

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case no: CC 16/2019

In the matter between:

THE STATE

and

BENJAMIN GEORGE STRONG

ACCUSED

Neutral citation: *S v Strong* (CC 16/2019) [2020] NAHCMD 210 (4 June 2020)

Coram: SIBEYA, A.J.

Heard: 2-6 December 2019, 20-23 January and 7 February 2020, 10-11 March 2020, 06 May 2020.

Delivered: 04 June 2020.

Flynote: Criminal law – Murder, Attempted murder, Assault with intent to do grievous bodily harm, Defeating or obstructing the cause of justice – Accused raising bare denials and an alibi,- to be evaluated together with the totality of evidence – The behaviour of an accused after the event can, in appropriate cases show intent – A party has a duty to put his version to an opposing witness – Approach to evidence of single witness revisited – On proven facts, court entitled to draw inference that accused killed the deceased with direct intent – Competent verdicts – Evidence not clear on defeating or obstructing the cause of justice – Material discrepancies

constituting doubt - Where there is doubt on guilt of an accused benefit of doubt to be given to accused.

Summary: The accused was indicted in the High Court on charges of murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003; attempted murder, two charges of assault with intent to do grievous bodily harm, read with the provisions of the Combating of Domestic Violence 4 of 2003 and defeating or obstructing or attempting to defeat or obstruct the course of justice. He pleaded not guilty to all counts.

It is alleged that the accused murdered the deceased with whom he had a domestic relationship. It is further alleged that he assaulted and attempted to kill *Phillip Gadi Matsaya (Mr. Matsaya)*, by stabbing and cutting him with a knife. He is further alleged to have assaulted the deceased by kicking and slapping her with intent to cause her grievous bodily harm. He is also alleged to have defeated or obstructed or attempted to so defeat or obstruct the course of justice by hiding his clothes and cleaning the knife used to stab the deceased and Mr. *Matsaya*. He pleaded not guilty to all counts and chose not to disclose the basis of his defence.

The accused raised bare denials to the charges and also raised an alibi although not specifically pleaded. The credibility of witnesses was tested in comparison to their witness statements.

Held, that evidence of a single witness should be approached with caution. That caution should however not replace common sense. A conviction may follow on the evidence of a single but credible witness.

Held further, that the discrepancies between a witness' statement and the testimony of such witness during trial does not necessarily mean that he/she deliberately lied to court as contradictions per se do not lead to the rejection of a witness' evidence. It may simply be indicative of an error.

Held further, that the behaviour of an accused after the incident may, in appropriate cases, show his intention.

Held further, that where an alibi is raised, the onus is on the state to prove that such alibi is false beyond reasonable doubt.

Held further, that parties have a duty to put so much of their case to opposing party.

Held further, that the accused's explanation to the charge of murder was not reasonably possibly true and it is to be rejected as false.

Held further, that the evidence led did not prove commission of the offence of attempted murder but proved the competent verdict of assault with intent to do grievous bodily harm.

Held further, that the offences of assault with intent to do grievous bodily harm on counts 3 and 4 were not proven but evidence proved the competent verdict of common assault.

Held further, that the court doubts whether the offence of defeating or obstructing or attempting to defeat or obstruct the cause of justice was proven. Where doubt exists, accused should be given the benefit such doubt.

ORDER

Count 1: Murder, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 – Guilty

Count 2: Attempted murder – Not guilty and discharged

In terms of section 258 of Act 51 of 1977 on the competent verdict of Assault with intent to do grievous bodily harm – Guilty

Count 3: Assault with intent to do grievous bodily harm read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 – Not guilty and discharged

In terms of section 266 of Act 51 of 1977 on the competent verdict of Common assault, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 - Guilty

Count 4: Assault with intent to do grievous bodily harm read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 – Not guilty and discharged

In terms of section 266 of Act 51 of 1977 on the competent verdict of Common assault, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 - Guilty

Count 5: Defeating or obstructing or attempting to defeat or obstruct the cause of justice – Not guilty and acquitted.

RULING

SIBEYA AJ:

[1] The accused was arraigned in this court on the following charges:

Count 1: Murder, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003;

Count 2: Attempted murder;

Count 3: Assault with intent to do grievous bodily harm, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003;

Count 4: Assault with intent to do grievous bodily harm, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003;

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

[2] Mr. *Malumani* appeared for the state while Mr. *Engelbrecht* appeared for the accused.

[3] The accused is Benjamin George Strong, an adult Namibian male. The deceased is an adult Namibian female.

[4] The allegations against the accused are that on Saturday, 16 September 2017, the accused, the deceased and *Phillip Gadi Matsaya* (Mr. *Matsaya*) were socializing at the deceased's residence in Otjomuise. An argument erupted in the afternoon and in the evening between the accused and the deceased which led to the accused assaulting the deceased as per count 3 and 4. By late night hours of 16 September or early morning hours of 17 September 2017 the accused stabbed the deceased with a knife at least 12 times on her body. Mr. *Matsaya* attempted to assist the deceased but the accused stabbed him too. The deceased died at the scene from stabbing to the chest. The accused thereafter hid properties and cleaned the knife used, so go the allegations by the state.

[5] The accused pleaded not guilty to all counts and chose not to disclose the basis of his defence, and to remain silent on allegations set out in the indictment.

[6] The deceased, (*Johanna Resandt*, an adult female) was involved in a domestic relationship with the accused as defined in the Combating of Domestic Violence Act.¹ Mr. *Matsaya* and the accused were friends.

[7] At the commencement of the trial several documents were introduced into evidence by agreement between the parties, the content of which was not placed in dispute. It is not necessary to discuss such documents in detail. Reference to some of them will be made in the judgment where necessary.

The state's case

[8] Mr. *Matsaya* whose leg was broken and was using crutches at the time of the commission of the offences was the first state witness. His testimony was that in the morning hours of 16 September 2017, he requested the accused to assist him to lift goods while he was fixing a microwave, a fridge and a washing machine for a fee. They bought *Monis Granada* (alcohol), cigarettes and meat after which they went to the residence of the deceased where they consumed alcohol together with the deceased. Accused gave the deceased N\$100 for food but later demanded the said N\$100 back. She refused to return the money. At around 17:00 the deceased was seated covering her face while the accused stood up. The accused then slapped her three times on her face and kicked her with shoes on her legs. She did not sustain injuries and they were separated where after they continued to drink alcohol.

