

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION  
HELD AT OSHAKATI

JUDGMENT

Case no CC: 04/2015

In the matter between:

**THE STATE**

**v**

**UUNANDAPO ELIASER**

**ACCUSED**

**Neutral citation:** *S v Eliaser* (CC 04/2015) [2020] NAHCNLD 254 (25 June 2020)

**Coram:** TOMMASI J

**Heard:** 5 -18 May 2017, 23 May 2017, 21 - 24 August 2017, 28 & 29 August 2017, 7 & 8 September 2017, 19 February 2018, 6 March 2018, 19 May 2018, 22 March 2018, 14 &, 17 January 2019, 21 & 23 January 2019, 28 February 2019, 20 February 2020, 21 February 2020, 1 June 2020, 4 June 2020, 16 June 2020

**Delivered:** 16 June 2020

**Reasons:** 25 June 2020

**Flynote:** Expert evidence — DNA analysis —sealed rape kit with identifying serial number handed to investigating officer – sealed rape kit handed for Forensic

analysis - Chain of handling of samples from collection to analysis found to be properly presented.

**Summary:** The deceased was seen in the company of the accused and another person the evening before her body was discovered. The cause of death was strangulation and there were signs of sexual assault. The husband reported that a black radio and cell phone was stolen. The State led evidence of DNA analysis which shows that the DNA of the accused was found in the vestibule of the deceased. The court rejected the accused's denial that he was last seen in the company of the deceased as false beyond reasonable doubt and the accused was convicted of murder and having contravened section 2(1)(a) of the Combating of Rape Act, 8 of 2000 – Rape. No evidence was found to prove that the accused was guilty of housebreaking with the intent to steal and theft and robbery with aggravating circumstances.

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### ORDER

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1. Count 1 – Murder – The accused is found guilty of murder with direct intent;
2. Count 2 - Robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977 – The accused is found not guilty
3. Count 3 – Contravening section 2(1)(a) read with sections 1, 2(2), 2(3), 3, 4, 5, 6 and 7 of the Combating of Rape Act, 8 of 2000 – Rape – The accused is found guilty.
4. Housebreaking with intent to steal and theft – The accused is found not guilty.

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### JUDGMENT

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TOMMASI J:

[1] The accused herein faced four counts i.e. murder, robbery with aggravating circumstances, contravening section 2(1)(a) of the Combating of Rape Act, 8 of 2000 – Rape and housebreaking with intent to steal and theft. The accused pleaded not guilty to all counts.

[2] On 19 March 2012 the accused and one Khariseb were seen in the company of the deceased at Okanyothi *cuca* shops in the district of Ondangwa. The next morning the body of the deceased, half naked, was found near a water pond with her belongings scattered in the vicinity of her body. The state's case is that it was the accused who during that evening of 19 – 20 March 2012 raped, murdered and robbed the deceased of a cell-phone with serial number 354187032235118, the property of or in the lawful possession of the deceased. The State further alleged that the accused thereafter broke into and entered the house of the deceased with the intention to steal and stole a radio, torches and a Nokia cell phone, the property of Tomas Itamalo (husband of the deceased) and/or the deceased.

[3] The accused in his plea explanation stated that he was at a location named Kanyothi at the *cuca* shop of Mrs Nangula. He was in the company of Mr Khariseb and Mrs Nangula when the deceased arrived. At some stage Khariseb touched the breast of the deceased and Mrs Nangula told him not to do it. Khariseb's response was that the deceased had eaten his money and he can touch her. Mrs Nangula told him that the deceased was a married woman and he informed her that he does not care. Ms Nangula ordered the deceased and Mr Khariseb to leave her *cuca* shop. The accused left the *cuca* shop and the deceased and Mr Khariseb followed him. He was carrying a container of *omagogo* traditional beer. They all went to Ms Nelago's *cuca* shop. He left Ms Nelago's *cuca* shop and was not in the company of the deceased and Khariseb.

[4] Mr Nsundano, counsel for the accused, placed on record at the outset that he hold instructions that the accused admitted he was in possession of the cell phone with the serial number 354187032235118 which he bought from the deceased. He however took issue with the seizure and handling of the exhibit.

[5] The accused's warning statement, handed into evidence by agreement, reflects that the accused had a teeth mark and a cut on his left pointing finger. The

accused stated that he did not murder nor rape the deceased. He left the deceased and Mr Khariseb with a lot of people at the *cuca* shop of Ms Nelago at around 22h30.

