

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case No: CC 15/2018

THE STATE

v

HENDRIK ATAB SWARTZ

**Neutral citation:** *S v Swartz* (CC 15/2018) [2019] NAHCMD 86 (8 April 2019)

**Coram:** USIKU, J

**Heard:** 27 September 2018; 29 – 31 October 2018; 01 – 02 November 2018;  
25 – 28 February 2019; 01 March 2019; 18 March 2019 and 08 April  
2019.

**Delivered:** 08 April 2019

**Flynote:** Criminal Procedure – Evidence – Similar facts evidence – Section 211 (a) (1) of the Criminal Procedure Act 51 of 1977 – Such evidence shall only be so admitted if it has significant probative value that is not substantially out-weight by its potential for unfair prejudice to the accused. In this case such evidence showcasing the accused's *modus operandi* in several charges of attempted murder and rape. Criminal Law – Identification – Such evidence be treated with caution – However prior knowledge of the accused by the victim strengthening her evidence – Such

evidence reliable – Criminal Law – *Alibi* defence – Such defence adversely affected where accused raising such defence only for the first time at his defence – Though no burden on accused to prove *alibi* – Courts duly to assess the reliability on an *alibi* on totality of evidence.

**Summary:** On the evening of Wednesday 1 May 2013 the 19 year old complainant in count five in the indictment and her friend were walking toward Aimablaagte in Mariental. Whilst on their way the accused came with an open knife and made stabbing movements towards the complainant in count seven in the indictment who avoided being stabbed by moving out of the way. The accused chased the complainant in count five with the open knife and he eventually took her to his shack and he assaulted the complainant as set out in count five. She lost her consciousness where after the accused raped her in the manner set out in count six in the indictment.

On the evening of Friday 25 March 2016 the 12 year old complainant in count three in the indictment was walking alone in the Ombili location in Mariental. The accused attacked her and he tied her hair band around her neck and strangled her. The accused, who was born on 24 December 1987, proceeded to rape the complainant as set out in count four in the indictment. During the rape a witness came to the rescue of the complainant and the accused fled the scene.

During the period Wednesday 19 October 2016 and Friday 21 October 2016 the 16 year old deceased in count one in the indictment was walking in the vicinity of the grave yard in Mariental. The accused attacked the deceased and rape her in the manner set out in count two in the indictment. The accused also strangled the deceased manually and/or with an object causing the deceased to die on the scene.

---

## ORDER

---

Count One : Murder with direct intent – Guilty.

Count Three : Attempted murder – Guilty.

Count Four : Rape – Guilty.

Count Five : Attempted murder – Guilty.

Alternative charge to count six : Crimen Injuria – Guilty.

Count Seven : Assault with intent to do grievous bodily harm – Guilty.

He is however found not guilty in respect of count two and six.

---

## JUDGMENT

---

### **USIKU J:**

[1] The accused was charged on the following counts:

Count One – Murder.

In that during the period 19 – 21 October 2016 and at or near Mariental in the district of Mariental the accused did unlawfully and intentionally kill EG a 16 year old girl.

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

In that during the period of 19 – 21 October 2016 and at or near Mariental in the district of Mariental the accused did unlawfully and intentionally commit a sexual act with EG (the complainant) by inserting his penis and or other part of his body and/or an object into the vagina and/or anus and/or mouth of the said EG (the complainant) under the following coercive circumstances:

1. By the application of physical force to the complainant and/or
2. By threatening the complainant with the application of physical force; and/or

3. Where the complainant is affected by physical disability or helplessness or other disability, or intoxicating liquor which mentally incapacitates the complainant, 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 commit the sexual act; and/or
4. Where the complainant is unlawfully detained.

Count Three – Attempted murder

In that upon or about 25 March 2016 and at or near Mariental in the district of Mariental the said accused did unlawfully assault CG by strangling her with intent to murder her.

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

In that upon or about 25 March 2016 and at or near Mariental in the district of Mariental the accused did unlawfully and intentionally commit a sexual act with CG (the complainant) by inserting his penis and/or other part of his body and/or an object into the vagina and/or anus and/or mouth of the said CG (the complainant) under the following coercive circumstances:

1. By the application of physical force to the complainant; and/or
2. By threatening the complainant with the application of physical force; and/or
3. Where the complainant is under the age of 14 years and the accused is more than three years older than the complainant.

Count Five – Attempted murder

In that upon or about 1 May 2013 and at or near Mariental in the district of Mariental the accused did unlawfully and intentionally assault JS by stabbing her with a knife and/or strangling her and/or stuffing a piece of material into her mouth with intent to murder her.

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

In that upon or about 1 May 2013 and at or near Mariental in the district of Mariental the accused did unlawfully and intentionally commit a sexual act with JS (the complainant) by inserting his penis and/or other part of his body and/or an object into the vagina and/or anus and/or mouth of the complainant under the following coercive circumstances:

1. By the application of physical force to the complainant; and/or
2. By threatening the complainant with the application of physical force; and/or
3. Where the complainant is affected by physical disability or helplessness or other disability, namely, unconsciousness; or intoxicating liquor which mentally incapacitates the complainant 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; and/or
4. Where the complainant is unlawfully detained.

Alternative charge to Count Six – Crimen Injuria

In that upon or about 1 May 2013 and at or near Mariental in the district of Mariental the accused did unlawfully and intentionally injure, insult and impair the dignity of JS by removing her clothes or some of the clothes she was wearing and thereby exposing her in her bra and/or panty and/or exposed her private parts and/or her breasts and/or her buttocks.

Count Seven – Assault with intent to do grievous bodily harm.

In that upon or about 1 May 2013 and at or near Mariental in the district of Mariental the accused did unlawfully and intentionally assault Stephanus Thomas by making stabbing movements with a knife aimed at the body of the said Stephanus Thomas with intent of causing him grievous bodily harm.

[2] The Summary of substantial facts in terms of section 144 (3) (a) of the Criminal Procedure Act, Act 51 of 1977.

[3] On the evening of Wednesday 1 May 2013 the 19 year old complainant in count five of the indictment and her friends were walking towards Aimablaagte in Mariental. Whilst on their way the accused came with an open knife and made stabbing movements towards the complainant in count seven in the indictment who avoided being stabbed by moving out of the way. The accused chased the complainant in count five with an open knife and eventually took her to his shack where he assaulted the complainant as set out in count five. She lost her consciousness whereafter the accused raped her in the manner set out in count six in the indictment.

