

REPUBLIC OF NAMIBIA

REPORTABLE

HIGH COURT OF  
WINDHOEK



NAMIBIA MAIN DIVISION,

Case No: CC 4/2016

**THE STATE**

And

**WILHELM WIMPIE DERICK FEBRUARIE**

**ACCUSED**

**Neutral citation** S v Februarie (CC 4/2016) [2019] NAHCMD 185 (13 June 2019)

**Coram:** SHIVUTE, J

**Heard:** 3-12 April 2018, 2-6 July 2018, 16-20 July 2018, 21 August 2018, 20-22 February 2019

**Delivered:** 13 June 2019

**Flynote:** Criminal Law – Accused charged with murder count 1 – State rests its case on circumstantial evidence – Inference to be drawn from circumstantial evidence – Such inference must be consistent with proven facts – Inference must exclude any other inference save the one to be drawn – If they do not exclude other reasonable inferences, there must be doubt whether the inference sought to be drawn is correct – Law not requiring court to act upon absolute certainty – When dealing with circumstantial evidence, the ultimate requirement is proof beyond reasonable doubt and the court must consider appraisal of the totality of the evidence.

Criminal Law – Rape count 2 – Accused charged with rape contravening s 2(1) (a) of the Combating of Rape Act 8 of 2000 – Deceased’s body found half naked from the bottom part – No evidence including forensic evidence suggesting that a sexual assault took place in particular rape – Accused not guilty and acquitted.

Criminal Law – Attempted rape – State asking court to invoke provisions of s 256 Criminal Procedure Act – read with s 18 Riotous and Assemblies Act 17 of 1956 – and find accused guilty of attempted rape – Rape Act does not create offence of rape – s 18 Riotous Assemblies applicable – Attempted rape – What constitutes – Deceased’s body found half naked – Distinction made between acts which are remote from and those proximate to commission of offence itself – Acts of preparation, even if accompanied by intention do not entail liability – Only acts immediately connected with the consummation of completed crime which amounts to attempts – Finding semi naked body – Such not constituting attempted rape – Court declines to invoke s 256 Criminal Procedure Act read with Riotous and Assemblies Act –

Criminal Law: Crimen iniuria alternative to count 2: Crime of Crimen iniuria – To determine whether there has been an infringement of dignity – Two requirements – The victim must – (A) – Be aware of the offending behavior – (B) – Feel degraded or humiliated by it – Subjective dimensions – Exception to the test – Where a young child or mentally defective person involved – In present matter deceased was neither a young child nor mentally defective person – Furthermore – not established whether stripping of deceased’s body happened before or after she died – It would appear offence cannot be committed against a dead body – Accused not guilty and acquitted.

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**ORDER**

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Count 1: Murder: Guilty of murder with direct intent.

Count 2: Rape- Contravening section 2 (1) (a) of Act 8 of 2000: Not guilty and acquitted.

Alternative to count 2: Crimen iniuria: Not guilty and acquitted.

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## JUDGMENT

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SHIVUTE J:

Introduction

[1] The accused is before this court on an indictment containing two counts namely; murder and rape contravening s 2(1) (a) read with ss 1-3, 5 and 6 of the Combating of Rape Act, 8 of 2000. The count of crimen iniuria was preferred in the alternative.

Count 1: Murder

As to the count of murder, it is alleged that upon or about 21 June 2014 and at or near Windhoek in the district of Windhoek the accused did unlawfully and intentionally kill Dinah Diedericks, an adult female person.

Count 2: Rape – Contravening section 2 (1) (a) of Act 8 of 2000.

In respect of the rape count, the allegations were that on or about 21 June 2014 and at or near Windhoek in the district of Windhoek, the accused did unlawfully and intentionally commit a sexual act with Dinah Diedericks by inserting his penis and or other parts of his body and/or an object into her vagina and/or anus and/or mouth under the following coercive circumstances:

- (a) By application of physical force to the complainant; and/or
- (b) By threats (verbally or through conduct of the application of physical force to the complainant); and/or

- (c) Where the complainant is affected by physical disability or helplessness or intoxicating liquor or sleep to such an extent that the complainant is rendered incapable of understanding the nature of the sexual act or is deprived of the opportunity to communicate unwillingness to submit to or to commit the sexual act.

#### Alternative charge to count 2: crimen injuria

It is alleged that on or about 21 June 2014 and at or near Windhoek in the district of Windhoek the accused did unlawfully and intentionally injure, insult and impair the dignity of Dinah Diedericks by removing her underpants and trouser and exposing her private parts.

[2] The accused and his girlfriend had an engagement party. The deceased and her friend, one Ms Ruppig, attended. Other people also attended the party. When the party ended, two of the witnesses accompanied by the accused escorted the deceased to her residence at No. 3 Curie Street in Windhoek West as she was under the influence of alcohol. The accused had taken intoxicating liquor with him in order to go and drink with the deceased at her place. The two witnesses dropped off the deceased and the accused at the deceased's residence and left the deceased in the company of the accused. The lifeless and naked body of the deceased was found later that night on the premises of her house but outside the house.

#### Summary of facts

##### *State case*

[3] Shaneen Melissa Diedericks, daughter to the deceased, testified that on 21 June 2014 between 22h00 and 23h00 she and her friend Chantel went home (to the deceased's house). They entered and they heard someone she referred to as Aunt Yvonne who was staying at the garage calling for them. She entered the garage and she saw Aunt Yvonne's underpants lying on the floor. However, she had her top on.

Aunt Yvonne reported to her that she was raped and nearly killed. The witness sent her friend upstairs to call the witness' sister. The witness phoned the accused because she knew her mother had attended the accused's party. The accused did not answer the phone but his girlfriend did. Whilst the witness was talking to the accused's girlfriend Audrey, she could hear the accused talking from the background. Audrey informed the witness that one of their friends dropped her mother off home safely.

[4] After the witness spoke to Audrey, she dialled her mother's mobile phone, but it was not being picked up. They checked at the back of the house and she saw her mother lying facing down. She was covered with a plastic bag over her head and a jacket. She did not have her underpants on. The jacket had covered her down part of her body but the legs were sticking out. Her sister Noleen came down and ripped off the plastic bag. The witness phoned her father. The father came at the scene as well as paramedics. She also observed the accused at the scene. The accused tried to console her by hugging her and asked her in Afrikaans 'Is dit so?' Which means, 'Is it like that'.

[5] The witness went back in the yard and realised that her mother was lifeless. The police also arrived and spoke to Aunt Yvonne. At a later stage the police informed the witness that they found her mother's pair of jeans trousers. It was put to the witness by counsel for the accused that at one stage whilst the deceased and her friend Yvonne Ruppig were at the accused's party at the Windhoek Correctional Facility, the accused's fiancé Audrey Bock, Andre Tropa and Ms Fredericks were in the kitchen and the accused remained alone in the company of the deceased and her friend. It was at that stage that the deceased's friend wanted to go home but the deceased and her friend developed a disagreement which led to a quarrel. The deceased and Ms Ruppig were almost involved in a physical fight and the accused person had to step in to separate the altercation. The witness had no comment to any of the propositions put to her because she was not at the party.

[6] Chantel Van Wyk a friend to the previous witness confirmed that she was in the company of Melissa Diedericks when they observed Melissa's mother lying face down.

Her head was covered with a plastic bag and her bottom side was partially covered with a jacket. She also confirmed that Melissa's sister ripped off the plastic bag from her mother.

[7] Neoleen Andrea Bock confirmed the version of the two previous witnesses that it was indeed true that she removed the plastic bag from her mother's head and that her mother was half naked. At that time she was not moving at all. The police came and loaded the body into their motor vehicle. The witness went to Ms Ruppig and inquired what happened. Ms Ruppig was sitting naked on her bed.

[8] The evidence of Hermanus John Diedericks an ex-husband to the deceased was that during midnight on 21 June in 2014, he received a phone call from his daughter informing him of the deceased's murder. He immediately rushed to the scene where he found his daughter waiting for him at the gate. The daughter took him around the house where the deceased was lying. He touched the deceased and at that stage the deceased's body was still warm. His daughter informed him that the deceased had attended the accused's engagement party. The witness phoned Audrey the accused's fiancé to inquire what happened to the deceased. Audrey said the deceased was dropped off home safely. The witness heard the accused's voice from the background. The accused took the phone from Audrey and the witness told him to come to the scene and see what happened. The accused and Audrey came to the deceased's house. The paramedics also arrived and declared the deceased dead.