[6] His plea in terms of section 119 of the Criminal Procedure Act, also handed in by agreement, reads as follows: 'On the day the deceased died she told me not to leave her at the *cuca* shops at Okanyothi Village. I however left her there only to hear the next morning that she died.'

[7] There were no eye witnesses to the offense and the state called an array of witnesses who gave circumstantial evidence in an attempt to discharge the onus to proof beyond reasonable doubt that the accused committed the offenses in the indictment.

[8] The state called the persons who discovered the body of the deceased. Not much turns on their evidence save to mention that they found the house of the deceased locked with no damage to the door.

[9] Detective Sergeant Immanuel Ndeutapo Nghaalukako was one of the first officers who arrived at the scene of crime. He observed the deceased laying face up with her panties pulled down to her ankle so that her naked bottom half was exposed. He found the ground still soft and he observed a knee impression and footprints leading from the scene toward the edge of the water. He saw some *plakkies* (flat rubber sandals) in close proximity to the scene. One of these *plakkies* was tied at the bottom with a wire. He also noted two sets of footprints entering the water pan and exiting it at a different point. He observed skid marks at the place where the footprints exited the water pan. At the same place he saw a bloody pad/tampon and blood stains on the ground. From this point he followed the two sets of footprints to where the body of the deceased was found. He also searched the area and found some keys. On the path to the house of the deceased, he saw a footprint of a person wearing *plakkies* which was the same print he observed at the scene. Near the entrance of the deceased's house he saw toe prints up to the entrance of the house of the deceased. He concluded that the person who made the prints removed the *plakkies* and walked to the door on his/her toes. The door was closed and locked with a padlock and a chain. He returned to the body of the deceased and saw that she had multiple marks on her face and the skin was peeling off at some spots. He observed black lines on her throat which did not completely

encircle the neck but was mostly in front. The nose and mouth of the deceased were filled with sand.

[10] The police determined that the accused and Khariseb were suspects and some officers were sent to arrest them. The police officers who arrested the accused found him at his house. They searched the room of the accused and found wet pants with mud on the knees and a red t-shirt. They seized these items, placed it in a plastic bag and returned to the scene.

[11] At the scene where the body was found, Sgt Ngaalukako noted that the accused had an injury on the left hand, the pointing finger. He asked the accused to see the injury and the accused removed the bandage. He saw a fresh cut on his finger. The accused explained when asked, that he cut himself whilst he was repairing the radio. Sgt Nghaalukako observed something in the pocket of the accused and it turned out to be a black Nokia without a screen.

[12] The other suspect in the case, Khariseb was also arrested and both were taken to the charge office. Sgt Nghaalukako booked the plastic bag with the clothes into the POL 7. He asked the accused to hand over items which they were not allowed to have in the cell. Amongst these items was the Nokia cell phone without a screen, which the accused had in his possession. He booked the Nokia phone also in the POL 7 register. The blue *plakkies* were however booked into the POL 7 at a much later stage.

[13] Sgt Nghaalukako returned to the scene with Warrant David the next morning and he handed the blue *plakkies* to Warrant David who took over the investigation from him. He was looking for the item which was used to inflict the injuries on the deceased. His search was rewarded when he found a broken necklace. He suspected that the chain was used to strangle the deceased. He handed it to Warrant Officer David. He further observed some hair stuck to glass at the same place where he found the pad/tampon the previous day. He pointed it out to Sergeant Taukuheke from the scene of crime. He also saw blood on a pole in the water and asked Sergeant Taukuheke to take a photograph of it.

[14] Mr Ovia Amon, testified that he was working with the accused on 19 March 2012 in the field. According to his observation the accused was wearing blue/green

old slippers also known as *plakkies* and a red jersey. The accused left his house and returned the afternoon before going to the *cuca* shops. The accused was wearing a greenish golf t-shirt, blue trousers and black shoes at that time. He gave the accused his cell phone to charge. The accused did not return the cell phone that evening but sent a child to deliver it to him the next morning. The cell phone was full of sand and blood. The accused called him three times that morning to determine what was happening at Okanyothi. The third time when the accused heard that the deceased had been killed he did not call again. He went to the scene and found the police there.