[4] On the evening of Friday 25 March 2016 the 12 year old complainant in count three in the indictment was walking alone in the Ombili Location in Mariental. The accused attacked her and he tied her with her hair band around the neck and strangled her. The accused, who was born on the 24 December 1987, proceeded to rape the complainant as set out in count four in the indictment. During the rape a witness came to the rescue of the complainant as the accused fled the scene.

[5] During the period Wednesday 19 October 2016 and Friday 21 October 2016 the 16 year old deceased in count one in the indictment was walking in the vicinity of the grave yard in Mariental. The accused attacked the deceased and raped her in the manner set out in count two in the indictment. The accused also strangled the deceased manually and/or with an object causing the deceased to die on the scene.

[6] The accused pleaded guilty to the murder charge and not guilty to the rest of the charges. Mr Appolus who appeared on behalf of the accused prepared a guilty

plea statement in terms of section 112 (2) of the Criminal Procedure Act, Act 51 of 1977 which was read into the record. Accused confirmed the contents of the statement and also acknowledged his signature thereon.

[7] The statement read as hereunder verbatim:

Statement in terms of section 112 (2) of the Criminal Procedure Act, Act 51 of 1977 as amended.

I, the undersigned, Hendrik Atab Swartz, do hereby make oath and state that:-

1. I am the accused person in this matter;
2. The facts contained herein falls within my personal knowledge and are both true and correct, unless otherwise stated;
3. I have been indicted by the state on the following offences:-
  - 3.1 Count One – Murder
  - 3.2 Count Two – Contravening the provisions of section 2 (1) (a) read with sections 1, 2, 3, 5 and 6 of the Combating of Rape Act, Act 8 of 2000 – Rape.
  - 3.3 Count Three – Attempted murder
  - 3.4 Count Four – Contravening the provisions of section 2 (1) read with sections 1, 2, 3, 5 and 6 of the Combating of Rape Act, Act 8 of 2000 – Rape.
  - 3.5 Count Five – Attempted Murder
  - 3.6 Count Six – Contravening the provisions of section 2 (1) (a) read with sections 1, 2, 3, 5 and 6 of the Combating of Rape Act, Act 8 of 2000 – Rape.
  - 3.7 Count Seven – Assault with intent to do grievous bodily harm.

4. My legal representative of record has fully explained to me all the charges on which I have been indicted by the State, as well as the possible sentences that may be imposed on me by the Honourable Court, that may be applicable to the said charges, should I be found guilty thereon and I hereby wish to confirm that I have clearly understood same.
5. I further wish to confirm that my legal representative of record has further explained to me that I have the constitutional right to remain silent and not to be compelled to say anything which may amount to self-incriminatory evidence, especially viewed in the light that such self-incriminatory evidence may later be used against me during any subsequent trial and I clearly understood that I do have such a right, however I wish to state that I have elected to waive the said right only in so far as it relates to Count Number 1 (One) – Murder and plead guilty thereto as I hereby do.
6. I wish to confirm that this Honourable Court has the jurisdiction to hear and adjudicate on this matter.
7. I hereby plead guilty to Count Number 1 (One) – Murder freely, voluntarily and out of my own free will and I have not been coerced or unduly influenced by anyone to do so.
8. The basis of my plea of guilty in respect of the said Count are as follows:

#### **8.1 AD COUNT NUMBER 1 (ONE) – MURDER**

8.1.1 I pleaded guilty to this charge on the basis that during the period between the 19<sup>th</sup> and 21<sup>st</sup> October 2016 and at or near Mariental in the District of Mariental, I did unlawfully and intentionally kill EG, a female person aged 16 years at the time, by strangulating her with the intent to murder her.

8.1.2 I approached her as she was walking alone on the road and without noticing me, I then grabbed her from behind and I strangled her by putting my arm around her neck and by applying force to her neck, thereby acting at all the relevant and material times, with the primary intention to merely suffocate her so that she could no longer put up any resistance to me.

8.1.3 I however, admit that I have reasonably and subjectively foreseen the possibility that the deceased may be killed in the process, but I notwithstanding foreseeing such a possibility, I proceed to strangle her in



that fashion, thereby reconciling myself to the real possibility that she may be killed in the process.

- 8.1.4 I admit that I, at all the relevant and material times, had the requisite intention in the form of *dolus eventualis*, to cause her death and I knew then and there that my conduct was wrongful, unlawful and punishable by law.
- 8.1.5 I further admit that I could at all the relevant and material times reasonably foresee that I may cause her death by continuing to strangle her as I did but, notwithstanding that fact, I continued to strangle her for a period of up to four (4) minutes and I further admit that by so doing, I had thereby reconciled myself to the very possibility that I may cause her death by strangling her as I did.
- 8.1.6 I further admit that the cause of death of the said EG as set out in the post-mortem report, a copy of which was disclosed to me by the State, has indeed been correctly recorded as *ligature and manual strangulation*.
- 8.1.7 I further admit that I have absolutely no valid defence in law, whatsoever, to justify my conduct.
- 8.1.8 I further admit that the body of the said EG did not sustain any injury at any given stage, during the handling and/or transportation thereof by the relevant officials of the state mortuary, from the scene of crime up to the state mortuary, where the post-mortem was eventually conducted.
- 8.2 As for the remainder of the Counts (i.e. Count Numbers 2 (Two up to 7 (Seven) herein, I intent to plead not guilty thereto and the State is accordingly put to the proof thereof. Thus done and signed at **Windhoek** on this **30<sup>th</sup>** day of **October 2018** by the Accused and his legal representative of record.

---

LEGAL REPRESENTATIVE

---

ACCUSED

[8] Accused having tendered a guilty plea in respect of the first count the state did not accept the guilty plea with regard to the form of the intent, proposing to lead further evidence. Admissions in terms of section 220 were recorded.

[9] The prosecution proceeded to lead evidence in respect of all the counts. The following pieces of evidence were handed in as exhibits without opposition from the defence:

- (1) The Plea in terms of section 112 (2) as Exhibit "A".
- (2) The Pre-Trial Memorandum as Exhibit "B".
- (3) The Reply to Pre-Trial Memorandum as Exhibit "C".
- (4) The Pol. 79 as Exhibit "D1" which is a sworn statement by the next of kin.
- (5) The Identification of the body as Exhibit "D2".
- (6) The Post-Mortem examination report Exhibit "D3".
- (7) The Affidavit by Dr Vasin who conducted the post-mortem examination on the deceased's body as Exhibit "D4".
- (8) The Death Certificate of the deceased as Exhibit "E".
- (9) The Photo-Plan about the post-mortem examination on the deceased's body as Exhibit "G". An objection was raised by the defence in respect of the Notes on the pointing out done by the accused under the supervision of Inspector Gariseb.
- (10) However the two sketch plans compiled by Sergeant Gomases, indicating the google map about Mariental town and its surroundings were received in evidence as Exhibit "J1" and "J2" respectively.

