

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI
JUDGMENT

Case no.: CC 3/2021

In the matter between:

THE STATE

v

HAFENI HIPANGELWA

ACCUSED

Neutral citation: *S v Hipangelwa* (CC 3/2021) [2023] NAHCNLD 87 (22 August 2023)

Coram: KESSLAU J

Heard: 17-21 October 2023; 24-26 October 2022; 28 October 2022; 8 November 2022; 14 November 2022; 17 January 2023; 20 February 2023; 6-8 March 2023; 16 March 2023; 3-5 April 2023; 18 April 2023; 8 May 2023

Delivered: 22 August 2023

Flynote: Criminal Procedure – Murder- Robbery aggravating- Accused pleaded not guilty to both charges - application in terms of section 174 of the criminal procedure Act not successful - application in terms of section 167 granted - Essential witness recalled – Credibility/reliability of witnesses – Material contradictions in evidence – Circumstantial evidence – Shoeprint – identification thereof treated with caution.

Summary: The accused is arraigned before this court on a count of murder and robbery (with aggravating circumstances as defined in section 1 of the Criminal Procedure Act 51 of 1977, as amended). The represented accused pleaded not guilty on both charges and denied knowledge of the allegations.

Held-Various witnesses testified, however the court had to rely on circumstantial evidence as no direct evidence was given in respect of the accused's identity.

Held that by not continuous tracking of the shoe/foot print it created doubt as to the identification of the assailant and the failing to link the accused to the crime scene beyond a reasonable doubt.

ORDER

1. Count 1: Murder –Not Guilty.
2. Count 2: Robbery (with aggravating circumstances as defined in s 1 of the Criminal Procedure Act 51 of 1977, as amended)-Not guilty.
3. The Mira/Mint cell phone (Exhibit 1) and the Okapi knife is forfeited to the State.
4. The pair of Nike sneakers to be returned to the accused.

REASONS

KESSLAU J

[1] The accused is arraigned before this court on two counts *to wit* Count 1: Murder and Count 2: Robbery (with aggravating circumstances as defined in section 1 of the Criminal Procedure Act 51 of 1977, as amended (CPA).

[2] The allegations on the count of Murder, is that the accused on or about the 10th day of August 2018 and at or near Onandjaba settlement, Okalongo Constituency in the district of Outapi, unlawfully and intentionally killed Monica Ndatila Tuludeni, a female person.

[3] Regarding the count of Robbery with aggravating circumstances, it is alleged that on the same date and place the accused did unlawfully and with the intent of inducing submission used violence or threats of violence against Monica Ndatila Tuludeni by stabbing her with a knife and did unlawfully and with the intent to steal took a black Mint/Mira cell phone from her which was her property or in her lawful possession.

[4] The accused, represented by counsel, pleaded not guilty to both charges and, apart from indicating that he has no knowledge of the allegations against him, gave no plea explanation. The State was set to the task of proving the allegations.

[5] Various exhibits were accepted into evidence either by agreement or through evidence and will be referred to when relevant to this judgment.

Evidence presented and the evaluation thereof

[6] Sara Kalombo is a vendor managing her sister Panduleni's stand in the village of Onandjaba. She testified that on a particular day the deceased, Ndatila while in the company of two other people, arrived at the stand and requested employment. The witness met Ndatila for the first time that day. Ndatila was told to return the next day. The next day Ndatila arrived with some of her luggage and, with the approval of the sister of the witness, Ndatila was told to start employment immediately. They proceeded with doing business while the bag with clothes was sent with Helao during lunchtime to Panduleni's homestead where Ndatila was supposed to stay. Around 17h00 to 18h00 they closed shop.

[7] Sara testified that the plan was for both her and Ndatila to first go to her room to bath and thereafter she would take Ndatila to Panduleni's homestead. On their way, whilst walking past a bar called Ompibi, the deceased was invited by a person called Kauna to stop there and drink beer.

[8] Ndatila decided to stay at Ompibi bar and said that Kauna will take her to the homestead of Panduleni later. Ndatila handed her phone to the witness to charge it at home. The witness described the phone as a small cell phone with a splash of

purple paint applied to the back of it. While the witness was walking away with the phone Ndatila changed her mind and asked the phone back for it to be charged by Kauna in the bar. Sara returned the phone to Ndatila, went home, bathed and proceeded to the homestead to sleep. Ndatila never arrived at the homestead.

[9] The next morning a police officer arrived at the homestead and enquired about Ndatila. He was taken to the room where she was supposed to sleep. They searched her bag and only found clothes. She testified that when she last saw Ndatila, she was wearing a white jersey, white t-shirt and short jean trouser. On the shirt were multi coloured letters however she cannot read and did not know the meaning. When showed the photo plan the witness identified the deceased as Ndatila and confirmed the clothes she last saw her in.¹ The photos depict the deceased dressed in a top with the word 'Billabong' printed on it in multicolours. The supposedly white part of the shirt appears stained red. She identified the phone (exhibit 1) as a small black Mira/Mint cell phone marked with a splash of purple nail polish on its back.² Her evidence for the most part was left unchallenged.

