

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

JUDGMENT

Case No: CC 15/2013

In the matter between:

THE STATE

v

MAURUS VALOMBOLA

ACCUSED

Neutral citation: *S v Valombola* (CC 15/2013) [2019] NAHCNLD 34 (26 March 2019)

Coram: JANUARY J

Heard: 8 – 21 May 2015, 02 June 2015, 15 - 16 June 2015, 18 - 19 June 2015, 06 – 09 October 2015, 19 – 20 October 2015, 22 October 2015, 09 - 10 November 2015, 16 November 2015, 19 November 2015, 20 - 23 June 2016, 27 - 28 June 2016, 01 - 02 August 2016, 15 – 16 February 2017, 23 February 2017, 27 – 28 February 2017, 01 March 2017, 06 March 2017, 08 March 2017, 29 June 2017, 04 – 05 July 2017, 07 July 2017 and 18 April 2018.

Delivered: 26 March 2019

Flynote: Criminal law – Murder – Deceased bumped with motor vehicle - Contravention of section 38(1)(o) of the arms and ammunition Act, Act 7 of 1996 – Admissions – Discrepancies not material – Circumstantial evidence – No intent to murder – Culpable homicide – Firing a shot justifiable.

Headnote: The accused in this matter is indicted for 1. Murder; and 2. Unlawful discharge of a fire-arm at a public place in contravention of section 38(1)(o) of the Arm and Ammunition Act, Act 7 of 1996.

The accused had altercations at his business placing, a bar. He pushed the deceased out of his bar when he wanted to close the bar at about midnight on 06 February 2013. He eventually hit the deceased with a pool stick and thereafter discharged a firearm. The deceased left the bar. The court acquitted the accused on this count.

The accused went to another place of business also belonging to him. On his return he encountered the deceased next to a road on his own admission. He denied that he chased and bumped the deceased with a motor vehicle and/or assaulted him. There is no direct evidence in relation to the charge of murder. The court inferred from circumstantial evidence that the accused bumped the deceased as a result of which the deceased eventually died. The court had doubt about the intent of the accused and convicted him for culpable homicide.

ORDER

The accused is convicted of:

1. Culpable Homicide.
2. The accused is acquitted on count 2; unlawfully discharging a fire-arm at a public place or on a public road.

JUDGMENT

JANUARY, J:

INTRODUCTION

[1] The accused is indicted for 1. **Murder**; and 2. Contravening section 38(1)(o) of the Arms and Ammunition Act, Act 7 of 1996 as amended-**Discharging a firearm at a public place or on a public road.**

I. In that upon or about the 7th day of February 2013 and at or near OkakuKanyaluwili village in the district of Outapi the said accused did unlawfully and intentionally assault Bernard Kalimbo thereby inflicting upon him certain injuries as a result of which the said Bernard Kalimbo died at Oshakati State Hospital in the district of Oshakati on 7th February 2013 and thus the accused did unlawfully and intentionally kill the said Bernard Kalimbo.

II. In that upon or about the 7th day of February 2013 and at or near Okeeke Location in the district of Outapi the accused did wrongfully, unlawfully and intentionally discharge a firearm in or on any public place or on a public road, or any place or road to which the public or a part thereof have access to wit: MK Special Feeling Bar.'

[2] The summary of substantial facts in terms of section 144(3)(a) of the Criminal Procedure Act, Act 51 of 1977 (the CPA) as amended alleges as follows:

'On the 7th day of February 2013, the accused was at or near Special Feeling Bar situated at Okeeke Location in the district of Outapi. Whilst at the said Bar the accused was involved in an altercation with the deceased known as Bernard Kalimbo. The accused fired and/or discharged a firearm at Special Feeling Bar which is a public place in the district of Outapi.

The deceased fled the Bar and left the scene. At a later stage the accused who was the driver of the motor vehicle with registration number N5553UP pursued the deceased and intentionally bumped the deceased with the said vehicle causing him severe injuries. The accused further assaulted the deceased with a Mopani stick. The accused did not render any assistance to the deceased; he left the scene and drove away. The deceased struggled to get to a nearby homestead where he was discovered later that morning laying on the soil. The deceased was taken to Oshikuku Roman Catholic Hospital from where he was subsequently transferred to Oshakati State Hospital. The deceased did not sustain any further injuries from the scene where he was found to Oshikuku Hospital and subsequently to Oshakati State Hospital. The deceased died on 7th February 2013 at Oshakati State Hospital as a result of the injuries inflicted on him by the accused.'

[3] The accused is represented by Mr Greyling and Mr Matota appears for the State. The accused pleaded not guilty to both counts. He gave the following plea explanation in terms of section 115 of the CPA:

' 1. I deny the allegations as contained in the charge sheet and accordingly put the State to prove all the elements of the offence as charged. I submit that on the date in question, at around

00.30, I instructed the people at my bar named MK Special Bar, to finish their drinks so that I can close the bar. All the people in the bar complied with my instructions, except the deceased, Bernard Kalimbo. I enquired as to why he does not want to leave, and he responded that he wants to finish his drinks first. Because he still refused to leave, I start pushing him outside the bar, with a pool stick which I used to play pool earlier, still in my hand. While pushing him outside, deceased further refused to hand back the glass he was drinking from, which is my property. As a result we started arguing, up to a point where he grabbed my arm, and in defence I struck him with the pool stick on his left side of his hip area. The deceased then grabbed the pool stick from me and swung in my direction, and hit the wall of the bar, which resulted in the pool stick braking. With a piece of the pool stick in his hands, and what appeared to be an object like a knife in the other, he suddenly approached me, whereby I acted in self-defence against a foreseeable imminent attack on my person and property, and discharged a warning shot between me and the deceased into the ground. The deceased stopped the attack and moved back and from a distance started to throw stones and bottles to me and my bar. As a result, I went to hide behind another bar up to the point where deceased left the area.

2. After that I left for my cuca shop at Ombathi, and on my way back from the said cuca shop, I met the deceased walking along the road. Because the deceased was unknown to me, I then stopped my vehicle with intention to take him to the police due to the unlawful assault on me and damage to my property. I informed him that it is my intention to take him to the police station, but he refused and a struggle ensued up to a point where the deceased calmed down and pleaded that I should not take him to the police. I then enquired as to where he is staying, and he told me that he is staying with his mother Mrs Naloliwa. I then told him that I will take him home. And the deceased agreed. I got in the vehicle and waited for the deceased to get in, but deceased failed to get in, and when I got out of the vehicle, the deceased where (sic) gone. I then drove around the area to look for him, but could not find him. I then drove home.

1. I deny that I chased the deceased with the vehicle, and that I bumped him with the motor vehicle.
2. I deny that I assaulted the deceased with a mopani stick.
3. I further also deny that the injury I may have inflicted on the deceased, caused the death of the deceased.
4. I accordingly put the State to the proof of the aforesaid.

AD: COUNT 2

1. I deny the allegation as contained in the charge sheet, that on the 7th of February 2013, I unlawfully discharged a firearm, and accordingly put the State to the proof thereof.
2. I submit that when I discharged the said firearm on the date in question, I acted in self-defence against a foreseeable imminent attack from the deceased on my person and property.
3. I further submit that the shot that was discharged was deliberately discharged into the ground as to ensure that no injury could be sustained by any person and that no damage could occur to any property.'

[4] The following documents were handed up in court by agreement: the indictment; summary of facts and list of witnesses; the State's pre-trial memorandum; the accused's reply to the pre-trial memorandum; the minutes to the pre-trial review conference.

[5] The accused admitted the identity of the deceased. He admitted that on 07th February 2013 he was at OkakuKanyaluwili village, at Special Feeling Bar, a public place and that he is the owner of motor vehicle with registration N5553 UP. He admitted that members of the public had access to the said bar.