(11) A Medical Report by Dr Omar on the accused was received as Exhibit "K" as well as the Photo-Plan compiled of scene of crime officer by Sergeant Gomases as Exhibit "L".

[10] Ms Jessica Jansen testified in respect of counts one and two. She knew the deceased as her friend. She had seen the accused previously in the Ombili Location where her mother was residing. On the 19 October 2016, she went out to visit her friends. Whilst visiting her friend AB, they were joined by the deceased. The deceased requested her phone in order to listen to music whereafter she left her and AB.

[11] Later on in the afternoon the deceased eventually returned. They sat and had general discussion whereafter she (Jessica) requested to be taken half way to her house. Whilst on their way they were called by one Anmire. She informed them about the deceased's father sitting at a shebeen drinking. They went to him and the deceased had a discussion with her father outside the shebeen. The deceased and her father returned and all of them sat inside the shebeen.

[12] The deceased was given N\$220 by her father and they all left the shebeen. Jessica then requested the deceased to buy one beer for them at Independence bar. They all drunk the one beer after which they parted ways. Jessica left for her house, in order to prepare herself for the evening whereafter she went back to the bar and met the deceased's father still drinking. The deceased and AB were also at the bar. Jessica then asked the deceased to ask her father to buy them beer but the latter refused and instructed her to ask her father instead. The deceased's father gave her a twenty N\$20 whereafter all of them left for a bar called Zoro.

[13] Having bought their beer at Zoro bar. They left for the room where the deceased and AB were residing. At the room, they prepared themselves for the evening whereafter they went to Eluwa bar. There, the deceased bought autumn harvest wine and a beer. They drunk the wine and the beer together. The deceased then informed them that she was going to hand over N\$150 to her mother for safe keeping. She left. After a while the deceased returned and join the rest and continued to finish the wine and the beer she had bought earlier.

[14] After they finished the wine and the beer, the deceased again left for her house to ask for N\$20 from her mother from the money she had given her for safe keeping. She did not find her, but got the total amount she had given for safe keeping. They then moved to another bar called Tsaraxa-eibes where they bought more beers.

[15] From Tsaraxa-eibes they moved to Mshasho bar to buy autumn harvest wine but there was none. The deceased returned to Eluwa bar where she bought the autumn harvest wine. They again went back to Tsaraxa-eibes bar and met the deceased's father. They asked the deceased's father for N\$20 but he had none. Whilst still at Tsaraxa-eibes bar, Jessica asked for a twenty N\$20 from a male person she knew and was given. They thereafter moved to Club Vegas. As they attempted to enter the club, the deceased and AB were refused entry, because of their ages. Jessica persuaded the security to allow her friends entry informing him that they only wanted to buy the beer and leave. They were allowed in and bought a beer and one cigarette after which they came out.

[16] At the club, the deceased and AB stood at a certain car and were dancing. The deceased asked for more drinks from a certain teacher but the teacher refused to give her beers. In the meantime, Jessica recognised the teacher and asked him for a drink. She was given a full glass of wine which she handed over to the deceased. The latter consumed all the wine and handed over the glass. Jessica then asked for more wine for herself and AB. They were offered wine.

[17] After she drank the wine she started to vomit whereafter the deceased came around and rubbed her on the back. The deceased informed her that she was drunk and requested to be escorted home. Jessica persuaded her to stay longer because she was sober after she had vomited. Whilst the deceased and Jessica were busy talking, AB joined them and handed a glass of wine to Jessica. They continued to chat amongst themselves. In the meantime the teacher came and requested his glass because he wanted to go home. The glass was returned to him.

[18] Jessica again started to vomit as the deceased sat on the ground and asked to be escorted home. AB suggested that she and the deceased should go together because Jessica was not residing far from the club. AB pulled the deceased and

they left together. As they left the deceased struggled to walk because she was drunk. Jessica entered into the club. That was about 11 o'clock in the evening. She did not see the accused at any of the bars they visited during the night of the 19 October 2016. Accused and the deceased use to reside in the same neighbourhood.

[19] In cross-examination the witness conceded that she was drunk but was still in a position to know what was going on around her during that night. She could however not tell what happened to the deceased, whom she met and under what circumstances she died.

[20] Mr Poulton Beukes: He is a police officer stationed at Mariental Police Station charge office. He had previously seen the accused at the holding cells whilst in police custody. On the 21 October 2016 he reported for duty at 5 am. He was approached by a school boy who appeared to be traumatised. The boy related to him about a female person that appeared either dead or severely injured behind Mariental School near the grave yard. He immediately arranged with other members and visited the alleged crime scene. After making observations, Serious Crime Unit was called in.

[21] The first observation he made was that the person was bleeding from the nose, and was badly bruised in the face. Her neck was also badly bruised. She had grass in her hair. The surroundings where she lay appeared to have been cleaned. Sand appeared to have been tempered with around the body, which made it difficult to see foot prints. One could however see that there were toes. Another observation was that the person was bare footed. Sand had been deliberately thrown around the body. One of the victim's wrist could have been broken, because it was too loose and appeared red.

[22] There were two footprints visible around the body. A few meters from the body one could see many footprints having moved up and down. After Serious Crime Unit was alerted they came and started to follow tracks in different directions. Mr Beukes specifically followed footprints going towards the dumping area. He found an ex-inmate. The ex-inmate was questioned about what he was doing in the area and explained that he had gone to harvest firewood. The ex-inmate became a

person of interest for him because his presence was suspicious in the area. However after further questioning the he was absolved.

[23] According to Mr Beukes when going to Ombili Location from Club Vegas, one has to take a southern direction. The deceased's body was found outside Mariental opposite Ombili Location which is in the southern end of Mariental. He further testified about the Photo Plan, Exhibit "L", with photo nine depicting the deceased's body as found. A hip of sand is shown with on-lookers standing staring at the body as found. The sand appear to have been deliberately thrown around. Whilst photos 13 and 14 depicts footprints seen clearly facing the body. Photos 21 and 22 depicts the position of the body of the deceased with one wrist of the deceased severely injured. Photos 21, 29 depicts blood coming from the deceased's nose as well as bruises on the face and the neck. Grass is seen in the deceased's hair.

