

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
JUDGMENT

Case no: CC 22/2019

In the matter between:

**THE STATE**

and

**SAGARIUS LEVI**

**ACCUSED**

**Neutral citation:** *S v Levi* (CC 22/2019) [2020] NAHCMD 218 (11 June 2020)

**Coram:** SIBEYA, A.J

**Heard:** 27-30 January; 17 February; 09 March; 11 May 2020

**Delivered:** 11 June 2020

**Flynote:** Criminal law – Murder, Housebreaking with intent to murder and attempted murder, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003, alternatively housebreaking with intent to murder and assault by threat – Accused raising private defence and stabbing the deceased by mistake on the charge of murder and denials on housebreaking with intent to murder and attempted murder with the alternative – Evidence to be evaluated in totality and all evidence to be accounted for – Requirements of private defence revisited – Lack of intent attributed to a mistake examined – The behaviour of an accused after the event can, in appropriate cases prove intent — On proven facts, court held that the accused killed the deceased with direct intent – On Housebreaking with intent to murder and attempted murder and the alternative – single witness evidence

approached with caution – Witness evidence marred by discrepancies – Court doubtful of the guilt of the accused – Benefit of doubt to be given to accused.

**Summary:** The accused was indicted in the High Court on charges of murder and housebreaking with intent to murder and attempted murder, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003, alternatively, housebreaking with intent to murder and assault by threat. He pleaded not guilty to all counts, offered no plea explanation and opted to remain silent.

It is alleged that the accused, who was in a domestic relationship with a *Rolena Garises* and was involved in a quarrel with her during the night of 11-12 November 2018 at her house after forcing the door open and entering the house. It is further alleged that in the house, the accused grabbed *Ms. Garises*, pressed a knife against her neck and throat and threatened to cut off her head. As alleged, the deceased came to her rescue and the accused stabbed the deceased with a knife on his neck to death. The accused pleaded not guilty to all counts and chose not to disclose the basis of his defence but to remain silent. During the trial the accused raised the private defence, coupled with the defence that he stabbed without intention to kill and therefor killed by mistake. He denied the charge of housebreaking with intent to murder and attempted murder together with the alternative charge.

*Held*, that evidence should be evaluated in its totality and all evidence led should be accounted for.

*Held further*, that a private defence is possible where the attack has commenced or is imminent and retaliation does not amount to a private defence.

*Held further*, that the defence of stabbing the deceased by mistake cannot be sustained on the proven facts of the case.

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

*Held*, that evidence of a single witness should be approached with caution.

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

*Held further*, that the court doubts whether the offence of housebreaking with intent to murder and attempted murder, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003, alternatively, housebreaking with intent to murder and assault by threat was proven. Where doubt exists, accused should be given the benefit such doubt.

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### ORDER

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Count 1: Murder – Guilty

Count 2: Housebreaking with intent to murder and attempted murder read with the provisions of the Combating of Domestic Violence Act, 4 of 2003, alternatively, housebreaking with intent to murder and assault by threat. – Not guilty and acquitted.

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### JUDGMENT

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#### SIBEYA AJ:

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

Count 1: Murder;

Count 2: Housebreaking with intent to murder and attempted murder read with the provisions of the Combating of Domestic Violence Act, 4 of 2003, alternatively, housebreaking with intent to murder and assault by threat.

[2] Mr. *Ipinge* appeared for the state while Mr. *Kamwi* appeared for the accused.

[3] The accused is *Sagarius Levi*, a 26 years old Namibian male. The deceased, *Harold Rooi* (hereinafter referred to as the deceased) is an adult Namibian male. The complainant on count two, *Rolena Garises* (hereinafter referred as *Ms. Garises*), is an adult Namibian female.

