

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: CC 14/2016

In the matter between:

THE STATE

v

PINEAS HEITA

ACCUSED

Neutral citation: *S v Heita* (CC 14/2016) [2023] NAHCNLD 103 (09 October 2023)

Coram: SALIONGA J

Heard: 5, 6 & 7 November 2018; 24 June 2019; 29 June 2020; 20 October 2020; 30 November 2020; 8 & 10 March 2021; 3 & 4 June 2021; 3 September 2021; 18 October 2022; 28 April 2023.

Delivered: 09 October 2023

Reasons: 12 October 2023

Flynote: Criminal Procedure – Murder - Reckless and negligent - Driving a motor vehicle without a driver’s licence – Requirements - (a) Accused must be aware of circumstances which made his act correspond to definitional elements and rendered

it unlawful – (b) Accused must be capable of acting in accordance with his insight into right and wrong. He must have criminal capacity at the time of the commission of the offence – (c) He must have foreseen the possibility ensuing and pursued his action that render the commission of the crime.

Deviation from the witness statement – Witness statement not intended to be all-inclusive - a summary of observations and not for testimony in court - only material where differences exist between statement and oral testimony - Discrepancies found not material.

Circumstantial evidence– Intention – State of mind – Subjective test to be applied – Approach to be followed holistic one – In absence of accused admitting intention to kill – An inference must be drawn from evidence relating to accused's outward conduct at the time of commission of act as well as circumstances surrounding events – Court must consider all circumstances of case before and after commission of act – Including possibility of previous arguments between accused and deceased – Determination for *dolus eventualis* – Accused acts with intention in form of *dolus eventualis* if commission of act or causing of unlawful result is not his aim , but: - Subjectively foresees the possibility that in striving towards main aim the unlawful act may be committed or the unlawful result may be caused and – he reconciles himself to this possibility-Accused's conduct during the whole incident was grossly reckless and this displaced any claim that he did not intend to kill her or that his action was not the sole cause of the deceased death or that he acted in self-defence.

Duplication of charges - the evidence of reckless supplementing or auxiliary that of murder which cannot be separated to establish guilt on either reckless or negligent driving. Same evidence and acts requires to prove murder and reckless driving. Accused's conduct from the time he recklessly drove the vehicle and eventually bumped the deceased constituted a single criminal transaction. Not justifiable.

Summary: The accused is indicted for murder read with the provisions of the Combating of Domestic Violence Act, 2003 (Act 3 of 2004); for Contravening s 80 (1) of the Road Traffic and Transportation Act, 1999 (Act 22 of 1999)–Reckless or negligent driving and Contravening s 31 (1) (a) of the Road Traffic and

Transportation Act, 1999 (Act 22 of 1999) -- Driving a motor vehicle without a driver's licence, Alternatively for contravening s 31 (1) (b) of the Road Traffic and Transportation Act, 1999 (Act 22 of 1999) - Driver's licence not kept in his possession or in a vehicle.

The accused was married to the deceased. On 21 March 2014, he drove a pick up motor vehicle whilst his wife was holding on the bonnet of the car. The accused drove on a public road from Oshivelo towards Tsumeb without a driver's licence or failed to carry his driver's licence. While driving slowly he gradually increased speed and eventually the deceased fell from the car. Thereafter the accused bumped her or drove over her body. Accused pleaded not guilty to all counts and offered no plea explanations. During the trial the credibility of witnesses including that of the investigating officers came under attack regarding the disparities between their witness statements and their oral testimonies as well sloppy investigations done. It was further averred that the points indicated in the photo plan were not correctly marked and mere hearsay.

Accused during the trial admitted to have driven a motor vehicle whilst his wife was on the bonnet but denied increasing the speed at any point. He also admitted to have bumped the deceased with a motor vehicle but denied any intention to murder her. There is no direct evidence in relation to the charge of murder. The court inferred from circumstantial evidence that the accused bumped the deceased as a result of which the deceased eventually died at Onandjokwe Regional hospital some days after.

Held; that a state witness is only at risk of being discredited if there is a material deviation from the witness statement and which the witness is unable to satisfactorily explain. Witness statements are not required to contain each and every aspect of the witness's testimony in court but merely intended to state facts for purposes of possible prosecution.

Held further; that though the accused's explanation was not reasonably and possibly true and stood to be rejected as false, the court had doubt whether the accused had direct intention to murder the deceased. However the court is satisfied that the

accused was able to foresee the deceased's death as a result of him driving with her on the bonnet and therefore convicted him of murder with *dolus eventualis*.

ORDER

1. Count 1: Murder read with the provisions of the Combating of Domestic Violence Act, 2003 (Act 4 of 2003) – Guilty of Murder with *dolus eventualis* read with the provisions of the Combating of Domestic Violence Act, 2003 (Act 4 of 2003)
 2. Count 2: Contravening section 80 (1) of the Road Traffic and Transportation Act, 1999 (Act 22 of 1999) - Reckless or Negligent- Not guilty and acquitted.
 3. Count 3: Contravening section 31 (1) (a) of the Road Traffic and Transportation Act, 1999 (Act 22 of 1999) - Driving a motor vehicle without a driver's licence- Guilty.
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JUDGMENT

SALIONGA J:

[1] The accused, an adult male, is arraigned before this court on three counts, namely Murder read with the provisions of the Combating of Domestic Violence Act, 2003 (Act 4 of 2003), Contravening s 80 (1) of the Road Traffic and Transportation Act, 1999 (Act 22 of 1999)-- Reckless or Negligent driving and Contravening s 31 (1) (a) of the Road Traffic and Transportation Act, 1999 (Act 22 of 1999) - Driving a motor vehicle without a driver's licence alternatively Contravening s 31 (1) (b) of the Road Traffic and Transportation Act, 1999 (Act 22 of 1999)—Driver's license not kept in possession or in vehicle.

[2] The State is represented by Mr Gawaseb and accused is represented by Mr Shakumu on the instruction of the Directorate of Legal Aid.

[3] The summary of substantial facts in terms of s 144(3) (a) of the Criminal Procedure Act, Act 51 of 1977 (the CPA) are that Pineas Heita was at all relevant times at or near Oshivelo. On 21 March 2014, the accused and Helena Penomwene Heita were in a domestic relationship as they were married to each other. The accused drove with a pick up and his wife was holding on the bonnet of the car. The accused drove on a public road *to wit* the road between Tsumeb and Oshivelo without a driver's license or failed to carry his valid driver's licence. The accused gradually increased the speed while driving. His wife (the deceased) held onto the car until she eventually fell from the car and the accused bumped her, or drove over her body. The accused got out of the vehicle and held his wife, the now deceased on her neck. The wife of the accused was rushed to hospital and two days later the wife of the accused passed away on account of injuries she sustained when she fell from the car and was bumped.

[4] At the commencement of the trial, accused brought an application in terms of section 87 of the Criminal Procedure Act¹ on the ground that the manner in which the charges are crafted does not specify the causes of injuries, how and whether the deceased was intentionally bumped, whether the deceased after she was bumped left the spot and accused needed a sketch plan in order to prepare for the trial. The State opposed the application and raised a point *in limine*. The application was heard on 5 November 2018 whereby the court upheld the point in *limine* and dismissed the application.

[5] Thereafter the charges were put to the accused. He pleaded not guilty to all counts including the alternative charge to the third count. The accused offered no plea explanation and put the State to prove all the allegations against him.

