REPUBLIC OF NAMIBIA

REPORTABLE

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: CC 23/2012

In the matter between:

THE STATE

and

PHILLIPUS NHINDA **ACCUSED**

Neutral citation: *The State v Nhinda* (CC 23/2012) [2013] NAHCNLD 08 (28 February 2013)

Coram: LIEBENBERG J
Heard: 22 February 2013
Delivered: 28 February 2013

Flynote: **Evidence** – Documentary – Post-Mortem examination report – Some medical words contained in report illegible – Court ordered prosecution to submit a report that is legible in all respects – Court is unable to rely on a document that is not legible in all respects – Party seeking to rely on a document as evidence under a duty to present a legible document.

Criminal Procedure – Section 212 (4) of Act 51 of 1977 – Post-mortem examination report handed in under section – Report contains medical words and terminology which are illegible – Court must insist on a report that is legible – Court otherwise has to invoke s 186 of Act 51 of 1977 – Court cannot rely on the report if it is in some respects illegible – Medical reports preferably to be typed.

Summary: The accused was convicted on his plea of guilty on a charge of murder. The prosecutor before sentence handed in the post-mortem examination report which contained medical words and terminology which are illegible. The medical practitioner who compiled the report is not available to testify in respect of the report. Court invoked the provisions of s 186 of Act 51 of 1977 and called a legal practitioner to decipher words contained in the report that were illegible. This would not have been necessary had the report, when compiled, been legible. Medical reports handed into evidence must be legible in all respects – preferably typed.

ORDER

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1. The accused is sentenced to 25 years' imprisonment.
2. The Deputy-Registrar of this court is directed to make a copy of the judgment available to the Prosecutor-General for her attention.

JUDGMENT ON SENTENCE

LIEBENBERG J:

[1] The accused was convicted on a plea of guilty of murder, having unlawfully killed his customary-law wife, Julia Ipudilo Ishinda. He admitted that on the night of 15 – 16 January 2012, at Ohainengena village, in the district of Eenhana, he hit the deceased with a stick several times all over her body, causing her death. He was convicted on the basis of having acted with intent in the form of *dolus eventualis*.

[2] In a statement prepared in terms of s 112 (2) of the Criminal Procedure Act 51 of 1977, and handed up by his legal representative, Mr *Bondai,* the accused not only admits all the elements of the offence, but also explains in some detail the background and circumstances which prevailed at the time of the incident. In order to fully appreciate these circumstances, it seems necessary to refer, in some detail, to the plea explanation forming the basis of the guilty plea as accepted by the State.

[3] The accused and the deceased on the day in question were at the local cuca shops. When it became dark the accused left for home in the company of the deceased's parents and without the deceased who could not be found at the time. At home he retired to bed. When the deceased returned late at night, she appeared drunk and started hurling insulting words at the accused. When the accused came out of his sleeping hut the altercation developed into a physical attack during which blows were exchanged, using sticks. At some point the deceased fell down and the accused disarmed her. He then continued hitting her with a stick several times all over her body. The deceased thereafter rose and went to lie down on the bed (apparently in another sleeping hut). In the morning the accused discovered that the deceased had passed away during the night. The deceased's parents and the police were accordingly informed and the accused was arrested. Accused admits that the deceased died from multiple blunt injuries to her body caused by blows, using sticks. He further states that although he had no intention to

bring about the death of the deceased at the onset of the fight, he later foresaw that possibility, yet he continued to assault the deceased whilst she lay on the ground, regardless whether death ensued.

[4] A photo plan and key in respect of the scene of crime, as well as the post-mortem examination report relating to the deceased, were received into evidence by agreement (Exh's 'B' and 'C').

[5] As regards the scene of the crime as depicted in the set of photos, it is significant to note the size of the sticks pointed out that were used during the assault. It appears to me that the diameter of these sticks compares well with that of a broomstick, though somewhat thicker. The rest of the photos regarding the crime scene add nothing to what has been placed before the court. As for the photos taken during the post-mortem examination (PM 49/2012), it would appear from photos 18 – 20 that there are signs of a head injury in that blood clots under the scalp are clearly visible. Surprisingly there is nothing noted in the post-mortem examination report about the head injury.