[4] The allegations against the accused who had a domestic relationship with *Ms. Garises*, are that, during 11-12 November 2018, he forced open the door and entered the house of *Ms. Garises* with the intention to kill her. He assaulted her by threatening to cut off her head. He pressed a knife on her neck and throat and tried to cut her head off. The deceased came to the rescue of *Ms. Garises* and the accused stabbed the deceased on his neck and he died as a result.

[5] The accused pleaded not guilty to all counts and opted not to disclose the basis of his defence. He further opted to remain silent on the allegations mentioned in the indictment.

[6] The accused made the following formal admissions which were admitted in terms of section 220 of the Criminal Procedure Act:<sup>1</sup>

- 6.1 That the names of the deceased as *Harold Rooi*;
- 6.2 That the body was identified by the mother of the deceased *Ms. Elizabeth Gomaxas*;
- 6.3 That the death of the deceased was caused by a stab wound to the neck on 12 November 2018;
- 6.4 That the deceased was transported from the scene to the hospital and did not sustain any other injuries up to the point where the post-mortem examination was conducted.

[7] As indicated in para 4 above, *Ms. Garises* and the accused were involved in a domestic relationship as defined in the Combating of Domestic Violence Act.<sup>2</sup>

[8] When the trial commenced, several documents were received in evidence by agreement of the parties, the contents of which was not placed in dispute. Where reference to particular documents is required, same shall be made in this judgment and details of all the documents need not be discussed.

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<sup>1</sup> 51 of 1977 (The Criminal Procedure Act).

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

The state's case

[9] *Mr. Polley Prince Fliede (Mr. Fliede)* testified that on the night of 11 November 2018, he was together with the deceased at the deceased's house when they heard a lady screaming 'help me' 'help me'. The screaming was from the direction of the house of *Ms. Garises*. *Mr. Fliede* and the deceased then went to the house of *Ms. Garises* in order to ascertain the occurring event.

[10] Upon arrival, at *Ms. Garises'* house, they found the accused at the doorway. He was moving in and out of the house with an okapi knife flipped open in his hand, while *Ms. Garises* was inside the house. *Mr. Kenneth Kastoor* was seated outside the house. The deceased advised the accused to stop what he wanted to do, leave and return the following morning to solve his difference with *Ms. Garises*. *Ms. Garises* then said that the accused made a lot of noise as a result of which she maybe evicted from that house she was renting. The deceased suggested to *Ms. Garises* that she could go to his house the next morning to stay there for about a week, as by then, the deceased would be away on a work-related assignment.

[11] The accused then went inside the house and he returned outside, walking normally without staggering. Without saying anything and in the absence of any altercation with the deceased, he stabbed the deceased with a knife. The deceased turned around and blood from his neck splattered onto the face of *Mr. Fliede*. The deceased then said 'I am stabbed with the knife'.

[12] The deceased ran to the house of his sister (*Claudia Rooi*) where he collapsed. He was later loaded in a vehicle in order to be taken to the hospital. During this process the accused, without offering assistance, passed by walking down the street. The deceased died at the hospital in Rehoboth.

[13] During the cross examination of *Mr. Fliede*, it was put to him by *Mr. Kamwi* that, the accused stabbed the deceased because the deceased slapped and pushed the accused on his face. *Mr. Fliede* responded that at the time that the deceased was stabbed, he was not facing the deceased and therefore did not observe the stabbing, and if the deceased slapped and pushed the accused (which he said was possible), he also did not make such observation. He stood about a metre away from the deceased and he did not hear any sound of a slap. *Ms. Garises* stayed in the house the whole time, he further testified.

[14] For her part, *Ms. Garises* testified that the accused was her lover in 2016 and in 2017 up to November 2018. On 11 November 2018, while sleeping in her house, the accused kicked the door to her house open. It was secured with a chain and a wire. He grabbed her. She screamed in vain for help. *Mr. Kenneth Kastoore* handed a knife to the accused and instructed him to cut off her head. The accused then pressed the knife on her throat with force and said that he would kill her. She did not sustain an open wound but there was a mark on her neck caused by the knife. She believed that he would kill her. She pushed him away.