¹ S 3(1)(b) read with s 3(1)(f) and s 3(2) of Act 4 of 2003.

[9] Mr. *Matsaya* further testified that at around 20:00, the deceased stood up to enter the house to prepare food. She entered her house followed by the accused. Accused started beating the deceased. Mr. *Matsaya* followed and upon entering the house he observed the deceased covering her face and screaming saying: 'stop' 'stop'. Mr. *Matsaya* did not observe the assault. Upon inquiry as to why the accused assaulted the deceased, the accused responded that she refused to return his money.

[10] The accused brought the mattress for Mr. *Matsaya* into the one roomed house of the deceased for Mr. *Matsaya* to sleep on. Before he could sleep, Mr. *Matsaya* observed the accused seated on the bed while the deceased appeared to have been looking for something in her wardrobe. He woke up around 03:00 or 04:00 in the early morning hours of 17 September 2017 to the deceased screaming: 'help' 'help' 'help'. Upon opening his eyes, he saw the accused busy stabbing the deceased with a knife. A paraffin lamp was lit which made it possible for him to make observations. Although he was under the influence of alcohol, he saw and appreciated what happened. The deceased was bleeding and he tried to intervene in attempt to disarm the accused but the accused stabbed him thrice on his arms, thrice on his abdomen and twice on his shoulders. He was injured. Accused then pushed him, he fell and hit his head against a stove and became unconscious.

[11] Around 10:00, he woke up to a sight of a pool of blood on the floor and on the mattress while the deceased lay motionless next to the mattress. The door of the house was open and accused was not present. Accused later came back and entered the house. Mr. *Matsaya* asked him as to what happened because he was not sure of the earlier happenings. The accused proffered ignorance saying he did not sleep in that house after being chased by the deceased the previous night. Accused informed him that he came from the house where he normally slept with *Marius Madjiedt*. Mr. *Matsaya* confronted him as to when he left the deceased's house because by the time that Mr. *Matsaya* fell asleep the accused was still present in the deceased's house where the accused said that he was chased out by the deceased. The accused lifted the deceased, tried to wake her up without success. Accused then said he only came to fetch his T-shirts to be washed. When asked to call the police, the accused said his phone was off.

[12] Mr. Matsaya asked *Robert Lepoane* to call the police. Attempts to call the accused later proved futile as his phone appeared to have been switched off. Mr. *Matsaya* testified further that he was attended to by a medical doctor who completed a medical record (J88). This J88 got lost at the police station and he later returned to the doctor where he obtained another J88.

[13] Mr. *Matsaya* testified further that, he informed the paramedics and the police officers when they arrived at the scene, that he could not remember what happened, but later in the afternoon, he regained his memory of the events of that morning, inclusive of the clothes worn by the accused.

[14] In cross examination it was put to Mr. *Matsaya* by Mr. *Engelbrecht* that the blood of the deceased got to the T-shirt of the accused when he picked her up. This allegation was disputed. It was further put to him that when the police arrived at the scene on 17 September 2017, he informed Sgt *Humphries Simataa*, Sgt *Mika Gottlieb*, Cst *Albertus Junius* and Sgt *Sem Esekiel* that he did not know what happened as he was too drunk. To this Mr. *Matsaya* responded in the affirmative but further said that although by then he could not remember the events, as he was still under the influence of alcohol, as the day progressed, he became sober and recalled what transpired. He however recalled in the afternoon of 17 September 2017 that it was the accused who stabbed him. He also informed the police that he could now remember what happened.

[15] He testified that he observed the accused holding the knife while the deceased was bleeding from her chest. He also observed the accused stab the deceased on the side of her body. It was put to him that the post-mortem examination report reveals that the deceased sustained stab wounds to the back of the chest but he maintained his position that he saw the deceased being stabbed on her side.

[16] Mr. *Matsaya* was questioned on discrepancies between his testimony in court and his witness' statement, to which he responded in not so many words, that he told the truth and did not provide false evidence. There was a confusion as to who fetched the mattress of Mr. *Matsaya* and brought it into the house of the deceased. The witness' statement of Mr. *Matsaya* provides that it was the deceased who brought the mattress in the house, while in testimony Mr. *Matsaya* said the mattress was brought by the accused. Mr. *Engelbrecht* pointed to another contradiction in the

evidence of Mr. *Matsaya* and that of *Willem Jacobus Van Wyk (Mr. Van Wyk)*. Mr. *Van Wyk* testified that he was informed by Mr. *Matsaya* that when he was pushed, he fell and hit his head against a chair.

[17] *Marius Madjiedt (Mr. Madjiedt)* testified that at around 23:00, the night of 16 September 2017, the accused arrived at the place where they both stayed (although at times the accused stayed at the deceased's house) and knocked on the door and he opened for him. Accused said that he was involved in a fight in the street. When asked who he fought with, the accused provided no response. Accused left to buy cigarettes and returned whereby they both smoked the said cigarettes. Accused said he would not sleep at their house but will sleep with their common friend in the same yard. Accused left and he has no knowledge of what the accused did thereafter until the accused returned to the house the next morning. Accused then informed Mr. *Madjiedt* that he wanted to go to the house of his girlfriend (the deceased). Mr. *Madjiedt* inquired from him that: 'How is it going there at your girlfriend?'

[18] The accused responded that the aunty was sleeping and there was a man sitting there. The accused then left and returned with his toiletries from the deceased's house. In cross examination it was put to Mr. *Madjiet* that on 16 September 2017 the accused was the only one who slept in their room as Mr. *Madjiedt* was next door to his girlfriend. This allegation was disputed by Mr. *Madjiedt*, who further stated that by then he did not even have a girlfriend.