[24] Under cross-examination Mr Beukes confirmed that there appear to have been some interference with the deceased's piece of clothing. That there must have been some application of physical force which resulted in the injuries on the deceased as depicted in photos 9, 20, 21 and 22. Soft sand had been thrown in the area where the body lay, to disturb the foot prints.

[25] Ms Josephine Games: She is the deceased's mother. The deceased was her biological daughter and her last born. During 2016, the deceased stayed with her elder sister, in Mariental. She did not know the accused. She met him for the first time at Mariental Magistrate's Court after the incident. Whilst in Rehoboth she received a call from Mariental enquiring whether the deceased did not come to her. The deceased was reported missing. She immediately travelled to Mariental. Upon her arrival, she visited the police station and was taken to the mortuary where she positively identified the deceased's body.

[26] On the 30 March 2018 she was contacted by Sergeant Isaaks from Mariental Police Station. He informed her that accused wanted to see her and ask for forgiveness because of the damage he had done to her. She informed Sergeant Isaaks that she will meet up with them at Mariental Holding Cells on the 31 March 2018. Upon arrival in Mariental she contacted Sergeant Isaaks at the police station. Accompanied by her elder sister Hanna Smith and Johanna Uiras, they met

Sergeant Isaaks. The accused was later brought to them and they were given a small room where they all sat and discussed.

[27] In the presence of Sergeant Van der Westhuizen, Hanna Smith and Johanna Uiras the accused person, on his own stood up and introduced himself. He told them the reasons why he had called the witness (Josephine Games). That he wanted to ask for forgiveness. Ms Games informed the accused that she had already forgiven him and ask him for what reasons he killed the deceased. She further asked him whether he had a relationship with the deceased. Accused responded in the negative. He informed her that he was trying to have a relationship with her and the deceased had first agreed to his request but the next time they met she refused, saying that it cannot be.

[28] Accused informed the witness that whilst the deceased was on her way home with a friend, he followed her and got hold of her, after her friend had left as she continued with her journey. He took the deceased in a different direction. As they walked he twisted the deceased's arm until they reached the grave yard, where he did what he wanted to do. After he finished and was going away, the deceased told him that she knew him and that she was going to report him to the police. He turned around went towards the deceased and killed her by throttling her to death.

[29] According to the witness accused had told her that he visited the scene the next day and saw the deceased's body laying. He wanted to carry it to the police station to report himself. When she reprimanded him about the manner in which the deceased was brutally killed, accused told her that they were both too drunk and could not believe what he had done.

[30] Under cross-examination the witness persisted that accused had admitted to the raped. He killed the deceased because she had threatened to report him to police. He was not forced or threatened by any person who attended the meeting.

[31] Mr Riegert Van der Westhuizen a police officer at Mariental Police Station also testified. He is a detective Inspector. He was approached by detective Sergeant Isaaks who informed him that accused wanted to ask for forgiveness from the deceased's mother. He identified the accused before court. Mr Isaaks later on

brought in the deceased's mother and her two sisters in the office whereafter accused was also brought in. He closed the office and proceeded to explain the accused's right not to incriminate himself. Further that he was not being forced to say anything. If accused chose to say something it will be written down and could be used as evidence in a Court of Law.

[32] Accused's right to legal representation was also explained. He informed the witness that he will not make use of a lawyer at that stage. Accused confirmed to have understood his rights and indicated that he merely wanted to ask for forgiveness from the deceased's mother. The deceased's mother and her sisters were also told about the procedure, that accused will speak and if they wish to put questions to him they will be allowed to do so. They communicated in the Nama language which all of them understood well.

[33] According to the witness accused informed them that he was originally from Aranos. He met the deceased and two other ladies at Club Vegas in Mariental. The deceased's friends remained at the club as she left for her home alone. Accused thereafter followed the deceased in the darkness and grabbed her on her hand. He took her towards Mariental High school. He proposed her but she refused. They walked until they reached a riverbed where he threw her down and had sexual intercourse with her without her permission.

[34] In the process the deceased scratched him in the face and he grabbed her on the throat. The deceased became quiet and he left her in the riverbed and went home. When he visited the scene the next morning he found (her) deceased dead. He also informed them that he wanted to take the deceased's body to the police station and hand himself to the police but changed.

[35] Accused explained further that he was afraid that police will arrest him, thus he left the body in the field where it was discovered. Accused was thereafter taken back to the cells. The witness confirmed that the deceased's body was found outside the yard of Mariental High school which is opposite the grave yard as depicted in photos 9 and 10.



[36] Under cross-examination the witness denied that accused had informed them during the meeting that the deceased had told the accused that she knew him and recognise him and would go and report him to the police, as claimed by the deceased's mother. Both Ms Games the deceased's mother and Mr Van der Westhuizen maintained that during the meeting accused related to them that he first raped the deceased whereafter he strangled her.

[37] Mr Samuel Gariseb: He was a police officer but has since resigned in 2017 and is self-employed. He has been in the force for 36 years. At the time of his resignation he was a detective Chief Inspector. He was tasked to assist in the pointing out of a crime scene whereafter he compiled a photo plan. He also prepared the Notes on the pointing out handed in as Exhibit "H1".

[38] In the Photo plan, Photo's 1 and 2 depicts the accused being introduced to him by one Constable Tjivau as well as the witness introducing himself to the accused, by showing him his appointment certificate. He is completing the notes on the pointing out because the photo plan and the notes run together. Photo 3 and 4 depicts the witness recording the accused's personal particulars. Whilst photo 5 he is explaining the accused rights.

[39] Photos 6, the accused is showing the witness his injuries on his legs when asked if he had injuries. Photos 7 the accused is showing his injuries on the chest and photo 8 depicts accused's injuries on his under left leg. Photos 9 depicts accused's injuries on both knees. Photo 10 indicates the witness and accused leaving the office, room number 20. Photos 11, the two are leaving the building whilst photo 12 indicates them entering the vehicle in the parking area. Photo 13 indicates the position as they are seated in the vehicle. Whilst photo 14 indicates the kilometre reading at the beginning of the trip. Photo 15 depicts the motor vehicle used for the trip. Photo 16 depicts how they exit the police headquarters with the vehicle in Mariental town.

