**REPUBLIC OF NAMIBIA**

NOT REPORTABLE

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

**JUDGMENT**

Case no: CC 18/2017

In the matter between:

**THE STATE**

v

**ELDRIN GOLIATH** **ACCUSED**

**Neutral citation:** *S v Goliath* (CC 18/2017) [2018] NAHCMD 393 (30 November 2018)

**Coram:** LIEBENBERG J
**Heard:** **15 – 19 October; 28 November 2018**
**Delivered:** **30 November 2018**

**Flynote:** Criminal Procedure – Accused indicted on charges of murder, rape and robbery with aggravating circumstances – Evaluation of evidence – Circumstantial evidence – No duty on an accused to convince the court of the truth of his propositions – The onus to prove that these propositions are false beyond reasonable doubt is on the prosecution – In assessment of the facts the Court will have regard to the evidence as a whole.

Criminal Procedure – Accused indicted on charges of murder, rape and robbery with aggravating circumstances – Accused's version may be tested against inherent probabilities but cannot be rejected simply because it is improbable – Untruthful evidence of the accused does not *per se* prove his guilt – But a factor to be taken into account when deciding his guilt in light of all the evidence adduced.

Criminal procedure – Defence of non-pathological criminal incapacity – Accused claimed to have suffered a blackout when strangling the deceased – No medical evidence adduced in support of accused's assertion.

**Summary:** The accused was indicted on charges of murder; rape, in contravention of s 2(1)*(a)* of the Combating of Rape Act[1]; and robbery with aggravating circumstances. He pleaded guilty to the charge of murder but not guilty to the charges of rape and robbery with aggravating circumstances. Accused raised the defence of non-pathological criminal incapacity stating that he did not know what happened when murdering the deceased. The State rejected his plea of guilty and thus had the burden to prove the allegations set out in the charges. There was no eyewitness who observed the actual commission of the offences, thus the court was faced with circumstantial evidence. The defence did not adduce any medical evidence in support of the accused's assertion of having suffered a blackout.

*Held*, that, it is a well-established rule of practice that the State carries the burden of proving the allegations made in each count beyond a reasonable doubt, whilst there is no duty on an accused to convince the court of the truth of the propositions advanced by him.

*Held,* further that, the court need not believe the accused's version in all its detail, but if it is reasonably possibly true in substance, then that becomes the basis the court must decide the matter on. The accused's version may be tested against inherent probabilities but cannot be rejected simply because it is improbable; unless it is so improbable that it cannot reasonably be true.

[1] Act 8 of 2000.

*Held,* further that, in its assessment of the facts the Court will have regard to the evidence as a whole, inclusive of the merits and demerits of the State case and that of the defence, as well as the probabilities of the case; and only when satisfied that the accused's version is not only improbable, but false beyond reasonable doubt, it may convict.

*Held*, further that, in the absences of medical evidence in support the accused assertion of having suffered a blackout, the accused evidence on this aspect is a mere factor to be considered in light of the rest of the evidence.

*Held,* further that, in light of all the evidence adduced the court is satisfied that the accused's explanation is not only improbable, but false beyond reasonable doubt and accordingly rejected.

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**ORDER**

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Count 1: Murder – Guilty (direct intent).

Count 2: Rape, in contravention of s 2(1)*(a)* of the Combating of Rape Act, 2008 – Guilty.

Count 3: Robbery with aggravating circumstances – Not guilty.
On the competent verdict of Theft – Guilty.

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**JUDGMENT**

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LIEBENBERG J:

[1] On 6th November 2016 the lifeless body of the 16 year old Camila Gabriela Steyn was found on the porch of an unoccupied house under

renovation, in the town of Rehoboth. The accused was arrested during the same day and found in possession of the deceased's cellphone and takkies. He stands indicted before this court on the following charges: Count 1 – Murder; Count 2 – Rape, in contravention of s 2(1)*(a)* of the Combating of Rape Act[2]; and Count 3 – Robbery with aggravating circumstances. Though he pleaded guilty to count 1, the State did not accept the plea on the basis tendered. The matter then proceeded to trial.

