

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA, MAIN DIVISION

CASE NO.: CC 5/2019

In the matter between:

**THE STATE**

and

**RYNARDT WYLIE ROELF**

**ACCUSED**

**Neutral Citation:** *S v Roelf* (CC 5/2019) [2020] NAHCMD 222 (12 June 2020)

**Coram:** RAKOW, AJ

**Heard on:** 24- 28/6/2019; 12/7/2019; 30/7-1/8/2019; 28/8/2019;27/10/2019;  
28/1/2020; 6/5/2020

**Delivered on:** 12 June 2020

**Flynote:** Criminal Law – Murder – Committed in domestic setting – Court to determine whether conduct by accused was intentional or culpable – Court

satisfied that there is enough evidence to proof the intention of the accused to kill the deceased.

**Summary:** The accused is charged with the murder of the deceased in that he caused her death by repeatedly beating her, throwing her on the ground and strangling her. Three State witnesses testified as to what they observed over the period of two days between the accused and the deceased. Cause of death was an assault-impacted head injury, which caused intracranial bleeding.

Held – The court accepts that the amount of force used in the attack by the accused was not moderate as testified by him but exceeded moderation as is clear from the injuries suffered by the deceased.

Held – The court further found that he attempted to strangle her with enough force to break the hyoid bone and leave markings on her neck and clearly at some stage, foresaw that he could kill her and reconciled himself with that notion. A supporting indication of the intent of the accused is the fact that the attack continued over some time and the court accept the evidence of Ingrid Meintjies that she heard the deceased cry out for the accused to stop.

Held further – The court finds that there is enough evidence to proof the intention of the accused to kill the deceased.

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**ORDER**

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The accused is found guilty on a charge of murder read with the provisions of the Domestic Violence Act, no. 4 of 2003.

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**JUDGMENT**

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**RAKOW, AJ**

[1] The accused is facing one count of murder read with the provisions of the Domestic Violence Act 4 of 2003 in that during the period of 22 to 23 January 2018 in Karasburg, the accused unlawfully and intentionally killed Kathrina Aloysia Alexander by repeatedly beating her, throwing her on the ground and strangling her. The accused pleaded not guilty and did not disclose a defence at the time of the plea. A number of exhibits were handed up and certain allegations were admitted by the accused like the identity of the deceased and that the corpse suffered no further injury during the transportation of the body.

[2] The State called five witnesses. Of these, three were present during the whole period or at least some part of the period 22 – 23 January 2018. They all reside in Westerkim, a sub-burb of Karasburg in Southern Namibia.

[3] The first State witness that was called was a certain Ingrid Meintjies. She is the girlfriend of Valencius Roelf, also a State witness and they both stayed together with the accused and deceased at that time. The accused is a cousin of Valencius Roelf and she was a friend of the deceased. On 22 January 2018 the accused left for work between 06h00 and 07h00, leaving the deceased and the witness behind at home. The deceased collected a certain Bonaventura Ortman, who is also a State witness, and they went to town. When they returned from town, the witness noted that they were drunk. The witness could see they were intoxicated as well as could smell alcohol. Bonaventura Ortman and the deceased went to lie down a bit inside the room of the deceased and the accused. After some time, the accused arrived home and woke Bonaventura Ortman up and sent her home. He then woke up the deceased and started fighting with her. He slapped her on her body, over both arms. The witness tried to stop the accused but he did not listen to her. The fight continued from the sleeping room into the sitting room and she observed the deceased fighting back.

[4] During the struggle, the accused pushed over the deceased and when she stood up, the accused hit her with his fist in the face. After this, she fell down again on her behind with her hands next to her, pressing on the floor. From there, the accused grabbed her under her armpits, picked her up and threw her down on the floor again. The accused continuously said he wants his money, he wants his money. The fight continued with the deceased on the floor and the accused kicking her on her buttocks and hips. During this, the deceased was crying and telling the accused to stop. He then dragged her by her arm to their room where he closed the room and locked it from inside. The afternoon Valencius Roelf came home and he then proceeded to the hospital to take some food to a patient. The evidence of Valencius Roelf differs slightly in this regard from the current witness.

