the back of this vehicle she also fell out".

The above evidence cannot be correct, given the fact that according to the accused's own evidence, at the time his girlfriend was shot at, he was still sitting in the bushes relieving himself. He then stood up and shifted his position. He came to stand behind his in-laws shack. How could he have been able to see exactly what she did in order for her to be found laying on the ground behind the bakkie. Simon Kavendja testified the following at the time he opened the door of his shack at the request of the accused, immediately after the second victim was gunned down.

I quote verbatim from the record at page 189 line 10: 20

“He called me Ndjambi, Ndjambi. And he said I do not have anything with you, wake up. ... yes. --- when I went out, he was standing ... with a gun in his hand”.

The above evidence goes to the core of the accused's case related to the presence of an unknown person at the scene, at the time of the incident. It clearly shows that the accused himself is the double murder suspect.

[14.9] The accused continued testifying that after calling both his in-laws a few times, Kavendja responded. The accused told him to come out as his wife has been shot. The accused stated that the incident took place in June when it was cold and indeed he found both his in-laws and his girlfriend sitting around the fire that evening. When Kavendja came out at his request, he started explaining to him about the stranger who shot his wife and at the door of the shack. The accused asked Kavendja if somebody was struck inside the house. Kavendja said his girlfriend just fell next to the bed. Thereafter he answered: “why is this boy doing like this”. This answer infuriated the accused who thought the stranger could possibly be known to Kavendja or else he could not have known he was a boy. The accused then forced Kavendja with a fist to say something, but he did not succeed.

[14.10] The accused testified that he went on and asked Kavendja about the presence of a police station or the residence of the police officers with a view

to driving there and report the incident, but was told there was only a sub-station, unattended during the night because officers slept at their houses. According to the accused, Kavendja then asked if the vehicle could be pushed to start and only then did the accused remove the body of his girlfriend from the back of the bakkie and placed it aside so that his bakkie could reverse. He then took out his long trouser which he left there at the time he went to relieve himself and dressed. It is my considered view that in such cold weather as described by the accused himself, it is highly unlikely that he could have stayed dressed only in a trunky for such a long time.

[14.11] The accused further testified that they then pushed the vehicle to a start whereupon Kavendja jumped the fence and ran away. According to the accused, Kavendja may have mistaken the canopy stick he was holding for a rifle, that is why he ran away. It is my considered view that there is no way Kavendja could have mistaken a rifle for a stick. More so, when regard is had to the shooting that took place at the scene and the results of ballistic tests which revealed that the empty cases were fired from the rifle found in the bakkie of the accused. It is also highly unlikely that an elderly man like Kavendja would have decided to jump the fence of the yard and run away for no apparent reason, and in particular if the atmosphere of the shooting incident was so successfully calmed down by the accused himself as he testified.

[14.12] The accused further testified that at some stage he took out the rifle from the back of the driver's seat and showed it to Kavendja saying if he had ammunition he would have shot at the stranger's sedan. It is not clear when this happened, because Kavendja is said to have already ran away on seeing the canopy stick.

[14.13] According to the accused when his vehicle started, he first drove to the police station in Okandjira, 300 meters away from the scene. He knocked and threw stones on the roof of the station, but there was nobody. He spent twenty

five minutes talking to Kavendja, visiting the Okandjira Policie Station before he chased after the strange vehicle. He was only guided by dust that is why he chased in the direction of Hochfeld. He drove at a very high speed, but he could only see the lighting of a vehicle at a far distance. According to the accused the dust he was seeing, was that of the white sedan driven by the unknown murderer.

[14.14] The threads of his tyre peeled and went off damaging the petrol lid and the exhaust pipe as he was chasing the white car along the Otjisundu road. He stopped, found that the interior part of the exhaust pipe was loose and used a cloth to tie it in place. He made a turn to his uncle's farm on the same route to ask for spare wheels, but the uncle was using another car model with different tyres. He started driving slowly towards Otjiwarongo. At the entrance traffic circle, he found an unmarked green 1400 pickup vehicle and a traffic vehicle parked behind it. All occupants were sitting inside and he thought an offence has been committed. He proceeded driving to the police station. He noticed the two vehicles following him, one had its blue lights on. The accused thought that the bad state of his tyres attracted the attention of the police, and he was pulled off the road.

[14.15] He was body searched, his vehicle was also searched, and taken to the police station. Here all the bedding, his shoes and other items and the vehicle itself was impounded by the police. According to the accused the empty cases retrieved at the scene of crime were of an R1 firearm, used by the military and the police. He testified that all such firearms and ammunition cannot be accessed by civilians.

