



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 13/2014

THE STATE

versus

SAGEUS SOMAEB

ACCUSED

Neutral citation: *S v Somaeb* (CC 13/2014) [2017] NAHCMD 324 (15 November 2017)

Coram: SHIVUTE J

Heard: 7-11 March 2016; 16 March 2016; 5 April 2016; 27 June 2016; 13 December 2016; 14 February 2017; 9 March 2017; 22-23 May 2017; 12 July 2017 and 31 July 2017.

Delivered: 15 November 2017

Flynote: Evidence – Circumstantial evidence – Inferences to be drawn – Must be consistent with proved facts – Must exclude any inferences – When dealing with circumstantial evidence Court must consider evidence in its totality – Its cumulative effect – Not in piece meal.

ORDER

1st Count: Guilty of murder with direct intent.

2nd Count: Guilty of murder with direct intent.

3rd Count: Not guilty and acquitted.

4th Count: Guilty of assault with intent to do grievous bodily harm.

5th Count: Guilty of attempting to defeat or obstruct the course of justice.

JUDGMENT

SHIVUTE, J

[1] The accused faces an indictment containing five counts, namely two counts of murder, two counts of assault with intent to do grievous bodily harm read with the provisions of the Combating of Domestic Violence Act 4 of 2003 and one count of defeating or obstructing or attempting to defeat or obstruct the course of justice.

1st Count: Murder

It is alleged that during the period 15 -16 May 2013 at Outjo in the district of Outjo the accused did unlawfully and intentionally kill Remember Gaingob, a six year old boy.

2nd Count: Murder

It is alleged that on or about 31 July 2013 at Outjo in the district of Outjo the accused did unlawfully and intentionally kill Charlotte Gaingos an adult female person.

3rd Count: Assault with intent to do grievous bodily harm

The State alleges that on 23 May 2009 at Outjo in the district of Outjo the accused did unlawfully and intentionally assault Remember Gaingob by hitting him all over his body with a piece of wire with the intent to do grievous bodily harm.

4th Count: Assault with intent to do grievous bodily harm.

The allegations are that during February - March 2013 at Outjo in the district of Outjo the accused did unlawfully and intentionally assault Charlotte Gaingos by throwing a stone at her with the intent to do the said Charlotte Gaingos grievous bodily harm.

5th Count: Defeating or obstructing or attempting to defeat or obstruct the course of justice.

It is alleged that during 15 -16 May 2013 and at or near Outjo in the district of Outjo the accused did unlawfully and with intent to defeat or obstruct the course of justice:

- (a) burn or destroy or otherwise dispose of pieces of a carpet containing blood;
and or
- (b) tamper or clean up the scene where the deceased in count 1 was killed; and
or
- (c) report to the police and/or members of the public that the deceased in count 1 died during the night and complained of a headache the previous day, and/or make an affidavit to Const. Kasuto of the Namibian police indicating that the deceased was not sick and died suddenly;

Whereas these acts were perpetrated whilst the accused knew or foresaw the possibility that:

- (i) his conduct may frustrate or interfere with the police investigations into the death of the deceased in count 1; and/or
- (ii) his conduct may conceal the death and/or may destroy the physical evidence of an assault perpetrated on the deceased in count 1; and/or
- (iii) his conduct may protect him from being prosecuted for a crime in connection with the death of deceased in count 1.

Wherefore the accused is guilty of the crime of defeating or obstructing or attempting to defeat or obstruct the course of justice.

[2] The accused pleaded guilty on count 2 and was convicted of murder with direct intent. However, he denied the charges in respect of the rest of the counts.

[3] The brief facts of the case are that the accused and the deceased in count 2 were in a romantic relationship. The deceased in count 1 was a biological son to the

deceased in count 2. It is alleged that on 23 May 2009, the accused assaulted the deceased in count 1 with a wire and the deceased in count 2 reported the matter to the police whereby the accused was warned by the police not to assault the deceased in count 1. During 15-16 May 2013 the deceased in count 2 left the deceased in the custody of the accused together with the accused's daughter. The deceased in count 1 and the accused's daughter with the late Gaingos were both minor children. It was during this period that the accused allegedly killed the deceased in count 1. It is further alleged that after the accused killed the deceased in count 1, he destroyed the evidence. With regard to count 4, the accused had thrown a stone at the deceased which struck her in the rib cage during February – March 2013. The accused further stabbed the deceased in count 2 on 31 July 2013 with a knife 21 times and this led to her death.

[4] The State in proving its case called several witnesses. The first witness was Eddie Namiseb who testified that before he heard that Remember Gaingos had died that morning, he saw the accused raking in front of his house at about six o'clock in the morning. The accused was also burning something in the rubbish bin. However, he did not see what he was burning.

[5] Ms Erna Awaras gave evidence that the accused was a boyfriend to the deceased Charlotte Gaingos (her sister) and that the deceased Gaingob was a step son to the accused. On 16 May 2013 around six o'clock in the morning the accused came to her house crying and informed her that deceased Gaingob had died. She went to call Mina Gaingos and the three of them proceeded to the place where the body of the deceased was. The body was lying on a carpet and it was covered. The deceased Gaingob was staying with her mother Gaingos, the accused and his sister. The deceased Gaingos was not at home. The accused told the witness that the deceased before he died, did not complain of any illness. The witness Mina and the accused went to report the matter to the police. However, they were advised by a police officer to take the body to the hospital mortuary. At the hospital, the doctor examined the body and said it was a police matter and they were referred to the police. At the police station each of them was asked individually. On 15 May 2013 around 17h00, the deceased Gaingob, the accused and his daughter visited the

witness' place. The children were playing with her son. She did not observe any abnormalities on the deceased Gaingob.

