

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

JUDGMENT

Case no: CC 13/2020

In the matter between:

**THE STATE**

v

**MARTIN NAMBARA AMUNYELA**

**ACCUSED**

**Neutral citation:** *S v Amunyela* (CC 13/2020) [2022] NAHCNLD 130 (13 December 2022)

**Coram:** SALIONGA J

**Heard:** 19, 20, 21, 22 July 2022; 12 and 19 August 2022; 23, 28-29 September 2022; 10-11 and 13 October 2022

**Delivered:** 13 December 2022

**Flynote:** **Criminal law** – Murder – Evidence – Circumstantial evidence – Court must be satisfied that the inference sought to be drawn is consistent with all the proved facts; and that the proved facts should be such that they exclude every reasonable

inference from them save the one sought to be drawn – Found that the only inference that can be drawn and is consistent with the proven facts is that the accused murdered the deceased with direct intent.

**Summary:** Both the accused and the deceased left Omunegongo cuca shops to go home on the evening of 23 December 2018. The deceased was the girlfriend of the accused. A witness who was also from the Sem cuca shops found the accused seated next to Kaarina Ngula who was lying on the ground by the road. The deceased was found dead the next day. The police were summoned to the scene and they followed the footprints of the person that was around the body of the deceased and who had left the scene. The accused could not be traced that day. He was only arrested on 26 December 2018. Accused allegedly admitted to police officers that the jacket found covering the deceased and the nike tekkies were his. The accused denied strangling the deceased save for stating that he was assaulted by the two men and he ran for his life. The post-mortem report shows that the deceased died of strangulation, and also an observation of fine linear abrasions on the skin of the neck which were possibly caused by nails. The court found that from the facts found proven the only inference to be drawn is that the accused murdered the deceased. Consequently, the accused is found guilty of murder.

*Held* that, no onus rests on the accused to convince the court of the truth of any explanations given even if the explanation is improbable, unless the court is satisfied that the explanation is false beyond reasonable doubt.

*Held further*, that accused's explanation was not only improbable but also false beyond reasonable doubt.

*Held further* that, the direct and circumstantial evidence led proved beyond reasonable doubt that the accused murdered the deceased with direct intent.

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## ORDER

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The accused is found guilty of murder with direct intent read with the provisions of the Combating of Violence Act 4 of 2003.

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## JUDGMENT

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**Salionga, J:**

*Introduction*

[1] The accused is indicted on a charge of murder read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003. In that on or about 23 December 2018 and at or near Omugulugonime village in the district of Ondangwa the accused did unlawfully and intentionally kill Kaarina Ngula by strangulating her.

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

‘At the time of the commission of the crime the accused and Kaarina Ngula (deceased) were in a domestic relationship as they were or had been involved in an actual or perceived intimate or romantic relationship as boyfriend and girlfriend. On the 23 December 2018, the accused strangled Kaarina Ngula to death near Oshangwena Primary School at Omugulugonime village. After strangulating her to death, the accused left her body at the scene and disappeared. The body of the deceased was discovered thereafter lying near the path.’

[3] The State was represented by Mr Matota and the accused was represented by Mr Shipila from the Directorate Legal Aid.

[4] The accused pleaded not guilty. He gave a detailed plea explanation in terms of section 115 of the Criminal Procedure Act, Act 51 of 1977 (CPA) as follows:

'1. I, the undersigned, **Martin Nambara Amunyela** do hereby state that

1.1 I am an adult male Namibian;

1.2 I am the accused person in this matter;

2. I am indicted on a count of murder.

3. I plead not guilty to all the charges against me.

4. My defence is that I did not strangle the deceased to death as alleged, nor did I do anything to cause her death.

5. 'In amplification of my defense, I wish to place the following on record;

5.1 The deceased was known to me during her life time.

5.2 She was my girlfriend, Kaarina Ngula.

5.3 We cohabitated for some time at Omugulugonime village.

5.4 Our relationship became strained towards the end as it appeared to me that Kaarina was either in a relationship with other men or she was seeing another person.

5.5 This became apparent to me when I found her at home with another man in the bedroom.

5.6 When we argued about this however, she told me that the said man had raped her and that they were not in a relationship at all.

5.7 I proceeded to take her to the clinic from where she was later referred to the Hospital

5.8 This was around October 2018 but unfortunately, I no longer recall the date when this happened though I do recall that her face was swollen.

5.9 I also recall that around that time, she was given a form by the Police for the doctors to go and complete in relation to her rape.

5.10 To my surprise however, she was not very keen on taking the matter any further.

5.11 We had another argument about the incident and I started to wonder whether she was really raped or whether she was in a relationship with the man I found her with.

