

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: CC 06/2013

THE STATE

and

RAPHAEL NAWA ILUKENA

ACCUSED

**Neutral citation:** *S v Ilukena (CC 06/2013) [2017] NAHCNLD 113 (17 November 2017)*

**Coram:** TOMMASI J

**Heard:** 5 – 7 July 2016; 17 October 2016

**Delivered:** 17 November 2017

**Flynote:** Criminal Law – Murder and assault by threat – Non pathological criminal incapacity – Induced by alcohol consumption; stress related to insults and provocation – State bears onus to prove criminal capacity - State assisted by natural inference that, in the absence of exceptional circumstances, a sane person who engages in conduct which would give rise to criminal liability does so consciously and voluntarily – Accused to lay foundation for it, sufficient to create reasonable doubt on the point – Evidence closely scrutinised – Court to decide question – Court found that the accused's appreciation of wrongfulness was weakened substantially - He acted with diminished criminal capacity.

**Summary:** The accused, a police officer, searched for a Zambian National after he learnt that he had an affair with his wife. When he eventually found him, he handcuffed him and took him to his house instead of the police office. This formed the basis of the count of kidnapping. The accused locked himself, his wife and the deceased in the house. After approximately four hours his wife summoned police officers to the house. They found the man he handcuffed lying face down on the ground. He was half naked, handcuffed on his wrists and ankles; he had visible linear lacerations and bruises on his back; faeces between his buttocks and was motionless. He was taken to the hospital and declared dead on arrival. The accused was indicted also for the murder of the Zambian National and of assault by threat in respect of his wife.

The accused pleaded guilty on all three counts and explained that the deceased consented to be detained. This defence was rejected and the court found that the accused did not believe that the deceased would have accompanied him voluntarily and hence he detained the deceased knowing that the deceased did not consent.

The accused raised the defence of temporary non- pathological criminal incapacity in respect of the counts of murder and assault by threat in that he was suffering from stress, anger and intoxication. The singular account of what led to the injuries on the deceased came from the wife of the accused. According to her testimony the accused whipped the deceased with a *sjambok*, kicked him with booted feet and jumped on him continuously for about four hours. The medical doctor who conducted the Post Mortem examination found injuries consistent with this account. The accused, did not testify but called the clinical psychologist who provided the court with a report. The State also handed into evidence a report of a clinical psychologist in the employ of the State.

The court held that the accused had killed the deceased in the manner described by his wife, that, his emotional state, his anger and intoxication had substantially weakened his appreciation of the wrongfulness of his act and he was convicted of murder and assault by treat with diminished criminal responsibility.

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## ORDER

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1. The accused is found guilty of kidnapping;
  2. The accused is found guilty of murder with diminished criminal capacity;
  3. The accused is found guilty of assault by threat with diminished criminal capacity.
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## JUDGMENT

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### **TOMMASI J:**

[1] The accused was indicted on counts of kidnapping, murder and assault by threat, read with the provisions the Combating of Domestic Violence Act 4 of 2003. He pleaded not guilty to all three counts. His defence on the count of kidnapping is that the victim consented. He raised the defence of temporary non-pathological criminal incapacity in respect of murder and assault by threat.

[2] All of the above charges originate from the events which occurred on 20 July 2012. What follows is a chronological summary of undisputed facts.

[3] On 28 May 2012 the accused, a serving member of the Namibian police, was told by his son that his mother, the accused's wife, was having an affair and that she was sharing their food and water card with her lover. One Joseph took him to the place where the man was living but the man managed to escape. They entered his room and found property belonging to the house of the accused and personal property of the man. They returned home and a quarrel ensued between the accused and his wife. The accused slapped his wife who confessed to having had a

sexual relationship with a man named Christopher (Chris). At this stage she left the common home.

[4] During June the accused apologised to the brother of his wife and she returned to the common home.

[5] On 19 July 2012 the accused spoke to his senior, Inspector Simasiku Matengo about his domestic issue.

[6] On Friday, 20 July 2012, the accused reported for duty. He requested a subordinate, Ms Ronety Lungowe Nyambe (Nyambe), to drive him as he did not have the authority to drive an official Police vehicle.