[6] The witness further testified that the relationship between the accused and Gaingos was not a happy one as they used to argue and had misunderstandings and the accused was also not getting along with the deceased Remember Gaingob. The accused and deceased Gaingos used to fight. One day they were fighting in the street and the deceased Charlotte Gaingos was beaten around her ribs with a stone by the accused. The witness observed this on a day when she was at home at night and she heard people screaming and shouting telling the accused not to throw a stone at the deceased as he had already done so otherwise he would kill her. The witness went out and observed the accused and deceased Gaingos being separated by two men. At that stage she also observed that Gaingos the deceased was holding herself around the ribs and she left with the two men towards her father's house. It was put to the witness that the accused told the police that deceased Remember Gaingob died at night and the witness said she did not hear him telling the police. However, the accused told the witness that when he woke up he made some tea and he told deceased Gaingob's young sister to wake him up and the young girl informed him that the deceased could not wake up.

[7] Mina Kornelius' testimony corroborated the version of Ms Awaras that they went together with the accused to the house where the deceased Gaingob was lying and that they all reported the matter to the police. They were told by the police that the police did not transport bodies of people who died natural deaths. She further testified that the accused told the police that deceased Gaingob died at night. They were referred to the hospital. They managed to get transport from a certain individual who transported the body to the hospital mortuary. The doctor examined the body and asked whether the child was sick. The accused responded that the child was not sick. The doctor referred them to the police station because he was suspicious about the death. The witness again testified that when they went to the accused's place she observed that the bin was burning and when she inquired from him as to what he was burning, he said it was not him who was burning the rubbish but the two men who were also residing on the premises.

[8] Anna Ais, a Sergeant in the Namibian Police, testified that on 16 May 2013 at about 09h00 she was on duty at the police station when she was approached by the accused and two ladies. The accused reported to her that his step son passed on the previous night and that he complained of a headache. She told him that if the child was sick, it means he died of natural causes and that they could take the body to the hospital mortuary. They left and after about two hours they returned to the police station and one Immolatrix told her that they were referred back to the police. She then informed the Investigating Officer, Mr Kasuto, who took over the case.

[9] Gerson Kharuxab, a brother to Ellison Kharuxab, testified that they were living on the same premises with the accused but in separate houses. On 16 May 2013 he and his brother Ellison left for work at about 06h00. On that day he and his brother did not burn rubbish or anything else in the bin. He also did not see the accused burning the rubbish. The accused was sharing a house with the two deceased and his daughter.

[10] Ellison Kharuxab corroborated his brother Gerson's version that on 16 May 2013 before they left for work at about 06h00 in the morning they did not burn anything in the rubbish bin. They also did not see the accused burning anything.

[11] Alexia Soabes testified that on 23 May 2009 she was attending her brother's wedding when deceased Charlotte Gaingos approached her and showed her how the boy Remember Gaingob was assaulted. According to her observation, the boy Remember Gaingob was assaulted on his feet and the feet were swollen and he could not walk. The boy was also assaulted on the back and on his cheeks. He observed some marks on the boy's body like as if he was assaulted with a wire. The mother of the child reported to her that the boy was assaulted by the accused. The witness advised the mother to go and lay a charge at the police station. The grandfather of the child, Mr Gaingob, took them to the police station. The witness also accompanied them to the police station.

[12] At the police station they met with Sergeant Gariseb. While they were busy talking to Sergeant Gariseb, the accused passed by and he was called in. He was asked for the first time whether he beat the boy up and he just laughed. When he

was asked for the second time he did not dispute it. The witness was then told to leave and she went to wait outside the office. The accused and the deceased Charlotte Gaingos remained inside. When they came out of the office the deceased Charlotte said nobody should discuss the issue of the assault on the child further. It was put to the witness that the accused disputes having had assaulted the deceased Gaingob with a wire and that he only gave him a hiding with a belt. The witness responded that the boy was able to speak and he said he was assaulted with a wire.

[13] Gottfried Gariseb, a Seargeant in the Namibian Police, testified that during May 2009 whilst he was on duty Ms Soabes and deceased Gaingos came to his office with a boy. The ladies wanted the accused person to be warned because he had beaten up the child. Whilst they were talking, the accused passed by and they alerted him that he was the culprit. He called the accused and explained to him that he allegedly beat up the child. The accused said as a step father he had to teach or reprimand the child. The mother of the child said the accused should be warned. Unfortunately the witness did not examine the child because the mother did not want to lay a charge. She just wanted the accused to be warned not to beat the child again.

[14] Hermanus Richter testified that during February 2013 he was in Soweto location Outjo walking with his nephew Sageus Richter when they met the deceased Charlotte Gaingos arguing with the accused. He asked the deceased why they were arguing again and the deceased ran towards them. Whilst she was going to them the accused threw a stone at her and it hit her very hard on her ribs and she fell on him. The witness put the deceased behind him. The accused moved towards the deceased and the witness stopped him. The accused left the place. Although the incident took place at night, the witness was able to see because it was not very dark as there were lamp posts. The witness saw the accused picking up a stone and threw it at the deceased. The deceased was hit but after it hit the deceased he did not see the stone again. The witness also heard the sound of the stone when it landed on the deceased.