[10] Elia Shikongo testified that he knew the deceased as they were from the same village. On Friday 10 August 2018 the deceased, who had started a new job at Panduleni's stand, temporarily stored some luggage at Ompibi 1 bar where he was employed. He said around 17h00 the deceased arrived in the company of two other ladies and he handed over her luggage. He testified that they stayed at the bar drinking with a person called Shigwedha. Elia closed Ompibi 1 bar at 21h00, then he, the deceased and Shigwedha walked to Ombipi 2 bar to deposit the day's cash. Upon arrival at Ompibi 2, Shigwedha told the deceased that it was late and it was time to go home. Instead the deceased requested the witness to escort her to Hafeni Shiku's bar close to PEP Store. He complied and left her there in the company of two ladies of which one was called Ndeshi. Ndeshi and the other lady said they know the homestead of Panduleni where the deceased was supposed to sleep and will escort her home. From the photo plan he identified the deceased.³

¹ Exhibit 'H' photos 17, 19, 20, 32, 33.

² Exhibit 1.

³ Exhibit 'H' photos 19 and 20.

[11] Wilhelmina Ndeshi Abraham, a resident of Onandjaba village testified that she knew the accused by the name Hafeni, that she had seen him for a period of some months in the village and that he was employed at Enos Bricks in Onandjaba. She testified that during August 2018, around 20h00, she was drinking tombo at the bar of a Mr Hafeni Shiku. She said that she drank about one and a half litre of tombo. Sometime after her arrival and after sunset, the accused and Ndatila arrived. There was one lamp providing light inside the bar. The barman David and Meme Nahambo were also present. The barman David told them he is closing the bar and he told them to drink outside. The accused had bought tombo which he shared with the deceased. They went outside and sat on a log. The witness was seated between the accused and deceased on the log with Meme Nahambo standing close to them. Meme Nahambo told them they must go home and that they were supposed to escort Ndatila to Pandu's homestead. At 21h00 the witness, Meme Nahambo and the deceased started walking away from the drinking place leaving the accused on the log. After walking about fourteen steps she realised the deceased is no longer with them. As it was 'too late' she did not call or look for the deceased but proceeded on her way home.

[12] During cross-examination the witness added that after they lost the deceased and, while only fourteen steps away, she looked back to where they came from however did not see Ndatila at the bar. She also added that when Ndatila arrived she enquired if they knew the homestead of Panduleni as she was supposed to stay there. She confirmed that a week later she saw a picture of the accused in a newspaper next to an article on the death of the deceased.

[13] The evidence of Ndeshi contradicts the version of Elia Shikongo on the arrival of the deceased and is also in contradiction with the version from the barman David on the events happening at the shebeen. Her evidence on time spent at the bar is questionable as it did not add up. Considering the volume of homebrew that she consumed and the fact that she lost the deceased in a matter of seconds casts a lot of doubt on her state of sobriety. She was correct in testifying that the accused was employed at Enos Bricks however conceded that she saw his picture in a newspaper article on the murder of the deceased which suggested the involvement of the accused. No identification parade was held to test her reliability and she did not

testify about any distinctive features of the accused which she relied on for identification. The evidence of this witness will for the foregoing reasons be approached with caution.

[14] David Hilukelwa testified that during August 2018 he was employed as a barman at the cucashop of Mr Hafeni Shiku in Onandjaba. He testified that he has never seen the accused before. On the night of the events he saw an unknown man in the company of the deceased. He testified that the shop had one lamp providing light. The unknown man bought tombo which he and the deceased shared. He denied that he told them to drink outside. He confirmed that the unknown man, deceased, Ndeshi and Madam Nahambo were drinking in the vicinity of an outside wooden bench or log. He said that around 20h00 he closed the business and left the deceased and the unknown man outside while Ndeshi had already left. At this point in his evidence he was asked by the State 'where is the unknown man?' upon which he pointed to the accused dock. He said the accused was dressed in a yellow T-shirt.

[15] The witness went to bed and two hours later was woken up by the police who enquired from him in whose company the deceased was at the cucashop. He took the police to the wooden bench where they were seated and observed that a shoe print was already circled there. He described the print as similar to a 'tennis' shoe with a protruding part leaving a star or cross print.

[16] When cross-examined, the witness conceded that the particular shoe was readily available in stores. The differences between his version and Ndeshi's evidence was pointed out and he conceded that he is not sure about the exact time he closed or the time when Ndeshi left the bar. He testified that no identification parade was held.

[17] The witness kept on referring to the 'unknown man' even after the dock identification of the accused. His description of the shoe print found at the seating area was incomprehensible and confusing.

[18] Benhard Hamunyela was present in the village of Onadjaba on the night in question and he was the only eye-witness of the attack. He testified that around 22h00 he was walking to meet a friend. In the vicinity of Thomas' school the deceased came running from his front whilst being followed by a man dressed in a short trouser. There were two street lights in the vicinity. He heard the deceased screaming: 'Please Help me, I am going to be killed!' She was dressed in a short trouser and vest. The man was hitting or beating her from behind over her shoulder with the blows directed at her chest. This man was holding her on her right arm and using his right arm to attack the deceased. Bernhard testified that he did not observe a weapon in the attacker's hand but that the hand was folded like a fist. The attacker said something which he could not hear. After being beaten many times the deceased fell down and landed on her chest. The attacker then pulled her up whilst beating her in the stomach. The deceased tried to run again but fell down and remained on the ground. He estimated the attack lasted less than ten minutes. The witness called out 'hey' while the attacker fled the scene in a western direction.

[19] The witness then called for help leading to the arrival of the police. He later realised that the deceased was known to him. In cross-examination he changed his evidence in that the deceased was screaming: Help me, I am being killed, I do not know him'. He did not identify the accused as being the attacker.