[6] He disputed a record of a previous bail application; disputed an affidavit by Dr Tulumba Florent Asaka in terms of section 212(4) of the CPA; disputed the Medico-Legal post-mortem examination reports, medical reports from other medical doctors indicating and disputing the cause of death and nature of injuries. The State was further required to prove the chain of custody of the body of the deceased. The State had to prove that statements in terms of sections 212(4) and 212(7) and 212(8) of the CPA in relation to the deceased were prepared according to law.

THE EVIDENCE

The State's case; Civilian witnesses:

[7] Simon Nambinga testified that he knew the accused since 1989. He also knew the deceased since 1980. On the relevant date he was at MK Special Bar, belonging to the accused, where he was invited for a drink by the accused. He found Benjamin Desiderius, the deceased and other persons in the bar. The deceased requested the witness to buy a beer for him. He bought a beer for him. The deceased was already

drinking beer with Ignatius Alweendo. The witness bought the beer for the deceased, a beer for himself and for Benjamin Desiderius.

[8] The witness got into a conversation with the deceased in relation to the beer that he bought for the deceased. The accused asked the witness if he was talking to a thief and in the same breath referred to the deceased as a big thief. He also asked if the witness could see that the deceased was looking around to see which zinc roof he could cut to later come and steal.

[9] The deceased reacted to the accusation and asked the accused when he stole. The accused responded that the deceased normally does steal. They kept quiet for a while thereafter. The deceased thereafter approached the accused with a dollar coin and requested to play the juke box machine. The accused responded that he can put money into the machine to play the juke box. The accused then said afterwards that the deceased can even put in more money so that he can afterwards come, break in and steal it because the deceased is a thief. The accused then went to play pool with a taxi driver. He, the accused, occasionally consumed alcohol during the game of pool.

[10] At some stage the accused pointed to the deceased and said: 'my boys when that boy is leaving follow him but make sure he does not see you just be on the sides until he arrive at his house.' It is uncertain to whom the accused was speaking at the time. There were a lot of people in the bar at the time. The deceased was drinking beer with Ignatius Alweendo at that stage. The witness wanted to go home but the accused offered him another beer. The witness drank half of the beer and thereafter went home to sleep. He left the accused, the deceased and other persons in the bar.

[11] In cross-examination the witness admitted that a statement was obtained from him by the police. He could not recall if the statement was read back to him. He signed the statement. The witness confirmed that he went to court on 14th February 2013 when the accused applied for bail. The witness heard when the accused testified in the bail application. Mr Greyling used the statement in cross-examination and pointed out discrepancies in the statement and the witness's evidence in court. The discrepancies mainly are in relation to the sequence of events in the bar, what the witness told the police or omitted to tell the police and what according to him the police omitted to write down. The witness testified about 2 years after he made the statement.

[12] Ignatius Alweendo testified that he knew the deceased who was his friend. He also knows the accused as Mr Mau. He and the deceased arrived at the accused's bar at about 21h00 on 06 February 2013. He corroborates Simon (the witness in paragraph 7 above) in so far as that he was at the bar on the night of the incident; was drinking beer together with the deceased; that Simon and the accused arrived later; that the accused received a nippy of Richelieu brandy and drank from it; that the deceased played a juke box machine; that at some point in time the accused played pool with persons in the bar; that later there was an altercation between the accused and the deceased.

[13] This witness further testified that at some point in time the accused asked persons in the bar to finish their drinks as he wanted to close the bar. The witness finished his beer but the deceased only drank some of his and put the glass with the remainder of beer on a chair or counter. The accused instructed the deceased to finish his beer. The deceased responded that he could not drink further. The accused wanted to beat the deceased with a pool stick. The deceased grabbed the stick on the wider end side whilst the accused held the narrower side with the tip. The accused pulled the stick from the deceased and beat him on the back with it once. The pool stick broke.

[14] The deceased went outside the bar and asked the accused as follows: 'Mr Mau I heard that you beat people, do you just beat people like that who did nothing to you?' The witness thereafter just heard a gunshot. The accused was outside the bar under a shelter when the shot was fired. The deceased was away from the shelter and moved away into the dark. The accused followed him into the dark.

[15] The witness identified a broken pool stick in court. He also identified photos taken inside the relevant bar and indicated points where the accused, the witness Simon and the deceased were and where the shot was fired.

[16] The witness confirmed his evidence in cross-examination. He was confronted with his witness statement to the police. It was pointed out to him that there are discrepancies in his evidence in court and the witness statement. The witness explained the discrepancies stating that either he did not tell the police officer who wrote the statement of those facts or otherwise it was something that the officer wrote on his own. The witness gave his statement in Oshiwambo but the statement was written in English.

He was just asked to sign it. The officer read the statement back in English and undertook to read it back at a later stage in Oshiwambo. It was however never read back in Oshiwambo.

[17] Leonard Kamwandi testified. He was an employee of the accused at the relevant time. He knew the deceased as a friend. The witness entered the bar on the relevant time and found the previous witness, Alweendo, amongst others, playing pool. The deceased and accused were also present in the bar. The witness participated in playing pool with the accused and other persons in the bar. The witness and the accused were the last persons to play pool. When the witness was about to play the last ball on the pool table he saw the accused beating the deceased with a pool stick on the hips or side, to the witness's observation twice. The pool stick broke.

[18] After the beating, the witness observed the deceased and accused outside the bar and heard a gunshot. He could not see who fired the gunshot. About an hour passed after the witness saw the altercation between the deceased and the accused beating the deceased with the pool stick at the entrance to the bar. The witness identified the relevant pool stick in court.

[19] The accused thereafter said that the bar must close. The witness then escorted the bar ladies to their place of stay as he used to do. At the time there were no persons at the bar. He left the accused at the bar near his motor vehicle.

[20] On his way back the witness observed a stone thrown from somewhere in the location. He does not know who threw the stone. The witness went to his room and slept. He testified that before he escorted the bar ladies a small stone was thrown on the roof of a shelter in front of the bar. He does not know who threw the stone. He identified the sandals of the deceased in court. He also identified the deceased on photos. The police took a witness statement from him. The statement was not read back to him and he was just asked to sign it. He identified the statement.

[21] Mr Greyling commenced cross-examination on the statement. The witness confirmed that the statement was not read back to him and that he was just asked to sign. The witness was the third state witness who testified that the content in the statement were facts emanating from the police officer who wrote the statement.

[22] Mr Greyling than applied that the witness's cross-examination must stand over until the police officer who took the statement has testified. I dismissed the application. The reasons follow.

[23] In cross-examination the witness testified that he was in a confused state of mind at some stage when the statement was taken. Some of the content of the statement is not correct and must have been written on own accord by the police officer who took down his statement. He reiterated that the statement was not read back to him and he was just requested to sign it.

The application to have cross-examination stand over

[24] This was an application for postponement of cross-examination by Mr. Greyling, counsel appearing for the applicant who is an accused in a criminal trial. The applicant faces a charge of murder and a charge of contravening section 38(1)(o) of the Arms and Ammunition Act, Act 7 of 1996.

[25] Mr Matota, representing the State in the case, opposed the application.

[26] This application was brought after the witness in the dock testified in cross-examination that portions in his statement to the police were not correct; that the statement was written by the police whilst the witness was narrating; that the statement was not read back to him; that he was just asked to sign the statement and that he was not asked to take the prescribed oath, indicating that the statement was never commissioned. The witness was the third civilian witness in the trial who is testifying to this effect.

[27] During the cross-examination of the previous State witness, Mr Greyling partly cross-examined and also stopped. He then addressed the court on the same issues. He contended that after what was testified to in cross-examination in relation to the non-reading back of the statement, the fact that deponents were just asked to sign and the discrepancies in it that it did not constitute proper disclosure. He further contended that the defence was being ambushed by new evidence that was not disclosed in the docket.

