

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

JUDGMENT

Case No: CC 09/2016

In the matter between:

THE STATE

v

THEODOR POPYENI SEBEDEUS

ACCUSED

Neutral citation: *S v Sebedeus* (CC 09/2016) [2023] NAHCNLD 89 (28-29 August 2023)

Coram: JANUARY J

Heard: 18 September 2019 to 26 September 2019, 22 June 2020 to 23 June 2020, 09-10 September 2020, 16 November 2020, 31 May 2021, 01 June 2021, 04 June 2021, 14-15 July 2021, 24 August 2021, 31 August 2021, 15 October 2021, 06-09 December 2021, 23 May 2023

Delivered: 28 - 29 August 2023

Flynote: **Criminal law** – Theft, crimen injuria, malicious damage to property, assault by threat, arson, rape, murder, defeating the course of justice

Criminal Procedure – Guilty pleas – Direct evidence – Accused placed himself on scene - No direct evidence on murder, rape and defeating the course of justice – Evidence - Principles of circumstantial evidence – Accused admitted most of the material evidence – Confession and admissions – Admissibility

Summary: The accused was at a cucashop/bar where he stole meat from a bowl without paying for it. When confronted, he pushed a table with a bowl of meat to the ground scattering the meat on the ground. In relation to charges of theft, malicious damage to property on these facts he pleaded guilty and was convicted.

He further assaulted the deceased with a stick, chased her with it, pushed her on the ground and had sexual intercourse with her without consent. Her body was found the following day with her tight/panties pulled down to the knees and menstruation pads nearby. A small pole protruded from her head with gaping wounds in the face and head. The accused set the cucashop on fire. When he returned to his place of residence, he burned out his clothes that were bloodstained.

The principles of direct and circumstantial evidence were restated. Further the adjudication of evidence was discussed. The accused pleaded guilty to theft, crimen injuria and malicious damage to property and placed himself on the scene. He admitted having assaulted the deceased with a stick and having chased her. He was the last person having interacted with the deceased. He made a confession to a magistrate and admitted to facts in a warning statement. He stands to be convicted of the charges to which he pleaded not guilty i.e. Arson, murder, rape and defeating or obstructing the course of justice.

ORDER

1. The convictions on counts 1; theft, count 2 crimen injuria and count 3; malicious damage to property are confirmed.
2. The acquittal on count 4; assault by threat is confirmed.
3. The accused is additionally convicted of:
 - 1) Count 5; Arson.
 - 2) Count 6; Contravening s 2(1)(a) read with ss 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000-Rape.
 - 3) Count 7; Murder with direct intent.
 - 4) Count 8; Defeating or obstructing the course of justice.

4. The matter is postponed to **12 October 2023** at **10h00** for submissions on sentencing.
5. Accused is remanded in custody.
6. Both counsels are directed to file heads of argument on or before **29 September 2023**.

JUDGMENT

JANUARY J

Introduction

[1] The accused stands indicted for:

1. Theft;
2. Crimen Injuria;
3. Malicious Damage to property;
4. Assault by threat;
5. Arson, Alternatively; Malicious damage to property;
6. Contravening section 2(1) (a) read with sections 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000, Alternatively; Violation of a Dead body;
7. Murder;
8. Defeating or obstructing the course of justice.

[2] He pleaded guilty to counts 1, 2 and 3. Initially by mistake, he pleaded guilty to count 4 but corrected it and pleaded not guilty. In addition, he pleaded not guilty to counts 5, 6, 7 and 8.

[3] Mr Mudamburi initially was representing the State and the accused by Mr Shipila. Mr Shileka, for the State, had to take over the matter when Mr Mudumburi was no longer available.

[4] The particulars of the charges are:

1. **'Theft;** in that upon or about the 24th day of May 2013 and at or near Oshikuyu Village in the district of Outapi in the district of Outapi the said accused did wrongfully and unlawfully steal meat valued at N\$10.00, the property or in the lawful possession of Ndinelao Kulo
2. **Crimen injuria;** in that upon or about the 24th day of May 2013 and at or near Oshikuyu Village in the district of Outapi the accused, a male. Did wrongfully and intentionally injure, insult and impair the dignity of Ndinelao Kulo, a female person by swearing and using obscene language to wit: by saying to her "give me meat your vagina" in the presence of Tobias Katopi.
3. **Malicious damage to property;** in that upon or about the 24th day of May 2013 and at or near Oshikuyu Village in the district of Outapi the accused, a male, did wrongfully, unlawfully and maliciously break or damage or destroy a basin in which meat was kept valued at N\$100.00 the property in the lawful possession of Ndinelao Kulo with the intent to injure the said Ndinelao Kulo in her property and thus the accused is guilty of the crime of Malicious Injury to Property.
4. **Assault by threat;** in that on or about In that upon or about the 24th day of May 2013 and at or near Oshikuyu Village in the district of Outapi the said accused, did wrongfully and intentionally assault Isack Wilbard by threatening then and there to hit the said Isack Wilbard with a concrete brick, thereby causing the said Isack Wilbard to believe that the said accused intended and had the means forthwith to carry out his threat.
5. **Arson;** in that on or about In that upon or about the 24th day of May 2013 and at or near Oshikuyu Village in the district of Outapi the accused did wrongfully, unlawfully and maliciously set fire to a shebeen, the property of Ndinelao Kulo and did then and thereby burn and destroy or damage the said shebeen with the intent to injure the said Ndinelao Kulo in her property.

Alternative to Count 5:

Malicious damage to property.

That the accused did upon or about the 24th day of May 2013 and at or near Oshikuyu Village in the district of Outapi the accused did wrongfully, unlawfully and maliciously

break or damage or destroy cooldrinks, different beers, sweets, glucose, containers, Tassenberg wines, Castello wines, cooking pots, gas, a sofa, cash of N\$1500.00, 25 crates of empty beers, 7 boxes of empty cooldrinks valued at N\$35 000.00, the property in the lawful possession of Ndinela Kulo with the intent to injure the said Ndinela Kulo in her property.