[15] She further testified that the deceased and *Mr. Fliede* arrived at her house. The accused went outside and she followed. The deceased informed the accused to stop quarrelling with her, to leave and return the next morning to resolve their differences. The accused attempted to kick the deceased who sidestepped the kick and it missed him. The accused thereafter stabbed the deceased. The deceased did not slap or push the accused, she testified. During cross examination, *Ms. Garises* conceded that she did not have enough strength to defend herself against the attack of the accused and if he had wanted to kill her, then he could have done so.

[16] When confronted by *Mr. Kamwi* about the absence of the version of the mark on her neck in her witness statement, she responded that she did not inform the police of such statement because she could not speak properly as her throat was sore. Her statement is further silent on her alleged sore throat, notwithstanding her confirmation of the correctness of such statement. In an attempt to explain the said discrepancy, *Ms. Garises* stated that she informed the author of her witness statement about her sore throat but this was omitted in her statement. When pressed further in cross examination, she testified that she provided her statement the day succeeding the date of the incident and therefore she was still in a state of shock.

[17] She disputed as false, the evidence of *Mr. Fliede* that at all times she remained in the house. It should be mentioned that *Ms. Garises* was traversing foreign land. This is so because it is the duty and prerogative of the court to decide on the credibility of witnesses and not any witness, as stated by *Van Den Heever JA* in *Vusi Roy Ndlamini v Rex*<sup>3</sup> (A judgment of the Court of Appeal of Swaziland. I will send it to you afterwards Judge and you can consider it. She stated that she was outside her house and there was nothing in between *Mr. Fliede* and herself which could have obstructed *Mr. Fliede* from observing her. She further disputed the

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<sup>3</sup> (3/1999) [1999] SZSC 18 (03 December 1999) para 5.

evidence of *Mr. Fiede* that *Mr. Kastoor* was found outside the house. It was her evidence that he entered the house together with the accused and thereafter *Mr. Kastoor* returned outside. In evidence, she testified that the incident occurred around 22:00. She, however, conceded to her confusion on the exact time of the incident, as when it was pointed out to her that her witness statement reveals that the incident occurred at around 01:00, she agreed.

[18] Warrant Officer *Joseph Hamutenya (W/O Hamutenya)* testified that he arrested the accused and retrieved an Okapi knife from a pillow on the sofa where the accused slept.

[19] *Ms. Magdalena Rooi* corroborated the evidence of *W/O Hamutenya* and testified that the accused arrived drunk at her house on the night of 11 November 2018. He slept on a sofa and was later arrested by *W/O Hamutenya*.

[20] *Dr. Lena Ndinela Ashipala*, a forensic pathologist, testified that on 14 November 2018, she conducted a post-mortem examination on the body of the deceased and she compiled a post-mortem examination report.<sup>4</sup> Her chief post-mortem findings regarding the deceased were:

20.1 Being stabbed on the neck;

20.2 The body was covered with dry blood and sand all over;

20.3 3cm by 1cm penetrating stab wound on the right side of the neck (anterior triangle) penetrating in the sternocleidomastoid muscle inferiorly through to puncture the right internal jugular vein and right common carotid artery, Haemorrhages under skin and underlining muscles, tailing of the wound evident, with clear edges and regular;

20.4 1.2L of blood from the right chest;

20.5 Systemic visceral pallor.

The cause of death was found to be a stab wound to the neck causing exsanguination.

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<sup>4</sup> Exhibit "C".

[21] She testified further that when the jugular vein is cut open, a splashing of blood occurs. The injury sustained by the deceased is very serious and death could occur instantly.

#### Defence case

[22] The accused adduced sworn testimony. He testified that *Ms. Garises* was his ex-lover as their love relationship was terminated at the end of October 2018.