[9] Wilfrieda Fredericks testified that she attended the accused's engagement party; she was invited by Superintendent (Sup.) Tropa. The witness was introduced by Tropa to the accused's fiancé Audrey, and to one Klaus, Winnie as well as Andre. Those were the people the witness found at the party around 15h00. Later on, they were joined by the deceased and her friend. After sometime Klaus and Andre left the party followed by Winnie and the deceased's friend Ms Ruppig and later on Audrey left. Then there remained only the witness, Sup. Tropa, the accused and the deceased. Around 21h00

the accused and the deceased had to be excused because the gate of the Correctional Facility where the party was taking place had to close at 22h00.

[10] The deceased was drunk and Sup. Tropa offered to drive her home in her car. The accused took a box of the remaining beers and said he was going to drink at the deceased's place. The witness, deceased and the accused were driven by Sup. Tropa to the deceased's house. Upon arrival, the deceased and the accused were left at the deceased's house. The witness and Sup. Tropa took a taxi home and that was about 22h00.

[11] Through cross-examination by accused's counsel, the witness testified that he was not highly drunk or drunk; that she did not see the accused dancing with the deceased; she did not observe any disagreement between the deceased and Ms Ruppig; she also did not witness any altercation between the deceased and her friend, or seeing the accused stopping the deceased and her friend from fighting. The witness further testified that she did not observe the deceased bleeding from the nose. However, the witness testified that there was a time when she visited the bathroom.

[12] Audrey Jenine Bock the accused's fiancé testified that the deceased and her friend attended their party on the date in issue. Apart from the deceased and her friends there were other people who attended namely; Tropa, Klaus, Andre, Tropa's cousin and Tropa's friend. They were drinking, chatting and eating whilst they were seated. After 18h00 Andre and Klaus left. After they left, Tropa's cousin and Yvonne the deceased's friend also left. Thereafter, the witness received a text message from her mother. The witness was not pleased with the text message. This upset the witness and she left the party. She left the party at about 21h30. There were two Andres at the party namely Andre Tropa and Andre Kloppers. Whilst the witness was at the party she did not see the deceased and Yvonne having an argument or a fight. She also did not see the accused intervening between them in an effort to stop a fight. She could not recall seeing the deceased bleeding. Yvonne left the party before the witness. According to

the witness, Andre Tropa was sober than anyone else. Although the witness was drunk she was able to follow what was happening.

[13] After the witness left, about 23h10 she received a text message from the accused informing her that he was on his way home. Again, at 23h24 the accused sent another text message telling her to open for him. She opened for the accused. She did not observe anything unusual on the accused. He appeared to be calm. The accused informed her that he, Tropa and Tropa's friend had dropped off the deceased home. He remained behind with the deceased because the deceased could not find her keys to the house. Whilst the accused and the witness were in bed, she received a call from Melissa, the deceased's daughter, inquiring where her mother was. She informed her that her mother was dropped off home safely by Tropa, his friend and the accused. Around past midnight, the witness received another call from Melissa informing her that they found the deceased's body. Melissa's father took the phone from her and inquired what happened. She tried to explain that she was not there when the deceased was dropped off. Thereafter, the witness and the accused went to the scene.

[14] The following day, the accused and the witness went to the police station to give their statements. After the witness gave her statement, she and the police went to her residence to get the clothes that were worn by the accused on the eventful night. The witness further testified that she sent a text message to Sup. Tropa that if the police asked him about the taking of the deceased home, he should tell them that the accused was not with him. She sent the message because the accused instructed her to do so. Tropa told the witness that he would not do it because he would be lying to the police and that the police would find out anyway because of his fingerprints that would be found at the scene.

[15] The witness again testified that on the day of the party the accused was wearing a blue Adidas tracksuit and white Adidas tekkies (sports shoes). The tekkies had black Adidas stripes on the sides so did the tracksuit pants and the jacket. The above mentioned clothes were the ones she handed over to the police.



[16] When the accused came home on the eventful night he had a half crate of beer. It has six bottles of Black Label beer. The witness further testified that during the party there was no music playing. There was no music system like a DVD or CD player. She could not recall any music playing. She was aware that Sup.Tropa did not own a music system. She is a friend and she normally visited him before the party. The witness further stated that she did not include in her statement that she was instructed by the accused to phone Sup.Tropa that he should tell the police that he was not with the accused when he dropped off the deceased. She did not do so because she was not thinking straight. She would protect him in a sense. She was protecting the accused because of what happened to the deceased and because of the accused's previous records. It was put to the witness through cross-examination that the witness concocted that he was instructed by the accused to tell Sup. Tropa that he should not tell the police that the accused was present when the deceased was dropped at her house. The witness insisted that, that was her instruction from the accused.

[17] The next witness called by the state is Superintendent Andre Tropa a correctional officer. His testimony is that on 21 June 2014 the accused and Audrey Bock had an engagement party at his house. They were seated outside. Around 19h00 the drinks got finished. Klaus, Andre Kloppers and the accused went to buy drinks. They returned with Yvonne and the deceased by the name Dinah. After the witness finished cooking he dished up. By then it was getting dark. After they ate Klaus and Andre left and thereafter Yvonne left with Winnie the cousin of the witness' daughter. It was only the accused, the witness, the deceased, Audrey and Fredericks the witness' friend who remained. Past 21h00 the witness informed the accused and the deceased that their gate closes at 22h00.

[18] Whilst they were sitting around the fire, Audrey was on the phone talking to her father. The accused was narrating to them (Dinah, witness and Fredericks about the relationship between Audrey and her father. Audrey heard about that and she was upset and decided to leave. Because the deceased was intoxicated, the witness offered

to drive the deceased's vehicle and dropped off the deceased and the accused at the deceased's place. The witness was in the company of Fredericks when he dropped off the accused and the deceased. There was a box of beer left that was not yet opened. The accused said he would be going to deceased's place and they will be drinking further. That was the reason the witness dropped off the accused at the deceased's place. The accused was the one who was directing the witness to the deceased's place because the deceased was too drunk.

[19] At the deceased's house, the accused loaded off the box of beer. The witness gave the keys to the deceased. The witness and Fredericks left the accused and the deceased remained on her premises. The witness and his friend went back by taxi. Past midnight the witness received a text message from Audrey to call her urgently. He texted her to say that he had no credit and that she should just tell him. She texted him and informed him that the deceased was raped and murdered. She further informed him that she and the accused would be on their way to the deceased's place. Later on Audrey sent a text message to him saying that if the police asked about Wimpie he must say that Wimpie was not with him when he dropped off the deceased. He inquired from her why he must not say he was with him and she said it was because of what happened there. He then sent her text message informing her that he would not lie, because he had left Wimpie at the deceased's place and that his fingerprints would be there.

[20] It was further the witness' testimony that before Yvonne and his daughter's cousin left he did not see any fight involving Yvonne and the deceased. 'There was absolutely no fight at all', the witnesses emphatically stated. There was no argument between them or anyone else apart from a minor misunderstanding between the accused and his fiancé. The accused never intervened between the deceased and her friend Yvonne. No physical contact between the deceased and Yvonne took place. He never noticed the deceased bleeding from the nose. There was no evidence of blood that night. The witness testified that he was sober as well as his colleague Fredericks. He could remember everything that transpired at the party.

[21] Through cross-examination, the witness testified that most of the time all the people who came to the party including him were seated outside except his colleague with whom he shared the premises, his wife and children who were watching TV. He again stated that there was no music playing and if there was music it must have come from the television set. Concerning the issue whether the witness was just around the fire outside during the party, the witness explained that there were times when he went to the kitchen. But the kitchen had a big window and if there were people quarrelling or fighting where they were he could have heard or seen them. With regard to the accused's instructions that Yvonne wanted the deceased to take her home but the deceased did not want to go home; the disagreement ensued and there was almost a physical fight and the accused intervened by going between them, the witness responded that it is not correct. Yvonne wanted to leave because the drinks she was drinking got finished. She did not ask Dinah to go because when she said she was leaving the witness was there. She stood up, Winnie also stood up and said she would go with her and they both left together. Contrary to the proposition by counsel for the defence that there was a scuffle the witness said there was no scuffle. It is further counsel's instruction that the nose started bleeding but not as a result of the scuffle.