[5] She testified that she went to lie down but could still hear the deceased saying 'please please stop it'. The witness tried to open the door after hearing this, but could not. She reported the fight to Valencius Roelf upon his return from the hospital and he undertook to talk to the accused about it the next day. Both the accused and Valencius Roelf left for work the next morning and it was only the witness and the deceased that remained at home. The witness found it strange that the deceased was still in bed sleeping as she was usually up early in the morning. She opened the room and saw how she was lying and looking and that frightened her. Both the eyes of the deceased were closed and they were purple-blackish and there was blood coming out from her mouth. When Valencius Roelf returned, she showed him how the deceased looked like.

[6] During this time, Valencius Roelf received a text message from the accused asking him to check on the deceased and whether she was still all right. Valencius Roelf then answered the accused, indicating that he thought the accused should come home. When he arrived home, he had a look at the deceased and took a basin with water and a cloth and he washed her face and washed the blood off. At that stage, Bonaventura also arrived and the accused

said they have to prepare the deceased; he was going to collect the ambulance. They dressed the deceased and at that time, she was still breathing. After they finished dressing the deceased, she stopped breathing. They started crying and also asked Valencius Roelf to have a look. After some time, the ambulance arrived and a certain Brandt, a nurse, and Ambrosius, also a nurse, entered the house. Then the police officers came, who fetched the deceased and took her to the hospital.

[7] During the assault, Valentius Roelf, according to this witness, was not present. She recognized the wallet of the accused; he kept it on top of his CD player or in his wardrobe. The couple also had a history of fighting with one another. During December 2017, the police came to collect the deceased for her own protection. During that incident, the deceased smashed the window of the accused's vehicle for no apparent reason. The deceased got aggressive when the accused confronted her about something she did wrong.

[8] Valencius Roelf testified that he is the second cousin of the accused and they resided in the same house in early 2018. On 22 January 2018, the accused went to work but before he went he told the deceased not to drink. The witness went to town to buy certain items for his aunt and when he returned home, he found the accused and the deceased fighting. The time that he entered the yard was the time he found Bonaventura Ortman leaving. He heard the accused telling the deceased that he told her not to go drink and now his money is gone. The accused asked his money from the deceased and she was drunk, she was fighting back. She would fall down every time he beat her. He slapped her in her face and also kicked her two or three times around the hips. The accused would also pick up the deceased and throw her on the floor. He returned from town in the middle of the fight, left again and when he returned thereafter, the accused and the deceased went into their room and locked the door. They were fighting like they normally do, either because of jealousy or because of being intoxicated.

[9] The witness went into the room of the deceased and the accused the next morning and saw that the left eye of the deceased was swollen and purplish. After the accused went to work, the witness' aunt called him and he went to town. In town, he received a sms from the accused person asking him whether the deceased was awake. When he got home, he informed the accused that he should come for himself because he found her lying in the same way that she laid in the morning. She was gurgling and had dried blood around her nose and bloodspots at her mouth. The accused returned and then went to the clinic. The witness went to his aunt and was phoned there by the first witness and informed that the deceased passed away.

[10] He further testified that on a previous occasion, the deceased stabbed the accused on his back and on his hand. The accused also on several occasions evicted the deceased from their residence and asked her not to return. The accused also told the witness that the deceased hit him in the face with a brick during the previous December and causing him to break up with her again. They had to have the police come at one stage because the deceased wanted to burn out the clothes of the accused.