[15] Sageus Johannes Richter corroborated the testimony of Hermanus Richter that during February 2013 whilst they were walking in the street at night they came

across the accused and deceased Gaingos who approached them from the opposite direction. However, before the accused and the deceased came close to them he heard the deceased screaming. When the deceased saw the witness and Hermanus, the deceased ran to Hermanus. The accused threw a stone at her and she was hit by the stone. The deceased fell onto Hermanus. The deceased was hit on her ribs. The deceased hid behind Hermanus. Whilst the deceased was behind Hermanus, the accused again took a stone and threw it towards Hermanus and the deceased. However, the stone missed them. The accused walked towards Hermanus in an aggressive manner. Due to the fact that the accused appeared very angry the witness told Hermanus to leave. The witness said he was able to see because of the flash light. The lighting was sufficient. The witness left with Hermanus. He did not know where the accused and the deceased left to. It was put to the witness that because he could not tell which side of the ribs the deceased was assaulted, the assault never took place. The witness was adamant that he saw the accused hitting the deceased with a stone.

[16] Frederik Gaingob, deceased Gaingos' father, testified that deceased Gaingob was his grandson. On 23 May 2009 the deceased Gaingos brought her son Remember Gaingob who was beaten. He looked at the boy and he observed that the boy was swollen all over the body including his feet. He also had blue marks on the body. After he observed that the body was swollen he took Alexia, deceased Remember Gaingob, Mina Gaingos and the late Charlotte Gaingos to the police station. He dropped them so that they could obtain a paper to enable them to take Remember to the hospital. After dropping them off he returned to the wedding. He did not know what transpired at the police station. Furthermore, the witness testified that one day at night deceased Gaingos arrived at his girlfriend's house. She reported to him that she was beaten by the accused with a stone around the ribs and that she was in pain. The witness advised the deceased not to go to the accused's place. However, whilst they were there, the accused came looking for the deceased. The witness told the accused that the deceased was not going to his house as she said she was in pain she had to spend a night with them so that she could go to the hospital during the day. The deceased had also informed the accused that she was in pain. Thereafter, the deceased went to see the doctor. From the hospital the deceased informed him that the doctor said her ribs were broken and she was

referred to the police. The witness did not know whether the deceased had opened a case or not.

[17] Emma Gamiros testified that the deceased Charlotte Gaingos reported to her and her father that she was hit by the accused with a stone on the ribs. The witness checked on her and observed swollen ribs. She observed this when the deceased called her in the room and undressed herself and showed her. The following day the deceased told them that she was going to the hospital. When she came back from hospital she was given tablets and ointment. She also told them that the doctor said she must go to the police to obtain a paper and she must report the incident. On the day of the incident accused also came to the house looking for the deceased.

[18] Johanna Kafidi, a Sergeant in the Namibian Police, testified that she attended a post mortem examination of deceased Remember Gaingob on 22 May 2013. She compiled a photo plan. According to her observation the deceased had injury on his mouth on the upper lip as depicted in photograph 5. She also observed a swollen left cheek. The witness said this is depicted on photograph 6. However, when the court looked at photograph 6, it was not evident that the deceased had a swollen left cheek.

[19] Victor Shivute Hailonga, Scene of Crime Officer, compiled a sketch plan. He also took photographs at the scene of crime on 14 June 2013. He was in the company of Constable Kasuto and one Mina Cornelius. At the place where the deceased died there was a concrete floor covered with a carpet. However, the whole floor was not covered there were some patches or spaces where the carpet was removed. The witness also took a sample of the burning objects found in the bin. The content of the ashes found in the bin was taken with a view to be sent to the laboratory for analysis to determine whether the objects or materials burned in the bin could be similar to the carpet. Part of the materials burned were similar to the carpet that was found in the room. The burned remains were sent to the laboratory. The witness did not receive the results until he left the police. Points indicated in the sketch plan and photo plan were pointed to the witness by Mina Cornelius.

[20] Zebedeus Kasuto gave evidence that he knew the accused very well and that they were socializing together. On 16 May 2013, the accused together with three ladies reported to him that deceased Gaingob who had passed on at Soweto location's body was removed and taken to the hospital mortuary. He inquired why the body was removed without the presence of police officers. They then informed him that the police officer who attended to them first told them to remove the body. The witness opened an inquest docket upon the report as there was no murder reported. The post-mortem report was conducted in his presence at Otjiwarongo State Hospital. When the body was transported from Outjo hospital to Otjiwarongo it did not sustain any injuries. The doctor who performed the post-mortem pointed to the witness wounds inside the mouth and on the gums of the deceased. He also pointed to him things that looked like bubbles on the deceased's lungs and swelling on the left cheek. The doctor further informed him that the deceased did not die a natural death. He again said the deceased was killed by suffocation.

[21] Having received the information that the deceased was killed, the witness went to arrest the accused. The reason why he had arrested the accused was because when the accused gave his statement in connection with the inquest docket, the accused stated that the evening preceding the deceased's death he was the only adult person who was in the house with the deceased and the deceased's younger sister (accused's daughter). The deceased's young sister was too young and he did not interview her. The witness investigated whether there was domestic violence between the accused and his girlfriend, the deceased's mother. During his investigations, he received information from the Richters that they witnessed the deceased's mother late Gaingos being assaulted with a stone by the accused on her ribs. Mr Gaingob, the deceased Gaingos' father also confirmed that the late Gaingos came running one evening to his house holding her ribs and she spent a night at his place. The following day she went to the hospital. Upon receiving the information concerning domestic violence, the witness went to the hospital to check in the hospital register. According to the register, the late Gaingos visited Outjo Hospital. Her name and her particulars were registered in the outpatient register.

[22] Estella Mukuiyu, an administrative officer, testified that she was responsible for making entries in the outpatient financial register. She identified exhibit "T" that

the deceased visited the hospital on 14 February 2013. Exhibit "T" revealed that the deceased Charlotte Gaingos who was born on 21 March 1986 visited the Outjo State Hospital. She was supposed to pay N\$4, but she did not have the money to pay.