5.12 She insisted she was raped and that her assailant beat her and caused her face to swell up.

5.13 I had my doubts about what she was saying but I really could not dispute it

5.14 I opted to believe her.

5.15 On or about 23 December 2018, Kaarina and I went to the cucashops at Omunegongo village.

5.16 We went to charge my cell phone, to socialize and to have a few drinks.

5.17 On the way to the cuca shops, Kaarina had asked me for my jacket saying that she felt cold.

5.18 I obliged and gave it to her.

5.19 While there I did not notice anything out of the ordinary.

5.20 We stayed at the cuca shops until after dark.

5.21 I must have been around 20h00 when we left although I cannot be sure of the time now.

5.22 On our way home, as we were passing Oshangwena Primary School, I noticed two men approaching us from the behind.

5.23 I looked like they were also coming from the cuca shops and they were walking quite fast towards us.

5.24 They came to us and one of them asked why I am always with his girlfriend.

5.25 I was surprised by what he said as I had no idea what he was talking about.

5.26 I asked him who his girlfriend was and he replied that he was talking about Kaarina.

5.27 Just after his reply, both men started assaulting me.

5.28 They beat and kicked me.

5.29 I became scared and ran for my life.

5.30 Kaarina was just standing and looking on as they assaulted me so I left her there.

5.31 The following day I heard that Kaarina's body was found near Oshangwena Primary School.

5.32 I dispute that I strangled or assaulted the deceased in any other manner that lead to her death.

5.33 I put the state to the proof of its case.

5.34 I confirm that I have consulted with my lawyer prior to making this statement.'

[5] The following was recorded as admissions in terms of section 220 of the CPA:

'5.1 The identity of the deceased as Kaarina Ngula;

5. 2 That, the deceased was my girlfriend and thus that there was a domestic relationship between her and I.'

[6] The following documents were handed up as exhibits by consent: The indictment as exhibit 'A', The section 115 CPA plea explanation as exhibit 'B', Summary of substantial facts and the list of witnesses as exhibit 'C', The State's pre-trial memorandum as exhibit 'D' ; Accused's reply to the State's pre-trial memorandum dated 18 May 2021 as exhibit 'E', Accused's reply to the State's pre-trial memorandum dated 28 May 2021 as exhibit 'F', The pre-trial review conference memorandum as exhibit 'G', Certified copy of the Namibian Identification card of Ngula Kaarina (deceased) as exhibit 'H', Identification of corpse of Kaarina Ngula (Pol 51) by Julius Ngula as exhibit 'J', Affidavit in terms of section 212 (4) by Doctor Godwin M. Zishumba (Pol 52) A.19 dated 28 December 2018 as exhibit 'K', Report on A medico- legal post –mortem examination with death Register No 267/208 by Dr Godwin M Zishumba dated 28 December 2018, A21 P as exhibit 'P', Affidavit in terms of section 212 (4) Act 51 of 1977 by Erwin Nestor Kavela (Pol 54), A20 dated 23.12.2018 as exhibit 'L', Photo plan and key thereto compiled by DWO Elifas Amutenya in respect of Okatope CR 50.12.2018 Omuthiya negative 278/2018 as exhibit 'M', Record of proceedings in terms of section 119 of the CPA 51 of 1977 under case number ; Ondangwa OND-CRM-3868/2018 as exhibit 'N', Okatope CR 50.12.208 (Sem Shipale statement) as exhibit 'O', Entries from OB Monday 24-12-2018 Pol 10 'Q' and 26-12-2018 (379) Pol 10 as exhibit 'R'.

#### State case

[7] Sem Shipale testified that he knew the accused person as Martin and the deceased as Nambata prior to this incident. He used to see the accused at

Omugulugonime village. According to this witness, the deceased was the girlfriend to the accused and resided in the Sem house of Nikela ya Nangolo a grandfather of the accused.

[8] Shipale further testified that on Saturday the 22<sup>nd</sup> December 2018 at around 22h00, while walking on the path road on his way from Omungonyati cuca shops going to the water point, he saw two persons on the road<sup>1</sup>. One was lying on the back while the other one was seated. He walked closer at the distance of 4 steps and saw that Martin was the one seated and Nambata now the deceased was laying on her back. He was able to identify them clearly because of the moon lit. He did not talk to the two persons he found, he just passed by and went straight to open the water tanks at the water point. After he opened the water tank he did not pass through the Sem route, he just went home.

[9] The next morning, the 23<sup>rd</sup> December 2018 around 8 o'clock, Shipale walked the Sem path taking the cattle to the water point. On his way he saw a group of people gathered at Oshangwena Primary School and he went there. He stood at a distance of 19 steps and observed a person lying on her back with her face covered with a blue jacket. He also saw Pieter in that vicinity. He proceeded to the water point. He only came to know later that the person who was lying on the ground was Martin's wife, Nambata.

[10] According to Shipale he saw the accused wearing the Sem jacket at the cucashop on the 22<sup>nd</sup> December 2018. Shipale came at the cucashop at 11o'clock and accused might have come around 12 o'clock because he found him there and accused was in the company of Nambata (the now deceased). He was together with the accused at the cuca shops since 13h00 until 20h00 p.m. when the accused and the deceased left. He identified the blue jacket depicted on photo 10 of exhibit 'M' as the jacket the

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<sup>1</sup> See page 15 lines 26-27 of the transcribed record

accused was wearing on 22 December 2018 and the Sem jacket he saw covering the deceased's face on 23 December 2018.

