

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

CASE NO.: CC 11/2016

In the matter between:

**THE STATE**

v

**BUTA EPAMBA**

**ACCUSED**

**Neutral citation:** *S v Epamba* (CC 11/2016) [2020] NAHCNLD 34 (28 February 2020)

**Coram:** JANUARY J

**Heard:** 03 September 2019 to 06 September 2019, 09 September 2019, 12 September 2019, 04 October 2019, 02 December 2019, 06 December 2019, 21 January 2020

**Delivered:** 28 February 2020

**Flynote:** **Criminal law** – Murder – Self-defence – Requirements for self-defence – Not acted in self-defence – accused aggressor – Direct intent

Criminal Law Murder – Mens rea – Intention – Type of intention – Determination of – Court to consider nature of weapon used, position on body where injury inflicted and force used.

**Summary:** The court reiterated that, in order for an accused to succeed with 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.

Intention is a state of mind which can be inferred from the circumstances of each case. In determining the type of *mens rea* in a murder case, the court will have to look at the nature of the weapon used together with the position on the body where the injury was directed and the force used. The accused did not act in self-defence.

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### ORDER

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In the result:

1. The accused is convicted for murder read with the provisions of the Combating of the Domestic Violence Act, Act 4 of 2003.
2. The matter is postponed to **09 March 2020** at **10h00** for mitigation and aggravation;
3. Accused is remanded in custody.

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### JUDGMENT

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JANUARY J

*Introduction*

[1] The accused is indicted for murder read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003:

'In that on or about 28 August 2013 and at or near Donkerhoek in the district of Rundu the accused did unlawfully and intentionally kill Isabela Epamba, an adult female person.'

[2] The summary of substantial facts reads as follows:

'At the time of the commission of the offence accused and deceased were in a domestic relationship as they were married and sired children together. The two were in an unhappy marriage and were no longer residing together. On 28 August 2013 after accused had made enquiries on deceased's whereabouts he proceeded to her house at Donkerhoek, Rundu where he attacked her with a knife, resulting in her death soon thereafter. Accused fled the scene and attempted to commit suicide which efforts were thwarted by the police.'

[3] The accused is represented by Ms Shailemo and the State by Mr Mudamburi.

[4] The accused pleaded not guilty and alleged in his plea explanation in terms of section 115 of the Criminal Procedure Act, Act 51 of 1977 (the CPA) that the deceased was the aggressor and he acted in self-defence. He further explained in his reply to the States pre-trial memorandum as follows:

'The accused Person will rely on the defence of self-defence. In that the deceased person grabbed the Accused person in (sic) the Accused Person's shirt's collar with her left hand and at the same time attempted to stab the Accused Person with a kitchen knife which was in her right hand. When the Accused Person attempted to prevent the deceased person from stabbing the Accused Person the deceased sustained some stab wounds during the struggle to prevent the deceased person from stabbing the Accused Person the Accused Person twisted the deceased person's right hand, the deceased person slipped while still grabbing the Accused Person in the collars (sic) and the deceased person fell and the Accused Person fell on top of the deceased person and the knife in the deceased person's hand pierced the deceased person's neck leading to the deceased person's death. (sic)

The dispute the Accused Person intends to raise is that the deceased person stabbed herself with a knife that she was holding in her hand by falling on to the knife while at the same time pulling the Accused Person who fell on top of the deceased person.'

### *The evidence*

[5] The accused admitted the following: the identity of the deceased; the court proceedings in the Rundu magistrate's court; the content of a warning statement; an entry in a police occurrence book; an interim protection order for the deceased against the accused; a marriage certificate; that the accused was married to the deceased; the content of a photo plan; that on 28 August 2013 the accused was not residing at the same residence with the deceased.

[6] The first state witness was 14 years old in 2013. She is now 20 years old. Her name is Zazitta. The deceased was her aunt. She knows the accused as he was married to the deceased. At some stage in 2013 the witness started staying with the deceased and accused after she was requested by the deceased. The deceased gave birth to twins and the witness was called to stay with the deceased to assist to take care of the twins.

