

REPUBLIC OF NAMIBIA

HIGH COURT
WINDHOEK
JUDGMENT



OF NAMIBIA MAIN DIVISION,

Case No: CC 29/2019

THE STATE

versus

KAZANA NICOLAUS MANGUNDU HAUSIKU

ACCUSED

Neutral citation: *S v Hausiku* (CC 29/2019) [2022] NAHCMD 418 (17 August 2022)

Coram: SHIVUTE, J

Heard: 18 – 20 January 2021, 8 February 2021, 19 April 2021, 14 June 2021,
13 September 2021, 16 -17 September 2021, 6 December 2021, 20
January 2022, 23 March 2022, 10 – 12 May 2022 and 14 June 2022.

Delivered: 17 August 2022

Flynote: Criminal Law – Murder – Accused pleading private defence – Requirements of private defence – Unlawful attack – Must be directed on a legal interest which had commenced or imminent – Present matter no imminent attack.

Criminal Procedure – Failure to cross-examine witnesses – If party fails to cross-examine witnesses unfair for him to argue later that witnesses should be disbelieved.

Evidence – Accused making spontaneous statements – Such admissions admissible against him if made voluntarily.

Summary: The accused was indicted on several counts including murder, robbery with aggravating circumstances and rape. He pleaded self defence. For private defence to succeed it 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 must be directed against the attacker and necessary to avert the attack. The means used must be reasonable and necessary in the circumstances but not excessive. In the present matter, accused was not under imminent danger. Private defence is not availed to him. The accused alleged that he had consensual sexual intercourse with his victim prior to the incident. Such version was not put to the victim. It is very unfair to fail to cross-examine witnesses and later argue that their evidence should not be believed.

The accused further made spontaneous statements or made extra judicially admissions without police officers soliciting for them. Such admissions are admissible against the accused if given voluntarily.

VERDICT

Count 1: Guilty of murder with direct intent.

Count 2: Guilty of robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act 51 of 1977 as amended.

Count 3: Guilty of rape contravening section 2(1) (a) read with sections 1, 2, 3, 5 and 6 of the Combating of Rape Act 8 of 2000.

Count 4: Guilty of kidnapping

Count 5: Guilty of driving a motor vehicle without a driving licence contravening section 31(1) (a) read with sections 1, 50,86 and 106-109 of the Road Traffic and Transport Act 22 of 1999.

Count 6: Guilty of reckless driving contravening section 80(1) read with sections 1, 50, 80(2) (3), 86, 106-109 of Act 22 of 1999.

JUDGMENT

SHIVUTE J:

[1] The accused pleaded not guilty to an indictment containing six counts namely:

Count 1: Murder

It is alleged that during the period 10 – 11 November 2018 at or near Otjimbingwe in the district of Karibib, the accused did unlawfully and intentionally kill Hendrik Petrus Coetzee an adult male.

Count 2: Robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act 51 of 1977 as amended.

It is alleged that during the period 10 – 11 November 2018 and at or near Otjimbingwe in the district of Karibib, the accused did unlawfully and with the intention of forcing them into submission assault MMC and Hendrik Coetzee by hitting one or both of them with a panga and/or axe and/or threatened to hit one or both of them with a panga and/or axe and/or punching one or both of them with fist(s) and did unlawfully and with the intention to steal take N\$500 cash, silver purse valued N\$80 with coins, BOB bank card, white GWM pick-up motor vehicle with registration number Shuura NA valued N\$200 000, ignition key and remote control valued at N\$300, wheelbarrow valued N\$400, rake valued N\$40, spade valued N\$100, ladder valued N\$1500, cast iron pot valued N\$800, metal frame valued N\$300, axe, panga, white Samsung cell phone valued N\$1700,

black Samsung tablet TAB 116 valued N\$2 500, one box of weetbix, 750 ml juice, 5 packets of soup, a box Bokomo biscuits, 54 packets of 5 gram thirst busters, Samsung 4 micro SDHC, 4G Netman, San Disk adapter, a suitcase with clothes, black Hurricane cell phone, blankets, bundle of keys valued N\$300, black bag valued N\$800, white torch valued N\$25, silver and black USB memory stick valued N\$120, black marker pen valued N\$15, screw driver valued N\$15 and a silver VIP watch valued N\$1400, the property of or in lawful possession of the said MMC and/or Hendrik Petrus Coetzee and that aggravating circumstances as defined in section 1 of the Criminal Procedure Act are present in that the accused before, during or after the commission of the crime wielded dangerous weapons namely an axe and/or panga, and/or threatened to inflict grievous bodily harm and/or inflicted grievous bodily harm to the said MMC and Hendrick Petrus Coetzee.

Count 3: Rape contravening section 2(1) (a) read with sections 1-3, 5 and 6 of the Combating of Rape Act 8 of 2000:

Particulars of the offence being that during the period 10 – 11 November 2018, at or near Otjimbingwe in the district of Karibib, the accused did unlawfully and intentionally commit a sexual act with MMC (the complainant) by inserting his penis and/or other part of his body and/or an object into her vagina under the following coercive circumstances:

1. By the application of physical force to the complainant; and/or
2. By threatening with the application of force; and/or
3. In circumstances where the complainant was unlawfully detained.

Count 4: Kidnapping

It is alleged that between 10 – 11 November 2018 and at or near Otjimbingwe in the district of Karibib, the accused did unlawfully and intentionally deprive MMC of her liberty of movement and against her will detained her on the farm of the deceased in Otjimbingwe and forced her to accompany him in the motor vehicle of the deceased

where he detained her until the said MMC managed to escape when the accused overturned the motor vehicle in which they were travelling on the gravel road between Otjimbingwe and Wilhelmsdal.

Count 5: Driving a motor vehicle without a driving licence contravening section 31 (1) (a) read with sections 1, 50, 86 and 106 – 109 of the Road Traffic and Transport Act 22 of 1999:

It is alleged that between 10 -11 November 2018 and at or near Otjimbingwe in the district of Karibib, the accused did unlawfully and intentionally drive a motor vehicle namely, GWM pick up with registration number Shuura NA, on a public road namely, the D1967 gravel road between Otjimbingwe and Wilhelmsdal without being the holder of a licence issued to him under the authority and in accordance with the conditions under Chapter 4 of Act 22 of 1999.