[2] Mr *Tjituri*, on the instruction of the Directorate: Legal Aid, appears for the accused, while Mr *Olivier* represents the State.

[3] In a statement prepared in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 and in amplification of the plea of guilty tendered on count 1, the accused admits having met with the deceased on the night of 5 November 2016 when she had asked him to escort her home. On the way he twice stopped to smoke cannabis and during the last occasion this was on the porch of a house being renovated, and at the request of the deceased who was afraid of being seen smoking on the street. Whilst there they became intimate and initially kissed but subsequently had consensual sexual intercourse. At some point she told him to stop and when he enquired from her what was wrong, she pushed him away and scratched him in the face. He then blacked out and strangled the deceased. Though not acting with direct intent, he foresaw that his actions indirectly could result in death. He freaked out and ran home. He admitted having kept the deceased's cellphone after it had earlier been used to provide light when preparing the cannabis cigarette, but that he inadvertently took possession thereof when putting it in his pocket. As for the deceased's shoes found in his back-pack, he explained that the deceased must have placed it there herself after she took it off before the sexual intercourse. He was unaware of the shoes until found in his back-pack by the police.

[2] Act 8 of 2000.

[4] In a s 220 statement subsequently handed into evidence, the accused admitted evidence about his sperm having been found on a vulva swab of the deceased, and sperm traces found on the deceased's panty. Also admitted into evidence is the Mobile Forensic Report[3] compiled and issued by Wycliffe Kauuova, an investigating officer at the Anti-Corruption Commission. This report relates to the Samsung cellphone of the deceased. The mainstay of the report is contained in paragraph 5 where it *inter alia* states that there was no activity like messages, contacts or any call logs present on the phone to indicate that it was used before. From this it was concluded that the phone was reset to it original factory setting and all data removed from it.

[5] Evidence that is not in dispute was admitted by way of several documents handed into evidence by agreement and without calling witnesses. This significantly shortened the trial and counsel are commended for their diligence in this regard and for focussing on the real issues in dispute.

[6] According to the post-mortem examination report compiled by the pathologist, Dr Vasin, there were patterned and irregular abrasions and multiple bruises on the skin of the upper neck along the jaw line. He concluded that the cause of death was manual strangulation (asphyxia). Besides these abrasions to the neck area, further abrasions were noted on the forehead; behind the right ear lobe with possible nail mark pattern; on both forearms; the left upper anterior chest area; and both knees. In addition, the possibility of forced penetration with a blunt hard object or recent sexual intercourse could not be excluded. An analysis of a blood sample taken from the deceased shows that it contained a concentration of not less than 0.18g of ethyl alcohol per 100 millilitres of blood.

[7] A photo plan compiled by Detective Sergeant Mutumba received into evidence comprises, *inter alia,* the murder scene and the post-mortem examination.[4] Depicted herein are close-up photos of the bruise marks and a cut on the left armpit (photo 36). Photo 37 depicts what appears to be a sanitary pad protruding from the genitalia. Other than mentioning in the post-

[3] Exhibit 'O'.
[4] Exhibit 'K'.

mortem report the panties with hygienic pad inside, nothing significant seems to turn on this aspect of the evidence, except for stating that the pad tested positive for semen.

[8] It is common cause that the deceased and one Javion Renaldo du Plessis were in a romantic relationship at the time. He testified that on 6 November 2016 at 01:00 am he received a phone call from the deceased who said she was a bit intoxicated and asked him to fetch her from the Suidwes Hotel. Shortly thereafter the deceased's mother phoned to say that the deceased had not returned home. This prompted him to wake his parents and ask for their vehicle in order to go to the deceased. He called her on the way and said she had to wait at the medical clinic. He also phoned a friend and asked him to go to the clinic and check on the deceased. On their arrival she could not be found at the clinic; they proceeded to the hotel but she was not there either. Next he received a text message sent from the deceased's phone saying that she was nearby (not mentioning her position) and that she was troubled by some people. When he thereafter made a call to the deceased's phone she answered whilst crying, saying that one boy did not want to leave her alone. When he enquired as to who this person was, the call was ended. He drove around in town looking for the deceased but was unable to find her, where after he returned home. Later that morning he learned that the deceased was murdered.