[7] At some stage the accused moved from the common house due to misunderstandings between him and the deceased. The misunderstandings and arguments were because the deceased used to go out to bars and shebeens and used to return home late. The deceased went to bars and shebeens because the accused had another girlfriend. The arguments were also centred on the fact that the deceased knew about the other girlfriend. When the deceased went out the accused was not in the house. When they both returned home, they started arguing.

[8] On 27 August 2013, the witness, her sister, the twins and the deceased returned from Tsumeb. The accused paid for the transport. He was at the house and stated that he was going back to his workplace, Woerman & Brock, where he was a supervisor.

[9] After a while, the deceased went out again not indicating where she was going to. The accused knocked off from work and came home. He enquired about the whereabouts of the deceased. The witness informed him that she did not know. The accused said that he will look for the deceased. At evening time the accused came back

and enquired if the deceased is back home. Since she was not back yet, the accused went to his place of stay. He however kept calling continuously to enquire if she was back.

[10] Early morning time on 28 August 2013 the witness noticed further miss calls from the accused on her phone. The accused again called to enquire if the deceased was back yet. The witness told him no. The accused thereafter enquired with text messages.

[11] The witness thereafter saw the deceased through a curtain sitting on a chair at a certain Ndeshi's house. The witness did not inform the accused about this.

[12] The deceased came back home later, undressed, went to the kitchen to eat something and came sitting with the witness, her sister and the children. The accused phoned again. The deceased did not speak to him. The witness informed the accused that the deceased was back. Shortly thereafter there was a knock on the door at about 08h00. It was the accused. He went to the room of the deceased. The witness followed and went standing in the door of the deceased's room. The door was open.

[13] She overheard the accused asking the deceased where she overnighted. The accused thereafter, whilst talking, hit the deceased with keys of his place of employment on her body several times. The deceased ran out of the bedroom with a child in the hand. The witness screamed and ran out to seek help crying. Her sister was also outside.

[14] People who heard her crying started approaching and enquired as to what was happening. Amongst the people was the brother of the accused. The witness asked the brother to go look inside the house. The brother however said that he was afraid and unable. The witness ran to the house of a certain Ingrid. She informed Ingrid what she saw, the accused beating the deceased. They both ran to the house of the deceased. On arrival they saw one child Jose outside with his head full of blood.

[15] Ingrid tried to open the front door but it was locked. The accused opened the sitting room window next to the front door. Ingrid asked the accused what was going on. The accused responded that Ingrid should take the children because the mother of the

twins is dead. The accused thereafter disappeared from the window but he was still inside the house.

[16] A certain Jerome arrived with the brother of the accused. They entered the house through the front door. The witness followed. She saw the deceased laying full of blood in the kitchen. There was a bloodstained bread knife on top of a table. She identified a bread knife with a black handle that was handed up in court as an Exhibit. She went to the children's room with Ingrid and noticed an open window. The accused was not in the house. The witness went out crying. The police arrived, entered the house and came out with the body.

[17] Ingrid Katambo is the second state witness. She knows the accused through his wife, the deceased. The witness knows the deceased having stayed in the same location not far from each other.

[18] On 28 August 2013, the first state witness came running and crying to her house. This witness informed her that her aunt is dying. They both ran to the house of the deceased. The witness tried to open the front door but it was locked. She noticed an open window. She went to the open window and talked to the accused to unlock the door. The accused told her that Isabella was deceased.

[19] The accused unlocked the door and took Jose, a child to the door. The witness took the child and entered the house. The first witness Zazitta followed. The witness went to the kitchen and saw the deceased full of blood on the floor. She also saw a big bloodstained knife with a black handle on the floor. The furniture in the kitchen was in disarray.

[20] The witness left the kitchen and went to the bedroom of the deceased. She noticed a big broken bowl and things scattered in the room. The accused jumped through a window in the children's bedroom when the witness entered. The witness could not talk to him.

[21] The witness left the deceased's bedroom and went to pick up the child where she left him. She went out of the house. The witness identified the big knife with a black handle which was handed up in court as exhibit.