[23] He testified further that on the night of 11 November 2018, together with *Mr. Kastoor*, they went to the house of *Ms. Garises*. He drank alcohol but appreciated his surroundings. His aim was to ascertain whether the child of *Ms. Garises* was in a good state as the child had been with the accused but such child was fetched in his absence. He further wanted to ascertain whether the child's clothes were fetched. When pressed in cross examination by *Mr. Ipinge* the accused said his aim in approaching *Ms. Garises* was only to ascertain whether the child was in a good condition and that the reference to the clothing was a mistake. Upon arrival, he knocked and *Ms. Garises* opened the door. The accused was together with *Mr. Kastoor*. The accused testified that he never entered the house at all.

[24] A quarrel erupted between *Ms. Garises* and *Mr. Kastoor* following the directing of vulgar words by *Ms. Garises* to *Mr. Kastoor* that he is 'a child of a big cunt'. The deceased and *Mr. Fliede* arrived. *Ms. Garises* requested the deceased to take the accused and *Mr. Kastoor* out of her yard. Then a quarrel erupted between the deceased and the accused. The deceased grabbed the accused on his shirt on the neck, slapped him and pushed him around. The accused, who had a knife in his hand, made a movement towards the deceased, from the front to the back with his hand and then downwards. Then the deceased ran out of the yard.

[25] His intention was to hit the deceased back with an open hand but his hand possessed an open okapi knife. The stabbing was a mistake. He did not observe any weapon on the deceased. His testimony is further that it was not necessary to stab the deceased. The life of the accused was not in danger neither was he injured from being pushed and slapped but only felt pain.



[26] It was his evidence that he knew at the time of stabbing the deceased that the knife was in his hand. His intention however, was to slap him too. He was further aware that stabbing someone on the neck with a knife can cause instant death.

[27] He disputed the allegation of obtaining the knife from *Mr. Kastoora*. He could, however, not inform the court as to which stage, he flipped the knife open. His explanation thereto was that he was under the influence of alcohol despite being aware of his surroundings and further that he also forgot some of the intricate details of the events. When challenged by *Mr. Ipinge* on the reason why he carried an open knife in the night at the house of *Ms. Garises*, the accused had no reason to proffer.

[28] He testified further that he carried the knife (flip) closed but he could not recall why he flipped it open. He further testified that he recalled having the knife in his pocket but he could not remember why he produced it. He denied pressing it on the neck of *Ms. Garises*.

[29] *Mr. Kastoora* was called by the court in terms of s 186 of the Act.<sup>5</sup> He testified that both the accused and the deceased were his friends. He testified further that between 11 and 12 November 2018 in the night, he accompanied the accused to the house of *Ms. Garises* in order to collect the accused's money. On their arrival, the accused knocked on the door and *Ms. Garises* opened the door. *Mr. Kastoora* stood right at the door. The accused and *Ms. Garises* began to argue about money. They then entered the house and later returned outside. At this point he did not make any significant observations because it was dark and he was then outside the yard. It was *Mr. Kastoora's* evidence that he never entered the house.

[30] When the accused came outside the house, he wanted to hand the knife to *Mr. Kastoora*.

[31] One of the two men who arrived at the scene asked the accused to stop quarrelling with *Ms. Garises*, to which he responded that: 'argh fok (fuck)'. Then one man ran out of the place but he could not identify him as it was dark. He further stated that from the position where he was, if the deceased slapped the accused, he could have heard.

### Analysis of evidence

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<sup>5</sup> The Criminal Procedure Act.

[32] It is trite 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, for him to be found not guilty of the charge(s) preferred. Where the accused offers an explanation which is improbable, the court may not convict him unless, it is satisfied that the explanation is false beyond reasonable doubt.<sup>6</sup>

[33] In the assessment of evidence, trial courts should not consider such evidence in isolation but the evidence should be considered in its totality. In *S v HN*<sup>7</sup> it was held that:

'In its assessment of these conflicting versions of fact, the proper approach of the court in a case as the present is to apply its mind not only to the merits and demerits of the state and the defence witnesses but also to the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond all reasonable doubt. ... The respective versions should not be viewed in isolation and weighed up one against the other; but rather that the court must strive for a conclusion in its determination whether the guilt of the accused has been proved beyond reasonable doubt, when considering the totality of the evidentiary material.'