[9] In cross-examination the defence took issue with the witness having failed to state in the police statement about the complainant crying and mentioning about one boy troubling her. He explained that he was still in shock when he made the statement and that this was a mere oversight. In view of the person referred to by the deceased not having been identified, it seems to me that not much turns on this aspect of the witness's evidence. The fact that it was omitted from the police statement is therefore immaterial. The accused's version on this score is that at no stage did the deceased cry whilst in his company.

[10] Etienne Owen Nitschke and the accused are cousins and shared a makeshift room behind the house of their aunt, Margaret Jansen. He was awoken when the accused returned between 04:00 – 05:00 on Sunday morning, the 6th of November 2016. Later that morning the accused told him that he had picked up a cellphone at Suidwes Hotel which he wanted to sell to Elfrico van Wyk, and invited him along. He waited outside while the accused and Elfrico were doing business. The accused reported that he got N$100 for the phone. It is common cause that this phone belonged to the deceased. The accused then bought drugs which they smoked together in the river. They parted ways and whilst on his way home in the afternoon, he saw the accused being apprehended by the police. He was adamant in cross-examination that the accused wanted to sell the phone and not merely pawning it.

[11] According to Elfrico van Wyk the accused approached him with a Samsung cellphone which he wanted to sell for N$500. Because he did not have that amount in cash on him, the accused lowered the price to N$200. Elfrico gave him N$150 in cash with the agreement that the accused would return later for the rest. The reason advanced by the accused for selling the phone was that he needed money to travel to the farm in order to collect his salary. The witness later changed his testimony to say that, if the accused would refund him, he would return the cellphone to him. If not, it becomes his property. There were no contact details on the phone when he switched it on. Later in the day he was arrested in connection with the cellphone which he subsequently handed over to the police.

[12] In cross-examination Elfrico conceded that the accused had bought drugs at his place of residence, but disputed same to have been part of their deal. He was adamant that the accused said he had to go to the farm to collect money and needed the money obtained from selling the cellphone for transportation.

[13] Detective Sergeant Johannes attended the crime scene where he made certain observations on the deceased's body. Besides observing two sets of shoeprints entering the premises where the body of the deceased was discovered, he also noticed a barefoot print exiting the premises. He

backtracked the shoeprints over a distance of approximately 50 m where he observed what he described as ‘struggle marks’. There he also picked up one earring. According to the officer the earring was later identified by the deceased’s mother, Mrs Jennifer Steyn, to have belonged to the deceased. Following up on information received from a police informer, Sgt Johannes went to the accused’s place of residence where he conducted a search of his room. There he came across a pair of Nike training shoes of which the soles matched those prints observed on the crime scene. In a back-pack he found a pair of All Star takkies which also matched the prints observed on the scene. The latter were identified to have been the deceased’s shoes worn on the night in question.

[14] The officer saw the accused approaching but upon seeing the police, he took flight. A search was conducted and the accused was later found hiding under some foliage of a house in the next street. He was informed of his rights upon his arrest. When asked what had happened, the accused said that when he met the deceased (the previous night), he went up to her and asked her for a cigarette. She did not have any and he walked with her up to a house where he asked her for sex, but that she refused him. He then strangled her and she lost consciousness. He took her shoes and cellphone; the latter he sold to Elfrico van Wyk. Sergeant Johannes explained that he did not reduce the accused’s explanation to writing as he was not a commissioned officer. Elfrico was apprehended at the sports field who then took them to where the cellphone was being recharged. The IMIE number of the cellphone retrieved from Elfrico matched the number on the box of the cellphone received from the deceased’s mother.

[15] Under cross-examination he elaborated on his evidence in chief by saying that he could see from the pattern of shoeprints that there was a scuffle between the two persons whose tracks he had been following up to that spot. He further denied having assaulted or threatened the accused upon arrest and was adamant that the accused voluntarily gave the explanation as to what had happened between him and the deceased.