[40] Photo 17 shows how the vehicle turned to the left into the street facing the direction pointed out by the accused. They proceed and drive along Khorixas street with kilometres reading at 48200. They drive into the southern direction and then turn left and stop with kilometres reading 48201. Photo 22 indicates a point where

the accused met the deceased next to a pole. All points were indicated by the accused to the witness. Photo 23 indicates the eastern direction where the deceased and accused walked from the pole. The witness then disembarked from the vehicle upon instructions from the accused because there is no road for the vehicle to drive through.

[41] Photo 24 indicates about 500 metres and the time is about 11h23 when accused and the witness arrived behind the police vehicle at the headquarters and move around the building before reaching the riverbed. The same place they had left. Photo 25 depicts the accused showing the direction he took the deceased into the riverbed turning in the northern direction. Photo 26 indicates the accused and the witness moving next to the road about 400 to 500 metres towards the tar road which is from town facing the location. Photo 27 indicates the accused and the witness reaching the tar road that is going towards the location and then crossing it as requested by the accused.

[42] Photo 28 depicts the accused and the witness crossing the tar road and going towards the cemetery in town. Photo 29 indicates the path accused and the witness took towards the cemetery in town. Photo 30 depicts accused showing the witness where he turned off to the right side with the deceased before reaching the grave yard. Photo 31 indicates the direction accused and the deceased took behind the sand wall into the riverbed.

[43] Photo 32 accused is pointing to an area next to a big stone where he allegedly raped the deceased, also pointing to a spot whilst seated few metres from the big stone where he killed the deceased. Photo 33, accused is pointing the direction he took after the incident towards the western direction. Photo 34 accused is walking ahead in the direction he and the witness took behind the grave yard, going back towards police barracks where the accused was residing. Photo 35 is a corner of the grave yard and the arrow is pointing towards the direction pointed out by the accused.

[44] The photo plan was admitted into evidence and marked Exhibit "H2" as well as the Notes on the pointing out Exhibit "H1". Mr Gariseb persisted that the accused had pointed out photo 32 being a point where he raped the deceased. He

questioned him about the reason he allegedly raped the deceased, to which he responded that she had threatened to go and open a case against him.

[45] Mr Gerson Garoeb a police officer stationed at Mariental police station testified. He was the station commander. He has been in the force for 31 years and hold a rank of Chief Inspector. He knew the accused from previous incidences. At the time of the incident accused resided at the police barracks illegally. On the 28 October 2016 he learned about a murder case in which a suspect had been apprehended. Warrant officer Amukwaya later requested him to assist. He met the accused at the offices of the Scene of Crime Unit.

[46] Because they knew each other, they greeted whereafter the witness asked the accused what was going on. He asked accused if he was willing to co-operate with the police. At that time accused offered to co-operate and offered to speak to the witness alone. Warrant officer Amukwaya wanted the accused to provide the clothes he had been wearing.

[47] Having offered to co-operate with the police Chief Inspector Garoeb warned the accused that he was not obliged to co-operate or to give any statement. He was advised of his right to remain silent. That he could engage his own lawyer or apply for legal aid lawyer. He chose to take the witness to the police barracks where his belongings were. At the barracks he took out some clothes from his suitcase as well as shoes which were in a plastic bag and handed them over to Warrant Amukwaya at the scene of crime offices.

[48] Accused related to Chief Inspector Garoeb that he had met a girl in the early morning hours of the 20<sup>th</sup> October 2016 in the vicinity of Club Vegas. He had known her because they resided at the barracks. She had stolen a perfume from one police officer. The girl was also staying in the same street as his in the location. After meeting the girl he forcefully took her from the vicinity of Club Vegas towards the side of the grave yard. He raped her. They were both under the influence of alcohol at the time. The victim scratched him on his body and also bite him. After the rape, the victim threatened to report him to police. That was the reason why he decided to kill her.

[49] Mr Garoeb observed scratch marks on accused's knees which he claimed was caused during the rape whilst he was sitting on his knees. The grave yard is located in town not far from the police barracks where the accused was residing at the time.

[50] The accused pleaded not guilty to the second count and persisted that he did not commit the sexual act with the deceased. Apart from the evidence by the deceased's mother Josephine Games and police officer Van der Westhuizen, that the accused had admitted to having had sexual intercourse with the deceased, during a meeting, there appear to be no other evidence to corroborate their versions.

[51] It is common cause that a rape kit exhibit NFM-00404 from the deceased was handed in at the National Forensic Science Institute by detective Warrant officer Amukwaya for scientific examination. A DNA kit in respect of the accused were also handed in for analysis. These exhibits were all properly packaged and sealed in official forensic bags to avoid possible contamination. They bore different exhibit numbers each. NFM-00404 (11 N AAA0997 XX, the Adult sexual assault evidence collection kit in respect of the deceased was obtained.

3.1 Swabs were taken from:

3.1.1 External anal

3.1.2 Rectal

3.1.3 Vulva

3.1.4 Vestibule

3.1.5 Vaginal vault and

3.1.6 Cervical OS of the deceased. The swabs tested negative for the P30 prostate specific (PSA). A Component of semen using immunochromatographic essays.

[52] There are known factors that may contribute to the fact that no semen is detected after sexual intercourse, such as when a condom had been used, if there was no ejaculation. Another possibility is where the wrong method had been followed during the collection of evidence by a doctor. In the present case the possibility that no sexual intercourse took place cannot be ruled out either. It is on this ground that counsel for defence argued that the findings confirm the contention that no sexual act was committed with the deceased.

[53] It is trite that the standard of proof to secure a conviction on a criminal matter is beyond reasonable doubt and that the accused bears no onus to prove his innocence. It is also important to look for corroboration in other credible evidence when it comes to cases of rape, especially where the victim is not alive and thus she could not be subjected to cross-examination.

[54] It is now common cause that the deceased EG was found dead in the field near the Mariental High School on the morning of the 21 October 2016 by Poulton Beukes a police officer at the Mariental Police Station. The body was positively identified by the deceased's mother. The report on medico-legal post-mortem examination conducted by Dr Vasin which is Exhibit "F" indicates that the chief post-mortem findings made on the body were:

- (1) horizontal ligature marks revealed on the skin of the upper neck.
- (2) numerous slaters on round shaped and irregular abrasions and bruises placed on the skin of the sub-mandibular and interior upper neck.
- (3) systemic visceral venous congestion.
- (4) features of initiative body decomposition.

that, as a result of the observations made by the doctor, he concluded.