[34] In view of the above legal principle, this court considers the evidence presented as a whole and not in isolation. It is further the responsibility of this court to account for all the evidence presented.

[35] The evidence established that between 11 and 12 November 2018, the accused stabbed the deceased with a knife on the neck. The deceased died as result of such stab wound to the neck causing exsanguination.

[36] The accused appeared to raise two defences to the charge of murder namely: that he stabbed the deceased in private defence and further that the stabbing was by mistake. With regard to the charge of housebreaking with intent to murder and attempted murder alternatively, housebreaking with intent to murder and assault by threat, he raised bare denials.

#### In respect of count 1 - murder

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<sup>6</sup> R v Difford 1937 AD 370 at 373.

<sup>7</sup> 2010 (2) NR 429 (HC) at 451.

[37] It was the evidence of *Mr. Fliede* that, at the house of *Ms. Garises*, the deceased informed the accused to stop quarrelling with *Ms. Garises* and to rather return the next morning to solve their differences. The deceased further said that *Ms. Garises* could occupy his house the next day as he was due to leave town. By then, the accused had an open knife in his hand. Without saying anything, the accused stabbed the deceased with a knife on his neck and blood splattered on *Mr. Fliede's* face. *Ms. Garises* corroborated the evidence of *Mr. Fliede* when she stated that there was a quarrel between the accused and herself and the deceased requested the accused to leave the house and return the following morning to solve their difference.

[38] *Mr. Fliede* conceded in cross examination that although he was about a metre away from the deceased, he did not observe the stabbing as he faced elsewhere at the moment of the stabbing. He further conceded that it was possible that the deceased could have slapped and pushed the accused but that was not his observation. He maintained that *Ms. Garises* stayed in the house the whole time. To the contrary, *Ms. Garises* testified that she went outside the house and observed the accused attempt to kick the deceased, the deceased sidestepped the kick and it missed him. Thereafter, without being slapped or pushed, the accused stabbed the deceased. I will return to this evidence later in the judgment.

[39] It was further the testimony of *Mr. Fliede* that when they loaded the deceased in the vehicle in order to take him to the hospital, the accused passed by walking down the street.

[40] There is a contradiction between the version of *Mr. Fliede* and *Ms. Garises* in respect of whether or not *Ms. Garises* remained inside the house the whole time. *Mr. Fliede* who is an independent witness testified in a forthright manner without self-contradictions. He answered questions without hesitation and this court found him to be credible. To the contrary, *Ms. Garises* was not impressive as a witness. She contradicted herself in several respects in cross examination and there are several discrepancies in her evidence. This court finds that she is not to a credible witness. What is apparent, however, even from her version, is that the accused stabbed the deceased.

[41] The accused testified that he stabbed the deceased because the deceased slapped and pushed him. In not so many words, the accused raised the defence of private defence.

[42] The private defence, as pointed out in *S v Naftali*,<sup>8</sup> requires that the attack which gave rise to an event that warrants a defence, must be unlawful and directed on a legal interest which had commenced or was imminent. The defence thereof should be directed against the attacker and must be necessary to ward off the attack. The means used to defend must be reasonable and necessary in the circumstances.

[43] The initial version of the accused that he was slapped and pushed by the deceased and that is why he assaulted the deceased with a hand holding a knife, demonstrates a completed attack on him by the deceased. By his own version, at the time that the accused stabbed the deceased, there was no commenced or imminent attack on him, against which he had to defend himself. The action of the accused amounts to retaliation. I hold this for a fact.