[20] Police Inspector Teacher Otto Komatzi, stationed at Outapi, testified that he attended the scene with Officers Mwanyangapo, Mungowa and Irmaly. They arrived on the crime scene at 00h30 and found members of the Onandjaba police present and that the scene was cordoned off and protected. He confirmed that they used the light provided by four vehicles to light the scene. He observed a female laying on her right side in a pool of blood. He confirmed the clothing she wore.⁴ The deceased had no shoes on. He observed multiple stab wounds to her chest, hands, arms and stomach. A distance from her body he observed what appears to be the shoes of the deceased being a pair of flip-flops.⁵ A distance from the deceased body he observed a white jersey.⁶ He also observed what he described as struggle marks, from the area where her shoes were for about 14 steps up to where the body of the deceased

⁴ Exhibit 'H' photos 1, 7, 8 and 10.

⁵ Exhibit 'H' photos 21 and 23 and Exhibit 'K' at 7 and 8.

⁶ Exhibit 'H' photo 22 and Exhibit 'K' at 6.

lied. The struggle marks contained a second set of print made by a sneaker type shoe, he could however not describe this shoeprint.

[21] He testified further that the body of the deceased was removed and transported to Etayi mortuary. They followed the tracks left by the sport shoe while on foot with the vehicles providing light as they proceeded. The area has soft sand and the tracks led in a south western direction. He testified that according to the distance between each step, and deep imprints of the track left in the sand, the person was running. About 1 km from the scene the person removed the shoes and continued barefoot. The bare feet prints were more difficult to follow and a decision was made to proceed in daylight. They stopped tracking around 02h00 am.

[22] The next morning at 06h00 he returned to the scene with officers Mwanyangapo and Irmaly. Officer Irmaly, who photographed the scene the previous evening, re-photographed it in daylight. He received a call from Sergeant Aushona who said they had followed the print to a certain house and directed them there. The house was about 2 km from the scene. Upon arrival officer Aushona pointed the prints out to him. He observed bare feet prints entering the homestead and tekkie prints leaving the homestead. The prints were identified to them as those of the accused by the residents of the homestead. He testified that they followed the prints in a northern direction with the assistance of other officers. The prints led them 10 km north in the direction of the Angolan border and then turned south for another 12 to 13 kilometres. The suspect was alternating between wearing shoes and bare feet.

[23] Around 18h20 that afternoon and close to the village of Olupanda the tekkie track led into a small field containing a house, mahangu field and bushes. The police divided into four groups and surrounded the field. He was on the eastern side of this field when he heard two shots being fired from the western side where he could see the other police. He saw a male person running towards him which turned out to be the accused. He fired two shots in the air and told the accused to stop. Accused surrendered by putting his arms in the air. He asked 'why are you running?' upon which the accused answered 'because I murdered someone'. He told him to remain quiet as he observed blood on the front part of the T-shirt of the accused which he

described had multiple colour stripes on.⁷ His opinion was that there was blood on the top and sides of the shoes of the accused who was wearing Nike sport shoes.⁸ The accused was wearing a short khaki trouser. The officer introduced himself, explain his legal rights and arrested the accused. The accused identified himself and indicated he wanted to apply for Legal Aid.

[24] The officer explained to the accused that they are investigating charges of murder and robbery and asked to search him. The accused agreed to the search. During the search he found two cell phones in the left side trouser pocket of which one was a Mint phone⁹ with purple nail polish markings at the back, this phone was still switched on. An Okapi knife was found in the right pocket.¹⁰ He testified that the search was in the presence of officer Irmaly. He handed the two cell phones and brown Okapi knife to officer Irmaly. The T-shirt and shoes of the accused, suspected to be blood stained, were seized and also handed to officer Irmaly.

[25] During cross-examination the witness confirmed that the lights of four vehicles were used during the initial tracking. He struggled to describe the print they were following and when shown the drawing made of the print by the witness Bernhard¹¹ could not confirm it to be similar. He conceded that according to his evidence there was a one kilometre gap from where he left the print to where officer Aushona summoned them to at the homestead. He testified that he used a measuring stick to compare the prints however that no pictures were taken of this process or any of the prints.

[26] Instructions that were put to the witness by counsel for the defence was that the accused denied running from the police, denied making any admissions, denied that this witness arrested him. It was put to the witness that the accused was assaulted upon arrest. This witness was also questioned on how he already knew at that early stage that a cell phone was robbed however could not shed light on where he got the information from. It was also denied that the accused was asked or gave permission to be searched. It was admitted that the accused had his own one cell

⁷ Exhibit 'K' at 10.

⁸ Exhibit 'K' at 9.

⁹ Exhibit 1.

¹⁰ Exhibit 'K' at 8.

¹¹ Exhibit 'R'.

phone with him, cash and a small nail clipper. It was further pointed out that the items allegedly found during the search were not photographed during that process by officer Irmaly who was supposedly present. Furthermore that no documentation was disclosed to the defence indicating that the confiscated items were booked in or a signed permission from the accused that items may be returned to their lawful owners.

[27] The witness conceded that it would be reasonable to assume that, considering the blood spatter found on the murder scene, the assailant, his clothes and shoes would be covered in blood. He failed to describe the print with confidence saying it was complicated with some straight lines and some zigzag patterns. He failed to point out a similar shoe or foot print on any of the photos in the photo plan.

[28] This witness was a single witness on the fact that the accused said 'I murdered someone' and on the fact that the accused was found in the possession of the cell phone of the deceased and an Okapi knife. The one kilometre of tracking remained unaccounted for between the scene and the homestead. In his opinion the print was of a size 8 and he testified that he used a measuring stick when comparing the print at different stages. The stick used in the investigating process is not part of evidence before this court. His evidence that the print followed from the homestead was a shoe print is a contradiction to Gideon's evidence that the accused fled bare foot with his shoes in his hand. The witness could not explain how he knew, at this stage already, that the charges included robbery as well.