(a) that death occurred about four days prior to the examination and;

(b) that the cause of death was ligature and manual strangulation.

[55] The accused on his own admitted to have strangled the deceased by putting his arms around her neck and applied force for about four minutes. He had previously pleaded guilty to the crime of murder in the form of *dolus eventualis*, which was rejected by the state. In order to determine whether the accused had a direct intent to kill the deceased, this court must consider the following.

- (1) That the deceased was brutally assaulted whereby she broke her arm, she sustained serious injuries on her face as confirmed by the post-mortem examination report compiled by the doctor who conducted the autopsy on the body. She was left seriously injured without any form of assistance from her assailant, the accused.
- (2) The accused used a lot of manual force which led the deceased to die on the scene. Taking into account all the above factors the only reasonable conclusion is that the accused had a direct intention to bring about the deceased's death on the night of the incident.
- (3) Accordingly accused is convicted with the crime of murder with direct intent on the first count.

[56] Moving on to the second count, in which the accused faces charges of Rape in contravention of section 2 (1) a of the Combating of Rape Act, Act 8 of 2000 in respect of the deceased EG. In that the accused did unlawful and intentionally commit a sexual act with the deceased by inserting his penis and/or other part of his body and/or an object into the vagina and/or anus and/or mouth of the said deceased (the complainant) under the following coercive circumstances:-

- (1) By the application of physical force to the complainant; and/or
- (2) By threatening the complainant with the application of physical force; and/or
- (3) Where the complainant is affected by physical disability or helplessness or other disability, or intoxicating liquor which mentally incapacitates the complainant, or asleep, 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; and/or where the complainant is unlawfully detained.

Counts one and two.

[57] It is common cause that the deceased body was found laying in the field near Mariental school. It was fully dressed. Apart from the evidence by the deceased' mother and Mr Van der Westhuizen's claim that accused had made admissions to them having raped the deceased before he killed her, there appear to be no further corroborative evidence before Court. As indicated earlier in this judgment there are certain factors that may contribute to the fact that no semen is detected even where sexual intercourse had occurred. In order to prove that a sexual act was committed, there must be an insertion of a penis or an object into the deceased's vagina even to a slightest extent, such evidence is lacking. In the absence of any corroborative evidence, the accused is entitled to the benefit of doubt, accordingly accused is acquitted in respect of the second count.

Counts three and four.

[58] On these counts the victim was a minor at the time of the incidences. They involve firstly attempted murder and rape under cohesive circumstances. It is common cause that at the time of the alleged rape the victim was aged 12 years old as confirmed by her full birth certificate admitted as part of the evidence.

[59] The complainant's mother and Mr Mofuka were the first to arrive on the scene where the complainant lay unconscious. The two state witnesses corroborate each other in that respect. Accused throughout the trial denied to have been the assailant. He raised an alibi defence. Though the defence argued that the complainant could not have been in a position to positively identify her assailant, she persisted that she knew the assailant prior to the date of the incident and she had recognised him at the time he grabbed her from behind and dragged her behind Mr Mofuka's shack. Mr Mofuka's testimony corroborate the victim's evidence that it was the accused he had chased after. He recognised him because he knew him at the time they previously worked together at the Farmers Meat Market.

[60] Evidence adduced is that the incident took place in the evening. Evidence of identification must as a general rule be treated with caution, and regard must be had to the circumstances of each particular case. Factors to be taken into account are such as the lighting, visibility at the time, which might have affected the complainant's ability to make a proper identification. It was confirmed that accused was known by the victim prior to the date of the incident. Secondly the victim was pulled/and/or dragged from a certain point until the house of Mr Mofuka. That created an opportunity for the victim to identify the accused because she had previously seen him in their neighbourhood.

[61] Accused had only raised his defence of an alibi belatedly. In the case of *S v Thebbus and Another*<sup>1</sup> it was held, 'It did not seem reasonably possible that his corroborating witnesses would not come forward immediately upon his arrest, or at least some short time later and advise the police investigating the crimes, which had shaken the whole community as whole, that he had been with them at the crucial times. It was equally not possible that the first appellant himself having so cogent an alibi, when arrested and charged, did not advise the police or the prosecution that this was the case. The only inference that could be drawn from his failure to advise the police and from the other witness's failure to do so, was that the alibi had no truth in it at all'.

I share the same view above.

[62] When measuring the totality of the evidence in respect of these counts and due regard being had to the shortcomings in the accused's evidence, I have come to the conclusion that the complainant's evidence is trustworthy and reliable. Firstly, she identified her assailant as the accused before court. Her evidence was corroborated by Mr Mofuka in all material respect.

[63] The accused's defence is not only improbable but false beyond reasonable doubt.

---

<sup>1</sup> *S v Thebbus and Another* 2002 2 SACR at 566.



[64] Evidence adduced before Court is that Mr Mofuka knew the accused prior to the date of incident. That evidence has not been contested by the defence. Infact accused claimed that there had been bad blood between him and the witness (Mofuka). Which was never put to Mr Mofuka during cross examination. In *S v Awala*<sup>2</sup> it was stated as follows:

‘The Court rightly referred to the rule and practice to put the defence case to the state witnesses to ensure that trials are conducted fairly; that witnesses have the opportunity to answer challenges to their evidence and parties to the suit know that it may be necessary to call corroborating or evidence relevant to the challenge that has been raised.’

[65] In the present case it was never put to Mr Mofuka that he had a fall out with the accused because of his brother who lost his employment as a result of the accused. Surely such evidence could have impacted on Mofuka’s evidence as a bias witness or that Mofuka had a motive to incriminate the accused in the commission of the offence charged. This Court is of the view that accused’s version is only an afterthought which stand to be rejected.

[66] The court is satisfied that accused had an intention to kill the complainant, when he dragged her and tied her head band around her neck, she could not breath when found. She sustained a small inflamed lesion on the left of her neck caused by the head band which was tied around her neck. An attempt was made to kill her.

[67] Coming to the charge of rape on the fourth count. It is common cause that when the victim was discovered she had her panties down her knees. Both Mr Mofuka and the victim’s mother described the background how they found the victim behind the latter’s house. Though there are some contradictions between the victim’s mother and her stepfather about the sexual act, the complainant testified that accused did not inset his whole penis into her vagina which seems to suggest that accused had tried to do so. Considering the victim’s age at the time and having regard to the medical evidence, that the doctor had found bleeding in the vagina and further considering the definition of a sexual act in terms of the Combating of Rape Act, Act 8 of 2000. A sexual act means the insertion of even the slightest degree of a/the penis of a person into the vagina’.