[19] *Robert Lepoane (Mr. Lepoane)* corroborated the evidence of Mr. *Matsaya* that the accused, the deceased and Mr. *Matsaya* were drinking alcohol together on 16 September 2017. He further corroborated the evidence of Mr. *Matsaya* that in the evening when the deceased was about to cook, the deceased stood up and went into the house, followed by the accused. Mr. *Matsaya* later followed them. He also heard the scream. He further said that the next morning Mr. *Matsaya* called him to the house of the deceased where he found Mr. *Matsaya* lying on his side covered in blood. He called his girlfriend *Elsa Alagoa* to come and observe the scene.

[20] He asked Mr. *Matsaya* about the knife cut marks on his body, to which he said that he did not know but perhaps he tried to intervene in a fight between two people. He called the police. It was put to Mr. *Lepoane* in cross examination that at no point was the accused and the deceased involved in an argument or fight. Mr. *Lepoane* disputed this allegation and insisted that he observed the deceased, the accused

and Mr. *Matsaya* enter the house on 16 September 2017 and he heard the deceased screaming. Mr. *Lepoane* referred to the accused and Mr. *Matsaya* (as he was the only one with the deceased when he arrived there) as possible murder suspects.

[21] Ms. *Elsa Alagoa* (*Ms. Alagoa*) corroborated the evidence of Mr. *Lepoane*. She further stated that the accused and the deceased were lovers. In the morning, while Mr. *Matsaya* was in a pool of blood she asked him as to what had happened and he responded that: 'I don't know my child.'

[22] Mr. *Willem Van Wyk* (*Mr. Van Wyk*) a city of Windhoek police officer, testified that when he arrived at the scene on 17 September 2017, Mr. *Matsaya*, who sat on the mattress with crutches, informed him that he could not tell what happened as he was very drunk the previous night. Later Mr. *Matsaya* said that he could recall that the accused and the deceased wanted to fight and accused had a knife. Accused wanted to stab Mr. *Matsaya* and he was trying to block the knife and it cut him. He then fell with his head against the chair and fainted. The next morning when he woke up, the deceased was lying close to him. Mr. *Matsaya* informed him that he did not know as to who stabbed the deceased.

[23] Sergeant *Stefanus Lazarus* (*Sgt. Lasarus*) of Women and Child Protection Unit (WCPU) testified that he overheard Mr. *Matsaya* saying that he was stabbed by the accused.

[24] Dr. *Rutendo Simwanza* (*Dr. Simwanza*) corroborated the evidence of Mr. *Matsaya* to a certain extent and testified that she treated Mr. *Matsaya* on 25 September 2017. She completed a J88 but he later returned for another J88 completed based on the information on his health passport. The J88 shows multiple lacerations which the doctor said were caused by a knife as informed by Mr. *Matsaya*.

[25] Detective Sergeant *Deoline Jarson* (*D.Sgt Jarson*) testified that on 17 September 2017 she was called to a murder scene. At the scene she was provided with a cell phone number of the accused. She called him and introduced herself to him. On inquiry of his location, he said that he was somewhere in Khomasdal near a Shell service station and when asked about a specific location, he hung up the phone. Several calls thereafter went unanswered. After persistently calling his phone, he said he was near the compound at Gammams service station. When called again his phone was off.

[26] *D/Sgt Jarson* testified further that later in the day she received information that the accused was at his daughter's house. Upon arrival at the said house, the accused was called out and fully informed of his legal rights. She informed him that he has the right to remain silent and not to incriminate himself and also that he has the right to legal representation of his own choice and she cannot afford he could apply for state funded legal aid. The accused responded that he requires no legal representation and he was prepared to tell his version.

[27] The accused disputes that such rights were explained to him. In particular the accused took issue with the allegation that *D/Sgt Jarson* informed him of the process to be followed in order to apply for legal aid. When asked of the whereabouts of the T-shirt which he was wearing on the day of the murder, he voluntarily retrieved the T-shirt from his bag and handed it over to *D/Sgt Jarson*. She further testified that at the deceased's house the accused took out a kitchen knife from a bucket containing water. In the deceased's house she saw one gas stove and one plastic chair. She further testified that the accused did not hide any clothing. She also testified that Mr. *Matsaya* informed her that he intervened in a fight and in the process, he was stabbed.

[28] Detective Chief Inspector *Hendrick Martinez Olivier (D/C/Insp Olivier)* testified and corroborated the evidence of *D/Sgt Jarson* to a large degree. He testified further that he travelled with *D/Sgt Jarson* to a house where the accused was found. *D/Sgt Jarson* read out the legal rights to the accused. At the police office, upon being informed that the accused wanted to make pointings out, the accused was informed by *Sgt Jarson* of his rights to have a legal representative present; the right to remain silent and not to be obliged to point out anything. *D/C/Insp Olivier* had no answer to the question that *D/Sgt Jarson* did not testify about informing the accused of the right to have a lawyer present during pointing out. He collected a T-shirt from one house and proceeded to another house where the accused collected a knife from a bucket of water.

[29] Dr. *Mamadi Guriras (Dr. Guriras)* testified that she is a medical officer at the Forensic Mortuary and she conducts autopsies on deceased persons. She testified on the post-mortem examination report compiled by Dr. *Yuri Vasin* following an investigation on the deceased's body. The chief post-mortem examination findings

were: 12 stab wounds, including 4 wounds, which penetrated the left pleural cavity; left side hemithorax (700ml) and moderate systemic visceral pallor. The deceased sustained 12 stab wounds and the cause of death was stabbing to the chest. Wound number 1 was at the mid auxiliary line while wound number 2 to 9 were at the back of the deceased's body. Wound number 10 was on the left arm, wound number 11 was on the right inner arm while wound number 12 was on the thigh.

Defence case

[30] The accused adduced sworn testimony. He testified that he was in a romantic relationship with the deceased from 2013 to 2017 which he later ended.

[31] He denied ever assaulting the deceased at all, neither was there any fight between him and the deceased, he testified. He knew Mr. *Matsaya* and they were friends.

[32] Two weeks before 15 September 2017, he moved away from the deceased because he was tired of her arguments. On 15 September 2017 he went to the deceased on her invitation to buy beer for her.