[29] Phillipus Shikongo, a retired member of the special field force testified that during 2018 he was stationed at Okombaye. On Saturday 11 August 2018 he and his colleagues received instructions to follow the prints of a suspect. They joined in the middle of the manhunt and a bare foot print was pointed to them to follow by foot. At around 18h00-18h30 he saw the suspect in a mahangu field wearing a yellow t-shirt and short trousers. The suspect saw them and ran to the south. He shot two warning shots into the air. The suspect stopped and raised his arms, when he went closer the suspect ran away. Another two shots were fired however the suspect ran on. The suspect jumped two fences and enter another mahangu field. The area was surrounded and the accused was arrested by his colleagues. He was 4 steps away

from the accused and kept the public at bay. He first testified that he saw that they found on the body of the accused an Okapi knife and two cell phones. One of the phones was black while the colour of the other he could not remember. The accused was wearing sneakers. He identified the clothes, sneakers and knife from the laboratory photos.¹²

[30] In cross-examination he conceded that he did not visit the crime scene and did not see the print where it originated. He also confirmed that the public members were aggressive toward the accused. He said as he did not touch the cell phones himself he is not sure of the colour of the second one and does not want to lie. On instructions put to him, that the accused started running because a man dressed in camouflage started shooting at him, he confirmed that he was dressed in camouflage however denied that he was at the time in a vehicle. He only heard the four shots that he fired himself. The witness denied that the accused was assaulted by his colleagues to the extent that he was bleeding from his nose, mouth and forehead. The witness also denied knowledge of cash and a nail clipper found in the possession of the accused upon arrest.

[31] In evaluating the above evidence, the witness contradicted officer Komatzi testifying that the phones came from the right pocket and knife from the left pocket of the accused. He failed to describe the so-called second cell phone and changed his evidence from seeing the items being removed from the accused to it being shown to them by an unknown officer who told them it was removed from the accused.¹³ Furthermore he only refers to the tracking of a barefoot print however the accused was found wearing sneakers. The witness was also not sure if the accused before court is the same person arrested on the particular day. The reliability of this witness and his observation skills are questionable possibly as his attention was directed at the control of the members of public present.

[32] Gideon Paulus Nghinaunye, aged 17, testified that he is staying at the homestead of his grandparents Fillemon and Taimi Shaanika. He knows the accused by name who was previously employed as herder by his grandparents. At the time of his employment the accused made use of a certain hut which since his departure

¹² Exhibit 'K' at 8-10.

¹³ At 160 of typed record, lines 10 to 20.

had been used as a storeroom. Gideon testified that one morning around 07h00 during 2018 he went to tend to the goats. He then met the accused at the small entrance to the homestead on the western side. The accused asked him who the people were that were talking at the main entrance. Gideon could not answer his question as the main entrance is obstructed by huts and is not visible from the gate where they were. He testified that the accused was carrying a pair of Nike sneakers and an Okapi knife in one of his hands. He identified the items held by the accused in photos shown to him.¹⁴ Gideon testified that the accused was wearing a t-shirt with black and white stripes which he identified as per the lab photo of the yellow striped t-shirt. After the greetings and brief conversation the accused ran off in a western direction.¹⁵ Gideon then met his grandmother and police officers while they were busy following tracks from the main entrance. He said that these tracks came from a mahangu field, entered the homestead at the main gate and then went into the room previously occupied by the accused. Gideon told the tracking party that the prints belongs to the accused and that he had ran off to the western side.

[33] During cross-examination the witness added that the accused was dressed in a short trouser. He also confirmed that some of the photos taken, were shown to him during consultations however that he could remember the details from memory. He became unsure about exactly how the shoes and knife were fitted or held in the accused's hand. He confirmed that the accused was not related to them however that the accused would refer to Fillemon Shaanika as grandfather as a sign of respect. Gideon also added that no prints would be seen on the floor of the hut as the surface was made of anthill clay which dries to form a very hard floor.

[34] In evaluating the evidence of Gideon it should be kept in mind that he is a single witness on the observation of the knife and shoes held in the hand of the accused. The position, in which these items were held by the accused, changed through his evidence and ended in, that he could not remember, raising a concern about his observation skills.¹⁶ Gideon also described the T-shirt worn by the accused as black and white stripes while it's not an exact description and which in turn reflected negatively on his observation skills. It was pointed out that he was shown

¹⁴ Exhibit 'K' at 8 and 9.

¹⁵ At 185, line 29 of typed record.

¹⁶ At 186, 191, 195, 196 of typed record.

the photos of the shoes prior to his evidence during consultation and managed to successfully describe those. He was however not shown a photo of the shirt and fail to properly describe same. His evidence that the accused entered and exited the homestead whilst bare feet¹⁷ and the direction he fled into, stands in contradiction with that of Officer Komatzi. Finally when asked if he recognised the Okapi knife from the photos he identified it as a knife resembling one used by his mother for harvesting mahangu.

