

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case No: CC 10/2017

In the matter between:

THE STATE

v

SHIYAVE NCAMUSHE

ACCUSED

Neutral citation: *S v Ncamushe* (CC 10/2017) [2021] NAHCNLD 33 (31 March 2021)

Coram: SMALL AJ

Heard: 19, 21, 26, 27, 28, 29 October 2020, 6 November 2020, 7 December 2020, 2, 3, 8, 9, 10, 11, 12, 19 February 2021, 1, 15 and 24 March 2021

Delivered: 31 March 2021

Flynote:

Criminal Procedure-Confessions in terms of Section 217 of the Criminal Procedure Act 51 of 1977-Confession taken by a Sergeant in the Namibian Police Force inadmissible per se if not confirmed and reduced to writing in the presence of a magistrate or justice of the peace.

Criminal Procedure-Confessions in terms of Section 217 of the Criminal Procedure Act 51 of 1977-The words 'any offence' in the phrase 'any confession made by any person in relation to the commission of any offence' used in section 217 covers the offence charged, including alternative charges and competent verdicts set out in Chapter 26 of the Act.

Criminal Procedure-Confessions in terms of Section 217 of the Criminal Procedure Act 51 of 1977-The present constitutional dispensation requires a reconsideration of the narrow definition of confession defined in respect of the word as used in the Criminal Procedure and Evidence Act 31 of 1917 and formulated in R v Becker 1929 AD as meaning 'an unequivocal acknowledgment of his guilt, the equivalent of a plea of guilty before a court of law' allows highly incriminating statements to be admitted under the far less stringent requirements prescribed for admissions under section 219A of the Act.

Criminal Procedure-Confessions in terms of Section 217 of the Criminal Procedure Act 51 of 1977-Properly considered the word confession as used in the section should be widened to also capture statements in which the accused acknowledges that he committed or participated in the commission of the offence and admits facts, if scrutinized and pieced together, lead to an inference of guilt on his part.

Criminal Procedure-Inadmissible confessions in terms of Section 217 of the Criminal Procedure Act 51 of 1977-Application to have it admitted under Section 217(3) of the Act-Accused should attempt to elicit a favourable portion in the inadmissible confession for such full statement to be admitted-An attempt to elicit a completely

different favourable version is not enough to have a inadmissible statement admitted under this subsection.

Criminal Procedure-Evidence-Circumstantial Evidence-Evaluation of-Inferences is only possible if the premises are consistent with all the case's proved facts. The facts should also exclude every other reasonable inference. If the facts do not exclude other reasonable inferences, doubt exists whether such a conclusion is correct and that the Court can deduce its existence

Criminal Procedure-Evidence-Circumstantial Evidence- A Court does not take each circumstance separately and give the accused the benefit of any reasonable doubt about the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and only then is the accused entitled to the benefit of any reasonable doubt if it exists

Summary

The accused was charged with murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

The accused resided with the deceased Kauma Nankali Clementine in one home in Hamweyi village in Rundu district. The two of them were in a marital relationship, as is defined in section 1 of the Combating of Domestic Violence Act 4 of 2003.

On the morning of 8 June 2015, the accused was at the home of Adam Sikaki at Lukwatetera village, some distance away from Hamweyi village. The accused accompanied a witness while looking for the cattle. At a certain stage, the witness wanted to relieve himself and handed the shotgun and one shotgun shell to the accused. The other shotgun shell was loaded in the exhibit. When the witness returned the accused had disappeared with the firearm and the loose shotgun shell.

The witnesses followed his footprints of the accused. It led to the house where the deceased was employed and stayed at that stage. When they arrived in Hamweyi

village, the police were on the scene. They did not find the accused in the village or at his house there.

The deceased was shot around 10:00 on 8 June 2015 at the house of Andreas Kambara in Hamweyi village in Rundu district. She died on the same date due to a severe head injury caused by a gunshot.

Accused was arrested on 13 June 2015 at Gongwa village with a bag and the shotgun in his possession.

The Court held that the direct evidence and the circumstantial evidence presented proved the commission of the crime beyond a reasonable doubt and convicted the accused of murder with direct intent read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

ORDER

1. The accused is convicted of Murder with direct intent to kill read with the provisions of the Combating of Domestic Violence Act, 4 of 2003.
2. This matter is postponed to **19-20 April 2021** at **10h00** for witnesses in mitigation and aggravation including submissions prior to sentence.
3. The accused is remanded in custody.
4. The Office of the Registrar is directed to subpoena the following witnesses on behalf of the accused for the aforesaid dates;
 1. Mukuve Serlima of Likwaterera village,
 2. Michael Jakara Tame of Likwaterera village
 3. Tame Sondaha Willem of Likwaterera village; and
 4. Magdalena Mukulilo of Likwaterera village.

JUDGMENT

SMALL AJ

Introduction

[1] The accused is charged with murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

[2] The State formulated the following charge against the accused: 'In that upon or about the 8th of June 2015 and at or near Hamweyi Village in the district of Rundu the accused did unlawfully and intentionally kill Kauma Nankali by shooting her with [a] shotgun.'

[3] The State is represented by Mr Gaweseb and at the time of the plea the accused was represented by Mr. Shipila on instructions of the directorate of legal aid.

[4] When Mr Gaweseb put the murder charge to the accused on 26 October 2020, he pleaded guilty. Mr Shipila placed on record that the plea was not in accordance with his instructions. On the invitation of the Court, he read the plea explanation into the record. The plea explanation indicated that the accused wishes to tender a plea of not guilty of murder, but guilty of culpable homicide.

[5] The plea explanation was interpreted to the accused, but he denied giving counsel such instructions. Mr Shipila subsequently withdrew, and the accused indicated that he knew he is entitled to be defended by a lawyer but that he will conduct his own defence.

[6] When the Court proceeded to question him in terms of section 112(1) (b) of the Criminal Procedure Act 51 of 1977, the accused indicated that he wants to plead not guilty. The Court subsequently entered a plea of not guilty into the record.¹ When the Court attempted to establish the basis of his plea of not guilty ², the accused indicated that he does not know the deceased, was unaware of her death

¹ Section 113 of the Criminal Procedure Act, 1977.

² Section 115 of the Criminal Procedure Act, 51 of 1977

and was in jail on the day of the alleged incident. He further alleged that he was arrested for possession of counterfeit cigarettes.

[7] The Court once again explained his right to be legally represented and to apply for legal aid. He, however, indicated that he wishes to proceed with the case notwithstanding and conduct his own defence.

[8] The trial continued with the accused representing himself. On 29 October 2020, when the Court again, as it did each day since the matter commenced, enquired from the accused whether he still wants to conduct his own defence, he indicated that he wanted a lawyer. The Court adjourned to facilitate this. Mr Shipila, the lawyer, locally employed by the Directorate of Legal Aid, assisted the Court. The matter was adjourned to 6 November 2020 to facilitate the accused's new application for legal aid. On this date, the Directorate in writing indicated that as it was the fourth legal aid lawyer that withdrew from the case, they were no longer prepared to instruct a lawyer to appear on the accused's behalf. The matter was postponed to 7 December 2020 to continue the trial, whereafter it was adjourned to 2 February 2021.