[6] The State handed in several documents by agreement to form part of the record. The minutes of the pre-trial review conference was not amongst the said documents as no conference was held. It is evident from the defence's reply

¹ Criminal Procedure Act 51 of 1977.

attached that accused did not answer most of the crucial questions in the State pre-trial memorandum for want of the further particulars. That incongruity procedure followed by counsel defeats the whole purpose of the pre-trial objectives namely to curtail the proceedings. It is no surprise that the trial took unnecessarily almost five years to be finalised and in future counsel are advised to adhere to the pre-trial guidelines in place in order to guard against similar occurrences. Notwithstanding the aforesaid, documents handed in were marked exhibit A-N.

State's case

[7] The state called Dr Lynet Sally Makura Ndlovu a medical practitioner in the employment of the State at Tsumeb State hospital. She testified that on 21 March 2014 she was a doctor on call. She received a patient Helena P Heita at night but cannot recall what time was it. The patient was brought in from Oshivelo clinic and was communicating well. She told her that she was bumped by her husband's car. However from the examination, she was in hypovolemic shock, had bruising on the right quadrant of the abdomen and she had difficulty in breathing. She was very pale and her condition was critical. When she examined the chest, she found that the patient had injury on the right side and no air was going through. According to the doctor the x-ray results showed the patient's 2nd down to the 8th ribs were fractured and she was bleeding from the abdomen.

[8] She stabilized the patient according to the x-ray results or findings by giving her blood transfusion. Because the lung was injured by the fractured ribs, she administered a chest drain to ease the breathing. After she stabilized the patient she called the Head of General Surgery department Dr Mushede who advised her to administer anti-biotic and have the patient transferred to Onandjokwe Regional hospital. The patient was transported by an ambulance. With regard to the bruises she could not tell how extensive they were but she recalls that there were multiple scratches above the area of the liver on the right side. Although the patient's condition was critical when she came at the Tsumeb hospital, she was communicating when she was transferred.

[9] In cross-examination the doctor testified that she did not know who brought the patient in. She only saw her in the casualty. She just assumed the patient came in by an ambulance. She conceded that it matters what mode of transport is used to transport a seriously injured patient and that they do receive a lot of patients brought in the hospital in private vehicles. The doctor explained that in medicine, it is better for a patient to be brought to the hospital for medical attention as early as it is practically possible than leaving the patient at the scene waiting for an ambulance. However a patient who is transported by a police van or a bakkie may bleed more or may have breathing problem than the one who is transported in an ambulance. She denied the possibility that the nature of injuries sustained by this patient could have been caused by being transported in the police van, at the same time agreeing that it might have worsened her condition. The doctor admitted that this patient, upon examination had serious internal injuries and that is why she called the specialist at Onandjokwe hospital. She could not however comment or conclude on her chances of survival because there was no sign of external bleeding visible upon her arrival at the hospital. She confirmed that the injuries the patient sustained is associated with those sustained when a person is ran over by a vehicle.

[10] In re-examination the doctor repeated that it matters what mode of transport is used to transport a patient however in medicine there is a time chase period within which a medical practitioner has to intervene for a patient to survive. In her opinion it matters most for a patient to be brought earliest to the hospital in whatever mode of transport. Unlike a patient with a spinal cord injury who must be transported by an ambulance, this patient had none of such injury as she was moving her legs. In this case it was more important to stop bleeding than leaving the patient at the scene waiting for an ambulance.

[11] Dr Akutu Appolus is a specialist in surgery employed at the Onandjokwe Regional Hospital. He corroborated the evidence of Dr Makura as far as the extent of the injuries the deceased sustained are concerned. He testified that on 22 March 2014 he was a specialist doctor on call. He received a call from Tsumeb hospital that they were going to transfer a patient who was involved in a car accident as a pedestrian. The patient arrived at the hospital at about 03:50 in the morning. The patient was assessed by the nurses and the first line doctor in the casualty as a

motor vehicle accident pedestrian who was injured. It was his testimony that because at Tsumeb State hospital there is no qualified surgeon to take the patient to a theatre, transferring the patient to Onandjokwe Regional hospital was the best option.

[12] The first line doctor did the chest x-rays, stabilized the patient by giving her oxygen, a drip and some medications. He was informed that the patient has arrived and he saw him at 04:00 in the morning. The initial report was that the patient was communicating well, had a tube on the right side upon arrival and was assessed to have bruises or some marks on the right chest and on the right part of the abdomen. He observed that the blood pressure was low due to internal bleeding from the chest. The x-ray was taken and indicated that there were nine ribs' fractured on the right side and the tube had blood. The patient was admitted in the ward, blood tests were taken. The first result showed that the strength of the blood in the body had dropped to 8.8. The normal level of blood in the body is 12. They did ultrasound scan or sonar which showed fluid in the tummy. The patient was unstable and was very sick as the blood pressure kept on fluctuating.

[13] After all the results were received, the patient was taken for an operation in order to stop the bleeding. The patient was operated, two liters of blood was found coming from the liver, which was about 75 per cent severely injured. In this case the liver injury was graded 4 meaning it was almost completely shattered because grade 6 is the worst while 1 injury is minor grade. The medical report was handed in and marked exhibit N. This Doctor considered the grade four injury of the liver the patient sustained as severe with the likelihood of survival being minimal as only few patients in that condition/category survive. Further that if a person falls from a car or a building of 1.2 meters such patient cannot sustain injuries of that magnitude just from the falling. He further explained that if a person is hit by a car while standing one would expect that the lowest parts of the body to be fractured or broken. While if a person is sitting, lying or kneeling down it also depends on the type of a car and the speed, the injury will concentrate more on the middle parts of the body. In his opinion, the injury sustained by this patient could have been caused by a bump on the right side including the chest and abdomen.

[14] In cross-examination, the witness testified that the injury this patient sustained has nothing to do with her being transported in a police van or any car than an ambulance. That He agreed that although a van may not be an appropriate mode of transporting a seriously injured person, from a medical point of view the injuries were sustained at the scene as they are from an impact. He confirmed that he is not a specialist in that field to form an opinion, but as a doctor, he received training on patients' traumas and he can give an opinion. He conceded though that had the patient earlier in Tsumeb received the same treatment she got at Onandjokwe, there might have been a different outcome all together.

[15] Paulus Kamelele, came to know the accused when he started working at Oshivelo. He testified that on 21 March 2014 he left his working place around 16:00 and went to Leticia cuca shop at Oshivelo. His testimony was that he only saw a girl he used to hear was the accused's girlfriend coming from the southern to western direction. She passed the fence and went straight in front of accused's car. Because the windows were tinted, it was like the car was moving while the girl was in front. From there he went inside the cuca shop and did not see what happened next. He knew it was accused inside the car because he knows him. It was a white Toyota bakkie. He made it clear that the girl came in front of the car, got hold on the bumper and the car started moving. The witness stated that he saw this girl climbing on top of the bumper before he went inside the cuca shop. By the time he came out, the car had already passed him. He knew the girl by seeing but did not know her name. He however came to hear later that she was married to the accused. He knocked off at 16:00 and the incident happened in the afternoon around 18:00. In cross-examination the witness denied to have told the police that he heard the hooting when the girl got onto the car nor did he see the driver reversing. He admitted that he saw the car when it stopped but not when it reversed.