[35] Taimi Jason Shaanika, the grandmother to the previous witness, confirmed that some years before the date in question, the accused was employed by them. She confirmed that at the time he made use of the said hut which was left unoccupied after his departure. She confirmed that the accused is unrelated to her or her husband. She said that the particular day she was called to the front entrance by one of her grandchildren as there were police officers at the gate. She remembers that one of the officers was Eliakim Muhafa Andreas. The police asked her how many boys slept in her homestead the previous evening. She informed them that Hafeni, the accused, was staying there before but left years before that day. She directed them to the room where he was staying before. The room had an old bed and damaged blankets in it. She said she observed the prints going into the room and leaving to the small entrance. At this stage her grandson Gideon arrived and enquired what the police was doing there. He then reported that he saw the accused running into the bushes carrying his shoes. During cross-examination, when putting to her that the accused was on his way from her homestead to Olupanda, she confirmed that Olupanda is to their west however that it is very far from them.

[36] Some minor contradictions exist in the evidence from Taimi and Gideon as according to Taimi she already identified the print as being that of the accused and informed the police while according to Gideon it was him who told the police the print belonged to the accused. Furthermore they contradicted each other on the content and purpose of the room used by the accused that night.

[37] Officer Olavi Aushona, stationed at Onandjaba police station, was tasked to visit the crime scene which was close to the police station. He confirmed the position

¹⁷ At 186, 188 of typed record.

the deceased was found in and that she had passed on. He observed several stab wounds on the body of the deceased and furthermore observed struggle marks for a distance of 10 metres leading to the deceased. Two sets of prints were observed involved in the struggle, one of which was a pair of flip-flops found on the scene and the other made by a sneaker. He described the print of the sneaker as 'stripes forming a half circle'. About 20 metres from the deceased's body he observed a jersey. According to his observation it was used to wipe blood from an object/hands before being discarded there. He testified that the print was barefoot from the point where the jersey was found.

[38] Officer Aushona testified that he told Constable Severine to retrace the prints to find its origin while he started to follow the prints in the direction it went. They followed the footprints for approximately 200 metres and then the prints went into a mahangu field making it difficult to track. They abandoned the tracking and returned at 06h00 am to the scene. He retraced the prints from the jersey which led them through various fields until they reached the homestead of the witness Taimi. He confirmed that Taimi identified the print as that of the accused and the fact that Gideon confirmed his presence at the homestead. According to this witness Gideon told them the accused was wearing a blue overall jacket. He testified that they followed the prints into the room and even observed the prints on the floor of the hut. Inside the room was a bed and blankets. They followed the prints leaving the homestead at the small entrance and according to him the accused was running due to the length between strides and the deep inprint in the sand. After about 1 kilometre they found a blue overall jacket discarded on the side of an 'oshona' (swamp). The prints led for 10 kilometres in the direction of Angola. Officer Aushona and two other officers stayed on this print until 18h00 when they received a call saying that the accused had been arrested in the Olupanda area. He went there and met the accused after the arrest was made.

[39] Officer Aushona further testified that he transported the deceased's body for the purpose of a post mortem to be conducted. No further injury was sustained on the deceased's body and he identified the body to the parties responsible. He also attended the post mortem and confirmed the stab wounds.

[40] During cross-examination he described the print as lines across the shoe. He also conceded that the assailant would have been covered in blood spatter based on the blood observed on the scene. He conceded that the area from the jersey to where they abandoned the tracking during the night was not cordoned off during the period up to 06h00 am when they started again.

[41] The evidence of officer Aushona is crucial, in that he is the only witness linking the print from the jersey to the homestead of Taimi from where the identity of the suspect became known as that of the accused. In that regard he started his tracking from the point where the jersey was found which was left unprotected with access to both the public and life stock. Another concern is that, even though he stayed on the print that left the Shaanika's homestead, he was not present with the arrest and thus there is a vacuum in the tracking somewhere between the homestead and the arrest of the accused. Another concern is that Officer Komatzi started his tracking not from the jersey but from the deceased's body and while Komatzi testified about a shoe print being followed, Aushona testified that from the jersey he followed a bare foot print. It was estimated that the discarded jersey and deceased body were 20 metres apart. Furthermore officer Komatzi said after one kilometre they abandoned the print while officer Aushona said that within 200 metres they abandoned the print. Both were estimated distances however it is still a material contradiction in their evidence. The description of the shoe print by officer Aushona of 'lines forming a half circle' cannot be said to be an accurate description of the Nike sneakers of the accused that forms part of real evidence in this court. In the opinion of officer Aushona the culprit stopped at the jersey, wiped blood from his hands on an object and then removed his shoes however the eye-witness of the attack who was present during the whole incident did not mention such action by the assailant.

[42] The tracking that took place the following day, leaves room for error as Aushona tracked the next morning through areas of fields and informal roads which was not protected from disturbance by the public or livestock. Another contradiction in officer Aushona's evidence is that he said the person arrived barefoot to the homestead while Officer Komatzi said the culprit arrived in shoes. Officer Aushona furthermore testified that the prints of the shoes were visible on the sandy floor under the bed while Gideon testified that it is made of a hard clay surface which will not

leave any visible prints. Another contradiction was that officer Aushona testified that Gideon mentioned that the accused left wearing a blue overall jacket which they found discarded along the track whilst neither Gideon nor any other witness made mention of such. The jacket does not form part of evidence before court even though Aushona said he handed same to scene of crime officers. Another concern is the manner in which the tracking was done as while Aushona stayed on the print other officers were cutting in front to try and save time. Whilst this method of tracking can be effective it does leave room for mistakes to be made. The areas that they covered are inhabited and would have many size 8 prints made either barefoot or in shoes. Officer Aushona left the tracking when he was informed the accused was arrested and thus there is another vacuum in the continuation and room for error from that point to where the accused was found.