[22] Jerome Howard Engelbrecht is residing in Katutura location, Rundu. On 28 August 2013 he was staying in Donkerhoek, Rundu. He knows the accused since 2007 as they were renting the same place of stay. He also knew the deceased as accused was staying in the same place with her in the same room they rented in 2007.

[23] On 28 August 2013, at about 06h30 the accused called the witness and wanted to know if the deceased was with the witness's wife the previous night. The witness informed accused that the deceased was not with his wife. The accused informed the witness that the deceased did not sleep at home and that he was looking for her.

[24] On the same date at about 10h30 the witness was sitting with the accused's brother and one Kabila at a shebeen called Good Hope. He heard a scream and noise from a house across the street. The witness stated that it was the accused's house but it turned out to be the house where the deceased stayed. The accused and the deceased were at the time no longer staying together.

[25] The witness, the accused's brother and Kabila went to the house to find out what happened. The brother first went in and came out shortly thereafter appearing in a state of shock. The witness and Kabila went into the house. The sitting room appeared normal. The witness went to the main bedroom. He testified the bed room was in disorder. He saw a broken glass on the floor and pieces of glass on the bed. In the passage the witness saw another bedroom which he referred to as the children's bedroom also appearing normal. The toilet and shower doors were also open but nothing was abnormal inside both.

[26] He went to the kitchen and saw deceased laying in a pool of blood already dead. He was not for long in the kitchen, exited the house and left. He did not make any other observations. He knows the accused as a soft hearted person. The deceased he described as a person who was straight forward and talkative but he did not have any problems with her.

[27] Ndara Johannes Kabila is residing in Donkerhoek, Rundu. In August 2013 he was residing at the same place. He knows the accused as his uncle. The deceased he knows as his aunt. She was married with the accused in 2013. During August 2013, he was staying in the same yard where the deceased stayed but in a separate house.

[28] On the fateful day he saw a lot of people's cars at the place where he stayed. He decided to go to what he called home and met Zazitta, the first state witness. Zazitta informed the witness what happened. He went to the door and opened it. He observed bloodstains at the entrance on the floor. He heard a child crying in the deceased's bedroom. He went there and found a child covered in blood. He eventually collected the child. The bedroom was in disorder with blood stains all over. He observed pieces of glass and the linen on the bed was stained with blood.

[29] He found the deceased in a pool of blood in the kitchen. He also observed a short knife with a red handle stained with blood on the floor. The witness exited the house with the child and handed it to Zazitta. After some time the police arrived. The witness knows Jerome Engelbrecht and the accused's brother. The name of the child is George.

[30] In cross-examination the witness first stated that the main entrance door was locked but later stated that it was just closed and he does not know if it was locked. Zazitta was crying. The witness denied that he was at a bar/shebeen beforehand. He stated that he was in a state of shock and does not know if his observations are correct.

[31] Immanuel Haikera Kampasi is currently residing in Windhoek and employed by the American Embassy. In 2013 he was a police officer in the Namibian police force attached to the Woman and Child Abuse unit in Rundu. He knows the accused through investigations he did. He knew the deceased as a person who sought help and who opened cases of assault and assault by threat against the accused. Some of the cases were withdrawn at a later stage by the deceased. The witness is also aware of a protection order against the accused. The deceased also later on withdrew the protection order. In most of the cases the deceased wanted to rather discuss matters to resolve issues. One of the cases was set for trial in November 2013 but by then the deceased passed away.



[32] Asser Festus Kavara is a police officer with a rank of Det/sgt in the Serious Crime Unit in the Namibian police and stationed in Rundu. During August 2013 he arrested the accused. He received a phone call about a case of murder. He went to the house in Donkerhoek, Rundu. On arrival he saw a lot of people at the house.

[33] At the entrance door to the sitting room he observed a lot of blood flowing as he stated it. He saw broken glass scattered all over the floor of the sitting room. In the kitchen he saw a body of a woman on the floor in a pool of blood. He also observed a big bloodstained knife with a black handle.

[34] The house has two bedrooms. The witness entered both bedrooms. He observed blood stains from the main bedroom to the kitchen. The main bedroom of the deceased was in disarray. In the main bedroom were pieces of broken glass, a broken bowl or plate and a broken piece of a broom. The bedding were scattered with a bedsheet on the floor and the bedding in disorder. He informed the scene of crime officer.