[16] Marcellus Narib is currently with Intermediate Life Support as a driver. On 21 March 2014 he was a driver for the Ministry of Health at Tsumeb State Hospital. That day he was on a night shift starting at 19:00 p.m. until 07:00 a.m. in the morning. At around 21:00 he was called by causality staff that there is a referral to Onandjokwe hospital. He prepared the ambulance a VW GRN 27641, and together with sister Ipumbu transported the patient about 250 km from Tsumeb. He drove on a tar road

from Tsumeb to Onandjokwe hospital. In cross-examination the witness testified that he drove for about 2 hours to 2 hours and 50 minutes and arrived at Onandjokwe at midnight. He disputes any evidence that he only arrived at Onandjokwe hospital at 04:00 in the morning.

[17] Elifas Amutenya was a detective-sergeant at the time of the incident. He is now a detective warrant officer attached at the Scene of Crime Unit in Oshikoto Region. He attended a six months scene of crime course at Israel Patrick Iyambo College in Windhoek. He visited the scene in this matter and compiled the photo plan with serial no 47/2014 of Cr 11/03/2014 Tsumeb which he identified from his full names and a signature at the end. He confirmed to be the author of the photo plan and went through the photo plan. He testified on the photos he took and the points he made which were pointed to him by witnesses as indicated in the plan as well as the measurements. In cross examination the witness admitted that he took the pictures on the 25 March 2014 although the incident happened on the 21 March 2014. He took note of counsel's instructions that the point depicting a mini shop on the photo plan is not C but D. He explained that the points he marked were shown or pointed out to him by witnesses. He could not agree with counsel's instructions and restated that he only indicated the points as pointed out to him. In re-examination the witness testified that the correct way of compiling a photo plan is to mark the points on the photo plan as indicated by the witnesses. According to the witness he used the word 'alleged' in his statement because the points were not his own but the witnesses' observations.

[18] Leticia Ndilinanye Nakakoti knew accused person as Pineas Heita for about six to seven years. She also knew the deceased Helena Heita for only 3 years when she got married to the accused. On 21st March 2014 in the evening, though it was not too late she was at her friend and neighbor's house, Ms Donna in Damara location. At first she saw a car and thereafter she saw a lady climbed on it. She was at a distance of four to five meters away when she first saw the car. She also heard a lot of noise from the group of people who were following the car. She stood up because she recognized the car as that of Mr Pineas, the accused person. She together with another person went straight to him as the window was half open in order to talk to him. When the accused saw them and a group of people coming

towards the car he closed the window. She heard the voice of the deceased saying 'I told you already' and at that time the car was driven slowly. She further heard the deceased saying 'when I left, you came and fetch me back and that 'you have my life.' Then after that the car was driven off at a fast speed.

[19] It was Ms Nakakoti's evidence that because she was the head of women network of that area she called Ndahafa Indongo a police officer. The officer responded that she is not on duty but will call the police station. The witness did not know what happened thereafter but the police officers came to her the following day asking for her statement. She confirmed it was around 20:00, however the street lights were on and she was standing near a street light. She explained that when she saw the deceased on top of the car, her feet were hanging down to the ground and she was lying with her stomach on the bonnet of the vehicle. The car at that stage was driven slowly and a group of people were following it from behind. She could not say when the accused increased the speed because she did not follow the car.

[20] In cross-examination she denied that the deceased was her friend or that she had seen her in person prior to seeing her on top of the car. She maintained that she was at point G in the photo plan and her house is depicted in point D which is a colored bricks structure. She was adamant that she was at a neighbor's house. She stated that she only speak Oshiwambo not English, that the police did not take her through the statement nor was it read back to her. She cannot recall if she signed the statement because a long time had passed. She however recognized the signature on the document as hers. She denied to have given her statement in English and whoever wrote in her statement that she was at her house at the time of the incident is lying. She denied giving the registration number of that vehicle in the statement and that she only saw the deceased already on top of the car. She knew it was officer Kanyemba who took down her statement but she did not tell him some of the things he wrote.

[21] At that point in time, Mr Shakumu counsel for the accused applied for a trial within a trial to be conducted. This application was objected to by the State. The court wanted to know in terms of which section of the Criminal Procedure should a trial within a trial be conducted. Counsel for the accused requested for a matter to

stand down till 14:15 to give counsel time to prepare submissions. On resumption, Mr. Shakuma informed the court that he was withdrawing the application and proceeded with cross-examination. The witness maintained that some contents of the statement were not true but some were correct. She denied knowledge of most of counsel's instructions including that there is a witness whose car was blocking the road. She could not comment whether the deceased used vulgar language because she was not present.

[22] In re-examination the witness indicated that she did not know if the crowd gathered because the deceased was screaming and using vulgar language. She only heard the deceased saying the words she testified to in her evidence. She did not hear any insult from the deceased. She denied being with the deceased prior to the incident, that the deceased had a knife or that the deceased came from her house. She confirmed signing the statement that was handed in court but stated that it was never read back to her. She stated that she did not know some of the things mentioned in her statement. However that officer who took her statement was speaking Oshiwambo and in her view the officer was not in a good mood because of certain things he was asking her. She referred to things or questions like whether she followed the car up to where it ended and the registration number of the car he recorded. When asked if she knew a witness Simeon Kanjome who will come and testify that accused's car could not pass because Kanjome's car was blocking the road, the witness responded that she only saw the deceased climbing on the bonnet.

[23] Matheus Nangombe knows the accused prior to 2014 as a neighbor for many years. On 21st March 2014 at around 21:00 in the evening he saw Pineas's girlfriend running towards accused's car. Accused was the driver thereafter the girl climbed on the bumper and she was holding on the wipers. Thereafter the accused person drove off. He testified that when he saw the accused's girlfriend running towards the car he did not observe anything in her hands and she was alone. The witness was at a distance of 17 meters when he saw her running to the car and he heard her saying 'accused stop.' At that time the car was driven slowly and when his girlfriend got on top of the car the accused increased the speed. It was around 20:00 in the evening and slightly dark but not dark, a person could see.

[24] In cross-examination the witness confirmed that apart from the natural light, the street lights were also on and the visibility was clear. The witness maintained that he was at a cuca shop next to Leticia's house. He did not see Leticia and did not know where she was at that time. That the accused's car was a distance away from the bar where he was. The witness testified that he never went to school, he gave his statement in Oshiwambo and signed it or wrote something on it. He denied to have told officers that he was at Phillip's place drinking tombo and does not know him. He insisted that whoever wrote that did not write it properly. He also did not tell them that the woman was walking backward. He saw her coming to the car whilst the husband was driving slowly and she climbed onto the car.

[25] Simeon Kanyome knows accused for 6-7 years prior to 2014. He testified that on 21 March 2014 he was in Sebron's car to be dropped off at Ovambo location because they were at another location. From there they went to stop at the shop next to the road. While there he saw a vehicle coming towards their vehicle. Pineas the accused was the driver of that car. There was a person on the bonnet who was holding the wipers with one hand and the legs were hanging. The witness then called Sebron who removed the car to the side. Accused's car proceeded driving slowly with a person on the bonnet. He did not hear anything said by that person nor did he see anything with her. It was dark around 20:00 but the street lights were on, the visibility was good.

[26] In cross-examination the witness denied telling the police officers that the deceased was holding the bull bars with both hands. Saying he told them that her one hand was on the bar and the other on the wiper. In re-examination he maintained that the correct version is that the deceased's one hand held the bar and the other hand was holding the wiper. He explained that the reason why there are discrepancies was because the police officer did not write what he told him and also did not read the statement back to him. According to the witness, he does not know how to read or write because he only advanced up to grade 2 in school.