[14.16] The accused's evidence was riddled with numerous improbabilities. During cross-examination he was very evasive to simple pertinent questions. He preferred to give his answers in a confusing long rambling manner.

[15] Counsel for the prosecution submitted that his witnesses have inferentially proved beyond reasonable doubt that it was the accused who gunned down the two deceased women. He persuaded the court to reject the story of the stray donkey and the presence of an unknown assailant at the scene of crime on the day of the incident. He asked that the accused be found guilty on all counts preferred against him.

[16] Counsel for the accused submitted that it was only the rifle that was sealed in a forensic bag while other exhibits were contained in a stapled envelope, and the chain of custody has been broken. This is not correct as the ballistic expert correctly pointed out that some exhibits from the police usually come in stapled envelopes. It is my considered view that if regard is had to nature of exhibits which in this case were two 7.62 mm empty cartridges; one 7.62 mm projectile; one 7.62 mm bullet and two metal plates cut out where the bullet had entered the shack door and exited on the rear side of the shack. The chain of custody was properly accounted for. All witnesses who cut the plates, picked up the empty cases and projectile testified as to where they picked/collected them to whom they handed the exhibits up to the scene of crime officer, W/O Kathena. This officer compiled a pro forma application form for scientific examination request properly signed by herself and the investigation officer W/O Maletzky and handed into court as an exhibit 'D'. It is common cause that the 308/7.62 mm found in the accused's bakkie uses military ammunition, the accused confirmed this in his evidence in chief. The ballistic expert also conceded to that fact, and said he did not have the 7.62 mm ammunition in stock. That is the reason the police provided him with the 7.62 mm bullet he test fired. There is no foul play in this exercise.

[16.1] Blood samples were also drawn from the accused during the early stages of investigation but were not sent for analysis due to lack of relevancy to the charges which were eventually preferred against the accused.



[16.2] Counsel for the accused submitted that the prosecution has dismally failed to prove its case against the accused beyond reasonable doubt. He persuaded the court to convict the accused only on count 3 on which he pleaded guilty and to acquit him on all other charges. Substantiating his submission the accused's counsel said the failure of the police to have the accused tested for possible gun powder residue immediately at the time of his arrest is fatal to the prosecution case. According to this counsel the accused's contention that he did not do any shooting with the rifle he would have easily have been displaced. This is not correct because the gun powder residue is not the only evidence that would have connected the accused to these crimes.

[16.3] On the non-testing of the accused for gun possible powder residue his counsel referred to the Supreme Court judgment in the matter of *Albertos Monday v St*<sup>1</sup>, delivered on 21 February 2002. In this matter the appellant was convicted of rape, the victim was medically tested and found to have been suffering from Gonorrhoea. Despite the doctor testifying that the Gonorrhoea of the victim consequently indicated no more than a sexual act with a person having Gonorrhoea, the appellant was not medically examined. His blood sample was drawn to be examined for other purposes, but not to see whether he also had the disease or not. In conclusion the appeal Court referred to the cumulative effect of irregularities in the case and in the failure to have the appellant also medically examined to determine whether he also had Gonorrhoea or not and the appeal was upheld.

[16.4] It is my considered view that the above appeal is clearly distinguishable from the matter at hand. The crux in that appeal was the evidence of the doctor who examined the victim saying the Gonorrhoea came from the sexual encounter. The medical examination of the appellant was thereby made central to his conviction, that is why the failure to do so and other irregularities contributed to the setting aside of the conviction and sentence. In the matter at hand, the failure

---

<sup>1</sup> *Albertos Monday v S SCA* delivered on 21 February 2002.

of the police to have the accused examined for possible gun powder residue on his hands is not fatal to the prosecution case. The reason being the presence of a much larger body of evidence inferentially pointing only at the accused as the person who gunned down the two women to death.

[16.5] Another distinguishable feature is that there were no irregularities in the way the police have investigated the matter at hand as the accused's counsel had submitted. The other issues raised by the accused's counsel were what he termed a balaclava that was found at the scene, but was not brought before court as an exhibit. This is also not an issue. The accused's own evidence was that the incident took place in June when it was cold, hence when he arrived at the scene some minutes after 20h00 in the evening, he found his girlfriend; Kavendja, and Elfriede Kenamune still sitting around the fire.