[15] Mr Erasmus Onesmus also known as Khariseb testified that on 19 March 2012 he came to the *cuca* shop of Mr Dudumo. He had N\$2 and he bought traditional beer. He found the accused and the deceased at the *cuca* shop. After he had his beer he went home at around 20h00. He left the accused and the deceased at the bar. He was arrested with the accused and was also charged with murder and rape until the case against him was withdrawn. He denied that there was an incident where he touched the breast of the deceased. He was confronted with his statement to the police. His response was that the police officer asked him whether he touched the deceased breast and he told him that the deceased accused him of doing it but it was not true.

[16] The state called Julia Nelao Hawino, the owner of a *cuca* shop in Okanyothi. It was her testimony that some people (Women and Men Network) who were investigating the ownership of a cow came to her *cuca* shop at around closing time. The deceased also arrived at her shop and she carried a pot with a plastic. In the plastic there were maize cobs. She ordered some meat from the deceased and the deceased wanted Pwaka, a traditional brew. She heard the accused's voice outside her *cuca* shop arguing with the people who were investigating the ownership of the cow. The deceased went outside. She did not see which way the deceased went. She did not see the accused with the deceased and neither did she see Khariseb at her *cuca* shop.

[17] Martha Mondjila Hamupunda testified that she was seated outside at the *cuca* shop of Julia Nelao Hawino. She saw the accused with the deceased when they arrived at the *cuca* shop. The accused was carrying a 5 litre container and the

deceased was carrying a pot with maize and meat in. The deceased entered the shop and the accused remained outside joking/playing with her. She also observed the altercation of the accused with the people who investigated the ownership of a cow. The accused called the deceased and they left together. She denied that Kariseb came to their *cuca* shop that day. It was put to her that the deceased and Kariseb went to the *cuca* shop of Ms Ester Kakunya. She stuck to her version of the events. She was unable to recall the clothes the accused was wearing that night due to the poor lighting outside the *cuca* shop. The accused disputed that she was present at the *cuca* shop of Ms Nelao when he arrived. He also disputed that he was in the company of the deceased.

[18] The husband of the deceased testified that he was in Walvisbay when the incident occurred. When he arrived at home he found some people at his house and some items were missing namely a black Eveready Radio and a cell phone. The radio did not have any identifying marks but the cell phone had his name and his wife's name written on the side of it. He was shown a radio and he identified it as his. He could identify it as he had it for a long time. He pointed out the names which was written on the cell phone and identified it as his property. The defence objected that the chain of custody was not proven. The court accepted these items into evidence and ruled that it would determine what the evidential value thereof would be. He testified that his door was not broken or damaged. The cell phone bore the serial number 354187032235118, the same phone which the accused admitted was in his possession.

[19] Alfred Nangombe the nephew of the accused testified that, at the material time, he lived with the accused. The morning of 20 March 2012 the accused took his aunt to hospital. When he came back, the accused had a radio which did not have any cover. The accused was "operating" the radio. After some time, the police came to his room looking for the accused and they arrested him. He later found the kids playing with a radio cover. He took it from them and kept it in his room. The police returned to the homestead on 23 March 2012. They searched the room of the accused and found one cover of the radio with batteries underneath the bed of the accused. He did not know that the accused had the technical know-how to repair radios and was unaware of other radios which the accused had repaired. The accused was not present at the time his room was so searched.

[20] A niece of the accused, Anna Sam, testified that the accused came to her early in the morning of 20 March 2012. He gave her a black Nokia cell phone without a screen cover. The name which appeared on the screen was Mr Itamalo, the husband of the deceased. The accused asked her to put the name "Jack" on the screen. She told him that she was not able to do so. The accused then went to fetch a radio which also did not have a cover. He recorded music from the radio onto the cell phone. The accused was thereafter arrested and taken into custody. She also was not aware of the fact that the accused repaired radios. She stayed with her mother but she occasionally came to visit her grandmother where the accused also lived. It was put to her that the accused asked her to remove a photo and not a name. This witness admitted that she was not telling the court the truth when she testified that her brother helped to translate during a consultation she had with the prosecutor.

[21] The post mortem report was completed by Dr Zambrano Rosario on 22 March 2012 at 09h20. The cause of death is described as asphyxia due to strangulation. The report indicated that there was a non-patterned ligature mark on the neck, two haemorrhagic infiltrate similar in diameter in the frontal region and two haemorrhagic infiltrated on both sides of the jaws similar in diameter and colour. It further reflects haemorrhagic infiltration of the vaginal vestibule.