[33] The accused confirmed the evidence of Mr. *Matsaya* that Mr. *Matsaya* fixed a stove and a microwave for a fee while the accused was assisting him. He did not receive money for assisting Mr. *Matsaya*. Mr. *Matsaya* then bought alcohol. The deceased, Mr. *Matsaya* and the accused consumed the alcohol together. He had N\$1 000 from his salary. He observed Mr. *Matsaya* hand over N\$100 to the deceased and the accused never demanded N\$100 from the deceased.

[34] The accused further said that there was big electrical stove in the house of the deceased but she used to cook outside because there was no electricity in her house. The deceased never cooked inside the house.

[35] Accused further testified that on 16 September 2017 he did not sleep at the house of the deceased. When he left the deceased's house, both the deceased and Mr. *Matsaya* were still awake. At that time there was still a lot of alcohol and accused said he will return the following day on a Sunday. He thus raises the defence of an alibi. Though not specifically pleaded, the accused appears to raise an alibi in that he alleges that he was not at the house of the deceased when the deceased and Mr. *Matsaya* were stabbed.

[36] It was his further evidence that he went to sleep at his room which he was sharing with Mr. *Madjiedt* and Mr. *Madjiedt* was not there when he arrived at the room. Their room only had one key which was in the possession of the accused.

[37] Accused denied being present at the house of the deceased between 03:00 and 04:00 in the morning hours of 17 September 2017. He further denied stabbing Mr. *Matsaya* and the deceased.

[38] In the morning of 17 September 2017 between 08:30 and 09:00, it was his evidence that he went to the house of the deceased and found Mr. *Matsaya* sitting on a mattress with a stab wound on the chest while the deceased was lying down on the same mattress. There was blood on the floor. Mr. *Matsaya* said somebody came into the room the previous night and stabbed him and the deceased. He lifted the deceased and realised that she had died. In the process the deceased's blood was transferred to his clothes.

[39] He left the deceased's house in order to go and charge his cellular phone battery so that he could call the police. Upon coming out of his neighbour's house where he went to charge his phone, he saw an ambulance motor vehicle and a police van in front of the house of the deceased. As he walked towards the house of the deceased the ambulance and the police van drove away.

[40] On 17 September 2017 he did not receive a call from the police. He proceeded to his daughter's house. He disputed informing *D/Sgt Jarson* that he was near Gammams. It was his further testimony that upon his arrest, *D/Sgt Jarson* did not explain any legal right to him.

[41] The accused testified further that he voluntarily handed the T-shirt over to *D/Sgt Jarson* when asked to do so. However, he has no knowledge about the knife and no knife was found in the house of the deceased. *D/Sgt Jarson* was just looking around in the said house without saying anything.

Analysis of evidence

[42] It is settled law that in criminal matters the state bears the onus of proof beyond reasonable doubt. The accused, on the other hand, may only provide an

explanation which may be reasonably possibly true in order to be found not guilty and acquitted. It is further trite that even where the accused's explanation is found to be improbable, the court may not convict such accused person unless it is satisfied that the explanation is false beyond reasonable doubt.²

[43] The evidence of Mr. *Matsaya* constitutes that of a single witness in as far the stabbing of the deceased and the stab wounds on his body is concerned. It is trite law that evidence of a single witness should be approached with caution. It is however, also settled law that the exercise of caution should not displace the exercise of common sense, as stated in *S v Snyman*.³

[44] In *Boois v S*⁴, while discussing the approach to evidence of single witnesses, this court said as follows in para 39: 'the CPA⁵ authorises a conviction on the strength of evidence from a single witness. This court in *S v HN*⁶ said the following regarding evidence of a single witness:

'Evidence of a single witness need not be satisfactory in every respect as it may safely be relied upon even where it has some imperfections, provided that the court can find at the end of the day that, even though there are some shortcomings in the evidence of a single witness, the court is satisfied that the truth has been told.'

[45] The evidence of Mr. *Matsaya* finds corroboration from Mr. *Lepoane* in that:

45.1 He observed the accused, the deceased and Mr. *Matsaya* consume alcohol;

45.2 When the deceased was to start cooking, she went inside the house followed by the accused and thereafter Mr. *Matsaya*. He heard her scream;

45.3 The following morning 17 September 2017, Mr. *Matsaya* informed him that he probably sustained the knife cuts when he was intervening between two people.

[46] Mr. *Van Wyk* also corroborated the evidence of Mr. *Matsaya* to the extent that he testified that on 17 September 2017 at the scene, Mr. *Matsaya* informed him that he recalled that the accused and the deceased were about to fight and the accused had a knife. The accused wanted to stab Mr. *Matsaya* and when he tried to block the knife, it cut him. He fell and hit his head and fainted.

² R v Difford 1937 AD 370 at 373.

³ 1968 (3) SA 582 (A); See also *S v Sauls and Others* 1981 (3) SA 172 (A).

⁴ (HC-MD-CRI-APP-CAL-2019/00063) [2020] NAHCMD 128 (22 April 2020).

⁵ Section 208.

⁶ 2010 (NR) 429 (HC) 443E-F.

[47] There is a contradiction between the evidence of Mr. *Matsaya* and Mr. *Van Wyk* regarding the object where Mr. *Matsaya* hit his head against when he fell and lost consciousness. Mr. *Van Wyk* testified that he was informed by Mr. *Matsaya* that the accused and the deceased wanted to fight and the accused had a knife and when accused wanted to stab Mr. *Matsaya*, he fell and hit his head against a chair and fainted, while Mr. *Matsaya* testified that he hit his head against a stove and lost consciousness. What is apparent from the above versions is that the accused wanted to stab Mr. *Matsaya* who then fell hit his head to an object and lost consciousness. Whether the accused hit his head against a stove or a chair is of less value. Nothing fundamental turns on the identity of the object he fell on.

[48] Sgt. *Lasarus* further corroborated the evidence of Mr. *Matsaya* where he testified that Mr. *Matsaya* informed him that he was stabbed by the accused.

[49] The J88, although falling short of stipulating the nature of injuries, the degree of the cuts of stab wounds, the length and width of the wounds, it, notwithstanding corroborates the evidence in respect of the injuries suffered by Mr. *Matsaya*.