[11] The State then called Bonaventura Ortman. She testified that she went to the house of the deceased on the Monday morning, being 22 January 2018. The deceased asked her to walk with her to Pep Stores in town to buy braids. The deceased ended up buying N\$10 airtime, some cool drink and a litre bottle of Leeukop (some kind of alcohol) and a beer for the witness which she drank in town. She paid with a N\$100 note. They returned home because the deceased said her boyfriend, the accused, would knock off at 12h00. When they arrived at home, the witness and another cousin drank the Leeukop without the deceased. She and the deceased went to lie down on the matrass in the room of the accused and the deceased. Whilst they were dozing off, the accused opened the door of the room and entered the room. The accused picked the deceased up and threw her down on the matrass. She tried to stop the accused but he

grabbed her and pushed her out of the room and out of the sitting room door. He closed the sitting room door behind her. She could hear the deceased crying out for help inside the room. During the time of the assault, Ingrid Meintjies and Valencius Roelf were there.

[12] The next day, she met the accused around lunch time and he said that her cousin, the deceased, does not want to wake up. She then went to the room of the deceased and the accused and found the deceased still breathing. She noticed that her eyes were swollen and blood was coming out of her mouth. The accused went to take a basin with water and wiped the blood from her mouth. He told her to wipe the arms and legs of the deceased whilst he went to call the ambulance.

[13] Rufanus Kooper testified that he was the medical doctor that conducted the post mortem on the deceased. He is attached to the Keetmanshoop hospital and is the Chief Medical Officer for the Kharas Region. He prepared a report on the Medico-Legal Post Mortem examination conducted on the deceased, Kathrina Aloysia Alexander, at the Keetmanshoop State hospital on 5 February 2018. His findings were that the victim died due to assault impacted head injury, she sustained multiple external injuries. She had multiple facial bruises and a massive haematoma on both eyes. She further had swollen multiple bruises on the upper limb and lower limbs, marks of hands on the anterior region as an evidence of a possible strangulation, a broken hyoid bone from the force of the strangulation and diffuse intracranial bleeding. The person who caused the marks on the neck of the deceased must have approached her from behind because the finger marks are on the front of the neck. The back of the head also showed a haematoma under the skin. The cause of death was given as assault impacted head injury. He further testified that head injuries do not necessarily lead to immediate death but it is possible that a person can die after seconds, minutes or even hours depending on what the degree of the injury was. He classified the injuries sustained by the deceased as severe. Photos were also

taken during the post mortem. The deceased weighed 54kg and was slight of build.

[14] Sergeant Petrus Ndilimani Kueyo testified that he is employed as an investigating officer in the Namibian police. He was called to a scene where someone died on 23 January 2018. They proceeded to house number 300 in Westerkim in Karasburg. He called the hospital to send out a nurse to establish whether the deceased was indeed dead. Nurse Nakhom arrived and declared the lady dead. The witness Ingrid Meintjies told him that the deceased was beaten by the accused and he also obtained a statement from her. They removed the body from the scene and he and a certain Rooi took the body to the mortuary at the hospital. The body did not sustain any injuries during the transportation. He met the accused at the police station and informed him of his rights, including the right to remain silent. He completed a Pol 17 warning explanation which includes an indication whether the accused had any injuries and he did not record any injuries on the accused.

[15] The State elected to close its case after the above witness and the Defence indicated that they intend to call the accused himself together with one other witness.

#### The defence case

[16] The accused testified that he owned a vehicle during 2018, a Polo Classic vehicle. The vehicle was roadworthy and the licence expired in January 2018. He was supposed to pay N\$700 and he kept the money under his matras. When he took out his wallet on 22 January 2018, he found that half the money or N\$350 was gone. He told the deceased that it is only the two of them that stay in that room and he wanted the remainder of his money. They did not fight about the money.



[17] Their relationship started in 2016 and from time to time, they would break up. There were times they did not understand one another and times that the police would come to break up their fights. In January 2018, they were again together. In December 2017, there was an incident when she damaged his vehicle; she broke the window of the vehicle. She also threw him with a stone in the face and the police came to remove her from the yard of the house.