[11] In cross-examination Shipale disputed accused's instructions that while he and the deceased were walking past Oshangwena Primary School on their way home, two men approached them of which one of them asked the accused why he was always walking with his girlfriend and that these men attacked and assaulted the accused while the deceased stood by and looked on, that the accused fled the scene leaving the deceased with the two men at that spot. He denied the accused's version that the sky was overcast and that it was about to rain when the accused and the deceased were walking past the school and said the sky was clear. He also denied accused's instructions that he gave his jacket to the deceased to wear on their way to the cuca shops stating that he saw the accused wearing the blue jacket at the Omungonyati cuca shops. He conceded though that he did not see the accused strangling or assaulting the deceased.

[12] Pieter Bernardo testified that on Sunday the 23 December 2018 around 06h27 he left the cattle post so that he could take his cattle to the water point. When he reached Oshangwena Primary School while following the cattle behind, he observed that the cattle were moving from the road going towards the fence of Oshangwana Primary School. He wanted to see why the cattle were leaving the road. He then saw something dark in front and went closer at a distance of about 17 steps away where he saw a person lying on her back on the road. Close to the body of this person he also saw dry sticks which he estimated to be 6-7 sticks in number. He called his neighbour Ms.Tuuliki one of the State witness to inform her that he had found something strange, who advised him to rather go and report to Mr Shikangala. According to the witness the distance from the scene to Mr Shikangala's house was about 8 minutes' walk. He did as advised and thereafter he and Mr Shikangala later came to the scene. Mr Bernado testified that he remembered having seen the deceased with the accused drinking at the Ongondjati cuca shop on or before the 23 December 2018. He estimated the time he



arrived at the cucashops to be around 16h00 pm. He did not know when the accused and his wife arrived there but they found him at the cucashops and he did not know them before. After the police arrived at the scene he informed them that he was the person who discovered the body of the deceased.

[13] Sem Ndinelago Amwenyo is a Sergeant Class two in the Namibian Police stationed at Okatope police station. He testified that he arrested the accused person on 26 December 2018 when he met him at Osipita location around 15h00 pm. Officer Amwenyo testified that he knew the accused was a suspect in a murder case committed near Oshangwena Primary School on the 23 December 2018 in which Kaarina Ngula was killed. The witness also knew Kaarina before the incident because their villages were adjacent to each other.

[14] According to Amwenyo, he and the accused are from the Sem's village, in the area of Onyaanya. On 26 December 2018, when he saw the accused, he recognised and called him by his name, Martin, but he ignored him as if he did not hear or that Martin was not his name. The witness called him again "Mbushe" the nick name they normally call each other. Accused responded by looking at him. Before he asked him anything the accused said; 'I was already on my way coming to you at Okatope where the witness was working. He was the one taking by himself saying in connection with crime which they said apparently he was the one who commit it at Oshangwena School.'(SIC) It must be noted that from the digital recording I listened, the following was said: Before I ask him anything, accused said I was on my way to you at Okatope where you are working in connection with a case they are saying I committed." According to the witness they were close to each other at a distance of about two steps and he identified the accused as the wanted suspect in the murder case. Thereafter he informed the accused of his legal rights and arrested him.

[15] It was Amwenyo's evidence that on the day of the incident, Sergeant Oscar Sileze informed him of a person who was killed on 23 December 2018 at

Omugulugonime village close to Oshangwena School. He accompanied Sileze and upon their arrival at the scene they found a group of people gathered. He also saw a body of a person lying with the face looking up and facing the school gate. The person lying was covered with a jersey or a jacket. Amwenyo testified that it was a body of a female person and close to the body there were a lot of sticks. They also observed one shoe print at the scene that passing around the body although it looked like it rained a bit. The same footprint walked away from the body to the northern direction. On the body itself they saw some marks on the neck, at the back or shoulder and on the leg which were swollen and a bit red. The marks on the neck looked like the person was strangled. The person wore a bra and a red skirt. The body was later loaded in a police van and taken to Omuthiya police mortuary.

[16] After the body was taken from the scene, the witness, Sileze and other members of the force followed the shoe prints for about 10 kilometers from Oshangwena Primary School to the area of Omuntele. He described the tekkie shoe prints they followed as having dots under the sole. According to him some people were following the prints by feet but he was driving a vehicle and was taking people from one place to another until other cars came from Okatope. In cross-examination Amwenyo stated that at the time he called the accused and questioned him about the alleged incident he knew that he was a suspect and that he was a Sgt class 2. He confirmed that he observed at least 5 different shoe prints at the scene. However he explained that the shoe prints counsel for the accused was referring to, were for people who took pictures and for his colleagues when they were investigating the case. When counsel put it to him that some footprints at the scene could be for members of public, the witness said he only knew that most of those footprints were for police officers. On whether Sem Shipale could not have left the footprints the previous night, the witness replied that he walked far not that close to the body.

[17] Tuuliki Pinehas was the fourth State witness. She corroborated the other two witnesses' evidence in that, the accused came at the cuca shops with Nambata on 22

December 2018. However contrary to Sem Shipale's evidence that he saw accused wearing a jacket, she testified that she saw Nambata wearing a blue jacket at the cucashops. Her testimony further corroborated the witness Pedro Bernado's evidence in as far as the report he made to her after he discovered the dead body next to the Oshangwena Primary School. She also testified that she was at home when she got the said report and advised Pieter Bernado to report what he saw to Mr Shikangala.