[23] Willemina Awases testified that on 14 February 2013 the deceased Charlotte Gaingos visited the clinic where she was working as a nurse. She had made entries in the register of patients who were coming to the hospital on a daily basis. According to the register the deceased Gaingos visited the clinic because she was assaulted on her ribs. According to the register, the witness wrote: 'Injury on the ribs'. The witness referred the deceased to Outjo State Hospital to see a doctor. The witness had also identified exhibit "S"

[24] Doctor Simasiku Kabanje was called to explain a post-mortem report in respect of deceased Remember Gaingob that was compiled by another doctor who conducted the post-mortem examination but he had gone back to his country of origin. Doctor Kabanje testified that according to the post-mortem report dated 22 May 2013, the chief post-mortem findings were that the cause of death was asphyxia due to suffocation. Why the doctor arrived at that conclusion was because the deceased had petechiae or tardiew spots and these are spots that develop if there is lower oxygen in the blood. The dark spots were visible in the lungs and there was severe pulmonary congestion. These are signs of asphyxia related deaths. Furthermore, there was severe brain edema and vessel congestion; a reaction of the brain when there is no sufficient oxygen. The doctor had also found that there was bleeding in the membrane surrounding the brain tissue. This is normally caused by blunt force trauma or by internal bleeding inside the skull which could also be a natural cause but in most cases it is more externally especially if a person was hit, the membrane is very thin and it easily bleeds. The doctor had also observed that there was bleeding internally in the mucosa of the upper and lower lips. This is normally caused when the membrane is pressed towards the teeth by force. The doctor had further observed injection conjunctivae on the right eye but accented towards the external angle. The doctor explained that haemorrhage red in colour was observed on the eye lid instead of the normal whitish. This may be caused by trauma but it is very common in cases of asphyxia related deaths due to suffocation or strangulation.

[25] When it is caused by trauma injuries may be noted, in this case there were superficial abrasion of 1, 5 cm on the right side of the face (cheek) with adjacent hematoma, infiltrated haemorrhagic in the superior gum but accented in the right side and superficial abrasion of 1 cm on the left side of the face was also noted. This means that there has been application of blunt force around the areas where abrasions were observed. The doctor further explained that hematoma is a type of contusion whereby due to impact, there is an accumulation of blood below the skin and swelling. This may be caused by moderate application of force or impact. However, the external findings also show that there was application of force around the face, there was hematoma abrasion, haemorrhagic infiltration of the lips that is upper and left mucosa. These are consistent with the application of force around those orifices. The findings of the doctor on the postmortem report were consistent with the photo plan except that the report indicates that there were abrasions on both cheeks. These were not visible in the photographs that were supposed to depict those abrasions. The injuries on the lips were clearly visible as well as on the eye. If a person was complaining of a headache and he had meningitis it is possible to have congestion. However, the injuries on the mouth would be excluded as well as the injuries on the eye. The eye was not supposed to be red. The doctor further testified that although meningitis could cause suffocation, there is no evidence that the deceased had suffered from meningitis. If it was meningitis, the brain was going to be clouded, there was going to be puss or yellow stuff and the doctor was going to mention it in the report.

[26] After the close of the State case, the accused decided to give evidence under oath and had no witnesses to call. The accused testified that he and the late Geingos the mother of the deceased Remember Gaingob were in a romantic relationship for six years. They were staying together in the same residence with the two minor children namely; the deceased Remember Gaingob and the deceased's sister Lensy Deborah who is fathered by the accused. On 16 May 2013, the deceased Charlotte Gaingos was not at home. The accused took the deceased Gaingob and her sister Lensy Gaingos to Ms Awaras' house in the morning. When he returned in the afternoon he went to Ms Awaras' house but he did not find the children. He went to look for them and he met them in the company of the accused's

elder daughter. Around 18h00 the accused and the children went to Ms Awara's house to let her know that he had found the children. From Awaras' house they all went home. Deborah was crying non-stop asking for her mother. Because the kids were making the accused to be restless he took a shoe (plaatjie) and beat the kids with it on the buttocks three times. The accused beat the children in order to chastise them because they had been walking around from one location to another.

[27] The accused pointed a shoe at the deceased Remember and warned him that if they continue moving around, he would not take responsibility. When the shoe was being pointed at deceased Remember, he moved backward. There was a bench behind and he tripped and fell over the bench. When he stood up he told him that he hit his head against the wall or floor. He fell on the right side. He was crying and the accused gave him pain tablets. The accused checked for injuries but there was no open wound on his head. Thereafter, they watched television. After the deceased finished watching television he went to make his bed and slept. On 16 May 2013, the accused woke up a few minutes past six o'clock in the morning and prepared coffee for himself and the kids. At about half past six o'clock the accused went outside the house to use the bathroom. When he went outside the house, he observed some plastic bags and papers lying around the yard and he removed them and put them in the rubbish bin. The accused further testified that during that morning he did not rake the yard neither did he come into contact with fire as he did not burn anything in the rubbish bin. However, when he threw the rubbish in the bin he observed ashes in the bin. When the accused went back inside the house around half past six o'clock Lensy went to call deceased Remember to come for coffee but Remember was not responding. The accused went inside the room where Remember was. His head was not covered however, the rest of the body was covered with a blanket. The accused lifted up the blanket and observed that there was no movements. He checked the pulse but he was just cold. The accused covered the body with blankets and he and Lensy Deborah went to Erna Awaras' house to inform her about the incident. He told Erna that Remember had passed on. He also informed her that the previous evening he beat him with a shoe (plaatjie) and that he fell down. Ms Awaras went to call her sister Mina and they all proceeded to the house of Charlotte's mom from there they went to the house where Remember was lying dead. When they arrived at the house they observed fire in the rubbish bin. Mina inquired from the accused what was

burning and the accused told her that he did not know who was burning things in the bin. The accused took a bucket with water and poured it in the bin.

