

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

JUDGMENT

Case no: CC 9/2019

THE STATE

v

FILLIPUS UUSIKU

ACCUSED

Neutral citation: *S v Uusiku* (CC 9/2019) [2020] NAHCNLD 61 (5 June 2020)

Coram: SALIONGA J

Heard: 3-7 February 2020

Delivered: 5 June 2020

Flynote: Criminal Procedure — Evidence — Failure by accused to testify—Accused not under obligation to testify in his defence—State led direct evidence incriminating accused-

Not appropriate case for accused to safely opt to exercise his right to remain silent--
State

evidence calling for an answer —Failure to answer in the face of the weight of uncontradicted evidence — Court safely concluded evidence was sufficient warranting conviction.

Summary: The accused was indicted on three charges namely, murder, assault with intent to do grievous bodily harm and assault by threatening, read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003. Accused pleaded not guilty on all charges and admitted in terms of section 220 of the Criminal Procedure Act 51 of 1977 the identity of the deceased and that a domestic relationship of a boyfriend and girlfriend was present. The state called several witnesses who directly implicated the accused. At the end of the state case accused elected not to testify and had no witnesses to call. With regard to count one and two it was not disputed that accused was at the deceased's homestead and a fight erupted. Thereafter he was seen assaulting and dragging the deceased to the gravel road where he continuously and unlawfully assaulted the deceased on the head with a pounding stick. That resulted the deceased not being able to move and becoming unconscious. There was further evidence that no further injuries were sustained during transportation. On count three the court heard the evidence of Lydia a single witness. It cautioned itself of the danger of convicting the accused on such evidence. The evidence of a single witness was found to be clear and satisfactory in all material respect. In submission counsel for the defence raised issues of novus actus intervenes and duplication of charges for the first time. In this regard the court rejected counsel submissions. The court held that although accused person has a right to remain silent, not obliged to disclose the basis of his defence during the pre-trial proceedings and/or at the trial itself, the decision to do so, depending on the circumstances of the case, may not be without consequences. The Court further found the case not appropriate for the accused to safely opt to exercise his right to remain silent as evidence adduced was calling for an answer. Therefore accused is found guilty on all charges and convicted accordingly.

ORDER

1. Count one: Guilty of murder with direct intent read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

2. Count two: Guilty of assault with intent to do grievous bodily harm read with the provisions of the Combating of Domestic Violence Act 4 of 2003.
3. Count three: Guilty of assault by threat read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

JUDGMENT

SALIONGA J:

Introduction

[1] The accused was charged before this court on three charges; namely murder, assault with the intent to do grievous bodily harm, and assault by threatening, all aforesaid charges read with the provisions of the Combating of Domestic Violence Act, 2003 (Act 4 of 2003).

[2] The particulars of the offence on count one are that on 31 July 2017 and at or near Ondjokwe village in the district of Ondangwa the accused did unlawfully and intentionally kill Rauha Kamati an adult female by assaulting her with a wooden mahangu pounding stick, while there was a domestic relationship as defined in sections 1 and 3 of the Combating of Domestic Violence Act, Act 4 of 2003 in that the accused was the boyfriend of the deceased.

On a second count of assault with intent to do grievous bodily harm read with the provisions of the Combating of the Domestic Violence Act, Act 4 of 2003 the state alleges that on the same date, at same place and in the same district, the accused did unlawfully and intentionally assault Rauha Kamati by kicking, hitting her with fists, and pulling her hair giving her then and thereby certain wounds, bruises or injuries with intent to do the said Rauha Kamati grievous bodily harm while there was a domestic

relationship as defined in sections 1 and 3 of the Combating of Domestic Violence Act, Act 4 of 2003

The State on count three of assault by threatening read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003 alleges that upon or about the 28 day of July 2017 at or near Ondjokwe village in the district of Ondangwa the said accused did unlawfully and intentionally assault Rauha Kamati by threatening then and there to hit her with a beer bottle, thereby causing the said Rauha Kamati to believe that the said accused intended and had the means forthwith to carry out his threat while there was a domestic relationship as defined in sections 1 and 3 of the Combating of Domestic Violence Act, Act 4 of 2003.

[3] Ms. Boois represented the accused on the instructions of the Directorate of Legal Aid while Mr. Matota appears on behalf of the State.