[43] Officer Irmaly, deployed at the Scene of Crime Unit in Outapi, confirmed that after the report was received they attended to the murder scene. They arrived past midnight and found police officers and public members on the scene. The scene was cordoned off. He confirmed the observation of the deceased body in a pool of blood with several stab wounds. He observed one particular sneaker print running from the scene in a western direction. He equally struggled to describe the print saying it had many lines crossing each other. He concluded the person was running due to the deep imprint left in the sand and the distance between steps. His reading of the scene was different than that of officer Aushona as he concluded that the point where the jersey was, was the point of first impact. He took photos of his observations both that night and the next morning when he revisited the scene. The officer also attended the post mortem and took photos thereof. He testified that clothes and shoes of the deceased were booked in as well as the okapi knife, shirt and shoes found with the accused. These items were forwarded to the lab together with blood samples from the deceased and accused.

[44] During cross-examination he conceded that he did not take any cast of the shoe or footprint. He also did not take photos of the various prints. He also testified that the next morning upon his return to the scene the area was disturbed and he could not take clear pictures of the prints found. He described the print as forming crossed lines. He conceded that he made an error in his statement regarding the

place where the post mortem examination was conducted. He said that he arrived at night at the area where the accused was arrested and could not take photos.

[45] When considering the officer's evidence, it is unclear why a scene of crime officer, equipped with a camera and trained to collect evidence, did not take any photo at the bar's wooden bench where the print originated or made no casting of the various prints for comparison. The officer was not sure if the picture that he took of a print in photo 5 was in fact the suspected assailant and he failed to take any photos of the prints at the homestead. He also did not photograph the arrest of the accused to indicate the clothing and shoes he was found in or the alleged items found with the accused. Furthermore the officer failed to ensure that the scene was protected until they were done with investigations as for instance photo 3 of the photo plan is depicting a multitude of unidentified prints.¹⁸ The officer could not describe the shoe print with any confidence describing it with 'lines crossing each other' to 'it is having a very big, big prints like for the tekkie'.¹⁹ He did not indicate any distinctive feature of the bare foot print, and contradicted officer Aushona who said it was a barefoot print from the scene with him testifying the assailant left in shoes.

[46] When testifying officer Irmaly contradicted his own photo plan in saying that he did not photograph the suspected print, however photo 5 depicts a print of a sneaker with a circle drawn around it and a box drawn around it in the sand. Unfortunately the picture's quality is not the best and from the photo it does not look like the print of the sneakers found on the accused. Thus the only result that this picture had, was to create doubt on the accuracy of the link to the accused. He furthermore changed his evidence on being present with the arrest and seeing the phones being removed from the accused. His reasons for not taking pictures of the arrest being that, it was at night, does not make sense as the camera was equipped to take such photos.

[47] Constable Erastus Shidingeni, stationed at the Etayi police station, testified that on 10 August 2018 he was on duty as driver. He testified that Onandjaba police requested assistance with the transportation of the deceased. He and a colleague attended to the request and on the scene found the lifeless body of the deceased.

¹⁸ Exhibit 'H' photo 3.

¹⁹ At 240 of typed record, line 9.

The body was surrounded by members of the community. He confirmed the observations regarding the circumstances and injuries made by other witnesses. They waited for the Scene of Crime Unit to complete their investigations and then transported the deceased to Etayi mortuary. No further injury was sustained to the body during transportation. In evaluating his evidence in the light of the fact that members of the community were surrounding the body, it is questionable if the scene was properly protected before the investigation was completed.

[48] Hango Shaningwa, employed at the mortuary at Okahao, confirmed that he received the deceased body and that a family member identified the body to him.²⁰

[49] Doctor Maria Namundjebo testified that she was stationed at the Okahao district and that she conducted a post mortem on the deceased.²¹ She noted a total of eleven wounds to the body of which one penetrated the chest area with enough force to sever the 6th rib from the sternum. It furthermore penetrated the heart and caused the death of the deceased. She testified that the pale organs were an indication that the deceased bled out. In her opinion a sharp object was used to inflict the wounds. Her evidence was left undisputed.

[50] Officers Jeremia Shipiki and Paulus Taapopi testified regarding the chain of custody of the exhibits received from the Scene of Crime Unit up to transportation and the submission of same for scientific examination at the Namibian Police Forensic Institute (NPFSI).²² Their evidence stand undisputed.

[51] T. S. Nakalemo testified that she is a forensic scientist employed at the NPFSI. She confirmed the samples in this matter received for scientific examination from the police. Her evidence regarding the chain of custody was left undisputed. She explained that during the initial testing it was established that there were biological specimen detected on some of the samples submitted. In particular testing indicated that human blood or biological matter was detected on the deceased's flip-flops and white jersey. Additionally biological matter was detected on the knife

²⁰ Exhibit "G" on PM 171/2018.

²¹ Exhibit 'E'.

²² Evidence bags NFE 13679 and NFP 02622 submitted at the NPFSI on 27 November 2018 on laboratory reference number 2497/2018.

allegedly found with the accused and the yellow striped t-shirt that he was arrested in.

[52] The witness testified that a first report was drafted and submitted to indicate the above result. Thereafter DNA analysis would follow to establish if either the deceased and/or accused are linked to these by comparing the unknown samples detected to the samples with a known origin being the saliva/blood collected from the accused and deceased. A second report would then be released with the results of the DNA testing. At this stage of the proceedings she testified that due to budgetary constraints the reagents needed for testing was unavailable and there-for the second report was not done. During cross-examination, when asked about the inconclusive findings recorded on some of the items, she testified that it might have been caused by the improper collecting of a swap or that the item was cleaned after an incident.