[22] Uamunavi Tjawira, a City Police officer, testified that on the date in issue he was on duty around Windhoek West and Windhoek North when he received a report that at house no.3, Currie Street, there was a lady who was not breathing. Upon arrival, he saw the lady and he called the ambulance. He also notified the control room to notify the police from the Criminal Investigation Department. While the ambulance people were busy and the detectives were arriving, one of the deceased's daughters picked up a stone and ran towards the accused. The witness prevented the lady from hitting the accused with the stone.

[23] At the scene, the witness observed a plastic, broken cellphone, one shoe and a panty next to the deceased's body. He also noticed that she was half naked from her

lower body. When he kneeled down closer to the deceased he observed that the deceased was not breathing.

[24] Seargent Raymond Khoeseb's testimony is that he arrested the accused person in connection with this matter. On 21 June 2014 whilst he was on standby duty, he received a call from the control room informing him of this incident. Upon arrival at the scene, it was already condoned off. He found some members of City Police and he spoke to Sgt. Tjawira. He also came across the body of a female person. The body was half naked on the lower part and she was wearing a bra. Next to the body there were shoes and a pair of underpants. There were many people at the scene including Inspector Kamusuvis and other investigators from the Gender Based Violence Unit. The body was identified to him by Melissa as that of Dinah Diedericks. Melissa is a daughter of the deceased. The body was removed from the scene.

[25] Early morning on Sunday 22 June 2014, the witness visited the scene again in the company of his colleagues. Whilst at the scene he spoke to one Yvonne who was renting at the deceased's place and now also deceased. She reported to him that someone who used a cellphone light entered her room and attacked her. She had a scuffle with that person and scratched the person on the neck area and bit the person on the hand.

[26] The witness further testified that during his investigation he interrogated Tropa who informed him that after the party he and Fredericks dropped off the accused and the deceased at the deceased's place with the deceased's car. Tropa and Fredericks left the accused with the deceased and went back by taxi. He also interrogated Fredericks and Fredericks confirmed Tropa's version.

[27] The witness again interviewed the accused, by then not as a suspect yet but because his name was also mentioned. The accused was cooperative. The accused said that he was very surprised and emphasised that:

'Officers, I am here to assist because I am surprised. I do not know anything about the incident of someone who was murdered. I heard also and I am very surprised. I am available, I can assist and I also want to find out who murdered the deceased.'

Because of the information he was given by Yvonne, whilst the witness and his colleagues were conducting the interview they were also making bodily observations on the people they were interviewing. They also did this in respect of the accused. Looking for the scratch marks and bite marks. The witness observed that the accused had some scratches on his neck and they asked the accused whether he was active at the party by assisting the organisers. The accused replied that he was not active. He did not help to carry things or chopping the wood. The witness asked the accused whether he was assisting at the party because of the slight injuries he observed on his neck. Apart from minor scratches on the neck the witness observed a mark on one of the thumbs. His impression was that it must be a bite mark. The witness inquired from the accused what happened and the accused said he could see the mark but he could not recall how it came about because it was minor but it might have occurred when he was doing something at home. He could not recall how it came about.

[28] The witness inquired what type of a phone the accused had and he said it was a Samsung cell phone. The accused took out the phone and he observed that the phone had a torch light.

[29] Because of the scratch marks, bite mark and the cell phone torch light the witness became suspicious that the accused might have been involved in the commission of the crimes. He informed the accused that he was going to implicate or link the accused to the crime and that he would advise him of his rights. The accused insisted that he had nothing to do with the crime. Any question the witness wanted to ask him, he needed not to be informed of his rights. He was a free person and he had explained to the witness what happened. The accused further stated that he knew the deceased's family for a long time and that he was employed by the deceased's ex-husband. The witness paused to listen to what the accused was saying and proceeded

to explain the accused's rights to remain silent, to get a legal representative and that whatever he said would be used as evidence in the court of law.

[30] The accused chose to remain silent. The witness formally arrested the accused and confiscated his cellphone for the purpose of investigations. The accused was left in the hands of Inspector Kamusuvise by the witness because Kamusuvise and the witness agreed that Kamusuvise should take the accused to the hospital to be examined because of the injuries they observed. Kamusuvise was the one who charged the accused.

[31] The witness continued to testify that at a later stage as an investigating officer he was also involved in this matter when the accused applied for bail. He opposed bail. Although on the record of proceedings during the bail application the name Sgt. Costa or Gaseb appeared, this was a typographical error. The witness was the one who testified opposing bail as he was the only investigating officer who was called to testify. He only ceased to be an investigating officer after bail application when the docket was assigned to a new investigating officer from Gender Based Violence Unit. It was again the witness version that he identified the body to Dr Kabanje at the mortuary that the body came from Currie Street upon Dr Kabanje's enquiry from him.

[32] Through cross-examination the witness was asked why he testified in the bail application that it was the accused who attempted to rape Yvonne Ruppung. The witness said Yvonne did not specifically identify the accused but because she said she scratched the person on the neck and she bit him on the hands when the witness observed the marks on the accused, drew an inference that it was the accused. The witness' further version was that he was in the company of police officers Jason and Kamusuvise when he observed the injuries. The witness again testified that there was blood from the deceased's nose when it was lying in the yard.

[33] Inspector Billy Wayne Kamusuvise's testimony corroborated the previous witness that the deceased's body was half naked and that next to the deceased her underpants

was lying there. He also noticed the blood on the nose as well as a plastic lying around. Behind the house there was a waste basket and the rubbish was removed from the bin. He further observed a vehicle key next to the vehicle. He informed officers from the police mortuary who arrived with the doctor and the doctor confirmed that the deceased was dead. The body was handed over to Constable Gertze to be taken to the mortuary. The witness further testified that there was a tenant at the deceased's house who was sexually assaulted. The tenant confirmed to them that she managed to bite the stranger who assaulted her. The witness left the scene and returned the following day for further investigations.

[34] The witness again testified that the following day he met the accused's fiancé, Tropa and Fredericks at the police station. He corroborated Sergeant Khoeseb that he noticed a small wound on the accused's left finger. The Acting Regional Commander, Deputy Commissioner Kamwangha, was also present and he instructed the witness and his colleagues to arrest the accused. After the accused was arrested, the witness left with Sergeant Tjikeama, Jason and Audrey Bock the accused's fiancé to go and fetch the accused's clothes that he was wearing at the party from Audrey's place. They asked for the accused's passport, they were given a file where they found the accused's passport and a document containing previous convictions of rape, assault and housebreaking in respect of the accused. There was also accused's marriage certificate. It was a Namibian marriage certificate.

[35] Audrey Bock gave them a pair of track suit that was an Adidas trousers and a jacket, blue in colour with red stripes. They were also given Adidas tekkies and an underwear white in colour. The witness had identified the clothes he got from Bock. The witness testified further that at the time they were given the clothes, the tekkies and the tracksuit had pieces of grass on them.

[36] The witness received exhibits from Sgt Khoeseb and Constable Gertze. All the goods were locked in the strong room. On a Monday with the assistance of Tjikeama, a National Forensic Laboratory form was filled in and the exhibits he received listed

therein. The witness identified the exhibits in court as those listed in the application for scientific examination from A - S. See exhibit 'W'. The exhibits were taken to the scene of crime officer Inspector Kathena for them to be taken to the laboratory for analysis.

[37] The items for the accused were packed separately in exhibit bags for NFSI. Again, deceased's goods were also packed separately in exhibit bags for NFSI. Apart from the clothing items the accused was taken to the doctor and blood was drawn from him. The tube containing the accused's blood sample was also placed in the exhibit bag for NFSI. Saliva swabs were also taken from the accused for DNA analysis. The witness had also requested the doctor to check on the accused's scratch marks as testified earlier on. The witness took the serial number for the accused's Samsung cell phone and applied for a search warrant in connection with the print outs. The exhibits were accompanied by a document listing all the items collected as well as the samples taken for DNA analysis. With regard to the injuries observed on the accused, the witness said he only observed an injury on the thumb.

