

REPUBLIC OF NAMIBIA

HIGH COURT OF  
DIVISION,  
  
HELD AT OSHAKATI



NAMIBIA NORTHERN LOCAL

JUDGMENT

Case No: CC 14/2021

THE STATE

v

ERKKI HAIMENE

ACCUSED

**Neutral citation:** *S v Haimene* (CC 14/2021) [2023] NAHCNLD 71 (03 August 2023)

**Coram:** SALIONGA J

**Heard:** 03, 04, 05, 06, and 07 October 2022, 17, 18, 19, 20 and 21 October 2022, 31 October 2022, 02 November 2022, 21 December 2022, 17 April 2023, 10 May 2023

**Delivered:** 01 August 2023

**Reasons:** 03 August 2023

**Flynote:** Criminal Procedure – Accused indicted on charge of attempted murder read with the Combating of Domestic Violence Act 4 of 2003, C/s 2 r/w sections 1, 39(2) and 39 of Arms and Ammunition Act 7 of 1996 as amended and murder read with the Combating of Domestic Violence Act 4 of 2003 – Evaluation of evidence – Section 208

– Single witness evidence – *S v Noble* 2002 NR 67 (HC) – Caution must be exercised when evaluating the uncorroborated evidence of a single witness – The court must be satisfied by the credibility of the witness's evidence and it should constitute proof of the guilt of the accused beyond a reasonable doubt.

Criminal Procedure – No onus rest on accused to convince the court of the truth of any explanation even if that explanation is improbable – What is required is for the court to be convinced that is not only improbable, but false beyond reasonable doubt – *R v Difford* 1937 AD 370 at 373 – It is sufficient if court is satisfied that there is a reasonable possibility that it may be substantially true – The approach the court must follow to decide whether the defence case, considered with the entire body of evidence, is reasonably possibly true is outlined in *S v Radebe* 1991 (2) SACR 166 (T).

Criminal Procedure – Circumstantial evidence – Inference to be drawn from circumstantial evidence – Such inference must be consistent with proven facts – Inference must exclude any other inference – In determining the guilt or the innocence of an accused person the ultimate requirement is proof beyond reasonable doubt and this depends upon appraisal of the totality of the facts – Individual items of evidence may seem to be insufficient to convict accused – If pieces of evidence considered in their totality - Cumulative effect of all these proves accused guilty beyond reasonable doubt.

**Summary:** The accused was charged with attempted murder, read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003, possession of a firearm without a licence and unlawful possession of ammunition and a murder charge also read with the provisions of the Act<sup>1</sup>. He pleaded not guilty to all the charges. Accused testified that the deceased in both incidents was shot by accident. In coming to a verdict, the court considered amongst other things, the evidence of a single witness as well as mutual destructive evidence, the circumstantial evidence, that the deceased was shot six times and the accused's conduct before, during and after the commission

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<sup>1</sup> Act 4 of 2003.

of offence in that accused in both attempted murder and murder ran away from the scene with a firearm after the shooting. Accused's behavior found not consistent with that of an innocent person. His evidence was found improbable and false beyond reasonable doubt.

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### **ORDER**

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

Count 2: Not guilty of unlawful possession of a firearm - contravening section 2 read with sections 1, 10, 11 and 38 of the Arms and Ammunition Act 7 of 1996.

Count 3: Not guilty of unlawful possession of ammunition – contravening section 33 of the Arms and Ammunition Act 7 of 1996.

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

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### **JUDGMENT**

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SALIONGA J:

[1] The accused person appears in this court charged with the following counts:

'Count 1: Attempted murder, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003.

It is alleged that upon or about 02 day of October 2010 at or near Green well Matongo Location, in the district of Windhoek, the accused did unlawfully assault Vistorina Ndeshiteelela Haimene by shooting her with a firearm on the upper arm and breast with intention to murder her.

Count 2: Possession of a firearm without a licence – contravening section 2 read with sections 1, 8, 10, 11, 38 and 39 of the Arms and Ammunition Act 7 of 1996.

It is alleged that upon or about 02 day of October 2010 at or near Green well Matongo Location, in the district of Windhoek, the accused did wrongfully and unlawfully have in his possession an arm to wit a pistol without having a licence to possess such arm.

Count 3 Unlawful possession of ammunition – contravening section 33 read with sections 1, 38 and 39 of the Arms and Ammunition Act 7 of 1996.

The allegations are that upon or about 02 day of October 2010 at or near Green well Matongo Location, in the district of Windhoek, the accused did wrongfully and unlawfully possess, ammunition, to wit live ammunition without being in lawful possession of an arm capable of firing that ammunition to wit 1 round of ammunition

Count 4 Murder, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003.

It is alleged that upon or about 15 April 2020 and at or near Omahenene Village in the district of Eenhana, the accused did unlawfully and intentionally kill Vistorina Ndeshiteelela Haimene an adult female person.’

[2] Accused pleaded not guilty to all counts. He offered no plea explanation apart from admitting the identity of the deceased as alleged and that she was his legal wife. In this regards, Vistorina Ndateelela Haimene (now deceased) is the complainant in count 1 and the deceased in count 4.

[3] The State in the first count of attempted murder, called Emerensiana Nangolo a warrant officer in Nampol who by then was a neighbour to the couple in Greenwell Matongo in Windhoek. She testified that on 2 October 2010 her attention was aroused by a noise outside and when she went outside she saw the deceased in their yard. The deceased made some reports to her and went back inside their house. The deceased did not take long inside the house, she came back outside again. After few minutes the witness saw accused person coming outside with a pistol in his hands following the deceased. According to Nangolo the deceased wanted to go behind their house but accused fired shots towards the deceased from the other direction of the Zink house. The witness then called the deceased to come to her. The deceased passed through the fence which is in between their houses and the witness told her to sit as she was heavily bleeding. The witness testified that as the deceased's right upper arm was raised up she saw that the deceased was bleeding.

[4] She further testified that whilst trying to tie the deceased inner arm, she saw another bullet scratched her under the breast. The accused shot at the deceased three times. The witness made it clear that she was looking at the accused when he was aiming at the deceased. She was the one who called the ambulance which took the deceased to the hospital. After the deceased was taken to the hospital, the witness also called the police. When the police arrived they did not find the accused person at home. She directed the police where the accused had gone to because she saw him leaving at the time they were waiting for an ambulance. Thereafter the police followed the accused and came with him after about 20 minutes. Accused was arrested and was taken away.

[5] In cross-examination the witness maintained that the deceased was shot while outside of their house. She denied accused's instructions that the deceased sustained injuries inside the house. She explained that she stood with the deceased outside when the late initially came screaming or calling the witness's name. It was her evidence that when the deceased came out for the second time, she went in the direction where she was shot.