[4] At the commencement of the trial, accused pleaded not guilty to all the charges and offered no explanation. He puts the State to prove all the elements of the offence. At the same time, accused admitted the identity of the deceased being that of Rauha Kamati and that there was a domestic relationship of boyfriend and girlfriend, which admissions were recorded in terms of section 220 of the Act. This remained his stance throughout the trial however counsel for the accused raised the issues of novus actus intervenes and duplication of convictions in the submissions for the first time.

Background of the case

[5] In summary the evidence was that on the 31 July 2017 Magdaleana Ndeshipewa Amakali received a report from the charge office that there was someone lying next to the gravel road from Okatope location to Ondjokwe village and was seriously beaten. Together with a colleague, she left to the scene of crime at around 20h00.

[6] Upon arrival, she saw the victim lying on her back and was facing the northern direction. She observed her left eye was swollen, was bleeding on the left side of the head and she had an open wound underneath the left breast. She further observed four (4) thick pieces of pounding stick, one (1) was close to her head about 30 cm and the other three (3) were a bit far almost one walking step. The victim was unconscious but was still breathing. She transported the victim to Onyaanya Health Centre using a private vehicle.

[7] At the hospital Amakali remained outside and was later informed that the patient passed on. She went back to the scene of crime where she picked up four (4) pieces of pounding stick allegedly used in the commission of the crimes and a black Samsung phone belonging to the deceased. These items were booked in Pol 7 at Okatope police station. According to Amakali the victim Rauha Kamati (now deceased) did not sustain any further injuries during transportation.

[8] Jason Moses was with his girlfriend Anna on their way from Okatokele cuca around 19h00 in the evening. While walking he heard a scream from south eastern direction. He stood to listen and the scream was like "oh my man leave me out". They walked faster towards the direction where the scream was coming from. They found accused holding the lady and was busy beating her. It was Phillip, the accused who was holding and beating Rauha Kamati the deceased. He (accused) held her with the right hand on the arm while beating her with left hand. Rauha (now deceased) was on her knees and accused was assaulting her on the head with a pounding stick of a half a metre. He could not say how long the beating lasted but could be two minutes after their arrival. Accused assaulted the deceased four times. The witness stood at a distance of about 30-40 metres. The visibility was not really good as it was sunset but was able to see. After the beating accused walked away from the scene leaving behind the weapons he used. Moses only saw two pieces of pounding stick and he did not know the reason why the accused was assaulting her.

[9] Anna Ndeapo Daniel of Ondjokwe village was with Moses Jason on her way from the cuca shop. She testified that while walking she heard a person screaming "Phillip don't kill my child". The scream was coming from the house of Lydia that was about 40-45 meters but was unable to see the person screaming. When she walked further, she saw the accused beating Rauha the deceased with a pounding stick. The deceased was bleeding on the left side of the head. Her version was virtually identical to that of Mr Jason Moses with minor difference' the scream she heard, that the deceased was seated and not on her knees. The deceased only fell after she was beaten. That she saw four pieces of pounding stick. Daniel too did not know why accused assaulted the deceased.

[10] Another witness called to testify was Tomas Ithindi. He stated that on the date in question, he transported the body from Onyaanya clinic to Onandjokwe hospital in a Nissan bakkie/van. The body was identified to him by Marietha Guxas as that of Rauha Kamati. He took the body to Dr Mbombo who certified the person dead. According to this witness the body did not sustain further injuries during transportation.

[11] Marietha Guxas was on duty on 31 July 2017 at Onyaanya clinic when a patient in an unconscious condition was brought on a trolley bed by Amakali and other police officers in a private vehicle. On examination she observed the left eye was swollen and bleeding. The deceased was also bleeding from the nose stream, had fractured the left hand, was bleeding severely from left ear, the head was injured on the left side heamonal corea. The skin on the whole body was pale because of loss of blood. The patient had no oxygen in the body. Both eyes were open but were not reacting to any movement, a sign of severe pain injury. Patient had difficulty breathing. They placed the arm bag on the nose and face to give air to the patient as there was no oxygen at their facility that night. They put her on intravenous to increase the blood in the body. Because the pulse was low they bandaged the head in order to stop the bleeding but there was no change in her condition. With the help of a senior registered nurse, Guxas tried to resuscitate the patient without success. She transferred the patient to Onandjokwe Hospital, called an ambulance but while waiting the patient stopped

breathing at 21h00. She notified the police and the body was taken to Onandjokwe Hospital for certification.

[12] Tobias Ndatitangi Kambishi is the investigating officer. He received a report from constable Amakali and proceeded to the scene of crime. Upon arrival he found a certain Ngolo who took him to where the accused stays. Whilst on the way to the accused's house, Ngolo received a call that the person they were looking for was at a neighbors' house.