[38] The witness further testified that he formally charged the accused. When he was completing a warning statement he asked the accused whether he had any injuries and the accused said he had no injuries. The witness also never noted that he observed injuries on the accused. The witness took a warning statement from the accused two days after the incident had happened. He was of the opinion that the injury he observed on the accused was very small, the scratch marks were artificial; by the time he took a warning statement the marks had already disappeared. The witness identified photograph 16 that depicts the deceased's body and blood on the deceased's nose. Photograph 42 depicts a small wound on the accused's left thumb.

[39] It is again the witness' testimony that all the exhibits were properly packed and sealed. Through cross-examination the witness testified that he could not determine whether the scratch mark he observed on the accused's left thumb was fresh or old because he is not a doctor. He later on changed that it was still not yet healed. Maybe it was fresh from the previous day. Photograph 42 depicts a very small wound.



[40] Sgt. Tuyoleni Jonas from Gender Based Violence Protection Unit testified that on 22 June 2014 she took part in interviewing the accused, his girlfriend, Tropa and Fredericks at Sgt. Khoeseb's office. Each person was interviewed individually. Tropa informed him that he received a text message from the accused's girlfriend Bock that he should not tell the police that the accused was in their company when they dropped off the deceased at her house. The witness inquired from Bock why she sent a text message to Tropa. She said it was because of a case of rape on which the accused was sentenced in his country South Africa.

[41] Whilst she was interviewing the accused, she observed some scratch marks on the accused's left hand and neck but these were not stated in her statement. She corroborated Inspector Kamusuvise that she went with him and Sgt. Tjikeama to Bock's place to fetch the accused's clothes. She identified the items they collected from Bock's residence. After the clothing items were collected, they were placed in forensic bags and taken to Gender Based Violence Protection Unit. Inspector Kamusuvise placed them in a safe. He was the only one who had access to the safe. Again, on 24 June 2014 she accompanied Inspector Kamusuvise to the mortuary where he received the rape kit. The rape kit was sealed and not tampered with. The rape kit was received from Warrant Officer Chitombo and the witness signed for it. The witness identified the rape kit because of its forensic exhibit number. The witness had also identified a forensic evidence collection form because it bore her signature as well from its serial number. The rape kit was handed over to Inspector Kamusuvise by the witness and he also signed for it.

[42] Onesmus Nangolo Chitombo testified that he was deployed as a record clerk and he attended the deceased's post-mortem examination. He also received a rape kit and specimen that was sealed in a forensic evidence collection bag on 23 June 2014 from Dr Kabanje. The witness handed over the items he received from Dr Kabanje to Sgt Jason. In the presence of Inspector Kamusuvise, Sgt Jason signed for the exhibits on 24 June 2014. The witness had identified the forensic evidence collection form.

[43] Kristiaan Ndemutilla Hashongo gave evidence that he is a Warrant Officer stationed at Windhoek Forensic Pathology sub-division. On 24 June 2014 he transported a blood sample from the deceased that was received from Dr. Kabanje to National Forensic Science Institute. He completed an application form that accompanied the blood sample for forensic examination and he identified it in court. The blood sample was sealed at the time he received it until he handed it over to Angelimos Nakawa, the specimen receiver at NFSI. She allocated the laboratory reference number. There was no tampering of exhibits during the transportation. The application for scientific examination was produced in court as an exhibit.

[44] Elvira Bianca Gertze's evidence was that she was stationed at police mortuary. On the date of the incident she transported the deceased's body from the scene to the police mortuary. They also picked up clothes found at the scene and they were handed over to Inspector Kamusuwise at the police mortuary for them to be taken to National Forensic Institute for DNA examination. The body was identified to him as that of Dinah Diedericks. She in return pointed it out and identified it to Dr Kabanje for medical examination. The body did not sustain any injuries during the transportation. The witness had also identified the deceased's clothes taken from the scene and the accused's blood sample contained in the tube that was drawn in her presence. The tube was handed over to him by Dr Kabanje. The witness handed the clothes and the blood sample to Inspector Kamusuwise. The tube containing the accused's blood sample was sealed and it was placed in a forensic bag.

[45] Warrant Officer Ello Pombili Hamukwaya testified that he took photographs at the scene of crime on 22 June 2014 and compiled a photoplan. Apart from the scene of crime he also took photographs whilst the doctor was conducting a post mortem examination. According to the witness, photographs 41-42 depicted a wound on the accused's left hand. The points at the scene of crime were pointed out to him by Melissa Diedericks. According to the photographs they depict the deceased's body lying with her face up and she was covered with a duvet cover. The photoplan was admitted

in evidence and marked as Exhibit 'R'. According to photograph 16, the deceased's jeans trousers appeared under the deceased's head contrary to the testimony of Gertze who said it was recovered from a river bed.

[46] Chief Inspector Kathena gave evidence that on 25 June 2014, he received exhibits from Inspector Kamusuvisi. The exhibits were accompanied by an application for scientific examination and the exhibits were listed in that application. The exhibits were packed in forensic plastic exhibit bags. Each exhibit had its own bag. The witness identified all the exhibits that he received from Inspector Kamusuvisi as listed in the application form contained in exhibit 'W'. After he verified the exhibits with the items listed in the application form for scientific examination he forwarded the exhibits and the list to the National Forensic Science Institute. The exhibits were booked in their register and they allocated the laboratory reference number on the application form. He was given two copies, he kept one and the other copy he gave it to the investigating officer. When the witness was given the exhibits by Inspector Kamusuvisi he signed the list that accompanied the exhibits. The witness identified the application form. Apart from the clothes that were listed in the application form there was a tube with blood and saliva swab from the accused, Samsung cell phone, a rape kit, a plastic bag white in colour, a Nokia cell phone, headband and an empty box of cigarettes.

[47] The exhibits were not tampered with. When the witness received them he kept them in an exhibit room where he was the only one who had access to the exhibits. The exhibits are registered in the exhibit register. That register is taken together with the exhibits to the National Forensic Science Institute and they acknowledge receipt of the exhibits.

[48] Doctor Simasiku Kabanje testified that he conducted a post-mortem examination of the deceased that was identified to him by Constable Gertze. The chief post-mortem report revealed that the cause of death was due to manual strangulation. The witness corroborated the version of Constable Hashongo that he, Hashongo took photographs of the deceased whilst the post-mortem examination was being conducted. According to

the witness, he observed blood from the nose of the deceased but there was no bone fracture. According to the doctor, if a person dies from strangulation, blood may accumulate due to pressure around the neck. Pressure is increased and the small vessels in the nose tend to rupture. The blood from the nose could be connected to the mechanism of death.

[49] The witness further testified that he collected evidence in respect of the deceased's genitalia and fingernail swab and it was captured in the rape kit. The rape kit was handed over to the police to be taken to National Forensic Science Institute for DNA purposes. The doctor identified the rape kit and according to the form that accompanied the rape kit it was handed over to Constable Chitombo. The accused was also taken to the doctor and he drew a blood sample from the accused and saliva swab. The blood sample was sealed in a tube and saliva swab was also sealed. The doctor identified the blood sample of the accused. After the blood sample was drawn it was handed over to the police. At the time the witness was testifying, he observed a small wound on the left thumb of the accused, depicted on photograph 42 but the injury never came to his attention when he was drawing blood from the accused. According to the doctor, the wound could have occurred more than 8 hours or more before the picture was taken. The wound was of recent but not fresh. It could have happened about three days prior to the picture being taken. A wound that occurred five days previously cannot be described as recent. That wound could have happened within 72 hours and it could not be described as an old wound. The post-mortem report was admitted in evidence and marked as exhibit.

[50] Kurt Van Wyk testified that he attended the accused's engagement party and that there was no music playing, however the television was on. The deceased and her friend came later at the party around 18:00 hours after the witness, Andre Kloppers and the accused had gone to buy more beers. They bought two boxes of Black Label beer. Around 18h20 he and Andre Kloppers left the party. After he left, the accused phoned him but the witness did not answer the calls because he knew that the accused wanted the witness to escort him to Okahandja.