[6] When I subsequently perused the report, I discovered that several other documents, not forming part of the report itself, were attached thereto. I ordered these to be returned to the prosecution as there was no application made to court to have these documents admitted into evidence. Prosecutors should take care that only those documents duly admitted into evidence, should be handed up, nothing else.

[7] On 17 June 2012 Dr Perez conducted a post-mortem examination on the deceased's body and noted his findings in a report (Exh 'B'). The doctor was not called to give evidence on the findings he had made in the report as he in the meantime returned to Cuba.

[8] When perusing the post-mortem examination report I found myself unable to properly read and understand some of the findings and remarks in the report as the doctor's handwriting, in some respects, is illegible. I accordingly ordered the prosecution to obtain a typed copy of the report in order to decipher the illegible words. Although some assistance came from Dr Ricardo from the Oshakati State hospital by submitting the first two pages of the report re-written in legible handwriting, I decided notwithstanding to subpoena the doctor in order to give evidence and clarify any uncertainty that existed in the report. I shall revert to this issue later in the judgment.

[9] The cause of death as stated in the post-mortem examination report is 'Multiple blunt injuries in the body', while the chief post-mortem findings were the following: Multiple lineal excoriations (abrasions) on both arms, hands, back and sides; oedema and haematoma of the abdomen and legs; one fractured rib; and injury to the left ventricle, atrium and mitral valve of the heart caused by blunt trauma. Dr Ricardo, during his testimony, expressed the opinion that strong blunt force was required to the area of the heart and the 10th rib to inflict those injuries noted in the report. When asked to express his opinion on the injuries visible on photos 18 – 20 of the photo plan, and why same were not noted in the post-mortem report, he was adamant that Dr Perez clearly missed it. He described the head injury as contusion of the scalp which was caused by blunt injury to the head.

[10] I now turn to consider the personal circumstances of the accused. These were placed before the court from the Bar. At the time of the incident the accused was 35 years of age. It was further submitted that he is functionally illiterate as he never attended school. Before the incident he was a seasonal worker at the coast; thus only employed periodically. When not employed, he used to do odd jobs from which he generated a small income which was used to support himself as well as his dependants and relatives.

He has 3 minor children, the two eldest living elsewhere with their respective mothers. The third, aged 4 years, was born from the union between him and the deceased and is currently staying with the paternal grandmother. The accused has remained incarcerated since his arrest; a period of approximately 13 months.

[11] It was submitted in mitigation that the preceding circumstances that eventually culminated in the deceased's death, should not be overlooked when the court considers sentence. The accused and the deceased both consumed some traditional (alcoholic) drink during the day. It was submitted that, although the accused's senses were not affected to the extent that he did not appreciate the wrongfulness of his act, the effect of alcohol on the human body is *usually* such that it reduces a person's sense of self-control and the power of restraint. Furthermore, that it could induce excitement and blur one's sense of judgment. It was also submitted that, had both the accused and the deceased not consumed alcohol, they would (probably) have been able to control themselves. Counsel argued that the deceased's behaviour towards a man, from a traditional perspective, is considered to have been unacceptable but concedes; it still does not justify the accused's reaction. It is against this background, counsel contends, that the accused may not have fully appreciated the impact of the assault.

[12] The accused acknowledges the seriousness of the crime he committed; also that he failed the deceased, their young daughter, the immediate family, and society in general. He is aware that their last born will now have to grow up without both parents as a custodial sentence appears to be inevitable. It was submitted that the accused's plea of guilty should be seen as a sign of remorse, though he did not give evidence to that effect. The State however contends that the case against the accused was so overwhelming, that he had no other option than to plead guilty; therefore, his plea should not be seen as contrition. It is trite that when the deterrent effect of a sentence on the

accused is adjudged, that genuine remorse is an indication that the accused is unlikely to re-offend in future. However, in order to be a valid consideration, the accused must satisfy the court that his penitence is sincere by taking the court into his confidence. This is usually done by giving evidence under oath.

[13] I do not think that a court would be wrong when finding, even though the accused has *not* testified in mitigation, that there are indeed signs of remorse present if that is apparent from the circumstances of the case. The court is entitled to have regard to the accused's conduct during and after the commission of the offence, his plea, and accompanying plea explanation. Evidence given under oath and tested through cross-examination, would obviously be given more weight, but an unsworn statement cannot simply be ignored, as it still has to be considered; more so, when the accused (as in this instance) accepts legal *and* moral responsibility for what he has done.