[18] On 22 January 2018, he did not see Valencius Roelf that morning and he did not issue the deceased with an instruction not to leave the house. He left for work and when he returned for lunch between 13h00 and 14h00, he found Ingrid Meintjies at home. He opened the door of his bedroom and found the deceased and Bonaventure lying there. He entered the room and tried to wake up the deceased but she did not wake up, he then woke up Bonaventure and told her to leave his room. She stood up to leave and that time the deceased woke up and started to fight with him. When he entered, he said "o it's my money that leaves you tipsy like this". The deceased grabbed him and they wrestled. She grabbed him in the front of his chest and he also grabbed her and they moved from the bedroom to the sitting room. There she slapped him and he blocked it and she slapped him again. Then he slapped her back, this happened a few times. When she stopped, he took her back to their room. He never dragged or pulled her to the room, he carried her. He took her to the room to stop the fight and after that there was no further fighting. He testified that at one point during their struggle, he had his hands on her neck, grabbing her. He never intended for the deceased to die during their struggle. During the time that he and the deceased were fighting, he did not see the witness Valencius Roelf.

[19] At some stage during the fight, the deceased looked as if she got an attack. She would get epileptic attacks and she would become very quiet and when she was like that, he knew that she was having an attack. She became like that after the slapping. After the fight, they went to lie down. He did not return to

work that afternoon and they did not leave the room that day again. The deceased never called for help when they went into their room.

[20] On the morning of 23 January 2018 he went to work. He observed that she had a little bit of swelling. He asked her to get up and clean the room but she did not respond. He later on in the morning phoned Valencius Roelf and asked him whether the deceased had stood up yet. He told the accused that she was still lying down and the accused said that he would return during lunch time. When he returned during lunch time, he saw that the deceased did not look well and her condition worsened from the morning. He saw swelling on her face that turned bluish and there was blood at her mouth. He then wiped her mouth and cleaned her and told Ingrid Meintjies and Bonaventura and Valencius to clean her as he was going to the hospital.

[21] He further testified that the wounds on the lower limbs of the deceased were from an incident that happened the previous weekend when they returned from the farm and the deceased jumped out of the vehicle whilst it was moving and injured herself. He reported this incident to the police. Richard van Niekerk was called by the accused as a witness to this reporting. He is a reservist constable stationed at Karasburg and confirmed that the accused reported the said incident to him. After this evidence the accused closed his case.

#### Arguments by counsel

[22] Council for the State argued that the court is to take into account that although the accused initially denied all the allegations, it became apparent that the date of the incident and the district where it happened as well as the identity of the deceased and that they were in a domestic relationship were no longer disputed by the accused. There are mutually destructive versions placed before court but all the eye witnesses at some point saw how the accused assaulted the deceased. The crime scene was the house where the deceased, accused, first

and second State state witnesses resided. It is also common cause that the accused was the only one who had an altercation with the deceased during that period. It could only have been the accused who strangled the deceased. The assault on the deceased was so severe that she suffered blunt force trauma to her head and her brain sustained injuries. She also suffered a broken bone in her neck. There could be no benefit to any of the witnesses to falsely implicate the accused.

[23] What remains to be determined is whether the accused acted, and secondly whether his conduct was wrongful and unlawful as well as whether the conduct was intentional or culpable. The evidence tendered by the State, if looked at cumulatively and in the totality of the case, including the version of the Defence, tends to show that the State has satisfied the court and has shown beyond a reasonable doubt that the accused did unlawfully and intentionally kill the deceased.

[24] Counsel for the accused argued that the accused is presumed innocent of the offence and that the State bore the onus to prove his guilt beyond a reasonable doubt, and in this instance the State has to prove the intention to kill the deceased by the accused. It is true that the evidence of a single witness may be relied upon for a conviction but the State did not satisfy the requirements in law with the single witness evidence they lead. The evidence of the second State witness is a collusion and dishonest and can therefore not corroborate the evidence of the first State witness. There was no specific head injury, the cause of death was an impact head injury resulting in intracranial bleeding brought about by ruptured blood vessels that the deceased incurred or sustained in her facial area. There was no specific head injury. The State in essence failed to prove intention in respect of the cause of death beyond all reasonable doubt.