[51] Mark William Plaatjie, an employee of MTC, testified that he received a search warrant in connection with this case to investigate communications in respect of several cell phone numbers and he compiled a report marked as Exhibit 'U'. The report had covered the period from 19 - 21 June 2014. A cell phone no. 264818879338 belonging to the accused was used. There is also location ID's of the cell that he used. Around 21:50 the cell phone number 0818879338 (accused's no.) received a call from cell phone number 0813967909. Cell phone no. 0818879338 was in the area of SWABOU 2 tower. Currie Street (deceased's residence) would have been covered primarily by SWABOU and Hanganani towers. Secondly, towers possibly covering the area would be Polytech and Dorado Park. Around 23h15 on 21 June 2014 the accused's number sent an SMS from 264818879338 to 264816236444 from Augustineum tower. Again, at 23:33 the accused made a call to the same number above from Modern Supermarket 3, Modern Supermarket 3 is in the area of Soweto, Katutura. Another SMS, (short text message) was made from the accused's cell phone no. around 23h11 to 264813967906 from Florence Tower at the intersection of Florence Nightingale Street. The cell phone no.264813967906 belongs to Audrey Bock. The MTC map was admitted in evidence and marked as Exhibit 'V'.

[52] Tuyeni Kelao Nakalemo employed by the Ministry of Safety and Security Forensic Science Institute testified that when exhibits are brought to their office they are given laboratory reference numbers and this applied to the exhibits in respects of this case. Only sealed exhibits are accepted. Exhibits are kept in the strong room by the head of the administration. If the exhibits require a chain of custody, a form is signed. The witness read the list of exhibits as recorded in Exhibit 'W'. The witness analysed and tested the exhibits he received for human blood. The accused's tracksuit jacket tested positive for human blood; deceased's blue jeans tested positive for human blood, deceased's jacket tested positive for human blood, a black t-shirt with red and white stripes tested positive for human blood and the deceased's head band tested positive for human blood. The witness' duty was mainly to do the screening after that the exhibits were referred to another scientist for DNA analysis.

[53] Maryn Swart, Chief Forensic Scientist at National Forensic Science Institute, dealt with DNA analysis in this matter and interpreted the DNA report which she compiled. She further testified about the procedure followed and the chain of custody. It was again her evidence that she verified and signed R1 report compiled by Ms Nakalemo. The witness further testified that she compiled report 2, 1201-2014-R2 dated 14 April 2015 and R3, 1201-2014 dated 23 October 2015. The following exhibits were subjected to DNA analysis, K001/2015 which is a reference blood from the deceased from exhibit G. K 002/2015 is a reference blood from the accused exhibit E. Q 004-2-2015 is a swab from exhibit D. Q 005-2-2015 is a swab from exhibit L. Q 006-2-2015 is a swab from exhibit S. According to DNA analysis the, deceased's DNA profile was found on the accused's blue Adidas tracksuit jacket. However on the same tracksuit jacket, there was again DNA profiles for two other individuals that was inconclusive. This is evident from Report 1201 – 2014 - R2 that is produced in evidence as Exhibit 'X'.

[54] Again according to Ms Swart's testimony exhibit QO82-10-2015 which is a fingernail swab from the right hand of the deceased's fingernail web. The accused's DNA profile was found on the swab. This testimony is also as per report R3 dated 23 October 2015 and marked as Exhibit 'Y'. It is the witness testimony that if the deceased had physical contact with the accused there might have been a transfer of DNA.

#### Defence case

[55] Wilhelm Derick Februarie testified that there was a time he worked for the deceased's ex-husband. That is how he came to know the deceased and her daughters. On 21 June 2014, the accused got engaged to his fiancée, Audrey Bock, at Sup. Andre Tropa's house situated at Windhoek Correctional Facility. First, there was the accused, his fiancé and Andre Tropa. They were joined by Fredericks followed by a man and a woman who were friends to Tropa. After that they were joined by Andre Kloppers and Klaus. Later on the accused contacted the deceased and invited her to

come and join them. The deceased came at a later stage with her friend Yvonne Ruppung.

[56] At the party they drank and ate. They were also having a 'braai'. According to the accused they were all drinking beer and Whisky. The music was playing from Sup. Tropa's sitting room. There was a time the accused and the deceased were 'kind of dancing together.' As it was getting late, Yvonne Ruppung told the deceased that she wanted to go home. The deceased did not want to go and she was saying it was still early. They then had a misunderstanding. This was not the first time the accused was experiencing a misunderstanding between the two but that is how he knew them whenever they drank. They grabbed each other like they were wrestling. The accused went between them. The accused told them that the deceased and Yvonne were friends. The accused then noticed some blood coming from the deceased's nose. The confrontation stopped when he went between them. When this incident was happening it was only the accused, the deceased and Yvonne who were present. Sup. Tropa and Klaus had taken the other Andre to the bathroom. He again said, Tropa, Fredericks and Audrey were busy in the kitchen. Tropa's female friend was also in the kitchen. However, he was not aware of the whereabouts of Tropa's male friend.

[57] After the accused stopped the deceased and Yvonne from wrestling, Yvonne went to the kitchen. He did not see her again. He was only informed by Sup. Tropa that Yvonne had left with one of Tropa's friends. The party continued and Andre Kloppers and Klaus also went home, followed by Tropa's friends. There remained the accused, Sup. Tropa, Fredericks and the deceased. Audrey left before Yvonne left, because she had a misunderstanding with the accused. This is contrary to Audrey's testimony when she said she left after Yvonne left. The deceased was under the influence of alcohol and Sup. Tropa decided to drive her home with her vehicle. The accused and Fredericks accompanied them. The accused is the one who knew where the deceased was staying, he was giving directions. The accused also wanted to see to it that the deceased had arrived home safely. The accused took a box of beer that was left after the party.

[58] When they reached the deceased's place Sup. Trope gave the keys to the deceased and Sup. Trope left with Fredericks leaving the accused and the deceased. The reason for the accused to remain at the deceased's house was to make sure that she was safe at home as it was dark. The deceased was the accused's friend and she was looking for the house keys which she could not find. After they searched for the keys and they did not find them, they moved to the back of the house within the yard at the kitchen's door. They were knocking at the door but nobody opened. They sat in front of the door and waited for some time maybe half an hour to 40 minutes. Thereafter, the deceased told him to go as she was of the opinion that Audrey might have mixed feelings about them. The reason why Audrey might have mixed feelings about them was because it was well known that the deceased used to date younger men.

[59] The accused asked the deceased whether she was sure that she wanted the accused to go. The accused then left the deceased. The accused confirmed that he texted Audrey that he was on the way. He also sent her a short message for her to open for him. He further corroborated Audrey and one of the deceased's daughter's version that when she called his cell phone Audrey answered the call. Upon the information received by Audrey, the accused and Audrey went to the deceased's place. Upon arrival, one of the deceased's daughters accused him of killing the deceased and she wanted to throw a brick at him but she was stopped from doing so.

[60] The accused confirmed that he was arrested on 22 June 2014. He however, disputed that he had scratch marks on his neck. He further said he could not recall if he had a bite mark as he was using his hands to do manual work. If a small injury was observed on his thumb, this could have been due to an old mark or it could have been due to the work he did with his hands. The accused further disputed having raped the deceased or to have murdered her. He had no reason to commit such offences against her. Concerning the blood stain that was on the accused's track suit jacket, the accused said this could have landed on his jacket at the time he was separating the deceased



and Yvonne when they were wrestling. He had no reason to rape or kill the deceased because the deceased was like a mother figure to him.

[61] It was put to the accused through cross-examination that the amendment to his reply to the pre-trial memorandum was a recent fabrication. The accused has an initial reply from his former lawyer and a supplementary reply from the same lawyer and an amended reply from the current legal practitioner representing him. The accused responded that what he told the court is the truth. The previous lawyer did not consult properly. Although he signed the statements, he just complied with the lawyer's instructions. However, the current legal representative had a proper consultation with him. Concerning the reason in the initial reply to the pre-trial memorandum that the accused took the box of beer to continue drinking with the deceased at her house, the accused said this was a lie. That was the defence case.