[28] They all went to the police station where he told a police officer that Remember was no more. He also told her that the previous night he complained of a headache and that he fell down. That police officer who was known by the accused as Ais told them that they only assist to remove bodies if a person had died of unnatural causes and that the family should take the body to the hospital morgue. The body was later taken to the hospital mortuary. From the hospital they went back to the police station and statements were taken from them. On 23 May 2013, the accused was arrested for the murder of Remember Gaingob. The accused further testified that he did not kill Remember, he had treated him like his own child. On 29 March 2013 his mother had vanished from the house and the accused took Remember to his aunt's house. The accused disputed that he had assaulted Remember Gaingob with a piece of a wire all over his body. However, he could remember that he was called by a female police officer whilst he was passing by the charge office. When he went to the office he found Charlotte and Alexia. The police officer informed him that it was alleged that he had assaulted Remember with a piece of wire. The boy was also present but no injuries were shown to the accused. The accused told a police officer that if it was alleged that he had assaulted Remember with a piece of wire then the police should open a case against him, but no case was opened. Concerning the allegation that Remember was unable to walk properly the accused said the deceased was walking around in police officer Philander's office. The accused said the other time he beat the deceased he used a shoe or 'plaatjie' when the deceased bed-wetted. He had only beat him on the buttocks and he never used a stick or a wire. With regard to count four of assault on deceased Charlotte Gaingos the accused said on 13 February 2013 the deceased Charlotte was not staying with him. She had left him on 9 February 2013 and went to stay at her father's house. He disputed to have assaulted her with a stone or to have met her on 13 February 2013. He only met her on 14 February 2013. The accused denied having disposed of pieces of carpet by burning them. As far as the accused's relationship with deceased Charlotte was concerned, they never fought physically but they had a few quarrels.

[29] It was put to the accused that he testified in court that the child Remember fell over the bench whilst he was moving backwards however, during the bail hearing the accused said the child fell down whilst he was running away. The accused's response was that the boy was moving backwards retreating. Maybe there had been a misinterpretation.

[30] After the close of the defense case, counsel for the State argued that although there is no direct evidence that the accused had killed the deceased in the first count, there is circumstantial evidence to prove that the accused is the one who had killed him. The circumstantial evidence is that the deceased died from asphyxia due to suffocation and that the doctor explained that the suffocation could only have been caused by a stronger person than the deceased and the accused was the only adult person at home. During the bail application, the accused testified that he assaulted the deceased on his buttocks with a shoe which led to the deceased attempting to run away but tripped over a bench and fell down. However, when the death was reported to the police the accused did not inform them of the chastisement and possible injury on the deceased. The accused only informed police officer Ais that the deceased had been complaining of a normal headache the previous night.

[31] Furthermore, the accused did not inform the doctor that the child had been sick. Ms Cornelius, a nurse at the hospital, heard the accused responding to the doctor when the doctor inquired whether the child was sick and the accused said the deceased had not been sick. To suggest that the deceased Remember had fallen over the bench and hit his head on the floor thereby sustaining injuries to be the probable cause of death is a concoction by the accused and the court should reject it because this is not consistent with the post-mortem report and the opinion of expert witness Dr Kabanje. Again, the conduct of the accused in respect of count 5 whereby he was seen burning things in the bin constitutes part of circumstantial evidence. Accused's destruction of what he deemed to be potentially incriminating evidence was only driven by the accused having caused the death of the child and the desire to ensure that the crime would never be detected. The accused's version that he discovered the body of the late in the morning, starkly going against the medical evidence as it does is conclusive of untruth, improbable and it ought to be rejected as false.

[32] With regard to count 3, the accused tendered a mere denial which is premised on the basis that if he had indeed assaulted the deceased Gaingob, he should have been charged and those injuries were not shown to him. If the accused did not assault the deceased there would have been no need for the accused to be called into the police station whilst he was passing by. The accused had assaulted the deceased otherwise he was not going to tell a police officer that as a father of the child, if the child had done something wrong he had to correct him.

[33] An intention to do grievous bodily harm can be deduced from the injuries sustained, so counsel argued. He further argued that Alexia and Frederik Gaingob were unanimous that the injuries were of such a nature that the deceased Remember could not walk. This gives credence to the existence of such serious injury. Concerning the weapon used, there is evidence that the marks observed by Alexia appeared to be induced by a wire.

[34] Counsel further argued that if the injuries were as a result of an assault by using a belt as the accused is suggesting through cross-examination of Alexia Soabes, then it must have been a vicious and savage beating which went well beyond 'teaching' a child who has been mischievous. The court should reject the accused's version and accept that the child could not walk. The accused only raised in the defense case that the boy could walk and was 'walking in the office of police officer Philander.' This should be rejected as a fabrication as it was not put to witnesses. Therefore it follows that the injuries must have been inflicted with an intention to do grievous bodily harm, or an assailant foresaw that eventuality but nonetheless did not care. In view of this, counsel argued, that the State has proved count 3 beyond a reasonable doubt.

[35] With regard to count 4, counsel argued that although the accused denied having seen deceased Charlotte Gaingob on 13 February 2013, the accused was placed on the scene of the assault by witnesses Hermanus and Sageus Richter who saw the accused assaulting Charlotte with a stone when she was running away from him. It was submitted that these two witnesses were impartial who bore no-ill will towards the accused. Charlotte had to seek medical attention as confirmed by

annexures "S" and "T". Ms Awases, the nurse, noted the injuries and referred Charlotte to the doctor. Again both Charlotte's parents testified of the accused coming to their house after the alleged assault seeking to persuade Charlotte to depart from her parents' home to go with him. These versions were not challenged by the defense through cross-examination. The accused only sought to do so when he was being cross-examined. Counsel further argued that the State has proved the fourth count and he should be convicted accordingly.