Count 6: Reckless or negligent driving contravening section 80(1) read with sections 1, 50, 80 (2) (3), 86, 106-109 of Act 22 of 1999:

Particulars of offence being that between 10 – 11 November 2018 and at or near Otjimbingwe in the district of Karibib, the accused did unlawfully and recklessly or negligently drive a motor vehicle, namely a GWM pick up with registration number Shuura NA, on a public road, namely the D 1967 gravel road between Otjimbingwe and Wilhelmsdal in that the accused:

1. Drove at an excessive speed; and/or
2. Did not exercise proper control over the vehicle; and/or
3. Failed to keep a proper lookout; and/or
4. Drove in a wilful or wanton disregard for the safety of persons or property.

[2] When disclosing the basis of his defence, the accused stated that in connection with the first count, he killed the deceased in self-defence. As the accused was trying to catch the goat, he realised that the deceased had pulled out the axe and was about to raise it in order to strike him with it. He managed to grab the axe from him and hit the deceased with it as the deceased was about to run away from him.

[3] As regards the second count, the accused stated that after the incident in the goats' kraal with the deceased, he went to his shack where he was keeping his belongings. He gathered his belongings in an attempt to get away from that place. He put his belongings in a bag. Whilst there, the complainant came and asked what he was doing and he told her that he was leaving the farm. She then offered to give him a lift up to the tarred road. He denied having robbed the complainant or her deceased husband marinating that he only took his suitcase with his clothes, Black Hurricane cell phone and blankets. All these items belonged to him.

[4] Concerning the third count of rape, he stated that he did not rape the complainant. He never inserted anything or any part of his body into any part of her.

[5] With regard to the fourth count of kidnapping, he denied the charge and stated that the complainant offered him a lift to the road of her own accord. She was not forced.

[6] The accused denied having driven a motor vehicle as he did not know how to drive. It was MMC who drove the motor vehicle and he was merely a passenger. Concerning the sixth count of reckless or negligent driving, he stated that he did not drive the said motor vehicle. It was the deceased's wife who was the driver.

[7] In proving its case, the State called several witnesses. The first witness was Doctor Augusto Gawab who examined the deceased's body. His findings were that the cause of death was severe head injuries secondary to assault with a sharp object to the

head. He further testified that the injury was sustained from the back and the deceased fell on his face.

[8] The second witness was Doctor Ivo Orlam. He testified that he examined the victim in the rape matter. He observed soiled clothing and injuries consistent with a motor vehicle accident. She had multiple abrasions across her arms and legs. She also had scratches that she sustained by running through thorn bushes and bruises on her inner thighs bilaterally on both sides. According to the complainant, she sustained these injuries while she was jumping the fence. The doctor had noted a white discharge from her female genitalia. The witness could not find any physical evidence of vaginal penetration. He collected a rape kit from the complainant which he handed over to the police. At the time he was examining the victim, he noticed that she was not wearing an underwear, Dr Orlam further observed injuries that were caused by a seatbelt. He described the injuries as ecchymosis on the left shoulder extending contralaterally down across the chest to the right flank then traversing across suprapubic region.

[9] The third witness called by the State was MMC. She testified that on 10 November 2018, the accused was in their employment as a gardener. She, her husband and the accused were at Otjimbingwe. They went to their plot on 15 October 2018, when they took the accused there. Around 6 pm on 10 November 2018 the deceased went to the kraal to milk the goats. At that stage the accused was at the maize or mielies plantation between the house and the kraal. When the deceased was going to the kraal he took a container where he was going to put the milk.

[10] After 20 – 30 minutes later, the accused came to her asking for a pistol. He was holding a panga. The witness told the accused that her husband does not own a pistol but he kept on asking for the pistol. The witness suggested that she would go to her husband and ask where the pistol was. The accused moved in front of her, lifted up the panga and threatened to hurt her should she make any movement. He pushed her in the main bedroom where he started to search the wardrobes and throwing things around looking for a pistol.

[11] When he failed to get the pistol, he raised the panga in the air and forced the complainant to take off her clothes. He further said to her: 'Today I will fuck you.' He tried to cut open the victim's belt with the panga. He did not succeed. He raised the panga again in the air and instructed her to remove her clothes. The complainant then complied with the accused's instructions. He further instructed her to put her hands on the bed and to bend down. The victim obeyed the instructions. The accused put his penis into her vagina and it slipped out. He again put it back with his hand but it again slipped out. After that he instructed her to put her clothes back on. After the witness put on her clothes, she was instructed to go to the sitting room.

[12] At the sitting room, the accused demanded money from her. She gave him about N\$500. He removed her Standard Bank and FNB ATM cards and demanded for the cards' pins. The accused wrote down the pin numbers. He gave the Standard bank card to the witness and kept the two FNB cards. The accused further searched the witness' handbag and removed her driver's licence and placed it in her hand. He ordered her to sit on the chair. The accused told the witness that he is a Satanist. The accused removed food items from the kitchen which included weetbix, cooking oil and juice.

[13] He took the witness outside and loaded the wheelbarrow, rakes, iron pot and four frames for building in the complainant and deceased's motor vehicle. After he finished loading the goods, he took the witness back to the house and ordered her to pack her clothes in a suitcase. He then loaded the suitcase in the motor vehicle. At the time the accused was ordering the complainant to do something, he was armed with a panga. Before the complainant was raped, she asked for the whereabouts of her husband, the deceased in this matter. The accused told her that he had handcuffed him in the kraal. The witness could not contact her husband because when the accused came from his room with a panga, he first took her big phone from her and put it in his pants' pocket. The witness also had a small phone and the accused threw it to the ground and it broke. The Samsung tablet was valued at N\$3000 and the small Samsung phone was valued about N\$1700.

[14] After the accused put the complainant's suitcase in the vehicle, they went to the accused's room. The accused ordered the witness to stand in the corner and he started to pack his clothes and blankets. After he finished, they returned to the vehicle and he loaded his goods in the vehicle. After that the accused received a phone call and he was speaking in his language. He placed the phone by the witness' mouth for her to speak to that person. The witness asked who that person was but before he responded, the accused pulled the phone away from her.