[50] When questioned in cross examination by Mr. *Malumani* that:

50.1 On 16 September 2017, as per the testimony of Mr. *Madjiedt*, he was involved in a fight on the street, the accused denied this evidence despite such evidence being left unchallenged during the cross examination of Mr. *Madjiedt*;

50.2 In the morning of 17 September 2017 he left Mr. *Madjiedt* to go to the deceased's house. On his return around 08:00 on the same day, Mr. *Madjiedt* questioned him as to how his girlfriend is and he responded that she was sleeping. He was questioned why he said so when that was not the case. To this the accused denied and said Mr. *Madjiedt* was not telling the truth. This version of Mr. *Madjiedt* also remained undisputed during the trial.

[51] In the morning of 17 September 2017, the accused entered the room where Mr. *Madjiedt* slept and said he was on his way to the place of his girlfriend (the deceased). On his return at around 08:00, Mr. *Madjiedt* asked him how the deceased was and he responded that she was sleeping and that a man is sitting there. In his evidence, the accused stated that when he went to the house of the deceased and lifted her up, he concluded that she had died, yet when he was later questioned by

Mr. *Madjiedt* about her condition, he said that she was sleeping. When pressed in cross examination by Mr. *Malumani*, the accused said he told Mr. *Madjiedt* that he found that the deceased was lying there in a pool of blood.

[52] It should further be mentioned that the following new versions only surfaced during the defence case and were not put to any of the state's witnesses:

52.1 That on 15 September 2017 the accused went to the house of the deceased on the invitation of the deceased so that he could buy her a beer;

52.2 That the deceased never cooked inside the house;

52.3 That when the accused left the house of the deceased on the night of 16 September 2017 to go and sleep, he left the deceased and the accused still awake;

52.4 That when he left the deceased and the accused during the night of 16 September 2017, he informed them that he will return the next day on a Sunday;

52.5 That in the morning of 17 September 2017 Mr. *Matsaya* informed him that somebody approached them during the previous night and stabbed them.

[53] *Mtambabengwe*, AJA in *S v Auala*,⁷ while discussing the failure on a litigant to challenge an opposing witness' evidence on a particular aspect stated that:

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

[54] Similarly, *Claassen*, J. in *Small v Smith*⁸ stated as follows:

'It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and if need be to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and opportunity of explaining the contradiction of defending his own character. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross examination and afterwards argue that he must be disbelieved. Once a witness's evidence on a point in dispute has been deliberately left unchallenged in cross examination and particularly by a legal practitioner, the party calling that witness is normally

⁷ 2010 (1) NR 175 (SC) at 181.

⁸ 1954 (3) SA (SWA) at 438E-G.

entitled to assume in absence of notice to the contrary that the witness's testimony is accepted as correct.'

[55] This court holds the view that the testimony of Mr. *Madjiedt* about a street fight is very crucial as it demonstrates that the accused was involved in a physical confrontation with another person. When asked who this person was by Mr. *Madjiedt*, he had no response. If he was not involved in any physical confrontation, he would have disputed this evidence of Mr. *Madjiedt* with relative ease. The further statement that the following morning the accused said that the deceased was sleeping is equally critical to this matter because by then the deceased was already stabbed and to the accuse'd peculiar knowledge. The failure to dispute such serious and incriminating pieces of evidence leaves no room for regarding same as true. This court is further not afforded reasons to disbelieve the unchallenged material evidence of Mr. *Madjiedt* who is an independent witness and has nothing to gain by giving false evidence against the accused. Based on the authorities referred to herein above, when material factors are left unchallenged in evidence, the opposing party is entitled to assume that such factors are admitted.

[56] In the same breath, there if no explanation why the above new versions that surfaced in the evidence of the accused were not put to the state witnesses. In the absence of such explanations, this court is constrained to conclude that the state's case, which is at variance with the new versions of the accused, stands to accepted as a true version of the events that occurred on the fateful day.

[57] Mr. *Engelbrecht* further argued that a negative inference should drawn against the state for not calling police officers, namely: *Sgt Iskiel*, *Sgt Simataa*, *Sgt Gotlieb* and *Cst Junius* to tetsify. As his argument went, these officers all stated in their witness statements that Mr. *Matsaya* informed them at their arrival at the scene on 17 September 2017 that he could not remember what happened earlier. The state is therefore said to have withheld crucial witnesses. Mr. *Malumani* was not to be outmuscled and countered this argument by stating that all the said officers were all on the state's witness list. The state however made such witnesses available to the accused to consult with and call them if so desired.

[58] When Mr. *Matsaya* was questioned about the version in the witness statements of the said police officers, he answered in the affirmative, namely that he indeed conveyed such information to them. He said although he said so to the police

officers, he later remembered the occurrences of the previous night. In view of the concession made by Mr. *Matsaya*, this court is of the view that nothing more would have resulted from the evidence of the said officers. Notwithstanding, such police officers were made available to the accused to call them if he so wished and he did not call them. Nothing therefore turns on the argument of Mr. *Engelbrecht* which is unmeritorious and it is rejected.

[59] The accused had another arsenal in his string. It was argued for the accused that the identity of the deceased and the chain of custody of the deceased's body from the scene to the point of post-mortem examination was not established. When the accused was called upon to respond to the state's pre-trial memorandum, he responded that he does not dispute the identity of the deceased neither does he dispute the admissibility and content of the post-mortem examination report on the deceased's body and the cause of death. The accused further stated that he does not dispute that the deceased's body did not sustain any wound or injury during transportation from the scene until the post-mortem examination was performed. The state's pre-trial memorandum⁹, the accused's response thereto¹⁰, the post-mortem examination report¹¹, the Identification of corpse¹², the statement of the next-of-kin of the deceased¹³ and the forensic pathology photoplan¹⁴ were all received as exhibits into evidence by consent of the accused.