[27] Magdalena Johannes, also known as Dona was together with Leticia and Ndeshi as well as one of her kids at her house on 21 March 2014. She testified that Leticia's house is close to her house and Helena Hamukoshi was with them in the

evening. The witness further testified that she did not see what happened because the road was behind her and when she went to check the vehicle had already gone.

[28] Martha Ipundaka Ndalikokule is a police officer working at the field training office in Oshikoto region. She knows accused person before court. On 21 March 2014 in the evening around 20:30 she was a shift Commander on duty at Oshivelo Police Station. She received a call from sergeant Haindongo through the charge office that the accused who works at Oshivelo clinic is driving a car while his wife was on top of the bonnet from Oshivelo location to the direction of Tsumeb. The witness, together with sergeant Nakwalumbu and Maswagu went to attend the reported incident about a kilometer on the Tsumeb road.

[29] While driving, she saw the car of Pineas (the accused) on the right side. Pineas and his wife were on the left side of the road and he was holding his wife on the armpit as if he was lifting her up. Upon their arrival she asked Pineas what was going on but he did not reply and the wife said she fell from the car and her husband bumped her at the back. From there they loaded her in the police car and took her to Oshivelo clinic. She communicated with the victim in Oshiwambo. Together with Maswagu they lifted her up holding her head and the legs and loaded her in a car. She was lying on her back on a mattress in the car. Maswagu was the driver and when they arrived they offloaded her inside the clinic. It took them about 6 to 7 minutes from the scene to the clinic. She confirmed that photo 8 on point L is where she found the deceased with the suspect and point M is where the car was parked.

[30] Sylvia Nakwalumbu is a detective investigator at Oshivelo police station. She knew the accused person in court. She testified that on 21 March 2014 in the evening she was performing her duty at the police station. The shift commander told her of the report she received and that they should go and attend the report. Together with the shift commander and Maswagu drove to the scene. From the police station they passed Oshivelo check point, before they passed Oshivelo Southern Location a woman approached their car and directed them where accused's car headed. They drove for about a kilometer and they found a white pickup Toyota on the right side of the road facing Oshivelo side. They found Pineas on the left side of the road with his wife leaning on his legs. The accused was like holding her with one arm trying to let

her sit down. Sergeant Ndalikokule asked what happened but accused did not say anything. When they came closer sergeant Ndalikokule asked again what happened and the wife replied in Oshiwambo that 'I fell out from the car then my husband bumped me.' They all held her up as it seems she was seriously injured and loaded her on the mattress in a vehicle. They loaded her lying facing up and took her to Oshivelo clinic where she observed bruises at her back.

[31] Fanuel Shinedima is a registered nurse at Oshivelo clinic. On 21 March 2014 he was on a night duty at the clinic busy with a woman in labour. While busy, another woman was brought in by the police and was restless. On examination he saw lacerations and swelling at her back. She was complaining of pain and he gave her painkiller injection. As he was already on his way taking the women in labour to Tsumeb, he could not put the two patients in an ambulance for privacy's sake. He requested/asked the police to transport the other patient to Tsumeb with their van. The patient was put on the mattress in a van with the assistance of the police. After he handed over the patient, he came to find the victim in the hands of the doctor. He returned to Oshivelo clinic as he was alone there.

[32] Darius Ndakalako is a police officer at Oshivelo. On the 21 March 2014 a Friday around 21:00 he received a call to go to the office. When he reached the office he was told to go to the clinic as there was a person who fell from the car. The witness, together with a nurse who was assisting as well as the suspect put the patient on a mattress which was in the car. He transported the patient to Tsumeb hospital. He observed the patient's back was reddish and slightly swollen. He knew the patient as Helena Heita, a wife to the accused and that time she was speaking clearly.

[33] The next witness to be called was a Cuban doctor who conducted the post-mortem examination and in the meantime had gone back to Cuba. It was placed on record that the Cuban Government was refusing to cooperate and a letter to that effect was submitted to court. Mr. Gawesed then indicated that the state was going to call a different doctor to come and read the contents of the post-mortem report into the record. Mr. Shakumu objected stating that they were not notified about the arrangements. Secondly that the purpose for their initial objection to the affidavit

being handed in was because they wanted the author to be present and answer questions. After heated arguments on the issue and after the matter stood down to 11:00 the parties agreed for Doctor Ricardo Armando Perez to come and read into records the contents of the report.

[34] Ricardo Armando Perez is a doctor in medicine since 1988, currently a senior medical officer in Forensic Services at Oshakati State Hospital. He has a degree in medicine obtained at Santiago de Cuba University in Cuba. He is the head of the mortuary department at the Oshakati Police Station for about 9 years and has conducted more than 3000 post-mortems. He identified the document given to him as a report on a medical legal post-mortem examination PM 47/2014 Otjiwarongo which he read into the record. He however made it clear to the court that it should be noted that the post-mortem report was done by Dr Batista Santos on the 28th March 2014, 09:40, the examination was on the body of a female adult that was identified to him by constable Taapopi of Nampol as that of Helena Penamwene Heita who was 26 years old. That the death took place in Onandjokwe hospital on the 23rd March 2014 at 21:00. The post-mortem was done 5 days after death. That the chief post-mortem finding made by him on this body were 'severe brain edema with vascular congestion.' That means the brain was swollen. 'Bilateral haemothrax' meaning there was blood on both sides of the chest, right and left. Right ribs from the third to the seventh fractured meaning ribs from the 3, 4, 5, 6, and 7 ribs were fractured on the right side and on the left side 2 and 3 were also fractured. The liver had multiple severe lacerations that penetrated into the parenchyma of the right lung. The liver was wounded and had a deep wound that went into the parenchyma, meaning deep in the liver, which is a sign of shock in the kidneys. Pulmonary respiratory distress and fracture of the right clavicle. The Doctor diagnosed the cause of death as a MVA Poly-trauma. The doctor who conducted the post-mortem examination was a pathologist specialist and designated at the pathology forensic services.

[35] At the close of the State's case, the accused applied in terms of s 174 of the Criminal Procedure Act, 51 of 1977 (herein the Act) for the discharge on the three counts preferred against him. The State opposed the application. The court after

hearing the evidence and submissions from the defence and the state, dismissed the application for the reasons stated in its ruling².

[36] Accused was placed on his defence. He testified that on 21 March 2014 at Oshivelo during the late hours around 15:00, his wife tried to fight him. He then tried to stop her from fighting but she did not want to stop. He screamed for help as his wife was too strong for him and Helena Shungu came to his assistance. According to the accused Helena held his wife when he run away. His evidence on this point, remains hearsay because Helena did not testify to confirm his version. That piece of evidence will be disregarded.

[37] He further testified that he ran to his car and drove away from the house towards the north for about 3 kilometres. After he realised that he did not have enough petrol to reach the village he called his friend Andre to give him N\$ 100 dollars. He drove back to Otjivelo, passed the road block to the other location called Oshivelo South. While making a U-turn back to the filling station, he saw his wife coming in front of his vehicle. She approached him and stopped the car. She was talking but he could not hear as the windows were closed. He could see a knife on her right hand which she took from a friend's house Leticia Nakakoti. He tried to stop her by hooting to no avail. He put the vehicle in a reverse gear and she kept holding on the bumper until she got onto the bonnet. She was actually holding on a bull bar until she jumped on the bonnet of the vehicle. When he noticed her on the bonnet he drove slowly looking for someone to take her off. He came at a certain corner whereby he saw people stopping their car on the road. He hoped someone would come to his vehicle to help but none came. He proceeded from where he stopped and on the way he found another car blocking the road. Then Simeon Akanyome went to get the driver of that car to remove his vehicle. He continued driving and until then his wife was still on top of the bonnet. Although accused testified that Simeon told his wife to get off to which she replied that she will not and that if anybody tried to remove her from the bonnet, she will fight him or her, Simeon did not corroborate his version.