[15] The accused took the witness to the side of the kraal and told her to stand about 10 to 20 metres from the kraal. He walked further to the kraal and warned her not to move. He returned from the kraal with an axe in his hands. At the same time he also had the panga. He placed the panga around his belt. When he returned the witness asked for her husband and the accused said he was fine. They went back to the car. The accused opened the passenger's door and let her in. The accused asked for the complainant's driving licence and she said she still had it. He closed the door and warned her not to move. The witness was very scared because at that stage the accused was armed with a panga and the axe. The accused got into the driver's seat and placed the axe behind the seat. The accused had also locked the house. He drove the vehicle. He was asking the witness where the road was. The accused was driving very fast. He was not a good driver. Whilst he was driving he would press on the clutch and ask the witness to change the gears.

[16] After he drove for few kilometres, they observed a vehicle coming from the rear. The accused drove faster. The witness told him to drive slowly and he got angry. The accused took a wide turn he hit into the wall on the left side, the car swerved to the right and then got off the road. The vehicle overturned and ended up on its roof. After the car overturned, the witness managed to leave the scene and walked towards Otjimbingwe. She walked for about 17 kilometers. She sat at the gate of a certain farm until five o'clock in the morning. She later received help from Ernst Katjimune who took her to the police station. She narrated what happened to her. From the police station she was

accompanied by Katjimune, Katjimune's uncle and the chief to their plot. At the house, the gates were still closed because the accused took the keys with him. The people who were with the witness went to the kraal whilst the witness was in the vehicle. The deceased was found dead in the kraal.

[17] When the police arrived, they went to the kraal. The witness further testified that she did not see the deceased going with an axe to the kraal. He only had a container. It is also not correct that the accused only loaded his own belongings in the vehicle. He also loaded the witness' and the deceased's goods including the wheelbarrow and the tools. Other goods are as listed in exhibit J. The vehicle that was driven by the accused, its registration number was Shuura NA. It was a GWM pick up single cab. The items that were stolen by the accused were recovered and returned back to her. It is further the witness' testimony that she was treated for the injuries she suffered on a Sunday evening.

[18] It was put to the witness that the deceased had asked the accused to milk the goats by then the deceased had an axe in his possession. When the accused was trying to catch the goats the deceased was in the process to attack the accused, the accused grabbed the axe from the deceased. As the deceased was trying to run away, the accused inflicted the fatal blow. The witness replied that she was not aware of that. It was further put to the witness that in the statement she gave to the police on 11 November 2018, she said the accused later asked her to undress herself and wanted to rape her but there was no erection and he left her. The witness responded that the accused raped her because he tried to put his penis into her vagina and it slipped out. It was further put to the witness that the accused never said he would 'fuck' her. The witness replied that he said it. It was again put to the witness that the accused only took what belonged to him. The witness responded that the accused took other items that belonged to them. She further said, the tent that he was sleeping in belonged to them and he was also given the iron pot just for use. The witness further testified that, the GWM bakkie was valued at N\$137 000.

[19] The fourth witness Appolus Mupumo testified that, the accused was brought to the farm during November 2018 and he was assigned to work in the garden. On the fateful day the witness knocked off at 12h00 and left the accused and his employers on the farm.

[20] The fifth witness called by the State was Angelica #Hoebes who testified that, she is a nurse and she went to the deceased's farm in the company of the police on 11 November 2018. Upon arrival on the farm she observed a big wound at the back of the deceased's neck, up to his ear. She checked for the deceased's pulse but, by then he was already dead.

[21] Ernst Katjimune, the sixth witness testified that on 11 November 2018, around four o'clock in the morning he travelled from Windhoek to Otjimbingwe. About 35 to 45 kilometres to Otjimbingwe he came across a white bakkie that had overturned. The ignition key was still on and the lights inside were also on. There were things scattered all over. He saw among other things, a handbag, a voter's card written Hendrik Coetzee, an axe that was full of blood and a wheelbarrow. He proceeded to drive to Otjimbingwe until he reached Okomitundu Farm where he found MMC. They gave her a lift to Otjimbingwe Police Station. There she reported what happened. However, there was no police vehicle to go to the scene. MMC told the witness to take her to a certain pastor in Otjimbingwe.

[22] He took her to the pastor's house. The witness, the pastor, MMC and the witness' two family members went to the Coetzee farm. They found the gate locked. They entered through the fence. MMC remained in the vehicle and the witness together with other people went to the kraal. There they found the deceased lying in a pool of blood and he appeared to be dead. The witness took MMC to the house. However, the keys were not found. They broke the window for her to get access to the house. The witness then left MMC in the company of her family members.

[23] Warrant Officer Simpson Nghiteka, the seventh State witness, testified that the accused was brought to him in Otavi from Rundu. The witness was in the company of Constable Shibaku. Certain exhibits were also received from Rundu. The witness also testified that at the accident scene, he recovered property belonging to the deceased and the complainant, namely a GWM white pickup, wheelbarrow, an axe, blankets, a suitcase and a lot of papers including the deceased's identity card. The properties were booked in Pol 7 at Otjimbingwe Police Station. It was again the witness' testimony that the accused gave consent for the disposal of the stolen property to be given to the lawful owner, MMC. The goods recovered were as per exhibit 'J'.

[24] The witness further testified that, after he warned the accused of his constitutional rights, the accused volunteered to give a statement that he killed the deceased because he was afraid of the deceased as he had been told that white people used to kill their workers and bury them secretly on the farm.

[25] The eighth witness, Constable Antony Shibaku, corroborated Warrant Officer Nghiteka that they received the accused and the exhibits from Rundu. He further testified that, whilst the property brought together with the accused were being offloaded, the accused out of his own free will informed him that he killed the deceased because he thought it was a plan of the accused's brother and the deceased to kill him. The accused allegedly told him on 13 November 2018, at Otavi Police Station.

[26] Sergeant Jafet Amukwa, the ninth witness for the State, testified that on 11 November 2018, the complainant was examined by Dr Orlam. After the examination he was given a rape kit. After he received it, he gave it to Warrant Officer Nghiteka the following day. The rape kit was not tampered with as it was still sealed.