The legal principles

[25] The definition for murder is well known. According to Hunt in “*South African Criminal Law and Procedure – Common Law Crimes*”<sup>1</sup> murder consists of the unlawful and intentional killing of another person, with the elements being (a) unlawful (b) Intentional (c) Killing (d) Of another person. With regard to the element of intention, it is required that the test is subjectively, the State must prove either actual or legal intention, *mere culpa* is insufficient. They further explain that actual intention exists where X commits the *actus reus* meaning to kill Y; and Legal intention exists where X commits the *actus reus* foreseeing that it may cause Y’s death. With regard to the Killing element, it must be proven that was it not for the conduct of X, Y would not have died when he did.<sup>2</sup>

[26] According to CR Snyman in Criminal Law:<sup>3</sup>

‘Intention can therefore be defined as the will to commit the act or cause the result set out in the definitional elements of the crime, in the knowledge of the circumstances rendering such act or result unlawful. Defined even more tersely, one can say that intention is to know and to will an act or a result.’

He then proceeds and discuss the forms of intention, being *dolus directus*, *dolus indirectus* and *dolus eventualis*. In the current matter, the type of *dolus* that we are possibly looking at would be *dolus eventualis* because there is no evidence of a direct intention by the accused to kill the deceased, neither that he had an intention to kill an unknown person.

[27] In *S v Humphreys*,<sup>4</sup> the court considered the test for *dolus eventualis* and it said:

‘In accordance with trite principles, the test for *dolus eventualis* is twofold:

(a) Did the appellant subjectively foresee the possibility of the death of his passengers ensuing from his conduct; and

<sup>1</sup> Revised 2<sup>nd</sup> edition by JRL Milton, published by Juta and Co, 1990, page 340 -341.

<sup>2</sup> Also see *S v van As* 1967 (4) SA 594 (AD).

<sup>3</sup> 4<sup>th</sup> Edition published by Butterworths; 2002.

<sup>4</sup> 2013 (2) SACR 1 (SCA) (2015 (1) SA 491; [2013] ZASCA 20) paras 12 – 17.

(b) did he reconcile himself with that possibility. . . .'

For the first component of *dolus eventualis* it is not enough that the appellant should (objectively) have foreseen the possibility of fatal injuries to his passengers as a consequence of his conduct, because the fictitious reasonable person in his position would have foreseen those consequences. That would constitute negligence and not *dolus* in any form. One should also avoid the flawed process of deductive reasoning that, because the appellant should have foreseen the consequences, it can be concluded that he did. That would conflate the different tests for *dolus* and negligence.

This brings me to the second element of *dolus eventualis*, namely that of reconciliation with the foreseen possibility. The import of this element was explained by Jansen JA in *S v Ngubane* 1985 (3) SA 677 (A) at 685A – H in the following way:

'A man may foresee the possibility of harm and yet be negligent in respect of that harm ensuing, eg by unreasonably underestimating the degree of possibility or unreasonably failing to take steps to avoid that possibility. . . . The concept of conscious (advertent) negligence (*luxuria*) is well known on the Continent and has in recent times often been discussed by our writers. . . .

Conscious negligence is not to be equated with *dolus eventualis*. The distinguishing feature of *dolus eventualis* is the volitional component: the agent (the perpetrator) 'consents' to the consequence foreseen as a possibility, he 'reconciles himself' to it, he 'takes it into the bargain'. . . .

The true enquiry under this rubric is whether the appellant took the consequences that he foresaw into the bargain; whether it can be inferred that it was immaterial to him whether these consequences would flow from his actions. Conversely stated, the principle is that if it can reasonably be inferred that the appellant may have thought that the possible collision he subjectively foresaw would not actually occur, the second element of *dolus eventualis* would not have been established.'