[6] Stefanus Lazarus is a warrant officer attached to the Gender Based Violence Protection Unit of the Namibia Police in Windhoek. He testified that he came to know the accused person on the 2<sup>nd</sup> day of October in 2010. On the evening hours of that day while on official duty he received a radio call about a shooting incident at Greenwell Matongo Location in Windhoek. He picked up two of his colleagues and left to attend the report at Audrey Street in Greenwell Matongo. On their arrival at the scene they found the previous witness who informed them that the incident happened at their neighbour's house. The witness was referring to warrant officer Emerensiana Nangolo, a neighbour to the accused at the time. She directed them to the house where the shooting took place. When they approached the house, warrant officer Nangolo saw the accused walking down in the street and pointed him to this witness.

[7] They then parked the vehicle and followed the accused on foot. They found him and ordered him to stop. Thereafter they searched him and found a pistol CZ on his belt with serial number 720932. After introducing themselves and explaining his rights, they confiscated the firearm from him. They took him to Wanahenda police station where he was detained and charged. The accused did not produce any licence to possess the said firearm at the time and that the firearm was later on booked in Pol 7. There was no ammunition in this fire-arm but an empty magazine. In cross examination the witness was adamant that the accused was found walking down on the street not too far from the place where the incident happened. He denied accused's instruction that he was found at the gate of their yard.

[8] Saima Hangula is a warrant officer in the Namibian Police stationed at Wanaheda Police Station in Windhoek. She was on duty on the 27 March 2014 from 07:45 to 17:00 when detective Kamwi came in her office wanting to handover a firearm to the lawful owner because the case had been finalized. The witness confirmed that she gave the Pol 7 book to officer Kamwi. After the order was given she searched for the firearm and completed the Pol 557, an indemnity by claimant whenever anything is booked out in Pol 7. She gave the firearm to the lawful owner which was Abel Mongoloka. Both the witness and the owner signed on both the Pol 7 and Pol 557, an

indication that he received the firearm. She handed a CZ, 65 mm with a serial number 720932 to Abel Mongoloka the owner of the firearm.

[9] At the time of the second incident Bonifatius Haindongo was residing in the house of the accused person and the deceased. He testified on the earlier commotions between the accused and the deceased at home including the day the deceased was shot. On the day of the incident the witness and another worker Pandu went to fetch water. On their way back he heard the accused and deceased arguing in their bedroom. He was still in the kitchen when he sent Pandu to go and fetch cooking oil and salt from the room. Before Pandu came back he heard gunshots from accused and deceased's sleeping room. After a while, a second shot went off and he ran away. After the first shot went off the witness heard the deceased screaming saying 'wuu you are killing me' and after the second shot he did not hear anything. The shots did not go off successively. The third shot went off while the witness was on his way to go and call a police officer who was their neighbour living about 2 kilometres away.

[10] It was his evidence that after he came back from the neighbouring house the accused phoned him asking where the Omukwanambwa is, referring to deceased's dog clan to which the witness replied that she was in the room where he left her. After a while accused called him again asking if the police had arrived. At that point the police took the phone from the witness, spoke to the accused and told him to come and report himself as the person is not dead. Accused failed to come home as requested by the police instead he just cut the call. Thereafter the body of the deceased was removed from the scene.

[11] In cross-examination he confirm that there was a day accused came home with the police but he did not know that his wife was drunk and the reason why the accused went to collect the police. When the police and accused came they could not find the deceased at home. The police called her and she arrived shortly thereafter. The deceased informed the police that she ran away because she was scared and also that the accused had a firearm and had previously shot at her in Windhoek.

[12] Twakulila Hamwele knows both accused and the deceased person prior to death. On 15 April 2020 he was sent by Abed Vaile to go and get a firearm (a shot gun) from the accused person's house. When he went there first in the afternoon, he did not find the accused, only found the deceased and Bonny. He told them that once accused come home he must leave the firearm with them because Tate Abel sent him to come and get it. He went back home but did not stay long he went back again to the accused's house. On his way from Vaile's house to the accused's house he heard three gunshots. The first two shots went off within a short period of time from each other and the last shot took a while. The accused's house is not far from theirs as they are neighbours and there is just a fence in between. Before he reached the accused's house he saw a car leaving towards the eastern side. When he arrived at accused's house, he only found a boy with whom he entered the accused's bedroom. He testified that because it was dark he lighted his torch and found the deceased laying on the floor with the head facing the eastern side. They called her but she did not respond. They then closed the door and went to inform people. On his return he found that police officers had already arrived at accused person's house.

[13] Christoph Hakandume is a police officer with the rank of warrant officer and a charge office member with more than 10 years' experience. He testified that while on duty during the evening hours of 23 November 2019 the accused came to the charge office at Oshikango Police Station to report that he had a quarrel with his wife and she was missing from home. He requested police assistance to go with him and search for her. He also informed the witness that he had a firearm/pistol and offered to temporarily hand it over to the police. He further informed the witness about an incident that happened in Windhoek when he shot his wife and did not want to have it with him. The witness then completed the paperwork and booked the said firearm and magazine with live bullets as requested. The witness together with other officers proceeded to the accused's house at Omahenge village.



[14] On 15 April 2020 the witness reported for duty around 22:00 as a shift commander. He got a report about a murder case that had happened at Omahenge village and the name of the accused appeared in the charge office occurrence book as the suspect. He remembered him as the same person who came to report about his missing wife the previous year. Together with Constable Hamukoto he attended to this murder report. As they drove on the gravel road towards Edundja area they saw a car crossing the road and switching off its back lights. They then drove towards that car. When they got at the car they found one occupant who was the driver and upon getting closer to him realised that it was the accused person. He greeted the accused and identified himself as a police officer. He asked the accused whether he had a firearm to which the accused admitted and handed over the firearm to him. He informed him that he was arresting him as a suspect on a murder charge. He then explained to him his right to remain silent, the right to engage a private lawyer on his own funds and/or apply for a legal aid funded lawyer by completing the form at the clerk of the court for the Directorate of Legal Aid. He also informed him of his right to apply for bail. Accused was then taken to the police station where he was handed over to warrant officer Mukete the unit commander of Serious Crime Unit. Later on the witness compared the entry of that firearm number with the one he made the previous year when accused brought his firearm temporarily for safekeeping and realised it was the same firearm. He then handed over the firearm, two live bullets, magazine and holster to W/O Mukete.

[15] In cross-examination the witness denied that the accused specifically informed him about his wife being drunk and she threatened to use the said firearm against him. He also denied that accused requested them to take the wife with to the station in order to sober up that night. According to his observation that night, the deceased was not drunk and there was no reason to take her along. He maintained that accused gave him the firearm for safe keeping as he testified before and he only learnt about the shooting that took place in Windhoek from the accused.