[13] They drove to the neighbour's house, the witness introduced himself and his colleagues to the occupants. He asked them if they have not seen the accused (Fillipus). A lady known as Anna Petrus responded that Fillipus had been in their house but just left saying he was going home. The witness was not convinced and started searching the house using a torch. He found the accused alone in a hut and was standing leaning next to the wall. The hut was open and looked like a living room. Ngolo identified the suspect as Fillip the accused person.

[14] The witness explained and warned the accused according to the judge's rules which he understood. Accused admitted to having assaulted his girlfriend. He was free from injury. The witness effected an arrest and took him to Okatope police station.

[15] Tuuliki Immanuel is a vulnerable witness who testified in camera in the presence of her guardian Maria Nangombe. She stated that she knows the accused as Uusiku Fillipus from Ondjokwe village. She also knew Rauha Kamati as an aunty and Lydia Nakale as a grandmother she stays with. Rauha Kamati was staying with them during her lifetime. On Monday 31 July 2017 she was busy cooking mahangu porridge in the house with Rauha Mboshono as she was known. Besides her and Rauha, her grandmother was also at home. The accused person came in the house and greeted them but she could see from his face that he was angry. At that stage Rauha went into the room and he followed her. They were there talking but the witness could not hear what they were talking about. Rauha came out telling her that Fillip (the accused)

wanted to take her phone. The accused later came out from the room and followed her up to the kitchen. Rauha went out of the house passing in between the wire and the sticks of the fence. Then he came back to the witness asking for a torch to go light for his things in Rauha's room but the witness did not have any.

[16] Accused went back inside the room and was standing alone at Rauha's room. He came out and went over the wires and started chasing Rauha. When accused went through the wires Rauha was outside seated on the ground. He got hold of her and started kicking her on the back and on the head. He was holding her and pulling the braids. Rauha was lying on the ground. She could not say how many times accused kicked her it could be three times. Rauha was crying, screaming '*mummy come and help me Phillip was beating me*'. According to Tuuliki her grandmother left the room with a pounding stick and passed through the sticks. She tried to go between them. Lydia hit the accused with a pounding stick once on his right ribs. She was trying to separate them. Thereafter the accused slapped her grandmother once on the left cheek and she fell down.

[17] Then accused took the pounding stick from her grandmother and pulled Rauha up to the gravel road. The witness stated that she followed them and stood at a distance of about 11 steps. She observed Rauha seated on the road with the head leaning on the folded arms and legs and accused was standing. She confirmed that accused was beating the deceased with the pounding stick he took from her grandmother.

[18] It was Tuuliki further testimony that her aunty Rauha was bleeding on the nose and on the left side of the head. The stick Phillip used to beat her with was lying close to her body almost to the head side. She only saw one piece of stick while she was lighting with a torch. Rauha was loaded into a van as she was unable to move. She knew the accused assaulted Rauha because she did not give him her phone. At the time of the incident the accused was staying at Ondjokwe village but did not know how his bag ended up in Rauha's room.

[19] The post-mortem examination performed by doctor Zishumba revealed that the deceased sustained a linear fracture of dome and base of the skull from left to right temporal, a fracture at the base of the skull, brain laceration along the skull fracture and racoon eye. Doctor Zishumba concluded that the cause of death was severe head injury. In his opinion one has to use excessive force in order to break the skull or cause such type of injury. In cross examination he conceded that the same injury could also be caused by a fall.

[20] Frans D. Iyambo was a charge officer stationed at Okatope police station. He was on duty on 31 July 2017 and recorded the exhibits in pol 7. He identified the four pieces of the pounding stick produced in court as the ones he received from constable Amakali. He however confirmed to have received four pieces of pounding stick but entered three. In cross examination the witness conceded to have made an error in recording three pieces instead of four. He explained that when he enter the exhibits in pol 7 on 31 July 2017 the exhibits were not there as they were already booked in on the 30 July 2017.

[21] Immanuel Nakanyala, a charge officer assistant at Okatope police station received the pieces of the pounding stick from constable Amakali i.e. three long and one short pieces of stick. He completed pol 4 copying from pol 7. He could not remember who completed pol 7 but was sure he received four pieces of pounding stick.