---

<sup>2</sup> S v Awala 2010 1 NR at 175 SC.

[68] There is sufficient evidence to support the complainant's contention that a sexual act took place. The doctor on examination found the examination painful and also found some bleeding in the victim's vagina. All these are pointers that a sexual act was committed.

[69] The victim was aged 12 years and the accused 29 years old, which would constitute a sexual act under coercive circumstances in that the complainant was under 14 years and the perpetrator more than 3 years older than the complainant.

[70] The complainant was grabbed and dragged whereafter she was forced to the ground which further constitute coercive circumstances, namely the application of physical force. Accordingly it has been proven beyond reasonable doubt that the accused committed the sexual act under coercive circumstances with the complainant in count four.

#### Counts five and six.

[71] These counts in respect of JS relate to the charges of attempted murder and rape, alternatively crimen injuria.

[72] Evidence adduced before Court is that the accused on the 1 May 2013 attempted to murder the complainant by stabbing her with a knife and or strangling her and or stuffing a piece of cloth into her mouth with the intent to murder her. Accused has denied the charges.

[73] JS: She did not know the accused prior to the date of the incident. On the 1 May 2013 she together with her friends AK and Stefanus Thomas escorted their friend from Takarania location to Aimablaagte. On their way back to Takarania and whilst passing by the corner of D D Guibeb Primary School she saw a men coming from behind them and started to chase after them. She recognised the men as the accused before Court. The accused grabbed S and asked him how he was doing. He attempted to stab S but the latter ducked as J and A run in different directions.

[74] After S had run into a yard, accused followed J and later on caught up with her. He grabbed her on her braids and dragged her a distance towards a church. She sought assistance from some male person but she did not get help. In the meantime accused pursued her and got hold of her for the second time. He cut her as result of which she started to bleed profusely. She was taken up to the accused's house. From the time she arrived at accused's house she could only recall some of the events that transpired there because she later on passed out.

[75] Evidence presented is that the accused assaulted and undressed her, whereafter he removed her t-shirt and jeans leaving her only with a panty and a bra. Accused had also threatened to rape and kill her as he took her to the house. Upon arrival at the house they wrestled over the knife after which it fell to the ground. She picked up the knife and stabbed the accused though she could recall on which side of the body she had stabbed him. Whilst she was creaming accused strangled her and put a piece of cloth in her mouth whilst holding her and sitting on top of her. From that time she on could no longer recall anything. She lost her consciousness and could not do anything. She gained her consciousness. Later on she found herself outside the house. Esau was holding her. At the time there was no one else inside the accused's house.

[76] J testified further that a lady approached her with a blanket, she rubbed it around her body because she was naked. The lady also brought water in a basin and washed the blood from her face whereafter Esau took her home. Whilst they were walking home with Esau, accused followed them holding a knife. He later went back to his house.

[77] Mr Stefanus Thomas knew the complainant. On the 1 May 2013 he together with AK and the complainant escorted Anna's friend from Takarania. He did not know the locations in Mariental because it was his first visit. On their way back they were attacked. Their attacker attempted to stab him with a knife which he ducked. Because of the attack they split, whereby the complainant and AK run in different directions. The attacker run after the complainant. He identified the attacker as the accused before court.

[78] After a while AK called him and they could hear the voice of the complainant screaming. They return to the scene where they were first attacked whereafter they walked to Takarania to seek help. They could not follow the accused and the complainant because they could no longer hear the complainant screaming. They reported to the complainant's parents what had happened whereafter they went to their room.

[79] Later on the complainant's parents came to their room and asked where the attack took place. During the attack the complainant left her shoes on the scene which they picked up and a towel belonging to the witness. That was the last time he saw the complainant until the next day when he saw her with had scars on her face. The witness persisted that he was in the company of the complainant when accused attacked them. He did not lie about the events because the complainant was her girlfriend's friend.

[80] Ms AK corroborate the witness's version with regard to the attack on them by the accused on the evening of 1 May 2013. She had known the complainant since their childhood. They grew together in Gibeon and they have been neighbours in Mariental. They visit each other often. She will be in a position to know if the complainant was involved in a relationship with someone. She has not been aware of the relationship between the accused and the complainant.

[81] On the night of the 1 May 2013 she, the complainant and Stefanus escorted her friend who was visiting her from Gochas. They moved from Takarania to Aimablaagte location escorting the friend half way to the house. Whilst they were walking back they were attacked from behind by the accused who held a big knife. She recognised the accused. Accused grabbed Stefanus by his shoulder and attempted to stab him but the later ducked whereafter they split. She and Stefanus run in the same direction whilst the complainant run in the different direction.

[82] According to AK, she run into the street and saw a house where there was a tree in which she went and sat whereafter she called Stefanus as he run passed her. They sat together under the tree for a while. They could hear the complainant screaming calling her name. After they left their hiding place they went back to the

scene, picked up the complainant's shoes and left to seek help. They could not follow the complainant because they first wanted to seek help.

[83] At the house, they informed the complainant's father and her boyfriend. She saw the complainant only the next morning. She recognised photo 1, in Exhibit "K", depicting the place where the attack took place. AK further testified that apart from the complainant's shoes that were left on the scene, Stefanus left his shoes and a towel which they collected, before they went to inform the complainant's mother and her boyfriend about what had transpired.

[84] Josephine Rooi: She also known as Poppie testified. She knew the accused because they are neighbours in the New Location. On the 1 May 2013 she was in bed and it was very quiet. She was awakened by her barking dog, which run into the accused's yard. She came out of her house went around and stood by her fence. She saw accused coming out of his house, he closed the door behind him. Accused wore a black trouser and was bare chested.

[85] She called the accused's name and asked him what was going on, and the reason why the dog was going towards his house. Accused told her that nothing was ongoing. He then went to seat next to a tyre next to his door. She stood for a while and called back her dog. It came up to her veranda and run back once again. She again called out the accused's name and he asked her what it was. He lit a cigarette and smoked. She again called her dog and it came at her veranda and stood there. Whilst she was about to get inside the house, the dog once more run out to the accused's house. The dog tried to enter accused's house persistently.