² *Heita v S* (CC14/2016) [2020] NAHCNLD 167 (30 November 2020).

[38] He was driving slowly to the southern direction up to the tar road hoping his wife would jump off. When she did not come off, he made a U-turn towards the police station. In the process of turning the deceased jumped off from the bonnet and he accidentally bumped her with the car. He confirmed that Leticia Nakakoti reported the matter to the police. That the police arrived while he was assisting his wife to get up. He also assisted the police to load his wife in a police van.

[39] The witness explained that his wife was holding on the wipers and when she saw him turning she jumped backwards because she was lying on her tummy facing the windscreen. He then bumped her accidentally. He drove with the police to the clinic for medical assistance. He confirmed that upon their arrival they found a nurse attending to a pregnant woman who later attended to his wife. The Oshivelo clinic was about 200 meters from the scene and she was only given painkillers. In a van where she was loaded there was no mattress. At that moment she was moving and walking on her own and was talking and they only assisted to load her onto the car. She was then taken to Tsumeb hospital and later transferred to Onandjokwe Regional Hospital. After his wife passed on he was charged with murder and appeared in the Tsumeb Court. He disputed the police photo plan which was handed in and marked as exhibit. Instead he submitted his own photo plan in which he marked the points and the plan was also handed in as an exhibit.

[40] He admitted to have continued driving the vehicle after he realised that his wife was on top of the bonnet because he had already stopped twice but no one could help him. He also admitted that he knew he did wrong to drive a car with his wife on the bonnet but he did it because they had a violent relationship where on many occasions she fought him. They had a lot of cases with the police where similar incidents occurred. There is one incident where she stabbed him with a knife on his hand and has a scar to date. That the latest incident happened a day prior to this incident. He used to report to the police's women protection unit for advice. His wife was a violent person and that day he intended to take her to the police. He realised that driving with the wife on the bonnet firstly is dangerous but he tried to stop now and then seeking for help. He denied any intention to kill or hurt his wife. He also did not foresee the possibility of her falling from the bonnet. He had been going through difficult times and in all those incidents he used to run away.

[41] Accused called Elias Kainda Martin as his witness. He is a businessman and a traditional counsellor living in Oshivelo and working at Tsintsabis. He knows Pineas Heita the accused person as, a local resident of Oshivelo. He knew that his wife is no more but knew her before she passed on. They were not family friends he just knew them. He could not really recall the year, but it should have been 2012, 2013 and 2014 around there when his wife was still alive. Accused went to his house asking for accommodation because they did not understand one another with his wife at home and he accommodated him. The witness testified that accused told him that they were fighting at home and he was scared of sleeping at his house. Accused wanted to sleep over at his place and he granted him permission. It happened twice but he could not really remember the time space between the two incidents. In cross examination he made it clear that the accused told him they were fighting but he did not elaborate. He however did not see the accused and his wife fighting. He was just told by the accused.

[42] Shiteni Erastus is the second defence's witness. He testified that around 2013 and 2014 he was residing at Oshivelo. He has known accused person as his neighbour since 2011 to date. He also knew that accused was married to Helena Penomuene now deceased. He was not certain as to when he got to know her. He would not describe their relationship in their marriage but there was a day that he heard the accused and his wife now deceased talking loud and he went to them at their house. He asked both of them to retain peace because he found them quarrelling. He did not know what the quarrel was all about. They retained peace and the witness continued his way. He could not remember the month but he knew it happened in 2013 in the afternoon. In cross- examination he confirmed that the accused and the deceased were quarrelling in 2013 and they made peace after he intervened. He did not see them physically fighting and it is fair to say they were exchanging words. He also confirmed that as a neighbour of accused since 2011 up until the passing of the deceased he only saw them once quarrelling or exchanging words. He also confirmed that it happens for couple to have misunderstandings. He knows the difference between shouting and quarrelling and according to him they were quarrelling. In re-examination he testified that his house is about 80 m from

accused's house and there is a road in between. He agreed that 50 or 80 m distance is far and cannot make the accused an immediate neighbour.

Submissions by Counsel

[43] Mr. Gaweseb while arguing that the State has discharged the onus of proof and proven the case against the accused beyond reasonable doubt stated that proof beyond reasonable doubt does not mean proof beyond any shadow of doubt. He summarised the evidence of both the State and the accused including the admissions accused made during the trial. He went further to refer the court to both Namibian and South African cases on credibility finding and the evaluation of evidence. Counsel held the view that the State witnesses featured very well in the witness box despite minor short-comings and deviations which could be due to the long time that has passed since the incident took place (See *S v Auala* (No1) 2008 (1) NR 223 HC at 236). That the credibility of these witnesses was not affected and as such are trustworthy and credible. While on this point he referred the court to the matter of *S v Hanekom* (SA 4 of 2000) [2001] NASC 2 (11 May 2001) where it was held that '.... not every contradiction or discrepancy in the evidence of a witness reflects negatively on such witness. Whether such discrepancy or contradiction is serious depends mostly on the nature of the contradictions, their number and importance, and their bearing on other parts of the witness's evidence.' He thus submitted that there is nothing in the individual testimonies of the state witnesses that shows that they have deliberately and consciously lied to this court, that the contradictions or inconsistencies if any in their testimonies are not only minor but also of the type that would be expected of any person in the circumstances.

[44] Counsel for State further cited *S v Burger*³ where a distinction between murder and culpable homicide was summarized as follows: If an accused does foresee as distinct from ought to have foreseen- the possibility of such resultant death and persists in his conduct with indifference to this fatal consequence then murder would be committed. That having regard to the requirements of foresight and persistence, the dividing line between murder with *dolus eventualis* and culpable homicide is at times rather thin. Mr. Gaweseb was convinced that the facts of this

³ *S v Burger* 1975 (4) SA 877 (A).

case shows that the actions of the accused amounted to murder with *dolus eventualis*. Mr. Gaweseb submitted that the State had proven its case beyond reasonable doubt and asked the court to find the accused guilty as charged on all counts.

[45] On his part Mr. Shakumu in his submissions concentrated on the charges of murder and reckless or negligent driving as his client had already admitted guilty to the charge of driving without a license. He argued that the State failed to prove causation and intent with regards to the murder charge.

[46] On the murder charge, Counsel submitted that it is not in dispute that the accused person's conduct factually led to the falling of the deceased from the bonnet. However that is not enough. It must be established that legally, the conduct of the accused person is blameworthy or without justification. He asked the court to look at what is fair and just under the circumstances to determine the blameworthiness of the accused. He went further submitting that whether the falling or sloppy medical treatment was the cause of the victim's death is for the court and not the experts to determine. He continued to submit that the accused person had acted in self-defence or alternatively that it was necessary for him to act in that fashion under the circumstances.