[35] In the other bedroom chairs were upside down.

[36] On arrival of the scene of crime member, the witness instructed him, Sylvester Kavindja, to attend to the scene. The witness received information that the suspect at that stage was at a certain Fish Market, a supermarket, in Rundu. The witness went there and was directed to a certain room where the accused used to stay. The witness tried to open the door but it was locked. The accused also did not respond to calls and knocks on the door.

[37] A certain Detective Sergeant Mbala was with the witness. They eventually forced the door open. The witness saw the accused having a knife and he was bleeding from the throat. The accused threatened the police officers that if they will come closer he will kill himself. They managed to get the knife from the accused and the witness arrested the accused.

[38] He transported him to Rundu State Hospital for treatment. The accused was admitted. The witness placed guards with the accused where after he drove back to the scene of crime. After the scene was photographed he collected the big knife with the

black handle, measuring 30,5 cm. He also seized the knife that was in possession of the accused. He put both knives in evidence bags and booked them as exhibits in the Pol 7 Register at the police station. The witness identified the big knife with black handle which was received as exhibit 1 as the knife he found in the kitchen. The other knife received as exhibit 2 is the one he found in possession of the accused.

[39] The body of the deceased was transported to the Rundu State Mortuary by Det/Chief Inspector Kakoro. On 29 August 2019 the witness went to the mortuary to inspect the body. He observed open wounds in the face, open cut wounds on the throat, open wounds on the arms and chest.

[40] Kakoro Johannes Hausiku is a member of the Namibian Police at Rundu and attached to the Serious Crime Unit. He now has the rank of Detective Chief Inspector. In August 2013 he was a sergeant. He was the investigator of the case.

[41] On Wednesday 28 August 2013 he received a phone call informing him of a case of murder in Donkerhoek, Rundu. He attended to the report with Cst Siteketa, Cst Mbala and Cst. Mathlalimane. On arrival at the scene there were a lot of people. Amongst them was Sgt Kavara, the previous witness. Sgt Kavara briefed the witness of what happened and directed him to where the body was.

[42] The witness entered the house with other police officers. He observed blood at the main entrance door to the sitting room. Sgt Kavara directed the witness to the kitchen where the witness saw a body of a female lying on the floor in a pool of blood. He observed stab wounds on the head, neck, chest and arms of the body. The throat of the deceased was cut. He also saw a bloodstained kitchen knife with a black handle on top of a table in the kitchen.

[43] The main bedroom door was open and the witness could see that things inside were scattered. He specifically saw that the blanket was disorderly and there was broken glass. He did not see any weapons. There was blood on the floor of the sitting room, main bedroom and kitchen.

[44] The witness testified that they could not find the suspect. He was informed that the suspect fled the scene. The suspect was a well-known person who was married to the deceased.

[45] After the scene of crime officer Sgt Kavindja took photos, the witness was assisted to load the body on a motor vehicle. He transported the body to Rundu State Hospital mortuary. The body did not sustain any further injuries.

[46] The State closed its case after this witness.

[47] The accused testified in his defence. He confirmed that he was staying at Fish Market in Katutura location, Rundu. He was married to the deceased for four years. The marriage was well and healthy in the beginning. After two years, problems started in that the deceased started going out to bars. The accused testified that it happened that they started fighting each other culminating in cases of assault. He remembers that he once was beating her with hands. He denies having stabbed her or threatening her previously.

[48] He testified that he received a phone call on 26 August 2013 that the deceased, the twins, Zazitta and her sister were coming from Tsumeb, The accused was requested to pay for the transport. Upon their arrival in Rundu, they did not remove their luggage but wanted that the transport should be paid.

[49] The accused took a taxi and proceeded to the house from his working place to pay the taxi who brought them. Thereafter he returned to his place of employment at Oceano, a franchise of Woerman & Brock. He continued working until 19h00 where after he went to his flat and slept.

[50] On 27 August 2013 he unlocked the shop and started working. He stated that past 9h00 the deceased came there and asked for his flat's key. She wanted to pack his belongings for him to return to the common home. He told her that the flat was open but that he was not ready to return. He wanted a separation for a small while to first solve the arguments and the drinking issue.