6. **CONTRAVENING SECTION 2(1)(a) READ WITH SECTIONS 1, 2(2), 3, 5, 6 ANF 7 OF THE COMBATING OF RAPE ACT, ACT NO 8 OF 2000-RAPE**

In that upon or about the 24th day of May 2013 and at or near Oshikuyu Village in the district of Outapi the accused, hereinafter called the perpetrator did unlawfully and intentionally commit or continue to commit a sexual act with Karina Ndinelago Shololeni Iyambo, hereinafter called the complainant by inserting his penis into the vagina of the complainant while he applied physical force to the complainant, by holding her.

Alternative to count 6:

VIOLATING A DEAD BODY

That the accused is guilty of violating a dead body.

In that upon or about the 24th day of May 2013 and at or near Oshikuyu Village in the district of Outapi the accused did unlawfully and intentionally physically violate the dead body, in life being that of Kaarna Ndinelago Shololeni Iyambo by having sexual intercourse with her.

7. **Murder:** In that upon or about the 24th day of May 2013 and at or near Oshikuyu Village in the district of Outapi the accused did unlawfully and intentionally kill Kaarna Ndinelago Shololeni Iyambo by assaulting her with a wooden stick.

8. **Defeating or obstructing the course of justice;** in that on or about In that upon or about the 25th day of May 2013 and at or near Epumbu Village in the district of Outapi the accused did unlawfully and with the intent to defeat or obstruct the course of justice:

1. Undressed his blood stained pant/clothes and burned it;
2. Or otherwise tampered and/or interfere with evidence leading to the death of the deceased;

Whereas these acts were perpetrated whilst the accused knew or foresaw the possibility that:

1. His conduct may frustrate and/or interfere with the police investigations into the injuries and/or the death of the deceased, and/or

2. His conduct may destroy the physical evidence of an assault perpetrated on the deceased and protect the accused from being prosecuted for the crime of assault and or causing the death of the deceased.

Explanation of the pleas

[5] The pleas were in accordance with the instructions to Mr Shipila. It was read into the record as follows:

'Plea in terms of section 112(2) of the CPA

I the undersigned, Theodor Sebedeus Popyeni do hereby state that I am an adult male, Namibian. I am the accused person in this matter. I am indicted on the following counts: Theft, *crimen injuria*, malicious damage to property, assault by threat, arson; alternatively, malicious damage to property, Contravening section 2(1)(a) read with sections 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000- Rape; Alternatively; Violation of a Dead body, Murder and defeating or obstructing the course of justice.

I plead guilty to the following counts: theft, *crimen injuria* and malicious damage to property. My plea is based on the following facts: I admit that on or about 24th May 2013 at or near Omayela location in the District of Outapi, I took and ate two pieces of meat belonging to Ninelao Kulo. When I acted as above. I had no intention of returning the said meat to Ms Kulo. Although Ms Kulo had informed me that the meat was for sale, I knew that I did not have money to pay for it. I did not have any intention to pay for the meat. The price of the meat was five Namibian Dollars per piece. I therefore stole meat worth ten Namibian Dollars. I have no defence in law for my conduct. I knew at the time that what I was doing was wrong and that I could be punished for it.

When Ms Kulo insisted that I pay for the meat, I insulted her by mentioning her private parts and more specifically her vagina. At the time, she was in the company of at least one other person who could hear what I was saying. I concede that what I said was obscene and could have the effect of causing Ms Kulo to feel bad about herself. There was no justifiable reason for me to insult her in that way. I also knew at the time that I was wrong to insult Ms Kulo in that manner.

After insulting Ms Kulo, I proceeded to her table and pushed it to the ground. As a result the ceramic bowl containing the meat, also fell to the ground and shattered. The meat was shattered all over the ground. My reason for pushing her table down was that I was ashamed of the fact that I could not pay for her meat even though she was demanding money from me in public. I knew that what I was doing was wrong and could attract punishment. I am deeply sorry for my conduct as outlined above. I wish to extend my heartfelt apologies for my bad behaviour towards Ms Kulo. I confirm that I have consulted with my lawyer before making this statement. I confirm that I fully understand the effect of this statement, more so, that as a result, I may be found guilty on the counts to which I have pleaded guilty without the State leading any further evidence. I make this statement freely without being forced and as a token of my remorse. I ask that the court have mercy on me in my sentencing.'

The accused confirmed the statement and his signature on it. Mr Mudamburi accepted the guilty pleas as tendered.

'Plea in terms of section 115 of the CPA

I the undersigned, Theodor Sebedeus Popyeni do hereby state that I am an adult male, Namibian. I am the accused person in this matter. I am indicted on the following counts: Theft, *crimen injuria*, malicious damage to property, assault by threat, arson; alternatively, malicious damage to property, Contravening section 2(1)(a) read with sections 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000- Rape; Alternatively; Violation of a Dead body, Murder and defeating or obstructing the course of justice.

I plead not guilty to the following counts: Assault by threat. My defence is that I did not threaten Isaac Wilbard in any manner as my conduct was directed to another person who had intended to throw bottles at me and not Isaac Wilbard. Arson; alternatively malicious damage to property; I did not set the shebeen of Ndinela Kulo on fire nor did I maliciously destroy cool drinks, different beers, sweets, glucoses, containers, Tassenberg wines, Castello winess, cooking pots, gas, a sofa, one thousand five hundred Namibian dollars in cash, 25 crates of empty beer bottles, seven boxes of cool drinks valued at thirty five thousand Namibian dollars.

Contravention of section 2(1)(a) read with sections 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000- Rape; or Alternatively; Violation of a Dead body, I deny committing a sexual act with Karina Ndelao Sholeleni Iyambo. I also deny having

been at the scene of her death or in the vicinity of her dead body. I have no knowledge of the time, or place of her death, therefore I did not violate her dead body.

Murder; I deny having killed Karina Ndelao Sholeleni Iyambo as alleged. I did not cause her death nor did I intent to and defeating or obstructing the course of justice. I do admit that I hit her with a small stick all over her body. I also admit that I hit her on the shoulder with an empty beer bottle. However, after I hit her, she got up and fled into the bushes and I did not see her after that. By the time that I had stopped assaulting her, she was still alive and able to run.