[7] They drove to the house of Joseph Siambango (Joseph) and Loveness Mwansa (Loveness). The accused demanded that they disclose the whereabouts of a certain Chris whom he said was having an affair with his wife. Chris was a relative of Loveness and they live in the same village in Zambia. Loveness in fact referred to Chris as her brother.

[8] All four of them, Joseph, Loveness, Nyambe and the accused drove together to a neighbourhood called Macaravan in search of Chirs. Accused and Joseph went looking for Chris whilst Loveness and Nyambe remained at the vehicle. The accused arrested a male person and handcuffed him. He however did not find Chris.

[9] The accused, the unknown male he arrested and Joseph walked to Old Musika in search of Chris but they did not find him. The accused arranged with Nyambe to meet them at Engen. They all drove to a township called New Cowboy. Here the search for Chris continued but he was not found. They, the accused, Joseph and the unknown male, went to a place which is called Diary and searched for Chris there but he was not found at this place either.

[10] They drove to the central business district (town) and stopped at MVA where the accused met his wife. He collected money from her and they proceeded to the police station.

[11] At the police station, the accused instructed Joseph to make a call to Chris. Having made this call the accused requested Nyambe to drive them all back to Macaravan. The person who was handcuffed was released. Joseph went searching

for Chris in Macaravan and left the accused with Nyambe and Loveness at the vehicle. After waiting a while for Joseph to return Loveness indicated that she needed to go home to attend to her baby. Nyambe took her and the baby home. Accused stayed behind. Joseph returned empty-handed and they took a taxi to New Cowboy.

[12] At New Cowboy they found Chris at a business belonging to Mikwanda Patrick, a police officer who had offered him accommodation. The accused handcuffed the person whom Joseph recognised as Chris. They (Joseph, Chris and the accused) went to another bar afterwards. After about an hour the three of them left the bar and got into a taxi. The accused instructed the taxi driver to drive to Chotto. The taxi driver stopped at Joseph's house and he disembarked. He stopped in front of the accused's house which is further down the street. The accused called his wife, Philna Ilukena (Philna), in a loud voice to pay the taxi driver. The accused and Chris, who was still handcuffed, got out of the vehicle.

[13] Philna paid the taxi driver and the three of them went into the house. She recognised the person who was with the accused as Christopher, the man with whom she admitted having had a sexual relationship. The accused instructed the children to take what they need out of the house and the door was locked behind the accused, his wife and Chris. This occurred at around 13H00.

[14] According to Philna, the accused collected a brown purse with the personal documents of Chris; a plastic container which they normally use in the house to urinate in, handcuffs and a black *sjambok*, from the bedroom. He handcuffed Chris on the ankles. The accused took out photographs from the brown purse and scattered them on the floor. He picked them up individually and wanted Chris to identify the people depicted in the photographs. He picked up a photograph of his wife and wanted to know from Chris why he wrote "my wife to be soon" Chris's response angered the accused and he pushed him from the chair to the floor and started to viciously torture Chris in her presence, insulting him, assaulting him with a *sjambok* and kicking him with booted feet all over the body, jumping on him; placing a gun into his mouth and forcing him to drink his urine for a period of over four hours.

[15] At some stage the accused called his son, to buy more beer but he was not allowed to enter.

[16] Philna wanted to give Chris water but the accused threatened to shoot her if she moved from the chair. He informed her that he planned to kill her after he had killed Chris. He told her that he intended to kill the deceased and thereafter place him on their bed. He would thereafter force her to undress and place her beside Chris and then shoot her. The accused informed her that he had planned to get Chris into the house so that he could kill both of them.

[17] The wife to the accused's younger brother was invited to enter the house briefly. She saw a person lying on the ground who was naked. She was ashamed as the person was naked and she was told to look at him. She saw that he had a cut wound on his cheek and all over his body. She left the room

[18] Philna testified that the accused pointed a fire-arm at her and threatened to kill her. She retorted that he would not kill her. He uttered words to the effect "Ah this woman" and fell back into the chair as if pushed. She managed to remove the fire-arm from his hands as he had fallen asleep. She called various police officers who came to the house.