[9] When the matter was called on 2 February 2021, and as the accused had to continue cross-examining the witness Adam Sikaki, the court instructed the interpreter to translate the witness's evidence up to then to the accused. The matter was for this purpose postponed to 3 February 2021.

Summary of the viva voce evidence

[10] Fourteen witnesses gave evidence in the State's case. For purposes of the summary, they are divided into four groups. Two witnesses were from Hamweyi village. Three witnesses were from Lukwatetera village. Two other witnesses were from Gongwa village. The rest of the witnesses making up the fourth group were police officers and the doctor who conducted the post-mortem examination.

[11] The witnesses from Hamweyi village were Andreas Kambara and Helena Kambara Mbava. Andreas is Ms Mbawa's son, and they reside at one homestead.

They knew the accused, who used to herd cattle for the principal and his wife, the deceased Nangali Clemintine Kauma, for about three months since the pair came to the Hamweyi village from Lukwatetera village. The deceased worked as a domestic worker in their household for about three weeks before the incident. The accused and the deceased had their own house about one hundred meters from where the two witnesses had their residence. From about a week before the incident, the deceased and her child, the accused's stepson, stayed at the witnesses' home and no longer resided with the accused.

[12] On the day of the incident, 8 June 2015, Andreas left his home, and so did his mother. The deceased remained at work. About an hour after leaving at 10:00, both witnesses heard a shot coming from their home's direction. They ran there and found the deceased lying on the ground in a pool of blood. They saw footprints entering the yard at one entrance and leaving through another. They both suspected the accused, although they did not see him in the vicinity on the fateful day. Andreas phoned the police, and they arrived at about 14:00 on the same date. Both witnesses identified the deceased on photograph 7 of Exhibit D in a photo plan completed by Constable Mbangu.

[13] The three witnesses from Lukwatetera village were Mukonda Thomas Likuwa, Johannes Sikaki and Adam Sikaki. Mr Likuwa, also known as Pastor, employed Johannes Sikaki as his cattle herder. Adam Sikaki is the son of Johannes. Mr Likuwa, who is the licenced owner of a Baikal 12-gauge shotgun serial number 12007712 under firearm licence SH037612B5058, did not know the accused. The State handed a copy of the firearm licence into Court as Exhibit C through this witness. Both Johannes and Adam, however, knew the accused since childhood. The accused grew up with Adam, and Johannes raised the accused. Johannes explained that the marital relationship between the accused and the deceased started in Likwaterera village.

[14] On 8 June 2015 Mr Likuwa handed his shotgun, Exhibit 1, to Johannes with two shotgun shells to take with him when searching for the cattle. Johannes handed the same shotgun and two shotgun shells to Adam as he was the one that would

have searched for the cattle. Adam found the accused sitting at his fire. Accused asked Adam if he could accompany Adam on his search. Adam agreed, and the two set off. After a while. Adam wanted to relieve himself and handed the shotgun and one shotgun shell to the accused. The other shell was in the shotgun. When he returned, the accused was gone. He called the accused several times but received no reply. He went back and reported this to his father. They both went to Mr Mukonda's house, but he was not at home at that stage.

[15] After they reported the loss to a neighbour, they went to the location where Adam handed the shotgun and shell to the accused. From there, they followed the footprints of the accused. Sometimes he walked, and sometimes he ran. The footprints led straight to Hamweyi village, where they found the police coming from the front following outgoing footprints from the house where the deceased was killed. They went to the accused house, but he was not there. Johannes explained that as he raised the accused, he knows his footprints as the accused would know his. He is a hunter from their community and a good tracker. He is part of a San community, and they are hunters and gatherers. Their survival depends on them to be able to track people and game.

[16] Livhora Benedictus Hausiku and Tadeus Shikindo Hausiku were the two witnesses from Gongwa village. This village is around thirty kilometres from Hamweyi village. Livhora is the elder brother of Tadeus. They have known the accused for about ten years. On 9 June 2015, a meeting was held by the community of Likwaterera. The head person told them that the accused killed his wife and that the police were looking for him. She urged the community to keep a lookout for the accused and contact the police if he is seen.

[17] Four or five days later, the accused arrived in Gongwa village. He met with the witnesses Livhora Benedictus Hausiku and Tadeus Shikindo Hausiku and asked for a cigarette. He had a bag and the shotgun Exhibit 1 with him. The witnesses with one Petrus caught the accused and tied him up. Tadeus secured the shotgun. There was no shotgun shell inside the gun at this stage. When Tadeus asked the accused if he knows why he is being tied up, the accused said he knew it was because he

killed his wife. It needs to be pointed out here that what was originally interpreted was that the accused said he murdered his wife. On a question by the Court, it became apparent that in the vernacular used at the time, the same word describes killing or murdering someone. Tadeus contacted the councillor of the area with the news of the accused's detention by the community. The police arrived two to three hours later and took the accused into custody. The police also took the shotgun. The accused in cross-examination did not deny that he had Exhibit 1 with him or that he said the words attributed to him. He only asked if these words were recorded, or his arrest photographed.

[18] Dr Kuddakwashe Nyumatukwa conducted the post-mortem examination on the deceased's body on 12 June 2015 after the body was identified to him as that of the deceased by Alwendo Philipus. His chief post-mortem findings were a gunshot wound with an entry wound on the right side of the neck and the exit below the mandible, destroying the entire left mandible. The cause of death was severe head injury due to a gunshot.

[19] Warrant Officer Nicolaus Kavanga Mbangu from the Scene of Crime Unit visited the Hamweyi village scene on 8 June 2015 and compiled a photo plan and key. The photo plan contained eight photographs and was handed in as Exhibit D. The key to it explains each photograph. Photo 2 indicated where the suspect allegedly entered the homestead, while photo 8 shows where he reportedly left the homestead. Photograph 7 shows the deceased with the exit wound.

[20] Sergeant Richard Rudolf Uatema was part of the police officers who attended the scene on 8 June 2015. They tracked the footprints of the suspect up to Lukwatetera village. On 13 June 2015, they received a report that the accused has been caught in a neighbouring village. They went there and arrested the accused and confiscated the firearm. The firearm was the shotgun Exhibit 1.

[21] Sergeant Phillipus Alwendo is a police officer stationed at Rundu. He assists the Doctor as a Forensic Pathology Technician at the Rundu mortuary during post-

mortem examinations. He also did so in this matter. The State handed in Exhibits E and F through this witness.

[22] Martin Aukongo is a police officer who transported the deceased's body from Hamweyi village to Rundu Mortuary. The body suffered no further injuries during the journey and transport. The State handed Exhibit G in through this witness.