[16] Twelihaka Hendson Twelihaka is a detective sergeant attached to the criminal investigation unit. He testified that on 15 April 2020 he received a call from warrant

officer Kapandja informing him about a shooting incident at Edundja Omahenge village. He then drove to the said village together with sergeant Katopeni and sergeant Vaile. Upon their arrival and entering the house, a certain Bonifatius came running to him. He informed him that Mr Erkki, the accused had shot his wife dead and drove away. Bonifatius directed them to the room where the deceased's body was. The door to the room was closed, he opened it, entered and observed a body of a female person laying on the floor. He checked her pulse but could not feel it. The witness then summoned detective warrant officer Mukete of Serious Crime Unit and detective warrant officer Nafidi of Scene of Crime Unit to the scene.

[17] When the two detectives arrived, the witness took them through the scene and thereafter warrant officer Nafidi photographed the scene. The witness further testified that the room where the body was, was still well arranged and the bed also made up. He observed that the deceased had a wound on the left chest/shoulder, another one in the left side of the stomach; one on the right upper hip and another one at the back right side. He further observed one damaged projectile on the ground, three cartridges and two live ammunitions. The body was then loaded into the van and he transported it to Engela State mortuary without sustaining any further injuries during transportation. The following day the witness, warrant officers Mukete and Nafidi went back to the scene for further investigations where a second projectile was discovered behind a speaker. A photo plan was introduced to this witness where he was able to indicate some points including objects found on the scene. A damaged projectile and a mark on the floor which might have resulted from the deflection of a projectile were also identified and pointed out in the photo plan. In cross-examination the witness was adamant that the damage to the floor was caused by a projectile that also damaged the carpet. He concluded as such because the damage to the floor and carpet appeared fresh to him.

[18] Aron Shikesho Emvula is a detective warrant officer attached to Serious Crime Unit who also attended the scene of the crime. During the evening hours of 15 April 2020 he received a call from warrant officer Mukete who informed him about a murder report at Edundja village. He picked up warrant officer Mukete with a police car at his

house and they drove together to the scene. He was briefed by warrant officer Mukete of a murder report at Edundja village where a man had shot his wife and fled the scene with a firearm. On their way to the scene they were also joined by warrant officer Nafidi of the Scene of crime unit. At the scene they found members of the public outside the home. They also found some police officers in uniform and some in civilian clothing at the scene and Sergeant Twelihaka was in charge of the scene. Sergeant Twelihaka briefed them and identified two witnesses to them that stayed in the house namely, Bonifatius and Panduleni. He then took them to the room where they found the deceased laying on her right side in a pool of blood motionless.

[19] It was his evidence that the room was neat, well packed and the bed made up. He only observed some blood spot on the bedsheet. He then called warrant officer Nafidi of Scene of Crime Unit to come and take photographs of the scene before he could start with his investigations. During his investigation of the scene he found two cartridges next to the body and one on top of the bed. He pointed these out to the scene of crime member who photographed them. His inspection of the body revealed four fresh deep wounds being, one in the abdomen/stomach, one in the chest, and one on the back and another one on the right hip. That while wrapping up the body and preparing to load it he discovered another projectile underneath the body.

[20] According to him this projectile seem to have penetrated through the carpet and hit the floor because they were damaged. The scene of crime was also then photographed by the scene of crime officer and the body was then loaded on the vehicle and transported by Sergeant Twelihaka. Before they left the scene they requested the residents of the house to lock the room and not enter there because they were not done with their investigations and would revisit the scene. That while still at the scene Bonifatius approached w/o Mukete and informed him that he just spoke to the accused who was inquiring about the condition of his wife. Warrant officer Mukete called the accused, informed him that his wife was in a stable condition and that they were busy loading her into an ambulance. He requested the suspect to come so that he joins them to the hospital but he refused and cut off the call. They went back to the police

station and while he was busy opening the case he saw Sergeant Hakandume coming in the charge office with the accused person.

[21] The following day when they revisited the scene, warrant officer Twelihaka discovered another projectile behind a speaker which he handed over to warrant officer Mukete. On the 20<sup>th</sup> April 2020 he also attended the post-mortem examination on the body of the deceased at Oshakati conducted by Doctor Armando where he discovered a fifth deep wound on the private parts of the deceased. It took the doctor almost two hours to recover the projectile as this wound did not have an exit. This projectile was handed to him by the doctor and he booked it in the pol 7. He was able to identify it in court and was marked as an exhibit.

[22] Ndamonoghenda Ndjuluwa is a sergeant in the Namibian police who is attached to the Gender based Violence Protection subdivision and stationed at Eenhana Police Regional Headquarters. She testified that on 25 December 2019 the accused person and the wife (deceased) came together to her office. Accused complained that he had a problem with the wife and that they were quarrelling. He continued telling her that he left the wife at the cuca shop, that she came home late and found him already sleeping. That when she arrived home she started knocking on the door but he refused to open and the argument started. Accused told this witness that what made him angry was the fact that the deceased was insulting him and his parents whilst outside. Also that after the insults from the wife and while she was still standing outside, he took his pistol and cocked it but could not find her when he opened and went outside.

[23] He further stated that after he could not find the deceased, he drove to the police station where he temporarily handed over his pistol. That he went to hand over the firearm because in 2013 in Windhoek, he once shot his wife in self-defence after she had taken out a knife and he did not want to make the same mistake again. The deceased was also given a chance to state her case but she was crying and looked confused. She stated that the reason why she arrived home late was because the accused left her behind and had to walk home. The witness then advised both parties to

seek counselling to which they had agreed. In cross-examination this witness denied that accused informed her that the deceased threatened him and maintained that accused had informed her that he cocked the firearm.

[24] Geyas Tapange Haukongo is a police officer with the rank of a warrant officer and attached to the Firearm Management Unit. On 05 December 2019 while on duty, constable Mupaya came with a receipt of safety custody, Pol 594. That was a receipt normally given to a person that brings a firearm for safe keeping at the police station. That receipt was written in the names of the accused person. He verified all the information on the receipt and firearm and handed back the firearm to the accused person. He did not have any objection because the accused was the owner of the said firearm.