[36] In connection with the fifth count of defeating or attempting to defeat the course of justice, counsel argued that the report which the accused made to the police how the deceased Remember died were discredited, the natural death reported by the accused to the witnesses and the police is not consistent with the post-mortem finding which conclusively identified the cause of death by asphyxia due to suffocation which could only have been caused by the accused. The misrepresentations inclusive of the inquest statement were made to frustrate the investigation and the ultimate prosecution of the accused. In respect of the combustion of possibly incriminating evidence or material i.e. carpet pieces allegedly burnt at the hands of the accused, counsel argued that it has been proven that the accused did perform the acts. The accused during the bail application never mentioned his going out of the house prior to his discovering the death of Remember. Neither did he mention his having gone out in cross-examination of Nanuseb. However, in his evidence in chief he revealed for the first time that in the morning he went out of the residence to an outside toilet. This could only give credibility to Nanuseb's version that he saw the accused burning something in the bin.

[37] It was again counsel's argument that the accused ingeniously sought to deflect responsibility of the burning in the bin by suggesting that the fire could have been started by his neighbors Gerson and Elison Kharuxab. This should be regarded as an afterthought as it was only brought up by the accused in his evidence in chief. Furthermore, the scene of crime officer Hailonga noted partly burnt pieces of a carpet similar to the ones he saw in the residence and uncovered patches of the floor suggesting some parts that covered the floor had been removed. Although the scene of crime officer visited the scene after about a month of Remember's death, it

was submitted that the accused's denial that he was seen burning something in the bin could only point to him having done so, as he gave a complete denial in the face of credible testimonies to the contrary.

[38] On the other hand, counsel for the accused argued that witness Nanuseb although he was alleging that he saw the accused raking the yard or burning something in the bin, could not tell what was burning. When the accused went to inform Awaras of the demise of Remember he was crying and he appeared to be upset. He also informed Mina Cornelius and Awaras that the deceased Remember was complaining of a headache the previous night. If he had killed the deceased he was not going to be upset or crying. Furthermore, witness Awaras did not observe any injuries or blood on the deceased. When the accused was asked by Ms Cornelius about the burning in the bin the accused told her that it was the other people who were burning the rubbish. Although the investigating officer testified that he was informed by Ms Cornelius about the blood at the scene, this is contrary to what she testified. Concerning the issue that the deceased Remember was complaining of a headache, the version of the accused was corroborated by police officer Ais who testified that the accused informed her at the police station that the deceased had a headache the previous evening. Although police officer Hailonga testified that he found pieces of a carpet in the rubbish bin he only visited the scene of crime about a month after the incident. Police officer Kasuto who attended to the post-mortem examination only testified that the doctor pointed to him injuries in the mouth of the deceased and he did not testify of any other external injuries. Concerning the post-mortem report, counsel argued that it does not correspond to the photo plan as far as injuries on the cheeks are concerned. The doctor testified that if there were injuries on the cheeks he expected them to be depicted on the photo plan. The photographer only depicted the injuries inside the mouth. This is a discrepancy between the post-mortem report and the photo plan.

[39] With regard to the assault on deceased Remember Gaingob, Alexia Soabes testified that Charlotte Gaingob arrived at her house and showed her how Remember was assaulted and slapped on the cheeks. According to her, Remember was assaulted with a wire as his feet were swollen and he could not walk. However, this piece of evidence was not contained in the statement she made to the police.

Although Officer Gariseb was informed that the child was beaten, he never looked at the child to inspect for injuries. If the injuries were serious as testified to by other witnesses how it is possible that it had never been observed by police officer Gariseb?

[40] Concerning the assault in respect of deceased Charlotte Gaingos, counsel argued that Awaras testified that she only observed a stone being thrown at the deceased in the process when the accused and the deceased were being separated by the Richters. According to counsel, this does not support the evidence of Hermanus and Sageus Richter. In examination-in-chief, Hermanus Richter testified that he saw the accused throwing a stone at Charlotte and also at Hermanus. However, Hermanus did not testify of any stone thrown at him by the accused. This is a discrepancy in their evidence. Furthermore, Frederik Gaingob testified that Charlotte went to his house complaining that she was assaulted by the accused with a stone between 20h00 and 22h00. This is contrary to what the Richters testified that the incident took place between 23h00 and midnight. Emma Gamiros also testified that Charlotte arrived at the house whilst she was busy preparing a meal. There is a serious discrepancy as far as the time line is concerned. Again, it was a point of criticism that the accused did not assault Charlotte with a stone on the date alleged by the State, because by then she had already left the house she was sharing with the accused.

[41] Counsel further argued that the accused did not contribute to the death of Remember. Remember fell on the back of his head. The accused was honest in his version in respect as to how Remember sustained injuries when he fell over the bench. The accused did not burn anything in the bin. However, when he took the plastic bags and papers to the bin he observed ashes in the bin. It was again counsel's further argument that there is no direct evidence that the accused killed Remember. The Court will have to rely on circumstantial evidence. The accused had no motive to kill Remember. The laboratory results concerning the burned pieces of carpet were not produced. No evidence that the pieces of carpet were thrown in the bin by the accused. The accused did not tamper with any evidence by cleaning the scene.