[28] He submitted that the statement was not properly authenticated and thus the accused was placed in a position that he could not properly prepare for his defence rendering the trial unfair. Mr Greyling then requested the court to make an order or for the State to disclose if the relevant police officers would be called as witnesses. He also wanted the court to make an order for the State to disclose any further possible witnesses whose statements have not been properly commissioned and contained inaccuracies in the statements. Mr Greyling contended that in the current situation, the accused was requested to prepare his defence on fabricated documents or purportedly fabricated documents. He submitted that the defence was not previously alerted to the new facts and thus the situation is prejudicing the accused's right to a fair trial.

[29] Mr Matota at the time responded that names of potential witness are indicated on the witness list. There are many witnesses to be called and for purposes of convenience they were separated into two groups. The State did not consult with all the witnesses and he was not in a position to disclose at that stage what was requested by the defence. According to Mr Matota no witness informed the State that his or her statement is not properly authenticated. In respect of the issue of discrepancies/inconsistencies Mr Matota contended that defence counsel must follow the procedure as set out in an appeal judgment delivered in this court. *Thomas v State* (CA 98/2009) [2011] NAHC 301 (07 October 2011).

[30] Mr Matota submitted that the docket was disclosed. He indicated that the police officers who took statements will be called by the State but if not called the defence may call them.

[31] Mr Greyling eventually abandoned his request for an order and finalized his cross-examination with the witness. I refer to the abovementioned incident because in my view this application of postponement of cross-examination is an extension of the alleged prejudice and unfairness previously alluded to by the defence.

[32] This application was based on the fact that the witness in the dock was the third witness that disputed the correctness of his statement to the police. The defence was aware that they could apply to recall witnesses but it apparently did not make any difference, so it was contended. Further it was submitted that the statement was not authenticated and there are material contradictions. The discrepancies allegedly were

not brought to defence counsel's knowledge otherwise they would not have brought this application. The constitutional rights to a fair trial are infringed and therefore cross-examination could not continue at that stage. It was lastly contented that there is validity in the application in that the court should also get clarity on the issue.

[33] Mr Matota opposed the application and in substantiation submitted that it is important for counsel to follow procedure as set out in the Criminal Procedure Act. The procedure is to start with cross-examination and finish it. There is nothing preventing counsel from doing that. If a new issue arises and if it is necessary, counsel may apply to recall a witness for cross-examination. The issue surrounding the taking of statements can be clarified with the police officer(s) who took a particular statement. The witness never testified that his whole statement is wrong but only denied certain aspects thereof. Mr Matota lastly contented that it will be inconvenient and unfair to the witness and court to now indefinitely delay the finalization of his cross-examination. He accordingly prayed that the application be dismissed.

[34] Mr Greyling replied that there is no provision in the Criminal Procedure Act that cross-examination cannot stand down. He contended that the State could have stalled civilian witnesses and called police officers to testify on authentication. He submitted that the defence cannot tailor their cross-examination. That it is not fair to the defence. He further submitted that the State did not comply with their undertaking to notify the defence of inconsistencies. He submitted that the defence is accordingly ambushed and hampered in preparing their defence.

[35] I requested both counsel to assist the court with authority supporting their contentions because during their address they only referred to the *Thomas* case and Mr Matota referred additionally to the Criminal Procedure Act. The *Thomas* case deals with the manner in which previous inconsistent statements should be dealt with. I am indebted to both counsel for their industry and thank them for the assistance.

[36] The Criminal Procedure Act, Act 51 of 1977 does not specifically provide for the postponement of cross-examination of a witness who has testified and for the court to continue with another witness in the meantime. The practice is that after examination in chief, cross-examination takes place immediately or as soon as possible thereafter. Courts do not necessarily sit after hours for the sake of finalizing cross-examination and

cross-examination is postponed in practice as of necessity to the following day or the soonest available time thereafter.

[37] There is a logical and practical reason why cross-examination ought to take place immediately after examination in chief. The witness' version is tested there and then. Weak points (inconsistencies, contradictions, hearsay, speculation, fabrications etcetera) are highlighted without delay. The presiding officer is placed in a position to judge the value of the evidence when it is still fresh in the mind. The court however has a discretion to allow a postponement when it is required by justice and reasonableness.¹

'If the party who has the right to cross-examination requires a postponement to obtain instructions, for example, the court ought to accede thereto unless there are compelling countervailing considerations. If necessary the court can continue with other evidence in the meantime. In view of the fact that because of the decision in *Shabalala and Others v Attorney-General of Transvaal and Another* 1995 (12) BCLR 1593 (CC), 1996 (1) SA 725 (CC) the defence has controlled access to the docket, there ought to be only a few cases where the defence really requires a postponement in order to consult with a view to cross-examine.'² (my underlining)

[38] Various authors are *ad idem* (agreeing) that cross-examination takes place immediately after examination in chief. Likewise they agree that the court has a discretion to postpone cross-examination.³

[39] There is no right to reserve cross-examination and the party who called the witness can insist that cross-examination immediately follows the examination in chief.

'It must first be emphasized that there is no right to reserve cross-examination. Cross-examination is supposed to take place immediately after evidence in chief. A party is indeed entitled to bring an application, with a summary of reasons which make it necessary in the circumstances for postponement. If this is mutually acceptable to both parties, or if the presiding officer deems it appropriate, cross-examination may be reserved. Should the reasons be inadequate, the court may rule that cross-examination should begin without delay. The discretion rests exclusively with the court, but it is offered for consideration that this discretion

¹ Dr. J P Pretorius *Cross-examination in South African Law* (1997) p160 - 161 paragraph 8.

² Albert Kriegler *Hiemsta's Criminal Procedure* Lexus Nexis (2008) at 22-57.

³ See: *Hiemstra Suid Afrikaanse Strafreë* 3rd ed at p252; Albert Kriegler *Hiemstra Criminal Procedure*, Lexus Nexis 2008 at 22-57, Dr. J P Pretorius *Cross-examination in South African Law* (supra), Shwikkard & Van der Merwe *Principles of Evidence*, 2nd ed (2002) reprinted 2006 at p347.

must be judiciously exercised. The interest not only of the disputing parties but also of the witness must be taken into account, and convenience for the witness also plays a role. There may be instances where the full import of evidence will only become clear once other witnesses have given their accounts, and in such cases cross-examination of a witness may be held over until later. What happens more frequently in practice however, is that application is made for postponement of cross-examination merely to take instruction.⁴

The evidence (continuance)

[40] Benjamin Salvadores Desiderius is a cousin of the accused and the deceased. On 06 February 2013. He arrived at MK Special Bar, the bar of the accused, at about 21h00. There were a lot of people in the bar. The witness consumed beer in the bar. At some stage he contacted his uncle, Simon Nambinga who was at another bar, to collect him at MK Special Bar. The deceased was also at the bar.

[41] At some stage Simon Nambinga arrived. He bought beer for the deceased. When the witness was about to leave with Simon Nambinga, they met the accused outside the bar coming from a white pickup motor vehicle. The accused asked Simon to buy him something to drink. Simon responded that he did not have money. The witness followed Simon and the accused into the bar. The accused bought Richelieu and 3 beers.

[42] The accused at some stage faced the deceased and said: "We have a criminal here." Simon asked who it was and the accused said it was the deceased. The accused put coins on the pool table and started playing pool with persons in the bar. The witness and his uncle Simon Nambinga left the bar.

[43] In cross-examination the witness confirmed that he gave a statement to the police. He confirmed the correctness of his statement.