[25] The other witness called was Kalipus Sem, a forensic scientist who is attached to the physics and ballistics section of the Namibian Police at the Namibian Police Forensic Science Institute. He is an expert witness who is a member of the Interpol Ballistics Information and African Wildlife Forensic Network. He testified about the report he compiled after he had analysed spent projectiles, cartridge cases and a firearm he received in this matter. Apart from the report he compiled he also compiled a photo plan of the said exhibits in this regard. That he received an application to examine and determine if exhibits B (2 spent projectiles), C (one spent projectile), and D (3 spent cartridges) were fired from exhibit A (the pistol). During the examination, constable Shau was taking photographs. He inspected the firearm and confirmed all parts were present. He test-fired the said firearm to ascertain whether it was in working condition. He also test fired four live rounds of ammunition from the pistol and ran the spent cartridges against exhibit D and the spent projectiles against exhibit B and C above. His findings were that there was sufficient agreement of individual and class characteristics between exhibit A and B meaning that there was strong evidence that exhibit D was fired from exhibit A. Also that sufficient agreement of individual and class characteristics between exhibit A, B and C meaning that there was strong evidence that exhibit B and C were fired from exhibit A.

[26] Mukete Trophy Hafeni is the investigation officer in the matter. On 15 April 2020 after receiving a murder report at Omahenge village he visited the scene together with detective warrant officer Hangula of Scene of Crime Unit. At the scene warrant officer Twelihaka introduced him to two individuals that resided in that homestead namely Bonifatius and Pandu. He was shown the room, when he entered the room he could see that everything inside was well packed. He observed the body of the deceased lying on the floor next to the bed. He also observed three pistol spent cartridges inside the room, two next to the deceased and one on top of the bed. He further observed two live bullets, one next to the bed on the floor and another one next to the wall nearby the entrance. He physically examined the deceased's body and saw some bullet wounds as follows, one in the chest, one in the stomach, third one on the right thigh and the fourth one on the back. He further observed a fresh mark on the floor between the bed and the deceased. When the body of the deceased was moved he discovered a damaged pistol projectile under her body. Thereafter Bonifatius came to the witness while on a call with the accused who wanted to know whether the deceased had died. The witness took the accused's cell phone number, called and informed him that he was a police officer and that he wanted to see him personally. Accused informed him that he only wanted to know whether his wife was still alive or not, and switched off his cell phone. He did not inform the accused that his wife had died and they left to Oshikango Police Station.

[27] While at Oshikango Police Station sergeant Nakandume arrived together with the accused person. Sgt Nakandume introduced the accused to the witness and handed him over. The witness also received a 9mm pistol, pistol holster and two live bullets allegedly found on the accused by Sgt Nakandume. That the bullets were similar to the three pistol cartridges recovered at the crime scene. The witness then identified himself to the accused person as a police officer. The accused then produced his firearm licence for the pistol. He then informed him of the charge against him and thereafter Mirandized him by explaining to him his right to remain silent and not to incriminate himself, the right to consult a legal representative of his own choice and the right to apply for legal Aid as well as the right to apply for bail. He went further to testify that the

following day 16 April 2020 and together with warrant officer Nafidi, Warrant officer Hangula, Sergeant Twelihaka and other members, they drove back to the scene where sergeant Twelihaka discovered another pistol projectile inside the deceased's sleeping room. This projectile was handed over to the witness together with all the exhibits discovered on the scene, the fire arm, live bullets and holster. On 23 April 2020 he completed a forensic form for the items to be sent for forensic examination at the forensic department. He then sent the following items for forensic examination: 9mm pistol with serial number 49109977, a magazine and two live bullets found on accused; three spent cartridges and two projectiles all found at the scene.

[28] Dr Armando Perez Ricardo is a medical doctor at Oshakati State Hospital who performed the post-mortem examination on the body of the deceased Vistorina Ndeshitelela Haimene on 20 April 2020. The body was identified to him by warrant officer Kankondi of Nampol mortuary Ohangwena. His chief post-mortem findings include three entrance gunshot wounds and two exit gunshot wounds. According to him the cause of death was multiple gunshot wounds. The wounds were located as follows: wound number one is an entrance wound located at the right edge of the sternum 9.5 cm from the right nipple and 1.36 m from the right heel. He also observed a contusion ring around this wound. That the exit to this wound was located at the upper left aspect of the back 1.38 m from the heel and runs from the skin perforating the sternum, lacerating the aortic arch, pulmonary artery and pericardium wounding the upper lobe of the left lung as well as perforating the 5<sup>th</sup> left posterior aspect of the rib and exit. Also that it was slight oblique, upward, right to left and from the anterior to posterior aspect of the body.

[29] Further that wound number two was also an entrance wound located at the right aspect of the abdomen 8.5 cm from the umbilicus, 1.12 cm from the right heel. A contusion ring was also observed. This wound also had an exit wound located at the right lateral aspect of abdominal flank above the iliac crest being 1.02 m from the right heel. The wound ran from the skin perforating the great omentum, wounding the traverse colon tangentially and exited. It was oblique from left to right and downward

from the anterior to the posterior aspect of the body. With regards to wound three, he testified that it had a graze (burn) on the upper anterior aspect of the thigh and penetrating to the pelvic cavity through the left inguinal region at 88 cm from the right heel perforating the uterus and right Ilium bone and end at the subcutaneous tissue of the right buttock. This wound did not have an exit. It was also oblique upward from the left to the right, from the anterior to the posterior aspect of the body.

[30] The witness made it clear that contusion appears on the skin as a result of the bullet hitting the skin and going through and is mostly observed at the entrance of the wound. These gunshot wounds do not resonate with burning because burning happens when the firearm is very close to the skin and one would be able to observe the gun powder on the skin which was not the case in this matter. The difference of 1.36m entrance and 1.38m exit from the heel on the first gunshot indicates that it was fired in an upward movement. That a bullet was found in the third wound. He also informed the court that under the circumstances it was very difficult for the deceased to have survived as many important internal organs were damaged with a lot of bleeding. In cross-examination he stated that he was not a ballistic expert to tell the court from how far the gun was fired, in his opinion it was not at close range because he could not find burns or powder on the body including the clothes of the deceased.

#### Defence case

[31] At the close of the State case, accused chose to testify in his defence and did not call further witnesses. His evidence was that, he was married to the deceased until her death on 15 April 2020. He was asked to testify about two incidents which form part of the charges in this matter, namely the events of 02 October 2010 and those of 15 April 2020. He testified that on 02 October 2010 he went to Havana to have his car fixed at a certain garage and while at the said place a friend of his by the name of Abel Mongoloka also arrived there. While there Mongoloka asked the accused to open his car so that he can put his firearm at the back seat because there was a lot of people at the garage. After his car was fixed he dropped off Mongoloka at his place and proceeded home at Greenwell Matongo Location in Windhoek.