[16] In 2015 Britney Engelbrecht and the deceased were in the same class and became best friends. The accused is unknown to her and she was adamant that, had the deceased and the accused been seeing one another or were in a secret relationship, the deceased would have disclosed this to her, as they shared their secrets. She confirmed that the deceased accompanied her and some friends to Suidwes Hotel that evening. Later before midnight the deceased received a phone call and asked the person to come and fetch her. Because she called the person 'lovey', Britney assumed that it was her boyfriend, Javion, she was talking to. Later when they decided to return home, the deceased was nowhere to be found. She disputed the accused's assertion that Javion was at the hotel with the deceased that night.

[17] The accused said he and the deceased were friends and when they met at Suidwes Hotel at around 23:00 that night she told him that she had been waiting a long time for her boyfriend to show up, and then asked the accused to walk her home. This version differs markedly from his plea explanation where he said that the deceased told him that her boyfriend was not prepared to go home which clearly implied that she and her boyfriend were both at the hotel. The accused essentially restated his plea explanation and while elaborating on parts thereof, new facts emerged which are irreconcilable with his earlier explanation. During his testimony he said that while seated at the entrance of the porch, he first made a cannabis cigarette ('blunt') which he handed to the deceased and then prepared a crystal meth[5] pipe for himself. This was new evidence not mentioned by the accused earlier. There is a material difference in the accused's explanations as to how the deceased's shoes ended up in his back-pack. While his plea explanation reads that he *remembers that the deceased took off her shoes and put them in his back-pack*, he changed course in paragraph 13 when reasoning that the deceased must have taken off her shoes and placed them in his back-pack. During his testimony he stuck to the latter version saying that he was unaware of the shoes found in his back-pack by the police. The differences in the two versions are irreconcilable and remained unexplained.

[5] Methamphetamine is a type of drug.

[18] As regards the deceased's cellphone, he maintained that he inadvertently placed it in his pocket after making the cigarette and that at all times he intended returning the phone to her. He qualified his answer by saying under cross-examination that he later would have returned it, had she been alive. According to the accused this explains why he did not sell the phone to Elfrico van Wyk, but pawned it until he could pay back the money. On a question as to why he simply not hand back the phone after making the cigarette, he gave a further reason namely that his mind set was affected by the drugs.

[19] These explanations, however, are flawed in more than one way. Firstly, he admitted that he started panicking after he strangled the deceased as he realised she was dying. Secondly, his actions thereafter were testament of a person who knew that the victim had died and that he wanted to keep it a secret. That much he admitted by saying that he was scared of being locked up and just decided to keep quiet, silently hoping that it would pass. Thirdly, on his own account, he exchanged the cellphone for money and drugs on the basis that, if he was unable to refund Elfrico, the phone would become the latter's property. He had therefore assumed ownership of the phone. The accused furthermore lied to his cousin Nitschke about him having picked up the phone; neither did he mention to Elfrico that it was not his phone. According to Elfrico, the reason for pawning the phone was to acquire money to travel to the farm and collect his salary. The accused however disputes this evidence.

[20] Be that as it may, the extent of the evidence adduced is such that it can safely be deduced that there was no intention on the accused's part to repossess the deceased's phone; not even on his own evidence where he clearly appropriated the phone with the intention to permanently deprive the deceased of her possession. This finding is consistent with forensic evidence that all data had been deleted from the phone. Against this backdrop, the probabilities furthermore favour Elfrico's evidence that, when he received the phone from the accused and inserted his own SIM card, only the name and

model of the phone came up and no contact details. To this end his evidence is corroborated by the forensic evidence adduced.

[21] On the accused's version there is no logical explanation for the deceased's sudden mood change while she was a willing sexual partner but the next moment, for no apparent reason, became violent and offensive towards the accused. He said her facial expression had changed and when asked how he was able to make the observation in complete darkness, he explained that her face was close to his and she was wide-eyed. Despite saying that he does not know what happened as he suffered from what he described as 'a blackout', he recounted in detail how he grabbed the deceased by the neck with both hands, pushed her backwards against the wall and the back of her head hitting the wall hard. Also that the strangulation lasted between 14 – 15 seconds before he loosened his grip. The deceased fell forward onto her knees, gasping for air. He tried to lift her up but she only became weaker until there was no further movement. He freaked out, grabbed his back-pack, and ran. The accused was the only witness for the defence.