[27] The 10th witness for the State was Chief Inspector Dino Skrywer. His evidence is that he transported the exhibits pertaining to this case to National Forensic Science Institute. He received the exhibits from Sergeant Kasuto. The exhibits were one rape kit with serial no.17EAAA001597 sealed in a forensic bag NFE 29639 in respect of the

victim, the DNA reference collection sample kit with seal no. NFC 32743 in respect of the accused, one National Forensic Science Institute bag number NFE-13870 which includes clothing, namely a white red and black sleeved stripe t-shirt, brown HTS jacket and khaki coloured shorts of the accused.

[28] The 11th witness called by the State was Warrant Officer Rudolf Kasuto. He corroborated Chief Inspector Skrywer that he received the exhibits as mentioned by Chief Inspector Skrywer from Warrant Officer Nghiteka and handed them over to Walvisbay Scene of Crime Unit.

[29] Warrant Officer Selma Shikongo, the 12th witness for the State, testified that she escorted the accused from Rundu Police Station and the property found in his possession to Otavi where she met with Warrant Officer Nghiteka and handed the accused to him. She also gave him the exhibits contained in Pol. 557 exhibit 'K'. It is also referred to as Pol. 7 no.251/2018.

[30] Simwanza Liswaniso, the 13th witness who is a Chief Forensic Scientist, testified that he received exhibits as alluded to by Chief Inspector Skrywer for DNA analysis. The witness testified that, he performed DNA analysis on the exhibits samples collected from the accused and the victim in the rape case. According to the witness' DNA analysis, the trouser inside swab from the complainant yielded a mixed profile from at least two individuals. The accused cannot be excluded as a possible major contributor and the victim cannot be excluded as a possible minor contributor. Vestibule swab yielded a mixed profile from at least two individuals. The accused cannot be excluded as a possible major contributor to the said profile. The vulva swab sperm fraction yielded a mixed profile from at least two individuals of which the accused cannot be excluded as a possible major contributor to the said profile.

[31] An affidavit in terms of sections 212(4)(a) and 212(8)(a) of the Criminal Procedure Act 51 of 1977 was admitted in evidence as exhibit 'M'. According to Foibe Eita who gave the affidavit, she is a police officer deployed at the Namibian Police

Forensic Science Institute Genetics section. She holds a Bachelor of Science Degree in Microbiology. On 21 May 2021, she received exhibits as contained in the application for scientific examination as per exhibit 'N'.

[32] Certain documents were admitted in evidence with the consent of the parties, namely the photo plan concerning the crime scene and accident scene exhibit 'A', photo plan relating to the post-mortem examination exhibit 'B', sketch plan of the scene of crime exhibit 'C', report on a medico-legal post-mortem examination exhibit 'D', notes on the pointing out of a scene of crime and/or points at a scene of crime exhibit 'H', the photo plan on pointing out exhibit H1, the State's pre-trial memorandum and the reply to the State's pre-trial memorandum that were marked as exhibits 'Q' and 'R' respectively.

[33] According to the pointing out notes, a pro forma was used that contained warnings and questions to the accused. After the accused was informed of his rights to remain silent, the right to legal representation and that whatever he may point out would be noted down and photographed and may later be used as evidence during the subsequent trial, the accused gave a free and voluntary statement. He also volunteered to point out. The accused in his pointing out notes stated that he was willing to point out the scene from where he took or removed the said motor vehicle and where the motor vehicle overturned. He further stated that he did not know the area very well and that was the reason he took the woman (victim) to give him directions out of Otjimbingwe on the way to Otjiwarongo.

[34] He was not having enough money for a hike, his aim was to use the victim to pass the roadblock due to the fact that she had a driver's licence. While he was driving, he was instructing the victim to change the gears of the motor vehicle. They both observed another motor vehicle following them which gave them reason to speed more. The woman touched something and the accused lost control of the steering wheel and the car overturned. After the accident, the accused tried to search for money in the glove box but he only found a few coins which he did not count. He further stated that from home he was given N\$400 by his boss' wife.

[35] At the end of the State's case, the accused applied to the court to be referred for observation in terms of sections 77 and 78 of the Criminal Procedure Act as he alleged that he was not able to follow the proceedings. After the court held an inquiry, he was referred for mental observations in terms of sections 77 and 79(1) (A) of the Criminal Procedure Act.

[36] The accused was observed and evaluated by two psychiatrists who prepared a report each. Both reports stated that, the accused has no mental disorder and that he was able to follow and understand the proceedings and able to give instructions to his legal representative. The two psychiatric reports were admitted in evidence and marked as exhibits 'O' and 'P'.

[37] The accused gave evidence under oath and he called no witnesses. He testified that on 10 November 2018, he was employed as a gardener by the deceased in Otjimbingwe. He was employed for about two weeks. On the fateful day around 18h00, his boss the deceased, approached him with a tin and an axe. He told him to accompany him to the kraal for them to go and milk the goats. At the kraal, the deceased told him to catch the goat. After he caught the goat, the deceased instructed him to bring the goat to him. Since the deceased was still standing whilst he was having an axe in his possession, the accused did not want to go to him. The accused and the deceased exchanged some words. The accused decided to leave the kraal whilst the deceased was standing at the gate of the kraal. Whilst the accused was passing, the deceased wanted to hit him with an axe but, the accused ducked it. The accused grabbed the axe from the deceased and hacked him with it at the back of his head twice and the deceased fell down.

[38] After the accused hacked the deceased, he went to the deceased's house where the wife was. He asked her to give him transport money and she told him that she did not have money unless they go to Okahandja, then she will give him money. The deceased's wife asked for the whereabouts of the deceased and the accused told her

that he was 'there'. By saying the deceased was 'there' he was referring to the kraal. The deceased's wife knew what he was talking about because she saw them when they were going 'there'. The accused did not tell the deceased's wife that he had hacked him. The accused and the deceased did not have an argument prior to this incident.

[39] After the deceased's wife suggested that they should go to Okahandja, the accused went to pack his belongings in his luggage including his blankets and took them to the car. The deceased's wife took her handbag and her driving licence and drove up to the gate. She opened the gate and she locked it. She had a bunch of keys and she put them in the accused's bag. The deceased's wife drove the vehicle towards Okahandja, but before they reached Okahandja the car overturned. The car overturned between 21h00 and 22h00. After the car overturned the accused saw a car passing by and he walked to the side where that car was going. Whilst he was walking, he got dizzy and collapsed. He did not know what happened further. He only found himself in Rundu where he was arrested the following day.