[32] Upon arriving home around 19:00 and when he was busy removing some parts from the car he discovered Mongoloka's firearm in the car. It was a 9mm pistol. He then took the firearm from the car and put it on his waists so that he can go and lock it up in a safe and hand it back to the owner the following day. When he entered the house he found his wife inside the house alone. He greeted her but she did not respond and she did not look happy. She then asked him where he was during the day and he responded that he was at the garage and took long because there was a lot of people who wanted their cars fixed. Then the wife answered that 'today I will deal with you' you do not know me'. When the accused stood up from where he was sitting in the seating room in order to go to the sleeping room, the deceased jumped on him, grabbed him and he fell to the ground. She then sat on his stomach and took the firearm that was on his waist. He started to fight in order to get up from the ground, they both got up and struggled for the firearm. In that process two shots went off from the gun.

[33] He stated that he wanted to take the firearm from the deceased because she had pointed it at him. That the firearm went off at the time the deceased was holding the firearm and while he held her arm that had the firearm. After the two shots went off the deceased went outside the house and the firearm was now on the floor. He could not see any injury nor blood on the deceased and only heard her saying that she was shot on the arm whilst outside. When he came to the door he could see the deceased standing at the fence with a neighbour, Emerensiana who thereafter called an ambulance. An ambulance came and loaded the deceased and he remained at the house until the police came. When the police came they first went to Emerensiana before they came to his house. Three police officers came where they found him standing and they searched him. One of the police officers went in the seating room where they were struggling and is where he found the firearm. He was then arrested and taken to Wanaheda Police Station. That after the wife had gone outside, he was not having a firearm when he came to stand at the door. He disputed Emerensiana's evidence that he was walking down the street and that he did not chase his wife. Also

that he did not shoot the wife three times while she was standing outside. That he was not the one that loaded the bullets in Mongoloka's firearm nor were the bullets his.

[34] Regarding the incident of the 10 November 2019 accused testified that together with the deceased, he went to their cuca-shop at around 16:00. They stayed there up until after 18:00. He told the deceased around 20:00 that they should now go home. She refused stating that it was not late as she was still drinking. He drove home where he found one Bonny and Pandu having dinner. Around 23h00 while asleep he heard a knock on the door, he looked through the window which is just close to the door and saw the deceased. He opened for her, she then asked him why it took long to open the door. He responded that it is because he was asleep. Deceased then asked the accused, why he left her at the cuca-shop and he responded that she refused to come with him. She then said 'today I will beat you because you are stubborn'. She also told him to give her his firearm but he refused. Accused put on his clothes and lay on the bed as they were talking. Thereafter he took the safe key, opened the safe and took out the gun and the licence. He then put the gun on the waist whilst in the holster and drove to Oshikango police station where he found a Police officer by the name Hakandume.

[35] At the Station he informed officer Hakandume that he had a problem with his wife at home and she is drunk. He requested the officer to go with him because his wife was also asking for the firearm and he was not able to sleep with her in the same house. Officer Hakandume agreed and accompanied by another police officer they went with the accused to his house. Upon arriving at the house they could not find the deceased. Officer Hakandume got her number and called her. She answered and said she was just close by and was coming. When she arrived home the officer sat down with them and asked what the problem was. Accused then explained how he had left the deceased at the cuca-shop and that when she got home she was drunk and was asking for his firearm. The officers refused to take her with to the police station instead suggested that they sleep in separate rooms and that the following day they should come to the police station where they will be directed to Gender Based Violence office. That before they came to the house the accused had informed officer Hakandume that

he cannot stay with the firearm, and he gave the firearm together with the holster and licence to him. That during the discussion at the house the deceased admitted that she had drunk alcohol and said that the accused was refusing to open for her. According to the accused, officer Hakandume was not telling the truth when he said that he went to the station and told him that he should come and assist him to search for his wife because he could not find her.

[36] With regard to the events of 15 April 2020 that led to the death of the deceased, the accused testified that on the said day and in the morning, himself, Bonny and Pandu went to cut some sticks/poles for the privet/hedge (Olupale). In the afternoon after eating lunch he asked Bonny and Pandu where the deceased was but they said they do not know. He only saw the deceased coming in the house around 14h00. That around 16h00 he left the house to the cuca-shop where he stayed up until 20h00. When he returned home he found, Bonny, Pandu and deceased, he greeted them and went to the sleeping room and took a shower, he then dressed up. The deceased then came in from the kitchen and asked him where he was going that time. He responded to her that he was taking his kid's birth certificates to their mother. The deceased then said accused will not leave the house because it was late and that should he leave the house the deceased would deal with him. Thereafter the accused opened the safe key, took his firearm which was in a holster and put it on the waist.

[37] While on his way out of the room the deceased jumped on him, grabbed and dropped him to the ground. She sat on his stomach. She then took the firearm from his waist and stood up. While accused was busy getting up from the floor deceased cocked the firearm and pointed it at him, he then held her right hand which had the pistol and they struggled for it. He stated that he specifically held her fingers and while struggling for the firearm he just heard three gunshots went off while the firearm was still in the hands of the deceased. It was after the third gunshot that he saw the deceased falling to the ground while holding the firearm. He then picked up the gun and went outside. The gunshots went off successively and the whole time he was trying to get the firearm from the deceased. Without stating the source of light he said it was not dark there was light

in the house and that the light which was visible in the room was from the open door, windows and curtains making it possible for him to see the deceased and the firearm. That deceased said nothing as the gunshots went off. That he just picked up the firearm, put it on his waists and drove to Oshikango Police Station. He did not remove any live bullets from the firearm and that before the struggle there was no live bullets laying around in the room.

[38] That while driving to Oshikango Police Station he realised that one of his back tyres was flat. He decided to pump the flat tyre and in the process heard a police siren from where he was coming from. He then decided to call Bonny to find out whether the police had arrived there. He then informed Bonny that he was going to Oshikango Police Station. A short while thereafter he received a call from a new number where a male person who identified himself as a police officer spoke to him. The officer told him that he was at his house and wanted to know where the accused was. He also told the accused to come to his house but accused informed him that he was on his way to Oshikango Police Station. Accused continued driving to Oshikango but a short distance before he could reach Oshikango Police Station he saw a vehicle approaching him from the front. This vehicle switched on the police emergence lights before it reached him, he then stopped and two police officers jumped out of the car and approached him. The driver of the police car who later introduced himself as Kristof Hakandume showed him his appointment certificate and asked him what he had in the car. He told the officer he had nothing apart from the firearm, he gave him the firearm and was handcuffed. The police asked him where he was going and he responded that he was going to Oshikango Police Station.

[39] The Police took him to Oshikango Police Station while another officer drove his car where they found warrant officer Mukete there. At the station warrant Mukete asked his name and informed him that he was a suspect on a murder charge. He gave his firearm to officer Hakandume which was loaded with two live bullets. He was asked about the licence and said that the licence was at home in the safe. His evidence was further that although Bonny and Pandu were also in the house, they were in the kitchen.