[51] Thereafter the deceased left and went to the accused's flat not far from his working place. The flat was guarded by a security guard. The security guard phoned and

informed the accused that there was a woman at the flat. The accused instructed the security guard not to allow the woman into the flat.

[52] The deceased came back to the accused's working place and enquired why the accused did not want to move out of the flat. He informed her that he would have gone to her after work and discuss the issue. He wanted to talk to her about caring for the children and that the drinking issue that needed to stop. The deceased warned the accused that if he does not move from the flat, he should not call her and not talk to her.

[53] After knocking off from work the accused phoned the deceased for them to discuss the issue. She enquired if the accused packed his things. He responded no. The accused went to deceased house but did not find her. He went back to his flat. At 22h00 the accused went to the bakery to open it. Thereafter again he went back to the flat and tried to call the deceased. She did not answer and only sent text messages enquiring if the accused packed his things.

[54] The accused called Zazitta again to enquire if the deceased was yet back at home. She was not at home. The accused went to sleep.

[55] On 28 August 2013 the accused got up in the morning and went to open the shop. Before 07h00 he called a certain Jerome Engelbrecht and enquired if their wives were together the previous night as they used to go out together. The wives were not together the previous night. The accused started working but periodically called Zazitta to find out if the deceased was back home. Eventually Zazitta confirmed that the deceased was back home but she did not want to talk to accused.

[56] The accused went to the deceased's house. He knocked and entered and was informed that the deceased was in her room. He went to her room and stood at the door. The house consists of two bedrooms, a kitchen, a toilet, shower and sitting room. There is a passage between the kitchen and main bedroom. There are two exit doors to enter or exit the house.

[57] The accused started talking to the deceased enquiring why she wanted him to return to the common home and why she did not answer her telephone. She responded

that the accused did not want to return because he has another girlfriend. She started getting angry. She had a plate of food in her hand. The accused was in possession of a void card and the shops keys.

[58] At some stage the accused hit the plate from deceased possession as it seemed she wanted to hit or throw him with it. The accused urged the deceased to stop the argument. He wanted to go to work. Deceased did not want to listen. Zazitta screamed to the accused not to fight. At the time the deceased was in front of the door of the children's bedroom. The deceased stormed to the kitchen side.

[59] She collected a long knife with a black handle in the kitchen. She came back and grabbed the accused on the T-shirt at the neck. The accused told her to drop the knife whilst he held her on the right wrist of the hand having the knife. The knife's blade was horizontally towards the accused. He removed her left hand from his neck. He was then holding both wrists. The deceased started kicking. They by now were pushing each other. The accused turned her right hand with the knife and they both fell. The accused fell on top of the deceased. The knife stabbed the deceased once in the neck. The deceased requested the accused to hold the wound to stop the bleeding. The blood did not stop. The deceased was on her knees and fell down. The accused called her name to no response.

[60] He testified that at the time Zazitta and Ingrid was outside the house. He saw them outside. He went to collect one of the twins from the cot and the other one who was playing on the bed. He handed the children to Ingrid and told her to take care of the children as their mother was not breathing. Zazitta started screaming and she together with Ingrid took one child each, crossed a street and stood on the other side of it.

[61] The accused again went to the deceased in the kitchen and screamed her name without receiving any response. Ingrid and Zazitta used the sitting room door it seems to enter the house. The accused went to the children's room and jumped outside through the window.

[62] The accused went to his flat and wanted to commit suicide because his wife was dead and he wanted to follow her. He collected a knife from the kitchen and started

cutting his throat. He did not cut deep. The police arrived with the accused's employer. One of the police and his employer advised the accused not to kill himself as the deceased was still alive and they took her to hospital. He threw the knife on the floor. Sgt Kavara took the knife. The accused was taken to Rundu Hospital where the throat wound was stitched.

[63] The accused denied that he was not co-operative. He denied of having locked or unlocking any door at the house of the deceased.