[23] Sergeant Regina Mwambwa was the investigating officer of this matter. In 2015 she was still employed by the Namibian Police and stationed at the Serious Crime Unit in Rundu. She attended the crime scene on 8 June 2015. The State further handed Exhibits H1 and H2, identifying the deceased's corpse, in through this witness. The suspect was not on the scene. The police requested the community to be on the lookout for the accused. On 13 June 2015, they went to another village after being informed that the accused was apprehended. They found the accused tied up and arrested him. She took him, and the shotgun found with him to Rundu Police Station. Later that day, she interviewed him. Sergeant Njamba translated from Rukwangali to English and vice versa during the interview Sergeant Mwambwa had with the accused on 13 June 2015. I will return to the evidence of the investigating officer hereunder.

[24] That concluded the evidence by the State. After his rights were explained to him, the accused elected not to give evidence and closed his case. I will return to this aspect when I evaluate the evidence presented.

[25] Before I deal with the applicable legal principles and evaluate the evidence presented, I deem it appropriate to provide the reasons for two rulings I delivered during the trial.

Reasons for Rulings on 11 and 12 February 2021 in respect of the Warning Statement

[26] On 11 February 2021, the Court ruled the warning statement by the accused before the investigating officer inadmissible as evidence in the main trial. On 12

February 2021 I dismissed the application by the State to have the warning statement of the accused admitted under section 217(3) of the Criminal Procedure Act 51 of 1977. I indicated that I would provide the reasons for the aforesaid decisions together with judgement on the merits. What follows are the reasons.

[27] During the main trial, while Sergeant Regina Mwambwa gave evidence, Mr Gaweseb commenced leading her evidence regarding a warning statement by the accused. She allegedly recorded it on 13 June 2015. The State handed the Court a courtesy copy of the warning statement to follow the witness's evidence.

[28] I perused the statement part thereof before the witness could get to it and asked the prosecutor whether the statement does not amount to a confession. If it were, it would be inadmissible due to the proviso in section 217 (1)(a) of the Criminal Procedure Act, 51 of 1977. He submitted that the State would submit that the statement, at best, contained admissions and did not amount to a confession.

[29] As the accused was undefended, I considered it appropriate to order a trial-within-a-trial to decide the warning statement's admissibility rather than it being admitted into evidence in the main trial and possibly prejudice him.

[30] During the trial-within-a-trial, the Sergeant read the content of the accused's statement into the record. The accused made the statement after Sergeant Mwambwa informed him that she was investigating a case of murder read with the Combating of Domestic Violence Act³ allegedly committed on 8 June 2015 at Hamweyi village against him.

[31] It is clear from a reading of the proviso to section 217 of the Criminal Procedure Act, 1977 contained in subsection 217(1)(a)⁴ thereof, that a confession

³ Act 4 of 2003

⁴ 'Provided-

(a) that a confession made to a peace officer, other than a magistrate or justice, or, in the case of a peace officer referred to in section 334, a confession made to such peace officer which relates to an offence with reference to which such peace officer is authorized to exercise any power conferred upon him under that section, shall not be admissible in evidence unless confirmed and reduced to writing in

'made to a peace officer, other than a magistrate or justice' 'shall not be admissible in evidence unless confirmed and reduced to writing in the presence of a magistrate or justice'.

[32] Sergeant Mwambwa, a non-commissioned officer in the Namibian Police, is in terms of the definition clause of the Criminal Procedure Act, 1977 as a police official, is a peace officer for purposes of section 217. She, however, is not a magistrate or a justice⁵ for purposes of the section. If she takes a confession, it must be confirmed and reduced to writing in the presence of a magistrate or justice before it becomes admissible. If it is not so confirmed and reduced, the confession is inadmissible per se.⁶ Justice here means a person who is a justice of the peace under the Justices of Peace and Commissioners of Oaths Act 16 of 1963. In terms of Section 4 read with the First Schedule, only commissioned officers of the Namibian Police are ex officio justices of the peace. The sergeant is however entitled to take an admission under section 219A of the Criminal Procedure Act, 1977.

[33] Whenever it is necessary to determine whether a particular statement is an admission or a confession, it is essential to make the determination as soon as possible since the requirements for a statement's admissibility are dependent upon the nature of the account in question. The general rule is that these requirements must be met before the statement becomes admissible. Either as a confession or merely as admissions.

[34] More requirements are laid down for a confession than for admissions. It is also important to note that compliance with a particular statutory proviso is essential for the admissibility of certain types of confessions (i.e. those made to peace officers). Such compliance is not necessary in the case of an admission. Before a prosecutor or a presiding officer can consider what requirements must be complied with or what procedure must be followed in presenting the evidence, it is of the

the presence of a magistrate or justice;'

⁵ Justice here means a person who is a justice of peace under the Justices of Peace and Commissioners of Oaths Act 16 of 1963. In terms of Section 4 read with the First Schedule only commissioned officers of the Namibian Police are ex officio justices of peace.

⁶ *S v Njiva and Another* 2017 (1) SACR 395 (ECM) paragraph 28

utmost importance that the statement's nature is determined first. The entire proceedings can be affected by such determination.

[35] In deciding whether the aforesaid statement amounted to a confession referred to in section 217(1) of the Criminal Procedure Act, 51 of 1977 it is important to understand that the Courts has for many years followed the definition of a confession as given in in *R v Becker*⁷ as meaning 'an unequivocal acknowledgement of guilt, the equivalent of a plea of guilty before a court of law'.⁸ Mr Gaweseb also relied on this definition in the *Becker* case and argued that the aforesaid statement does not comply with this definition.

[36] The Namibian Supreme Court in *S v Engelbrecht*⁹ referred to the definition in *R v Becker* (supra) of a confession and found that on such definition, the statement in the appeal did not amount to a confession.

[37] Before I proceed, I consider it important to first establish what offences are covered under the words 'any confession made by any person in relation to the commission of any offence' as used in section 217 of the Criminal Procedure Act 1977. The use of the words 'any offence' clearly must cover the offence charged, including alternative charges and competent verdicts set out in Chapter 26 of the Act.¹⁰ A confession on any another charge will simply not be relevant enough to be

⁷ *R v Becker* 1929 AD 167 at 171-172

⁸ *S v Molimi* 2008 (2) SACR 76 (CC) para 28. 'There is no definition of 'confession' in the statute. However, courts define 'confession' narrowly as 'an unequivocal acknowledgment of guilt, the equivalent of a plea of guilty before a court of law' in footnote 51 quoting *R v Becker* 1929 AD 167 at 171. It is, according to Du Toit et al Commentary on the Criminal Procedure Act Service Issue 37, 2007 (Juta, Cape Town) at 24-51, an extra-curial admission of all the elements of the offence charged.

⁹ 2017 (3) NR 912 (SC) in paragraph 22

¹⁰ *S v Gcaba* 1965 (4) SA 325 (N) at 330 and *R v Kant* 1933 WLD 128 at 129 as quoted in *S v Lalamini* 1981(1) SA 999 (V) at 1001B-C

admissible.¹¹ On a charge of murder, it will thus include attempted murder¹², being an accessory after the fact to such murder¹³, and the competent verdicts set out under section 258.¹⁴ The crimes of culpable homicide, assault with the intent to do grievous bodily harm, common assault and pointing of a firearm are prima facie applicable in the matter under consideration.