In the room where they were struggling it was only him and the deceased. That the kitchen is in the same building but has a different door. In fact it is a single structured house with 5 rooms made of three sleeping rooms, kitchen together with seating room a shower and toilet. That it was warrant officer Mukete that called him and not him calling warrant Mukete, that he did not ask warrant Mukete whether the deceased was still alive. Also that Bonny lied when he said that accused asked him where was Omukwanambwa (referring to the deceased).

[40] During cross-examination, accused admitted that he was older than the deceased and that it was shots from his firearm that caused the deceased's death. He was a licenced firearm owner since 2007. That he was aware of his duties as a licenced firearm owner, such as to safeguard the firearm and those people around him. That with regard to the events of October 2010, he agreed for Abel to put the firearm in the back seat of his vehicle because the vehicle was locked and they were nearby leaning on the car. Although his house was not far to Havana 2 where Abel lived and he saw the need to drive back and give the firearm to Abel, he could not because it was late and the roads are always busy around that time. That he just removed the firearm from the car and put it on his waist without checking whether it was in safe mood. At this time his own firearm was in the safe because he did not go with it.

[41] Accused admitted in cross-examination that his evidence did not include him putting spare parts of the vehicle that were in a plastic bag behind the sitting room door of the house before he sat down. That as he was going inside the bedroom but still in the sitting room the deceased jumped on him and grabbed him with her arms around and dragged him to the ground. He then fell on his side but turned to lay on his back while deceased held him and sat on his stomach. She held his arms and took his pistol. He agreed that it was the first time he was mentioning that his left arm does not work well because it was broken. That she took away the firearm from his waists while sitting on his stomach. That after she removed the firearm from him, he also tried to get it from her. She then stood up and he also stood up. They continued to fight for the firearm with

him trying to grab it and pulling it while it faced upwards with one of her fingers in the trigger when two shots went off.

[42] He explained that the deceased was injured on the outer upper part of her right arm because she held the firearm with one hand. Confronted on the entry and exit directions of the wounds on the arm and breast of the deceased as per the medical report provided in this regard, he could not explain any further apart from saying that when they were struggling for the firearm it was up but the time when the shot went off he does not know where it was pointing. He maintained that the firearm was in the hands of the deceased when the shots went off while he held it on top on the barrel side.

[43] He dismissed Emerensiana Nangolo's testimony that while the deceased was standing in their yard accused came out from the house, aimed at her and shot at her. He was also confronted on why he did not flee when he was disarmed and why he would go to a firearm that is already pointed at him. That after the shot went off, he could not remember whether he searched himself to see if he was shot and if he asked the victim whether she was injured because she was standing outside away from him. He heard the deceased telling Nangolo that she was shot but could not do anything because an ambulance had been called. He denied having left the house and being arrested down the street as testified by Nangolo and Stefanus Lazarus. He conceded that the firearm was licenced in the name of Abel Mongoloka but stressed that since it was late when he got home, he intended to take the firearm back to the lawful owner the following day.

[44] With regards to the incident of November 2019, accused confirmed that he arrived home earlier than the deceased who came drunk and started to ask for his firearm. He denied informing officer Hakandume that the deceased had ran away from the house because he shot her in Windhoek. Instead he informed officer Hakandume that he could not sleep with the firearm because the deceased was asking for it.

[45] In respect of the murder charge he denied that the time Bonny and Pandu went to fetch water, he was already arguing with the deceased about the relish. Accused maintained that the deceased jumped on him while on his way out to the door of the bedroom, overpowered him to the ground and sat on his stomach. That he only took a firearm with him that day because it was late and he was taking his children's birth certificates to their mother. That when he managed to stand up he stormed at the deceased who was pointing the firearm at him in order to remove it from her. That the three shots went off at the same time while they were struggling and that time the firearm was still in the hand of the deceased. There was no scream from the deceased. He confirmed that after the shots were fired he did not check if the deceased was injured nor did he call an ambulance because he was confused after the gunshots. He only picked up the firearm and left the scene.

*Applicable law/ legal principles*

[46] Section 208 of the Criminal Procedure Act 51 of 1977 provides that an accused may be convicted of any offence on the single evidence of a competent witness. In *S v Noble*<sup>2</sup> this court considered the provisions of this section and held that, the court when evaluating the uncorroborated evidence of a single witness, must exercise caution. The court must be satisfied that the witness is credible and his/her evidence should be of such nature that it constitutes proof of the guilt of the accused beyond a reasonable doubt.

[47] However caution should not be allowed to displace the exercise of common sense (*S v Snyman*.<sup>3</sup>) I agree and endorse what this court stated in *S v HN*<sup>4</sup> that 'the evidence of the single witness need not be satisfactory in every respect as it may safely be relied upon even where it has some imperfections, provided that the court can find at the end of the day that, even though there are some shortcomings in the evidence of the single witness, the court is satisfied that the truth has been told'.

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<sup>2</sup> *S v Noble* 2002 NR 67 (HC).

<sup>3</sup> *S v Snyman* 1968 (2) SA 582 (A).

<sup>4</sup> In *S v HN* 2010 (2) NR 429 (HC) at 443E – F.

[48] Further that where the court, as in this instance, is presented with two mutually destructive versions, it is a well-established rule of practice that the court must have good reason for accepting one version over the other and should not only consider the merits and demerits of the testimonies of the state and defence witnesses respectively, but also consider the probabilities present (*S v Engelbrecht*,<sup>5</sup> *S v Petrus*<sup>6</sup>). The evidence presented by both parties must neither be considered in isolation or as an independent entity when assessing the credibility of the respective witnesses and the reliability of their evidence, but rather to look at it holistically.

#### Evaluation of the evidence

[49] At the onset it should be noted that the victim in the count of attempted murder who is also the deceased in the murder charge was shot with a fire arm. It is also common cause that the deceased was a wife to the accused and a domestic relationship existed during both incidents. Unlike in the second shooting that resulted in death, in the first count of attempted murder, a witness Emerensiana Nangolo, who was a neighbour to the couple, witnessed the shooting on 2 October 2010 at the couple's residence in Greenwell Matongo in Windhoek. It should be noted that this witness is a single witness and the evidence is mutual destructive in as far as the shooting of the deceased is concerned. A cautious approach should thus be followed in the court's assessment of the veracity of her evidence and the evidence must be considered holistically.

[50] Nangolo testified that on the date in question, her attention was aroused by a noise outside and upon going out to check, she saw the deceased in their yard. The deceased made some reports to her and went back inside their house. The deceased did not take long inside their house, she came back after some few minutes. Then the witness also saw accused person coming outside with a pistol in his hands. The accused fired shots towards the deceased who wanted to go behind their house with

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<sup>5</sup> *S v Engelbrecht* 2001 NR 224 (HC).