Defeating or obstructing the course of justice; I deny that I burnt my clothes with the view to defeat or impede the course of justice as alleged. The reason for burning my clothes was that I suspected that a snake or other reptile had sought refuge in the box where I kept my clothes. I pulled it out of my sleeping hut and into the field to burn it with a view to kill the snake or whatever it is that was making noise inside the box. I had no intention to frustrate police investigations. I had no intention to destroy evidence of an assault on the deceased. I put the State to the proof of its case in so far as the above counts to which I pleaded not guilty are concerned. I confirm that I have consulted with my lawyer prior to making this statement. I know and understand that I am not compelled to make the statement but I make it freely without being forced.'

The accused confirmed the statement and his signature thereto.

The summary of substantial facts

[6] The summary of substantial facts reads as follows;

'That the accused was during May 2013 at Oshikuyu Village. He took meat from the complainant in count 1 without paying for it. When he was confronted by the complainant in count 1, to pay for the meat, he swore at her as outlined in count 3 of the indictment. He also destroyed the basin in which her meat was as outlined in count 3 of the indictment. He also threatened the complainant in count 4 to hit him with a concrete brick if he interferes. When the complainants in count 1, 2 and 3 left her place of business to go and look for help against the accused, he set her shebeen on fire as outlined in count 5 and its alternative charge.

The inferno destroyed the shebeen itself as well as the properties which were inside the shebeen. A woman who was looking after the shebeen when the complainant in count 5 and the alternative thereto left to look for help, was overpowered and raped or in the alternative, her body was sexually violated after the Accused overcame her resistance and murdered her.

On the following day, the accused burnt the blood stained clothes which he was wearing at the time of the murder with the intention of defeating or obstructing the course of justice as outlined in count 8 of the indictment.'

Exhibits

[7] The following exhibits were by agreement handed up, marked and received by the court: A - Summary of substantial facts and list of witnesses; B – Pre-trial-memorandum; C – Defence's reply to State's pre-trial memorandum; D – Pre-trial review conference minutes; E – Accused's plea; F – Accused's statement in terms of section 115 of the CPA; G – Transportation statement; H – Identification of corpse statement; J – Affidavit in terms of section 212(4) of CPA by Sev Suseb; K - Affidavit in terms of section 212(4) of the CPA by Dr Tulumba Florent Asaka in relation to the post-mortem 181/2013; L – Statement of next of kin; M – The post- mortem report PM 181/2013 by Dr Asaka; N – Medico-legal examination report in relation to the accused by Dr T L Gwande; O – Collection of forensic evidence form in respect of the accused in relation to sexual assault by Dr Gwande; P – Collection of forensic evidence form by Dr Asaka in relation to the deceased; Q – Application for scientific examination form; R – Forensic Report; S – Photo plan; Exhibit 1 - Two empty Tafel Lager bottles; Exhibit 2 – Self-made lamp; Exhibit 3 – Pieces of a Jean cloth; Exhibit 4 – Broken pieces of a bowl or plate; - Exhibit 5 – Fork with a red handle; Exhibit 6 - Sticks and pieces of a broken stick.

Section 220 Admissions

[8] The accused admitted that he assaulted Karine Ndelao Sholeleni Iyambo by hitting her with a small stick all over the body. He also admitted that he hit her on the shoulder with an empty beer bottle. These admissions were recorded as formal admissions in terms of section 220 of the CPA.

The evidence for the State

[9] Ndinelao Kulo knows the accused as they are from the same village. She testified that the accused set her room on fire. She also knew the deceased, Karina Ndinelao Iyambo as she grew up with her. On 24th May 2013, the accused came to her shop with two Angolan guys and requested her to give him meat. She responded that he may take meat if he had money, otherwise he was not allowed to take meat. She refused to give meat to the accused. He however insisted saying give me meat 'poes' (vagina), moerskont'. She was selling a variety of items such as meat, alcohol, fuel, beer, Tassenberg, Castello, sweets and Niknaks. Besides the accused and two Angolans, there were also other people including the deceased at the shop. Some of the persons were eating meat. The accused took 2 pieces of meat and went about five paces from the witness after he took the meat.

[10] The accused person came back with a stone in his hand holding it behind his back. He dropped the stone and kicked the bowl with meat. The table on which the bowl was, fell. The bowl also fell causing the meat to fall scattered on the ground. The deceased asked the accused why he was insulting the witness after taking her meat. The accused continued insulting. The witness decided to contact the police. She contacted a certain Mwanyangapo who informed her to contact the nearest police station. She contacted Women's Network and spoke to Mr Judas Sebedeus, the father of the accused person.

[11] Judas Sebedeus arrived after a short while and enquired if it was the accused who caused the scattering of the meat. The accused saw his father's motor vehicle approaching and went behind the shop. Mr Sebedeus could not compensate the witness for the scattered meat and informed the witness that they should approach the accused's grandmother for her to come and see what the accused did. They embarked the motor vehicle and went to the grandmother. At the time, the accused was nowhere to be seen. The witness left Shololeni (the deceased), Silas Kulo, Johannes Ankoondo and Tobias to take care of the shop.

[12] When they arrived at the grandmother, she advised the witness to contact a certain Petrus Kalenga at Etilyasa police station. The witness contacted Petrus Kalenga. Kalenga who indicated that he was on his way and said that the witness should meet him on the road. They met him at the police station and afterwards proceeded to Omaela cuca shops where the witness's shop was. Before reaching Omaela, the witness observed a fire. She observed on arrival at her shop that it was burning. There were about six empty bottles of Tafel beer lying around. The persons that she left to take care of the shop were absent. The accused was also absent.

[13] Mr Petrus Kalenga contacted the police at Okahao. These police officers came. Mr Judas Sebedues enquired from his wife, Ms Mary, if the accused was at home. She confirmed his presence. Mr Judas proceeded to his house with police officers. The witness remained at the shop. The accused was brought to the shop by the police at about 21h00. The accused was questioned and confirmed that it was him who set the shop on fire. The shop consisted of two rooms. One room completely burned down and the other room partly burned down. The witness was in shock, fell down and was escorted home by Mr Judas Sebedeus, the father of the accused. The witness looked around for the deceased in the room where she used to stay but could not find her. She went and slept.