[19] The police officers arrived and one of the officers of the Scene of Crime unit, Sakaria Ashipala took photographs of the scene. The body was loaded onto a police vehicle and taken to the casualty department where he was placed on a hospital stretcher. The doctor, Aneniyi Twiwo Amos, was summoned and he declared the person to be dead on arrival. He was taken to the State Hospital Mortuary and a post mortem examination was performed on 23 July 2012. Dr Amos also performed the Post Mortem examination. The body of Chris was later identified by a family member.

[20] The accused consulted, Dr Joab T Mudzanapabwe, a clinical Psychologist who compiled a report. The State applied to re-open their case to allow them the opportunity to obtain their own expert opinion whether or not the accused suffered from temporary non-pathological incapacity. The court granted the application and the State obtained a report compiled by Ms L H N Nangolo, a Clinical Psychologist.

[21] I shall first deal with count 2 and 3 i.e. murder and assault by threat.

[22] The court is called upon to decide a number of factual and legal issues which counsel addressed the court on during submission.

[23] Mr Nsundano, counsel for the accused, referred the court to *S v Auala (No 1) 2008 (1) NR 223 (HC)*, page no 235 paragraph 35, where Liebenberg J remarked as follows:

'The evaluation of evidence requires from the court to consider the evidence as a whole, instead of focusing too intently upon the separate and individual parts of the evidence. Doubt may indeed arise when one or more aspects of the evidence are viewed in isolation, but when evaluated with the rest of the evidence, such doubt may be set to rest. The approach followed in *S v Chabalala 2003 (1) SACR 134 (SCA)*, in my view, correctly sets out the manner in which evidence should be evaluated. Heher AJA (as he then was) at 139i - 140b says the following:

"The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt to the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be on an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture in evidence."

It also needs to be borne in mind, that there is no obligation on the State to prove its case beyond a shadow of doubt, but only beyond reasonable doubt. In this regard the following was said in *R v Mlambo 1957 (4) SA 727 (A)* at 738A:

"In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to the accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused."

[24] It is also in the very same case that Liebenberg J at page 231 – 232 paragraph 24 also stated the following in respect of the failure of a witness to testify:

'It is trite law that, if, at the close of the State's case, there is sufficient evidence upon which a reasonable man could convict, then the accused is put to his defence. Furthermore, that if he exercises his right to remain silent and calls no evidence in answer to the prosecution case, then he runs the risk of being convicted, but it is not a necessary consequence.

The evidential implications of an accused put to his defence, but failing to give evidence, was discussed in *S v Van Wyk 1993 NR 426 (SC) (1992 (1) SACR 147)* at 434D where Ackermann AJA said the following:

"It has long been settled that failure to testify may, depending on the circumstances, be taken into account against an accused. It is necessary to distinguish between a situation where the State's case is based on circumstantial evidence and where there is direct prima facie evidence implicating the accused.

- (a) Where the State's case against an accused is based on circumstantial evidence and depends upon the drawing of inferences therefrom,
- (b) Where there is direct prima facie evidence implicating the accused in the commission of the crime

". . . his failure to give evidence whatever his reason may be for such failure, in general ipso facto tends to strengthen the State case, because there is then nothing to gainsay it, and therefore less reason for doubting its credibility or reliability; . . ."

(*S v Mthetwa (supra) [1972 (3) SA 766 (A) - Eds]* at 769 D - E). As pointed out, however, in *S v Snyman 1968 (2) SA 582 (A) at 588H*:

"The ultimate requirement . . . is proof of guilt beyond reasonable doubt; and this depends upon an appraisal of the totality of the facts, including the fact that (the accused) did not give evidence."

See also *S v Buda and Others 2004 (1) SACR 9 (T)* para 19 [at 16j - 17b - Eds]:

It is, of course, in accordance with their constitutional right to remain silent. Yet there are, as has been held by the Supreme Court of Appeal 232 and the



Constitutional Court, limits to this right. There comes a stage in a prosecution where an accused has a duty to tell her or his story or to lead other evidence, which would show that, for example, the denial of participation is reasonably possibly true.

It was held in *S v Katari 2006 (1) NR 205 (HC)* at 210 that when the State has established a prima facie case against the accused which remains unchallenged, the court may, in appropriate circumstances, conclude that such prima facie evidence has become conclusive. That of course will only happen when the accused's silence is not reasonably explicable on other grounds.'