#### State's argument

[62] At the close of the defence's case counsel for the State argued that the accused was the last person seen in the company of the deceased. The accused took the beer to go and drink with the deceased at her house. The accused testified that he wanted to make sure that the deceased was safe. However, his version was proved to be false because if he wanted the deceased to be safe he could not have left her alone outside the house. The accused's version that he was convinced by the deceased to leave is improbable and it should be rejected. The accused in his bail application told the court that he left immediately after Sup. Tropa and Fredericks left. But now he is saying that he remained for some time looking for the key and waiting for one of the deceased's daughters to arrive home. The accused and the deceased were dropped off before 22h00 at the deceased place. Sup. Tropa arrived back at the correctional facility at about 21h45. The accused arrived home at about 23h25. It takes a few minutes from the deceased's home to Audrey's place where the accused spent the night. The accused before he went home was in the vicinity of SWABOU Tower which is close to the deceased's home. When the accused texted Audrey for the first time, he was still at the deceased's house. It took him about 14 minutes to reach Audrey's place.

[63] When Melissa phoned the accused, it was Audrey who picked up the phone and told Melissa that her mother was dropped off safely home. Why would Audrey tell Melissa that her mother was safely dropped home without Melissa even asking anything? The witness could hear from the background the accused giving instructions to Audrey. The only inference that could be drawn from this is that the accused was trying to use Audrey to cover up his tracks. This evidence was not challenged through cross-examination. It remains undisputed. Audrey later on texted Sup. Trope on the instructions of the accused telling her to tell Sup. Trope to inform the police that he should say that he was not with the accused when he took the deceased to her house. This version was not put to Sup. Trope; it was only put to Audrey. This is inconsistent with the behaviour of an innocent person who is faced with such allegations against him. If the accused did not kill the deceased there was no need for him to cover up.

[64] Furthermore, the accused throughout the trial never put to the witness that the blood from the deceased's nose at Sup. Trope's house landed on his jacket. This only came during his testimony and that he only put it to Chantel that when the incident happened, Sup. Trope was in the kitchen instead of putting it to the witnesses who were at the party. Trope and Fredericks testified that there was no scuffle between the deceased and Yvonne. They also never observed any bleeding from the nose. Counsel further argued that Gaweseb and Jason observed scratch marks on the accused's neck. The only inference that can be drawn is that the accused sustained those injuries when he was raping the deceased. The accused's DNA profile was found on the deceased's nail swab. Concerning the rape charge, counsel for the state conceded that no seminal fluid was found on the genitalia and no DNA profile that could link the accused to a sexual act. However, the court should invoke the provisions of s 256 of the Criminal Procedure Act 51 of 1977 and find the accused guilty of attempted rape. The deceased's body was found semi-naked from the waist to the bottom. She had injuries on her knees and on her thighs and that is indicative of a sexual attack or an encounter perpetrated against the deceased. Again the court should consider that the accused

had amended his reply to the pre-trial memorandum, recanting some of the things he had admitted in an attempt to save himself from self-incrimination.

#### Defence's argument

[65] On the other hand, counsel for the accused argued that the investigating officer during the bail application testified that he received a statement from Yvonne Ruppung alleging that there was a person who attempted to rape her and she scratched him on the neck and she bit one of his fingers during the attack. The witness said it was the accused who almost raped her. It turned out that the statement never mentioned the accused's name. Concerning the injuries, there is no J88. The fact that there is no medical report to that effect is because there were no such injuries. According to the photographs, they only concentrated on the old scratch that was on the thumb. According to Sgt. Khoeseb, the accused was bitten on the finger. However, no such injuries were depicted in the photograph neither were there scratch marks on the neck depicted. Furthermore, if there were injuries these should have been reflected in the warning statement. No such injuries have been reflected therein. When Ms Bock testified, she said she did not observe injuries on the accused.

[66] Concerning the allegation that the accused went to the deceased's place to drink further, counsel argued that, that was not the accused's intention. The accused was the one who gave directions to the deceased's place. His other intention to go there was to make sure that the deceased was safe at home. He even knocked at the door of the house but nobody opened. He further testified that he stayed about 30-40 minutes hoping or waiting that someone would come. The deceased was left inside the yard near her kitchen. With regard to the blood from the nose, the body was tampered with. Tjawira testified that when he arrived at the scene the body was found lying face down. This could also have resulted in nose bleeding as Dr Kabanje said it is also possible. So, counsel for the State cannot argue that the bleeding occurred at the time the crime was perpetrated against the deceased. I pause to say, I see no contradiction in this regard because Melissa and Chantel the witnesses who arrived first at the scene also found the deceased lying face down. Counsel argued further that the state had failed to

prove rape against the accused because Dr Kabanje said there were no signs of semen as per the rape kit. The evidence of doctor Kabanje was corroborated by Ms Swart in this respect. There was also no DNA on the plastic that was found covering the deceased's face. Concerning the blood spatter on Exhibit 'R' it was a very small blood spatter on the accused's track suit jacket.

[67] The State wanted the court to believe that the blood belonged to the deceased. According to evidence from the DNA expert, one cannot conclude that the blood spatter came from the deceased. It is worth mentioning here, that it was the accused who implied that the blood came from the deceased when she was allegedly bleeding from the nose and that blood could have landed on his jacket at the time he was separating the deceased and Yvonne Ruppung. Counsel further conceded that, the DNA belonging to the deceased was found on the accused's jacket where that blood spatter was as well as that of the accused and two other unknown individuals. In respect of the fingernail swab where the accused's DNA was found, Ms Swart who analysed the DNA said the DNA can be transferred through contact for example by touching or hugging. The accused said they were at the party and they might have hugged. He is the one who invited the deceased. It is not known how the blood spatter landed on the accused's jacket; maybe he cut himself. I pause to mention that the suggestion that the accused may have cut himself is contradictory to an earlier argument that the accused had no injuries.

[68] It was further counsel's argument that with regard to the three replies to the pre-trial memorandum, there was not much of a difference except in respect of three aspects. Firstly, the accused indicated that there was a social gathering instead of an engagement. Secondly, it was stated that there was no relationship between Audrey Bock and the accused and lastly, when the question was asked whether the accused person had scratch marks and wounds on his hands when he was arrested he admitted it. These issues are not material that can have adverse effect on the accused's case. Furthermore, the state had failed to prove beyond reasonable doubt that the accused

committed the offences he is charged with so, counsel argued. Therefore, the accused should be acquitted. Both counsel referred me to authorities which I have considered.

### The law

[69] The State rests its case on circumstantial evidence. Therefore, the State urges the court to draw inferences. Where the court is required to draw inferences from circumstantial evidence, it may only do so if the requirements set out in *R v Blom* 1939 AD 188 referred to as the 'two cardinal rules of logic' have been satisfied namely:

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

[70] The fact that the court will have to draw inferences does not mean that the State will be relieved of its duty to prove the guilt of the accused beyond reasonable doubt. The accused is under no obligation to prove his innocence as he bears no burden to prove his innocence.

[71] In *S v Sauls and others* 1981 (3) SA 172 (d) at 182 G, the following was stated:

'The state is however not obliged to indulge in conjecture and find an answer to every possible inference which ingenuity may suggest any more than the court is called on to seek speculative explanation for conduct which on the face of it is incriminating... A passage in a minority judgment given by Malan JA in *R v Mlambo* 1957 (4) SA 727 (A) AT 738 is apposite. Two paragraphs in this passage were cited with approval by Rumpff JA in *S v Rama* 1966 (2) SA 395 (A) at 401:

"In my opinion, there is no obligation upon the crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the crown to produce evidence by means of which such a degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists

no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilty of the accused. An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case.”