[38] If the *R v Becker* definition is used, the accused's statement must be unequivocal in its acknowledgement that he is guilty of the crime in question or any other offence, as I have said, which might be a competent verdict on the charge.¹⁵ Or an unequivocal acknowledgement that he is guilty of one of the crimes he is charged with or an alternative charge on such a charge.¹⁶

¹¹ Section 210 of the Criminal Procedure Act, 1977: 'No evidence as to any fact, matter or thing shall be admissible which is irrelevant or immaterial and which cannot conduce to prove or disprove any point or fact at issue in criminal proceedings.'

¹² Section 256 of the Criminal Procedure Act, 51 of 1977

¹³ Section 257 of the Criminal Procedure Act, 51 of 1977

¹⁴ If the evidence on a charge of murder or attempted murder does not prove the offence of murder or, as the case may be, attempted murder, but-

- (a) the offence of culpable homicide;
- (b) the offence of assault with intent to do grievous bodily harm;
- (c) the offence of robbery;
- (d) in a case relating to a child, the offence of exposing an infant, whether under a statute or at common law, or the offence of disposing of the body of a child, in contravention of section 113 of the General Law Amendment Act, 1935 (Act 46 of 1935), with intent to conceal the fact of its birth;
- (e) the offence of common assault;
- (f) the offence of public violence; or
- (g) the offence of pointing a fire-arm, air-gun or air-pistol in contravention of any law, the accused may be found guilty of the offence so proved.

¹⁵ *S v Mbatha* 1985 (2) SA 26 (D) 29E-D

¹⁶ *S v Mjoli and Another* 1980 (3) SA 172 (D) at 175A where the accused confessed to robbery but not on murder and were charged with both charges; *S v Mhlangu* 1972 (3) SA 679 (N) at 682A – B for a statement that was a confession on the alternative but not the main charge.

[39] However, applying the required objective standard to ascertain if a statement is a confession does not mean that all subjective factors must be ignored. The court will sometimes take the state of mind or intention of the person, making the statement into account as one of the surrounding circumstances from which it can ascertain the objective meaning of his statement. In many cases, the precise meaning of a statement can only be shown against the background of the prevailing circumstances, particularly in an oral statement consisting only of a few words. The surrounding circumstances can be considered if they put the statement in its proper setting and helps to ascertain the true meaning of the words used.¹⁷

[40] The total statement must also be considered to decide whether it amounts to a confession.¹⁸ A Court should not only consider what appears in the statement, but also that which is implied therein. Suppose the statement's content does not expressly admit all the offence elements or exclude all grounds of defence but does so by necessary implication. In that case, the statement amounts to a confession. Whether a statement, either standing alone or in conjunction with such surrounding circumstances as can lawfully be considered, is capable of a necessary implication will have to be determined according to the merits of each case.¹⁹

[41] In *S v Mofokeng*²⁰ Eloff J referred to *Hoffmann and Zeffert*²¹ where the learned authors pointed out:

‘The logical conclusion from these cases is that, in crimes which require mens rea, an

¹⁷ *S v Yende* 1987 (3) SA 367 (A) at 374C-D

¹⁸ *S v Yende* 1987 (3) SA 367 (A) at 375B-C quoting *S v Msweli* 1980 (3) SA 1161 (D) at 1163F; *S v Motloung* 1970 (3) SA 547 (T) at 549B; *S v Mhlangu* 1972 (3) SA 679 (N) at 682A – B and *S v Potgieter* 1983 (4) SA 270 (N) at 274A

¹⁹ *S v Yende* 1987 (3) SA 367 (A) at 375C-D referring to *S v Msweli* 1980 (3) SA 1161 (D) at 1164B and ***S v Mbatha*** 1985 (2) SA 26 (D) at 29F

²⁰ *S v Mofokeng* 1982 (4) SA 147 (T) at 149B; See also *S v Engelbrecht* 2017 (3) NR 912 (SC) paragraph 22

²¹ *South African Law of Evidence* 3 ed at p181.

account by the accused of his actions, however detailed and damning, will hardly ever amount to a confession (unless) there be something in the surrounding circumstances to indicate that what was said amounted to an unequivocal admission of guilt because it would always be possible to give some further explanation which would negative the mental intent.²²

This provides one of the reasons why courts generally are reluctant to find that even highly incriminating statements amount to confessions using the definition in *R v Becker*.

[42] I genuinely doubt that this narrow definition of a confession dutifully followed by our Courts up to now, should be applied in respect of the word confession as used in section 217 of the Criminal Procedure Act, 1977. A constitutional dispensation and the constitutional fair trial provisions require that constitutional rights like the right not to incriminate oneself are given the best statutory protection possible. A narrow definition, developed under a criminal procedure process vastly different from the present one, simply does not do this. What is meant by a confession in section 217 requires a proper interpretation without necessarily considering oneself bound by a definition developed almost one hundred years back under a different Act and circumstances.

[43] The word confession's narrow definition allows highly incriminating statements by accused persons to be allowed into evidence as admissions under section 219A²³. This section requires far less stringent prerequisites than section 217²⁴ for

²² This was also alluded to by the Namibian Supreme Court in *S v Engelbrecht* 2017 (3) NR 912 (SC) in paragraph 22

²³ Section 219A in essence reiterates the common law requiring that the admission is admissible when it is found to be voluntarily made. *S v Mpetha and Others* (2) 1982 (2) SA 406 (C) at 414F-H concluded that 'voluntarily' where it is used in s 219A means that that the accused's will was not swayed by external impulses, improperly brought to bear upon it, which are calculated to negative the apparent freedom of volition. See also *S v Schultz and Another* 1989 (1) SA 465 (T) at 467D-E

²⁴ Generally, '[t]he notions "freely", "voluntarily", "sound and sober senses" and "undue influence" with which the proviso operates are plainly concepts eiusdem generis and relate to factors which are calculated to negative the exercise of free will.' It is a question of fact to establish in the particular instance if the confessor's will was swayed by external impulses, improperly brought to bear upon it, which are calculated to negative the apparent freedom of volition, or not. *R v Kuzwayo* 1949 (3) SA

admitting such evidence. This narrow definition of the word confession for example enables a highly incriminating statement that might contain four of five crime elements to be treated as admissions.

[44] When one peruses *R v Becker*, the Court considered the meaning of the word confession used in section 273 of the Criminal Procedure and Evidence Act 31 of 1917. When it had to decide what 'confession of the commission of an offence' in that section meant, it concluded that it could only mean that 'the accused acknowledges that he committed or participated in the commission of the offence'. Only after considering the word confession as used in sections 79, 159, and 227 of the relevant Act, did the Court conclude that the word confession used in the Act and, thus, in section 273, must mean an 'unequivocal acknowledgement of guilt.' When it further considered section 286 of the Act, it finally concluded that the word confession as used in it is 'an unequivocal acknowledgment of his guilt, the equivalent of a plea of guilty before a court of law'.