[22] Another report titled "REPORT BY AUTHORIZED MEDICAL PRACTITIONER ON COMPLETION OF MEDICAL-LEGAL EXAMINATION" (J88) completed by Dr Zambrano Rosario was handed into evidence by agreement. This document bear the name of the deceased and it records the same injuries which were recorded on the post mortem report, which was also handed in by agreement. These two documents bear the same date and time. It may therefore be inferred that the documents were completed whilst Dr Zambrana was conducting the post-mortem examination of the deceased.

[23] The J88 contains an identifying sticker numbered 11NAAA4502XX. This document forms part of the contents of a "rape kit and the sticker reflects the serial number which appears on the rape kit. The form makes provision under the heading titled: "Samples taken for investigation" for details of the samples taken and the



name rank, force number and signature of the police officer to whom specimens were handed to. This part was left blank.

[24] Dr Zambrano also completed a document titled "Collection of Forensic Evidence" from an adult patient of sexual assault". The defence in their reply to the State's Pre-trial Memorandum and in the Minutes of the Pre-trial conference indicated that this document was not disputed. The minutes however states that the accused would dispute the National Forensic Science Institute Report 745/2012/R1 dated 4 March by T Nakalemo and the report of M Swart on the basis that a proper chain of custody was not established.

[25] Dr Ricardo, a pathologist at the Oshakati State Hospital, testified that he worked with Dr Zambrana. He testified that the J88 form is part of the contents of the sexual rape kit. He further explained that the Collection of Forensic Evidence form is also part of the content of the sexual rape kit and both these documents bear the same identifying serial number. He explained that the samples collected by the doctor are individually sealed and placed back in the rape kit box which is then sealed and handed to the police officer for dispatch to the forensic laboratory.

[26] Dr Zambrana, the author of the Collection of Forensic Evidence form, the J88 document and the Post Mortem Report, according to Dr Ricardo, returned to Cuba. Dr Ricardo, when looking at the document, recognized his handwriting where the ticks and the abbreviation N/A appear. He testified that this would mean that he was present at the time the forensic evidence was collected. He explained that sometimes the examining doctor would request assistance of another doctor with the completion of the form given the fact that his hands may be soiled. According to him the ultimate responsibility for evidence collected is that of the examining doctor who appends his signature to the form. The court ruled that this document could not be handed into evidence through this witness as he was not strictly speaking the author thereof.

[27] Warrant Officer Lebius Hangula David, the investigating officer attached to the serious crime unit in Oshakati, testified that he received a rape kit of the deceased from Dr Gamar (Zambrano) who conducted the autopsy on the deceased on 22 March 2012. He testified that the identifying/serial number of the rape kit was

22NAAA4502XX. He placed the rape kit in a scientific bag with the serial number NFM05309.

[28] On 23 March 2012 he went to the accused and Khariseb and explained to them that they are not forced to give samples but if they want to they may do so. The accused and Khariseb voluntarily opted to give the samples and he took them to the hospital where Dr Aboh conducted the examination. He received the two rape kits from Dr Aboh. One was numbered 11NAAA174088XX. This he placed in a forensic bag NFM08104. The other was numbered 11NAAA1733XX. This was placed in a forensic bag NFM08290. These exhibits were locked in his safe and he was the only one who had access to the safe. He completed a form titled Application for Scientific Examination and recorded the three rape kits in his possession: the rape kit he received from Dr Gramar (Zambrana) as exhibit 1; the rape kit for Khariseb as exhibit 2; and the rape kit for accused, exhibit 3. This he took to the Scene of Crime Unit and handed it to Warrant Elago who also signed the form.

[29] He also testified that he returned to the room of the accused and his nephew pointed out the room. He then searched the room and found the radio without a cover. Underneath the bed he found the battery and a handle which was inside a container in a hole dug into the ground. He went to the deceased house where he met the deceased's husband who informed him that he missed a cell-phone and a black radio. W/O Dawid showed him the radio he seized from the accused's room and he confirmed that it looks exactly like his radio.