These sentiments were echoed when this matter was taken on appeal in *S v Auala 2010 (1) NR 175 (SC)*. The Supreme Court held that that even though an accused was not obliged to give evidence, his failure to do so could nevertheless lead to his guilt being proved if the weight of the evidence was sufficient.

[25] Guided by the above principles the court now considers the material aspects raised by both counsel in argument.

[26] Mr Shileka, counsel for the State submitted that the chain of custody of the body from the time the deceased was assaulted to death by the accused and leading to the identification of the corpse examined by the doctor as well as identification of the deceased by his relative, has been established. Mr Nsundano disagrees. He argued that there were discrepancies in the testimonies of the State witnesses for example the arms and ankles of the body which when found in the house of the accused were handcuffed whereas no handcuffs were found on the body which was examined.

[27] Murder is defined as the unlawful and intentional causing of the death of a human being<sup>1</sup> (my emphasis). The court has to be satisfied that the State had established a proper chain of custody from the time the corpse was removed from the scene of crime until such time as the post-mortem examination took place.

[28] The State called Sakaria Ashipala who at the time was a member of the Scene of Crime Unit. He testified that he took photographs of the scene. The admission of the photo plan, particularly the notes accompanying the photographs, was objected to by the defence. The court accepted the photo plan into evidence.

<sup>1</sup> C R Snyman Criminal Law 5<sup>th</sup> Ed page 447

Suffice it to say that the court was satisfied, having accepted the evidence of Sakaria Ashipala, that the photographs were taken at the house of the accused on 20 July 2012 at around 19H06 – 19H17, without having regard to notes which accompany the photographs. These pictures depict *inter alia*: a naked body of a person lying face down in a room in the house of the accused; a shirt which is draped around his arms and lower back; ankles tied with handcuffs and underpants around his knees and pants around his calves, ankles; multiple linear shaped lacerations on the back and arm, multiple bruises on the back.

[29] The State called Inspector Veldskoen who was a Warrant Officer at the time of the incident. He testified that he was present at the scene of crime (the house of the accused) and he observed the body of a half-naked person lying on the floor. He was requested to assist with the transportation of the body from the scene of crime to the State hospital. They offloaded the body on a hospital stretcher. After the doctor declared the person to be dead, he assisted Constable Muondo to move the body to the Mortuary. He describes the body of the person he transported from the scene of crime to the mortuary as follow: 'it is a black of complexion adult male person of slender built and the body the way how I get it from the sence with some bruise marks and open cut wound on the left cheek ...' I must add that the cut wound on the left cheek is not visible in the photographs taken at the scene of crime.

[30] The State called Constable Muyondo who assisted Warrant Officer Veldskoen to take the body from the hospital to the mortuary. According to him he was informed that the body was that of Christopher Chisanga by Warrant Officer Sidakwa. This was however not confirmed by Warrant Officer Sidakwa. On 23 July 2012, Warrant Officer Sidakwa gave him a wallet of the deceased and he found documents indicating that the name of Chisimba Chisanga. The chain of custody of this wallet was compromised. This witness made a number of errors on the forms he completed e.g. he made a mistake regarding the Post Mortem Number and it is clear that he failed to put a tag on the body of the deceased.

[31] The State called Samoka Sylvest Samoka, an officer attached to the Scene of the Crime Unit who testified that he took the photographs in the mortuary. One of the pictures depicts the body of an adult male with linear lacerations and bruises similar to the lacerations and bruises depicted in the photographs taken at the house of the

accused. Dr Amos indicated that he observed multiple bruises on anterior and posterior aspect of the trunk, the buttocks and upper limbs. He recorded a laceration about 5cm long and 2cm wide on the left chin. He also recorded that he noted impressions around the wrists and ankles. The photographs taken in the mortuary by Officer Samoka show a laceration on the cheek and not the chin. The pictures furthermore differ from Dr Amos' description of the injuries as the pictures clearly depict bruises and linear lacerations whereas Dr Amos only recorded multiple bruises.