[45] The Court accepted that although the accused's admission of facts, if scrutinized and pieced together, leads to an inference of guilt, it might be considered a confession in the abstract. Still, it found that this was not a confession within the meaning of the Act.

761 (A) at 768

In respect of the 'Freely and Voluntarily' requirement see footnote 20; See also *S v Yolelo* 1981 (1) SA 1002 (A) 1009C-D

The sound and sober senses requirement is satisfied if the accused knew and appreciated what he was saying. *R v Blyth* 1940 AD 355 at p361; *R v Mtabela* 1958 (1) SA 264 (A) at 267D and *S v Masia* 1962 (2) SA 541 (A) 543E—H

'Without undue influence does not mean no influence. Mere influencing is not enough. The criterion is the improper bending, influencing, swaying, or affecting of the will, not its total elimination as a freely operating entity. Undue influence is wider than freely and voluntarily. In essence the following question should be asked: 'Was the inducement such that there was any fair risk of a false confession?' *S v Mpetsha and Others* (2) 1983 (1) SA 576 © at 581F; *R v Zwane* 1950 (3) SA 717 (O) at 720H; *S v Mahlala and Others* 1967 (2) SA 401 (W) 406G-H; *S v Pietersen and Others* 1987 (4) SA 98 (C) 100G-J; *S v Kearney* 1964 (2) SA 495 (A) 498I; *R v Afrika* 1949 (3) SA 627 (O) at 634; *S v Tjiho* (1) 1990 NR 242 (HC) at 247E-F'

[46] As alluded to before this definition of a confession related to the Criminal Procedure and Evidence Act 31 of 1917 and was given in 1928. Although the definition mentioned earlier²⁵ has been called a self-contained statutory definition of unquestionable authority²⁶, I believe the Court must test it against the present provisions of section 217 the Criminal Procedure Act, 1977.

[47] The provisions of section 217 of the Criminal Procedure Act 51 of 1977 fall to be interpreted in terms of what we refer to as the modern interpretational approach, with the guidelines arising from various recent authorities adopted both in South Africa and Namibia. These provisions' meaning falls to be determined by the grammar used, the background and contextual circumstances, the interaction between the different sections, and the purpose behind these provisions.

[48] Interpretation is no longer a process that occurs in stages but is essentially one unitary exercise. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document. All this is consistent with the emerging trend in statutory construction. The words of the section provide the starting point and are considered in the light of their context, the apparent purpose of the provision and any relevant background material.²⁷ One should avoid 'excessive peering at the language to be interpreted without sufficient attention to the contextual scene'.²⁸

[49] Interpretation is the process of attributing meaning to the words used in legislation while considering the context provided by reading the particular provision or provisions in the light of the Act as a whole and the circumstances attendant upon its coming into existence. The court considers the language used, including the ordinary rules of grammar and syntax and the context in which the provision

²⁵ 'an unequivocal acknowledgment of his guilt, the equivalent of a plea of guilty before a court of law'

²⁶ *S v Njiva and Another* 2017 (1) SACR 395 (ECM) paragraph 21

²⁷ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) paragraph 17-18;

²⁸ *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another* 1950 (4) SA 653 (A) at 664G – H

appears. Where more than one meaning is possible, each possibility must be weighed by the court. The process is objective, not subjective. A sensible meaning must be preferred above one that undermines the apparent purpose of the provision. Judges must guard against the temptation to substitute what they regard as reasonable, or sensible, for the words used. To do so regarding a statute is to cross the divide between interpretation and legislation. The inevitable point of departure is the language of the provision itself, read in context and regarding the purpose of the provision and the background to the Act's preparation and production.²⁹

[50] In South Africa it was stated that this means that all statutes must be interpreted through the prism of the Bill of Rights. All law-making authority must be exercised in accordance with the Constitution.³⁰ Although Namibia does not have a section 39(2) as the South African Constitution stating '[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights', it seems as if Namibian Courts will, or should, take the same approach on the basis that 'the Constitution is the source of all law and must take precedence over other laws which are subordinate to it.'³¹ The Supreme Court stated it as follows in *Attorney-General of Namibia v Minister of Justice and Others*³² when it considered other provisions of the Criminal Procedure Act, 51 of 1977:

²⁹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) paragraph 17-18; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) (2004 (7) BCLR 687; [2004] ZACC 15) para 90-93; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) paragraph 12; *Commissioner, South African Revenue Service v Bosch and Another* 2015 (2) SA 174 (SCA) paragraph 9 and *Total Namibia (Pty) Ltd v Obm Engineering and Petroleum Cistributors* CC 2015 (3) NR 733 (SC) paragraphs 22-23

³⁰ *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) paragraph 21; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) (2004 (7) BCLR 687; [2004] ZACC 15) para 90-93.

³¹ *MW v Minister of Home Affairs* 2016 (3) NR 707 (SC) paragraph 46; *Government of the Republic of Namibia and Another v Cultura 2000 and Another* 1994 (1) SA 407 (NmS) at 418F-G; *Kashela v Katima Mulilo Town Council and Others* 2018 (4) NR 1160 (SC) paragraph 59

³² 2013 (3) NR 806 (SC) paragraph 6

'At the time of its promulgation, the political, socio-economic and constitutional landscape in Southern Africa was vastly different to that which we see today. Most pertinent to the historical context of the impugned provisions in this case is the fact that they were passed in an era of 'parliamentary sovereignty' when the legislative powers of the South African Parliament were not constrained by constitutionally-entrenched fundamental rights and judicial review.'³³

[51] As mentioned above, the Chief Justice concluded that a confession in section 273 in the Criminal Procedure and Evidence Act, 1917 means 'an unequivocal acknowledgment of his guilt, the equivalent of a plea of guilty before a court of law' after he compared section 273 (being one of the South African predecessors of section 217 in the current Criminal Procedure Act) with sections 79, 159, 227 and 286 (the South African predecessor of section 209 of current Criminal Procedure Act).

[52] When one compares section 273 of the Criminal Procedure and Evidence Act 31 of 1917 with section 217 of the Criminal Procedure Act 51 of 1977 one immediately sees the differences. Section 273³⁴ deals with confessions made extra-judicially and confessions made in court and during the preparatory examinations done under that Act.³⁵ Section 186 is also vastly different from section 209³⁶ of the

³³ See the rest of paragraph 6 referred to supra

³⁴ 273. Admissibility of Confessions by Accused if Freely and Voluntarily made without Undue Influence and, if Judicial, after Due Caution

(1) Any confession of the commission of any offence shall, if such confession is proved by competent evidence to have been made by any person accused of such offence (whether before or after his apprehension and whether on a judicial examination or after commitment, and whether reduced into writing or not) be admissible in evidence against such person:

Provided that such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto.;

Provided further that if such confession is shown to have been made to a peace officer, other than a magistrate or justice, it shall not be admissible in evidence under this section unless it was confirmed and reduced to writing in the presence of a magistrate or justice

Provided also that when such confession has been made on a preparatory examination before any magistrate, such person must previously according to law, have been cautioned by the magistrate that he is not obliged, in answer to the charge against him, to make any statement which may incriminate himself, and that what he then says may be used in evidence against him.

current Criminal Procedure Act, 51 of 1977 because it had to include guilty pleas (or confessions) made in court.³⁷

[53] There is nothing in section 209 of the Criminal Procedure Act, 51 of 1977 that would necessitate a narrow definition of the word “confession” as contained in section 217 as the only viable definition. It most certainly does not exclude a confession meaning a statement in which the accused acknowledges that he committed or participated in the commission of the offence or an admission by an accused of facts which, when scrutinized and laboriously pieced together, may lead to the inference of guilt on the part of the accused.