[18] Oscar Sileze's testimony was that on Sunday the 23 December 2018 while on standby he was summoned by Omuntele police to attend to a murder report. He testified that he was called because he was a Unit Commander of the uniformed investigators in that area. After receiving a report together with Sem Ndinelago Amwenyo they went to attend the scene. According to this witness upon their arrival at the scene there was no other police officers around. He saw a saw a body of a female person lying on the ground on her back without shoes. This person was wearing a red shirt and the face was covered with a blue jacket and near the head there were broken dry sticks. He also observed red bruises around the neck, on the arm and on the left leg. He further observed a tekkie shoe print next to the body and described the prints of the tekkie as having dots. At a distance of about 30 meters, he could see a piece of a cloth which looked like the red skirt worn by the person lying on the ground. He walked to where the piece of cloth was and observed a pair of black sandals, one piece of broken dry stick, some struggling marks, bare foot and tekkie shoe prints similar to the ones he was following from where the person was lying up to where a piece of cloth was.

[19] Sileze, testified that while they were still investigating some other members of the community arrived whereby Johannes Nikela recognised the blue jacket as belonging to Martin Nambara the accused person. Julius Ngula, another member of the community identified the body of the deceased as that of Kaarina Ngula. The witness walked through the scene and observed one tekkie shoe print leaving the scene to the northern direction. As they had already alerted the scene of crime and mortuary personnel of

Omuntele and Omuthiya respectively before they went to the scene, the said officers also arrived and joined them. According to Sileze, the mortuary personnel arrived after an hour and the scene of crime officer arrived about 30 minutes after. After the body was inspected, it was handed over to sergeant Kavela who transported it to Omuthiya police mortuary. At the scene he collected 13 sticks altogether, the blue jacket and the one pair of black sandal which were handed to Sergeant Hans Nambahu for safe keeping.

[20] It was Sileze's testimony that after the body and the exhibits were given to the responsible officers some of them followed the footprints up to almost 500 meters. Thereafter the prints disappeared due to wet surface as it rained the previous night and there was grass. At that point Amwenyo said he knew the suspect was from Elambo and suggested that they should go there. The officer from Omuntele accompanied them to accused's mother's village Elambo which is about 10 kilometers in order to trace the accused. On their way to Etambo at a certain cucashop they again found shoeprints which looked like the ones they found at the scene, however they also disappeared after about 10 meters. They proceeded to his mother's place but accused was not there. They searched at other villages such as Elambo, Onyaanya, Omugulugonime and Omugandji but they could not trace him that day. He identified the exhibits found at the scene such as the shoes visible in photo 12 of exhibit 'M' as that of Officer Amutenya the Scene of Crime Officer and that of the investigating officer himself Mr Sileze.

[21] Godwin M Zishumba who is a medical doctor testified that he examined the body of a 41 year old female. The body was identified to him by Sergeant Kavela of Forensic Unit as that of Kaarina Ngula. He compiled the report number 267/2018 marked exhibit 'P'. The Doctor further testified that during his examination he observed small haemorrhages on the white part of the eyes, finger nail scratch marks on the front neck of the deceased, abrasions around the neck posterior surface. According to doctor Zishumba, the small haemorrhages around the white parts of the eyes were signs of suffocation. He recorded the cause of death as strangulation. He explained that

because of the position of the irregular abrasions which were transversely across the neck, he opined that the person inflicting them was from behind. He was not able to explain the causes of the other abrasions the deceased sustained on her body.

[22] Zakaria Hans Nambahu was a charge office driver at Okatope Police Station. On 23 December 2018 he received a report that they should go to an incident at Omuntele, Omugulugonime village. After the report was made in the office, four of them went there. The other three officers were Sergeant Amwenyo, Warrant Shilumbu and Sergeant Sileze. They went with two cars and he went with Warrant Shilumbu. Upon their arrival at the scene he observed a lady lying dead and she was covered with a man's jacket. They found members of the public standing about 17 steps away and they did not find police officers at the scene. He also observed broken sticks at the surroundings where the body was lying. Some sticks were close to the body and some were about one step away. The body was then removed by the mortuary officers of Omuthiya. Sileze gave the witness the sticks, a pair of sandals and a jacket found covering the face of the deceased so that he could go and record them in the books. He went with the exhibits to the office and locked them up in the safe as it was knock off time. The next morning he entered the exhibit in Pol 7 number 379/2018. He was able to identify the entry number 1458 he made which is a serial number. These exhibits were booked in under Pol 7 number 379/2018 on 25 December 2018 and marked exhibit 'Q' and 'R' respectively.