[47] While referring to case law, counsel argued that the law does not impose a duty to retreat, especially the accused in this matter where the attack was with a lethal weapon, a knife. He stated that the onus is on the State to prove beyond reasonable doubt that the conditions or requirements for self-defence did not exist or that the bounds of self-defence were exceeded. It was his submission that the state was further to prove beyond reasonable doubt that the accused did not genuinely believe that he was acting in self-defence. It was Counsel's argument that the accused person did not act unlawfully, had no intention to take her life nor has he caused the death of the deceased person.

[48] Counsel went further to analyse the evidence and discrepancies of the witnesses evidence individually. With regards to Dr. Makura, he argued that this witness did not know what mode of transport was used by the victim from Oshivelo

to Tsumeb. That she agreed that an ambulance was the most suitable transportation for a person like deceased because it would minimise further injuries. That this doctor agreed that the mode of transport used might have worsened her injuries. He argued that this witness failed to produce medical records from the hospital indicating that she treated the deceased. On the evidence of Dr Munyika, Counsel submitted that this witness was not an expert in physics, speed, impact and the likes, he conceded that Tsumeb was not properly equipped to handle the deceased's situation and if an intervention had been done earlier at Tsumeb hospital the patient might have survived. Further submitted that the fact that the death was caused by a fractured liver disproves that the deceased was run over or the impact was a result of a fast moving vehicle.

[49] With regard to the evidence of the ambulance driver, Narib Markus, Counsel highlighted the discrepancy in his evidence with that of Dr Munyika regarding the time the deceased arrived at Onandjokwe hospital. With the driver indicating 23h50 while the doctor said 04h00 am. Counsel went further to argue that the evidence of Amutenya who drew the sketch plan was hearsay and that this sketch-plan differed significantly from the one accused compiled. With the evidence of Leticia Nakakoti, he submitted that she had lied about her position in photo 5 that she was not at point G but D where she and the deceased were together drinking. That this witness distanced herself from the statement she had given to the police and that she could not explain the contradictions between her *viva voce* evidence and the statement. That this witness had lied about her position and the speed of the car, with her statement indicating that the accused was not speeding but testifying that he drove fast.

[50] On the evidence of Sgt Nangombe counsel argued that he did not know in which car and how the deceased was transported to Tsumeb while Sgt Nakwalumbu could not tell the court how many people handled the deceased. Counsel continued submitting that the investigations done were pathetic because there was a background of domestic violence perpetuated by the deceased.

[51] Mr. Shakumu made it clear that it was not disputed that the deceased could have possibly died from internal bleeding. He however disputed that the bleeding

can solely be ascribed to the alleged blunt impact or that the accused acted unlawfully and intentionally causing the death of the deceased. He questioned how the deceased was handled from Oshivelo clinic and the quality of medical care received there and attributed them to being contributory and intervening factors. He submitted that there was a *novus actus intervenes*. He submitted that if it was not for poor and insufficient medical treatment the deceased would not have died.

[52] In his conclusion, counsel submitted that the State did not establish that accused wrongfully and unlawfully caused the death of the deceased. He pray for an acquittal on this charge.

[53] On the charge of reckless or negligent driving, Counsel submitted that the State failed to make out a case on either counts. That no expert evidence was advanced in the matter to prove these charges. I get the impression that Counsel is of the view that this charges can only be proven by expert evidence which in my view is not the case. On the charge of driving without a licence, although accused made admissions which amounts to admission of guilt, Counsel argued that no evidence was advanced in this regard and accused be given the benefit of the doubt and be acquitted.

The law

[54] Hunt and Milton⁴ state that murder consists of the unlawful and intentional killing of another person, with the elements being (a) unlawful (b) Intentional (c) Killing (d) of another person. With regard to the element of intention, it is required that the test is subjective, the State must prove either actual or legal intention, *mere culpa* is insufficient. They further explain that actual intention exists where X commits the *actus reus* meaning to kill Y; and Legal intention exists where X commits the *actus reus* foreseeing that it may cause Y's death. With regard to the Killing element, it must be proven that if it was not for the conduct of X, Y would not have died when he did.⁵

⁴ PMA Hunt and JRL Milton *South African Criminal Law and Procedure- Common Law Crimes* 2 ed 1990 at 340 - 341.

⁵ *S v van As 1967 (4) SA 594 (AD)*.

[55] According to CR Snyman⁶ intention in the technical sense of the term can be defined as;

‘the will to commit the act or cause the result set out in the definitional elements of the crime, in the knowledge of the circumstances rendering such act or result unlawful. Defined even more tersely, one can say that intention is to know and to will an unlawful act or a result.’

[56] For the accused to be convicted of the offence of murder, his actions should meet the following requirements as per Snyman:⁷ (a) He must be aware of the circumstances which made his act correspond to the definitional elements and rendered it unlawful, (b) He must be capable of acting in accordance with his insight into right or wrong and must have criminal capacity at the time of the commission of the crime. (c) He must have willed the commission of the act constituting the crime.

[57] Intention is a state of mind. In a case where an accused like in this case is denying legal intention a subjective test must be applied. Therefore an inference must be drawn from the evidence relating to his outward conduct at the time of the commission of the act as well as the circumstances surrounding the incident. All the circumstances of the case should be considered, including a possibility of earlier or previous arguments between the deceased and the accused before the commission of the offence.

[58] Snyman referred above went further to discuss the different forms of intention, being *dolus directus*, *dolus indirectus* and *dolus eventualis*. In the instant matter it is possibly the *dolus eventualis* we are looking at since there is no evidence that accused had direct intention to kill the deceased. The test in this regard is whether the accused foresaw the possibility of death resulting or arising as a result of his conduct and proceeded with such conduct reckless of that result.

[59] In *S v Humphreys*,⁸ the court considered the test for *dolus eventualis* and it said:

⁶ CR Snyman *Criminal Law* 5 ed (2008).

⁷ CR Snyman above at 155.

⁸ *S v Humphreys* 2013 (2) SACR 1 (SCA) (2015 (1) SA 491; [2013] ZASCA 20) paras 12 – 17.

'In accordance with trite principles, the test for *dolus eventualis* is twofold:

- (a) Did the appellant subjectively foresee the possibility of the death of his passengers ensuing from his conduct; and
- (b) did he reconcile himself with that possibility.'

For the first component of *dolus eventualis* it is not enough that the appellant should (objectively) have foreseen the possibility of fatal injuries to his passengers as a consequence of his conduct, because the fictitious reasonable person in his position would have foreseen those consequences. That would constitute *culpa* and not *dolus* in any form. One should also avoid the flawed process of deductive reasoning that, because the appellant should have foreseen the consequences, it can be concluded that he did. That would conflate the different tests for *dolus* and negligence.

[60] This brings me to the second element of *dolus eventualis*, namely that of reconciliation with the foreseen possibility. The import of this element was explained by Jansen JA in *S v Ngubane* 1985 (3) SA 677 (A) at 685 A – H in the following way:

'A man may foresee the possibility of harm and yet be negligent in respect of that harm ensuing, e.g. by unreasonably underestimating the degree of possibility or unreasonably failing to take steps to avoid that possibility. The concept of conscious (advertent) negligence (*luxuria*) is well known on the Continent and has in recent times often been discussed by our writers as follows;

Conscious negligence is not to be equated with *dolus eventualis*. The distinguishing feature of *dolus eventualis* is the volitional component: the agent (the perpetrator) 'consents' to the consequence foreseen as a possibility, he 'reconciles himself' to it, he 'takes it into the bargain'.