[22] It is a well-established rule of practice that the State carries the burden of proving the allegations made in each count beyond a reasonable doubt, whilst there is no duty on an accused to convince the court of the truth of the propositions advanced by him. The onus to prove that these propositions are false beyond reasonable doubt is therefore on the prosecution. The court need not believe the accused's version in all its detail, but if it is reasonably possibly true in substance, then that becomes the basis the court must decide the matter on. The accused's version may be tested against inherent probabilities but cannot be rejected simply because it is improbable; unless it is so improbable that it cannot reasonably be true (*S v Haileka*[6]*; S v Naftali*[7] and the cases cited therein).

[6] 2007 (1) NR 55 (HC).
[7] 1992 NR 299 (HC).

[23] In its assessment of the facts the Court will have regard to the evidence as a whole, inclusive of the merits and demerits of the State case and that of the defence, as well as the probabilities of the case; and only when satisfied that the accused's version is not only improbable, but false beyond reasonable doubt, it may convict. The court's approach in the present instance would be, not to evaluate the evidence in respect of each count separately with the view of determining whether his version is reasonably true, but to follow a holistic approach and decide the question on the evidence as a whole. Moreover where the counts are closely related in time and place as the present.

[24] Although the accused on the murder count admitted having caused the deceased's death by strangulation, he essentially raised the defence of non-pathological criminal incapacity by claiming that he suffered a blackout, not knowing what happened. He claims that he was unable to direct his conduct in accordance with his insight, seemingly due to anger combined with the taking of drugs immediately prior to the act, therefore he lacked criminal capacity. It would also appear that it is suggested that this could have been an instance of substance induced psychosis. Mr *Tjituri* therefore submitted that the evidence shows that the accused had acted with diminished criminal capacity when strangling the deceased.

[25] The accused's narrative of events that led up to the killing of the deceased was described in fine detail, accompanied by precise timelines. Anomalous to his alleged blackout, the accused during his testimony was capable of vividly recounting the incident in all its detail. He had a clear recollection of what happened prior, during and after the incident, except for the alleged blackout. Except for suggesting that he suffered a blackout, no explanation or evidence was forthcoming which could possibly explain his condition and whether the taking of drugs had any effect on his mental capacity. Neither can it be deduced from the evidence. On the contrary, the accused's explanation and conduct after the incident tends to show the contrary.

[26] In view of the defence raised about the accused having suffered a blackout and submissions of him having acted with diminished criminal capacity, it seems apposite to repeat what I occasioned to say in *S v Bryan Rickerts*[8] at para 22:

'The burden is on the State to prove beyond reasonable doubt that the accused in this instance had the required criminal capacity when he committed the murder i.e. that he acted voluntarily. In order to prove that the act was voluntary, the State is entitled to rely on the presumption 'that every man has sufficient mental capacity to be responsible for his crimes: and that if the defence wish to displace that presumption they must give some evidence from which the contrary may reasonably be inferred.'[9] The presumption of mental capacity is only provisional as the legal burden remains on the State to prove the elements of the crime, but until it is displaced, it enables the prosecution to discharge the ultimate burden of proving that the act was voluntary. Lord Denning further reasoned that:

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

[27] In this instance no medical evidence was presented which supports the accused's assertion of having been incapacitated or having acted with diminished criminal capacity when killing the deceased. Counsel's explanation of the accused being an indigent person and without means to obtain such evidence is without substance, in that no attempt was made before or during the trial to obtain such evidence; neither was the court approached to assist in this regard. The defence therefore solely rely on the accused's own evidence as proof of his assertion. To this end, his evidence is unsubstantiated and must at face value be considered together with the rest of the evidence.