[40] The police informed him that they were looking for him in connection with the deceased's murder. The accused did not comment anything because, that day he was tired and feeling sleepy. The accused was later transferred to Karibib. At Karibib the accused was taken to the investigator who told him that there were people who came to the station complaining about murder and theft. The investigator told him that if he is not going to tell the truth he will be sent to the High Court. Furthermore, he said if the accused is not going to tell the truth, they would get a rope and hang him. The accused then decided to tell the truth to the investigating officer of what happened. He told them that he had a fight with his employer and from there he went to the wife to demand money from the employer's wife.

[41] The following day he was taken out for a pointing out to the place where the deceased died. There he pointed out the scene, where they had an argument and the spot where he hit the deceased. However, the accused disputed that he showed the police officer where the car overturned because when the car overturned he was not in

his right mind. The accused disputed that he robbed the deceased and his wife. He testified that he took the axe which he used to kill the deceased and put it in the car. However, when the car overturned he left it there. With regard to other property listed in the annexure, those were already found in the motor vehicle. Concerning the iron pot, this was the pot that he used on the farm and the employer used to deduct money for it from his salary. The accused further disputed that there were goods belonging to the deceased and his wife found in his possession whilst he was in Rundu.

[42] With regard to the consumable items, the accused said the deceased's wife is the one who put them in the car. The accused disputed that he robbed the deceased and his wife. He disputed that he raped the deceased's wife. He explained that his DNA was found on the complainant's trousers because he had sexual intercourse with the complainant on a preceding Wednesday and the rape offence allegedly took place on Friday 10 November 2018. The complainant went to his room on Wednesday presumably the 8th of November 2018. She was watching pornography movies on her cell phone. They watched together. The accused got erected and asked her whether they can also do the same thing. The complainant was just quiet looking at him. The accused grabbed her and fondled her breasts and they started to have sexual intercourse. According to the accused, he had no comment whether the sexual intercourse he had with the complainant was consensual. The accused further disputed that he kidnapped the complainant.

[43] It was again the accused's testimony that he did not drive the motor vehicle in issue because he had never driven a car as he did not know how to drive. He also did not have a driver's licence. The accused further testified that he applied for bail in respect of case numbers 1016/2018 and 1017/2018. In that letter he wrote, amongst others, as follows:

'I want to greet you in the mighty name of Jesus, I am Nicolaus Hausiku serving my sentence of a fine of N\$2000 or 6 months' imprisonment at Omaruru Correctional Facility. I am applying for bail on my case of 1016/2018 plus 1017/2018.... I want the magistrate to have

mercy on me as I am the only bread winner to my unemployed parents at home. I admit my guilt and take full responsibility for my actions.'

[44] Although the accused initially stated that he wrote the letter, when it came to the issue of admitting his guilt and take full responsibility for his actions, he changed his version and said he was helped by a certain man to write the letter as he did not know how to write English. The accused also testified that the letter had nothing to do with this case. I pause to mention that the present matter was Case number 1016/2018 in the Magistrate's Court, one of the cases referred to in the letter applying for bail.

[45] Through cross-examination, the accused was asked as to where the axe was whilst he and the deceased were at the kraal. The accused responded that the deceased went with the axe to the kraal. The deceased was holding the axe in his right hand whilst he was instructing the accused to catch the goat. The accused was asked further why is it that he instructed his erstwhile legal representative to put it to the deceased's wife that when the deceased had the axe at the kraal he had tucked it behind his back if it was so that the deceased was holding the axe in his right hand. The accused responded that the deceased was holding the axe in his right hand. Again it was put to the accused that his instructions to Mr Kaurivi that was put to the deceased's wife was that as the deceased was trying to run away when the accused inflicted the fatal blow. The accused responded that his legal practitioner was only asking his own questions. The accused was also confronted with the aspect that when he made a pointing out to Inspector Orub, he pointed a spot where he (the accused) picked up the axe at the kraal and hacked the deceased. He replied that, that is not correct.

Arguments by counsel

[46] Counsel for the State argued that it is common cause that the accused hacked the deceased with an axe. The accused further admitted that he hacked the deceased whilst the deceased was not at the time facing him or still armed but was turning away

from him. Further instructions were put to the deceased's wife that in fact the deceased was trying to run away when the accused inflicted the fatal blow. The accused had no reason to continue to assault the deceased, because he had dispossessed the deceased of the weapon. The accused was no longer under imminent threat or danger as the unarmed deceased was running away. The axe in issue was kept in the store room where the accused also slept. Therefore, the accused had access to the axe. The accused testified that the deceased had the axe in his hands at all times yet in his plea explanation, he said that when he arrived at the kraal the axe was tucked behind the deceased's back.

[47] These contradictions show that the accused is not telling the truth. Furthermore, during the pointing out, the accused indicated a spot on the ground where he claimed to have picked up the axe from and hit the deceased. It is more probable that the deceased never had an axe in his possession as his wife testified that when the deceased left for the kraal he only had a container. If it was true that the accused acted in self-defence, the accused was going to inform Inspector Orub during pointing out. The accused had different explanations as to why he killed the deceased when he was arrested. He voluntarily informed Constable Shibaku that he believed his brother and the deceased planned to kill him. What the accused told Constable Shibaku amounts to spontaneous admissions and it should be admissible. The accused volunteered to make such admissions himself before he was warned and asked anything. The accused also offered a different explanation to Warrant Officer Nghiteka that he believed the deceased would kill him because he had heard that white men kill their workers.

[48] With regard to the offence of robbery with aggravating circumstances, the accused went to the deceased's wife wielding a deadly weapon namely a panga demanding that he be given a pistol. After he failed to get a pistol and after raping the deceased's wife, he demanded to be given money. The deceased's wife gave him about N\$500. The accused went on to rob the deceased's wife of the motor vehicle which he drove and later overturned. In the pointing out notes, he informed Inspector Orub that he removed the vehicle from point D on exhibit H1. He did not tell Inspector

Orub that it was the deceased's wife who drove the motor vehicle. The accused was found with the deceased and his wife's property in Rundu as per exhibit 'J'. The accused's explanation in his evidence-in-chief was that the property had been loaded into the vehicle after the accused and the deceased finished working in the garden. The juices were packed into the car by the deceased's wife. However, this was never put to the deceased's wife. Despite the vehicle overturning, the accused continued with the deceased and his wife's property to Rundu.