[23] The last witness called by the State was Lenah Elago, a Constable in Nampol and stationed at Okatope. She testified that she works with books such as OB, Pol 9, Pol 7, Pol 10 and others. She explained that pol 7 is a book where one records the exhibits and on 24 December 2018 she made several entries in pol 7. She further explained that pol 7 does not belong to a particular officer but to the office in general. One of the entries she made is CR 50.12.2018 which she got from Sergeant Sileze the Investigation Officer in this case. She took the court through the entries she made. She was able to explain the three signatures on that entry, one being for the Investigator, in

this case for Sergeant Sileze, her own signature as the person who wrote down exhibits in the book and the signature of a person who will keep or deal with pol 7. She further testified that the items she booked in on that day were pieces of palm and Mopani sticks, a navy blue jacket and a pair of Hainnavasia plaakies which she identified in court.

[24] After the state had closed its case, counsel for the accused applied for a discharge in terms of the Criminal Procedure Act 51 of 1977. He argued that there was not enough evidence presented against the accused to show that he committed the offence referred to in the indictment. Counsel argued that the State did not successfully discharge the *onus* that rested upon it. Therefore the court should enter a verdict of not guilty at this stage and discharge the accused person.

[25] On the other hand counsel for the State submitted that the decision whether to discharge or not is a judicial decision. In this case the evidence presented by the State can only be ignored if it was of such a poor quality that no reasonable person could possibly accept it. According to counsel the evidence of Sem Shipale that he found the deceased lying on her back and the fact that the following morning the body was found in the same position should not be ignored because it was not challenged. Counsel pray that accused be placed in his defense.

[26] Thus, section 174 application was then dismissed on the following reasons. The inquiry in an application for a discharge was not, and has never been whether the evidence was cogent, plausible or constituted proof of guilt beyond a reasonable doubt. The Supreme court in *S v Teek*<sup>2</sup> in para 7 also re-affirmed the generally accepted view that, although credibility is a factor that may be considered during the section 174 application, it plays a very limited role. It is only relevant if the evidence is of such poor quality that, in the court's opinion, no reasonable court could accept it as reliable.

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<sup>2</sup> (SA 44/2008) [2009] NASC 5 (28 April 2009)

[27] Section 174 of the Act makes plain that the court, at the close of the case for the State, has discretion to return a verdict of not guilty if it is of the opinion that there is no evidence that the accused committed the offence charged, or can be convicted on any of the competent verdicts applicable. The words 'no evidence' has been interpreted in our Namibian Courts in *S v Nakale and others*<sup>3</sup> to mean no evidence upon which a reasonable court acting carefully may convict (also see *S v Teek*<sup>4</sup> ).

[28] In the instant matter the State led evidence that on 22 December 2018 the accused in the company of Kaarina Ngula now deceased found Sem Shipale at the cuca shops and left home together. The next day Kaarina was found dead at the road near Oshangwena Primary School. That was the same place where Shipale testified that he saw the accused seated next to Kaarina who was lying on her back. Although accused in his plea explanation disputed to have strangled the deceased he admitted that he was with the deceased on that particular night. He explained that he was attacked while the deceased was watching and he ran away for his life leaving her there. He also admitted that he was only arrested three days after the incident. Accordingly the plea explanations by the accused cannot be used as versions to discredit state witnesses to the extent mentioned in this regard<sup>5</sup>. Neither can in my view accused's instructions to his counsel which were put to witnesses in cross-examination of what he alleges do this.

[29] In determining whether the State led evidence on which a reasonable court acting carefully may convict, this court was convinced that the evidence adduced by the state up to that stage was not of such poor quality that no reasonable court may convict. Unless contradicted, it established sufficient *prima facie* evidence to place the accused on his defence.

[30] After delivering the ruling, accused elected to testify under oath and had no witnesses to call. In his evidence accused testified that he knows nothing about the

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<sup>3</sup> 1994 NR 262 (HC)

<sup>4</sup> 2009(1) NR 127 (SC)

<sup>5</sup> *Ibid*

killing. He further testified that on 22 December 2018 he went to the Omunegongo cuca shops with Kaarina Ngula around 16h00. He knew Sem Shipale a witness in this case and they found him there. He disputed Sem Shipale's evidence as not true save for admitting that they were together. By being together he meant that they were in the same area, sitting at different places not together with him. He denied that he was socialising with Sem Shipale on that day. He admitted to have left the cucashop at around 20h00 pm in the company of Kaarina Ngula his girlfriend and the deceased in this case.

[31] While on their way home, and at or near Oshangwena Primary School, two unknown men came from behind and approached him. One of the two unknown men asked the accused why he was walking with Kaarina Ngula who is allegedly the girlfriend of the unknown man. Before he could ask or answer the unknown men started assaulting him by beating, kicking and assaulting him. At that time Kaarina was just there watching him being assaulted. The accused then left the scene walking to save his life as he could not fight the two men. He left Kaarina Ngula talking to those unknown men but did not hear what they were talking about. He stated that he could not have gone with Kaarina as she was talking to them and the two men fought him because of her. It was his evidence that the next day at eight o'clock he heard from a neighbour that Kaarina's body was found at that school. Accused testified that he was arrested by Sgt Amwenyo on 26 December 2018. He also testified that the blue jacket exhibit 'P' belongs to him which the deceased was wearing on that fateful day and a pair of plakkie sandals exhibit '2' belongs to the deceased which he had given her.