[60] In *S v Boois* (supra) at para 28-31 this court held that:

[28] What is obvious is that, had the appellant objected to the admission of the documents now complained of, the state would have had no option but to call the authors of the respective documents (excluding the medical doctor who conducted the post-mortem examination by virtue of s 212(7A)(a)) to testify on the veracity of the said documents. In *casu*, the appellant extended the admission of the post-mortem examination report by expressly stating through Mr *Christians*, that she is in agreement with the contents of the exhibits. It however appears that Mr *Christians*, armed with the *Goagoseb* judgment, was lying in wait, to attack the post-mortem report, the state and the trial court at the opportune time. Laying a trap for the state and the court to fall in by not objecting to the handing in of the medical and accompanying reports (as it appears in this matter) and then by the flip (sleight) of a hand turn around and contend that such reports were not duly proven, must be

⁹ Exhibit "B".

¹⁰ Exhibit "C".

¹¹ Exhibit "H".

¹² Exhibit "H1".

¹³ Exhibit "H2".

¹⁴ Exhibit "D".

discouraged in the strongest of terms. This court has numerously stated that a criminal trial is not a game of catch as catch can.¹⁵

[29] The Supreme Court in *S v Eiseb (supra)*¹⁶ authoritatively found that the failure of appellant's legal representative to object to the production of the medical report indicates to the state and the court that he or she is not objecting to the admissibility of the medical report as evidence. This means that the court is entitled to accept that the appellant admitted the information contained in the report.

[30] In the *Eiseb* matter, the Supreme Court cited with approval the following passage from *S v Hufnagel*¹⁷ where *Levy* AJ stated as follows regarding admissions made by legal representatives during trials:

“Mr Brandt's statement that he had no objection was a clear indication to the State and the Court that he was not objecting to the admissibility of the affidavit in evidence. If the affidavit was invalid, his failure to object does not make it valid. However, by reason of his specific statement and conduct, appellant is estopped from raising this point on appeal. A litigant is bound by the decision of his legal adviser when the latter handles his trial.”

[31] The challenge that the appellant launched against the admission of the identity of the deceased in the post-mortem examination report, as well as the chain of evidence regarding such identification, is unmeritorious. On the strength of s 212(7A)(a) and the *Eiseb* judgment, the non-objection on the appellant's behalf, to the production of the post-mortem examination report resulted in the admission of the contents of such report, inclusive of the identification of the deceased. The appellant is further bound by the statements made by her legal representative during the trial.’

[61] Suffice to state that from the above authority and the above exhibits referred to which were received into evidence, it is clear as noon day that that the identity of the deceased and the chain of custody was proven by the state and nothing more need to be said on this aspect.

[62] I now turn to consider the alibi defence which surfaced during evidence to the extent that at the time that the deceased and Mr. *Matsaya* were stabbed the accused was sleeping at the room jointly rented with Mr. *Madjiedt*. This court emphasises that

¹⁵ *S v Auala (No 1)* 2007 NR 223 (HC) para36.

¹⁶ Para 15.

¹⁷ Case No. CA 28/2001, (unreported) judgment of this court, delivered on 15 October 2001. See also: *SOS Kinderdorf International v Effie Lentin Architects* 1992 NR 390 (HC) (1993) (2) SA 481 at 398H-I (SA at 490C-D) and *Isaac v S* (HC-MD-CRI-APP-CAL-2018/00011) [2018] NAHCMD 213 (16 July 2018) para 16. See also: *S v Likoro* (CA 19/2016) [2017] NAHCMD 355 (08 December 2017) at para 29.

there is no burden on the accused to prove the truth of his alibi as the onus is on the state to prove beyond reasonable doubt that the alibi is false. In the event of the existence of a reasonable possibility that the alibi may be true then the accused must be given the benefit of the doubt.

[63] Mr. *Engelbrecht* referred this court to the judgment of *S v Katjiruova*¹⁸ where Hoff J (as he then was) quoted with approval the following passage from *R v Biya* 1952 (4) SA 514 (AD) at 521 C-D:

'If there is evidence of an accused person's presence at a place and a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime.'

[64] I associate myself with above passage as authority the proper approach in assessing an alibi defence. Unless the alibi defence is found to be false beyond reasonable doubt, the accused will be entitled to an acquittal.

[65] The evidence of Mr. *Madjiedt* that the accused did not sleep in their room during the night of 16 to 17 September 2017; that Mr. *Madjiedt* slept in their room and not at his girlfriend's room (that he did not even have a girlfriend by then) and that despite the mere say so of the accused that he was going to sleep at their friend's room which Mr. *Madjiedt* could not confirm, contradicts the alibi defence that the accused informed him that the aunty (the deceased) was sleeping. Mr. *Madjiedt* was unshaken during cross examination and maintained that during the night of 16 to 17 September 2017 he was at his room and suggestions that he was elsewhere are false. In the face of the aforesaid evidence the alibi defence cannot be said to be reasonably possibly true. This court concludes that the state proved the said alibi defence to be false beyond reasonable doubt and the alibi defence is so rejected.

[66] It is worth mentioning at this stage that during cross examination the accused was persistently questioned to provide any reason why the state witnesses particularly *D/Sgt. Jarson* would falsely implicate him. In *S v Lesito*,¹⁹ cited with approval in *S v Katjiruova (supra)* at para 25, the accused was convicted of possession of dagga found in his house but stated that such dagga was planted there by the police, without having seen them plant the said dagga. The magistrate

¹⁸ (CA83/2008) [2012] NAHC 84 (20 March 2012).

¹⁹ 1996 (2) SACR 682 (O).

rejected this version and found it inherently improbable for police officers incriminate a member of the public. On review the court stated (on the headnote) that:

‘While it could be accepted that it was generally unlikely that a police officer would falsely incriminate someone, more a general probability was needed before an accused’s version could be rejected. The court held further that even if the accused’s allegation that the dagga had been planted could be rejected as being false, this did not mean that his denial of knowledge of the dagga was also false. *In casu*, the accused’s allegation that the dagga had been planted had been an inference he had drawn. It would have been another matter altogether if he had testified that he had in fact seen the dagga being planted and the court had specifically rejected that allegation. In such a case it could justifiably be concluded that the rest of his evidence was also false. However, if the court rejected an inference made by the accused, that did not justify the conclusion that all his evidence was false. The court also warned that it was necessary to guard against putting an onus on the accused to explain why a State witness would lie. The question arose as to why the accused should know as to why a witness had lied.’