[49] The accused informed the court that he was given the watch belonging to the deceased by the deceased. He also said the money for the pot was subtracted from his wages. However, these versions were never put to the deceased's wife through cross-examination.

[50] In respect of the rape count, the accused forced the deceased's wife into having sexual intercourse with him against her will on 10 November 2018. He threatened her with a panga and made her to undress. He inserted his penis into her vagina twice. Although the complainant was taken to task through cross-examination that in her statement to the police she had not said that she had been raped, when she testified she was adamant that the accused had raped her as he had inserted his private part into her private part. The accused never offered the explanation that he had in fact had consensual sexual intercourse with the complainant on the Wednesday of that week. This only came up at a later stage when he was asked to explain how his DNA could have been found in the complainant.

[51] The fact that the accused's DNA was found on the semen in her vulva and on the inside of the pair of trousers she was wearing, means that the accused had sexual intercourse with her on 10 November 2018. The alleged consensual encounter was a recent fabrication for the accused to explain the origin of his DNA found on the complainant. Whilst to a lay person it might have appeared as if there was no sexual act, it was submitted that the complainant's evidence confirms legal penetration as defined in the Combating of Rape Act.

[52] The complainant's statement to the police reads that:

'Later he asked me to undress myself and wanted to rape me and there was no erection then he left me.'

The complainant explained that if from her first statement it appeared as if the accused did not rape her, then it was wrong and may have been some confusion. The Warrant Officer who took the statement had to retake the statement from the complainant as she was not so clear. He also confirmed that the complainant was in a state of shock.

[53] As regards the count of kidnapping, counsel argued that the complainant never agreed to go with the accused. The accused forced her to go into the car with him. The accused gave contradictory statements as to how the complainant ended up with him in the car. The first one in the pointing out is that he took her along so that she could give him directions and to pass road blocks as she had a driver's licence. In his evidence-in-chief the accused changed his version and informed the court that she told him that she had no money to give him for transport unless they went to Okahandja where she would give him the money. It is improbable that the complainant would have agreed to take him to Okahandja to give him money as she had already given him about N\$500 when he demanded for money.

[54] With regard to driving without a driver's licence; reckless or negligent driving, the accused's defence is that he did not know how to drive. However, there is evidence from the complainant that the accused drove whilst she was on the passenger's seat. The accused could not drive well and was asking her to change gears while he was operating the clutch. The accused was also driving too fast and caused the accident. The complainant sustained seatbelt injuries running from left to the right groin. For the complainant to sustain that type of injuries she had to seat on the passenger's seat as explained by the doctor who examined the complainant. The accused further told officers that he was the one who was driving. The pointing out notes and photos were

never challenged and they were admitted into evidence by consent. The accused cannot be heard to be saying that his erstwhile legal practitioner did not consult him.

[55] On the other hand, counsel for the defence argued that, the accused killed the deceased in self-defence as there was an unprovoked attack on the accused. It is not always the case that if a person is facing the victim, the victim could not have been assaulted at the back of his head. It is possible for the injuries to be sustained whilst the deceased was still facing the accused. The accused had given a plausible explanation of what transpired and that is the only explanation before court. Therefore, it should be accepted. The accused was faced with imminent danger and before it was completed he acted in self-defence.

[56] If the intention was to rob, he could have killed or attacked the deceased's wife who was where the goods were. Furthermore, the accused denied having pointed out the spot where he picked up the axe. The accused killed the deceased not because he wanted to rob the couple but, because he was attacked. The panga that the accused had was his own panga that he was taking to Rundu. He did not have it to threaten the deceased's wife. The items that were allegedly stolen were put in the vehicle by the deceased after the accused and the deceased finished to work in the garden. The accused disputes that the deceased's wife acted on his instructions. The accused asked for money for transport to go to Rundu which the deceased's wife said she did not have. She offered to take him to Okahandja in order to give him money there. Again if it is true that the accused asked for a pistol, why would the accused kill the deceased with an axe and thereafter go and ask for a pistol? This piece of evidence did not make sense so, counsel argued.

[57] It was again counsel's argument that although the accused made some pointing outs, he disputes the alleged admissions made. The accused told this court that his instructions were not carried out by his erstwhile counsel. Therefore, the shortcomings of whether certain issues were not put to witnesses should not be counted against the accused. Counsel argued that concerning the murder case, should the court find that

the accused did not act in self-defence, then he should be found guilty of culpable homicide when he attacked the deceased the way he did. The death was caused as a result of negligence on the accused's part.

[58] With regard to the rape count, it was a criticism by counsel for the accused that the complainant is an adult and she would know whether there was rape or not. The complainant in her first statement to the police stated that the accused told her to undress herself and wanted to rape her. There was no erection then he left her. The subsequent statement that was obtained from her is an improvement of her testimony to enhance the State's allegations against the accused person. Concerning the only DNA profile of the accused that was found on the sample taken from the complainant's pair of jeans, his DNA profile could have been deposited on the pair of jeans of the complainant because they had prior sexual intercourse before this incident.

[59] I pause to state that, it is not correct that the DNA profile was only found on the trousers of the complainant as the vulva swab from the complainant also presented the DNA profile of the accused as a major contributor. Counsel for the defence continued with his submissions by arguing that the State has failed to prove that the accused inserted his private part into the complainant's private part. Therefore, the accused's version should be believed as the truth. Furthermore, if the court is to find that there was some act of a sexual nature during this incident, the accused can only be convicted of attempted rape.

[60] With regard to the kidnapping charge, counsel argued that the State did not adduce sufficient evidence that the accused kidnapped the deceased's wife. The complainant out of her own accord offered to take the accused to Okahandja. The accused never threatened the deceased's wife with a panga. The explanation offered by the accused is probable and it was not proved beyond a reasonable doubt to be false.

[61] Concerning the counts of driving without a driver's licence and reckless or negligent driving, the accused person denies that he drove the motor vehicle. Counsel

argued that the accused had never driven a motor vehicle in his life. He did not have a driver's licence and he did not know how to drive. Therefore, it is impossible for him to drive recklessly or negligently.