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[8] (CC 08/2015) [2016] NAHCMD 30 (25 February 2016).

[9] An excerpt from the speech of Lord Denning referred to in *Bratty v Attorney-General for Northern Ireland* (1961) 3 All ER 523 at 534

[28] On the accused's version of events that night the deceased took the initiative on the smoking of cannabis as well as the consensual sexual intercourse. She proposed their entering into the vacant house where she could smoke without being observed by anyone on the street. Taking into account that this was after midnight, there was hardly any reason to hide as there was no mention made of anyone else present at the time. The accused's evidence on this score is in conflict with that of Britney who disputed that the deceased was using drugs and said that she would have known about it, had that been the case. Contrary to what is stated in his plea explanation, the accused testified about him having lit a crystal meth pipe from which he took a few puffs before the deceased came to sit on his lap. Though the accused did not say what effect the drug had on him (if any), its inclusion into his evidence at this late stage seems to suggest that he was drugged when he strangled the deceased. In the absence of tangible evidence to that effect, not too much weight should be accorded thereto.

[29] Mr *Olivier* argued that the accused's evidence about the deceased seemingly having been in no hurry to reach home, is inconsistent with the evidence of Javion who said that she had asked him to fetch her. His evidence was corroborated by Britney who overheard the deceased asking to be fetched while the accused also said that the deceased told him that she could no longer wait for Javion, as she wanted to go home. This indeed creates the impression that the deceased was in a hurry to reach home – moreover where she had left her handbag behind in the car at Suidwes Hotel. It therefore stands in sharp contrast with the accused's explanation of the deceased seemingly not being in any hurry to reach home.

[30] Turning next to the sexual act, the accused said he had not ejaculated but, notwithstanding, admits to forensic evidence about his spermatozoa having been found in the deceased's genitalia. It was submitted that his inability to know whether or not he ejaculated could be attributed to his mental state at the time. It seems to me that such conclusion could only be reached if substantiated by reliable evidence which, in this instance, is lacking.

[31] The accused's account of the deceased's awkward conduct during the sexual act when she suddenly told him to stop and immediately started attacking him, stands in sharp contrast with that of a person who initiated the act. The deceased was found fully dressed with a sanitary pad or liner inside her panties. The accused is silent as to whether she undressed herself or not. Did they have sexual intercourse by only pulling the panty aside or did she get dressed after she had stood up and before attacking him? These are material gaps in his testimony; moreover when he said the moment she got up she attacked him. He claims to have observed the change of her facial expression but prior thereto he had to use her cellphone to provide light in order to prepare a cannabis cigarette as it was pitch dark. He further contradicted himself as regards him having seen the deceased removing her shoes and putting them in his back-pack. Bearing in mind the reason why he was with the deceased i.e. to escort her home as she requested, there is simply no logic in the deceased having taken off her shoes and putting them in his back-pack. I find counsel's submission that this was likely done to secure custody of the shoes unconvincing. The same could be said of the reason why the accused took possession of the cellphone. If she had to provide light with her phone while he was making the cigarette, then one would have expected that the deceased should have handled the phone, not him, as he had to use both his hands to roll or prepare the cigarette. This much was conceded by counsel. It then seems highly unlikely, as he testified, that he unintentionally placed it in his pocket once he was done. The accused's account on both issues has all the makings of an afterthought.

[32] When considered together with evidence about the accused's intention to pawn or sell the phone the next day to buy drugs; the fact that the deceased's shoes were found in his back-pack by the police – which the accused must have noticed when he later went into the bag to retrieve something from it – and him fleeing from the police on sight, it is inevitable to come to the conclusion that the accused's reaction is indicative of a guilty mind. His explanation for having been in possession of the deceased's property is improbable to the extent that it cannot reasonably be true, and falls to be rejected as false.