[67] A question as to why a witness would falsely incriminate an accused, unfairly encroaches on the accused’s right to a fair trial. It offends against the presumption of innocence as it assumes that there is an underlying truth to every part of the evidence of a state witness. It is critical not only at the conclusion of the evidence led but at all stages of the criminal trial to observe that the onus is on the state to prove the guilt of the accused beyond reasonable doubt. It is therefore elementary learning that every element of the offence must be proven by the state without making assumptions that, no witness will falsely incriminate an accused without any reason. The aforesaid question is therefore discouraged and this court will not count against the accused, his failure to state any reason why a witness would falsely incriminate him.

[68] From the evidence presented it is established beyond reasonable doubt that the deceased died as a result of stabbing and that she sustained multiple stab wounds at least 12 in number. It is further proven beyond doubt that Mr. *Matsaya* also sustained knife cuts and wounds. The issue to be determined is who stabbed the two.

[69] The version of the state, is heavily reliant of the evidence of Mr. *Matsaya* and corroborated by other witnesses (*supra*), namely that it is the accused who stabbed both the deceased and Mr. *Matsaya*.

[70] The testimony of Mr. *Matsaya* together with other state witnesses have some differences. It is true that discrepancies between the testimony of state witnesses and their witness statements and between different versions of witnesses were pointed out by Mr. *Engelbrecht*. It is not strange that witnesses, when testifying, differ from one another in certain areas. Several reasons may come to the fore to explain these discrepancies and it does not necessarily mean that they deliberately lied to court. Contradictions *per se* do not lead to the rejection of a witness' evidence, as it may simply be indicative of an error. *Nestadt JA in S v Mkhole*²⁰ stated the following in this regard:

'... it is stated that not every error made by a witness affects his credibility; in each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness' evidence . . . no fault can be found with his conclusion that what inconsistencies and differences there were, were 'of a relatively minor nature and the sort of thing to be expected from honest but imperfect recollection, observation and reconstruction'. One could add that, if anything, the contradictions point away from the conspiracy relied on.'

[71] It should be mentioned that Mr. *Matsaya* earlier explained to persons who arrived at the scene in the morning of 17 September 2017 that he was not aware of what transpired. This was brought about when he fell and hit his head against a stove. Although Mr. *Van Wyk* testified that Mr. *Matsaya* informed him that he hit his head against a chair, the common denominator is that, he fell, hit his head and became unconsciousness. This explains why he could only remember later after which his explanation was probable and consistent.

[72] The behaviour of the accused after the event cannot be seen as reasonable and consistent with that of a person who had just lost a beloved person and had seen his friend injured. The explanation that when he left the deceased in a pool of blood he went to charge his phone but while he was on his way back to the house of the deceased, he saw an ambulance motor vehicle and a police van and then decided not to reach the house or pursue the vehicles to ascertain the condition of the injured is not reasonable or innocent. When *D/Sgt Jarson* called him and upon her introduction, the accused hanged up his phone, is indicative of a guilty mind and I so hold.

²⁰ 1990 (1) SACR 95 (A) at 98f - g.

[73] This court is of the view that the explanation of the accused that when he left the house of the deceased, the deceased and Mr. *Matsaya* were still awake and that he even informed them that he will return the following day on Sunday is highly improbable. This is so because he would have been excluded from perpetrating the offences in question. His behaviour after the event also casts doubt on the veracity of his version. How he informed Mr. *Madjiedt* that the deceased was sleeping when asked how she was when that was not the case is not explained. To the contrary the accused persisted in his bare denials and kept adjusting his version by introducing new evidence during the defence case. This court has no doubt that the evidence of the accused standing at variance with that of Mr. *Madjiedt* is false and falls to be rejected.

[74] When considering the evidence of Mr. *Matsaya* as corroborated in different aspects as above-mentioned, this court finds that despite some immaterial shortcomings, which are not entirely unexpected in trials, Mr. *Matsaya* was honest and testified in a forthright manner in his evidence. He, in the court's opinion, told the truth.

[75] The accused on the other hand was not an impressive witness. His evidence is littered with contradictions and improbabilities. Furthermore, his evidence was further not corroborated in material respects, if at all. His imaginary alibi defence could not withstand scrutiny, given the totality of the evidence led. His bare denials of the commission of the offences are not supported by any credible evidence. Considering the totality of the evidence, together with the probabilities set out herein above, regarding the circumstances surrounding the events leading to the commission of the offences, the commission of the offences and the accused's behavior after the event, the court is directed towards one reasonable conclusion only. It is that the accused's version, where it contradicts that of the state witnesses, constitutes a well-oiled but transparent fabrication and it is not reasonably possibly true. It is therefore found to be false beyond reasonable doubt. Accordingly, such evidence falls to be rejected where it is in conflict with the evidence of state witnesses and it is so rejected.

[76] The only reasonable inference to be drawn from the totality of the evidence on record, and which I find for a fact, is that the accused, on 16 September 2017, twice assaulted the deceased, and later in the early morning hours of 17 September 2017 he stabbed both Mr. *Matsaya* and the deceased.

[77] The Supreme Court in *S v Shaduka*²¹ approved the approach decided by Malan JA in *R v Mlambo*²² that:

‘When an accused causes somebody’s death by means of an unlawful assault and only the accused is able to explain the circumstances of the fatal assault, but he gives an explanation which is rejected as false, then the Court can make the inference that the accused committed the said assault with the intention to kill rather than with any other less serious form of *mens rea*.’

[78] In the present matter, the accused is the only person who is in a position to explain to court why he stabbed the deceased at least 12 times thus causing her death. The accused, however, made a choice and decided to provide a fabricated explanation for his deeds. In such events, the court is entitled to infer that he killed the deceased with direct intent as opposed to a less serious form of *mens rea*.²³ Having found that the accused’s explanation regarding the circumstances surrounding the death of the deceased is false and rejected, this court finds that the proven facts establish that the accused killed the deceased with direct intent to kill (*dolus directus*).