[30] He conceded during cross-examination that he did not investigate whether the *plakkies* fit the accused. He did nothing about the footprints and the knee impression observed by Sgt Nghaalukako. The trouser and some sand samples collected at the scene were sent for forensic examination but this was not handed into evidence. No cell phone analysis was done and no evidence was led as to who the owner of the keys was. A cell phone appears amongst the items photographed in the mortuary titled the "belongings of the deceased". No evidence was adduced as to where this cell phone was found and how it ended up in the mortuary. No investigation regarding the necklace was done and he did not conduct an investigation to see if there were any signs of a break-in.

[31] Ms Tuyenikelao Nakalemo a Forensic Scientists employed by the ministry of safety and security under the National forensic Science Institute testified that she is in charge of screening the cases they receive and after screening they do DNA analysis. She compiled a report during 2013. The report reflects that on 11 May 2012 the following exhibits pertaining to this case were submitted to the National Forensic Science institute by hand of D/Sgt Taukuheke:

(a) Exhibit 1 (11NAAA4502XX) sealed in Forensic evidence bag no NFM-05309; The report reflects that this is the rape kit of the deceased and a photograph depicting a rape kit (box) in a sealed bag. The report further contains a photograph of the contents of the rape kit. The photographs depicts a brown paper bag and clothing of the deceased. In the report she indicated that the vulva swab, the vestibule swab and the cervical Os swab tested positive for semen using an immunochromatographic assay. The clothing of the deceased tested positive for human blood using an immunochromatographic assay.

(b) Exhibit 2 (11NAAA1740XX) sealed in forensic evidence bag NFM08104: This report contains photograph of a rape kit of an accused, a brown paper bag and a underpants. The findings disclosed that nothing of forensic significance was detected on Exhibit 2.

(c) Exhibit 3 (11NAAA1733XX) sealed in a forensic evidence bag no NFM 08290. Photographs depict a rape kit (box) of an accused together with a brown paper bag and short pants. The findings disclose that the clothing tested positive for human blood using immunochromatographic assay. Sufficient amounts of Exhibit 3 remain for further analysis if deemed necessary.

[32] Ms Swart also testified and confirm the contents of her report. Her report reflects that she subjected Easi Collect Samples of both the accused (exhibit 2 and 3) and the vestibule swab from the deceased (exhibit 1) to DNA analysis and the following were her findings;

The sample of all the exhibits yielded sufficient DNA to proceed with STR analysis. Exhibit 2 and 3 resulted in a male profile. Exhibit 3 was designated

as male 1 and Exhibit 2 was designated as male 2. The vestibule sample of exhibit 1 resulted in a mixed profile consistent with having originated from at least 2 individuals of which at least one was male. Male 1 could not be excluded as a possible major contributor to this profile and the minor contributor was of limited forensic significance. From the sperm fraction, a complete male profile was generated and male 1 could not be excluded as a possible contributor to this profile. During cross-examination she testified that her report by implication, automatically excludes male 2.

[33] The accused testified that on the morning of 19 March 2012 Mr Ovia Amon called him to assist in the *mahangu* field. When work was done in the field, he took big scissors to cut the trees in the yard. At the gate there was a zinc plate and whilst cutting the trees, he cut himself on the zinc plate. All this time he was with Mr Amon. He ate bathe and went home afterwards.

[34] At home he washed his clothes and hung it on the washing line. He washed his red t-shirt and his jean. He put on a jean, a white t-shirt, a white cap, Paulo Falcon shoes and a necklace. He then went to the house of Mr Amon again. Mr Amon no longer wanted to go with him but he gave him his phone to be charged. He dropped the phone at the charger in Okanyothi and he went to call Mr Amon's wife. He brought the wife to Mr Amon and returned to Okanyothi *cuca* shops.

[35] He went to the *cuca* shop of Mr Ndunduma where he found Khariseb and the deceased. Khariseb offered to share a glass of *tombo*. At some stage Khariseb touched the breast of the deceased and they started arguing. Ms Nangula Simeon chased them out of the *cuca* shop. He left Khariseb and the deceased at Ms Nangula's *cuca* shop and went to Ms Nelago's *cuca* shop. At 22h00 he went home alone.