[44] Teopolina Ipumbu was employed by the accused at MK Special Bar and was one of the bar ladies on 06th February 2013. The witness confirmed and corroborates the previous witness who was in the bar with the accused. She testified that at some stage the deceased entered the bar. At about 23h30 the accused asked persons to finish their

⁴ Dr. J P Pretorius, Cross-examination in South Africa.

drinks. The deceased said that he could not be forced to drink as he bought the beer with his own money.

[45] The accused started pushing the deceased still with the glass of beer to the entrance of the bar. The deceased turned back and took a stick from the pool table. The accused took the pool stick from the deceased and hit the deceased once. The pool stick broke and accused put it on the pool table. The deceased left, running outside. The deceased picked stones and threw them twice on the roof of the bar. The accused told the deceased to stop otherwise he, the accused will shoot. The witness thereafter heard a gunshot.

[46] After the gunshot the witness and Hendrina Shikuma were escorted to their rooms by Kamwandi, also a witness in the case.

[47] The State called 5 witnesses who all testified about an altercation between the accused and the deceased in the bar belonging to the accused and an eventual gunshot. The altercation ended in that the accused fired a shot with his fire arm. There are contradictions on minute detail of events in evidence in chief and cross-examination.

[48] The witnesses corroborated each other that; the accused played pool with other persons in the bar; the deceased was in the bar drinking beer; the accused referred to the deceased and accused him of being a thief or a criminal or words to that effect; that the accused at some point requested customers to finish their drinks; the deceased refused to finish his beer; he wanted to leave with an half empty glass of beer; the accused pushed the deceased; eventually the accused hit the deceased with a pool stick; the pool stick broke; stones were thrown on the roof or towards the bar; the accused fired a shot with a fire arm.

[49] It is evident from the accused's plea explanation that he admits most, if not all of the facts mentioned above. In my view the disputed facts should have been ironed out at the pre-trial conference to shorten these proceedings. The minutes of the pre-trial review conference indicate that 25 court days were needed to finalize both the State and defence cases. We are now in 2019. Four plus years further. I appreciate that there were necessary applications, objections and arguments prolonging the finalization of the matter.

[50] The evidence and cross-examination of these witnesses included unnecessary minute details of circumstances, positions of persons in the bar, times when persons arrived at the bar, distances of where persons were in the bar, their positions and movements and other detail which I consider not material in the case. The State is *dominus litus* and decides what is necessary to prove its case. I am not prescribing what the State should present or not or what defence counsel should do. The State and Defence counsel should however consider that every accused is constitutionally entitled to a speedy trial. In my view, that is one of the purposes of the institution of pre-trial proceedings to adhere to any accused's constitutional right to a fair trial.

[51] Circuit High Court proceedings were conducted previously in different regions in Namibia. These High Court cases were set down for 2 to 3 weeks with a roll of 5 to 6 cases in the circuit court's roll. These courts managed to finalize cases in those periods. That scenario was before the introduction of pre-trial proceedings. The pre-trial proceedings were introduced to expedite proceedings to the trial. It is to iron out disputes relevant to the trial. It seems not to accomplish that goal currently but instead, unnecessarily as in this trial the proceedings are prolonged by evidence less relevant to facts admissible to adjudicate the matter.

[52] Salom Benjamin Shimbu was an assistant to the headman of Onyaluwili village in the Anamulenge Constituency, Omusati Region. The witness knew the deceased and knows the accused. He received a call on 07th February 2013 from Beata Shilongo about a person being injured at the house of a certain Maria Paulus. The witness went to that house with a motor vehicle.

[53] Maria Paulus was at the scene with other persons where the deceased was. He observed the deceased at the homestead lying on the ground on his back at the entrance. He telephonically called the deceased's uncle, mother and the police at Ogongo Police Station. The deceased was moving but laying outstretched on the ground on the side of his stomach, with a swelling on the stomach. The witness followed footprints of the deceased with other persons who were present. He observed places where the deceased fell and crawled on the ground. His observations are based on the fact that long grass was flattened and on other sides was upright. Whist on the scene the police arrived.

[54] The police went to the deceased prior to his death and talked to him. The police collected the deceased. The deceased could not walk. The police came back and investigated the scene.

[55] Justus Kondjele Adrian Nekongo knows the accused as a person residing in the same village, Oneeya village. He resides with his wife, Maria Matheus, who turned out to be Maria Paulus.

[56] He woke up between 06h00 and 07h00 on 7th February 2013 and went into the bushes to relieve himself. On his return he observed a person in a land field about 20 to 25 meters away moving towards the witness's homestead. Visibility was clear as the sun was about to rise. The person arrived at the homestead before the witness. The person reached the entrance of the homestead, bend down as if to tie his shoes but fell down flat on the ground. The witness went closer. The face of the person looked familiar but the witness could not remember where he had seen the person before.

[57] The person was blocking the entrance to the homestead. The witness greeted the person and talked to him. There was no response. The witness went and reported the incident to his wife, Maria. Maria got dressed and went to the person at the entrance. Maria also greeted and talked to the person without any response. The witness left his wife at the scene and reported the incident to a certain Beata Shilongo who is his neighbour. He went back with Beata to where the person was laying.

[58] On their return, he found a certain Erastus Nghifeimwe Ndakolo who is an uncle of Maria. Erastus spoke to the person. At this time the person responded. In the meantime more people arrived at the scene. Amongst others was the headman of the village Salom Benjamin Shimbo, the witness who testified hereinbefore. The headman identified the person as Fella, the deceased in this matter. The witness than realized and confirmed the name as a person he used to see at soccer games and cuca-shops. Fella is a soccer name but his real name is Bernard Kalimbo.

[59] The witness again talked to the deceased enquiring as to what happened. The deceased responded intermediately and remained quiet at times when spoken to. It appears from the evidence that the deceased was barefoot. On the request of the

headman the witness, Erastus, Beata and headman followed footprints into the direction from where the deceased came.

[60] The footprints came from a cultivated land field with grass. The witness testified that at places in the grass he could observe where the grass was flattened as if caused by a person walking thereon. They backtracked only one set of footprints. At one place the witness observed a bigger spot where grass was flattened extensively and a mark indicative of the deceased having laid there. The witness concluded that the deceased must have sat or rolled at this spot. The witness described the general condition of the grass to have been knee height, fresh and green. The witness estimated the distance from the entrance of the homestead to the extensive flattened grass to be about 200 to 250 meters.

[61] The witness could not follow further footprints on the grass. The persons who were with the witness crossed a fence. The witness went to a place in the fence where he used to cross the fence when going to fish. He walked in the direction of the persons who were with him. He came across a pair of sandals that he described as flip in/on sandals with white and black stripes like a zebra snake. The sandals were in an open area near a tree trunk.

[62] Next to the tree trunk the witness observed motor vehicle tracks. The sandals were close together. The witness called the other persons who went with him following the tracks to come and look at the sandals. The headman then phoned the police at Ogongo. The police arrived after about half an hour. The witness recalled the names of the police officers as Nantana and Hamutoko.

[63] The witness observed the vehicle tracks coming from the tarred road to where the sandals were found with a skid mark where the vehicle came to stop at the tree trunk. The estimated distance from the sandals to where he observed the vehicle to have stopped at the tree trunk is about half a meter. The estimated distance from where the vehicle left the tarred road to the tree trunk and sandals is about 50 to 60 meters. The witness observed and followed another booted like shoe print from where the sandals were to a mopani tree where some branches were broken from, with leaves scattered on the ground. A piece of stick was also found on the ground. The witness testified that the police observed the sandals, tracks of a vehicle up to the tree trunk

where the vehicle stopped and where the sandals were. They also observed skid marks where the vehicle went off the tarred road.

[64] The witness thereafter took the police to the entrance of the homestead where the deceased was. The police talked to the deceased and he responded. The police put the deceased on a bedsheet and loaded him on their police vehicle. The police collected the piece of stick and sandals and left.