[33] In deciding whether the accused is guilty of the offences charged and without the benefit of knowing what actually happened, the court is constrained to decide the matter only on circumstantial evidence presented by the State. This is usually done by way of inferential reasoning where the court is required to draw inferences from circumstantial evidence and may only do so once the guidelines in *R v Blom*[10] have been satisfied. Absolute certainty is not required. Every component in the body of evidence need not be considered separately or individually to determine what weight it should be accorded, but the cumulative effect thereof counts to decide whether the accused's guilt has been established beyond reasonable doubt. Though the untruthful evidence of the accused in itself does not *per se* prove his guilt, it is indeed a factor to be taken into account when deciding his guilt in light of all the evidence adduced.[11]

[34] Having duly considered the accused's evidence regarding him having suffered a blackout and his inability to account for his actions leading up to the murder of the deceased; their consensual sexual intercourse prior thereto, and the reasons how he subsequently came in possession of the deceased's property, I am satisfied that, in the light of all the evidence before court, the accused's explanation is improbable and false beyond reasonable doubt.

[35] In circumstances where the accused's evidence is rejected as false, the *dictum* in *R v Mlambo*[12] (as per Malan J), adopted with approval in this jurisdiction, is that in such instance the court may draw an inference that the accused committed the assault with intent to kill.[13] The following appears at 737C-E:

'Proof of motive for committing a crime is always highly desirable, more especially so where the question of intention is in issue. Failure to furnish absolutely convincing proof thereof, however, does not present an insurmountable obstacle because even if motive is held not to have been established there remains the fact that an assault

[10] 1939 AD 188.

[11] *S v HN* 2010 (2) NR 429 (HC).
[12] 1957 (4) SA 727 (A).
[13] *S v Shaduka,* Case No SA 71/2011 (unreported) delivered on 13.12.2012.

of so grievous a nature was inflicted upon the deceased that death resulted either immediately or in the course of the same night. If an assault - using the term in its widest possible acceptation - is committed upon a person which causes death either instantaneously or within a very short time thereafter and no explanation is given of the nature of the assault by the person within whose knowledge it solely lies, a court will be fully justified in drawing the inference that it was of such an aggravated nature that the assailant knew or ought to have known that death might result. The remedy lies in the hands of the accused person and if he chooses not to avail himself thereof he has only himself to blame if an adverse verdict is given.'

[36] Although denying that he directly intended bringing about the deceased's death, he admitted that his actions were indirectly intended to achieve that, having thus acted with intent in the form of *dolus eventualis*. This admission in any event negates any suggestion that the accused lacked criminal capacity when he acted by killing the deceased. Neither is it supported by the totality of evidence adduced

[37] Whereas the accused's evidence on the interaction between him and the deceased that night had been found to be false, and the court not having the benefit of receiving reliable evidence on the accused's subjective state of mind at the time, regard must be had to other external factors to determine his intent at the time he so acted.[14] Factors such as the use of weapons or the method of killing; at which part of the victim's body was the assault directed; and the nature of the actual injuries inflicted. From these indicators the court would then be entitled to draw certain inferences as regards the accused's state of mind at the relevant time.

[38] I already alluded to the evidence given by Sergeant Johannes about the accused's explanation upon his arrest which differs substantially from his evidence in court. Despite the accused now divorcing himself from making the earlier statement, there is at least one tangent-point in both statements and that is that he admitted having strangled the deceased. Mention was also made of cigarettes and sexual intercourse which became prominent in his

[14] *S v Mokeng,* 1992 NR 220 (HC).

defence. Also what he did with the deceased's cellphone which led to the phone being retrieved from Elfrico later the same day. This in itself corroborates the officer's evidence that the accused gave an explanation as to what had happened the previous night that caused the deceased's demise.

[39] The court in *S v Shikunga and Another*[15] endorsed the sentiments expressed in *S v Nduli and Others*[16] that 'a statement made by a man against his own interest generally speaking has the intrinsic ring of truth; but his exculpatory explanations and excuses may well strike a false note and should be treated with a measure of distrust as being unsworn, unconfirmed, untested and self-serving.'[17]

[40] I can see no reason why this principle should not equally apply to oral statements as in this instance. For the foregoing reasons the court is satisfied that the evidence of Sergeant Johannes on this point is reliable whilst the accused's denial of making the impugned statement is rejected as false. His earlier statement is furthermore consistent with Britney's evidence that there was no amorous relationship between the accused and the deceased, evidence that is consistent with his explanation that she refused him sex when he asked her. When considering that sexual intercourse ultimately took place and the deceased's body showing injuries that are unexplained, the only reasonable conclusion to reach from the proven facts is that it was forceful. The accused's explanation of the deceased having sustained the injuries to her knees when she fell forward is unconvincing, bearing in mind that those were not the only injuries inflicted.