[42] Having summarized the evidence and submissions by both counsel, I will now proceed to consider whether the State has proved its case beyond a reasonable doubt in respect of all counts. I propose first to deal with the first count of murder of deceased Remember Gaingob, a six year old boy. There is no eye witness to this crime. The State rests its case on circumstantial evidence. In assessing circumstantial evidence it has been said that the Court should not approach the evidence on a piecemeal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. What is required is to consider the evidence in its totality from which the Court would then be able to draw certain inferences if '(a) the inference sought to be drawn is consistent with all the proven facts and (b) the proven facts are such that they exclude every reasonable inference from them, save the one sought to be drawn'. *R v Blom* AD 188 at 202-3.

[43] Although the accused had testified that he had assaulted the deceased with a shoe on the buttocks, and that the deceased had fallen over the bench, according to the postmortem report there is no indication that he was indeed assaulted on the buttocks or that his head was injured because he fell on the bench. According to the doctor who conducted a post-mortem examination on the body of the child, the cause of death was asphyxia due to suffocation. Doctor Kabanje explained that the reason why the doctor arrived at such conclusion could be that the doctor had observed petechiae or tardiew spots and these are spots that develop if there is a lower oxygen in the blood. These spots were visible in the lungs and there were severe brain edema and vessel congestion a reaction of the brain when there is no sufficient oxygen. There was internally bleeding in the mucosa of the upper and lower lips. According to the doctor, this is normally caused when the membrane is pressed towards the teeth by force. Concerning the conjunctivae on the right eye the doctor explained that haemorrhage that was observed on the eye lid instead of the normal whitish may be caused by trauma but it is very common in cases of asphyxia related deaths due to suffocation or strangulation.

[44] Furthermore, although the accused in his testimony suggested that the deceased had complained of a headache, the doctor explained that if a person was complaining of a headache and he had meningitis, it is possible to have a

congestion. However, the injuries in the mouth would have been excluded as well as the injuries on the eye. In this case there is no evidence that the deceased was suffering from meningitis. From the doctor's finding it is evident that the cause of death was asphyxia due to suffocation. The above mentioned reasons or observations made by the doctor are more consistent with an unnatural death rather than a natural death. Concerning the external appearance of the body, the doctor mentioned in his report that some abrasions on the cheeks as well as a swelling on the face were observed. However, these are not clearly visible in the photographs that were supposed to depict these injuries. Therefore, it would be safe if I don't attach much weight or rely on the said injuries.

[45] The State having established beyond reasonable doubt that the deceased died of asphyxia due to suffocation, the only question that remained is who is responsible for the deceased's death? There is evidence that there were only three people in the house where the deceased died. The deceased who was six years old, his young sister and the accused who was the only adult. According to doctor Kabanje, the infiltration of the upper and lower lips is consistent with the application of force around those orifices. Doctor Kabanje explained that the suffocation could only have been caused by a much stronger person than the deceased.

[46] Having assessed the evidence in its totality and having considered the circumstances and probabilities pertaining to the case and that the deceased died of asphyxia due to suffocation, there is no evidence that someone else had access to the premises, on the fateful day apart from the three occupants who were there. The only inferences to be drawn is that the accused being the only adult person is the one who suffocated the deceased. I reject the version of the accused that he did not kill the deceased because it could not be reasonably possibly true in the circumstances. The Court can safely rely on the inferences to be drawn because the requirements have been met. I am therefore, satisfied that the State has proved its case beyond reasonable doubt.

[47] I will now turn to consider count 3 which is assault with intent to do grievous bodily harm. There is no eye witness to this offence. However, the mother of the victim reported to her father Mr Gaingob and Ms Soabes that the accused had

assaulted the deceased Remember. The witness Ms Soabes observed that the boy was assaulted on the feet, on his back and the mother of the child showed her that the boy was also slapped on the cheeks. According to Soabes, the boy could not walk as his legs were swollen. When the witness was asked why he did not mention in the statement she gave to the police that the boy could not walk, she said that she showed the injuries to the police officer. However, this is contrary to the version of police officer Gariseb who attended to the witness and the victim's mother that he did not observe injuries on the boy as he never examined him. Mr Gaingob the grandfather of the boy also testified that he observed that the boy was assaulted all over his body. His feet were swollen and that he could not walk. Witness Soabes testified that the marks he observed on the body of the boy appeared to be made by a wire. She also said the boy told her that he was assaulted with a wire. However, Remember at that stage was only 2 years and a few months old. I have a doubt as to his reliability due to his tender age. Ms Soabes did not explain how the marks looked like and how she was able to determine that such type of marks were made by a wire.

[48] Whilst the witness was reporting to police officer Gariseb, the accused was seen passing by the witness and the mother of the child informed him, Gariseb, that the accused was the culprit. The accused was called into the office and was informed that the two ladies were alleging that he assaulted the child. The accused said as a father of the child, if the child had done something wrong he had to teach him, meaning he had to correct him. He explained to the police officer that he had reprimanded the child. It was also put to the witness that the accused beat the child with a belt to give him a hiding. According to the accused's explanation and his version that was put to the witness through cross-examination, the accused denied any intention to do grievous bodily harm to the child. He also denied that he unlawfully assaulted the child because his defence is that he was only chastising the child.

[49] What witnesses Ms Soabes and Mr Gaingob were told by the mother of the child that the accused was the one who assaulted the child, with a wire, is hearsay if it is meant to establish the truth that the accused indeed assaulted the child and it is

inadmissible. However, the same is not hearsay if it is meant to establish that the report was made to the witnesses.