[65] The witness identified photos in the photo plan depicting the homestead; the place where he observed the sandals; where he saw the vehicle tracks; where vehicle tracks stopped; where branches of a tree were removed; where scattered leaves and a piece of stick on the ground are depicted; where the vehicle left the tarred road. He identified the sandals in court that he observed on the scene.

MEDICAL EVIDENCE

[66] Felistas Kalimbo is a nurse at St. Martins Oshikuku Hospital. She was on duty in casualty ward at about 07h00 on 07 February 2013. A police officer brought in a patient at about 08h50. The history was that the patient was bumped by a car. This is hearsay and inadmissible. She put the patient on a bed. She could observe that the person was in pain. He was touching on his abdomen and was moving restlessly on the bed. The patient was Bernard Kalimbo, the deceased in this matter.

[67] The witness took the blood pressure and tested the blood sugar level of the person. Both readings showed low. She put the person on an IV (intra venous) drip and administered a 75mg of diclofenac injection. She called Dr Potschka who treated the person after a sonar and X-ray examinations were conducted. The doctor admitted the person in casualty ward. The witness observed bruises on the abdomen and left arm.

[68] Ruusa Akwaake is another nurse at Oshikuku Hospital. She was informed of the presence of the deceased in the hospital. She went to observe the patient and corroborates the previous witness's findings. The deceased was bare chested, in pain and restless. She called Dr Awe who was at the hospital. Dr Awe came and observed the deceased. The doctor prescribed medicine and transferred the deceased to Oshakati State Hospital. The witness called an ambulance. Sisters Josefa and Katrina

Nepembe arrived with the ambulance, collected the deceased and departed to Oshakati.

[69] Katrina Nepembe is the other person referred to above and a nurse at Oshikuku Hospital. She was on duty from 19h00 on 06th February 2013 to 07h00 on the 07th February 2013. She corroborates the testimony of Ruusa Akwaake in all material aspects.

[70] Cross-examination followed and thereafter Mr Greyling requested the file of admission of the accused, the X-rays, BP results, sonar results, copies of the hospital passport and copies of medication prescribed to be disclosed to the defence. The court granted the order as the State did not object thereto.

[71] The requested documents were received and introduced as part of the evidence. The accused initially appointed Mr Greyling on a private instruction. He ran out of funds and had to apply for legal aid. He succeeded with his application and Mr Greyling eventually continued representing him.

[72] Dr Potschka is the doctor who first attended to the deceased at Oshikuku Hospital. She completed a J88 on her examination and findings. She read the contents of the J88 into the record. The deceased had a history of being bumped by a motor vehicle. This is hearsay and inadmissible. His general health condition was stable. The injuries were bruises and abrasions on the abdominal wall and bruises on the left lower arm.

[73] The deceased had a very tense abdomen with especially painful epigastric area. The doctor did not detect anything abnormal with the liver and kidneys. She sent the deceased for X-rays and a full blood count. The heart and lungs seemed normal. The right side of the diaphragm was a bit elevated, painful and it could have been as a result of pressure of fluid in the abdominal cavity. The blood pressure was low and deceased was in shock. There was no indication of blood loss. The deceased was admitted in hospital and transferred to the male ward. The doctor compiled a MVA report wherein she restated her findings. She diagnosed deceased with blunt abdominal trauma (contusion). She testified that something must have hit the body quite hard.

[74] Dr O S Awe was called to see the deceased in the male ward. On examination the patient was restless, conscious but weak, sweating profusely with cold and clammy extremities and cyanotic tongue, meaning the tongue was blue. The blue tongue is an indication that the person did not receive enough oxygen. The blood pressure was low. The doctor diagnosed the deceased with hypovolemic shock from possible intraperitoneal bleeding. The deceased was given medication, put on IV drip and transferred with a referral letter to Oshakati Hospital for an urgent laparotomy.

[75] Mr Matota applied to recall the nurses Felista Kalumbo and Ruusta Akwaake to read into record the content of medical documents they compiled. These documents are handed up as exhibits and contain information and confirmation of the treatment of the deceased.

[76] Dalia Ndalila Negumbo is a registered nurse at Oshikuku Hospital. She also made entries in medical documents reflecting the pulse rate, blood pressure and medication the deceased has received.

[77] Krista Amutenya is another qualified nurse at Oshikuku Hospital. She also made entries in the abovementioned medical documents reflection her observations of the deceased and administering of medication.

[78] Dr Hlexey Udenussukir is the doctor who was on duty on 07 February 2013 in the casualty ward of Oshakati State Hospital from 17h00 to 08h00 on 08 February 2013. During his duty, the deceased arrived from Oshikuku hospital in a critical condition at about 21h05. His blood pressure and oxygen levels were low. The person was in hypovolemic shock due to loss of blood and plasmatic fluids in his body. There was no external bleeding.

[79] This doctor suspected haemorrhagic shock, put the patient on IV fluids (a drip) and administered oxygen per an oxygen mask. The surgeon on call was informed and the patient was transferred to the surgical ward for operation.

[80] Dr Fuentes Cervera is the doctor at Oshakati State Hospital at the Surgery ward. He saw the patient at about 21h05 where he was admitted in ward 3 in the hospital. The patient was diagnosed with hypovolemic shock after blunt abdominal trauma with a history of a motor vehicle accident (hearsay). The patient developed cardio respiratory

arrest at 21h40. The heart and lungs stopped functioning. The doctor tried to resuscitate the patient. The patient eventually passed away at about 22h00. The patient had abdominal bruises. No surgery was done on the deceased.

[81] Dr Armando Perez Ricardo is a senior medical officer at the Ministry of Health and Social Services in Oshakati. Dr Tulumba Florent Asaka worked with him in Oshakati conducting post-mortem examinations at the police mortuary. Dr Ricardo was the supervisor of Dr Asaka.

[82] Dr Asaka conducted the post-mortem examination on the deceased in this matter. As Dr Asaka left the services of the Ministry of Health and Social Services and is currently in the United States of America, Dr Ricardo read the post-mortem report into record without any objection by the defence.

[83] The findings were: Disseminated sub pleural petechial which is in laymen's terms small haemorrhages on the membrane covering the lungs; a large abrasion on the anterior aspect of the abdomen affecting the hypogastric region, both lower quadrants; a ruptured stomach with disseminated content in the peritoneal cavity; hematic fluid mixed with the stomach content measured to 1680ml; lacerated abdominal aortic branch, (gastric aorta). The gastric artery on the branch of the abdominal aorta was cut. This is caused by blunt trauma to the abdomen, quadrants. Large abrasions were observed on the anterior aspect of the abdomen affecting both lower quadrants. Abrasions were observed on the upper limbs mostly on the posterior aspects of both forearms. There was blood in the mouth and the pharynx. No fractures or dislocations were observed. The injuries must have been caused by blunt impact to the abdomen.

[84] The cause of death was hypovolemic shock due to rupture of the stomach/ blunt impact to abdomen with internal bleeding.

[85] Elizabeth Katheta was a nurse at Oshakati State Hospital at surgery ward on 7th February 2013. She made an entry on 07 February 2013 in the hospital file exhibit P7 confirming and corroborating the evidence in material aspects of the doctors who treated the deceased.

THE POLICE

[86] Irmaly Irmaly is the scene of crime officer who compiled a photo plan. The witness was directed by W/O Nantana to a scene next a tarred road where he observed tyre tracks, a shoe print, damaged bushes and trees. The witness observed the tyre tracks into the direction of the shoe print and damaged bushes. He observed one sandal, scattered branches and fresh leaves of a Mopani tree on the ground. The vehicle tracks went over some of the bushes and it was evident that the motor vehicle must have damaged the bushes.