[44] In view of the principles regarding private defence as laid down in *S v Naftali*<sup>9</sup>, (*supra*) the accused's act of stabbing the deceased with a knife in his alleged defence does not constitute a private defence as there was no attack commenced or imminent against him, which warranted him to defend himself against it.

[45] The behaviour of an accused person after the event may, in appropriate circumstances, signify intent. The behaviour of the accused of passing by the persons who were loading the deceased's body (whom he just stabbed) in a vehicle without stopping by or rendering any assistance, cannot be reasonable and consistent with an innocent mind, as he alleges.

[46] For what it is worth, *Mr. Fliede*, who was about a metre away from the deceased when the deceased was stabbed, did not hear any sound of a slap. The accused conceded that when one person informs another to cease from quarrelling at night, and tells such person to leave and return the next morning, to solve the difference, then such person intends to bring peace. The accused further conceded that he did not observe any weapon on the deceased's person. The following relevant exchange during cross examination of the accused appears on record:

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<sup>8</sup> 1992 NR 299 (HC) at 303.

<sup>9</sup> 1992 NR 299 (HC).

'From what was happening there it was not necessary for *Harold Rooi* to be stabbed with a knife on the neck. There was no need for him to be stabbed. That is correct.'

[47] It is highly improbable, in the circumstances that the deceased grabbed, slapped and pushed the accused as the accused alleged. This court finds the version of the accused that he was grabbed, slapped and pushed by the deceased, not to be reasonably possibly true and false beyond reasonable doubt. It therefore stands to be rejected accordingly, as I hereby do.

[48] The accused had another defence namely that, he stabbed the deceased by mistake and therefore lacked the required intention to commit murder. Accused's version was that after being slapped and pushed by the deceased, he intended to hit the deceased with an open hand. His hand, however, possessed an okapi knife which stabbed the deceased by accident when he hit the deceased.

[49] The accused testified that he was aware at the time of stabbing the deceased that, he had a knife in his hand. He was further aware that stabbing someone on the neck could cause instant death. He further testified that he always carried his okapi knife flip closed in his trousers' pocket. He could not remember the stage when he took it out of his pocket before stabbing the deceased. He could further not remember the reason why he removed the knife from his pocket nor the reason why he flipped it open and the time when he flipped it open.

[50] With regard to what is stated herein above, this court finds the defence of the accused that he stabbed the deceased by mistake to be highly improbable. There is no explanation why the accused stabbed the deceased on the neck, if at all he intended to hit the deceased with an open hand. There is further no explanation why the accused did not put the knife aside or return it to his pocket and thereafter hit the deceased with an open hand. To all these weighty questions, the accused simply responded that he could not remember as he was under the influence of alcohol. When questioned on the extent of the influence of alcohol on him, he responded that despite consuming alcohol, he appreciated his surroundings.

[51] In view of the foregoing, this court finds that the version of the accused of stabbing the deceased by mistake cannot be said to be reasonably possibly true. This court concludes that the state proved the defence of mistake to be false beyond reasonable doubt and it is so rejected.

[52] Having rejected the defences raised by the accused as false beyond reasonable doubt, this court is left in darkness as to the reason why the accused stabbed the deceased.

[53] The Supreme Court in *S v Shaduka*<sup>10</sup> approved the approach decided by Malan JA in *R v Mlambo*<sup>11</sup> 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*.’

[54] *In casu*, the only person who could shed light on the reason why he stabbed the deceased to death is the accused himself. The accused, however, opted to provide fabricated explanations for his actions. In the premises, this court is entitled to infer that he killed the deceased with direct intent as opposed to a less serious form of *mens rea*.<sup>12</sup> This court is therefore satisfied that the state proved the guilt of the accused beyond reasonable doubt on the charge of murder with direct intent to kill (*dolus directus*). The accused is found guilty and convicted of murder as charged.