[14] She woke up at about 4h00, went to a certain Letta Shilongo and Sema Kulo, and together proceeded to her cuca shop. En route to the shop, they observed blood spots on the ground and marks as if persons wrestled there. There was one slipper with an emblem of the South African flag on it at the spot. The witness observed the body of the deceased a short distance, about 20 to 25 meters from there, lying on the ground. She observed a stick piercing through her left eye and emerging at the back of her head. She screamed, called Mr Petrus Kalenga and informed him of her discovery. They waited for the police near the scene.

[15] The witness observed that the tight (panty) of the deceased was at her ankles and pads for menstruation were lying near the body. The police took her away because many people gathered at the scene. The police cordoned off the scene. She valued her burnt shop with the items damaged at 35000 (thirty five thousand) Namibian dollars.

[16] In cross-examination, the witness refused to accept the apology of the accused for stealing the meat, having insulted her and for damaging her bowl that contained the meat. The witness maintained that fuel containers filled with petrol that was in her shop belonged to someone else who was supposed to collect it from her. She conceded that the petrol containers could have escalated the fire at the shop. She stated that the shop did not have electricity. She used a Chinese lamp with bulbs and batteries for power and never used a self-made lamp with petrol or paraffin and a cloth inside. The witness stated that a self-made lamp that was handed up as an exhibit, could have been used by children outside the shop. She was adamant that no self-made lamp was used inside the shop. She stated that everything inside the shop burned to ashes and if she used the self-made lamp, it would not have survived the fire. The witness admitted that she took two empty beer bottles, had them in her hand but only just asked the accused to leave her place.

[17] Further in cross-examination, the witness confirmed her evidence in chief. She testified that Isak Uushona wanted to beat the accused but later changed this version that Uushona had only reprimanded the accused. It was put to her that the container with fuel contributed and caused the fire hazard to the burning of the shop. She agreed to that. It was put to the witness that after the arrest of the accused, he was not offloaded at the cuca shop. His instructions are that the police just passed by the cuca shop with him. Further that he denied at arrest that he set the cucashop alight. The witness was adamant that the accused was offloaded at the cucashop and when confronted there, he admitted that it was him who set it on fire. The witness identified, what she called, a slipper in photos 15 and 16 as the one that she saw on the road near the deceased's body. What is depicted is actually a slip-on shoe/plakkie with an emblem of the South African flag. She saw the accused and one Tobias Katopi during the day wearing similar slip-ons. The value of N\$25000 does not include the building that was destroyed in the fire.

[18] Johannes Aamwama Ankongo knows the accused as they went to school together. On the 24th of May 2013, he went to the Omaela cuca shop together with other persons at about 18h00. Whilst at the cuca shops, the witness was called by Ms

Ndinelao Kulo, the previous witness, to her shop. After a while the accused arrived with another person. The witness also saw the deceased at the cuca shop. The accused enquired from the owner of the cuca shop about the price of the meat which was in a bowl/pot on a table. He opened the bowl, took meat and ate it. The witness testified that the shop was lit with a candle. The accused came back after eating the meat whereupon Ms Ndinelao Kulo, the owner of the bar asked the money for the meat.

[19] The accused responded that he wanted lots of meat. The owner of the shebeen took two empty beer bottles and walked to the accused. The accused ran behind the shebeen. The accused returned and pushed the table to the ground causing the meat to also fall on the ground. Ms Ndinelao then telephonically called the father of the accused to come and see what the accused did. One person, Uushona (Isak Wilbard) reprimanded the accused. The accused's father turned up and went with Ms Ndinelao and Uushona to the aunt of the accused. The accused was at the time behind the shebeen. The witness and other persons remained at the shebeen whilst the deceased was left in charge thereof.

[20] After the owner left, the accused came back from behind the shebeen, went into it and took crates of beer. The accused took the candle and set the crates of beer alight. The accused then exited the shebeen with two empty beer bottles. He started to hit the deceased in the face with a beer bottle. The deceased fell down, got up and ran a short distance. The accused followed her and again started to beat the deceased. The witness concluded that the deceased was being beaten when he heard her crying and screaming. The accused confronted the deceased asking why she mentioned his name to his father. The witness also ran away. He made his observations after he ran in the moonlight from a distance of about 200 meters. The witness went to Ms Ester to inform her what had happened as they could also see the flames emanating from the shop.

[21] He heard Ms Ndinelao crying and went with Ms Ester to the shop. He did not see the accused and the deceased but saw the burnt-down cuca shop. The witness thereafter went home. The father of the accused collected the witness the next day on the 25th of May 2013 and went to the shop. He found a lot of people and police officers there. He only heard that the deceased passed away. The witness testified that

amongst others, the accused was wearing slippers with the colours of the South African flag on it and shorts with a brand name 'Dicks' on the day of the incident. According to the witness, the accused, on arrival at the shebeen, did not show that he was intoxicated. He also set alight boxes of Tassenberg wine simultaneously with the beer crates.

[22] In cross-examination, the witness testified that he took and consumed two times about 500 millilitres jars of homebrew drinks and beer in addition at the shop of Ms Ndinelao. He confirmed his evidence in chief about his observations. He confirmed that he heard the deceased and accused speaking after he ran away.

[23] Tobias Tobias Katopi knows the accused as they are cousins. On the 24th of May 2013, the witness went from his home to the Omaela cuca shops. He went to the cuca shop of a certain Ms Kamanya (Ndinelao Kulo) to enjoy drinks. On arrival at the cuca shop he found a number of people seated outside and drinking beer. Whilst he was at the cuca shop, the accused and two unknown males arrived. The accused was wearing, amongst others, knee length shorts, with the name 'Dicks' written on it and slippers (slip-ons) displaying the South African flag on it. The witness was accompanying the accused in the past when he bought the slip-ons. The witness identified a slip-on depicted in the photo plan similar to the ones he observed that the accused was wearing.