[41] In view of the close connection between the sexual act committed with the deceased and her strangulation, and in the absence of an acceptable and plausible explanation by the accused, it seems inescapable in the circumstances to find that the murder was committed consequential to the raping of the deceased. I accordingly so find.

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[15] 1997 NR 156 (SC) at 177I.
[16] 1993 (2) SACR 501 (A).
[17] 1993(2) SACR 501 (A) at 505g.

[42] Although the accused admitted having foreseen the deceased's ensuing death and associated himself with that possibility (*dolus eventualis*), the court still has to determine the accused's state of mind when he acted. Despite an attempt by the accused during his testimony to create the impression that he did not know whether the deceased was still alive, his conduct subsequent thereto paints a different picture altogether. He lied to his cousin as to how he came into possession of the cellphone and disposed of it as quickly as possible. There is a strong possibility that he is the one who deleted all data stored on the phone. The reason could only have been to destroy any possible link to the deceased, as he knew she was dead and he could not return the phone. Although his evidence fell just short of admitting that the deceased had already died whilst he was still on the scene, his conduct subsequent thereto is testament thereof. The assault was forceful and directed at the throat with intent to suffocate the deceased. She collapsed and died of asphyxia on the spot.[18] The medical evidence is furthermore supportive of a finding that the accused had acted with direct intent. Although the motive for killing the deceased remains unknown, the evidence overwhelmingly points at a murder committed with direct intent.

[43] Next I turn to the charge of robbery. Robbery is defined as theft of property by unlawful and intentionally using violence to take the property or threats of violence to induce the person to submit to the taking of the property. As regards the element of violence, robbery would still be committed if the victim is physically put out of action, where after the perpetrator deprives him of the property, *provided* that at the time of the assault he already had the intention to put the victim out of action and then take the property.

[44] Whereas the accused is the only person who knows what had happened and what his intentions were at the relevant time, and the court having rejected his evidence as being false, the circumstances under which the respective crimes were committed, and the sequence in which it took place, remain unknown. In order to sustain a conviction on the charge of robbery, there has to be established facts from which it may be inferred that

[18] He testified that he could see she was dying and that made him to panic.

the accused already had the intention to deprive the deceased of her cellphone and shoes at the time of the murder. In the present instance this evidence is lacking. Although it is possible that it might have been intended, it could also be that the intention to take the property was only formed *after* the deceased was killed. The second rule of logic required when dealing with circumstantial evidence as per *Blom* (supra), is that the proved facts should be such that they exclude every reasonable inference from them save the one to be drawn and, if it does not, then there must be doubt whether the inference sought to be drawn is correct.

[45] As stated, other reasonable inferences cannot be excluded and there must be doubt as to the accused's intention at the time of the assault. Although the offence of robbery had not been proved, the court is satisfied that the accused unlawfully and intentionally appropriated the deceased's property and has made himself guilty of the competent verdict of theft.[19]

[46] In the result, the court finds as follows:

Count 1: Murder – Guilty (direct intent).

Count 2: Rape, in contravention of s 2(1)*(a)* of the Combating of Rape Act, 2008 – Guilty.

Count 3: Robbery with aggravating circumstances – Not guilty.
On the competent verdict of Theft – Guilty.

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JC LIEBENBERG

JUDGE

[19] Section 260(d) of the Criminal Procedure Act 51 of 1977.

APPEARANCES:

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|---|---|
| STATE | M Olivier<br>Of the Office of the Prosecutor-General, Windhoek. |
| ACCUSED | M Tjituri<br>Instructed by the Directorate: Legal Aid, Windhoek. |