[16.6] According to the investigation officer, there was no balaclava. What was found at the scene was an ordinary hat usually worn by some men during winter. Looking at the whole evidence and in particular at the manner in which the accused has fabricated the events of the incident, it is my considered view that the hat could have belonged to him, and he left it behind when he fled the scene.

[16.7] The accused's counsel also referred to Kavendja's evidence as being full of contradictions which is not the case. The court found his evidence to be very credible, he had all the means to even tell the court that he saw the accused shooting the victims, but he simply said he didn't observe or hear the sound of the first gun shot that killed the accused's girlfriend. He was fast asleep, tired from the drawing of water using a donkey cart. Only when he was awoken by his deceased girlfriend Elfriede Kenamune, did he begin to realize there were problems on his residence. I am satisfied with the account of Simon Kavendja the moment he woke up, up to the end of the incident. His account is coherent, to the point, and credible in all material respects.

[16.8] The accused's counsel also said it did not make sense that the accused could have shot and killed the two ladies without doing the same to Simon Kavendja in order to destroy the whole evidence. It is my considered view that such a conduct by the accused does in fact make sense, when regard is had to the history of how he borrowed the 308/7.62 mm rifle that uses the R1 military ammunition. He told Kheimseb that there were possibilities for him to get ammunition elsewhere. It therefore makes sense that he only managed to get the two bullets which he used to shoot and kill the two ladies.

[16.9] The accused's counsel submitted that the accused was not pursued all the way from the scene of crime at Okandjra, Ovitoto, he could easily have set alight all the bloodstained bedding, but he did not do that because there was nothing to hide. I don't find anything wrong in this conduct, because all that the accused was looking at is to forcefully persuade the court about the presence of an unknown assailant which from the whole evidence is not the case.

[17] The analysis of the accused's evidence / the unknown assailant: The accused's vehicle came to park at the scene of crime, a sandy terrain; it remained there till the two ladies were gunned down and the accused drove away. The police arrived early in the morning and saw the tracks without any difficulty. Kavendja also saw and testified about the tracks of the accused's vehicle, saying it was the only vehicle he saw at his residence.

[17.1] The evidence of the accused regarding the unknown assailant driving a white sedan vehicle is that it first came, stopped at the scene of crime for some time and none of the occupants got out. It drove away only to come back again at the scene. This time around, the alleged unknown murderer climbed out of the car. He first engaged in a verbal exchange with the accused's girlfriend, gunned her down. The stranger proceeded to further engage in another verbal exchange with Elfriede Kenamune, Kavendja's girlfriend and also gunned her down. The improbabilities in this evince are the following:

Firstly, the most pertinent crucial displacement the above evidence is why the tracks of the unknown sedan vehicle were nowhere to be seen at all by any of the police officers as well as Simon Kavendja, the owner of the residence where the incident took place.

Secondly, how could the verbal exchange of the unknown assailant with the two ladies could be so clearly heard by the accused sitting and relieving himself a distance away in the bushes, but could not be heard by Kavendja who was sharing the same bed with his girlfriend, Elfriede Kenamune. This is especially when regard is had to the fact that the stranger appears to have been talking on top of his voice.

Thirdly, how Elfriede, who was already in bed could have engaged in such a verbal exchange with a stranger in the middle of the night without waking up, alerting and seeking help from her boyfriend, Simon Kavendja. Equally improbable is how Kavendja would have failed to be alerted or awoken by all the noise of the verbal exchange from the start to the end.

[17.2] The family set up at the scene of crime consisted of Simon Kavendja, the owner of the shack where the incident took place, Elfriede Kenamune his girlfriend, Paulina Kenamune, the latter's daughter and the accused's girlfriend plus five children. Immediately after the second deceased was gunned down, the accused called Kavendja to come out saying "I have got no any problems with you ... there is no any problems with you ... I will not do anything to you". It is my considered view that the above are ordinary words which imply that the accused had problems with the two deceased ladies, but not with Kavendja. In the light of the above observations it is my considered view that the prosecution witnesses only inferentially point to the accused as the person who gunned down the two ladies at the scene of crime on the evening of the incident.

[18] In my view compliance with the requirements that need to be present before a conviction based on inferential circumstances can be sustained as stated in the matter of *R v Blom*<sup>2</sup> have been met. In the above matter the following requisites were set:

“In reasoning by inference there are two cardinal rules of logic which cannot be ignored:

- (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
- (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought 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”.