<sup>6</sup> *S v Petrus* 1995 NR 105 (HC).



the accused following her by going the other side of the house. At that point the witness called the deceased to come to her. The witness made it clear that she was looking at the accused when the accused was aiming at the deceased. According to this witness when the deceased came to her, she observed the deceased bleeding on the upper arm. While she was tying the wound on the deceased inner arm, she saw another injury under the breast. According to this witness the deceased was shot three times, evidence which is consistent with what Doctor Sikuvi recorded in the J88 medical examination handed in court.

[51] In cross-examination the witness maintained that the deceased was shot outside and denied that the shooting happened inside their house. When asked by Mr. Nyambe at which point she called the deceased, she responded that she called after she saw that the deceased was shot. Although her answer was not clear to Mr. Nyambe, she made it clear that she stood with the deceased at the fence when the late initially came screaming or calling the witness's name and she went back in the house. When she came out of the house for the second time, the deceased went the direction where she was shot and she only called the deceased after she was shot.

[52] Nangolo's evidence is overwhelming to disprove the accused's version that the deceased was shot when they were fighting for the fire-arm inside the house. She testified that she was in her yard which is separated only by a fence from that of the accused where this incident happened. She knew both the accused and the deceased well before the incident. According to Nangolo the deceased was shot three times; on the upper arm, on the inner arm and another one under the breast. Her evidence on the injuries sustained was corroborated by the doctor who recorded the injuries as follows, exit wound of +/- 0.5 cm anteromedial on right upper arm, another entry wound of +/- 0.5 cm lateral on right upper arm, entry wound of +/- 1cm lateral lower quadrant on right breast, and exit wound of +/- 1.5 cm on lower quadrant midclavicular line. No evidence presented that Nangolo has a motive to falsely implicate the accused. Accused denied that the victim was bleeding but the J88 which was not contested described the condition of her clothing as blood stained. His evidence is totally divergent to that of

Nangolo and the injuries sustained are not consistent with his version that the deceased was shot when they were fighting for the fire-arm inside the house.

[53] Ms Nangolo made a good impression to the court and honest witness. The manner in which she clearly and directly answered the questions put to her by counsel for the accused shows that she was a credible witness. Her evidence that accused left the scene was corroborated by the police officers who were directed towards the accused walking on the street upon their arrival at the scene and arrested him in the street. Accused's conduct after the shooting is dubious. He even failed to render assistance to the victim if his version is to be believed that he was not arrested whilst walking in the road. It is not in dispute that Nangolo called an ambulance, directed the police to the scene and rendered assistance to the victim. I have no reason to doubt her evidence. In any event there was no evidence led that accused laid a charge of pointing of a fire-arm against his wife. In the circumstances surrounding the commission of the offence same cannot be said of the evidence of the accused. I have rejected the version of the accused as false and highly improbable on the charge of attempted murder.

[54] With regards to count 2 it is trite that no onus rests on the accused to convince the Court of the truth of any explanation he gives. If he explains, even if that explanation is improbable, the Court is not entitled to convict unless it is satisfied not only that the explanation is unlikely, but that beyond any reasonable doubt, it is false. If there is any reasonable possibility of his explanation being true, he is entitled to his acquittal.<sup>7</sup>

[55] Possession is defined by s 1 (1) of the Arms and Ammunition Act 7 of 1996 as follows:

'possession' includes 'custody' and 'possess' shall be construed accordingly'. As a general rule the notion of 'possession' when used in a penal statute, comprises two elements namely a physical element (*corpus*) and a mental element (*animus possidendi*)

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<sup>7</sup> *S v Haileka* 2007 (1) NR 55 (HC) in parag 7 approving and applying *R v Difford* 1937 AD 370 at 373; *R v Vlok and Vlok* 1954 (1) SA 203 (SWA) at 207B – D/

[56] *In S v Paulo and Another (Attorney-General as Amicus Curiae)*<sup>8</sup> the Supreme Court approved the dictum enunciated in *S v Smith*<sup>9</sup> and indicated that:

'The concepts of custody or possession comprise two main elements: they are, firstly, the physical element of corpus, i.e. physical custody or control over the res in question, exercised either mediately or immediately, and the mental element of animus, i.e. the intention to exercise control over the thing.' (See also *Shidangi v S* (HC-NLD-CRI-APP-CAL-2020/00049) [2022] NAHCNLD 10 (15 February 2022) I agree with the above dictum enunciated.

[57] It is common cause that upon his arrest on the road the accused person was searched and found with a pistol on his belt and an empty magazine which were booked in Pol 7 at Wanahenda Police Station. Accused gave explanation that the firearm used in the attempted murder case, belongs to Mongoloka who left it in his vehicle. Further explained that he was busy removing some parts from the car when he discovered the fire-arm in his car. He then took it from the car, put it in his waist so that he could go and lock it up in a safe and hand it back to the owner the following day. It is part of the evidence that accused had acquired his own fire-arm in 2007 which was in the safe at his house. It is also a fact that Mongoloka collected his fire-arm from Wanahenda police station according to Officer Saima Lasarus who handed the pistol to its lawful owner Abel Mongoloka at the police station. Mongoloka was not called to testify on the circumstances surrounding this fire-arm. Although the accused denied to have picked up the firearm after the deceased was shot, this explanation is highly improbable and is rejected. It cannot however be said nor be inferred that accused possessed the fire-arm for any other purpose than what he explained. I find that the element of physical possession was proven but the not the mental element as the sole intention of possessing it was for safe-keeping in order to take it back to the lawful owner the following day but to his detriment this incident happened.

[58] Regarding count 3, no evidence was led that the accused possessed ammunition on the date of the incident. There is evidence from the police officer Lazarus who

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<sup>8</sup> *S v Paulo and Another (Attorney-General as Amicus Curiae)* 2013 (2) NR 366 (SC) at 378D – F.

<sup>9</sup> *S v Smith* 1965 (4) SA 166 (C) at 171D – E.

followed and arrested the accused that after he introduced himself to the accused he searched him. He found a pistol CZ on the accused's belt with serial number 720932. He went further testifying that there was no ammunition in the fire-arm but there was an empty magazine. The evidence led before this court indeed suggests that the bullets fired from the fire-arm in question were already in the fire-arm and there is a strong possibility that they might have belonged to the lawful owner of the fire-arm as this court has pronounced itself on count 2. For the State to secure a convictions on count 2 and 3 much more was required. The fact that the appellant was properly convicted of attempted murder in which the same fire-arm was used does not automatically translate into an automatic conviction on the counts of possession of firearm and ammunition. As such, having already found that the mental element of possession was not proven in the possession of a fire-arm in count 2 the accused cannot be found in possession of ammunition without being in lawful possession of a fire-arm. The same reasons are equally applicable in count 3 and I am not inclined to restate it again. This court is not satisfied that the State proved its case beyond reasonable doubt on count three and the accused is entitled to the benefit of the doubt.