[24] On arrival, the accused stated that he wanted to eat meat. The meat was in a bowl on a table. The accused enquired from Ms Ndinelao about the price of the meat. She informed the accused that the price was N\$5-00 per piece. The accused took one piece of meat and went behind the cuca shop to the two persons who were accompanying him. The accused returned to where the meat was and took another piece of meat. Ms Ndinelao insisted that the accused should first pay for the meat he already took before taking a second piece of meat. The accused however, took a second piece of meat and went a distance away.

[25] Thereafter the accused returned. Ms Ndinelao reprimanded the accused not to take meat without paying for it. She took two empty beer bottles out of a crate and

walked towards the accused. The accused retreated and went to the place where he ate the meat. The accused picked up a brick. A certain Uushona reprimanded the accused not to cause trouble and to leave the place. The accused wanted to hit Uushona with the brick. He however put down the brick and went straight to the bowl of meat and started insulting people in Afrikaans. He specifically insulted Ms Ndinelao and kicked over the table on which the bowl of meat was, causing the meat to fall on the ground. The bowl broke. The accused then walked behind the shop to his two companions. Ms Ndinelao confronted the accused about what he did.

[26] Ms Ndinelao contacted the accused's father to come and observe what the accused has done. When the father arrived, the accused was absent as he went into the bushes behind the shop. The father suggested to inform the accused's grandmother and eventually took Ms Ndinelao to the grandmother. The witness and another person present at the time, were left at the shop. The accused returned to the shop. It was dark at the time and the source of light was a paraffin lamp, a bottle with paraffin in it and a piece of cloth through a hole in the cap on top, which was placed on a counter inside the shop.

[27] The accused on his return went into the cuca shop. He remained inside for a while and exited with two empty beer bottles. The accused went to a lady unknown to the witness. He threw the lady with the empty beer bottles and struck her in the face on the forehead with the second bottle. The lady fell to the ground. She got up and started to run behind a structure that was erected for shade. The accused followed her and took a stick from the shading structure. It was a stick about 1,5 to 2 meters in length. He chased the lady and started to beat her with the stick. The stick eventually broke because of the beating. It is uncertain if the lady picked up one of the broken pieces, but she took a stick and tried to block the beatings with the stick by the accused. The lady ran around the shading structure and eventually away from the structure in the direction of a road. The accused followed her. En route, she collapsed/tripped and fell to the ground. The accused stepped with a foot on the neck of the lady. The witness ran to them and tried to separate them.

[28] The witness called the other people to assist and to hold the accused. The lady in the meantime got up. The witness instructed her to run. She ran away. The witness released the accused. The accused started walking saying that he was going home. The witness went to one Mwaala to collect puppies (small dogs) that he left in his care. The witness eventually went home. Whilst walking he observed flames of fire in the vicinity of Omaela cuca shops. The following day, the witness observed that the shop of Ndinelao had burnt down.

[29] The witness identified, exhibit 2, as the lamp that was illuminating inside the cuca shop. He was confronted with his witness statement where he stated: 'the lady run into the bushes and Mandala (the accused) ran after her armed with the same stick and that I went back to Mr Mwaala and I found him with only one puppy and the other one ran away. I just took one puppy from Mwaala and I followed the other dog which I suspected ran back. I walked home calling my dog and as I was walking home I could hear a voice screaming saying 'yeeyee'. I suspected that the voice was for the lady who was being assaulted by Mandala.' The witness was unsure if he stated that. He eventually stated that he could have stated that to the officer who took down his statement. Later on, he admitted the hearing of the scream but denied the part stating that the accused followed or ran after the deceased with the same stick. This confusion led to an application and proof of the previous statement of the witness.

[30] In cross-examination, the witness confirmed that he also had flip-flop shoes displaying the South African flag at some stage. These shoes were for sale at a Chinese Shop. The witness confirmed his evidence in chief during cross-examination. He later on conceded that he must have told the police officer who took his statement that the accused followed the lady with the same stick as it is appearing in his statement. He stated that it was just that he could not remember to have told the police officer that. He further confirmed that the lady ran into a different direction than the accused. The witness, however, when confronted with other parts of his statement, could not remember if he told the police officer that or not. He stated in cross-examination that the slip-ons displaying the South African flag must have been left there by the accused.

[31] Isak Wilbard is the witness who was referred to as Uushona by the previous witness. He knows the accused as they used to be together at a cattle post. He is not related to the accused. He also knows Ndinelao Kulo as his aunt. On the 24th of May 2013, the witness was at the cuca shop of Ndinelao Kulo from about 20h00 to enjoy some drinks. The accused also arrived at the cuca shop. Ms Ndinelao and a certain lady, Shololeni, (the deceased) were also at the cuca shop. The shop was illuminated with a Chinese lamp operating with batteries as a source of energy. The witness knows Tobias Katopi Tobias as they are from the same village. He knows Johannes Amwaamwa Akongo. They are related and he referred to him as his brother.

[32] On the 24th of May 2013, both the abovementioned two persons arrived at the cuca shop shortly after the witness. The accused went to take a piece of kapana (meat) after his arrival. After that the accused insisted to take another piece of meat. The accused insulted Ms Ndinelao and created a commotion. He grabbed a table and pushed it to the ground. As a result the meat that was in a bowl fell to the ground and the bowl broke. Ms Ndinelao phoned the accused's father. The father arrived at a later stage. The accused went behind the cuca shop on the arrival of his father. The father suggested that the grandmother of the accused should be informed about the incident. The witness went with the father and Ms Ndinelao to the grandmother and thereafter proceeded to the police station and reported it to a certain Petrus Kalenga who is a police officer.

[33] All of them thereafter departed to the cucashop where the meat was scattered on the ground. On their way back there, they saw that the cucashop was on fire. They arrived at the cucashop and did not find any of the people whom they left behind. The father of the accused phoned a certain Maria, his wife, and enquired if the accused was at home. Ms Ndinelao phoned the Okahao police. These police officers arrived. They went with the accused's father to his house and returned with the accused. The police questioned the accused about the burning shop and he admitted that it was him who set it alight. The accused was placed in a police van and taken to Okahao police station.