[87] The police officers proceeded to the entrance of a house belonging to a certain Meme Maria. The witness observed struggling marks on the ground where it seems a person was sitting or crawling. This place was about 100m from where the mopani leaves were detected.

[88] The photo plan depicts the building of the bar, the inside of the bar of the accused, a tarred road and a place in the bushes with orange cones indicating different points, pointed out and observed by the witnesses. The photo plan was read into the record. Amongst others, there are points with cones indicating where a cartridge and projectile were allegedly discovered and removed from the vicinity of the bar. A broken pool table stick is also depicted in the photo plan.

[89] Some photos depict what the witness observed as skid marks on the tarmac leaving the road and leading into motor vehicle tracks on the gravel. The witness testified that at one point he observed sandal imprints showing that a person was running. The witness could differentiate the movement of the person from the different imprints on the ground between when the person was walking and started running. He also detected visible motor vehicle tracks in the direction from where the person started running to where a sandal was found. He further traced foot prints from the broken mopani tree and mopani leaves to a place where he observed a person must have been sitting or crawling on the ground.

[90] The witness took photos of the motor vehicle of the accused and pieces of tree or bush bark on and in the vicinity where the vehicle was parked. He suspected the bark came from the bushes/trees bumped or ran over. There are also photos of the house of Meme Maria and the sitting, crawling or struggle marks observed. The deceased was photographed with injuries at Oshikuku District hospital. Photos were taken after the

post-mortem examination was conducted. The witness identified the sandal that he observed in court. He did not take a photo of it. He is the only witness who testified that he observed only one sandal on the scene.

[91] In cross-examination the witness conceded that he was summoned to the scene, went there, observed points indicated to him but did not ensure that the scene was preserved to remain uncontaminated. He only photographed it the next day.

[92] Johannes Aule is a police officer and assisted with the investigation in the matter. He attended to a report at Okeeke village with Sgt Nandaana, Sgt Shiimi, Cst Nombaua and other police officers. He attended a scene where they found a person who showed them tyre tracks of a motor vehicle. The person turned out to be Salom Benjamin Shimbo who is referred to in paragraph 57 above. The witness observed the tracks of a motor vehicle from a tarred road passing certain bushes and stopping in front of a Mopani bush/tree. On the other side of this bush was a pair of sandals with blue and white stripes. The witness later corrected himself that the sandals had black and white stripes. He also observed a Mopani stick on the ground.

[93] A certain Maria Petrus called them about a person being at her house. The officers went there and the witness saw a person laying on his stomach. The person had fresh bloodstained bruises and scratches on the arms and waist. The person turned out to be the deceased in this matter. The police requested a sheet from Maria Petrus. This witness, Sgt Tobias, Cst Antonio and Cst Nomboha carried the deceased to a police vehicle as he could not walk. The deceased was then taken to hospital and handed to nurses on duty. The deceased was in a serious condition and could not stand on his own.

[94] The witness and police officers with him went back to the scene. He found witnesses at the bar of the accused and obtained statements. The witness identified the sandals he observed in court. The witness confirmed that he took a witness statement from Leonard Kamwandi in Oshiwambo language and translated it into English.

[95] Rosalia Shehupe Shiimi is a police officer at Outapi Police Station in the criminal investigating unit (CIU). She was informed by officer Nantaana on 07 February 2013 that he received a call about a person who is seriously sick at Okeeke village. She

departed to the place with other police officials. She corroborates the evidence of other police officials who testified about finding the deceased, carrying him to a police vehicle, damaged bushes, observing tyre tracks and other observations of the scene.

[96] The witness testified about tyre marks of a vehicle driving fast. Mr Greyling objected thereto as inadmissible opinion evidence. The issue was argued and I eventually made a ruling on it upholding the objection. This witness also took statements from other witnesses.

[97] Josef Nantaana is the police officer who received a phone call about the incident from Salom Benjamin Shiimbo on 07 February 2013 at Ogongo police station. He was the unit commander of the Criminal Investigating Unit. He thereafter went to the charge office. He informed other police officers and they drove with 2 motor vehicles to the scene.

[98] The witness knows Salom Shimbo as a resident of OkakuKanyaluwili village. He recognized Shimbo next to the road and stopped near him. Shimbo approached and pointed out tyre tracks of a motor vehicle that applied brakes and left a tarred road. The witness saw skid marks on the tarred road continuing on a gravel road. He observed the tyre track continuing over a bush up to a spot where the witness could see the vehicle came to stop at another bush. The witness testified that the second bush was hit by the vehicle as the branches were broken. A pair of black and white slide-in sandals were observed at the second bush. There was a broken stick from a Mopani tree/bush.

[99] Shiimbo lead the police officers, including this witness over a fence into a land field where he pointed out a place where the witness observed a spot where it seemed a person sat or was on the ground according to the reflection of marks on the ground. Shiimbo further lead the police to the deceased next or close to the entrance of Maria Paulus's homestead.

[100] The person could not walk and was in pain to the witness's observations. The person had fresh bloodstained scratches on the left forearm. The person/deceased was put on a bed sheet and carried to a nearby police vehicle. He was transported to the Oshikuku hospital. This witness called Irmaly, the scene of crime officer to take photos of the scene(s). He also called Chief inspector Junias. Both of them eventually arrived.

[101] The witness confirmed the evidence of officer Irmaly that at that stage no photos were taken. They all went to the hospital to see the deceased. The sandals and Mopani stick were left at the scene to be picked up only at a later stage. He went back to the police station to open a case. The witness corroborates the evidence on the condition of the deceased at the hospital.

[102] On the return from the hospital, this witness collected the sandals and mopani stick on the advice of officer Irmaly. No photos were taken at that stage. Some police officials remained at the scene. It is not clear if to protect it from contamination or not. The witness took the sandals and mopani stick to the police station and a case was opened. He identified the sandals and stick measuring about 90 cm in court. The witness confirmed that photos of the deceased were taken at the hospital in Oshikuku. He identified the photos of the deceased and photos depicting the scene as he testified in court.

[103] This witness went to the scene on 08 February 2013, the following day for further investigation because the deceased passed away. He met with Inspector Junias and officer Irmaly at the scene. The witness confirmed that photos were then taken by officer Irmaly.

[104] Chief Inspector Cornelius Johannes Junias is attached to the Office of the Regional Commander, Omusati Region as a unit commander. He knows the accused since 2000 as a business man in the Omusati Region.

[105] This witness testified that he was called by W/O Naantana on 07 February 2013 about an incident at OkakuKanyaluwili village. He collected another member and drove to the village. He arrived at about 10h00 at the place and found officers Shiimi, Naantana and Irmaly there. The witness observed tyre tracks that left skid marks on a tarred road and on the gravel next to it. The tyre tracks led to shoe prints which went to two bushes.

[106] The tyre tracks went over one bush. The witness could observe some of the bark of the bush was freshly peeled off. The tyre tracks went to a second bush in front of which the tracks stopped. The witness estimated the height of both bushes at about one meter high. He observed a pair of black and white slip-in sandals in the vicinity not far

from the second bush. He observed a fresh stick or branch from a mopani tree about 5 to 6 meters from the second bush.

[107] The witness thereafter left with Cst Shikongo, leaving officers Naantana and Irmaly at the scene. He left to the business place/bar of the accused at Okeeke village. He could not find the accused but found two bar ladies. On information from the bar ladies he and Cst.Shikongo looked around the place, found and collected a spent cartridge and projectile outside the bar. The witness called the accused on his phone. The accused answered and responded. The witness went to a second business place looking for the accused but could not find him.

[108] The following day the witness again searched for the accused at the bar and market but could not find him. A Toyota 2.7 pick-up truck was parked at the second place of business. The witness communicated with the son of the accused to get permission to investigate the motor vehicle.