[64] The accused only saw one stab wound to the right side of the deceased's neck. He does not know how the deceased sustained the several other wounds on the head, neck and chest. He speculated that the other wounds may have been sustained during their scuffle. He stated that the plate hit the deceased on the head when he knocked it from her.

[65] In cross-examination, the accused admitted that he had another girlfriend. He admitted and confirmed that he was at the time not staying with the deceased. He confirmed that a case of assault was previously opened by the deceased but eventually withdrawn. His testimony corroborates the State's case on most material aspects.

[66] He differed in relation to the date when deceased and the children arrived from Tsumeb. In relation to the charges opened by the complainant, he could only remember one case of assault with intent to do grievous bodily harm. The other case of assault according to him was withdrawn. He confirmed the protection order. The accused differed with Zazitta on the occasions that he went to the deceased's house or on how many occasions he phoned to enquire whether or not she was back. The accused confirmed that he made phone calls as well to enquire contrary to his answer in the reply to the State's pre-trial memorandum that he made no phone calls. He admitted that the deceased absence made him to become angry. Later on he testified that he did not become angry but was worried because the children were alone at home. He denied that he phoned Zazitta on her phone when eventually the deceased's phone was not answered. He was adamant that he phoned on the deceased phone and maintained that Zazitta was not truthful.

[67] The accused denied that he was in the vicinity of the deceased's house when he was informed that the deceased was back home. The accused denied that when Zazitta opened the door that he was in a hurry to get to the deceased and was breathing fast. He denied of having entered the bedroom where the deceased was. He speculated about the rest of the wounds apart from the neck wound the deceased sustained. The accused first was of the view that some of the wounds on the deceased's head and face could have been caused when he knocked the plate or bowl from her. Later on he speculated that it could have been sustained when the scuffle for the knife ensued. He alleged that the deceased was the aggressor.

[68] The accused later on admitted that some of the wounds on the head and face could not have been sustained by a plate or bowl. The accused denied to have beaten the deceased with keys. I am referring to these discrepancies because most if not all of them were not put to any of the State witnesses. That makes me to conclude that those were afterthoughts. They might sound immaterial when considered in isolation but cumulatively it impacts negatively on the credibility of the accused.

### *Self defence*

[69] The requirements of private defence as stated in the case of *S v Goliath* 1972 (3) SA 1 (A) are as follows: 'In order for the accused to succeed with private 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;
- (c) The attack must be imminent but not yet completed.<sup>1</sup>

I agree with Hoff J (as he then was) where he states in *S v Mwanyekele* and refer with approval to authority reflected hereunder:

'It is axiomatic that the act of defence may not be more harmful than necessary in order to ward off the attack but much depends upon the varying circumstances in each case in deciding the

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<sup>1</sup> *S v Naftali* 1992 NR 299 (HC)

question whether the bounds of self-defence have been exceeded. In the consideration of this question the courts adopt a robust approach.<sup>2</sup>

“In *Ntanjana v Vorster & Minister of Justice* 1950 (4) SA 398 (C) at 406A – D Van Winsen AJ stated the following:

The very objectivity of the test, however, demands that when the Court comes to decide whether there was a necessity to act in self-defence it must place itself in the position of the person claiming to have acted in self-defence and consider all the surrounding factors operating on his mind at the time he acted. The Court must be careful to avoid the role of armchair critic wise after the event, weighing the matter in the secluded security of the Courtroom. . . . Furthermore, in judging the matter it must be ever present to the mind of the judge that, at any rate in the particular circumstances of this case, the person claiming to act in self-defence does so in an emergency, the creation of which is the work of the person unlawfully attacking. The self-defender is accordingly entitled to have extended to him that degree of indulgence usually accorded by law when judging the conduct of a person acting in a situation of imminent peril.”

[70] The version of the accused that the deceased was on her knees after she fell and requested him to hold the wound also is improbable. He further observed only one wound to the neck and cannot explain the wound into the chest and any of the other wounds. The post-mortem report reflects 13 wounds. This in my view makes his contention of self –defence all the more improbable. There is no evidence that someone else was in contact with the deceased after she was injured, it was only the accused. The accused speculated on the so called defensive wounds on the deceased to justify his version of self-defence.