[50] From the evidence presented before me, there has been some indication of assault in respect of the child by the accused but it is not clear as to what extent, whether he assaulted the child in order to chastise him or he had the intention to cause grievous bodily harm or to injure him. This doubt is being cast in light of the contradictions in the version of Soabes who said they showed the police officer the injuries whilst officer Gariseb who attended to the witness and the child's mother said he did not observe any injuries on the child. Furthermore, there is also no medical evidence to corroborate what the witnesses are alleging. In view of these findings, I am not satisfied beyond a reasonable doubt that the State had proved that the accused assaulted the deceased with the intention to cause grievous bodily harm or to injure her. I therefore give the benefit of the doubt to the accused and he must be acquitted on count 3.

[51] I will now proceed with count 4 which is that of assault in respect of the deceased Charlotte Gaingos. There is evidence from two witnesses the Richters who testified that the accused assaulted the deceased with a stone. These two witnesses testified that the incident happened between 23h00 – 24h00 or midnight. Whilst Mr Gaingob testified that when the deceased Gaingos went to their house complaining that he was assaulted by the accused with a stone was between 20h00 and 22h00. I agree with counsel for the defence that there has been discrepancies in the witnesses' versions with regard to the time frame when the incident of assault allegedly took place. However, I am of the opinion that the discrepancies concerning the time frame are not material. The accused was placed at the scene of crime by the two witnesses, Hermanus Richter and Sageus Richter. Their evidence was corroborated by witness Awaras who said that after hearing people screaming she went outside the house and observed the accused and the deceased being separated by the two men. The mother of the deceased and her father both testified that on the same evening deceased Charlotte Gaingos complained of rib injuries when she went to their house. The mother observed the injuries when Charlotte undressed herself. There is also evidence from Ms Gaingos parents, that on that very night the accused went to their house and wanted Charlotte to go with him to

the place where they were both residing. However, Mr Gaingob informed the accused that Charlotte had to spend a night at his place so that she could visit the hospital for her injuries. There is also evidence from Ms Awases that Charlotte Gaingos visited the clinic where she was working as a nurse on 14 February 2013. She made entries in the register 'injury on the ribs' and the witness referred Ms Gaingos to a doctor. The accused version that he did not see Charlotte on 13 February 2013 as she had left him on 9 February 2013 and that he only came to meet her again on 14 February 2013 could not be reasonably possibly true as he was placed at the scene. His version is rejected as false. The Court is satisfied that the State has proved its case beyond a reasonable doubt that the accused did assault Charlotte Gaingos and by assaulting her with a stone he had the intention to cause her grievous bodily harm.

[52] Having dealt with count 4, I will now proceed to count 5 of defeating or obstructing or attempting to defeat or obstruct the course of justice. The State alleged that the accused did destroy or burn or dispose of pieces of carpet containing blood, tampered or cleaned up the scene where the deceased in count 1 was killed or that he reported to the police or members of the public that the deceased in count 1 died during the night and complained of a headache the previous day and made an affidavit to Constable Kasuto of the Namibian police that the deceased was not sick and died suddenly. In proving this count the State relied on the testimony of Ms Awaras that when she asked whether the deceased Remember had complained of anything before he died, the accused said he did not complain of any illness or pain. The State also relied on the version of Ms Kornelius who testified that when the doctor asked whether the child was sick, the accused said he was not sick and that when the witness asked the accused what was burning in the rubbish bin the accused said it was the two men who were burning things and that they were living on the same premises but in separate houses. The State argued that because the accused had given a different version to police officer Ais that the child was complaining of a headache and at the same time he gave a statement to police officer Kasuto that he told police officer Ais that the child was not sick and that he died of a sudden death, this amounted to defeating or obstructing or attempting to defeat or obstruct the course of justice. The State also relied upon the evidence of police officer Hailonga who said he found pieces of carpet in the bin that

were burned and that the remains of the carpet appear to be similar to the carpet where the body was allegedly found. The accused was also seen by Eddy Nanuseb raking and burning something in the bin. The accused disputed that he burned the carpet and said that he only picked up some papers and plastic bags and put them in the bin that morning when he allegedly visited the toilet that was outside the house.

[53] There is a possibility that the accused had burned something in the bin but there is no evidence that what he burned contained evidence that could have implicated him in the commission of the offence. The State has alleged that the accused burned pieces of a carpet that had blood. However, no evidence was placed before this Court that the pieces allegedly burned and found in the bin contained blood and/or that it was the accused who burned them, as the burnt pieces were discovered after a month. Again, as to the allegation that the accused was seen raking where the deceased was allegedly killed, there is no evidence that the deceased died outside the house or at the spot where the accused was allegedly seen raking. Moreover, there is no proof of what type of evidence was allegedly destroyed by the accused. The evidence which is before Court is that the deceased was found dead inside the room. The raking and the burning did not link the accused to the commission of the offence.

[54] However, there is evidence that the accused gave different versions concerning the deceased's state of health before he died. One version indicated that the deceased complained of a headache after he allegedly fell and another version is that the deceased did not complain of anything, he died a sudden death. The only inference that could be drawn from the accused's conflicting versions as to how the deceased died was to frustrate the police investigations into the death of the deceased and to possibly shift the investigations far away from him. In view of this, I am satisfied that the accused attempted to defeat or obstruct the course of justice and that the State has proved its case beyond a reasonable doubt.

[55] In the result the following verdicts have been arrived at:

1st Count: Guilty of murder with direct intent.

2nd Count: Guilty of murder with direct intent.

3rd Count: Not guilty and acquitted.

4th Count: Guilty of assault with intent to do grievous bodily harm.

5th Count: Guilty of attempting to defeat or obstruct the course of justice.

NN SHIVUTE

Judge

APPEARANCES:

THE STATE:

Mr S. Nduna

Of Office of the Prosecutor-General, Windhoek

ACCUSED:

Mr J. Van Vuuren

Instructed by Directorate of Legal Aid