REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case no: HC-NLD-CRI-APP-SNA-2021/00033

In the matter between

THE STATE **APPELLANT**

v

KAUNAWOYE HAMUKWAYA **RESPONDENT**

Neutral citation: *S v Hamukwaya* (HC-NLD-CRI-APP-SNA-2021/00033) [2022] NAHCNLD 54 (19 May 2022)

Coram: Salionga J *et* Kesslau AJ
Heard: **25 March 2022**
Delivered: **19 May 2022**

Flynote: Criminal Law- Murder- Competent verdict of attempted murder- Formal admissions- Identity of deceased and cause of death not admitted- Duty of court to call witnesses to ensure substantial justice- Factual causation and legal causation- Method and manner of killing- Conclusive evidence.

Summary: The Respondent was charged with Murder. He initially pleaded not guilty and on the date trial was to commence his lawyer made formal admissions in terms of section 220 of the Criminal Procedure Act. State and defense then closed their cases without calling any witnesses. The court was of the view that since the identity of the deceased and cause of death were not admitted there was no evidence to convict the Respondent for murder as charged and convicted him on the competent verdict of attempted murder. The court *a quo* also found that it would amount to an irregularity to call witnesses after both the State and defence had closed their cases. The State now appeals against his acquittal on the main charge of murder.

Held: that the provisions section 113 of the CPA are not available where an accused did not plead guilty;

Held further: that once it has been established that the evidence missing is essential to ensure a substantial and just decision, the responsibility of the court to call witnesses becomes mandatory;

Held further: that the formal admissions made by the Respondent remained unchallenged and amounted to unequivocal acknowledgement of guilt;
Held further: that the method of killing, the manner and means of killing are not elements of the offence charged;

ORDER

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1. The appeal is upheld and the conviction on count 1 is substituted with a conviction on murder with direct intent.
2. The sentence on count 1 is set aside.
3. The matter is remitted to the Regional Court Ondangwa to proceed with sentencing.
4. The Respondent to appear in Ondangwa Regional Court on 14 June 2022.
5. The Respondent is remanded in custody.

JUDGMENT

KESSLAU AJ (SALIONGA J concurring):

Introduction

[1] The respondent was charged in the Regional Court of Ondangwa with count 1: Murder; count 2: Defeating or obstructing the course of justice and; count 3: Theft. Respondent was legally represented during proceedings in the court *a quo*.

[2] The respondent, during April 2019, pleaded not guilty on all three counts and elected to remain silent. The matter was hereafter remanded for trial. In November 2019, when the matter subsequently appeared again, the prosecutor, failing to refer to his notes or the court record, indicated that he is ready to put the charges. The magistrate then informed the parties that the accused had already pleaded. Similarly the respondent's lawyer was under the impression that there was no plea taken yet and had prepared a guilty plea in terms of Section 112(2) of the Criminal Procedure Act 51 of 1977 (hereinafter referred to as the CPA). He then decided to present the content of the Section 112(2) document as formal admissions in terms of Section 220 of the CPA. The admissions were confirmed by the respondent and the magistrate noted them as formal admissions.

[3] The formal admissions form the basis of this appeal and will therefore be quoted in full:

'1. I, the undersigned KAUNAWOYE HAMUKWAYA, do hereby state that:-

I am pleading guilty to three counts of murder, attempting to defeat or obstruct the course of justice and theft.

2. I confirm that I am fully aware of the allegations in all the 3 counts preferred against me.

3. I confirm that I am fully aware of and have been informed by my counsel of my right namely:

3.1 That I am presumed to be innocent until guilty beyond reasonable doubt, and

3.2 That I cannot be compelled to give self-incriminating evidence and that if I so wish can remain silent and do not have to testify during these proceedings.

4. I confirm that I am pleading guilty of my own free will and that no one has influenced, enticed or forced me in any manner whatsoever to plead guilty nor were (sic) I made any promise, considerations or rewards.