[36] At 6 o'clock the next morning his mother woke him up to take his aunt to the hospital. He gave Amon's cell phone to one of the children at the house to deliver it. He went to the hospital and after they were treated, he returned home. He was listening to the radio when the police surrounded the house. They asked him where his room was and he showed them the room. They searched his room and found his red t-shirt hanging over the chair. The police also took five of his trousers which were stacked on top of the chair. He denied that they found the red t-shirt and trousers

under the matress and that it was wet. According to him, he removed the clothes from the washing line when he returned from the *cuca* shop and he placed it over the chair. They did not show him a search warrant nor did they obtain his permission to search the house.

[37] The police who arrested him took him to the scene. At the scene he was asked if he knows to whom the *plakkies* belong and he said no. He confirmed that it was the exact same slippers the state introduced as an exhibit. One of the police officers asked him what he had in his pocket. He told them it was a cell-phone and one of the police officers took it from him. They handcuffed him and loaded him into the police van. At the Ondangwa Police station the police informed him that he was arrested for the murder of the deceased. They took his phone and his money which he had in his pocket.

[38] The accused testified that he bought the phone four months ago and he gave his niece the phone so that she can remove the name the day he bought it. He could not remember the date but he testified that it was before the incident.

[39] He confirmed that, when he was taken to the hospital for the Doctor to take samples of his hair on his head and private parts. The doctor also took the white shorts he was wearing underneath his pants. He was with Khariseb at the time.

[40] He denied that he called Mr Amon the morning of 20 March 2012 to find out what was going on at Okanyothi.

[41] Mr Grushaber correctly pointed out that the State's case is based on circumstantial evidence and that the test for circumstantial evidence is set out in *R v Blom 1939 AD 188 at 2020 – 203* where Watermeyer JA stated as follow:

'In reasoning by inference there are two cardinal rules of logic that cannot be ignored:

- (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
- (2) The proved facts should be such that they exclude every reasonable inference from them save from the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.'

[42] The question for determination is whether the court, on the totality of the evidence, can draw an inference that the accused committed the offences in the indictment.

[43] The accused, according to Martha Hamupanda, was last seen with the deceased. The accused denied that he left the *cuca* shop of Ms Nelao with the deceased. Martha's testimony is to some extent corroborated by the accused that he was carrying a 5 litre container. The accused also admitted having visited the *cuca* shop of Ms Nelao. Ms Nelao (Nelago) confirms Martha's testimony that she was seated outside her *cuca* shop, that the deceased came to her *cuca* shop and that she heard the voice of the accused. Martha was in a position to see him coming and leaving with the deceased. Her inability to recall the clothes he was wearing she ascribes to the poor light outside the *cuca* shop.

[44] The accused on the other hand gave different versions of where he was and who he was with that evening. In his warning statement, he stated that he left the deceased and Mr Khariseb with a lot of people at the *cuca* shop of Ms Nelago at around 22H30. In his plea explanation he stated that when he left the *cuca* shop of Ms Nangula, and the deceased and Khariseb followed him and they all went to Ms Nelago's (Nelao) *cuca* shop. During his testimony he testified that he left Khariseb and the deceased at the *cuca* shop of Ms Nangula and proceeded to Ms Nelao *cuca* shop alone and he later left alone.

[45] Martha's testimony was coherent and corroborated by Ms Nelao, Her version is credible and reliable. The accused denial of the fact that he was last seen with the deceased is false beyond reasonable doubt.

[46] The State submitted that the clothing found in the room of the accused and the *plakkies* found on the scene point to his involvement in the murder. The accused, according to Mr Amon, was wearing a red t-shirt in the morning and not the evening when he went to the *cuca* shops. According to Mr Amon the accused was wearing a greenish t-shirt. No forensic investigation was done on the t-shirt. I do therefore not see the relevance of the red t-shirt. The trouser was not produced as part of the evidence.

[47] The state also placed much reliance on the evidence of Mr Amon who testified that the *plakkies* which were found at the scene are the plakkies he saw the accused wearing on 19 March 2012. Mr Amon was not a credible witness. He failed to immediately alert the police to crucial evidence such as the blood and sand on his phone, the fact that he saw the accused wearing the same *plakkies* the previous day and he was unable to account how he knew about the wire underneath the *plakkie*. It is not safe for the court to rely on his evidence in this regard. The state dismally failed to prove that the *plakkies* belong to the accused or that his clothes were soiled.