[32] Despite the discrepancies in the evidence I am satisfied that the body on which the Post Mortem examination was performed, is the same body which was found in the house of the accused and it may reasonably be inferred by the evidence adduced that it was the body of Chris, the man who the accused brought into his house at approximately 13H00 on 20 July 2012.

[33] Dr Amos described the cause of death as 'Internal haemorrhage secondary to trauma possibly involving massive hydrothorax. During his testimony in court he corrected it to read hemothorax and not hydrothorax. This appears to be a genuine mistake given the presence of the words 'internal haemorrhage'. He further recorded the following findings:

'Thoracic cage and diaphragm: Some blood collection seen within the thoracic cavity.

Pleurae and lungs: Possibly there is collection of blood in the pleura. Both lungs show multiple nodules (dark) on the visceral pleura.

Right Surface covered with multiple dark nodules probably as a result of a chronic decease.

Left The surface is covered with multiple dark nodules as a result of the lung chronic decease.'

[34] Mr Shileka, counsel for the State submitted as follows:

'It is submitted that the speculated and other unknown suggested (causes) as probed by Court, with all due respect, should not dent the cause of death *in casu* since prior to his death the deceased was well and perform other duties

without any complain before being kidnapped and finally murdered by the accused.'

[35] Dr Amos speculated that the person whom he examined suffered from chronic lung disease and used words like "possibly" when referring to the existence hydrothorax and hemothorax. The State is required to present expert evidence which leaves no room for speculation. The post mortem examination was justifiably criticised by the defence. Where an examiner finds macroscopic (visible) evidence of an existing disease, specimen samples ought to be sent for microscopic examination so that any other cause of death may be safely ruled out by the court.

[36] Mr Shileka however correctly submitted that it is evidence that the doctor's finding of the cause of death was internal haemorrhaging and I am satisfied that the State had proven beyond reasonable doubt that the deceased died of internal haemorrhage secondary to trauma despite the unsatisfactory aspects of the post mortem report.

[37] The evidence of Nyambe suggests that she did not know that the accused was in search of Chris, a man who had an affair with the accused's wife, that day. This evidence was contradicted by Joseph and his wife Loveness. I accept the evidence of Joseph and his wife Loveness that she was present when the accused spoke about his unhappiness with them for not telling him that his wife was having an affair with Chris and when he demanded that they show him where he lives. I find her evidence that she was not present not credible.

[38] Joseph was the accused's constant companion that day from morning at around 09H00 to around 13H00. He testified that the accused started drinking when he found Chris. Mwikanda Patrick, the owner of the place where the deceased was found and handcuffed testified that the accused came into his place with a bottle of beer. It is evident that Joseph's testimony in this regard is not corroborated. He also contradicted himself in respect of the number of beers the accused consumed at the next bar. He first testified that the accused bought two beers and that he drank half a beer. During cross-examination he changed to the accused having finished the first one and later on he came and bought two beers. The court cannot ignore the possibility, given the contradicting evidence adduced by the State, to entertain the

possibility that the accused had started drinking before he found the deceased and that it was more than this witness was willing to admit.

[39] Based on the testimony of Mwikanda Patrick that the accused was carrying a beer when he arrived at his place, that he finished the beer in his presence and that he was dancing to the music, the reasonable possibility cannot be excluded that he accused had consumed beer prior to this stage.

[40] Philna testified that the accused arrived at the house shouting in a loud voice. She admitted that he was already a bit drunk. It was the evidence of the State that the accused ordered more beer and Philna admitted that the accused was drunk although she maintained that he was not so drunk that he did not know what he was doing. Her testimony was furthermore that the accused fell down on the chair as if pushed and thereafter fell asleep. The two psychologists interpret this conduct of the accused differently. Ms Nangolo ascribes it to sheer exhaustion and Dr Mudzanapabwe describes it as a “black out” brought about by the excessive use of alcohol.

[41] There are further discrepancies in the testimony of State witnesses in respect of the state in which the accused was found by the police when they arrived at the scene. Sibinda testified that he arrived first at the scene and he found the wife of the accused outside. He went inside and he observed the half-naked body of the deceased, the whip and beer bottles. Philna could not recall the fact that he entered the premises. He was therefore a single witness of the admission the accused made to him. The court heard evidence in a trial-within-a-trial and ruled that it was a dispute of fact as the accused disputed having made such an admission. The State was allowed to lead evidence on the disputed statement.