[72] The law does not require from a court to act upon absolute certainty, but rather upon just and reasonable convictions. When dealing with circumstantial evidence, as in the present case, the court must not consider every component in the body of evidence separately and individually in determining what weight should be accorded to it. It is the cumulative effect of all the evidence together that has to be considered when deciding whether the accused's guilt has been proved beyond reasonable doubt. In other words doubts about one aspect of the evidence led in a trial may arise when the aspects is viewed in isolation, but those doubts may be set at rest when it is evaluated again together with all the other available evidence. *S v Hadebe and Others* 1998 (1) SACR 422 (SCA) at 426 e-g) cited with approval in (*S v HN* 2010 (2) NR 429 (HC) at 444 D-F)

#### Evaluation of the evidence

[73] It is common cause that the deceased and her friend Yvonne Ruppig attended the accused's engagement party to Audrey Bock. It is also common cause that the accused and the deceased were taken to the deceased's place by Sup. Tropa accompanied by Fredericks. It is common cause that the accused took a box of Black Label beer with him. It is further common cause that the accused was left in the company of the deceased. The accused was the last person seen in the company of the deceased.

[74] Blood samples were taken from both the accused and the deceased. The accused was referred to as male 1 and the deceased was referred to as female 1. A swab that contained human blood was taken from the accused's tracksuit jacket and analysed for DNA purposes. A mixed DNA profile for four individuals was found. The

accused and the deceased's DNA profiles were not excluded although the DNA profiles for two other individuals were inconclusive. Again finger nail swab was taken from the right hand of the fingernail web of the deceased was for DNA analysis. The accused's DNA profile was found on the fingernail swab of the deceased. The deceased blood sample was taken and analysed. It was found that it contained a concentration of not less than 0.29 g of ethyl alcohol per 100 millilitres of blood.

[75] The accused's explanation in this respect was that, there was a scuffle between the deceased and her friend Yvonne Ruppung. There is a possibility that the deceased's blood landed on his tracksuit jacket when he was separating them. His instructions to his lawyer was that the blood was not as a result of the scuffle. The accused testified that when the incident happened it was only him, the deceased and Ruppung who were present. Sup. Tropa and Klaus had taken the other Andre to the bathroom. He again said Tropa, Fredericks, Audrey and Tropa's female friend were busy in the kitchen. This version was not put to Audrey or Tropa neither to Fredericks. It was only put to Chantel. It is also not clear from the accused's testimony where exactly Sup. Tropa was at the time. The accused gave contradictory evidence in this regard, saying at one time that he was in the kitchen and at another that he had taken the other Andre to the bathroom.

[76] None of the witnesses who were at the party who testified saw a scuffle between the deceased and her friend. None of them observed the deceased bleeding from the nose whilst she was at Sup. Tropa's residence. Again the accused said there was a time he and the deceased were 'sort of' dancing. However, none of the witnesses who were present saw the accused and the deceased dancing. As earlier stated, Sup. Tropa gave evidence that most of the time people were seated outside around the fire. When Yvonne Ruppung said she was leaving, Sup. Tropa was present and she never asked the deceased to go with her. She left with a certain Winnie. Concerning the disagreement between the deceased and her friend that allegedly happened whilst Tropa was in the kitchen, Tropa testified that there is a big window and through that window a person who is in the kitchen could clearly see and hear. The curtains to the window were drawn open and the door to the kitchen was open.

[77] Having stated the above, I consider it fit to first determine whether there was a scuffle between the deceased and her friend.

Having weighed the testimonies of witnesses who attended the party including that of the accused and the evidence in its totality, I have come to the conclusion that the version of the State witnesses that there was no scuffle between the deceased and her friend is more reliable and reasonably possibly true in the circumstances. I see no reason why the witnesses should testify that there was no scuffle and that they did not see the deceased bleeding from the nose at the party more specifically Tropa, a friend to the accused who even allowed the accused and his fiancée to hold the party at his residence. He had no reason to deny such allegation. I therefore reject the accused's version that there was a scuffle between the deceased and her friend and that the deceased bled from the nose whilst at the party, because it could not be reasonably possibly be true in the circumstances. If such an occurrence had taken place it is highly unlikely that it could only have been known by the accused alone. The assertion that there was a scuffle between the deceased and her friend is a mere tactic to justify how the deceased's DNA profile landed on his tracksuit jacket. I also regard this to be an afterthought, formed after the accused learned that at the time the body of the deceased was found, it was bleeding from the nose.

[78] Again the accused said he danced with the deceased. However, his version was not corroborated by any of the State witnesses. On the contrary, it was disputed by Tropa, Fredericks and Van Wyk. I see no reason why the accused's friends and/or acquaintances should dispute that the accused did not dance with the deceased.

[79] With regard to the accused's three different replies to the State's pre-trial memorandum, according to the reply to the pre-trial memorandum dated 9 February 2017, the accused denied having been in a relationship with Audrey Bock at the time of the deceased's death. He also denied having celebrated his engagement to Audrey on 21/6/2014. Instead, he said he was only aware of a social gathering and/or 'potjie kos.' In the same document, the accused also admitted having had a wound on one of his



fingers and scratch marks on his neck. Again, the accused had admitted in the same reply that he wanted to accompany the deceased to her place in order for the two of them to drink further. This answer was also given in the pre-trial reply to the State's memorandum dated 31 March 2017. However, on the reply dated 31 March 2017 there was no answer provided concerning the accused's injuries on the finger and on the neck.

[80] Again, according to the reply to the pre-trial memorandum dated 2 April 2018, the accused admitted to have been in a romantic relation with Bock at the time of the deceased's death. Furthermore, he also admitted that on 21/6/2014 he celebrated his engagement to Bock. He again admitted that he wanted to accompany the deceased to her residence so that the two of them can drink further. This version is contrary to what the accused said in court. In this particular reply, the accused denied that the police observed a wound on one finger and scratch marks on the neck. In all replies to the pre-trial memorandum, the accused denied to have undressed the deceased and he said he was not at the deceased's residence. However, when he was asked whether around 22h00 on 21 June 2014 the two state witnesses who off loaded him and the deceased at the deceased's residence left the premises of the deceased , he replied that he left the deceased's premises shortly after the two State witnesses had left. The reason for the last amendment of the reply to the pre-trial memorandum was that the accused's instructions were allegedly not properly carried out by the previous legal practitioner. It is worth mentioning here that even in the last amended reply to the pre-trial memorandum where the instructions were allegedly properly taken, the accused had contradicted himself with respect to the version he gave in court. According to his amended reply, he said he left shortly after they were dropped off at the deceased's residence whilst in court he testified that he left after 30 - 40 minutes.

[81] The accused is alleging that his previous legal representative did not take his instructions properly. However, it appears to me that the alleged irregularities are only in respect of issues that are likely to incriminate the accused. As pointed out earlier, even in the instance the accused said his instructions were properly taken he contradicted

himself with the version he gave in court, especially in respect of the time frame he departed the deceased's place after the witnesses who dropped them off had left. The accused gave an impression that his former legal practitioner invented what he wrote in the replies to the pre-trial memorandum only in respect of what appears to incriminate the accused. However, the rest of the replies are exactly the same as per his latter instructions. Why would a legal practitioner try to incriminate his client, one may rhetorically ask? It is hardly conceivable that such a thing would occur. The accused by giving different versions to the pre-trial memorandum is a clear indication that he is not a reliable witness.

[82] There is no rule of thumb test that the accused person should be bound by the admissions he made in his reply to the pre-trial memorandum, but each case has to be treated on its own merits. All the three replies are admitted in evidence and they will be considered together with other evidence adduced before court. The accused wants to distance himself from the instructions he gave to his erstwhile counsel in respect of the incriminating parts.

[83] It is trite that once an accused has placed his case in the hands of his legal representative, the legal representative takes control over the case and the accused cannot distance himself from the conduct of his legal representative. This is in line with *R v Matonsi* 1958 (2) SA 450 (A) at 458 as cited with approval in *S v HN* supra.

#### Application of the law to the facts

[84] Having dealt with the above issues, I will now turn to the first count of murder and apply the relevant principles to the facts. After the deceased was left in the company of the accused few minutes to 22h00 (I am saying few minutes because Tropa arrived back to the facility at 21h45), the deceased was later found dead between 22h00 - 23h00. Although the accused gave two different versions concerning the time he spent at the deceased's place, he only texted his fiancée Bock that he was on the way at 23h10. He again texted her informing her to open for him at 23h24. There is no evidence that after the accused left the deceased's place he went to another place apart

from going to the road to get a taxi. Again, no evidence suggesting that the accused spent a long time on the roadside waiting for a taxi. There is no direct evidence that the accused was seen committing the crime. The court has to draw inferences from circumstantial evidence.