[34] The witness went to the cuca shop the following day. He found a lot of people there. There was a body on the ground about 20 to 30 paces from the cuca shop. The witness observed a stick stuck into the head of the body.

[35] In cross-examination, the witness maintained that a Chinese lamp was used for lighting the cuca shop. The witness never saw a bottle with paraffin or a candle used as a lamp. The witness did not comment when it was put that Tobias Katopi and Johannes Amwaama testified that the accused found them at the cuca shop. The witness was adamant that the accused was brought to the cuca shop, offloaded and then questioned after the shop was burning, whereupon he confirmed that it was he who set the shop alight.

[36] Taimi lileka testified that she knows the accused person as her cousin. She referred to him as Mandala. In May 2013, the accused came to the house of one, Maria, the wife of the accused's father, and went to the room of her grandmother, Ndewenda Barnabas. The accused informed the grandmother that he was provoked. Thereafter, the accused went to the grandmother's kitchen to get food and went to his room. The accused undressed and put the clothes on the ground. At the time, the witness saw only one slipper/slip-on displaying the South African flag in possession of the accused. Amongst the clothes was a 'Dicks' pants/shorts. The witness took this pants from the ground and observed bloodstains on it. The witness observed the accused going into his room. The witness then went to sleep. After a while she observed a light emanating from a fire. Shortly thereafter, police officers arrived. The police officers went away with the accused person.

[37] In cross-examination, the witness stated that the accused's room is actually a hut. That is where the accused put his clothes on the ground after undressing. The witness testified that what she observed on the trouser looked like blood. She guessed that it was blood.

[38] Petrus Kalenga is a member of the Namibian police stationed at Etilyasa police station. On 25th of May 2013, (the date should be the 24th) he was coming from work at about 19h00 when he received a phone call from Ms Ndinelao Kulo. She reported that

someone was at her cuca shop causing havoc. The report was that the person broke a bowl with meat. The witness did not have transport and was eventually picked up by the father of the accused and Ms Ndinelaο. They passed by the police station and collected another police officer, Cst Amon.

[39] They proceeded in the direction of the cuca shop. They saw within a short distance, flames emanating from the cuca shop. They drove to the cuca shop. They found nobody at the cuca shop. On their arrival, the witness observed that the roof of it had collapsed. The witness contacted his senior officers at Okahao police station. Officers Asino and Andreas Shipyu arrived shortly thereafter. The police was informed that the suspect/accused was at his home. The father of the accused took the police officers to the said house. The motor vehicle was parked some distance from the house. The witness remained at the vehicle to guard it. The father of the accused and other police officers went to the house. They entered and exited with the accused. All of them returned to the burned down cuca shop. Officer Shipyu had a discussion with the accused. The police officers from Okahao thereafter took the accused to Okahao police station.

[40] Early the following morning of the 25th of May 2013, the witness received a phone call from Ms Ndinelaο informing him of a dead body of a person that was discovered in the bush nearby the cuca shop. The witness ran to the cuca shop since his homestead was not far from the cuca shop. He found a lot of people at the scene. He was directed to the scene and observed the body of a female person. The witness observed that the underpants of the deceased were pulled down to her ankles/feet. A dry stick of about 2 meters in length was protruding from the head of the deceased. Ms Ndinelaο informed the witness that it was the body of the person that she left in charge of the cuca shop the day before when she left to the accused's grandmother's house. The witness instructed the bystanders to move a distance away from the body. He then contacted the members of Okahoa police station. The witness observed on the ground at the scene that the body was pulled/dragged. He also observed marks on the ground as if persons were fighting there. The witness also found a slipper/slip-on shoe, displaying the South African flag on it, at the scene. The Okahao police arrived, took over and attended the scene.

[41] There was no cross-examination for the witness.

[42] Andreas Shipyu testified that on 25th May 2013 a report was received about a disturbance at Omaela cuca shops in the area of Etilyasa. The witness departed with two other police officers to the scene. On arrival, they found a cuca shop burning with a lot of people at the scene. There was a meat bowl outside and meat scattered on the ground. The information from the accused's father was that the accused was responsible for the burning cuca shop and the meat scattered on the ground. The father directed the police to the house where the accused was at the time. The witness found the accused inside his room, arrested him and returned to the burning cuca shop. Upon questioning, the accused denied that he set the cuca shop on fire.

[43] In cross-examination, the witness stated that the accused was removed from the police vehicle and he was standing between the vehicle and the cuca shop when he was questioned.

[44] Cornelius Hiwanwa Junias is a member of the Namibian police stationed at Outapi police office. In 2013 he held the rank of inspector. On 25th May 2013 he received a report about a cuca shop burning and that a body of a deceased person was discovered. He departed to the scene. On arrival, he observed a cuca shop that burned down and the body of a female deceased person. A stick was protruding from her head and her panties were on the left leg at knee level. He made inquiries and was informed that the suspect was arrested the previous night and taken to the Okahao police station. He was informed about ashes from burned object(s) that was discovered outside a house in the area. The witness departed to the said house and found the ashes of clothes that were burned. He departed to Okahao where the accused was kept in custody.

[45] The accused was brought into a boardroom where the witness was. The witness introduced himself to the accused as an inspector in the Namibian police and showed him his police identity document. He informed the accused his purpose of the visit. The witness warned the accused of his constitutional rights. The accused indicated that he

will represent himself. The witness then handed the accused over to the investigating officer.

Trial within the trial

[46] The court was forewarned that the State wanted to introduce a warning statement and a confession. The defence had an objection and consequently trials within the trial were held. The basis of the objection was that the warning statement was not obtained in the absence of undue influence. He was unduly influenced by the officers who obtained the warning statement and secondly, the accused opted to have a legal representative and was not afforded the opportunity before the statement was obtained. The same reasons for the objection were raised in relation to the confession. In addition, the confession was allegedly not taken freely and voluntarily. The court ruled both the confession and warning statement to be admissible. These are the reasons.