5. I further confirm that I am fully aware of the consequences of this plea namely that I may be convicted on these charges to which I have pleaded guilty without the State having to call witnesses or tender any evidence against me.

6. I also confirm that I am fully aware of the serious nature of the charges to which I have pleaded guilty.

7. Admissions: Count 1-Murder.

7.1 I knew the deceased during his lifetime as a neighboring (sic) villager. Prior to the commission of these offences the decease had gone to the Police and falsely implicated me in any (sic) offence which allegedly took place at his homestead.

7.2 On a date I cannot recall around 8 to 13 February 2013 at Onakankuzi village in the Ondangwa district I was coming from cutting poles from a nearby field when I came across the deceased who was walking on a path. I struck the deceased with the back of an axe on his head and hacked him with the axe on his upper body. The deceased collapsed and died on the spot. I pulled and concealed the deceased's body in a nearby bush. I admit deceased's cause of death as per post-mortem examination report.

7.3 I admit that I intentionally and wrongfully caused the death of the deceased and I fully appreciated and knew at all times that my conduct was unlawful and punishable under the law. I have no lawful defence or excuse for my conduct.

8. Admissions: Count 2- Attempting to defeat or obstruct the course of justice.

8.1 I admit that on a date I cannot recall around 8 to 13 February 2014 at Onankankuzi village in the district of Ondangwa I killed the decease and hid his remains in a bush.

8.2 I fetched a hoe from the deceased's house and dug a shallow grave in the bush. I buried the deceased's remains in the shallow grave to conceal the crime I committed in killing the deceased and to hinder and make it difficult for the authorities and other people to find the remains of the deceased.

8.3 I knew at all times that my conduct was wrongful and punishable under the law. I have no lawful defense or excuse for my conduct.

9. Admissions: Count 3-Theft

9.1 I admit that on a date I cannot recall around 8 to 13 February 2014 and after I killed and buried the deceased in a bush at Onankankuzi village I went to the deceased's house and intentionally and wrongfully stole one chicken, a pair of jeans trousers, a

panga, a hoe, a pair of sandals, a chain and padlock and N$ 100 cash the property of the deceased. I cooked and ate the chicken at the deceased's house.

9.2 I knew at all times that my conduct was wrongful and punishable under the law. I have no lawful defence or excuse for my conduct' (emphasis added).

[4] Content with the admissions made, the prosecutor and defence closed their cases. The State thereafter requested for a conviction on all charges. The magistrate at that stage took issue with the fact that the name of the deceased was not admitted and that the respondent admitted the cause of death 'as per the post mortem', leaving the court *a quo* in the dark about the cause of death. The prosecutor then argued that the respondent admitted that he struck the deceased resulting in his death. Defence counsel suggested that the magistrate should read the admissions made in conjunction with the charges against the accused to 'cure the problem'. The prosecutor also submitted that the State intends to 're-open' their case and, when realising that there is no provision in the CPA for such, requested the court to apply Section 186 of the CPA and call an essential witness to ensure substantial justice.

[5] The magistrate ruled that the cause of death was not before court. Without the post mortem report before court the magistrate reasoned that: 'And as it stands the court does not know if the assaulted person is even dead or not, he could still be alive as we speak'. The magistrate furthermore ruled that he will not invoke Section 186 of the CPA to call a witness, as that will amount to ensuring that the accused is convicted at all cost because there was no evidence and in his opinion this will amount to an irregularity. The respondent was then convicted on the competent verdict of attempted murder on count 1 and guilty as charged on the other counts. The post mortem report was handed in by the State during sentencing proceedings.

[6] With leave granted, the State is now appealing against the conviction on the competent verdict of attempted murder on count 1. The grounds of appeal are fourfold and will be dealt with in the following order:

(a) that the magistrate erred by failing to record a plea of not guilty in terms of section 113 of the Criminal Procedure Act 51 of 1977 when realising that the accused did not admit the cause of death;

(b) that the magistrate erred by reasoning that it would be irregular for him to call further witnesses where no evidence has been led and which witness will result in the conviction of the accused;

(c) that the magistrate erred by not utilizing section 186 of the CPA to call the medical doctor as witness when realising that the evidence was essential to the just decision of the case and;

(d) that the magistrate erred by not finding that the death of the deceased was caused by the actions of the respondent despite the admissions recorded;

That the magistrate failed to record a plea of not guilty in terms of section 113 of the CPA.