[59] Coming to the fourth count, accused pleaded not guilty and offered no plea explanation apart from admitting the identity of the deceased and that a domestic relationship existed. From the evidence presented there was no eye witness as the shooting took place in the couple's common bedroom. The only witnesses who were in the couple's house at a time of the shooting was Bonifatius Haindongo and another witness who was not called to testify. Haindongo's testimony centered on prior commotion the couple had in their house, the earlier quarrel between the couple he heard prior to the shooting and that he also overheard the deceased screaming 'you are killing me' before the third shot went off. In this regard the evidence on count 4 is partly direct and circumstantial.

[60] In his evidence Haindongo described the sequence of the first and second shots as not continuous, with the third shot going off after some minutes. His evidence on the sequence of the shots was corroborated by the evidence of Twakulilwa Hamwele who

was on his way to the accused's house when the shots were fired. Their evidence is inconsistent with accused's version that the deceased shot herself or was shot in the process of struggling for a fire-arm. If his version was to be believed that the deceased either shot herself or by accident, there were people in the house why would the accused leave the scene instead of calling for help? The least he could do was to call Haindongo later-on enquiring if Mukwanambwa is alive and whether the police were at home. It is further strange that when the police called the accused's cell for him to come home, he just switched it off without telling them that he was already on his way to the police station.

[61] The evidence of Doctor Ricardo who performed the post-mortem examination on the body of the deceased adds more fresh to the bones. In his findings he recorded 3 entrance gunshot wounds and 2 exit wounds and recorded the cause of death as multiple gunshot wounds. According to the doctor, he only found a contusion ring suggesting that the deceased was shot from a distance. He explained that usually burning happens when the fire-arm is fired very close to the skin and gun powder would be found on the deceased's skin. He dismissed accused's version that the deceased shot herself in that if the range was very close one was going to find gunpowder on the skin of the deceased which was not the case in this matter. In cross-examination the doctor conceded that he is not a ballistic expert but was adamant that he as a doctor he qualifies to give opinion as he only found the contusion ring which suggests that the bullet hit the skin from a distance. In this regard the defence's argument will hold no water when the evidence is evaluated cumulatively.

[62] The approach this court must follow when dealing with circumstantial evidence was fairly articulated in a well-known case of *R v Blom* 1939 AD 188 at 202-3 which I amenable, where Watermeyer JA referred to two logical cardinal rules which govern the use of circumstantial evidence in criminal trials namely '(1) The inference sought to be drawn must be consistent with all proved facts and if not the inference cannot be drawn. (2) The proven facts should be such that they exclude every reasonable inference from them save the

one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inferences sought to be drawn is correct.’

[63] In considering circumstantial evidence, this court is guided by various legal principles in determining whether the charge against the accused has been proven beyond reasonable doubt. In *S v Reddy and others*<sup>10</sup> the court held that in assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece meal basis and to subject each individual piece of evidence for consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. In the present case, the court must not consider every component in the body of evidence separately and individually in determining what weight should be accorded to it. It is the cumulative effect of all the evidence together that has to be considered whether the accused’s guilt has been proven beyond reasonable doubt.

[64] I find what the court stated in *S v Hadebe and others*<sup>11</sup> convincing when it was held or stated that: ‘Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation, but those doubts may be set at rest when it is evaluated again together with all the other available evidence.’ In this case, when regard is had to the evidence of the doctor who conducted the post-mortem examination on the deceased’s body, that the shooting was preceded by a quarrel between the couple, that accused picked up a fire-arm and drove from the house only to call Bonifatius later enquiring if the deceased is still alive, are all indicators showing that the accused knew he shot the deceased dead.

[65] In a dissenting dictum in the matter of *R v Mlambo*<sup>12</sup>, quoting with approval in number of cases by this Court and Supreme Court, the following is a trite law that:

‘If an accused deliberately takes the risk of giving false evidence in the hope of being convicted of a less serious crime or even perchance, escaping conviction altogether and his evidence is declared false and irreconcilable with the proved facts a court will in suitable cases, be fully justifiable in rejecting an argument that notwithstanding that the accused did not avail

<sup>10</sup> (416/94)[1996] ZASCA 55 (28 May 1996).

<sup>11</sup> *S v Hadebe and Others* 1998 ISACR 422 SCA at 426 E – G.

<sup>12</sup> *R v Mlambo* 1957 4SA 727 AD at 738 A.

himself of the opportunity to mitigate the gravity of the offence, he should nevertheless receive the same benefits as if he had done so.'

[66] I remind myself that there is no onus on the accused to prove the truthfulness of any explanation he gives or to convince the court that he is innocent. Any reasonable doubt the court might have regarding guilt must be accorded to the accused. In case where accused opted to offer an explanation which is improbable, the court may still not convict, unless it is satisfied that the explanation is false beyond reasonable doubt which is the case in the matter before court. (See *R v Difford* 1937 AD 370 at 373).

### Conclusion

[67] In this regard accused was the only person who was with the deceased in their bedroom on the evening of the shooting and what remain of the evidence of the shooting the deceased before this court is circumstantial. Having considered the merits and demerits of both the State and the defence case as well as the probabilities, the only inference to be drawn from the evidence in its totality is that the accused murdered the deceased. His evidence on count 1 and 4 is not only improbable and not consistent with the proven facts but equally unreliable and incredibly false beyond reasonable doubt. Further that his behaviour during and after both incidents, the manner in which the deceased was murdered and the nature of the injuries sustained showed that the accused had direct intention to kill the deceased. However, same cannot be said with regard to counts 2 and 3 and this court is not satisfied that the State has discharged its burden of proof beyond reasonable doubt and gives the accused the benefit of the doubt and acquit him on these counts.

[68] In the result, I made the following order:

Count 1. Guilty of attempted murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

Count 2. Not Guilty of Contravening section 2, read with sections 1, 10, 38 (2) and 39 of the Arms and Ammunition Act 7 of 1996 as amended- possession of a fire-arm without a licence.

Count 3. Not guilty on contravening section 33 read with sections 1, 38 (2) and 39 of the Arms and Ammunition Act of 1996 as amended- possession of ammunition.

Count 4. Guilty of murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

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J T SALIONGA

Judge



## APPEARANCES

RESPONDENT: R Shileka  
Of Office of the Prosecutor General, Oshakati

APPLICANTS: M Nyambe  
Of Mukaya Nyame Incorporated, Ongwediva