[28] A similar position was found by Leach JA in *Director of Public Prosecutions, Gauteng v Pistorius*,<sup>5</sup> when he defined that intention, in the form of *dolus eventualis* -

'Arises if the perpetrator foresees the risk of death occurring, but nevertheless continues to act appreciating that [it] might well occur, therefore gambling as it were with the life of the against whom the act is directed. It therefore consists of two parts: (1) foresight of the possibility of death occurring, and (2) reconciliation with that foreseen possibility. This second element has been expressed in various ways. For example, it has been said that the person must act reckless as to the consequences (a phrase that has caused some confusion as some have interpreted it to mean with gross negligence) or must have been reconciled with the foreseeable outcome. Terminology aside, it is necessary to stress that the wrongdoer does not have to foresee death as a probable consequence of his or her actions. It is sufficient that the possibility of death is foreseen which, coupled with a disregard of that consequence, is sufficient to constitute the necessary criminal intent.'

[29] In this regard, Leach JA also referred to the dicta of Holmes JA emphasised in *S v Sigwaha* 1967 (4) SA 566 (A) at 570C – E:

'The distinction must be observed between what actually went on in the mind of the accused and what would have gone on in the mind of a [reasonable person] in the position of the accused. In other words, the distinction between subjective foresight and objective foreseeability must not become blurred.

...

What was required in considering the presence or otherwise of *dolus eventualis* was whether he had foreseen the possible death of the person behind the door and reconciled himself with that event.'

[30] Leach JA also went on to state:

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<sup>5</sup> 2016 (1) SACR 431 (SCA) (2016 (2) SA 317; [2016] 1 All SA 346; [2015] ZASCA 204).

'What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.'

[31] The question to be answered in the current matter therefore is to whether the accused foresaw that his actions would lead to the death of the deceased, the requirement of foreseeing the result. As the authorities are understood, it seems that there can be no *dolus eventualis* if the accused did not envisage the result.<sup>6</sup> He does not have to see it as a result that will necessarily flow from his act but only as a possibility.<sup>7</sup> It does not have to be a strong possibility but one is to assume that there must be a substantial or reasonable possibility that the result may ensue.<sup>8</sup>

[32] On the other hand, the test as set out in Snyman (*supra*)<sup>9</sup> for negligence is as follows:

'A person's conduct is negligent if

- (1) The reasonable person in the same circumstances would have foreseen the possibility
  - a. That the particular circumstances might exist;
  - b. his conduct might bring about the particular result;
- (2) the reasonable person would have taken steps to guard against such a possibility; and
- (3) the conduct of the person whose negligence has to be determined differed from the conduct expected of the reasonable person.'

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<sup>6</sup> See Criminal law by Snyman (*supra*) page 182.

<sup>7</sup> See Criminal law by Snyman (*supra*) page 182.

<sup>8</sup> *S v Ostilly and Others* (1) 1977 (4) SA 699 (D).

<sup>9</sup> Page 209.

The test is an objective test wherein the accused person is measured against a standard outside himself, namely the standard of what a reasonable person in the same circumstances would have done. In *S v Ngubane*,<sup>10</sup> the court recognized that negligence “connotes a failure to measure up to a standard of conduct.”

[33] The onus of proof in criminal proceedings rests with the State. In *Hendricks and Others v Attorney-General, Namibia and Others*<sup>11</sup> Maritz J referred to *R v Oakes, (1986) 26 DLR (4th) 200* in which the Canadian Supreme Court (per Dickson CJC) examined the reasons underlying the presumption of innocence and then reiterated the three components of the presumption. He is quoted at 212-213:

‘The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that until the State proves an accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice.

The presumption, so Dickson CJC held at p. 214 of the same judgment, contains three fundamental components: (a) the onus of proof lies with the prosecution; (b) the standard of proof is beyond reasonable doubt; and (c) the method of proof must accord with fairness.’

[34] The issue was further raised regarding the contradictions between the written statements of the witnesses and their evidence. In *S v BMR*,<sup>12</sup> Liebenberg J discussed the applicable case law in relation to discrepancies

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<sup>10</sup> 1985 3 SA 677 (A) at 687 E-F.

<sup>11</sup> 2002 NR 777 (HC).