[14] As for the two previous convictions proved against the accused, it was submitted that these have no direct bearing on the case at hand as it involves charges of housebreaking with the intent to steal and theft (1995), and stock theft (2000). In respect of both these cases, custodial sentences were imposed. It is indeed correct that the crimes, of which he was previously convicted, did not involve the element of assault on the person of another; however, it confirms that the accused has had two previous brushes with the law and therefore, he should not be treated as a first offender. The fact that he has steered clear for a period of almost 12 years is indeed a factor the court will keep in mind, finding in his favour. I am therefore of the view that in sentencing the accused today, not too much weight ought to be given to the accused's record of previous convictions.

[15] Mr *Lisulo,* appearing for the State, submitted that, in order for the court to find that any alcohol the accused had consumed on that fateful day played

a significant role in the commission of the crime, the accused, at least, had to lead evidence pertaining to the quantity of alcohol he consumed and the effect it had on him at the time of committing the crime. Therefore, it could not by means of a general assumption, simply be assumed; neither could the court be expected to rely on an assumption being applicable to the present facts. The submission is sound in law and I agree. There is nothing before the court from which this court would be entitled to draw the inferences sought by defence counsel; I accordingly decline to do so.

[16] It was further submitted on behalf of the State that, although there was a preceding exchange of blows, it would appear from the accused's own version, that he had the upper hand over the deceased when he came under attack. This is evident from the accused's own admissions when saying that he succeeded in striking the deceased down, whereafter he disarmed her. He then continued hitting her with a stick in circumstances that did not require, or justify such action. It seems to me, in the present circumstances, reasonable to find that the accused, to a certain extent, was provoked by the deceased, directly giving rise to the ensuing altercation and assault. Insults were hurled at the accused for no apparent reason; sparking a reaction from him that was completely unjustified. It would further appear that the deceased's drunkenness (according to the accused) probably contributed to this unfortunate incident. It is trite that a sentencing court would usually consider provocation to be a mitigating factor, weighing in favour of the accused. However, in the present circumstances the fact that the accused continued beating the deceased, despite foreseeing that death may ensue from his actions, should not be overlooked.

[17] When the court considers the injuries inflicted, and more specifically the fracturing of the 10th rib on the left side and blunt trauma to the heart which required strong force by the accused when inflicted, it emphasises the

seriousness of the assault perpetrated on the deceased, who clearly, was no match for the accused.

[18] It was further pointed out by the State that the murder was committed within a domestic relationship, constituting another aggravating factor. This is indeed so, and it is now well established that the courts will not be sympathetic towards those who make themselves guilty of committing crime in a domestic relationship; and that sentences will become progressively heavier in appropriate cases. See *S v Bohitile.*[1] I must however accept in favour of the accused that his actions were not pre-meditated and that he became angry and upset only when awoken by the deceased; insulting him for no apparent reason. To a certain extent his emotional condition plays a part in reducing his moral blameworthiness, as it is well known that often an angry and emotional person does not think with a clear mind and acts on the spur of the moment. In the present case the altercation developed into a physical fight during which blows were exchanged, using sticks. There is no evidence suggesting that the deceased was the victim of an abusive relationship and, in the absence thereof, it must be accepted that this was an isolated incident.

[19] This notwithstanding, society expects that persons in intimate relationships, which may at times be trying, should not let their emotions get the upper hand and lead to violence against one another. Although the accused might have had sufficient reason to be annoyed with the deceased's behaviour on the night in question; and, though entitled to defend himself against an unlawful attack, there came a time during the fight when he was in control and managed to disarm the deceased. Instead of defusing the situation, as morally could be expected from him, he continued beating the deceased all over her body, inflicting severe injuries that resulted in death later that same night. This case seems to me to be just another example of

[1] 2007 (1) NR 137 (HC) at 141D-F.

intolerant behaviour, where the injured party retaliates by taking the law into his own hands, resulting in the unnecessary loss of life. As already mentioned, it is clear from the post-mortem examination report that the assault was forceful and brutal.