[54] Judges can and should adapt the common law to reflect the country's changing social, moral, and economic fabric. Rules whose social foundation has long since disappeared, should not be allowed to perpetuate. However, the judiciary should confine itself to those incremental changes that are necessary to keep the common-law in step with the dynamic and evolving fabric of our society.³⁸

The Statement by the accused

[55] Considering the statement itself is vital for the decision as to whether the statement amounted is a confession or not. If it is, it is subject to the proviso in

³⁵ Section 273 of the Act has thus much more in common with section 244 of the old South African Criminal Procedure Act 56 of 1955 and the Pre-Independence Namibian section 219 of the Criminal Procedure Ordinance 34 of 1963

³⁶ 209 Conviction may follow on confession by accused

‘An accused may be convicted of any offence on the single evidence of a confession by such accused that he committed the offence in question, if such confession is confirmed in a material respect or, where the confession is not so confirmed, if the offence is proved by evidence, other than such confession, to have been actually committed.’

³⁷ Section 186 of the Act has thus much more in common with section 258 of the old South African Criminal Procedure Act 56 of 1955 and the Pre-Independence Namibian section 233 of the Criminal Procedure Ordinance 34 of 1963

³⁸ *S v Dausab* 2011 (1) NR 232 (HC) paragraph 30; See also *JS v LC and Another* 2016 (4) NR 939 (SC) paragraph 26-28

section 217(1)(a), if not it amounts to an admission and can be dealt with under section 219A of the Criminal Procedure Act, 1977.

[56] What follows is the verbatim statement-part of the warning statement:

'I used to stay with my wife (deceased) at Hamweyi village until one woman took her from me to go work in one house to be cooking for the children and myself. I was not happy with the arrangement because my wife never used to be with me anymore. One day I asked my wife when was she planning on coming back to me, my wife answered me that she won't come back to me anymore and if I continue following her she will go open a case with the police against me. With this information from my with wife I got so angry and that's when the thought of killing her (deceased) came to my mind.

On Sunday 7 June 2017 during night time I walked from Hamweyi village to Likwetera village. I walked almost the whole night for me to reach Likwetera village. My aim of going to Likwetera village was to go collect a fire arm and to come shoot my wife (Nankali) because I used to see my friend Kanyetu with a fire-arm. I thought of lying to Kanyetu in order for me to get a fire arm.

On Monday 8 June 2015 early morning hour while I was at Likwetera village I saw Kanyetu carrying a fire arm, then I told Kanyetu that we must go in the bush to go hunt animals. While in the bush with Kanyetu, I was carrying the fire arm, I later told Kanyetu to go a bit in the bush and check in one hole if the was an animal., from there I ran with the fire arm until I reached Hamweyi village.

When I arrived at Hamweyi village I found my wife (Nankali) in the house where she was working, then I told her that I heard that they were trying to get another man for her. So I told her that myself and that man will both loose her, from there I shot her one time, after that I ran away.'

[57] When the statement is evaluated objectively in its totality together with the reasonable inferences as required by our common law it clearly amounts to a confession in the wider sense in that the accused acknowledged that he committed or participated in the commission of the offence and admitted facts which, when scrutinized and laboriously pieced together, may lead to the inference of guilt on his part. If not a confession on murder, it would amount to a confession on one or more of the competent verdicts possible on a count of murder as was already set out hereinbefore.

[58] Not only did the statement amount to a confession in the wider sense as described before, it also amounts to an unequivocal admission of guilt setting out facts that would have amounted to a plea of guilty if given in a court of law on a charge of murder; If not a confession on murder, it would amount to a confession on one or more of the competent verdicts possible on a count of murder as was already set out hereinbefore.

[59] As the statement is a confession, such statement is inadmissible because Sergeant Mwambwa was not an ex-officio justice of the peace and any confession, should be ruled inadmissible as it was not confirmed and reduced to writing in the presence of a magistrate or justice.

[60] Not only did the statement amount to a confession but in my opinion it must pointed out that although Sergeant Mwambwa in her evidence stated that she explained the accused's right to apply for the assistance by a legal aid lawyer prior to him making a statement, this warning is not incorporated in the warning statement handed up in court.

[61] She on a question by the court confirmed that this document [warning statement] contains everything that transpired between her and the accused on 13 June 2015. As the fact that the accused was informed about his right to apply for a legal aid lawyer and to consult such lawyer before making such statement was not added into the document, it at the very least creates a reasonable possibility that the indigent and unsophisticated accused was not fully informed of his rights as to legal aid and understood this right.³⁹

[62] The fair trial provisions require that an accused person has the right not only to consult with a legal practitioner during the pre-trial procedure but also to be informed of such a right. Similarly, he is also entitled to be informed of his right to be represented by a legal aid counsel. The entitlement to legal aid is not a fundamental

³⁹ *S v Kau and Others* 1995 NR 1 (SC) at 8C-D: 'The question is not whether an indigent accused is entitled to be provided by the State through a system of legal aid at his trial with legal representation. We are concerned here with the right to legal representation - the right to be informed.'

right in terms of the Namibian Constitution's provisions. However, the question is how an indigent and an unrepresented layperson would exercise his right to legal representation if this entitlement were (perhaps inadvertently) withheld from him or her? The fair trial standard requires testing the entire process of bringing an accused person to trial and the trial itself. Without being properly informed, one cannot even begin to speculate whether the accused has waived his rights or not in an informed manner. This court has the discretion to allow or exclude evidence obtained in conflict with an accused person's constitutional rights as it must enforce the fundamental rights or freedoms guaranteed by the Namibian Constitution.⁴⁰

[63] In any democratic criminal justice system, there is tension between the public interest in bringing criminals to book and the equally great public interest to ensure that justice is done to all. Courts must curtail excessive zeal by State agencies when preventing, investigating, or prosecuting crime. The Court's duty in this regard should not be seen as having sympathy for crime and its perpetrators. Nor does it mean a preference for 'technical niceties and ingenious legal stratagems'. The Constitution demands a fair trial for each accused. Ultimately fairness is an issue that the Court must decide upon each case's facts. The trial Judge is the person best placed to take that decision.⁴¹