[48] I shall not deal with the issues raised in respect of the search without warrant, the handling of the radio and the *plakkies* by the police investigating the case as I accord little or no weight to these exhibits handed into evidence. The only exhibit which has evidential value is the cell-phone in light of the accused's admission that he was in possession of that specific phone.

[49] The state also intimated that the injury which the accused sustained somehow links him to the offence. It is suggested that it was a bite mark but this amounts to pure speculation. The injury was not examined by a medical doctor and there is therefore no evidence as to the nature and cause of this injury. The accused's explanation in this regard is undisputed.

[50] The final evidence adduced by the State which it submits implicates the accused in the commission of the offence of murder and rape is the DNA analysis conducted by Chief Forensic Scientist Ms M Swart. This evidence was vigorously contested by Mr Nsundano, on the basis that the chain of custody was not proven and that the samples obtained from the accused was unconstitutionally obtained.

[51] In *S v Gemeng and Another* 2018 (3) NR 701 (HC) the court held that it was empowered to make an order that bucal swabs be obtained as the results may exonerate the accused persons or may also incriminate them and that it is in the interest of justice for the court to grant the order for the accused persons to provide buccal swabs. The accused when being subjected to an examination to collect evidence may do so voluntarily and failing which the court would be empowered to order that such evidence be obtained. (See also *S v Malumo and Others* 2006 (2) NR 629 (HC)). The accused was aware why he was being examined and I am of the considered view that the examination was lawful.

[52] The defence persistently resisted the handing in of the document titled "Collection of Forensic Evidence" from an adult patient of sexual assault". The document was authored by Dr Zambrana who was not available to testify. The State tried to hand it into evidence by insisting that the accused be kept to his Reply to the State's Pre-Trial Memorandum and the Minutes of the Pre-trial Conference. The accused however, in the Minutes of the Pre-Trial Conference, disputed the National Forensic Science Institute Reports on the basis that there is no proper chain of custody of the exhibits examined.

[53] The State wanted to hand the report in in terms of section 212 (7)(a) of the Criminal Procedure Act, 51 of 1977<sup>1</sup>. The court was not prepared to accept same under the provisions of section 212 (7) (a) and the reasons are contained in a ruling given during the proceedings.

[54] The state was afforded ample opportunity to secure the attendance of this witness. The difficulty the state however experienced is the fact that Dr Zambrana, returned to Cuba. A concerted effort was made to secure the attendance of this witness but with no positive result.

[55] Mr Pienaar, counsel for the State, referred to the evidence of Dr Ricardo as support for a finding that Dr Zambrana completed the form and collected the forensic contents which was placed in the rape kit. The testimony of Dr's Ricardo is strengthened by the fact that the J88 which relate to an examination of the deceased bears the same identification number of the sexual rape kit. Dr Zambrana according to W/O David, handed him a sealed rape kit marked 11NAA4502XX. The J88 bears the same identifying number as the rape kit which was received by W/O Dawid. The proven facts, to my mind is consistent with an inference that Dr Zambrana collected samples from the deceased, that he placed it in a rape kit which he sealed and handed to W/O David. The aforesaid inference is the only reasonable inference to be drawn from the proven facts.

[56] W/O Dawid's placed the rape kit in a forensic bag with had a distinct identifying number. He kept it in his office in a safe which he alone had access to. He

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<sup>1</sup> (7A)(a) Any document purporting to be a medical record prepared by a medical practitioner who treated or observed a person who is a victim of an offence with which the accused in criminal proceedings is charged, is admissible at that proceeding and prima facie proof that the victim concerned suffered the injuries recorded in that document.



completed a form titled Application for Scientific Examination which was handed into evidence. He then handed the form and the exhibits to Warrant Elago who signed the form confirming that he received it. Warrant Elago in turn handed it to Detective Sergeant Taukuheke who hand delivered it to the National Forensic Science Institute. The latter two witnesses confirmed this. The serial numbers of the rape kit, the number of the forensic bag was meticulously recorded in the above form and there was no evidence adduced that the sealed rape kit of the deceased was in any way tampered with. I am satisfied that the state proved that the rape kit marked exhibit 1 on the form contained forensic samples from the deceased who was a victim of sexual assault and that same was sealed when it was handed to W/O David. I am satisfied that it was sealed when it was delivered at the National Forensic Science Institute. The State thus proved the chain of custody of the rape kit of the deceased.