#### *The post-mortem report*

[71] The medico-legal post-mortem examination was conducted by Dr Yuri Yancazov. It was handed up in court by consent. Since Dr Yangazov is no longer available in Namibia the court called Dr Armando Perez to clarify some issues contained in the report.

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<sup>2</sup> 2014 (3) NR 632 at 636 C



[72] The post-mortem examination was conducted on 29 August 2013 at Rundu Hospital mortuary. The deceased was about 34 years of age. The most important post-mortem findings were:

(a) Multiple wounds of the head, neck, and chest, one penetrating into the chest cavity;

(b) Heart injury with hemo-pericardium

(c) The cause of death was a stabbing wound of the chest 2 x 1 cm from the midclavicular line into the fourth intercostal space into the left ventricle 1cm x 0.5 cm of the heart. In the pericardium was 200 ml of blood. The annexure depicting the body reflects two wounds above and below the left eye, two wounds on the neck on the left side, one wound on the throat, one on the chest, one above the collarbone, three wounds on the right side of the face, one wound on each of the inside arms and one on the left index finger. 13 wounds in total are depicted. The wounds on the forearms and finger were described by Dr Perez as defensive wounds.

[73] The photo plan depicts the house where the incident happened, the main bedroom in disarray, blood spots at the door of the main bed room, the kitchen where the body was found, the body with blood and a big blood stain on the wall, a bloodstain with an imprint of a bloodied hand on the kitchen door, the knife used, and photos of the post-mortem examination.

[74] The accused portrayed the deceased as the aggressor. The evidence of Zazitta however indicates that the accused is the one who went to the deceased, enquired where she slept the previous night and started to attack the deceased with keys multiple times.

[75] In my view the defence of self-defence does not make sense. The accused testified that he held the deceased on both wrists. At some stage the accused twisted her wrist of the hand that held the knife. In the process the deceased fell and pulled the accused also to fall. The accused is alleging that the deceased stabbed herself once in the neck. According to the accused he did not attack the deceased and portrays a picture

that he did nothing. I am of the view that for self-defence there has to be a counter attack to an unlawful attack to act in self-defence.

### *Conclusion*

[76] None of the witnesses observed the stabbing. It is only the accused that could testify to it. The State's case is based on circumstantial evidence. This court will have to make inferences from the established facts. It is trite that the court should approach circumstantial evidence as follows:

'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.<sup>3</sup>

[77] I find the accused not to be credible. His version of one wound do not tally with the wounds reflected on the body of the deceased. The accused in cross-examination conceded that the wounds in the face and on the head of the deceased could not have been caused by a bowl or plate that he allegedly hit from the hand(s) of the deceased. Certain aspects of his evidence were not put to witnesses and appears to be afterthought. I find that the accused tailored his evidence to suit his case.

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<sup>3</sup> See: *S v HN* 2010 (2) NR 429 (HC) headnote at 429 C-F

[78] There are minor discrepancies between witnesses' evidence. I find those to be bona fide mistakes. The evidence of Zazitta is credible on all material aspects. She testified that the deceased stormed out of the room to the direction of the kitchen. The impression I got from her evidence was that the deceased was fleeing from the attacks of the accused. Significantly Zazitta talked to the accused not to fight and not the deceased.

[79] Considering the evidence as a whole, in my view the State proved its case beyond reasonable doubt.

[80] Considering the cumulative conduct of the accused, the fact that he wanted to commit suicide, the nature of the weapon used, the position where the wounds were inflicted, the number of times injuries were inflicted, the conduct of the accused before and after the incidents, I conclude that he had direct intent to kill the deceased.

[81] In the result:

1. The accused is convicted for murder read with the provisions of the Combating of the Domestic Violence Act, Act 4 of 2003.
2. The matter is postponed to **09 March 2020** at **10h00** for mitigation and aggravation;
3. Accused is remanded in custody.

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H C JANUARY

JUDGE

## APPEARANCES

FOR THE STATE:

Mr J Mudamburi

Of the Office of the Prosecutor General, Oshakati

FOR THE ACCUSED:

Ms T Shalemo

Of Shalemo &amp; Associates, Ongwediva