[7] Counsel for respondent correctly submitted that this ground is unmeritorious in that the provisions of Section 113[1] of the CPA was not available to the magistrate since the respondent did not plead guilty; the admissions were received under Section 220 of the CPA. The ground of appeal that the magistrate should have applied Section 113 of the CPA is therefor dismissed.

That the magistrate erred by reasoning that it would be irregular for him to call further witnesses where no evidence has been led and which witness will result in the conviction of the accused.

[8] This ground of appeal links to the next ground because the reasoning of the magistrate led him to the conclusion that Section 186 of the CPA should not be invoked.

[9] The statement of the respondent was presented by his legal counsel to the court *a quo* under the banner of Section 220 of the CPA which reads: 'An accused or his legal adviser may in criminal proceedings admit any fact placed in issue at such

[1] Section 113 is titled 'Correction of plea of guilty' and states: 'If the court at any stage of the proceedings under section 112 and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he has pleaded guilty or is satisfied that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution: Provided that any allegation, other than an allegation referred to above, admitted by the accused up to the stage at which the court records a plea of not guilty, shall stand as proof in any court of such allegation.' (emphasis added)

proceedings and any such admission shall be sufficient proof of such fact' (emphasis added). In the matter of *S v Sesetse and another*[2] it was stated that: 'sufficient proof means that the State is relieved from the burden of adducing evidence concerning the facts admitted and if left standing at the end of the case becomes conclusive proof of those facts'. In *casu* the formal admissions made by the respondent stood unchallenged before the court *a quo* at the end of the case.

[10] This court is also in agreement with what was stated by Hannah J in the matter of *S v Maniping; S v Thwala* 1994 NR 69 at page 75 F-H: '. . .generally speaking, much more weight will attach to an admission made by a legal representative on behalf of his client than one made by an unrepresented accused. Normally the court would be justified in accepting that the legal representative has made all necessary enquiries of his client or the prosecutor or elsewhere so as to satisfy himself that the admission can properly be made'.[3] The cited remark was made regarding admissions in terms of a guilty plea however equally finds application to formal admissions made with the assistance of a representative.

[11] The magistrate, guided by Du Toit's Commentary on the Criminal Procedure Act, quoted the following:' Where a court calls a witness at the conclusion of the State and defence case in circumstances where the record does not disclose that an offence has been committed, and convicts on strength of the evidence of such witness, the conviction may be set aside on appeal'.[4] (emphasis added). The learned writer however went on to qualify the preceding statement in the light of *S v Khumalo* 1972 (4) SA 500 (O). The facts of the *Khumalo* matter cannot be compared to the case before court because the magistrate in that case 'forced' the accused to testify after misleading him that there is a *prima facie* case against him; hereafter gave directions for more investigations to be done and; consequently calling these new witnesses. In *casu* the formal admissions made by the respondent amounted to conclusive evidence. By reasoning that there was no evidence before court or that the record does not disclose that an offence has been committed, the magistrate with all due respect misdirected himself. In conclusion, Section 186 was available to the magistrate's discretion and this brings us to the next ground of appeal.

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[2] *S v Sesetse and another* 1981(3) SA [AA] at page 374 par A-B.
[3] See also *S v Omar* (CR 50/2020) [2020] NAHCMD 297 (17 July 2020)
[4] *Commentary on Criminal Procedure* Du Toit *et al* Service 11, 1993.

That the magistrate erred by not utilizing section 186 of the CPA.