[47] The first witness for the state in the trial within the trial was Josef Mungowa. He is the police officer who transported the accused from the police station to the magistrate. He knows the accused as he was kept trial awaiting at the Outapi holding cells. On 19th June 2013, the witness was assigned to take the accused to the Outapi magistrate's office. The witness at the time did not know what the case against the accused was all about. He signed out the accused and took him to the magistrate's office. The accused appeared sober, not unhappy and normal. The witness knocked at the magistrate's office and handed the accused to the magistrate. The witness left the accused with the magistrate and returned to the charge office at the police station. He was called after some time to collect the accused from the magistrate.

[48] In cross-examination the witness stated that he booked out the accused in the occurrence book at the police station. The witness does not know what happened in the magistrate's office. The accused was not taken to a medical practitioner before or after he was taken to the magistrate.

[49] Rosalia Uugwanga is the official interpreter at Outapi magistrate's court. She knows the accused since she met him in the magistrate's office at Outapi on 19th June 2013. The witness was called by the magistrate. She went to his office. Whilst seated two persons, a police officer and the accused came into the office. The accused was invited to sit, the police officer was told to leave and that he would be called to collect the accused afterwards.

[50] The magistrate introduced himself and the witness to the accused. The accused told the magistrate that he wanted to give a statement. The magistrate informed the accused about his right to legal representation including the right to apply for legal aid. The accused opted to give his statement and to afterwards apply for legal aid. The magistrate asked questions to the accused from a form in front of him. The witness interpreted the questions to the accused and the answers from the accused to the magistrate. During the questioning the accused answered that he had a stab wound that was inflicted on him before his arrest. He showed the scar of the wound to the magistrate. The accused answered all the questions and the magistrate noted it down. The accused appeared sober and confirmed that he was sober. After all the questions, answers, and the content of what the witness informed the magistrate was noted, the witness read back and interpreted the document to the accused. He signed, the magistrate and the witness also signed.

[51] The witness identified the document as a confession in terms of section 217 of the CPA. The accused, when asked, informed the magistrate, amongst others, that he was not coerced, influenced or forced to make the statement. It did not appear that the accused was stressed or threatened to make the statement.

[52] Marcellos Mwanyangapo is the investigating officer of the matter. He obtained the warning statement of the accused on 26th May 2013. The accused was brought to his office at Okahao police station at about 14h30 by the late officer Aihuki. The accused sat in the office. The witness introduced himself with his appointment certificate. He also introduced Aihuki to the accused. She showed her appointment certificate to the accused. The accused introduced himself as Theodor Sebedeus. They used the Oshiwambo language which is spoken by the accused person. They

understood each other. The witness explained that he was there to obtain a warning statement from the accused. He explained that the charges were murder, rape, assault, arson and defeating the course of justice. The witness explained to the accused his constitutional rights to silence, his rights to legal representation including the right to legal aid, and the right to apply for bail.

[53] The accused indicated that he understood. The accused indicated that he wanted to apply for legal aid. In addition, the accused indicated that he wanted to give the statement at the time and afterwards to hand the statement to his lawyer. The witness informed the accused that if he wanted to make a statement it will be done on his own free will. The accused appeared sober. The accused answered that he was not influenced by anybody to make a statement; that he did not have any injuries. The witness then recorded his warning statement on clean folio papers. After the recording, the statement was read back to him. The accused confirmed that the statement was correct. The accused then signed the statement with the initials 'T S' confirming the correctness thereof.

[54] Officer Aihuki was present all the time but was just sitting in as a witness. The witness identified the preliminary part of the warning statement (Pol 17) as the document that he completed with the accused. The witness does not know the circumstances under which a confession was obtained from the accused. At that time, the witness was on leave and only came to hear about the confession on his return from leave and when the late officer Aihuki handed the confession to him for filing in the case docket. The witness stated that he never influenced the accused to make the warning statement and/or the confession. At the time that the confession was taken, the witness was on vacation leave. He stated that after having taken the warning statement, he never had contact with the accused again.

[55] In cross-examination, the witness denied that there were about nine officers in the office where the warning statement was obtained. According to him the office cannot even accommodate more than six persons. He further confirmed that the accused immediately, after the explanation of his right to legal aid, indicated that he wanted to apply for legal aid. The witness did not stop to take the warning statement at this time

because according to him he did not know that he had to stop. The witness was alerted to the fact that it does not reflect on the warning statement that it was explained that the making or not of the statement or not was his own choice. The statement, however, reflects a question where the accused was asked if it was his own choice to make a statement, to which the accused answered yes. He re-confirmed that he asked all the questions as reflecting on the statement. He denied that the accused was handcuffed and foretold what to say and/or hit or beaten on the head with knuckles when he denied certain facts. Further, he denied that he influenced and/or threatened the accused to accept responsibility and admit what he did. The witness did not observe any injuries because when asked, the accused stated that he had none.

[56] Frederick Musakana is the Magistrate who took down the confession. He is currently staying in Harare, Zimbabwe. His presence had to be secured through diplomatic channels. By the 19th of June 2013 he was serving for seven years in Namibia as a Magistrate. The witness identified the confession of the accused that he recorded on 19 June 2013 with his signature on it. The accused was brought to his office by Cst. Mungowa. The witness called Rosalia Uugwanga, who was the official interpreter to his office. He told the officer who brought the accused to leave and closed the door of the office. In the office only the Magistrate, the interpreter and the accused were present. The Magistrate was informed earlier that the accused wanted to make a confession.

[57] He explained to the accused that he was a magistrate at the time for the district through the interpreter. Further, that he was not attached to the police. He requested the accused to introduce himself and was provided with the name Sebedeus Theodor which he wrote down. He assured the accused to feel free to tell whatever he wanted to say. The Magistrate continued in explaining the rights to legal representation of his own or apply for legal aid before making the confession. Further, he explained the procedure, i.e. that he will ask the questions reflecting on the confession pro-forma and that the statement will be in relation to the charges that he faced. At all relevant times the interpreter interpreted from English to Oshiwambo and vice versa.