[42] Mr Shileka counsel for the State argued that, in the absence of the accused's testimony, this court ought to accept that the accused had made the statement. This the court may do if it is satisfied that Sibinda is a credible witness since he is a single witness in respect of the conversation which took place between him and the accused. According to Philna the accused was asleep when she started calling the police. Inspector Liomba arrived shortly after this witness and according to him he found the accused asleep. It was his evidence that the accused woke up when he came to sit next to him but according to Philna he had to shake the accused to wake

him up and he was speaking 'as if in a dream'. Liomba admitted that the room reeked of alcohol but was unwilling to admit that the accused reeked of alcohol. He testified that accused asked to use a toilet but took the plastic container and urinated in it in his presence. Sibinda admitted that he saw the bottles but was unwilling to concede that there may have been beer in the bottles. Sibinda not only found the accused awake but according to him he was normal. The accused's conduct of urinating in the presence of other persons is consistent with Philna's testimony that he was speaking as if in a dream. It is improbable that the accused could have been lucid and normal in between the time he fell down on the couch and the time Liomba found him asleep. I therefore conclude that it would not be safe to rely on Sibinda's testimony that the accused was awake and normal at the time and consequently I find that the State did not prove that the accused spoke to Sibinda. In view of my conclusion it is not necessary to deal with whether or not it was admissible.

[43] A further factor which this court has to consider is the failure by the investigating officer to determine the level of intoxication of the accused, despite the fact that the empty beer bottles were clearly visible on the scene of the crime. This would have gone a long way to limit the disputes during the trial.

[44] The next factual question is whether the accused caused the death of the deceased and whether the accused threatened to kill Philna. Philna is the only eyewitness to what transpired between the hours of 13H00 and approximately 16H00. It is trite that the court ought to apply caution in respect of her evidence. She has a bias adverse to the accused and she stated clearly that she still experienced anger toward the accused for what he did. She was having an affair with the deceased and wanted to divorce the accused to marry the deceased. In addition to this she sustained head injuries which affected her memory, sight and her hearing. It would be safe for this court to accept her evidence where same is corroborated. It must however be borne in mind that her evidence was not rebutted by the accused.

[45] Her testimony of the whipping by the accused is consistent with the linear lacerations and bruising on the body of the deceased. The Post Mortem Report furthermore indicates that the accused suffered internal haemorrhage secondary to trauma. This is consistent with Philna's evidence that the accused kicked the deceased and jumped on the deceased. I am thus satisfied that the State had

proven that the accused caused the death of the deceased beyond reasonable doubt.

[46] What remains is whether the accused appreciated the wrongfulness of his act; or was capable of acting in accordance with an appreciation of the wrongfulness of his act.

[47] The author CR Snyman in *Criminal Law*, 4<sup>th</sup> ed, at page 163 states the following;

'This name was formulated for the first time by Joubert J A in *Laubscher 1988 SA 163 (A) 167D-I*. The judge wanted to separate this defence from that of mental illness created in section 78(1) of the Criminal Procedure Act. He pointed out that the defence set out in section 78 (1) applies to pathological disturbances of the mental abilities but apart from this defence our law also recognised a defence of non-pathological criminal incapacity. (The word "pathological means "related to a disease") In this way the expression "non-pathological criminal incapacity" (perhaps because of its erudite-sounding phraseology) came to be accepted in our case law.'

[48] In *S v Ngoya 2006 (2) NR 643 (HC)*, a case referred to by Mr Nsundano, counsel for the accused, Damaseb JP, extensively dealt with the defence of non-pathological incapacity and stated as follow at page 655 paragraph 39:

'The State bears the onus to disprove the defence of non-pathological incapacity beyond all reasonable doubt. But the accused must lay a foundation sufficient to create a reasonable doubt for the State to disprove it. I can do no better than once again refer to the following observations of Snyman (op cit) at 166 (with which I agree):