[22] The witness confirmed that constable Iyambo worked under his supervision. He explained that when the exhibits were brought in by constable Amakali he instructed Iyambo to receive them. In court he identified the pieces of stick as the ones received in the charge office by Iyambo. In cross examination Nakanyala explained that they were few and busy in the charge office that day. He conceded that it was just human error that Iyambo recorded three pieces of stick, in actual fact four pieces of stick were received.

[23] Epafra Shikonda is a Pol 7 commander administrator for 9 years and had 17 years of experience in the force. He testified that part of his duties was to collect exhibits and personal property from the charge office to the store room for safe keeping. He also booked out exhibits for court. He testified that he collected four pieces of pounding stick for Court and signed them out. In cross examination he admitted that the charge office made a mistake by recording three instead of four pieces of stick.

[24] On 31 July 2017 Hendrick Nelenge was on his way home when he found Phillip busy beating his girlfriend (Rauha Kamati) in the mahangu field about two meters from Lydia's house. Accused was beating her with fists many times on the head. Rauha was lying on the ground. He separated them and proceeded his journey home. Whilst on his way he heard Tuuliki screaming and he returned. By then the deceased was already beaten and accused was leaving the scene. He observed the deceased was bleeding on the face and on the left side of the head. He saw the stick the accused used to beat the deceased which got broken into pieces. He identified the three big and one small pieces of stick in Court as the once he saw at the scene of crime.

[25] Lydia Nakale is the mother of the deceased, residing at Ondjokwe village. She testified that she and Rauha Kamati now deceased went to Okatokele cuca shop, around 16h00 pm on 28 July 2017 to charge the phones. When they reached Freddy's bar at Onankali they found Phillip, the accused before court. Rauha greeted Phillip who replied by asking her "do you know me" and Rauha said "how don't I know you, are you not Phillip?" Accused took a beer bottle and chased Rauha wanting to beat her. Rauha ran away in hiding and remained in hiding until the accused left the place. The deceased only came out of the room after the accused left. The deceased later received a call that Phillip was at the police station and she should go there. The witness accompanied her to the police station and they found accused already at the police station. She remained outside the police station and after a while Rauha now deceased came out saying she did not want Phillip anymore.

[26] With regard to count one and two, Lydia witnessed the beating of her daughter Rauha with fists and later with pounding stick which preceded the death. She further testified that on 31 July 2017 she left her house to the cuca shop at 16:00 hundred hours with a pestle. On her way she met Phillip and they struggled for a pestle in the mahangu field. She fell down and accused took the pestle from her. At that stage Rauha ran away as accused wanted to beat her. Accused got hold of Rauha in the mahangu field and started beating her with the pestle a lot of times. She was at a distance of 20 metres. She observed Rauha, was hurt on the right side of the head, and had an open wound. From there she could not control things anymore and didn't know what happened to a pestle accused took from her. She however went along to Okatope police and later she was taken home. Before the assault that took place on the gravel road she also saw the accused beating Rauha at the house with fist several times. Accused was beating Rauha on the head and pulling her hair. The reason for the assault was because of the phone. She identified the pieces of stick as coming from the pestle accused took from her. The witnesses throughout their evidence made reference to Phillipus or Phillip referring to the accused.

[27] That was the State case and accused at the conclusion of the State case elected to remain silent and had no witness to call.

Submissions by the State

[28] Mr Matota submitted that with regard to count one, all the elements of murder were proven and the only issue the State required to prove was whether Rauha was alive at the time of the killing. According to counsel, there was unchallenged evidence that Lydia and Tuuliki were with Rauha at their residence when accused arrived there. They both saw the accused assaulting the deceased firstly with fists and pulling her hair and later with a wooden pounding stick. Their evidence was corroborated by several witnesses. If the evidence of Lydia and Tuuliki was to be believed, it appears as if the reason for the assault was accused was demanding the cell phone of the deceased.

[29] Matota conceded that the deceased or victim was loaded and transported in a private vehicle a land cruiser. However Constable Amakali testified that she sat with her on the loading box to the clinic and no further injuries were sustained apart from the ones sustained at the scene. Amakali's evidence was corroborated by Constable Tomas Haifeni who transported the body of the deceased from Onyaanya to Onandjokwe hospital. It was further corroborated by Phillipus who transported the body of the deceased from Onandjokwe to Tsumeb. Counsel contends that accused's conduct in continuously assaulting the deceased was unlawful as no defence was advanced, and no evidence controverting the version of the State. Therefore counsel submits that the unlawful assaults perpetrated by the accused on the deceased, the type of weapon used and the sensitive parts of the body the assaults were directed at show that he had necessary intention to kill the deceased. He prays that accused be found guilty and be convicted on a charge of murder with direct intent.