[109] He got permission and investigated. He observed a small piece of bark of a mopani tree in front somewhat under the car on the ground and pieces of bark on the bulbar. Photos were taken by officer Irmaly. There were also small scratches on the bulbar indicating that the vehicle must have hit something. The witness seized the motor vehicle and eventually booked it as an exhibit at the police station in Ogongo.

[110] Later the same day of 08 February 2013, the witness drove again to Ogongo police station where he met the accused and his lawyer. The witness explained the accused's rights and eventually arrested him. The accused also handed an Astra 6.35 calibre pistol, one magazine with four bullets, a pistol holster and a firearm license to the witness. He arrested the accused and took him to Outapi police station where he was detained trial awaiting.

[111] All the confiscated items were booked into the exhibit book at Outapi police station. Copies of the entries in the occurrence book and exhibit book were handed up in court. The witness identified in court the confiscated items including a broken pool stick that he received at the bar of the accused. Those were received as exhibits proper. The witness also identified photos depicting the motor vehicle, places and points that he observed at the scene next to the tarred road.

INSPECTION *IN LOCO*

[112] The relevant motor vehicle is parked in the court premises. On application the court held an inspection *in loco* of the vehicle. The following observations were made:

- i. A white Toyota Hilux Single Cab pick-up bakkie with black roll bar and black bulbar parked under roof in a parking bay on the court's premises;
- ii. The bulbar is made of steel or iron with vertical and horizontal what seems to be pipes. There are 3 horizontal pipes with open space in between covering the grill, front bumper and lights with vertical pipes connecting the whole equipment;
- iii. I observed 2 scratches on the bottom bar of the bulbar on the driver's side;
- iv. Chief Inspector Junias pointed out that the piece of bark was laying more or less in the middle of the vehicle under the front number plate depicted in photo 26 of the photo album;
- v. The witness measures 1.88 meters in height;
- vi. The bottom horizontal bar of the bulbar is 43 cm from the ground;
- vii. The middle horizontal bar is 69 cm from the ground;
- viii. The top horizontal bar is 94 cm from the ground
- ix. The bottom horizontal bar exceeds the witness's knee height from the ground;
- x. The scratch mark on the bottom bar driver's side measured 300 mm in length;
- xi. The scratch mark on the middle bar measured 12 cm in length;
- xii. When the witness stood in front of the bulbar, his waist reached the top of the bulbar but did not touch the top horizontal bar;
- xiii. It seemed that at some stage the bulbar came into contact with the bonnet of the motor vehicle on both the right and left side of the motor vehicle.

THE LOWER COURT PROCEEDINGS

[113] Mr Matota applied in terms of section 235 of the CPA to hand in the record of proceedings of the lower court. Mr Greyling objected thereto. The issue was argued. I eventually ruled the lower court proceedings inadmissible. The accused was defended at the bail application in the lower court. The accused was however not warned of his rights to silence and against self-incrimination.

[114] I agree with Hoff J (as he then was) where he stated the following:

'The court has often emphasized the fundamental rights of an accused person to a fair trial as guaranteed by the provisions of art 12(1)(a) of the Namibian Constitution, and explained that the right to a fair trial was not limited to the proceedings during the trial but included the pre-trial proceedings. A bail application was one such pre-trial proceeding and the same principles and considerations must apply. Therefore the privilege against self-incrimination which an accused person enjoyed was not only applicable during trial proceedings but also during a pre-trial proceeding such as a bail application.

The court accordingly upheld an objection to the contents of the record of bail H proceedings where the accused in question had incriminated themselves and had not been made aware of their privilege against self-incrimination.⁵

[115] The following documents were received as exhibits proper by agreement of counsel:

- i. The affidavit in terms of section 212(7) of the CPA relating to Junias Johannes having received the body of the deceased for safe custody at the Oshakati hospital mortuary and handing it to Cst Rauma;
- ii. The affidavit in terms of section 212(7) of the CPA relating to Cst Rauma having received the body from Junias Johannes, the identification of it and the identification to Dr Asaka, the pathologist who did the post-mortem examination;
- iii. The identification of the body;
- iv. The affidavit by Dr Asaka relating to the conducting of the post mortem examination;
- v. The certificate of the post-mortem examination.

[116] The State then closed its case.

Cross-examination and discrepancies

[117] The following discrepancies emanated from cross-examination and from the evidence of State witnesses:

⁵ *S v Malumo and 111 Others* (2) 2012 (1) NR 244 (HC) Headnote F-H.

- On count 2, the witnesses disagreed to distances, places where other witnesses were, where the deceased was, the accused was and/or their observations;
- Whether or not the altercation in the bar of the accused between him and the deceased was caused by the accused or the deceased;
- Who caused the breaking of the pool stick?
- Who was the aggressor to that incident etcetera?

[118] In my view, these were immaterial to the adjudication of the matter in the end as I have alluded to above in paragraph 55. The accused was not indicted for assault in relation to all the alleged facts the State tried to prove with evidence. This evidence I consider relevant only as a motive to what transpired later. Unnecessary time was spent going into minute detail of it as the accused admitted that there was an altercation with the deceased causing him to discharge a shot with a firearm at his bar before the alleged incident of murder.

[119] The only dispute is whether or not the accused was justified to fire the shot and if he had intentionally transgressed the law. Any person is entitled to protect his/ her person and property. That should be executed within the boundaries of the law. Otherwise people might take law into their own hands.

THE DEFENCE CASE

[120] The accused testified in his defence. He confirmed to be the owner of MK Special feeling bar, the relevant bar in the matter. He corroborated the evidence of witnesses who testified that he was at the bar on 06 February 2013. He further confirmed and corroborated evidence that at some stage there was an altercation between him and the deceased. There are differences on the minute detail of the incident which I do not consider material. He admitted that he discharged a shot with his firearm. He testified that he was acting in self- defence and protection of his property. He stated that the deceased threw stones at him and his property. Some of the witnesses of the State confirmed that stones landed on the roof of the building at the premises afterwards.

[121] The accused admitted that after the incident he encountered the deceased on the Outapi – Oshakati road. He recognized the deceased as the person previously he had the encounter with at his bar, applied brakes and confronted the deceased about the earlier confrontation. The accused testified that he was not taken to the scene depicted in the photo album. He could recognize the scene depicted on photos to be about 1 km from where he recognized the deceased and confronted him. The accused denied that he chased and bumped the deceased with the motor vehicle. He confirmed that he drove the motor vehicle confiscated by the police. He testified that he is not the owner but it belongs to a relative, Johannes Valombola. This is contrary to his admission at the commencement of this proceedings that he is the owner thereof. He testified that the vehicle was previously involved in an accident, bumping a donkey that caused damages to the bulbar and body of the vehicle.

[122] He identified photos handed up in court relating to his bar, the inside and outside thereof. He denied the alleged assault on the deceased with sticks or branches of a bush or tree. The accused testified that on his re-encounter with the deceased, he again had an altercation with him in that they grabbed each other before allegedly and eventually he offered the deceased a lift home. The accused stated that he got into his motor vehicle after the deceased accepted the offer. The deceased did not board the vehicle. The accused searched for him but could not find him and drove home.

[123] The accused explained that he does not deny the bark on the vehicle as it was raining and he had to swerve out of the road driving over bushes. The accused testified that officer Naantana, who testified had a grudge against him because of a previous civil case instituted against the officer. Allegedly the accused advised the complainant in the matter to sue Naantana for illegal arrest. The accused further testified that police officers fabricated the case against him and staged the scene where tracks, damaged bushes/trees and foot/shoe imprints were observed.