The true enquiry under this rubric is whether the appellant took the consequences that he foresaw into the bargain; whether it can be inferred that it was immaterial to him whether these consequences would flow from his actions. Conversely stated, the principle is that if it can reasonably be inferred that the appellant may have thought that the possible collision he

subjectively foresaw would not actually occur, the second element of *dolus eventualis* would not have been established.'

[61] A similar position was found by Leach JA in *Director of Public Prosecutions, Gauteng v Pistorius*⁹ when he defined that intention, in the form of *dolus eventualis* arises –

'...if the perpetrator foresees the risk of death occurring, but nevertheless continues to act appreciating that [it] might well occur, therefore gambling as it were with the life of the against whom the act is directed...Terminology aside, it is necessary to stress that the wrongdoer does not have to foresee death as a probable consequence of his or her actions. It is sufficient that the possibility of death is foreseen which, coupled with a disregard of that consequence, is sufficient to constitute the necessary criminal intent.'

[62] If I understand the aforesaid authorities correctly, it seems there can be no *dolus eventualis* if the accused did not envisage the result.¹⁰ He does not have to see it as a result that will necessarily flow from his act but only as a possibility.¹¹ It also does not have to be a strong possibility but one is to assume that there must be a substantial or reasonable possibility that the result may ensue.¹²

Application of the law to the facts

[63] It is a well-established rule of principle that the State carries the burden of proving the allegation contained in each charge against the accused beyond a reasonable doubt which means evidence should carry a high degree of probability. This however does not mean proof beyond the shadow of a doubt.¹³

[64] The following facts are common cause that the accused and the deceased on count 1 were in a domestic relationship of husband and wife as defined in section 3 of the Combating of Domestic Violence Act 4 of 2003; that the accused on 21 March

⁹ *Director of Public Prosecutions, Gauteng v Pistorius* 2016 (1) SACR 431 (SCA) (2016 (2) SA 317; [2016] 1 All SA 346; [2015] ZASCA 204).

¹⁰ C R Snyman above at 182.

¹¹ C R Snyman above at 182.

¹² *S v Ostilly and Others* (1) 1977 (4) SA 699 (D).

¹³ *Miller v Minister of Pensions* [1947] 2 All ER 372.

2014 drove a motor vehicle as alleged by the State without a driver's licence or with the licence not with him or in the vehicle. That the deceased was lying on the bonnet of the vehicle which was being driven by the accused. That accused drove a vehicle with the deceased on the bonnet from the location up to the tarred road and passed Punyu in the direction of Tsumeb. That the accused later made a U-turn back to Oshivelo check point and parked his vehicle on the right side of the road. The deceased fell from the bonnet and was bumped by a vehicle on the right side of her body. Furthermore that the incident took place on a public road between Oshivelo and Tsumeb and that the deceased died some days later at Onandjokwe Regional hospital.

[65] The main contention of the defence was that although the accused was the factual cause he could not be the legal cause of the deceased's death. It was argued that the accused acted in self-defence. In the alternative that the victim was transported in a police van without a mattress that could have worsened the bleeding. The defence further argued that the manner in which the deceased was handled by the medical personnel and the insufficient medical treatment could be *intervenens actus*. He further disputed the initial points in the photo plan where the deceased jumped off the vehicle and the point of impact where she was bumped. He also placed the cause of death as per the post-mortem report and the credibility of State witnesses in dispute.

[66] It is not disputed that some of the witnesses' deviated from their police statements when they testified. The court is alive that the credibility of the witness in this regard might be at stake. However discrediting a witness who deviates from a previous statement is done only in cases where there is a material deviation. In deciding whether or not the truth has been told, despite some contradictions, regard must be had to the rest of the witness's evidence, considered against the totality of evidence presented.

[67] Ms Nakakoti was one of the witness' whom counsel for the defence argued that she deviated from her police statement when she stated in her statement that she was at her house when she saw the deceased climb on the bonnet while in court she testified that she was at her friend and neighbor's house. That is contradictory but not material deviation to reject her evidence *in toto*. Neither the evidence of a

witness who testified that he was at Leticia' cuca shop when he saw the deceased for the first time while in his statement he told the police that he was at Philip's bar. It really does not make a difference where the witness was when they witnessed the incident because it is common cause. When considering the contradictions in the witnesses' versions as pointed out by defence counsel, I am not persuaded that such deviations adversely impacts on the credibility of the witnesses, the court will just disregard it. The defence further questioned how and why the deceased went onto the bonnet. That argument is neither here nor there as it is not an element of the offence that the State is required to prove. I am not inclined to take it further.

[68] Accused pleaded not guilty to all counts and elected to remain silent. It only became apparent during cross-examination that accused acted in self-defence alternatively he acted under necessity. He also raised for the first time a *novus actus intervenes* as a possible cause of death. In his evidence accused stated that he knew it was wrong to drive a vehicle with his wife on top of the bonnet but had no intention to kill her. According to the accused, he was dealing with a violent person, the deceased who had a knife in her hand and that was the reason why he drove around with her on the bonnet looking for assistance.

[69] The principles applicable to self-defence are clear and trite. In order for an accused to succeed with private defence (or self-defence), the following requirements must be met: (a) The attack must be unlawful; (b) the attack must be directed at an interest legally deserving of protection; and (c) the attack must be imminent but not yet completed (*S v Lukas* 2014 (2) NR 374 (HC) (headnote)).

[70] In the present case, the evidence before court which accused confirmed is that he drove his car with the windows closed. The deceased approached his car from the front, got hold on the bumper, went on top and was lying on the bonnet. None of State witnesses saw the deceased with a knife at any point except the accused who claimed that the deceased had a knife. His evidence was not corroborated on that point. Accused did not also testify that the deceased whilst on the bonnet was trying or damaging or injuring the accused's vehicle or himself. The only thing the deceased said was 'I went to my family and you came to get me.' A clear indication that there might be a misunderstanding between the couple. Same

can corroborate the evidence of the accused that there might have been a fight prior to the incident. If the accused's version is to be accepted that prior to the incident, the deceased' fought him and Helen came to his rescue, surely he was out of danger at that time. In his evidence he testified that he drove away from home, passed the check point and came back for the money when he encountered the deceased. He did not even bother to pass at the check point and report the alleged incident. Instead he decided to drive around with her until he made a U-turn and she fell from the bonnet. Going by what the defence put to the witness, that the deceased had a knife in her hand, deducing that at the time the accused was driving around, she had a weapon with her. That was not possible because, she was outside the car holding her both hands onto the car while he locked himself inside. The court finds that there was no threat on the accused warranting an action in defence.

[71] Accused is further disputing that he caused the death of the deceased. He attributed the transporting of the deceased from the scene to the clinic in a police van without a mattress, the insufficient medical treatment by medical personnel as *novus actus interveniens* that possibly caused her death. Convincing as the submissions sound, sight should not be lost that the deceased was bumped by a bakkie and suffered mostly internal injuries according to the evidence. The deceased was taken to Oshivelo clinic, then to Tsumeb hospital and ultimately transported to Onandjokwe hospital the same day. It should be noted that the patient had internal injuries which could not be detected without x-rays results. According to the doctors the injuries sustained were too severe and her chance of survival was very minimal. The doctors also testified on the importance of taking the injured person immediately to the hospital for medical attention despite which mode of transport is used. I further disagree with the submission made by counsel for the accused with regard to the time the ambulance arrived at Onandjokwe hospital, in that the Doctor Munyika testified that when the deceased arrived she was attended to by the shift doctor at casualty and only thereafter he came to see her at 04h00 am.