"The Court will approach this defence with great care and scrutinize the evidence with great caution. The chances of X's succeeding with this defence if he became emotionally disturbed for only a brief period before and during the act, are slender. It is significant that in many of the cases in which the defence succeeded or in which the Court was at least prepared to consider it seriously, X's act was preceded by a very long period - months or years - in which his level of emotional stress increased progressively. The ultimate event which led to X's firing the fatal shot can be compared to the last drop in the bucket which caused it to overflow. When assessing the evidence, it should be borne in mind

that the mere fact that X acted irrationally is not necessarily proof that he lacked the ability to direct his conduct in accordance with his insights into right and wrong. Neither does the mere fact that he cannot recall the events or that he experienced a loss of memory, necessarily afford such proof. Loss of memory may for example be the result of post-traumatic shock which arises in X as a defence mechanism to protect him from the unpleasantness associated with the recalling of the gruesome events.”

[49] This approach was confirmed in *Hangué v The State* (SA 29/2003) [2015] NASC 33 (15 December 2015), where Maritz A J comprehensively discussed the defence of non-pathological criminal incapacity. In paragraph 36 of that judgment, Maritz A J agrees with the approach adopted by Navsa A J in *S v Eadie* 2002 (3) SA 719 (SCA) and he restated the position as follow:

‘It is well established that when an accused person raises a defence of temporary non-pathological criminal incapacity, the State bears the onus to prove that he or she had criminal capacity at the relevant time. It has repeatedly been stated by this Court that:

- (i) in discharging the onus the State is assisted by the natural inference that, in the absence of exceptional circumstances, a sane person who engages in conduct which would ordinarily give rise to criminal liability, does so consciously and voluntarily;
- (ii) an accused person who raises such a defence is required to lay a foundation for it, sufficient at least to create a reasonable doubt on the point;
- (iii) *evidence in support of such a defence must be carefully scrutinised; and*
- (iv) it is for the Court to decide the question of the accused's criminal capacity, having regard to the expert evidence and all the facts of the case, including the nature of the accused's actions during the relevant period’ [my emphasis]

[50] The State’s expert witness, Ms Nangolo, a clinical psychologist made the following finding:

- ‘(a) Although Mr Illukena drank alcohol on the day of the crime, he was functional as he was able to carry out his work duties and responsibilities;
- (b) On the day of the crime, he was able to give instructions and directions to people as to where he wanted to go and what he wanted done, hence his judgment was intact and his cognitive functioning was **NOT** impaired, which



was corroborated by his performance of the Neuropsychological Assessment Battery (NAB)

- (c) Based on on the collateral information, he was rational and coherent. He was clearly understood by the people he spoke to and gave orders to.
- (d) On the day of the crime, he seems rather to have failed to control his anger and as such excessive energy an force were exercised to punish Chris, whom he believed had wronged him, by having an affair with his wife.
- (e) In addition, Mr Ilukena's wife's infidelity seemed to have been a major contributing factor to his actions on the day of the crime.
- (f) It appears as though Mr Ilukena felt that his masculinity and pride were threatened by his wife's infidelity and he had to assert his authority and control over the victim, hence the way he emasculated the victim by drawing down his trousers and pulling and bending his penis at the time of the crime. The above mentioned could be the contributing factors to the way in which Mr Ilukena reacted when he captured Chris, which led to murder.'

[51] During her testimony she conceded that her conclusion in (b) and (c) above did not specify which part of the day she was referring to; and that the anger she referred to in paragraph (d) above may be defined as pathological anger.

[52] The defence expert Dr Mudzanapabwe, a clinical Psychologist stated the following in his conclusion:

'On the basis of finding from clinical interviews, psychometric tests, collateral information and police documents a my disposal, I arrive at the following conclusions:

- (a) Mr Ilukena suffered from significant emotional stress and provocation as noted in section 9 of this report;
- (b) Mr Illukena was intoxicated by alcohol and that impaired his judgment and behavioural control;
- (c) The aforementioned stressors coupled with the excessive alcohol intake are significant factors to have impaired or diminished Mr Illukena'a ability to distinguish right from wrong and the ability to control his actions.'