Evaluation of the evidence and applicable law

[62] Having summarised the evidence as well as the respective parties' submissions, this court is called upon to determine whether the accused person committed the offences contained in the indictment. I propose to deal next with the first count of murder.

Murder

[63] There was no eye witness in respect of this count. The accused does not dispute that he killed the deceased. However, he pleaded self-defence.

The law relating to self defence

[64] For private defence to succeed it 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 must be directed against the attacker and necessary to avert the attack and the means used must be reasonable and necessary in the circumstances but not excessive. *S v Naftali* 1992 NR 299(E).

[65] Although the accused testified that he acted in self-defence because the deceased wanted to attack him first, during his plea explanation the accused stated that as he was trying to catch the goat, he realised that the deceased had pulled out the axe and was about to raise it in order to strike him with it. He managed to grab the axe from him and hit the deceased with it as the deceased was about to run away from him. There is further medical evidence that the deceased was hacked from the back and the deceased fell on his face as a result. The deceased died due to severe head injury inflicted by a sharp object (strong force to the head). There was further instructions put

to the deceased's wife that the deceased was trying to run away when the accused inflicted the fatal blow.

[66] Apart from the above-mentioned evidence, the accused testified that the deceased had the axe in his hands at all times, but during his plea explanation he said whilst the deceased was at the kraal, the axe was tucked behind the deceased's back. Furthermore, the accused gave different explanations as to why he killed the deceased. He gave a spontaneous statement to Constable Shibaku, that he believed his brother and the deceased planned to kill him and this is one of the reasons he had killed the deceased. He again explained to Warrant Officer Nghiteka, that he believed the deceased would kill him because he had heard that white men kill their workers.

[67] When the accused was confronted with the instruction that was put to the witness that the deceased was running away at the time he was hacked with the axe, the accused said that his erstwhile counsel was asking 'his own questions.' It is trite that once an accused has placed his case in the hands of his legal representative, the legal representative takes control over the case and the accused cannot distance himself from the conduct of his legal representative. *R v Mantosi* 1958 (2) SA 450 (A) at 458. The accused cannot shy away from the instructions he gave to his counsel. The accused was present in court and he never alerted the court that what his counsel was saying was not in accordance with his instructions. The accused only came to terminate the services of his counsel at the time he wanted to be sent for observation in terms of sections 77 and 78 of the Criminal Procedure Act after the close of the State's case.

[68] If this court is to go by the accused's instructions that the deceased was unarmed and running away at the time he was hacked, then the accused was not under imminent attack. The blow at the back of the deceased's head is consistent with the accused's explanation that he struck the deceased as he was about to run away from the accused.

Spontaneous statements made by the accused

[69] The legal position is that if an accused has made spontaneous admissions without the police officers soliciting for them then such admissions are admissible provided they are made freely and voluntarily. The accused volunteered to explain to Constable Shibaku and Warrant Officer Nghiteka the reasons why he killed the deceased. If it was true that he acted in self-defence he could have informed the police officer right at the beginning that he was acting in self-defence. The evidence of the police officers concerning the accused's explanations why he killed the deceased was not challenged at all. Section 219 (A) of the Criminal Procedure Act 51 of 1977 makes provision for the admissibility of admissions made by an accused as follows:

'Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him at criminal proceedings relating to that offence...'

[70] The accused also made a pointing out in terms of section 218(2) of the Criminal Procedure Act which reads as follows:

'Evidence may be admitted at criminal proceedings that anything was pointed out by an accused appearing at such proceedings or that any fact or thing was discovered in consequence of information given by such accused notwithstanding that such pointing out information forms part of a confession or statement which by law is not admissible in evidence given against such accused at such proceedings.'

[71] The accused was properly informed of his rights and of the consequences of making an admission or pointing out and he decided to freely and voluntarily make a pointing out or extra curial admissions. Therefore, the admissions made by the accused are admissible. Taking into consideration the contradictions given by the accused in explaining the reasons for killing the deceased, as well as the pointing out, the only reasonable inference that can be drawn is that the accused did not kill the deceased in self-defence.

[72] His claim for self-defence cannot reasonably possibly be true in the circumstances and stands to be rejected. The accused killed the deceased for the reasons only known to him. By hacking the deceased with an axe at the vital part of the body the accused evidently had direct intent to kill the deceased.

Robbery with aggravating circumstances

[73] After the accused killed the deceased, he went to the deceased's wife and threatened her with a panga. He demanded to be given money. After he was given the money he took other goods as stated in the indictment. He put the goods in the vehicle. The accused disputed that he committed robbery. However, the accused informed Inspector Orub during the pointing out that he removed the motor vehicle from point D on exhibit H1 to the place where the vehicle overturned. He stated that he did not know the area very well and that was the reason he took the deceased's wife to give him directions and to use her to pass at the road block because she had a licence.

[74] The accused further claimed that he only took his own goods. Some of the goods were already found packed in the car. However, the accused was found in Rundu whilst in possession of the property of deceased and his wife as per exhibit J. It is the accused's testimony that the deceased's wife offered to take him to Okahandja in order to give him money. The aspect that the goods were already loaded in the vehicle prior to this incident has never been put to the deceased's wife. Also not put to the witness is the claim that he was given the watch by the deceased and that money for the iron pot was deducted from his salary. In *S v Smith* 1954 (3) SA 434 (SWA) the following was stated:

'It was grossly unfair and improper to let a witness' evidence go unchallenged in cross-examination and afterwards argued that he must be disbelieved.'

[75] It is standard practice for a party to put to an opposing witness its defence or the facts which concern that witness and which will be relied upon, in order to afford the witness the opportunity to give evidence about those issues. If it was true that the goods

were already loaded in the vehicle or that the accused was given the watch and that the money for the iron pot was deducted from his salary these allegations were supposed to be put to the deceased's wife when she was testifying. Again, the accused in his plea explanation stated that when he told the deceased's wife that she was leaving the farm, she offered to give him a lift up to the tarred road. This is in contrast to what he testified that when he asked the wife to give him money for transport, she told him that she did not have money unless they go to Okahandja where she could give him money. These contradictions cast doubt to the accused's credibility.