[30] On count two, Matota submitted that this assault preceded the murder. Accused assaulted Rauha with fists and he also pulled her hair. He further submitted that his unlawful assault was witnessed by Nelenge who separate them. The court also heard evidence of Tuuliki which was corroborated by Lydia the mother of the victim. The assault took place in close proximity to her homestead as per the evidence of Tuuliki and Lydia. From photo three and ten, point F in the photo plan compiled by D/W/O Amutenya one could clearly see the braids lying on the ground. Counsel submits that accused was well aware and foresaw the possibility of causing grievous bodily harm to the victim and be found guilty as charged.

[31] With regard to count three. Counsel submitted that although Lydia Nakale was a single witness and her evidence needs to be approached with caution in terms of section 204 of the Criminal Procedure Act 51 of 1977 her evidence was clear and satisfactory in all material respect. It remained uncontradicted and that being the case the court is required to accept and believe her evidence. Accused threatened to assault Rauha with a bottle and she genuinely believed that he had means to carry out his

threat. There was no justification whatsoever for the accused to threaten the deceased with a bottle. If she could not have fled the scene, accused could have assaulted her.

[32] It was further counsel's submission that accused despite tendering a plea of not guilty on all counts did not dispute the evidence tendered by the State. The only evidence the court has to consider was that of the State. He based his argument on the holding of the court in *S v Van Wyk* 1993 NR 426 (SC) at para E).

Submissions by the defence

[33] In her address Ms Boois submitted that the accused is charged with three counts and all counts are read with the provisions of the Combating of the Domestic Violence Act 4 of 2003. She argued that as a matter of practice, duplication should be avoided to prevent multiple convictions. She made reference to *R v Khan & others* 1949 (4) SA 868 (N) which sets out two tests to be applied in determining whether there was duplication of convictions. She further submitted that when applying the evidence test on count one and two in the present case, one cannot be charged with assault and murder if the assault had caused the death of the deceased. It will amount to duplication of convictions. Therefore the court has to disregard the assault in count two and if it is disregarded then the assault on count three automatically is disregarded.

[34] It was further Counsel's submission that the witnesses who witnessed the scene testified that the accused walked away from the scene. According to her the court has to take judicial notice that people who commit murder don't walk away but run from the scene of crime. Further that the intention to murder the deceased was not proven because the court has a situation where Rauha (the deceased) was transported in a private vehicle a land cruiser without a matress which was not meant to transport injured persons, that the victim was loaded in the loading box by people who were not trained medical personnel and that was on a gravel road. In her view all these events coupled with the lack of oxygen at the health centre constitute abnormal *novus actus*

intervenies between the assault perpetrated by the accused on the deceased and her death. It could not be said that the accused who had caused injuries to the deceased could have foreseen that such person was to be transported in a private vehicle and the unavailability of oxygen at the health centre. She therefore submits that there was no legal basis on which the accused could be held liable for Rauha's death and he be found not guilty on all counts.

[35] Mr Matota in his reply on a point of law rightly submitted that section 85 (1) of the CPA provides an objection to a charge before pleading on five grounds. Accused in the instant case did not object to any counts being put to him. The defence could not now lean towards the duplication of charges and *novus actus intervenes* in the submissions as they had a chance to do so at the pleading stage. Counsel submits that the evidence needed to prove the assaults was not necessarily the same to prove murder. Therefore applying the evidence test in *casu*, it could not be correct to say the death of the deceased was caused by assault with perpetrated fists, kicking and pulling deceased's hair in coming to the defence rescue. The evidence led was totally different and the assault on count three was committed two days before the murder charge was committed.

[36] On the *novus actus intervenes* counsel submits that accused should have pleaded same and then opted to remain silent. The defence could not introduce *novus actus intervenes* in the submission and expects the State to prove it. No foundation was laid and the submission should be rejected. When it comes to the judicial notice relied upon by the defence counsel, Matota argues that no authority was provided and there is no legal basis for this court to rely on it and it should be disregarded.

Evaluation of evidence

[37] It is common cause that Tuuliki was with the deceased from the time accused arrived at their house and witnessed the assault throughout the incidents. Lydia the mother of the deceased witnesses the incidents of the 31 July 2017 and she was with the deceased on the day of the first assault. Hendrick Nelenge found the accused

assaulting the deceased and separated them. The court heard evidence that the deceased indeed was taken to the health centre in a private vehicle and died at the clinic. All witnesses who transported the body of the deceased from one point to another maintained that no further injuries were sustained during transportation. Accused exercised his Constitutional right and elected to remain silent at the close of the state case.