<sup>12</sup> 2013 (4) NR 967 (NLD) 1014E – 1015C.



between a witness statement and the witness' testimony afterwards in court and said the following:

'From the above it is clear that not every discrepancy between a witness' statement and his or her evidence in court would affect the credibility of such witness, but only when the discrepancy is found to be material and the court is further satisfied that the witness statement correctly reflects what the witness had earlier said. When the court is required to evaluate contradicting evidence emanating from the witness statement, the approach to be adopted by the court is set out in *S v Mafaladiso en Andere (2003 (1) SACR 583 (SCA))* (Headnote):

"The juridical approach to contradictions between two witnesses and contradictions between the versions of the same witness (such as, inter alia, between her or his viva voce evidence and a previous statement) is, in principle (even if not in degree), identical. Indeed, in neither case is the aim to prove which of the versions is correct, but to satisfy oneself that the witness could err, either because of a defective recollection or because of dishonesty. The mere fact that it is evident that there are self-contradictions must be approached with caution by a court. Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and what is the precise nature thereof. In this regard the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination, that there may be language and cultural differences between the witness and the person taking down the statement which can stand in the way of what precisely was meant, and that the person giving the statement is seldom, if ever, asked by the police officer to explain their statement in detail. Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Non-material deviations are not necessarily relevant. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions - and the quality of the explanations - and the connection between the contradictions and the rest of the witness' evidence, amongst other factors, to be taken into consideration and weighed up. Lastly,

there is the final task of the trial Judge, namely to weigh up the previous statement against the viva voce evidence, to consider all the evidence and to decide whether it is reliable or not and to decide whether the truth has been told, despite any shortcomings. (At 593e - 594h).”

[35] When dealing with two mutually destructive versions, as a rule courts must have good reason for accepting one version above another. In *S v Radebe*,<sup>13</sup> Swarts J said the following with regard to the evaluation of evidence of mutually destructive versions:

‘The correct approach is that the criminal court must not be blinded by where the various components come from but rather attempt to arrange the facts, properly evaluated, particularly with regard to the burden of proof, in a mosaic in order to determine whether the alleged proof indeed goes beyond reasonable doubt or whether it falls short and thus falls within the area of a reasonable alternative hypothesis. In so doing, the criminal court does not weigh one 'case' against another but strives for a conclusion (whether the guilt of the accused has been proved beyond a reasonable doubt) during which process it is obliged, depending on the circumstances, to determine at the end of the case: (1) where the defence has not presented any evidence, whether the State, taking into account the onus, has presented a prima facie case which supports conclusively the State's proffered conclusion; (2) where the defence has presented evidence, whether the totality of the evidentiary material, taking into account the onus, supports the State's proffered conclusion. Where there is a direct dispute in respect of the facts essential for a conclusion of guilt it must not be approached: (a) by finding that the State's version is acceptable and that therefore the defence version must be rejected; (b) by weighing up the State case against the defence case as independent masses of evidence; or (c) by ignoring the State case and looking at the defence case in isolation.’

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<sup>13</sup> 1991 (2) SACR 166 (T) quoted in *S v Britz* (CC 02/2017)[2017] NAHCMD 326 (16 November 2017).

[36] The accused and the deceased at the stage of the deceased death were staying together. A domestic relationship is defined in Combatting of Domestic Violence Act, 4 of 2003 as follows in s 3:

'For the purposes of this Act a person is in a "domestic relationship" with another person if, subject to subsection (2) –

(a) .....

(b) they, being of different sexes, live or have lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other.'