[57] The testimony of Dr Aboh clearly indicates that Male 1 is the collected forensic evidence of the accused. Dr Aboh completed both the J88 and the Collection of Forensic Evidence form in respect of both the accused and Khariseb. The forms pertaining to accused were handed into evidence without objections. He confirmed that the forensic evidence collected was placed in a rape kit, sealed and handed over to W/O Dawid. The number which appear on both the J88 and the form for the collection of forensic evidence from an adult patient of sexual assault is 11NAAA1733. This rape kit was placed in a forensic bag with an identifying number NFM – 08290. This rape kit was marked as Exhibit 3 on the application for scientific examination form.

[58] The easy collect sample subjected to DNA analysis which resulted in a male profile designated as Male 1 was that of the accused. The DNA analysis shows that the DNA of Male 1 i.e. the accused was found in the Vestibule Swab of the deceased

[59] The presence of the accused's DNA in the genitalia of the deceased is circumstantial evidence of the fact that a sexual act was perpetrated. Other circumstantial evidence of sexual assault is the finding of Dr Zambrano that there was haemorrhagic infiltration of the vagina vestibule which led to his conclusion that the deceased was raped. A further factor is the fact that the deceased was found half

naked with her underwear and trousers pulled off. These facts are consistent with an inference that the deceased was subjected to a sexual assault.

[60] The medical evidence clearly shows that a savage and fatal attack was perpetrated on the deceased thus excluding the remote possibility that sexual intercourse was consensual. The accused denial that he was not in the company of the deceased is evidently false. He was seen leaving with the deceased and his DNA was found to have been present in the vestibule of the deceased. The facts are consistent with an inference that the accused was with the deceased that evening and that he committed a sexual act by using physical force which caused the death of the deceased. The only reasonable inference to be drawn from the proven facts is that the accused raped and murdered the deceased. The accused therefore cannot escape a conviction of murder and of having contravened section 2(1)(a) of the Combatting of Rape Act, 8 of 2000 – Rape.

[61] In respect of the offence of housebreaking with the intent to steal and theft the state failed to prove the accused had broken into the house of the deceased. Although there were footprints/toe prints found leading to the house this was never investigated. The door of the house was not damaged at all. No evidence was led to prove that the keys found at the scene belonged to the deceased. The only evidence adduced is that the accused was found in recent possession of a black radio and a cell phone. The cell phone found in possession of the accused is however listed in the offence of robbery. The only other cell phone is the one which was photographed in the mortuary which was labelled, amongst other property, as belonging to the deceased.

[62] The black Eveready radio had no identifying marks. The husband of the deceased testified it was his but was unable to positively identify it as his property. At best he could only say that it resembles his radio. The accused claims that it was his radio. His nephew and niece were not aware that he was able to fix radios but this does not take the State's case any further. The available evidence does not prove beyond reasonable doubt that the radio belonged to the deceased husband.

[63] In light of this conclusion it cannot be said that the State proved beyond reasonable doubt that the accused is guilty of the offence of housebreaking with the intent to steal and theft.

[64] It is alleged that the accused robbed the deceased of a cell phone. The accused admitted that he was in possession of the deceased's husband's phone. He admitted that he wanted his niece to change the name appearing on phone. His version however is that he bought the phone long before the incident. No evidence was adduced that the deceased had the phone on her person that evening. The evidence of his niece proves possession of the phone which was not denied. His niece's testimony that he asked her to change to name the morning after the incident, on its own, does not prove beyond reasonable doubt that he robbed the deceased. An investigation into the cell phone records would have been of assistance to the court but alas no such investigation was done. In light of these factors a conviction of robbery or any of the competent verdicts cannot be sustained.

[65] In the result the following order is made:

1. Count 1 – Murder – The accused is found guilty of murder with direct intent;
2. Count 2 - Robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977 – The accused is found not guilty;
3. Count 3 – Contravening section 2(1)(a) read with sections 1, 2(2), 2(3), 3, 4, 5, 6 and 7 of the Combating of Rape Act, 8 of 2000 – Rape – The accused is found guilty;
4. Housebreaking with intent to steal and theft – The accused is found not guilty.

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M A TOMMASI  
JUDGE

APPEARANCES

For the State:

Mr .Pienaar

Office of the Prosecutor-General

Oshakati

For the Accused:

Mr Grusshabber

Directorate of Legal Aid

Outapi