[79] In any event the fact that the deceased was stabbed 12 times all over her body including her vulnerable parts is indicative of intention of the attacker to kill with direct intent unless there is evidence proving the contrary, and there is none. This court is therefore satisfied that the state proved the guilt of the accused beyond reasonable doubt on count one. The accused is found guilty and convicted of murder with direct intent, read with the provisions of the Combating of Domestic Violence Act.

Count 2: Attempted murder

[80] The evidence on the charge of attempted murder established that Mr. *Matsaya* sustained knife cuts. It was not made clear to this court whether Mr. *Matsaya* sustained stab wounds or just knife cuts. The medical report (J88) is also not of much assistance in this regard. This is attributed to the fact that this court is in darkness on the measurements of the cuts or injuries, inclusive of the width and

²¹ Case No SA 71/2011 (unreported) delivered on 13.12.2012. See also: *S v David* (CC13/2018) [2019] NAHCMD 377 (30 September 2019) para 96.

²² 1957 (4) SA 727 (A) at 738B-D.

²³ *S v Rama* 1966 (2) SA 395 (A).

depth of the said injuries sustained. The explanation that one uncovers from the evidence is that the measurements appear to have disappeared together with the original medical report which got lost somewhere at the police station.

[81] There being no other evidence which could point to attempted murder, this court is of the view that the evidence led on this charge does not prove the charge of attempted murder but proves that of offence of assault with intent to do grievous bodily harm. In terms of section 258²⁴ this court is authorised in the circumstances, as I hereby do, to retain a verdict of guilty on the competent verdict of assault with intent to do grievous bodily harm, which I hereby do.

Count 3: Assault with intent to do grievous bodily harm read with the provisions of the Combating of Domestic Violence Act, 4 of 2003.

[82] The evidence led proves that at around 17:00 on 16 September 2017 the accused assaulted the deceased by kicking her thrice on her legs and slapping her thrice on her face while the deceased covered her face. The deceased did not, from the evidence adduced, sustain any injuries. There is no evidence on the degree of force employed by the accused in kicking and slapping the deceased. These assaults may well have been slight. This court therefore harbours doubt whether the offence of assault with intent to do grievous bodily harm was proven beyond reasonable doubt. Our law is trite that when a court is in doubt, then the accused should be afforded the benefit of that doubt.

[83] In the result it is found that the totality of the evidence does not prove the charge of assault with intent to do grievous bodily harm but proves that of common assault read with the provisions of the Combating of the Domestic Violence Act. In terms of section 266²⁵ this court is competent to convict a person on a competent verdict. I accordingly find the accused guilty of common assault read with the provisions of the Combating of Domestic Violence Act on this count.

Count 4: Assault with intent to do grievous bodily harm read with the provisions of the Combating of Domestic Violence Act, 4 of 2003.

[84] The evidence led proves that at around 20:00 on 16 September 2017 the accused assaulted the deceased while inside the house. When Mr. *Matsaya* entered the house, he found the deceased covering her face shouting 'help' 'help' help'.

²⁴ The Criminal Procedure Act 51 of 1977 (the CPA).

²⁵ The Criminal Procedure Act 51 of 1977.

Upon inquiry to the accused as to why he was assaulting her, the accused responded that it is because she was refusing to return his money. There is no indication as to the nature of the assault and whether the deceased sustained any injuries. What is clear however is that the accused assaulted the deceased.

[85] In the result it is found that the charge of assault with intent to do grievous bodily harm was not proven. To the contrary, the evidence proves the offence of common assault read with the provisions of the Combating of Domestic Violence Act. In terms of section 266²⁶ this court is competent to convict a person on a competent verdict. I accordingly find the accused guilty of common assault read with the provisions of the Combating of Domestic Violence Act on this count.

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

[86] The accused is charged with defeating or obstructing or attempting to defeat or obstruct the course of justice. The accused is alleged to have hidden a shirt, a pair of shoes and a cell phone and further he cleaned the knife used to stab the deceased and *Mr. Matsaya*.

[87] There is no evidence led that the accused hid any of the above-mentioned items. As a matter of fact, the evidence is crystal clear that the accused did not hide the shirt, shoes or cell phone. He voluntarily presented these items to the police upon mere asking.

[88] When regard is had to the allegation surrounding the knife, it is alleged that the accused cleaned the knife by placing it in a bowl of water. The knife is said to have been retrieved from a bowl of water. This court is not informed as to the quantity of the water in the bowl, there are not pictures of the said bowl and there is no evidence of whether the knife was fully submerged under water or not. This court is doubtful whether by placing the knife in a bowl of water the accused intended to defeat or obstruct justice or at the very least attempted to do so. No such evidence was led.

[89] In the result this court gives the accused the benefit of the doubt on count 5 and finds that the guilt of the accused was not proved beyond reasonable doubt. In light of the conclusion reached on this count, it has become academic to deal with

²⁶ The Criminal Procedure Act 51 of 1977.

the aspect of the accused's legal rights. This court lacks the luxury of time and energy to engage in academic debates such as this issue presents.

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

Count 1: Murder, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 – Guilty

Count 2: Attempted murder – Not guilty and discharged

In terms of section 258 of Act 51 of 1977 on the competent verdict of Assault with intent to do grievous bodily harm – Guilty

Count 3: Assault with intent to do grievous bodily harm read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 – Not guilty and discharged

In terms of section 266 of Act 51 of 1977 on the competent verdict of Common assault, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 - Guilty

Count 4: Assault with intent to do grievous bodily harm read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 – Not guilty and discharged

In terms of section 266 of Act 51 of 1977 on the competent verdict of Common assault, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 - Guilty

Count 5: Defeating or obstructing or attempting to defeat or obstruct the cause of justice – Not guilty and acquitted.

O S SIBEYA

ACTING JUDGE

APPEARANCES:

FOR THE STATE:

I Malumani
Of Office of the Prosecutor General
Windhoek

FOR THE ACCUSED:

Aid)

M I Engelbrecht
Of Engelbrecht Attorneys (instructed by Legal
Windhoek