[64] At times, fairness might require that evidence unconstitutionally collected be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted. If the evidence to which the applicant objects is tendered in criminal proceedings against him, he will be entitled at that stage to raise objections to its admissibility. It will then be for the trial Judge to

⁴⁰ *S v Malumo and Others* 2010 (1) NR 35 (HC) paragraphs 15-16 and 90-96; *S v Malumo and Others* (2) 2007 (1) NR 198 (HC) at 211A – E; *S v Kapika and Others* (1) 1997 NR 285 (HC); *S v De Wee* 1999 NR 122 (HC); *S v Shikunga and Another* 1997 NR 156 (SC); *S v Scholtz* 1998 NR 207 (SC) (1996 (2) SACR 426) at 217B). *S v Kasanga* 2006 (1) NR 348 (HC) at 360D - E

⁴¹ *Key v Attorney-General, Cape Provincial Division, and Another* 1996 (4) SA 187 (CC) (1996 (2) SACR 113; 1996 (6) BCLR 788) at 195G – 196D-J paras 13 and 14 as quoted in *S v Engelbrecht* 2017 (3) SA 912 (SC) paragraph 30

decide whether the circumstances are such that fairness requires the evidence to be excluded.⁴²

[65] Even if I were convinced that the statement by the accused was not a confession and only amounted to admissions, I would have in my discretion have excluded the statement as there is a reasonable possibility that has been obtained unfairly and in conflict with the Constitution's fair trial provisions as described hereinbefore.

Dismissal of application for admission of the statement under section 217(3) of the Criminal Procedure Act, 51 of 1977

[66] As pointed out before, on 12 February 2021, the State brought an application in terms of 217(3) of the Criminal Procedure Act, 1977, to have the inadmissible statement of the accused admitted. During cross-examination, Mr Gaweseb submitted that the accused attempted to put forward a different version than what the confession contained. This question, he submitted, allows grounds for admitting the statement into evidence under this section.

[67] The subsection in full reads as follows:

'(3) Any confession which is under subsection (1) inadmissible in evidence against the person who made it, shall become admissible against him-

- (a) if he adduces in the relevant proceedings any evidence, either directly or in cross-examining any witness, of any oral or written statement made by him either as part of or in connection with such confession; and
- (b) if such evidence is, in the opinion of the judge or the judicial officer presiding at such proceedings, favourable to such person.'

[68] It is necessary to describe the subsection in a slightly different manner. The accused must adduce direct evidence or cross-examine a witness. He must put forward evidence that forms part of the inadmissible confession. If such evidence or the suggestion put forward is in his favour and part of the inadmissible confession,

⁴² ibid

such inadmissible confession becomes admissible. Even if it is accepted that what the unsophisticated accused put to the witness was in his favour, it did not form part of the inadmissible confession. It was put as follows in *S v Xaba*⁴³: ‘That section is, however, not of application to the situation in casu. It applies only when the accused in chief or in cross-examination elicits a portion of a confession which is favourable to him, in which case the State is entitled to elicit the whole of the confession. This is simply an application of the principle that a document must be read in its entirety in order to be interpreted.’

[69] As the question by the accused did not comply with the aforesaid preconditions, the Court dismissed the application.

Direct and circumstantial evidence

[70] As can be seen from the summary above of the State’s evidence, the State led no eyewitnesses to link the accused to killing the deceased. The evidence against the accused in part is what is called circumstantial evidence.

[71] When a Court is required to draw inferences from circumstantial evidence, it may do so only if the premises are consistent with all the case’s proved facts. The facts should also exclude every other reasonable inference. If the facts do not exclude other reasonable inferences, doubt exists whether such a conclusion is correct and that the Court can deduce its existence⁴⁴

[72] A Court must distinguish inference from conjecture or speculation. There can be no inference of a fact unless there is objective evidence from which to infer. In some matters, the factual finding can be concluded with as much practical certainty as if a witness observed it. In other cases, the inference does not go beyond a reasonable probability. In the absence of proved facts from which the Court is able to make the inference, the inference method fails, and what is left is mere speculation or conjecture.⁴⁵

⁴³ *S v Xaba* 1997 (1) SACR 194 (W) at 197I-198A

⁴⁴ *R v Blom* 1939 AD 188 at 202 in fin; *S v HN* 2010 (2) NR 429 (HC) paragraph 57

⁴⁵ *Coswell v Powell Duffryn Associated Collieries Ltd* [1939] All ER 722 at 733 as quoted in *S v Mtsweni* 1985 (1) SA 590 (A) at 593E – G and approved and applied in *S v HN* 2010 (2) NR 429 (HC)

[73] The Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt about the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and only then is the accused entitled to the benefit of any reasonable doubt if it exists. To put the matter in another way, the State must satisfy the Court, not that each separate fact is inconsistent with the innocence of the accused, but that all the evidence is beyond reasonable doubt inconsistent with his innocence.⁴⁶

[74] Several circumstances, each individually very slight, may so account with and confirm each other to leave no room for doubt of what fact they tend to establish. Two circumstantial evidence items may not amount to much on their own, but they might prove much more if they are joined with the other piece of evidence. In *S v Reddy and Others*⁴⁷ the Court quoted Lord Coleridge,⁴⁸ where he made the following observations concerning the proper approach to circumstantial evidence:

'It is perfectly true that this is a case of circumstantial evidence and circumstantial evidence alone. Now circumstantial evidence varies infinitely in its strength in proportion to the character, the variety, the cogency, the independence, one of another, of the circumstances. I think one might describe it as a network of facts cast around the accused man. That network may be a mere gossamer thread, as light and as unsubstantial as the air itself. It may vanish at a touch. It may be that, strong as it is in part, it leaves great gaps and rents through which the accused is entitled to pass in safety. It may be so close, so stringent, so coherent in its texture that no efforts on the part of the accused can break through.'

[75] Once several independent circumstances point to the same conclusion, the probability of that conclusion's correctness is not the sum of those circumstances' simple probabilities but is the compound result of them.⁴⁹

paragraph 58

⁴⁶ *R v De Villiers* 1944 AD 493 at 508-9 as referred to in *R v Sole* 2004 (2) SACR 599 (Les) 665F-G

⁴⁷ *S v Reddy and Others* 1996 (2) SACR 1 (A) at 8G -9E; See also *S v Van Wyk and Another* 2015 (4) NR 1085 (SC) at paragraph 74

⁴⁸ in *R v Dickman* (Newcastle Summer Assizes, 1910 - referred to in *Wills on Circumstantial Evidence* 7th ed at 46 and 452-60)

⁴⁹ *S v Glaco* 1993 NR 141 (HC) at 148C-D

Evaluation of the evidence

[76] The State's evidence indicates that in June 2015, the accused resided with the deceased Kauma Nankali Clementine in one home in Hamweyi village in Rundu district. The two of them were in a marital relationship, as is defined in section 1 of the Combating of Domestic Violence Act 4 of 2003. About one week before 7 June 2015, the deceased and her child moved to and resided at her place of employment, being the home of state witnesses Andreas Kambara and Helena Mbava Kambara and not at the house she shared with the accused.