[32] In cross-examination the accused testified that he left his girlfriend with two unknown men; that he never informed anybody that he was assaulted by two unknown men on the night of 23 December 2018. That he was taken by Okatope police to the hospital. He testified that the next morning of 24 December 2018 he was told that the body of his girlfriend was found near Oshangwena Primary School. He denied to have left the scene running as he stated in his plea explanation, saying he merely walked



away to save his life; he denied to have told Amwenyo that he wanted to go to Okatope to report but got lost from the scene. He further testified that from the scene he knew how to get to the village and to the farm where he was residing with Kaarina Ngula; he stated that he used to pass by the school many times about six to seven times;

[33] The accused admitted that a pair of black Nike tekkies with blocked or squared prints marked exhibit 5 belongs to him. He also confirmed that he was wearing the same tekkies on 23 December 2018 and on 26 December 2022 the day of his arrest. These were the same tekkie D/Sgt Sileze testified that he seized from the accused. He however denied that he was seated next to Kaarina Ngula on the night before her body was found. He denied to have made admissions to Amwenyo. He maintained that it was him instead who was looking for Sgt Amwenyo because he wanted to go and report at Okatope Police Station and not vice-versa. He did not dispute that the deceased died of strangulation.

#### Submissions by the State.

[34] Mr Matota submitted that the evidence of Sem Shipale was clear and satisfactory in all material respects and complies with the requirements of section 208 of the Criminal Procedure Act 51 of 1977. He further submitted that Sem Shipale knew the accused and the deceased three months prior to this incident. He further submitted that, not only that Shipale knew the accused before the incident but he had also seen the accused and the deceased on the 22 December 2018 at the cucashops in that regard, his evidence was corroborated by that of the accused. According to counsel, because of the moon light and Shipale was at a close proximity of 4 steps from them, the witness was able to identify and describe the position he found them. On the defence's submission that it was cloudy and rained, counsel submitted that it could only rained late that night. In making reference to case law counsel submitted that Sem Shipale placed the accused at the scene where Kaarina Ngula was found dead the next morning.

[35] He further submitted that the evidence of Sem Shipale was corroborated by that of Pieter as he discovered the body the next morning near the same school and the jacket found covering the face of the deceased was that of the accused. Counsel contended that Sileze and Amwenyo also saw the body in a position described by Shipale and Pieter. The evidence of Sileze and Amwenyo that they saw the tekkie prints around the body and some leaving the scene in this regard is credible when regard is had that accused testified that he was at and left the scene after he was attacked. Counsel thus submitted that the accused's defence that he was assaulted and left the deceased with two unknown men was a fabrication and should be rejected. It was counsel further submission that the fact that accused did not tell anyone about the assault until he was found by Sgt Amwenyo three days after the incident is not reasonable and questionable. That was despite, the knowledge that the body of his girlfriend was found at a spot where he left her with the so-called unknown men the following morning. For the aforesaid reasons, counsel submitted that the behaviour of an accused after an event can serve as an indication as to his state of mind at the time of the commission of the crime. Therefore his evidence that he was attacked should be rejected as fabrication and be found guilty of murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

#### Submissions by Defence

[36] Mr Shipila in referring to case laws<sup>6</sup> submitted that the State failed to disprove the defence raised by the accused in his plea explanation save for Shipale who disputed the version of the accused without any basis. He submitted that Sem Shipale was not a credible witness in that his claim that he was in the company of the deceased and the accused on 22 December 2018 at Omunegongo cuca shops and that he had seen the accused seated next to the body of the deceased near Oshangwena Primary School is so poor that it cannot be accepted by a reasonable court. With regard to Amwenyo's evidence where he claimed to have called the accused, questioned him pursuant to his

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<sup>6</sup> *S v Shivute* 1991 NR 123 (HC), 1991 (1) SACR 656 and *S v Ananias* 2014 (3) NR 665 (HC)

knowledge that he is a suspect regarding the incident counsel submitted that such admissions are inadmissible. Further that even if it were found to be admissible that is evidence of a purported admission, such were not reduced in writing, nor was it made to a justice of peace nor was the accused given an opportunity to confirm or deny the veracity thereof. He argued that this further vitiated the admissibility of such evidence against the accused. On Sileze's evidence counsel submitted that the court should reject it as an afterthought, that the evidence before court does not support the inference that the accused person killed the deceased and even if the court finds that it supports such an inference, it is not the only inference to be drawn from the facts.

[37] In substantiating his argument counsel submitted that Sem Shipale's evidence is in conflict with that of Pieter Bernardo with regard to the time the accused and the deceased arrived at the Omunegongo cuca shops and that Shipale was in the company of the accused and the deceased. He further submitted that the State led evidence to the effect that the killer wore the shoes with a dotted shoe print which was followed from the scene however the shoes that the accused was wearing did not match that description. He thus submitted that the inference that it is the accused who killed the deceased is not consistent with the proved facts. Therefore counsel is asking this court to acquit the accused, order his immediate release from custody and the return of his items being marked exhibits 1 and 5.