[53] There is evidence adduced before this court that the accused's alcohol abuse may have reached a level for concern. The accused was not authorised to drive a

official vehicle in view of the fact that he was seen at a bar and came to work whilst under the influence of alcohol. This does not mean that the accused was incapable of functioning at work. Philna and the accused's son testified that the accused squandered his money on alcohol. On the day in question the accused started drinking whilst he was on duty. There is evidence of the emotional stress, anger and intoxication on the day in question.

[54] The accused however displayed a single minded focus i.e. to locate Chris and would not be deterred. It is apparent from questions put to the witnesses that the accused recalled the events which took place that day and that he decided to take the deceased home and not to the Police Station. This fact the court infers from his decision not to call Nyambe to fetch them but he decided to take a taxi instead. He furthermore ordered the taxi to take a short cut to Chotto which is where his house is. There is nothing to suggest however that the accused planned to take him to his home beforehand save for the testimony of Philna in this regard. Her testimony in this regard is not coherent. The fact that he initially embarked on the search with a fellow police officer and an official vehicle does not support a conclusion that he intended to take the deceased home before that moment when he found him. It is my view that he consciously made the decision to take the deceased to his home when he found him and not to take him into custody.

[55] The accused's conduct when he arrived home as described by Philna speaks of organisation and planning. The accused intended to confront the deceased with the photographs, to whip him and to handcuff his ankles given the fact that he collected the handcuffs, the purse and *sjambok* from his room. According to his wife this is what he did. He planned to perpetrate a sustained assault without interruption by the children or the necessity to relieve himself. It ties in with the testimony of Philna that the accused intended to assault the deceased until he dies.

[56] It was put to a witness that the accused recalled having sent his son for additional beer. The accused had no reason for taking the deceased home. He had reconciled with his wife and she agreed to stop the relationship. His clear intention when he looked for the deceased was to avenge himself. The failure by the accused to testify herein leaves this court without his version and the above conclusions are, under these circumstances, warranted.

[57] I am prepared to accept that at some stage after sending his son to bring more beer, the accused was overtaken by anger which was exacerbated by his excessive alcohol consumption. Mr Shileka however pointed out that the court must bear in mind that the alleged 'black out' referred to by Dr Mudzanapabwe occurred after the murder was committed. I also have to consider the fact that Philna testified of the anger of the accused and Ms Nangolo testified of pathological anger. Furthermore I am mindful that Dr Mudzanapabwe conceded that the actions of the accused at time were voluntary but compromised or diminished. The above speaks of substantial weakening of the accused's appreciation of wrongfulness.

[58] This court is of the view that the accused's ability to act in accordance with an appreciation of wrongfulness was weakened substantially and not just to the extent that it can be said that his moral blameworthiness was materially reduced. This court is of the view that the accused's actions were voluntary but I am persuaded that the accused's appreciation of wrongfulness was weakened substantially.

[59] This court finds that the accused acted with diminished criminal responsibility caused by non-pathological incapacity when he committed the murder and the assault by threat.

[60] In count 1 the State alleges that the accused wrongfully and unlawfully deprived Chisanga Chishimba of his liberty of movement by forcibly removing him from house no 376, New Cowboy, Katima Mulilo, handcuffing him and taking him to erf 1231 Chotto Compound Katima Mulilo where he detained him unlawfully. The accused in his reply to the State's pre-trial memorandum stated that he admitted that he and the deceased came from New Cowboy to Chotto Compound while he placed the deceased in handcuffs. He stated in the reply that the deceased gave his consent. The accused, according to an instruction by his counsel stated he said 'I am putting on these handcuffs in case you decide to run away like the last time'. The court may infer from this information that if the deceased were given an opportunity he would flee and he had to be restrained from doing so. In the mind of the accused it is apparent that he was aware that the deceased would not come with him voluntarily. The evidence adduce before court supports a conviction on this count as the State proved its case in respect of this count beyond reasonable doubt.

[61] In the result the court makes the following order:

1. The accused is found guilty of kidnapping;
2. The accused is found guilty of murder with diminished criminal responsibility;
3. The accused is found guilty of assault by threat with diminished criminal responsibility.

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M A TOMMASI J

Judge

APPEARANCES

STATE:

Adv Shileka  
Office of the Prosecutor-General

ACCUSED:

Mr Nsundano  
Instructed by Legal Aid