[19] In the light of all the evidence placed before this court, the submissions for and against the accused, I have come to the following conclusion:

[19.1] That at the time the accused visited the scene of crime he was in possession of the 7.62 mm rifle serial no. 651920 which he borrowed from Gerson Kheimseb with a view to obtaining ammunition elsewhere. The ballistic expert's evidence that it was possible to get the ammunition of the 7.62 mm rifle elsewhere has credible credence because that is in fact what the accused told Gerson Kheimseb, and he indeed succeeded to get the ammunition which he used at the scene of crime.

[19.2] The accused's case is that he was chasing a double murderer driving a white sedan from the scene of crime in Ovitoto to Otjiwarongo. It is therefore my considered view that the first sight of any police vehicle irrespective of the Unit it belongs to, should have been a great relief and a heaven fallen chance for him to immediately report the double murder suspect driving a white sedan he was chasing after. In point here is the police vehicle he found parked at the entrance

---

<sup>2</sup> R v Blom 1939 AD 188 at 202-3.

traffic circle to Otjiwarongo, which he just ignored and drove past till he was arrested further down the street, in town.

[19.3] The shoeprint which the scene of crime officer said did not belong to the accused does not sway the direction the whole body of evidence that is pointing at the accused. This is if regard is had to the undisputed evidence of Kavendja where he testified that he does not drink tombo but his deceased girlfriend brewed and sold it to people. Such a shoeprint could safely be said to belong to any of the tombo patrons. There is no way that empty cartridges retrieved at the scene of crime could have been found to have been fired from the rifle the accused claims he never used, but had instead innocently kept behind the driver's seat of his bakkie for the whole duration of his visit at the scene of crime.

[19.4] Simon Kavendja was fast asleep, he did not hear the first gunshot, he was only awoken by his girlfriend Elfriede Kenamune, who after the first gunshot was proceeding to go out and see what was happening there. She was struck before she could even open the door of the shack. Immediately after the second gunshot had struck Elfriede Kenamune dead, the accused called Simon Kavendja to come out and help him push his bakkie to start. When Kavendja opened the door of his shack he saw the accused standing holding a rifle in his hand. It was this rifle the accused was seen holding immediately after the two ladies were gunned down that has been connected to the double murder by the ballistic test analysis.

[19.5] The description of the accused's demeanor by the investigation officer W/O Maletzky at the time of his arrest at the police station clearly shows the mindset of a severely troubled person who has knowledge of something that terribly went wrong. After the incident the accused, knowing that he was a double murder suspect had nothing to do with the police, that is the reason why he was driving very fast to get away from the scene in order to avoid an arrest at all costs.

[19.6] The evidence of the accused related to the shooting of a stray donkey and the presence of an unknown person driving a white sedan vehicle at the scene of crime at the time of the incident is a carefully reasoned fabrication and twisting of events to divert the attention away from the actual double murder suspect who is the accused before court to a ghost. This evidence is false beyond reasonable doubt.

[19.7] In view of the aforestated observations I am satisfied that the prosecution has inferentially proved beyond reasonable doubt that: The accused directly intended to kill his girlfriend, Paulina Kenamune and did in fact shoot her in the abdomen as a result of which she died.

[19.8] That the accused regularly came to visit his deceased girlfriend at Simon Kavendja's residence (shack house). He already knew that the shack is used as a sleeping room by Kavendja's family. At the time of the incident the accused saw Kavendja and his deceased girlfriend Elfriede Kenamune entering the shack to join the children who were already sleeping inside. The accused nonetheless shot through the said shack's door striking Elfriede and therefore indirectly causing her death.

[20] In the result the accused is convicted as follows:

Count One: Guilty – Murder, dolus directus read with Act 4 of 2003;

Count Two: Guilty – Murder, dolus indirectus;

Count Three: Guilty – Possession of a firearm without a licence on diverse occasions in contravention of section 2 read with sections 1, 8, 10, 38 and 39 of the Arms and Ammunition Act 7 of 1996: Read with section 94 of The Criminal Procedure Act 51 of 1977 as amended;

Count Four: Guilty – Possession of ammunition on diverse occasions in contravention of sections 1, 8, 10, 38 and 39 of the Arms and Ammunition Act 7 of 1996, read with section 94 of the 'Criminal Procedure Act 51 of 1977 as amended'.

---

A M SIBOLEKA

Judge

APPEARANCES:

STATE : Mr E. Moyo



Office of the Prosecutor-General, Windhoek

DEFENCE : Mr B. Basson  
Instructed by Directorate of Legal Aid