[77] Early on the morning of 8 June 2015, the accused was at the home of Adam Sikaki at Lukwatetera village, some distance away from Hamweyi village. Johannes Sikaki, on the same day, obtained a shotgun [Exhibit 1] and two shotgun shells from his employer and the licenced owner thereof Thomas Likuwa Mukonda and handed it to his son Adam Sikaki to take with him while looking for cattle. Before Adam Sikaki departed, the accused requested whether he [the accused] can accompany the witness while looking for the cattle and the witness agreed that he could.

[78] After walking some distance, Adam Sikaki wanted to relieve himself and handed the shotgun Exhibit 1 and one shotgun shell to the accused. The other shotgun shell was loaded in Exhibit 1. When Adam returned to where he left the accused, the latter had disappeared with the firearm and the loose shotgun shell. He called the accused several times but received no answer. He went home and reported this to his father.

[79] Johannes and Adam Sikaki returned to the location where Adam handed the shotgun to the accused. They followed his footprints from there. At times, the accused was walking, and at times he was running. The footprints lead to the house of Andreas Kambara in Hamweyi village, where the deceased was employed and stayed at that stage. When they arrived in Hamweyi village, the police were on the scene. They did not find the accused in Hamweyi village or at his house there.

[80] The deceased was shot around 10:00 on 8 June 2015 at the house of Andreas Kambara in Hamweyi village in Rundu district. She died on the same date due to a severe head injury caused by a gunshot. No-one saw the assailant, but his footprints entered the homestead where the deceased was shot and left shortly afterwards. The accused was not in Hamweyi village after the incident.

[81] On 13 June 2015, the accused arrived at Gongwa village with a bag and Exhibit 1. This village is about 30 kilometres from Hamweyi village. When he was detained by civilian witnesses and asked if he knew why he was detained, he stated that he knew that was because he killed his wife. The accused was later the same day handed over to the Namibian Police, and Exhibit 1 was handed to them as well.

[82] The accused put to Andreas that he was the one that shot the deceased. The State argued that the accused thus placed himself on the scene at the time of the deceased's killing. I however must consider that it was an unrepresented and unsophisticated layman who did this cross-examination. He, at the time, faced a witness who shared his assumptions that it was the accused who killed his wife with the Court. I consider it risky to rely on such a statement as if a seasoned criminal lawyer put it forward. The mere fact that the witness denied this suggestion by the accused and that he was in the accused's presence on the scene further renounces the conclusion, the State requested me to draw from the cross-examination.

[83] However in his cross-examination of Johannes Sikaki, it became clear that the accused did not dispute that he was in Likwatetera village early on the morning of 8 June 2015. He suggested to the witness that he saw him going to his employer to collect the firearm. Accused also put to Adam Sikaki that the colour of the shotgun shells was red and not green, and thus placed himself on the scene at the occasion the shotgun and shell was handed to him according to the witness.

[84] According to Livhora Benedictus Hausiku's evidence, the accused's reply to Tadeus contained, when interpreted, an acknowledgement that he murdered his wife. As alluded to when the evidence was summarized, on an inquiry by the Court, it

became clear that in the vernacular used, the same word describes killing or murdering someone.

[85] Whether the aforesaid verbal acknowledgement constitutes a confession or only an admission requires no decision in this matter as it was established that he made this statement to a member of the public freely and voluntarily, without undue influence while he was of sound and sober senses. It is therefore admissible against him proving that he was the one who caused her death.

[86] The accused elected not to give evidence and closed his case. In *S v Mthetwa*⁵⁰ the following was said in this regard.

'(a) Where the State case against an accused is based upon circumstantial evidence and depends upon the drawing of inferences therefrom, the extent to which his failure to give evidence may strengthen the inferences against him usually depends upon various considerations. These include the cogency or otherwise of the State case, after it is closed, the ease with which the accused could meet it if innocent, or the possibility that the reason for his failure to testify may be explicable upon some hypothesis unrelated to his guilt; see *R. v Ismail*, 1952 (1) SA 204 (AD) at p. 210, and *S. v Letsoko and Others*, 1964 (4) SA 768 (AD) at P. 776B - D.

(b) Where, however, there is direct prima facie evidence implicating the accused in the commission of the offence, his failure to give evidence, whatever his reason may be for such failure, in general ipso facto tends to strengthen the State case, because there is then nothing to gainsay it, and therefore less reason for doubting its credibility or reliability; see *S. v Nkombani and Another*, 1963 (4) SA 877 (AD) at p. 893G, and *S. v Snyman*, 1968 (2) SA 582 (AD) at p. 588G. In the latter case this Court went on to say, at p. 588H,

"The ultimate requirement, of course, is proof of guilt beyond reasonable doubt; and this depends upon an appraisal of the totality of the facts, including the fact that he did not give evidence."⁵¹

[87] Applying the principles on circumstantial evidence set out hereinbefore I find that the only reasonable inference that is consistent with the totality of all the proved facts and which excludes any other reasonable inference is that the accused was the assailant who around 10:00 on 8 June 2015 entered the homestead of Andreas

⁵⁰ *S v Mthetwa* 1972 (3) SA 766 (A) 1972 (3) SA at 769B-E

⁵¹ See also: *S v Van Wyk* 1993 NR 426 (SC) at 434D

Kambara in Hamweyi village in Rundu district and shot and killed the deceased with Exhibit 1. He thereafter fled the scene.

[88] Shooting someone with a shotgun in the manner the deceased was shot and killed signifies a direct intention to kill. The accused directed his will to kill the deceased and deliberately accomplished what he intended and desired to achieve. He intended to, and killed the deceased.⁵²

[89] It is ordered that:

1. The accused is convicted of Murder with direct intent to kill read with the provisions of the Combating of Domestic Violence Act, 4 of 2003.
2. This matter is postponed to **19-20 April 2021** at **10h00** for witnesses in mitigation and aggravation including submissions prior to sentence.
3. The accused is remanded in custody.
4. The Office of the Registrar is directed to subpoena the following witnesses on behalf of the accused for the aforesaid dates;
 1. Mukuve Serlima of Likwaterera village,
 2. Michael Jakara Tame of Likwaterera village
 3. Tame Sondaha Willem of Likwaterera village; and
 4. Magdalena Mukulilo of Likwaterera village.

D F Small
Acting Judge

⁵² *S v Sigwahla* 1967 (4) SA 566 (A) at 569G-H; *S v De Bruyn* 1968 (4) SA 498 (A) at 510F; *S v Howard* 1972 (3) SA 227 (R) at 230E; *S v Dube* 1972 (4) SA 515 (W) at 520F-G and *S v Dladla* 1980 (1) SA 1 (A)

APPEARANCES:

STATE:

Mr T Gaweseb

Office of the Prosecutor-General, Oshakati

ACCUSED:

Mr. Shiyave Ncamushe (In person)

Oshakati Police Station – Holding Cells, Oshakati