[12] Section 186 reads: 'The court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case' (emphasis added).
Referring to the predecessor of the current Section 186 of the CPA, it was stated in the case of *Rex v Hepworth* 1928 A.D. 265 at page 277: 'The intention of sec 247, seems to me to give a judge in a criminal trial wide discretion and power in the conduct of the proceedings, so that an innocent person be not convicted or a guilty person get free by reason, inter alia, of some omission, mistake or technicality'.
It is for the court to decide whether the evidence is essential. If it appears that the evidence was in fact essential to the just decision of the case, a failure to call such witness could be an irregularity[5]. Accordingly, once it is established that the evidence is essential to ensure a just decision, the responsibility to invoke Section 186 and call further witnesses becomes mandatory.

[13] This court was referred to *S v Van Den Berg*[6] which established that in cases were evidence appears to be essential for the just decision of a case, a duty rest on a magistrate to act in accordance with the provisions of Section 186 which should not be regarded as 'descending into the arena' but rather fulfilling its statutory duties. I agree with O'Linn J (as he then was) in *S v Van Den Berg*[7] where he stated that: 'A perception exists in some circles that the fundamental right to a fair trial focuses exclusively on the rights and privileges of accused persons. These rights, however, must be interpreted and given effect to in the context of the rights and interests of the law-abiding persons in society and particularly the persons who are victims of crime, many of whom may be unable to protect themselves or their interest because they are dead or otherwise incapacitated in the course of crimes committed against them'. The crime of murder is regarded as one of the most serious offences. A person lost his life and therefor the unprepared and careless approach by both the State and defence counsel in the court *a quo* does not go unnoticed. Furthermore this court does not agree with submissions by counsel for

[5] *Commentary of the Criminal Procedure Act*, Du Toit *et al* at Service 15 1995 page 23-13
[6] *S v Van Den Berg* 1995 NR 23
[7] Supra at page 33 C-E

respondent that the magistrate, by only enquiring about the post mortem without acting on it, had fulfilled his duty to see that substantial justice is done[8].

[14] From the record it is clear that the magistrate was of the opinion that the cause of death, as per the post mortem, was essential to the charge of murder and once that was clear, he had a duty to call the relevant witness. In not calling the witness essential to the just decision of the matter, the magistrate failed to ensure that substantial justice was done.

That the magistrate erred by not finding that the death of the deceased was caused by the actions of the respondent despite the admissions recorded.

[15] Section 98 of the CPA states: 'It shall be sufficient in a charge of murder to allege that the accused unlawfully and intentionally killed the deceased…' and Section 91 of the CPA reads: 'A charge need not set out the manner in which or the means or instrument by which any act was done, unless the manner, means or instrument is an essential element of the relevant offence'. Neither the method of killing, manner or means of killing needs to be alleged in the charge sheet however it is customary and advisable to do so.[9]

[16] The question before this court is whether the accused unequivocally admitted that his actions caused the death of the deceased. The crime of murder is defined by Snyman as: 'Murder is the unlawful and intentional causing of the death of another human being'. The elements of the murder are listed as: (a) causing the death (b) of another person (c) unlawfully and (d) intentionally.[10]

[17] Snyman explains further that the act (or omission) of an accused qualifies as the cause of death if it is both the factual and legal cause of the death. It is the factual cause of death if it is a *conditio sine qua non*, that is, an indispensable condition, of the death, which means that the accused's conduct cannot be thought away without the deceased's death disappearing at the same time. Legal cause, as the second requirement, is if a court is of the view that there are policy considerations

[8] See *R v Beck* 1949 (2) SALR 626
[9] *Commentary on the Criminal Procedure Act*, Du Toit et al, 14-41
[10] CR Snyman *Criminal Law* 6 ed (2014) at 437

for regarding it as the cause of death.[11] Policy considerations will include reasonableness, fairness and justice.[12]

[18] In the matter of *S v Tembani* it was ruled that the question of legal causation is to be approached on a fair, practical and common-sense basis in determining whether there is a sufficiently close link existing between the act of the accused and the result thereof.[13]