[38] The rights to remain silent has always been acknowledged by the courts; more so, since the advent of the Constitution through which a fair trial is guaranteed by Article 12 (1) (f). However, although an accused person has the right to remain silent and is not obliged to disclose the basis of his defence during the pre-trial proceedings and even at the trial itself, the decision to do so, depending on the circumstances of the case, may not without consequences.

[39] The position of our law was properly expounded in the following words by Langa DP in *S v Boesak* 2001 (1) SA 912 when he said:

no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence'. What is stated above is consistent with the remarks of Madala J, writing for Court, in *Osman and Another v Attorney-General, Transvaal*, when he said the following:

"Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilty beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to

'The fact

silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice.” I agree and endorse the legal principles expounded.

[40] Accused did not challenged the evidence adduced except for counsel’s assertion in her submission that an intervening event had broken the chain of causation. I understood counsel’s submission to mean the intervening event aroused from transporting the critically injured person in a private vehicle and the lack of oxygen at the health centre. The court agree with counsel for the state that novus actus intervenes is a defence and should have been pleaded to at the pleading stage. This was never done nor was it put to any State witnesses in cross-examination. The doctor who conducted the post-mortem testified that the cause of death was severe head injuries and according to him the chance of survival was very slim. There was no evidence that Rauha posed any threat to him either.

[41] On the issue of duplication of convictions on count one and two; it is correct that the murder and assault were committed on 31 July 2017, however it was held in *R v Khan & others* 1949 (4) SA 868 (N) at page 870 that ‘it is clear that each of these counts could have been established by evidence which did not establish the others’. The evidence on the assault charge in count two as witnessed by Nelenge established that the accused hit the deceased with fists and pulled her braids in the mahangu field. The manner in which the assault was perpetrated and the object used was quite different as witnessed by eye witnesses. The doctor who performed post mortem concluded that the deceased died of severe head injuries which obviously could not have been caused by fists or pulling the braids. I therefore disagree with counsel for the defence that the accused should not have been charged with the assault of the deceased where “the assault had led to the death of the deceased.” This certainly is not a duplication of convictions.

[42] In the final analysis the circumstances of the present case are that a causal link between the assault and the death of the deceased was sufficiently established. Direct evidence had been led that incriminated the accused and this evidence calls for an

answer. Even though the accused is not obliged to give evidence, it is my humble opinion that this is not an appropriate case where the accused can opt to exercise his right to remain silent. There was no defence or justification apart from counsel for the defence questioning the State witnesses whether the injury could have been caused by a fall and in submitting that accused could not be held liable for the deceased's death because the deceased was transported in a private vehicle. However, the credible evidence of eye witnesses were not displaced in cross-examination. If the evidence of Tuuliki and Lydia were to be believed the only reason for the assault was that accused was demanding the deceased's cell phone. In the face of such unchallenged evidence, the Court safely concluded that the evidence before Court was sufficient, warranting a conviction.

[43] What remains to be decided is whether the accused had direct intend to murder the deceased in this matter. In determining the intention to kill the court has to infer from the circumstances of the assaults inflicted on the deceased. Intention in the form of dolus directus will exist when the accused directing his will towards achieving the prohibited result or towards performing the prohibited act. Accused directed the stick on the sensitive part of the body. The deceased was unconscious from the scene and upon arrival at the health centre, the nurses tried their best to no avail. From the evidence presented and the circumstances surrounding the commission of the offences it could be inferred that the intention in the form of dolus directus was proven.

[44] Conclusion

For the aforesaid reasons I am satisfied that the State proved beyond reasonable doubt that the accused unlawfully assaulted the deceased on 28 and 31 July 2017 and brought about death to the deceased.

[45] In the result the following orders are made

1. Count one: Guilty of murder with direct intent read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

2. Count two: Guilty of assault with intent to do grievous bodily harm read with the provisions of the Combating of Domestic Violence Act 4 of 2003.
3. Count three: Guilty of assault by threat read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

J T SALIONGA

Judge

APPEARANCES

For the State:

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Office of the Prosecutor-General, Oshakati

For the Accused:

Ms B Boois

Of BB Boois Attorneys, Ongwediva

Instructed by Directorate of Legal Aid