[53] The State applied for a remand for the DNA testing to be completed and the second report to be submitted. Because the witness could not give an indication on when this would be done and with the potential prejudice to the accused, who was in custody, the application was refused.²³ Thereafter the State closed its case.

[54] Defence counsel brought an application for a discharge in terms of s 174 of the CPA which was unsuccessful.²⁴ Once the s 174 application was refused the State brought an application in terms of s 167 of the CPA for the recalling of a witness as in the meantime the second report with DNA results was done by NPFSI. Considering that the results would be of essential value for this court to get to the truth, the application to recall witness T. S. Nakalemo was granted.²⁵

[55] The witness was recalled to present the DNA results found on the items that previously were determined to have biological matter (human blood) on it. She testified that they received two 'known' samples being the DNA material of the deceased (blood) and the accused (swap). The items subject to the second report were a white jersey, pair of flip-flops referred to as slippers, an Okapi knife and the accused's T-shirt.

²³ S v Hipangelwa (CC 3/2021) [2022] NAHCNLD 117 (26 October 2022).

²⁴ S v Hipangelwa (CC 3/2021) [2022] NAHCNLD 13 (20 February 2023).

²⁵ S v Hipangelwa (CC 3/2021) [2022] NAHCNLD 21 (7 March 2023).

[56] She testified that the T-shirt of the accused did not contain enough DNA for a comparison and therefore the result was inconclusive. None of the submitted items contained the DNA of the accused. The white jersey, flip-flops and Okapi knife conclusively had the DNA matter of the deceased on it in the form of human blood. The report furthermore indicates the presence of unknown DNA on the Okapi knife as well as the flip-flops.²⁶ In cross-examination this witness conceded that considering the allegation that the knife was retrieved from the pocket of the accused it should have contained his DNA. This evidence places serious doubt on the version of officer Komatzi that the accused was found with the items.

[57] Accused testified under oath. He was an unimpressive witness and his demeanour appeared aggressive and nervous. He avoided answering questions from his own counsel or gave irrelevant answers. The accused testified that all the witnesses are unknown to him however confirmed the evidence from Wilhelmina that he was employed at a certain brick making business. He denied ever meeting or knowing the deceased or being in her presence at the cucashop however confirmed that he knows where the cucashop is situated.

[58] The accused's version is that on 10 August 2018, the day of the death of the deceased, at 13h00 he started travelling to Onandjaba as he received a call from a certain Rosalinda Kaoso from the Olupanda area who owed him money for a pit latrine that he dug. He arrived with a taxi or lift at Onandjaba village and overnight at the homestead of his 'uncle' Fillemon Shaanika. His plan was to proceed from there to Olupanda to collect the money owed to him. He testified that at the estimated time of the attack on the deceased he was already in the room that he previously occupied when he was employed there as herder. Also that he did not meet any of the inhabitants that evening when he entered the homestead. He testified that the room has a cement floor and would not show prints.

[59] The accused further testified that the next morning he woke up, greeted his uncle at his room and, whilst leaving through the small entrance, met Gideon. He denied being aware of the presence of the police at the main gate at the time. He

²⁶ Exhibit 'U' at 3.

also denied carrying the shoes and an okapi knife in his hand as he was wearing the shoes and only had a small nail clipper. He denied running from the small entrance. He testified that later in the day he observed a vehicle with camouflaged officers on driving in his direction whilst firing shots. He then jumped through a fence and was eventually arrested. After he was caught he was beaten and used his t-shirt to clean the blood from a cut on his forehead. The attack on him resulted in him having swollen lips, a cut, swollen eye and a swollen face. He said he was completely confused by the circumstances and that no rights were explained to him. After a body search on him the police found his phone, a Samsung, a small nail clipper and N\$60 in cash. The accused denied being found with the cell phone of the deceased or that he had an Okapi knife with him. That was the evidence for the defence.

Law applicable

[60] Regarding the credibility and reliability of witnesses, in the light of contradictions in oral evidence, it was said in *Absalom v S*²⁷ that from experience witnesses rarely give identical evidence. Furthermore that contradictions *per se* do not render such evidence unreliable.²⁸ Differences in evidence presented should be considered against the totality of evidence while taking into account the nature of contradictions, the number of contradictions and the importance thereof on other parts of witness' evidence.

[61] In this matter the identity of the assailant was not established by direct evidence and therefor will require this court to draw inferences from circumstantial evidence. In that regard Liebenberg J in *S v HN*²⁹ 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.

²⁷ *Absalom v S* (CA 112/2016) [2017] NAHCMD 251 (04 September 2017).

²⁸ *S v Auala* (no 1) 2008 (1) NR 223 (HC).

²⁹ *S v HN* 2010 (2) NR 429 (HC) para 57.

(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.”

[62] It is trite law that the State carries the burden of proving the allegations contained in the charges 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.³⁰ Furthermore when dealing with circumstantial evidence the court must not consider every component in the body of evidence separately and individually in determining what weight should be accorded to it, but rather have to consider the cumulative effect of all the evidence when deciding whether the accused's guilt has been proved beyond reasonable doubt.