[20] Given the current levels of crimes involving domestic violence in this country, and the widespread outrage that it evokes in society, it appears to me, that this is an instance where retribution and deterrence, as objectives of punishment, should be emphasised. I am mindful that the object of sentencing is not to satisfy public opinion, but to serve the public interest. However, in deciding what an appropriate sentence would be, the court should approach sentence bearing in mind that 'Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances'[2]. The accused should therefore not be sacrificed on the altar of deterrence. He had not acted with direct intent and the assault on the deceased was not premeditated. It was in fact preceded by provocative behaviour on the deceased's part. Though the accused's actions remain unjustified, I consider the circumstances under which the crime was committed, to some extent, mitigating.

[21] When balancing the competing interests of the accused against that of society, I am convinced that the personal circumstances and interests of the accused do not measure up to the gravity of the crime committed and the interests of society. In the circumstances, a lengthy custodial sentence would be appropriate. In deciding the extent of the sentence to be imposed, it is trite that the period the accused has been incarcerated, pending the finalisation of his case, will be taken into account and usually leads to a reduction in sentence.

[2] *S v Rabie,* 1975 (4) SA 855 (AD) at 862G.

[22] Before I pronounce sentence, it seems necessary, and in the interest of the administration of justice, to make a few remarks on the post-mortem examination report (hereinafter referred to as the "report") handed into evidence; and generally, on other medical reports regularly coming before the courts.

[23] Post-mortem examination and other medical reports are usually handed into evidence in the form of a pro-forma document, filled out in pen by a medical practitioner on completion of the autopsy or medical examination. More often than not the presiding officer, in the evaluation of the evidence adduced, finds it extremely difficult, if not impossible, to decipher the handwriting of medical practitioners of which most are notoriously blessed with an illegible handwriting. Often these reports contain medical terminology, phrases and abbreviations which are unfamiliar to presiding officers who, at the stage of judgment writing, have to battle through these reports, armed with medical dictionaries (when available), in an endeavour to find the correct meaning of a specific word or abbreviation used in the report; and to give the correct interpretation thereto. In quite a number of the reports the medical terminology are wrongly spelt, complicating matters even further.

[24] It is for the very reason that I, in this matter, ordered that the post-mortem examination report handed in by agreement, be supplemented by a legible copy of the report. Subsequent thereto I decided to have Dr Ricardo subpoenaed to assist the court with the deciphering of some words contained in the original report. I wish to stress the fact that it would not have been necessary for the court to resort to this procedure had the State presented the court with a legible post-mortem examination report in the first place.

[25] I have no doubt that where the State wants to rely on the contents of a medical report, either by agreement or in terms of statutory provision, it bears

the *onus* to present the court with a report which, at least, is legible. Logic dictates that a court which is unable to read and comprehend a partly illegible medical report placed before it as evidence, would be unable to make factual findings or draw inferences from the report if it illegible, or even partly illegible. It therefore underscores the need for a party to proceedings relying on such document, not only to satisfy the requirements of admissibility, but also to ensure that it is *legible*.

[26] In circumstances where a medical report or other document is handed in by agreement or under statute and the presiding officer is unable to fully comprehend the report due to an illegible handwriting, or any other reason, it should bring this fact to the attention of the State and the defence. In these circumstances the court, in my view, should either *insist* on a report that is legible, or have the witness subpoenaed in terms of s 186 of the Criminal Procedure Act, in order to decipher and clarify any illegible words or terminology contained in the report. Unless the deficiency is cured in this manner, the court would hardly be in a position to rely on a report which does not satisfy the basic requirement of being legible.

[27] I believe that it is in the interest of the administration of justice to require, as far as it is reasonably possible, that all medical reports submitted into evidence in court proceedings, should in future be typed. I therefore propose that the necessary arrangements be made by the prosecuting authority to have this working procedure implement as soon as possible.

[28] I now return to the sentence the court intends imposing. After due consideration of the accused's personal circumstances and interests, the gravity of the offence committed and the interests of society, I have come to the conclusion that the sentence imposed, is appropriate in the circumstances of the case.

[29] The accused is sentenced to 25 years' imprisonment.

[30] It is further ordered that the Deputy-Registrar must make a copy of the judgment available to the Prosecutor-General, for her attention.

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JC LIEBENBERG

JUDGE

APPEARANCES

STATE	D Lisulo Of the Office of the Prosecutor-General, Oshakati.
ACCUSED	G F Bondai Instructed by the Directorate: Legal Aid, Oshakati.