#### Count 2: Housebreaking with intent to murder and attempted murder read with the provisions of the Combating of Domestic Violence Act.

[55] On this charge, *Ms. Garises* testified, *inter alia*, that the accused, her lover up to November 2018, kicked open the door to her house on the night of 11 November 2018. He grabbed her and Mr. Kastoor, handed a knife to the accused and instructed him to cut her head off. Accused pressed the knife on her neck with force but she did not sustain any open wound save for a line on her neck caused by the knife. She believed that he would kill her. During cross examination she conceded that she did

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<sup>10</sup> 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.

<sup>11</sup> 1957 (4) SA 727 (A) at 738B-D.

<sup>12</sup> *S v Rama* 1966 (2) SA 395 (A).

not possess sufficient strength to ward off the accused and further that if he wanted to kill her then he would have killed her.

[56] The following discrepancies appear from the evidence of *Ms. Garises*:

56.1 That when she was questioned about the absence from her witness statement of the version that she had a mark on her neck caused by the knife, she stated that she did not inform the police of such version because she could not speak properly due to a sore throat. She also conceded that her witness' statement is silent regarding her sore throat, despite confirming the correctness of such statement. She later explained that she informed the police officer who recorded her statement about her sore throat, but she could not explain the reason why such officer did not record same. She did not go to the hospital, as a result no medical report was produced in court. When pressed further *Ms. Garises* changed her version and stated that she provided her statement the day after the incident and she was still in shock, hence she could not remember everything.

56.2 That she testified that when the accused and *Mr. Kastoore*, arrived at her house, the accused kicked the door to the house open. This version is disputed by *Mr. Kastoore*, who testified that, upon their arrival, the accused knocked and *Ms. Garises* opened the door. To his credit the accused corroborates *Mr. Kastoore* on this position.

56.3 *Ms. Garises* testified that *Mr. Kastoore* handed the knife to the accused inside the house and instructed the accused to cut off her head. *Mr. Kastoore* denied entering the house and further denied handing the knife to the accused. The accused further corroborated the evidence of *Mr. Kastoore* that he did not receive the knife from *Mr. Kastoore* neither did *Mr. Kastoore* instruct him to cut off the head of *Ms. Garises*. *Mr. Kastoore* was not charged together with the accused as an accomplice.

56.4 *Ms. Garises* testified that she followed the accused outside the house. This is in total contrast to the evidence of *Mr. Fliede* (whom this court found to be a credible witness) who said that *Ms. Garises* stayed in the house the whole time and never went outside. *Mr. Fliede* testified that he found *Mr. Kastoore* outside the house when he arrived at the residence of *Ms. Garises*,

[57] *Ms. Garises* is a single witness regarding the charge in count 2. Her evidence therefore requires to be approached with caution. She was not impressive as a

witness and she kept adjusting her evidence. She contradicted herself on material facts. She was not a credible witness. This court is doubtful whether the accused, while inside the house grabbed *Ms. Garises*, pressed the knife against her neck or throat and that he threatened to cut her head off. In the further view of the evidence of *Mr. Kastoora* and the accused that the accused knocked on the door and *Ms. Garises* opened, this court does not accept the version of *Ms. Garises* in this regard.

[58] In the foregoing, this court gives the accused the benefit of the doubt on count 2 and finds that the guilt of the accused was not proved beyond reasonable doubt.

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

Count 1: Murder – Guilty

Count 2: Housebreaking with intent to murder and attempted murder read with the provisions of the Combating of Domestic Violence Act, 4 of 2003, alternatively, housebreaking with intent to murder and assault by threat. – Not guilty and acquitted.

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O S SIBEYA  
ACTING JUDGE



**APPEARANCES:****FOR THE STATE:**

H Ipinge,  
Of Office of the Prosecutor General  
Windhoek

**FOR THE ACCUSED:**

K Kamwi  
Of K Kamwi Law Chambers  
(instructed by Legal Aid)  
Windhoek