[37] Domestic violence offences are in terms of s 21 of Act 4 of 2003 and the offences listed in the first Schedule list are the following offences:

a) Common assault.

b) Assault with intent to do grievous bodily harm.

c) Any offence under s 1 of the Trespass Ordinance, 1962 (Ordinance No.3 of 1962) where the necessary permission contemplated would be permission from the complainant.

d) Contravention of section 14 of the Combating of Immoral Practices Act, 1980 (Act No. 21 of 1980).

e) The offence under section 38(1)(i) of the Arms and Ammunition Act, 1996 (Act No. 7 of 1996) where the fire-arm is pointed at the victim or someone else in the presence of the complainant.

f) Crimen injuria.

g) Kidnapping.

h) Malicious injury to property – (a) owned by the complainant; or (b) jointly owned by the complainant and the alleged offender; or (c) in which the complainant has a substantial interest.

i) Murder.

j) Rape, including rape as defined in the Combating of Rape Act, 2000 (Act No.8 of 2000).

k) Indecent assault.

l) Robbery where violence or threats of violence are used against the complainant or in the presence of the complainant.

m) Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.

### Findings

[38] The accused and the deceased were in a domestic relationship. They stayed in one room and both had keys for the said room. It was not a happy relationship as the accused had in the past from time to time ordered the deceased to leave. It was also the testimony of their housemates that they fought regularly and that the deceased in the past had broken the window of the vehicle of the accused as well as threw him with a stone in the face.

[39] The incident on the morning of 22 January 2018 started with the accused missing N\$350 of his money from his wallet. The accused and the deceased shared a room and she was the only one who knew where he hid his wallet and he suspected her from removing the money. He went to work and the deceased and Bonaventura Ortman went to town and bought certain items, including a litre of Leeukop wine. When they returned to the house, Ingrid Meintjies testified that

she thought them to be tipsy, although Bonaventura Ortman testified that the accused did not drink anything that day.

[40] The accused returned from work between 13h00 – 14h00 for a lunch break and found the deceased and Bonaventura sleeping in the room him and the deceased shared. He immediately thought that they bought liquor with his missing money. He threw Bonaventura out and a fight between him and the deceased ensue. I accept the evidence of the accused and of the other witnesses that testify that it was not a one-sided affair but that the deceased also participated in the altercation.

[41] I accept the evidence that the accused slapped the deceased several times, had his hands around her throat and according to the post mortem evidence, used so much force that the hyoid bone of the deceased fractured and that his fingers left clear marks on the neck of the deceased. I further accept that this attack must have come from behind as the markings of the fingers found on the neck of the deceased were facing towards the front. I find further that the deceased was punched on the eyes and hit in the face with enough force to cause multiple facial bruises and a massive haematoma on both eyes. The other injuries found on her upper torso were also as a result of the altercation between the deceased and the accused.

[42] I find that the deceased was of slight built and small in posture and that the accused could easily pick her up as was testified by Ingrid Meintjies, Bonaventura Ortman and the accused himself. I find no reason not to believe Ingrid Meintjies and Bonaventura Ortman that during the fight the accused would pick up the deceased and throw her on the floor. The injuries sustained by the deceased do however not bear out any indication that she was kicked in the area around her hips and buttocks as she had no injuries in those areas. It might be that the kicks were slight but they left no marks on the body.

[43] The court further accepts that the injuries on the lower limbs of the deceased might have been caused by happenings of the weekend prior to the current incident when the deceased jumped out of the moving vehicle of the accused and injured herself.

[44] The court accepts that the amount of force used in the attack by the accused was not moderate as testified by him but exceeded moderation as is clear from the injuries suffered by the deceased. The court further found that he attempted to strangle her with enough force to break the hyoid bone and leave markings on her neck and clearly at some stage, foresaw that he could kill her and reconciled himself with that notion. A supporting indication of the intent of the accused is the fact that the attack continued over some time and the court accept the evidence of Ingrid Meintjies that she heard the deceased cry out for the accused to stop. The court finds that there is enough evidence to proof the intention of the accused to kill the deceased in the form of *dolus eventualis*.

[45] In light of the above, the court finds the accused guilty on a charge of murder read with the provisions of the Domestic Violence Act, no. 4 of 2003.

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E RAKOW  
ACTING JUDGE

APPEARANCES:

For the State:

Q S HAUSEB  
Of Directorate Legal Aid, Windhoek

For the Accused:

T IITULA  
Of Office of the Prosecutor-General, Windhoek