[86] In the meantime Josephine decided to go to another house. When she pipped she saw the couple sleeping. Shortly after that, Esau came out of his house to relieve himself in the bushes. He asked her why she was not sleeping. She told him that she was watching her dog. The dog went into accused's yard again. According to her the dog did not want to leave the accused's yard. She again asked the accused what was going on. Esau came and joined her. They both questioned the accused about what was going on.

[87] After a while accused entered his house. She and Esau also left. She kept an eye on the accused's house. Whilst inside her house, accused came and called her. She was afraid because at that point accused only wore his underpants. She questioned him why he was calling her. He told her to go and take out the women, because if he return he will cut her head off. She left for accused's house and when she reached the door to accused's house, he told her to enter and take the women out. It was dark inside the house and she requested for a match but accused had none.

[88] She went to collect a candle and a lamp whereafter she returned to accused's house. Whilst standing in the doorway she lit a candle and entered at the time Esau stood at the door whilst the accused sat next to the tyre. When she entered, she saw a fridge, behind it there was a matrass and next to the matrass there was female clothing, a panty, a bra and jean trousers. At that point she could not see a person and asked the accused where the person was that he wanted to be taken out. Again the dog came running and went behind the fridge. She saw the complainant behind the fridge. The complainant appeared very weak. She called Esau who was standing in the door. Together they lifted up the complainant who was totally naked. The complainant could not speak. The complainant had something in her mouth and was suffocating. With the assistance from Esau they lifted up the complainant Esau held her in her armpits from the front and she from behind.

[89] The victim was taken out from the house and put outside. Whilst outside, she asked the victim who she was several times but she could not respond. She was facing down and her face was covered in blood which was still running. She was still naked. She asked the accused whether he could provide water for the victim to wash herself but there was no water at accused's house.

[90] Josephine left for her house to get water and returned with an old towel. The victim could not respond still because she was too weak. She then washed the victim's face and dried it with a towel. Whilst lifting up her face, she saw that the victim had something in her mouth. She pulled it out whereafter the victim started to breathe out loudly. She realised that the victim had been stuffed with a t-shirt in her mouth.

[91] After the t-shirt was pulled out from the victim's mouth, she (Josephine) asked the accused where he brought the victim from. Accused did not respond. The victim was quiet and attempted to run away as they held her. When she asked Esau whether he knew her, he informed her that he knew her parents only. At that stage the victim was still naked. She left her with Esau to go and fetch a blanket to wrap around her.

Counts five and six.

[92] Evidence adduced in respect of counts five, six and seven is that the complainant's were attacked near D D Guibeb Primary School after returning from escorting their friend to Aimablaagte.

[93] At though accused have denied to have met the complainant in the seventh counts, JS and AK maintained that they were in each other's company when accused attacked them by holding a knife and stabbing in Stefanus Thomas' direction.

[94] It was from that point the three parted ways whereafter the accused chased after JS, whom he caught up with and took her to his shack.

[95] Witnesses Josephine Rooi and Amseb corroborated each other's evidence that J was found lying in the accused's shack. She was naked. The condition in which JS was found by Josephine Rooi does not accord with an atmosphere of peace. Accused had maintained that he have been involved in a relationship with her.

[96] She arrived at the accused's shack after he had informed her to remove the women before he could kill her. She found the complainant severely injured across her face and had a t-shirt stuffed in the mouth. The complainant at the time could not breathe properly. She was naked and lay helpless in the shack whilst accused was sitting on a tyre outside. He did not offer any assistance.

[97] The only reasonable inference is that accused assaulted the victim and stuffed the t-shirt in her mouth in attempt to kill her. Further evidence adduced is that the victim had to be help out because she was too weak to walk on her own. The victim's mother maintained that when she was brought to their house she was completely naked, only covered in a blanket.

[98] Indeed the victim could not testify whether sexual intercourse took place between her and the accused under coercive circumstances, evidence by witnesses who went to rescue her, cannot prove that sexual intercourse took place under coercive circumstances. However, a case of Crimen Injuria a competent verdict on a charge of rape have been proven beyond reasonable doubt against the accused. In that the complainant's private parts were completely exposed thereby injuring her dignity.

[99] At no stage did the defence put it to the complainant that she was involved in a relationship with him at the critical time. Such failure to put such a pertinent issue to the complainant only lead to the conclusion that the defence accepts the evidence given by witnesses.

[100] It must be further be noted that all the victims were in one way or another throttled or strangled manually or with objects. That seem to have been the accused's *modus operandi*.

#### Count seven.

[101] Count seven is interrelated to counts five and six in which the complainant JS was involved. Accused denied to have met Stefanus Thomas and AK. The three state witnesses however, corroborated each other that they were attacked by the accused at the corner of D D Guibeb Primary School on the evening of the 1 May 2013.

[102] According to the evidence adduced before Court accused followed the trio from behind and attacked Stefanus. Holding him on his shoulder and made stabbing movements towards him. Stefanus's testimony is that he saw a shining knife and ducked to avoid being stabbed. It is trite that it is not necessary that there is actual



bodily harm, it is enough that one intend to cause bodily harm, for the crime is not 'causing grievous bodily harm but assault with intent to do grievous bodily harm'. *S v Mbele*.<sup>3</sup>

[103] A knife is a dangerous weapon. The victim must have felt threatened. It was an indirect causing harm towards the victim as he ought to believe that accused was capable of carrying out the threat against him. He could not have taken the threat lightly under the circumstances because the accused had the means to fulfil his threats.

[104] Accordingly the offence of assault with intent to do grievous bodily harm has been proven beyond reasonable doubt against the accused. He is convicted of assault with intent to do grievous bodily harm.

[105] For the a foregoing reasons the Court is satisfied beyond reasonable doubt that accused committed the following offences:

Count One : Murder with direct intent – Guilty.

Count Three : Attempted murder – Guilty.

Count Four : Rape – Guilty.

Count Five : Attempted murder – Guilty.

Alternative charge to count six : Crimen Injuria – Guilty.

Count Seven : Assault with intent to do grievous bodily harm – Guilty.

He is however found not guilty in respect of count two and six.

---

<sup>3</sup> S v Mbele 1966 1 PHH176 N.

-----  
D N USIKU

Judge

APPEARANCES:

STATE: Mr Olivier  
Office of the Prosecutor-General, Windhoek

ACCUSED: Mr Appolus  
Instructed by Directorate of Legal Aid, Windhoek