[63] The witnesses who allegedly saw the accused in the company of the deceased at the bar prior to her murder identified the accused as the culprit however done so through dock identification which is suggestive and of lesser evidential value than for instance if an identity parade was held.³¹ Witnesses should be tested on any distinctive details which allowed them to make the identification.³² The aspect of identification should be approached with caution as there is always a possibility of honest mistaken identity.³³ The reliability of the witness Wilhelmina Ndeshi is questionable considering the evidence suggesting that she was intoxicated and after the incident she saw a newspaper article on the murder with a picture of the accused next to it. That in itself is a suggestive fact that can influence her mind. She also attended frequent court appearances made by the accused which possibly cemented her opinion on his identity. The barman, David Hilukelwa, made a dock identification however he appeared uncomfortable with that and even after this identification he kept on referring to the assailant as the ‘unknown man’.

[64] In *S v Imene*³⁴ it was stated that although the evidence of shoe prints should be treated with caution, it is admissible in cases where there is other evidence available for the court to rely on. A factor to be considered when relying on

³⁰ *Miller v Minister of Pensions* [1947] 2 All ER 372.

³¹ *S v Nakale* 2011(2) NR 599 SC.

³² *R v Shekelele and Another* 1953 (1) SA 636 (T).

³³ *S v Shipanga and Another* 2015(1) NR 141 para 15; *S v Nango* 2006(1) NR 141.

³⁴ *S v Imene* 2007(2) NR 770 (HC).

circumstantial evidence presented in the form of footprints is that there should be some distinctive character or imprint left by the print.³⁵ Furthermore it can be of great assistance if proper photos or casting are presented in confirmation of the descriptions of the prints given.³⁶

[65] Regarding the evidence of a single witness I wish to echo what was stated by Liebenberg J in *S v HN*³⁷ 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’.

[66] Officer Komatzi testified that the accused immediately admitted that he murdered someone as being the reason for him fleeing. He was a single witness on this alleged admission. In *S v Dausab*³⁸ it was said that legal rights, including the right not to incriminate oneself, should be explained to a suspect/accused before such admission would be allowed into evidence.³⁹ The admissibility of extra-judicial admissions into evidence is furthermore regulated by section 219A (1) of the CPA which states:

‘Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him at criminal proceedings relating to that offence. . .’

Conclusion

[67] It was proved beyond reasonable doubt that the deceased was intentionally killed in an unlawful attack by the assailant. The question to be determined is

³⁵ *S v Amunyela* (CC 13/2020) [2022] NAHCNLD 130 (13 December 2022).

³⁶ *AlugoOdhi v S* (CA 19-2014) [2015] NAHCNLD 3 (23 January 2015).

³⁷ *S v HN 2010* (2) NR 429 (HC) at 443E – F.

³⁸ *S v Dausab* 2014(3) NR 652 (HC).

³⁹ *S v Kapia and Others* 2015 (4) NR 1094 (HC); *S v Mbango* (CC 19/2012) [2014] NAHCNLD 5 (31 January 2014).

whether the State proved beyond reasonable doubt that the accused was responsible for the murder and robbery of the deceased.

[68] The accused did not make the best of impressions when he testified however he does not carry the burden of proof. The evidence is that the deceased screamed for help with the words 'He is killing me, I do not know him'. It could mean that she only met the assailant earlier that evening or that in fact that she did not know him at all. In an attempt to link the accused to the offences the State relied on evidence regarding foot and shoe prints followed. In this regard, the witnesses contradicted each other on the point from where the print was followed and the distance before it was abandoned in the early morning hours. The witnesses also contradicted each other on the type of print followed with officer Komatzi following a shoeprint from the deceased's body and Officer Aushona following a barefoot print from the deceased's jersey. All witnesses had different and vague descriptions of the shoe print and none testified on any distinctive feature of the bare foot print. No casting was made of any of the prints. No photos were taken of prints apart for the one that does not resemble the shoes before court. The evidence of an unexplained blue overall jacket found by officer Aushona on the track but not worn by the accused add to the doubt of this court. No photos were taken during the arrest to indicate the Okapi and cell phones found on the accused. While one witness described the brown Okapi knife as red in colour, Gideon identified it as the knife used by his mother for harvesting mahangu.

[69] The scientific results indicate that the DNA of the accused was not present on the knife with only the DNA of the deceased and another unknown contributor found. No DNA of the deceased was found on the shoes and clothing of the accused whilst in the opinion of various witnesses it would have been the case considering the amount of blood found on the crime scene.

[70] When considering the probability of the State's version presented that the accused was the assailant I cannot help but to consider the following. The accused would have known that he was seen in the act of killing as Bernhard made his presence known, he would not have known that the witness did not identify him, he then ran away for either 800 metres or 2 kilometres and overnighted in a homestead where he is well known and was previously employed. The next day he left with the

murder weapon in his hand for Gideon to see, ran for 10 kilometres to the Angolan border and then ran for another 12 kilometres to Olupanda which gave him ample opportunity to get rid of the items. However when found he still had the murder weapon and the cell phone of the deceased with him. On top of that he supposedly admitted murder to the first officer he met. The accused would have also managed to stab the deceased multiple times with blood spatter spewing everywhere and managed to not get a single drop on him or his clothes or shoes. The version presented seems highly improbable.

[71] In conclusion, when considering the totality of the evidence presented, I cannot find that the accused was linked beyond a reasonable doubt to these offences. In the result the court finds as follows:

1. Count 1: Murder- Not guilty.
2. Count 2: Robbery with aggravating circumstances- Not Guilty
3. The Mira/Mint cell phone (Exhibit 1) and the Okapi knife is forfeited to the State.
4. The pair of Nike sneakers to be returned to the accused.

E.E. KESSLAU
JUDGE

APPEARANCES

FOR THE STATE: L S Matota
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FOR THE ACCUSED: L P Shipila
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