[76] This court is alive to the fact that the deceased's wife is a single witness, as far as to what happened that fateful night. Section 208 of the Criminal Procedure Act reads:

'An accused may be convicted of any offence on the single evidence of any competent witness.'

However, the evidence of a single witness should only be relied upon when it is clear and satisfactory in every material respects. Although the accused is disputing that he did not rob the deceased and his wife of their property, I consider this to be a mere denial, because the accused pointed out to Inspector Orub from where he moved the vehicle until where it overturned. As already mentioned, the accused was found with the couple's property when he was arrested. It also does not make sense for the deceased's wife to pack the food stuff and her suitcase in the vehicle if her intention was to drop the accused at the tarred road or to take the accused to Okahandja in order to give him money as the accused is claiming. Although the complainant is a single witness, I have no reason to doubt her testimony that she was robbed. She gave her evidence in a straight forward manner and she did not contradict herself in this regard. The accused contradicted himself during his plea explanation and when he testified. I find the accused's evidence as far as the robbery is concerned to be farfetched and I reject it as improbable and false under the circumstances. I am satisfied that the State has proved its case in respect of this count beyond reasonable doubt.

Rape

[77] With regard to the count of rape, criticism has been levelled against the complainant concerning her initial police statement wherein she stated that the accused asked her to undress herself and wanted to rape her, there was no erection and he left her. Counsel for the accused argued that because of that statement, no sexual intercourse took place on 10 November 2018. The witness was requested to write a second statement in order to explain what she meant by that statement in which she explained. When the witness testified, she said that after the accused ordered her to undress, he ordered her to place her hands on the bed and to bend down. The accused then inserted his penis into her vagina and it slipped out. He then used his hands to insert it for the second time and it slipped out again because he was not erected.

[78] The complainant explained that if from the first statement it appeared as if the accused did not rape her, then that position is wrong. In *S v Govender and Others* 2006(1) SACR 322(E) at 326 the following was stated:

‘...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 the correctness] of precisely what was meant, and that the person giving the statement is seldom, if ever asked by the police officer to explain [his or her] statement in detail...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 shortcomings.’

[79] In the light of the above legal principles with which I agree, I found the argument by counsel for the defence that the failure of the witness to give all the details in her statement to the police is an indication that sexual intercourse did not take place, to be without merits. The complainant testified in court what happened. The complainant's evidence was corroborated by forensic evidence, especially the vulva swab from the complainant that tested positive for the accused's semen and the swab from the inside of the complainant's trousers. ‘Sexual act’ as defined in section 1(a) of the Combating of Rape Act means, among others, ‘the insertion (even to the slightest degree) of a penis into the vagina or anus or mouth of another person.’

Having considered all the evidence, this court is satisfied that the complainant gave reliable evidence. The evidence by the accused that he had a consensual sexual intercourse with the complainant is an afterthought that is designed to explain away the DNA evidence which is damning. It is clearly false. If it was true that they had consensual sexual intercourse this was going to be put to the witness through cross-examination or stated in the accused's plea explanation, as people normally profess their innocence at the outset.

Kidnapping

[80] The complainant testified that the accused threatened her with a panga. He demanded, amongst other things, her driver's licence and told her to keep it in her hands. After he had robbed her of their property, he took her to the vehicle, opened the passenger's door and instructed her to get into the car. At that time he was still armed. The victim had to comply as she was under duress. The accused locked the house and drove up to the gate where he locked the gate and put the bundle of keys in his bag. The complainant was deprived of her liberty of movement from the farm up to the place where the motor vehicle overturned. The complainant never agreed to go with the accused. If she had gone with the accused voluntarily, the accused was not going to give different explanations regarding the reasons why he went with the complainant. This court is satisfied that the probabilities of the case favour the version of the complainant. Although this court is faced with mutually destructive versions on this score, this court after applying its mind looking at the evidence holistically and weighing all the probabilities, it is satisfied that the State has proved its case beyond reasonable doubt.

Driving without a driving licence

[81] As far as this count is concerned, there is an admission made during a pointing out that the accused drove the motor vehicle from where it was parked to the place where it overturned. Although the accused is now disputing it, the admissions he has made are admissible. There is further evidence from the complainant that the accused

was the one on the driver's seat controlling the steering wheel and the clutch whilst he was ordering the complainant to change the gears. It is common cause that the accused did not have a driver's licence. Having weighed the evidence as a whole, I have come to the conclusion that the complainant gave credible and reliable evidence that the accused drove without a driving licence. I consider the accused's version to be a mere denial and it is rejected as false.

Reckless or negligent driving

[82] Regarding the accused's version and the argument advanced by counsel for the accused that he did not drive the vehicle in a reckless or negligent manner as he did not know how to drive, the complainant indeed testified that the accused was not a good driver. At the pain of being repetitive, the accused whilst he was on the steering wheel ordered the complainant to change the gears for him. The accused made admissions which are admissible during the pointing out that he drove the vehicle. He also admitted that when he observed another motor vehicle following them, it gave him the reason to speed. The complainant testified that the accused was driving very fast especially when he observed the vehicle coming from the rear. The witness told him to drive slowly but instead he became angry. He lost control of the vehicle, it hit into the wall and overturned. This court is satisfied that the State has presented credible evidence that the accused drove the motor vehicle in a reckless manner. He drove a vehicle in wilful or wanton disregard of the safety of persons and property.

[83] In the result, the court arrives at the following verdicts:

Count 1: Guilty of murder with direct intent.

Count 2: Guilty of robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act 51 of 1977 as amended.

Count 3: Guilty of rape contravening section 2(1) (a) read with section 1, 2, 3, 5 and 6 of the Combating of Rape Act 8 of 2000.

Count 4: Guilty of kidnapping

Count 5: Guilty of driving a motor vehicle without a driving licence contravening section 31(1) (a) read with sections 1, 50,86 and 106-109 of the Road Traffic and Transport Act 22 of 1999.

Count 6: Guilty of reckless driving contravening section 80(1) read with sections 1, 50, 80(2) (3), 86, 106-109 of Act 22 of 1999.

N N Shivute
Judge

APPEARANCES:

THE STATE: Ms Ndlovu
Office of the Prosecutor-General

ACCUSED:

Mr Kanyemba

Of Salomon Kanyemba Legal Practitioners

(Instructed by the Director of Legal Aid)