[72] In this case the doctor excluded the possibility of the injuries suffered to have been caused from transporting the patient in a bakkie without a mattress. Although doctor admitted that had this patient have gotten the same treatment he got in Onandjokwe earlier in Tsumeb, it could have made a difference he did not concede that the deceased could have survived. I find no evidence to gainsay the evidence

before court. This defence's claim that the *novus actus interveniens* caused her death is a mere speculation as it is not supported by a single shred of evidence. The cause of death was recorded as MVA polytrauma. There is no other expert evidence to the contrary to substantiate his proposition to that effect. This court having assessed the facts and evidence, finds that the cause of death was as a result of the actions of the accused and that there was no intervening act between the accused's conduct and the deceased's death.

[73] Counsel for accused went on contending that for the accused to be convicted, the state was supposed to prove that legally his conduct is blameworthy and unlawful under the circumstances. There is no direct evidence in the instant case that the accused intentionally drove his car and bumped the deceased. The court is required in those circumstances to draw inferences from the circumstantial evidence. In that regard Liebenberg J in *S v HN*¹⁴ cautioned against a court speculating and stated:

'Where the court is required to draw inferences from circumstantial evidence, it may only do so if the 'two cardinal rules of logic' as set out in *R v Blom* 1939 AD 188, have been satisfied. These rules were formulated in the following terms:'

- “(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.
- (2) The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct.”

[74] The law does not require from a court to act only upon absolute certainty, but rather upon just and reasonable convictions. When dealing with circumstantial evidence, as in the present case, the court must consider the cumulative effect of all the evidence together when deciding whether the accused's guilt has been proved beyond reasonable doubt. If not, doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation.

¹⁴ *S v HN* 2010 (2) NR 429 (HC) para 57.

[75] This court having found that accused did not act in self-defence and there was no *novus actus intervenes* proven. The next question to be determined is whether accused acted with direct intent or that of *dolus eventualis* when he killed the deceased. *Dolus eventualis* refers to a situation where an accused did not intend to kill, but foresaw the possibility of death that can ensue and was reckless as regard to the consequence.¹⁵ In this matter accused drove his car around well knowing that his wife was on the bonnet. Accused knew driving with his wife on the bonnet is dangerous but persisted in his conduct causing her to fall and bumped her with the vehicle. Surely the accused ought to have foreseen the possibility of not only that the deceased might fall off from the vehicle but also of bumping her in the process or that the deceased might be hit in any way resulting her sustaining serious injuries on her body.

[76] It is without doubt that the situation in which the accused found himself was one of annoyance and unusual behaviour of his wife who decided to climb onto the bonnet of a moving vehicle. He then acted out of rage, irritation and frustration. Notwithstanding the aforesaid this court is not satisfied that the accused had no other options or that the only other remedy available was to keep on driving around with his wife on the bonnet. Accused's conduct during the whole incident was grossly reckless and this displaced any claim that he did not intend to kill her or that his action was not the sole cause of the deceased death or that he acted in self-defence.

[77] With regards to the charge of reckless or negligent driving, it is clear that the State relies on the same evidence to prove both the reckless and negligent driving and murder charge. Although there is evidence indicating that accused drove reckless when he drove a vehicle with the deceased on top of the bonnet, the court has warned it self of the potential danger of duplication of convictions in this regard. The Supreme Court in *S v Gaseb and Others*¹⁶ endorsed a twofold test that helps the courts to determine if or not there is a duplication of convictions. In this matter the Supreme Court approved the two tests as summarized in *S v Seibeb and Another and in S v Eixab*¹⁷ where it was stated as follows:

¹⁵ C R Snyman *Criminal Law* 5 ed (2008) at 184.

¹⁶ *S v Gaseb and Others* 2000 NR 139 (SC).

¹⁷ *S v Seibeb and Another and in S v Eixab* 1997 NR 254 (HC).

'The two most commonly used tests are the single evidence test and the same evidence test. Where a person commits two acts of which each, standing alone, would be criminal, but does so with a single intent, and both acts are necessary to carry out that intent, then he ought only to be indicted for, or convicted of, one offence because the two acts constitute one criminal transaction. See *R v Sabuyi* 1905 TS 170 at 171. This is the single intent test. If the evidence requisite to prove one criminal act necessarily involves proof of another criminal act, both acts are to be considered as one transaction for the purpose of a criminal transaction. But if the evidence necessary to prove one criminal act is complete without the other criminal act being brought into the matter, the two acts are separate criminal offences.'

[78] It is crystal clear that at all relevant times when accused drove his car with the deceased on top of the bonnet he was reckless and foresaw the possibility of the deceased either falling off or crashing her head against the tar road. In this regard the evidence of reckless is thus supplementing or auxiliary to that of murder which cannot be separated to establish guilt on either reckless or negligent driving. It would require the same evidence and acts to prove murder and reckless driving. Thus the accused's conduct from the time he recklessly drove his car and eventually bumped the deceased constitute a single criminal transaction.

[79] With regard to the charge of contravening s 31 (1) (a) of the Road Traffic and Transportation Act, 1999 (Act 22 of 1999) - Driving a motor vehicle without a driver's licence with an alternative of contravening s 31 (1) (b) of the Road Traffic and Transportation Act, 1999 (Act 22 of 1999) - Drivers licence not kept in possession or in a vehicle. Although the accused pleaded not guilty, he made admissions on the 9 March 2018 which were recorded in terms of s 220 of the Criminal Procedure Act 51 of 1977 as amended. Accused admitted that he did not have a licence when he drove a vehicle on 21 March 2014. The said admissions were supplemented by his own evidence where he stated in cross-examination that he had been driving this vehicle since 2008 without a licence. He went further to state that he knew if the police were to catch him he could get a ticket or could be arrested for that. It is therefore not correct for counsel for the accused to argue that no evidence was

advanced and that the state has not made out a case of driving without a driver's licence.

[80] Having considered the evidence in its totality, the merits and demerits of this case the court is satisfied that the state had proved beyond reasonable doubt that accused did not act in self-defence and that there was no *novus actus interveniens* or imminent danger on his person or property. I have rejected accused's version as an afterthought, improbable and false beyond doubt and accused has to be found guilty of murder with *dolus eventualis*. However, the conviction on count two cannot stand as it will amount to a duplication of convictions. Accused is given the benefit of the doubt and is acquitted on a charge of reckless or negligent driving. While on the third count, I am satisfied that the guilt of the accused was proven beyond reasonable doubt and finds him guilty as charged.

[81] Consequently, the following order is made:

1. Count 1: Murder read with the provisions of the Combating of Domestic Violence Act, 2003 (Act 4 of 2003) – Guilty of Murder with *dolus eventualis* read with the provisions of the Combating of Domestic Violence Act, 2003 (Act 4 of 2003)
2. Count 2: Contravening section 80 (1) of the Road Traffic and Transportation Act, 1999 (Act 22 of 1999) Reckless or Negligent - Not guilty and acquitted.
3. Count 3: Contravening section 31 (1) (a) of the Road Traffic and Transportation Act, 1999 (Act 22 of 1999) - Driving a motor vehicle without a driver's licence - Guilty.

J.T SALIONGA

Judge

APPEARANCES

THE STATE:

T Gaweseb

Office of the Prosecutor- General, Oshakati

ACCUSED:

K Shakumu

Of Kishi & Shakumu Associates

Instructed by the Directorate of Legal Aid