#### Court analysis and findings

[38] In the instant matter the only issue for determination is who murdered Kaarina Ngula whose body was found on 23 December 2018 next to Oshangwena Primary School. It is trite that there was no eye witness to the actual killing of the deceased. However the State is basing its case on the evidence that the accused was seen seated next to Kaarina Ngula who was lying on her back, the admissions accused allegedly made on the date of his arrest as well as circumstantial evidence. I must state that the

approach this court must follow when dealing with evidence of a single witness and the circumstantial evidence is fairly articulated in a number of case law<sup>7</sup>.

[39] The court is alive that Sem Shipale was a single witness in respect of the events that he had been called to testify about. In evaluating his evidence I cautioned myself of the danger of convicting an accused on such evidence. He at no stage appeared to be biased against the accused. He knew the accused and the deceased three months prior to the incident. Not only that he knew both accused and the deceased, he was also with them on 22 December 2018 at the cucashops. He had seen the accused and the deceased leaving the cucashops and at a distance of about 4 steps from them he was able to identify them as the two people he found at the road. He described the position in which he found them that the accused was seated next to Kaaria Ngula who was lying on her back. This is the position the body of the deceased was found lying the next morning. Surely the visibility ought to be good for him to make those observations when he passed by the scene on the night in question.

[40] In the instant matter counsel for the defence profoundly argued that Shipale deviated from his police statement and was not credible witness. This court in *S v Xaba*<sup>8</sup> held that it is a well-known fact that police statements are as a matter of common experience not taken with the degree of care, accuracy and completeness. The approach to such evidence or deviation was articulated in *S v Mafaladiso*<sup>9</sup> that not every error by a witness nor every contradiction or deviation severely affects the credibility of a witness and non-material deviations are not necessarily relevant. In his statement to the police Sem Shipale stated that he saw the accused and his girlfriend at the cuca shops happily together and did not see them arguing. In his evidence under oath Shipale testified that accused was in a company of the deceased when they came at the cuca shops. While in cross-examination he testified that he was with the accused at the cuca shops and accused's girlfriend was seated under the tree. When regard is had to Shipale's statement at the police, his evidence under oath in court, and having

<sup>7</sup> *Boois v S* (HC-MD-CRI-APP-CAL-2019/00063) [2020] NAHCMD 128 (22 April 2020) and *S v HN* 2010 NR 429 (HC) 442 E-F

<sup>8</sup> 1983 (3) SA 717 (A) at 730B-G

<sup>9</sup> *S v Mafaladiso en andere* 2003 (1) SACR 583 (SCA) at 593e – 594 h

applied the approach applied in *Mafaladiso en andere*<sup>10</sup>, it is my respective opinion that the said deviation was not material to reject his entire evidence. Shipale as a witness appeared to be a relatively credible and intelligent and find that Sem Shipale's evidence notwithstanding some shortcomings was satisfactory and reliable.

[41] Coming to the evidence of doctor Zishumba that the deceased died of strangulation, same was not disputed nor was it displaced in cross-examination and the court will consider that as conclusive evidence.

[42] It is common cause that the evidence of Pieter on what he observed while herding cattle to the water point was also that of a single witness. He gave crucial evidence on a number of aspects such as the position in which he saw the deceased lying on the ground. His evidence to some extent corroborated the evidence of Sem Shipale in that the body was lying on its back and was covered with a blue jacket. I am mindful of the salutary warning expressed in *S v Snyman*<sup>11</sup> that even when dealing with the evidence of a single witness, courts should never allow the exercise of caution to displace the exercise of common sense.

[43] Equally important is the sentiments of the court in *S v Sauls and Others*<sup>12</sup> that there is no rule of thumb test or formula to apply when it comes to consideration of the credibility of the single witness. The court must consider the merits and demerits of the testimony and having done so will decide whether it is trustworthy and whether despite that there are shortcomings or defects or contradictions in the testimony he is satisfied that the truth has been told. Equally as Pieter's evidence was not challenged in cross-examination the court found that he was an independent and trustworthy witness and accepted his evidence.

[44] Counsel for the accused again took issue with the admissions allegedly made by the accused to officer Amwenyo. Counsel correctly argued that this witness knew that

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<sup>10</sup> Ibid

<sup>11</sup> 1968 (2) SA 582 (A) at 585 G

<sup>12</sup> 1981 4 All SA 182(AD); 1981 (3) SA 172 (A) at 180 E-F

accused is a suspect in this matter and that although they followed the shoe prints, no shoe print was traced to the accused person. He contended that the court should not attach any weight because Sgt Amwenyo in cross –examination stated that he called and questioned the accused about the alleged incident well knowing that he is a suspect. It is trite that there are prerequisite before admissions made by a suspect to a police officer can be admitted into evidence. In casu I was privileged enough to listen to the transcribed record of proceedings because the transcribed record was not clear. From the digital recording, Amwenyo is quoted verbatim as follow; ‘Before I ask him anything, accused said I was on my way to you at Okatope where you are working in connection with a case they are saying I committed’. I am not satisfied that, what was said here was admissions and I will not consider them as such nor will I attach any weight on such evidence.