[124] The accused has a license for the pistol that he used. He testified that he fired the shot in self-defence and protection of his property. He admitted to have encountered the deceased afterwards and confronted him. He disputes that he assaulted the deceased, bumped him with the motor vehicle and that the incident happened at the scene depicted in photographs presented in evidence. I find it significant that the

accused encountered the deceased in the middle of the night in darkness next to the road and yet he allegedly could identify the place of the encounter. I find this highly improbable.

[125] Johannes Valombola testified as a defence witness. He identified the motor vehicle depicted in photos as his property. He bought the vehicle from the accused. He testified that the bulbar is damaged as depicted in the photos. Allegedly he bumped against a donkey, 2 donkeys chasing each other moving over the road, on 15 January 2013 at Okapa Bridge on the Ombalantu-Ruacana road. After the time of the donkey incident the accused, his brother borrowed the car. He explained that the damage of scratches on the bulbar must have been caused by the accused.

SUBMISSIONS

[126] Mr Matota submitted that the State proved its case beyond reasonable doubt on both counts. He contended that the accused should be convicted on both counts as charged. He referred to discrepancies between witness's statements and their evidence in court and submitted that the discrepancies are not material.

[127] Mr Greyling submitted that the State did not prove its case beyond reasonable doubt on both charges. Mr Greyling was at pains to convince the court that there are so many discrepancies and inconsistencies in the evidence of witnesses that none of it is reliable.

[128] He further submitted that the contradictions and discrepancies are indicative that the police and witnesses fabricated evidence; either in collaboration with civilian witnesses or on their own; that the police and or witnesses staged the scene where the footprints, motor vehicle tracks and sandals were observed. Lastly Mr Greyling submitted that there was a *novus actus interveniens* (a new cause intervening) in that the deceased might have sustained the fatal injury in the hospital by falling from a bed and/or that the administering of medicine, diclofenac, is a cause of enhancing abdominal bleeding leading to the death of the deceased. He further alluded to negligence of hospital personal delaying treatment and the transfer of the deceased to Oshakati State Hospital.

[129] The evidence does not support any of the above submissions. I find the submissions to be speculative. The accused in his testimony also alluded to the fabrication of evidence which is also speculation. The accused was selective in being truthful with his evidence. The allegation that the scene was staged, evidence fabricated and the possibility that there was a *novus actus interveniens* (a new cause intervening) are, in my view, afterthoughts. The accused tailored his evidence as the case progressed.

[130] There are indeed discrepancies in witnesses' statements and their evidence in court. The discrepancies mostly relate to minute detail of events in relation to places where persons were at a specific point in time, specific words uttered by the accused, distances etcetera which I do not find material. The scene of crime officer testified that he only found one sandal on the scene contrary to other civilian and police officers testifying of two sandals. In my view the scene of crime officer made a *bona fide* mistake.

EVALUATION

[131] The discrediting of a witness's deviation from his previous statement is limited to material aspects of his/her evidence. (*S v Unengu* (CC 14/2013) [2015] NAHCMD 33 (24 February 2015)).

[132] I agree with the sentiments expressed in *S v Hanekom* (SA 4/00) [2001] NASC 2 delivered in the Supreme Court of Namibia on 11/05/2001 stating:

'Not every contradiction or discrepancy in the evidence of a witness reflects negatively on such witness. Whether such discrepancy or contradiction is serious depends mostly on the nature of the contradictions, their number and importance and their bearing on the other parts of the witness's evidence.'

[133] The accused admitted to having fired a shot with his firearm. There was an altercation with the deceased on two occasions. The benefit of doubt is accorded to the accused in the circumstances that he fired the shot in protection of himself and/or his property.

[134] It is not very clear from the evidence if the shot was fired before or after the stones were thrown. One of the State witnesses testified that stones were thrown before

the shot. She further testified that the accused warned the deceased to stop throwing stones, otherwise he was going to shoot, I accept that the deceased threw the stone/s. State witnesses confirmed that a stone or stones landed on the roof of the bar and/or a shading structure adjacent to the relevant bar. The witnesses did not see bottles being thrown, nor did they see that the deceased attacked the accused with a knife or pool stick.

[135] The accused admitted that he encountered the deceased at a later stage. He disputed that the scene where this encounter took place was the scene depicted on photos. He eventually searched for the accused with the motor vehicle. Witnesses followed foot prints from where the deceased was at the homestead, eventually leading to a scene where the sandals and motor vehicle tracks were observed by civilian and police officers.

[136] There is no direct evidence in relation to the allegation that the accused intentionally chased and bumped the deceased to kill him. The fact of the matter is that the deceased is dead.

[137] This court needs to decide whether the accused acted justifiably in discharging the shot at the bar and if he is criminally and responsible for the death of the deceased.

[138] Further I must decide if it is the accused who is responsible for the death of the deceased. If so, the *mens rea* of the accused must be determined.

[139] Secondly, this court must decide if the discharging of a firearm was justifiable or not. The facts of the second count are that the accused discharged his firearm after an altercation with the deceased as stated above. He admitted to it.

[140] The principles applicable to self-defence are trite law. In order for an accused to succeed with private defence (or self-defence), the following requirements must be met: (a) The attack must be unlawful; (b) the attack must be directed at an interest legally deserving of protection; and (c) the attack must be imminent but not yet completed (*S v Lukas* 2014 (2) NR 374 (HC) Headnote). In my view the accused was in the circumstances justified to use his firearm in self-defence. Accordingly he stands to be acquitted on that charge.

[141] On the count of murder this court needs to decide on the circumstantial evidence.

[142] The approach to circumstantial is also trite:

'Where the court is required to draw inferences from circumstantial evidence, it may only do so if the 'two cardinal rules of logic' as set out in *R v Blom* 1939 AD 188, have been satisfied. These rules were formulated in the following terms: (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn. (2) The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct.

The law does not require from a court to act only upon absolute certainty, but rather upon just and reasonable convictions. When dealing with circumstantial evidence, as in the present case, the court must not consider every component in the body of evidence separately and individually in determining what weight should be accorded to it. It is the cumulative effect of all the evidence together that has to be considered when deciding whether the accused's guilt has been proved beyond reasonable doubt. In other words, doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation, but those doubts may be set at rest when it is evaluated again together with all the other available evidence.⁶

[143] The accused admitted that he encountered the deceased on his way back from one of his other cuca-shops.

[144] Witnesses and the police followed footprints from the entrance of the homestead where the deceased was found to where sandals and vehicle tracks were observed. Although the accused denied that it was the place where he met the deceased, I find that it is where he met the deceased. The accused further admitted that he searched for the deceased in his vehicle. This is consistent with motor vehicle tracks on the scene.

[145] In relation to the indictment of murder, the only reasonable inference is that the relevant motor vehicle depicted in photographs, tracks testified about, admitted to being driven by the accused and with which the accused encountered the deceased with, bumped the deceased.

[146] I find that he bumped the deceased. On the allegation of beating the deceased with a mopani stick I have doubt that the accused did beat the deceased. The court

⁶ See: *S v HN* 2010 (2) NR 429 (HC) headnote at 429 C-F.

observed the stick. In my view the stick could not have caused serious injury or any of the injuries that the deceased sustained. It is more probable that the injuries were sustained when the deceased was bumped with the motor vehicle.

[147] I doubt that the accused intended to kill the deceased. He was in possession of a pistol. The deceased must have been seriously injured after the bump. In my view the accused had all the time thereafter to shoot or drive over the deceased. I exercise the benefit of doubt in favour the accused.

[148] A reasonable person in the circumstances would not have acted in the manner the accused did. I find that the accused was negligent to a high degree. In the circumstances he stands to be convicted of culpable homicide.

[149] In the result:

The accused is convicted of;

1. Culpable Homicide.
2. The accused is acquitted on count 2; unlawfully discharging a fire-arm at a public place or on a public road.

H C JANUARY
JUDGE