[19] The respondent was during all relevant times represented by counsel who had disclosure of the post mortem report. The following formal admissions regarding the causal link were before the court a quo:

- On the fateful day the respondent attacked the deceased by striking him with an axe on the head and hacking him with the axe on his upper body.
- The deceased collapsed and died on the spot.
- The respondent pulled and concealed the deceased's body in a nearby bush.
- Respondent admitted deceased's cause of death as determined in the post-mortem examination report.
- Respondent admitted that he intentionally and wrongfully caused the death of the deceased and fully appreciated and knew at all times that his conduct was unlawful and punishable under the law.
- Respondent had no lawful defence or excuse for his conduct.
- Respondent left the scene and returned with a hoe from the deceased's house.
- The respondent dug a shallow grave in the bush and buried the deceased's remains in the shallow grave.

[20] The doubt of the magistrate was caused by the formal admissions referring to the cause of death 'as per the post mortem report'. It only became known to the magistrate at the sentencing stage that is was found to be 'polytrauma'. Polytrauma or multi trauma is defined as 'a short verbal equivalent used for severely injured patients usually with associated injury (i.e. two or more severe injuries in at least two areas of the body), less often with a multiple injury (i.e. two or more severe injuries in one body area)'.[14]

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[11] CR Snyman *Criminal Law* 6 ed (2014) at 437
[12] *African Dynasty Investment CC v Xavier Gomes* (I 2009/2015) [2017] NAHCMD 280 (6 October 2017)
[13] *S v Tembani* 1999 (1) SACR 192 (W)
[14] https://pubmed.ncbi.nlm.nih.gov.

The respondent, with assistance of counsel, admitted same in that he 'attacked the deceased by striking him with an axe on the head and hacking him with the axe on his upper body. The deceased collapsed and died on the spot'. The respondent furthermore with assistance from counsel and with knowledge of the content of the post mortem admitted that he caused the death of the deceased.

[21] The respondent admitted that after his attack on the deceased with an axe, the deceased collapsed and died on the spot; he pulled the remains into the bushes; left the scene and upon returning with a hoe he buried the remains of the deceased. The factual causation or *conditio sine qua non* being the first requirement is thus satisfied in that when removing the actions by the respondent (the respondent swinging his axe) from the scenario the death of the deceased disappears. Considering the second requirement of causality *to wit* legal causality requires the application of common sense, fairness, reasonableness to the facts admitted. Considering the admissions in context leaves no doubt that the crime of murder was committed. The admissions made, amounted to an unequivocal acknowledgement of guilt[15]. With all due respect, the magistrate finding that 'the deceased can still be alive and running around' is absurd. The magistrate misdirected himself in finding that the admissions do not suffice a conviction on murder. The appeal succeeds on this ground and the conviction and sentence on count 1 are set aside.

[22] From the facts it is clear that the respondent, when causing the death of the deceased, acted in cold blood. The respondent was fuelled by his believe that the deceased reported him previously to the police and attacked in revenge. A dangerous weapon was used in attacking the deceased multiple times including a blow to his head. The facts admitted surrounding the intent of the respondent, satisfies the requirements for a conviction on *dolus directus* or Murder with direct intent. The conviction on count 1 will thus accordingly be substituted accordingly.

[23] In the result it is ordered:

1. The appeal is upheld and the conviction on count 1 is substituted with a conviction on murder with direct intent.
2. The sentence on count 1 is set aside.

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[15] See *S v Njiva and Another* 2017 (1) SACR 395 (ECM) page 399 par 21-22.

3. The matter is remitted to the Regional Court Ondangwa to proceed with sentencing.
4. The Respondent to appear in Ondangwa Regional Court on 14 June 2022.
5. The Respondent is remanded in custody.

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E. E. KESSLAU

ACTING JUDGE

I agree,

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J. T. SALIONGA

JUDGE

Appearances:

Appellant:	Mr. L. S. Matota Office of the Prosecutor-General, Oshakati .
Respondent:	Mr. L. P. Shipila Directorate of Legal Aid, Oshakati.