[45] Having found as above, what remains to be considered is circumstantial evidence. In so doing, the court is guided by various legal principles in determining whether the charge against the accused has been proven beyond reasonable doubt. In *S v Reddy and others*<sup>13</sup> the court held that in assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piecemeal basis and to subject each individual piece of evidence to consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence need to be considered in its totality. It is only then that one can apply the often quoted *dictum* in *R v Blom*<sup>14</sup> where reference is made to two cardinal rules of logic which cannot be ignored. These are; firstly that the inference sought to be drawn must be consistent with all the proven facts and secondly the facts should be such that they exclude every reasonable inference from them save, the one sought to be drawn.

[46] On Sileze’s evidence counsel for the accused also submitted that the scene was contaminated, Sileze testified on a number of aspects in the course of their investigation

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<sup>13</sup> (416/94)[1996] ZASCA 55 (28 May 1996)

<sup>14</sup> 1939 AD 188 at 202-203

of the case. The evidence of footprints may in the same way as fingerprints provide circumstantial evidence of identity and is therefore admissible evidence. However it has been said that courts must be cautious of relying upon such evidence especially where it is the only evidence against the accused, and the cogency of such evidence must depend upon all the circumstances of the case. One of such circumstances is whether the imprint left by the shoe in question has some distinctive character or pattern (see *S v Mkhabela* 1984 (1) SA 556 (A) at 563)

[47] In his testimony, Sileze testified about his observations at the scene of crime. Sileze's evidence on the observations at the scene was corroborated by the scene of Crime Officer who compiled a photo plan marked exhibit 'M' and by the evidence of officer Amwenyo in material aspects with an exception of who arrived first at the scene.

[48] From the evidence of police officers who attended the scene, this court did not get the impression that their evidence was false or that they had ulterior motives to implicate the accused. Save for not corroborating each other regarding who first arrived at the scene. Counsel for the accused submitted that such contradiction is material in as far as it relates to the description of the shoe prints found on the scene. Counsel went further to state that if there were other people at the scene as testified by Amwenyo then the shoe prints found and followed by the police could have belonged to any of those people. In the same vein counsel contended that if there was no-one at the scene as per Sileze's evidence then one wonders who discovered the body of the deceased and alerted the police. Counsel argued that Amwenyo and Sileze's evidence left a lot of doubt as regards whose shoe prints were at the scene.

[49] I for one do not agree with counsel for the accused that no explanation at all was given regarding the foot/shoeprints found at the scene. Amwenyo testified that although the ground looked disturbed due to reasons given in his evidence, it was only one footprint around the scene which they followed. He explained that the footprints in photo 3 were for the police officers they met/found at the scene including that of himself and

that was corroborated by Sileze. Amwenyo's evidence that the police from Omuntele were first at the scene was corroborated by that of Hans Zakaria Nambahu. Amwenyo further explained that the footprints for other members of the community who were at the scene were not close to the body and this piece of evidence was confirmed by Pieter who testified that they stood at about 17 steps away.

[50] I find it strange for counsel for the accused to profoundly contend and insist that the evidence of shoe prints the police followed were that of the accused is hearsay and inadmissible evidence. Such evidence should not have been in dispute when regard is had that accused placed himself at the scene of the crime. The accused testified that he was with the deceased when he was allegedly attacked and that he fled the scene. To argue and contend that the evidence of the shoe print is hearsay is displayed and baseless. In my view the only issue in dispute in casu was the identity of the perpetrator.

[51] Accused admitted in cross-examination that the pair of Nike tekkie shoe found was his which Sileze seized from him after he was arrested. The accused apart from confirming a pair of tekkies, also confirmed the blue jacket exhibit '1' to be his. Accused also admitted that he was wearing a pair of Nike tekkies exhibit 5 on 23 December 2018. The police searched for him on the 23 December 2018 without success and was only arrested on the 26 December 2018. Even if it is true that he was then attacked by two men and fled the scene, the least accused could do was to report the culprits the next day especially when he was informed that the body of his girlfriend was found near Oshangwena Primary School.

[52] I remind myself that there is no onus on the accused to prove the truthfulness of any explanation which he gives or to convince the court that he is innocent. Any reasonable doubt the court might have regarding his guilt must be accorded to the accused. In case where accused opted to offer an explanation which is improbable, the



court may still not convict him, unless it is satisfied that the explanation is false beyond reasonable doubt. (See *R v Difford* 1937 AD 370 at 373).

[53] Having considered the merits and demerits of both the State and the defence case as well as the probabilities, the only inference to be drawn from the evidence in its totality is that the accused's explanation that he was attacked by two men and fled the scene, is not only improbable but also false beyond reasonable doubt and is rejected as an afterthought. Further that his behaviour after the incident, the manner in which the deceased was murdered and the nature of the injuries sustained showed that the accused had direct intention to kill the deceased.

[54] In the result:

Accused is found guilty of murder with direct intent read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

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J T SALIONGA  
Judge

## APPEARANCES:

For the State: Mr L Matota

Office of the Prosecutor-General, Oshakati

For the Accused: Mr L P Shipila

Directorate of Legal Aid, Oshakati