[85] According to the forensic evidence, the accused's DNA profile was found on the fingernail swab taken from the fingernail web of the deceased. The deceased's DNA profile was also found on the swab taken from the accused's tracksuit jacket. Although the accused has explained that the deceased's blood might have landed on his jacket when the deceased was fighting with her friend and he separated them, his version was not corroborated by the other witnesses who were present and I have rejected it. In the same vein, I have also rejected his version that he was dancing with the deceased because if that was so his friends who attended his party could have seen him. The accused is a single witness in respect of his alleged activities with the deceased at the party. Although the court may rely on the evidence of a single witness, certain requirements have to be satisfied which is not the case in this matter. By saying he was dancing with the deceased the accused is trying to explain away his DNA that was found on the deceased's fingernail web. He is implying that because they danced together and there was a possibility that they hugged each other, the DNA might have been transferred through that supposed contact.

[86] Although the forensic expert testified that DNA can be transferred through physical contact that includes hugging, it is not the accused's testimony that he and the deceased hugged each other. Furthermore, the accused gave two different versions as to the reason for him to remain with the deceased, namely to drink further hence the taking along of a box of the *Black Label* beer. Another version was that he remained at the deceased's place to see to it that she was safely home. If he was concerned with the deceased's safety why did he leave a few minutes shortly after Sup. Trope dropped them off as per one of his replies to the pre-trial memorandum? If one has regard to his testimony in court that the deceased lost her key, this does not make sense.

[87] Again, if the accused said he remained behind to see to it that the deceased was safe, why would he give in to the alleged insistence by the deceased that he should leave if the deceased was still unsafe outside? Furthermore, Tropa's testimony was that, Bock on the instruction of the accused informed him that he should hide from the police the fact that he, the accused, was present when the deceased was dropped off at her place by Tropa. Although the accused disputed this, Tropa's version has been corroborated by Bock. Both these witnesses are close friends of the accused, especially Bock was very dear to the accused as she was engaged to him. She informed Tropa of the accused's instructions immediately after the incident happened before she even broke up with him. I find Tropa and Bock to be reliable witnesses in this regard and I see no reason why they should make false allegations against him. The mere denial that he never instructed Tropa, through his then fiancé, does not hold water against such overwhelming evidence. I accept the State witnesses' version because looking at the possibilities and all the probabilities it appears to be reasonably possibly true as opposed to the accused's uncorroborated version. The accused's version in this respect is thus rejected.

[88] Having considered the evidence in its totality and its accumulative effect, I am of the view that it is safe to draw an inference as it appears to be the only inference to be drawn that the accused is the one who killed the deceased by way of strangulation. It is therefore, my finding that the State has proved beyond reasonable doubt that the accused killed the deceased unlawfully, wrongfully and intentionally. I find that he had direct intention to kill the deceased.

[89] I will now proceed to the 2<sup>nd</sup> count of rape and its alternative count of crimen injuria. The State rests its case on the evidence that the deceased's body was found half naked from the lower part. There is no other evidence connecting the accused to the rape. According to the forensic investigations, there is no evidence suggesting that the deceased was raped. This position has also been conceded by the State. However, the State urged the court to invoke the provisions of s 256 of Act 51 of 1977 read together with the provisions of the Riotous and Assemblies Act 17 of 1956 and to find

the accused guilty of attempted rape. The Combating of Rape Act 8 of 2000 does not specifically provide for the offence of attempted rape. However, section 18 (1) of the Rites and Ceremonies Act, provides that any person 'who attempts to commit any offence against a statute or a statutory regulation shall be guilty of an offence and, if no punishment is expressly provided thereby for such an attempt, be liable on conviction to the punishment to which a person convicted of actually committing the offence would be liable'. Although the State had proffered an alternative charge to the accused it did not lead evidence to that effect.

[90] It was held in *S v September* 1999 NR 334 (HC) at 336H – 337A citing *R v Schoombie* 1945 AD 541 at 546 as follows”

‘Attempts seem to fall naturally in two classes:

- (a) Those in which the wrong doer intending to commit a crime, has done everything which he set out to do but has failed in his purpose either through lack of skill, or of foresight, or through the existence of some unexpected obstacle, or otherwise.
- (b) Those in which the wrongdoer has not completed all that he set out to do, because the completion of his unlawful acts has been prevented by the intervention of some outside agency. It seems, therefore, that in the case of interrupted crimes and attempt to commit such crime is proved when the court is satisfied from all the circumstances of the case that the wrongdoer at the time when he was interrupted, intended to complete the crime and that he had at least carried his purpose through to the stage at which he was “commencing the consummation.”

The court held that: ‘Merely undressing the deceased would fall under the category of those wrong doers who have not completed all that they set out to do, because the completion of the acts has been prevented by the intervention of some outside agency.’

Watermeyer CJ, in *R v Schoombie* referred to an extract from the textbook *Principles of Criminal Law*, 2<sup>nd</sup> ed. by Burchell and Milton where the authors describe an uncompleted attempt in the following terms:

'In the case of attempt, however our courts have preferred the objective test in judging the conduct of the accused for, following the English law and American law, a distinction is made between those acts which are remote from and those which are proximate to, the commission of the crime itself. The former are merely acts of preparation and even if accompanied by an intention do not entail liability; it is only acts immediately connected with the consummation of the completed crime which amounts to attempts.'

[91] Applying the above principles to the present facts, finding a mere semi naked body of the deceased does not amount to attempted rape. This was not an act of preparation for an intended rape. There was no other evidence suggesting an attempted rape.

[92] The State referred me to *Williams v The State*, Case No. A 342/2010, delivered on 15 October 2010, a judgment of the High Court of South Africa, Western Cape.

The facts in the above matter are distinguishable from the present matter. In that case, although the deceased's body was found in a semi naked state and no evidence of rape was found there was other additional evidence. This included deceased bleeding on her posterior fouchette, seminal fluid found in her vagina and pubic hair of the appellant found in the carpet between the deceased's legs just to mention a few.

[93] Having assessed the evidence, I am of the opinion that the State has not succeeded to prove beyond a reasonable doubt that the accused raped the deceased or that a competent verdict in terms of s 256 of the Criminal Procedure Act read with the Provisions of the Riotous and Assemblies Act of 1956 can be availed to it. The accused is therefore entitled to the benefit of doubt.

[94] With regard to the alternative count of crimen injuria, Snyman *Criminal Law*, 6<sup>th</sup> ed. at 461 defines the crime as follows:

'Crimen iniuria consists in the unlawful, intentional and serious violation of the dignity or privacy of another.'

[95] At this stage, I only wish to discuss one of the elements of the crime, namely violation of dignity because the charge refers to the impairment of dignity. According to Snyman, *supra*, at 463:

'The act consists in the violation of another's dignity or privacy. In order to determine whether there has been an infringement of another's dignity both a subjective and an objective test are applied. Subjective test: In instance of infringement of dignity (as opposed to the infringement of privacy) Y must (a) be aware of X's offending behaviour and (b) feel degraded or humiliated by it'.

[96] According to subjective- dimensions there is an exception to this test where a young child or a mentally defective person is involved. In respect of this case, the deceased was neither a young child nor a mentally defective person. It is also not established whether the stripping of the deceased happened before she died or it was done after she had died. From the authority referred to above, it would appear that this offence cannot be committed against a dead body. In view of this I am not satisfied that the State has proved its case beyond reasonable doubt.

[97] In the result, the following verdict has been arrived at:

Count 1: Murder: Guilty of murder with direct intent.

Count 2: Rape- Contravening section 2 (1) (a) of Act 8 of 2000: Not guilty and acquitted.

Alternative to count 2: Crimen iniuria: Not guilty and acquitted.

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NN Shivute  
Judge

APPEARANCES:

THE STATE:

S. KANYEMBA  
Office of the Prosecutor-General, Windhoek

ACCUSED:

M. SIJOMUNJI  
Instructed by Directorate of Legal Aid, Windhoek