[58] The witness identified the document in court as a confession in terms of s 217 of the CPA. He further confirmed that he followed the process of taking down the confession as testified to by the interpreter. The magistrate read the preliminary portions into record, reflecting questions relating to the names and particulars of the declarant, to legal representation, voluntariness and injuries. Thereafter he also read into record the certification by the interpreter.

[59] The witness confirmed that the accused elected to make the confession first and thereafter to apply for legal aid as it is reflected in the document. Further that the accused acted freely and voluntarily when he provided the confession.

[60] In cross-examination, the witness confirmed his evidence in chief. He emphasised that he continued to take down the confession because the accused was adamant that he will only apply for a legal aid lawyer after making the confession.

[61] The accused testified in the trial within the trial. He testified that he was collected from the police cells at Okahao by the investigating officer, Mwanyangapo together with six other police officers. He was taken into the charge office and interviewed. He told the officers that the cause of his arrest was as a result of insulting a person, eating two pieces of meat that he did not pay for and arson. Thereafter, the accused remained silent. He further testified that the investigating officer told him that he left out some portions like the rape and killing of a girl at Oshikwiyu village.

[62] He testified that the he was then handcuffed and told that he will be dealt with. According to him, he was handcuffed with his hands behind the back to admit to the charges of rape and murder. He admitted the taking of meat without paying, the insulting and the arson. He further testified that he was asked to admit the murder and rape, was then assaulted with knuckles on his head and further injured on an existing wound on his shoulder. Eventually, he admitted to the arson, murder and rape. The handcuffs were thereafter removed and he was told to admit the allegations in a certain office in Outapi otherwise, he will again be dealt with. He was instructed to sign a document and then taken and locked up in the cells.

[63] He further testified that after about three weeks, he was taken to Outapi. There, he was taken from the police charge office to another office where the magistrate and interpreter were present. He was earlier informed that in that office he has to admit to facts which were to be read to him from a document. The magistrate allegedly asked him if he was going to tell what happened and what he did or if it should be read from a statement, in possession of the magistrate. He confirmed that the interpreter interpreted to him. He opted to tell the magistrate what happened. He told the magistrate about the cause of his arrest, that he took meat without paying and that he insulted a person. According to the accused, he was foretold what he should tell the magistrate. He was forewarned if he refused to tell that, he would face consequences afterwards. Allegedly the investigating officer told him that the documents will be returned and he (the investigating officer) will see what the accused said.

[64] The accused testified that, although, his right to a private legal representative was explained, the magistrate did not explain that he may apply for legal aid. Allegedly he told the magistrate that he will ask his parents to assist in paying a private lawyer. Further, he denied that he told the magistrate that he will give his statement and apply for a legal aid lawyer later. He testified that he had a fresh wound on his shoulder for which he received medication at a hospital. He took the medication the morning before he was taken for the confession. That, however, did not have any influence on him when he gave his statement.

[65] At first, the accused testified that the magistrate did not write anything and that documents in front of him were already written. Later on, he stated that the magistrate wrote after he questioned the accused. He stated that the document was never read back to him or him given an opportunity to read it, but he was asked to put his name thereon. He denied that he committed any of the offences.

[66] In cross-examination, the accused confirmed most of his evidence in chief. He confirmed that he made the confession to the magistrate and the warning statement to the investigating officer. He denied that officer Aihuki collected him from the cells for the taking of the warning statement. He denied that the investigating officer was pulling his T shirt, but stated that the T-shirt was pressed on the wound that he had by the

investigating officer. He stated that it was the investigating officer who pulled the handcuffs to injure him and hitting him on the head with knuckles. He answered that he informed the investigating officer of his wound contrary to the answer that he had no injury in the warning statement.

[67] The accused was confronted with versions in his testimony that were not put to State witnesses. His explanation was simply that the versions were put by his counsel, otherwise he could not give an explanation. It was for instance not put that Mwanyangapo, the investigating officer, told the accused that he will be arrested because he came from the village where the girl was killed and raped. Further, that the investigating officer said that he will not be released unless he admits to the crimes. In addition that the other officers present also said that he must tell the truth. It was further not put that the investigating officer wrote down facts beforehand and instructed the accused to simply admit those to the magistrate.

[68] Further in cross-examination the accused gave the impression that he did not tell the magistrate about any facts relating to the crimes but that it was already written on a paper and that the magistrate simply read that out to him. He stated that was only asked questions in relation to his age, schooling and name. It was put to the accused that the handwritings in the warning statement and confession are obviously different. No answer followed.

[69] The grounds of objection against the admissibility of the warning statement and the confession were clearly put on record as follows: That it was obtained not without undue influence. In other words, the accused was influenced by police officers who obtained the statement from him and that the statement was obtained from him in contravention of the accused's right to legal representation, despite him having indicated that he wanted legal representation. He was thus not afforded the opportunity to consult a legal representative and the statement was not given freely and voluntarily.

[70] The same reasons were advanced in relation to the confession that it was not freely and voluntarily made and likewise he was not afforded an opportunity to prior consultation with a legal representative despite him indicating that he wanted same. It is

significant to note that during cross-examination of witnesses in the trials within the trial on admissibility, the accused intimated that the contents of the statements were dictated by police officers who interrogated him and further that he was foretold what to tell the magistrate when the confession was taken down. Further, it was suggested that the right to legal representation was not adequately explained to the accused before the confession was taken.

[71] This court needed to adjudicate on the issue whether the confession and warning statements were obtained in terms of sections 217 and 219A of the CPA. In other words were they made by the accused freely and voluntarily, without undue influence, when the accused was in his sound and sober senses? Further, was the accused properly informed of his rights to legal representation? i.e. that he may appoint and consult a legal representative of his own choice and if he cannot afford one to apply for legal aid through the office of the clerk of court before making any statement, otherwise that he could represent himself and that he had the right to remain silent. The onus is on the State to prove beyond reasonable doubt that the requirements were complied with.

[72] I found the evidence of the State in this regard to be reliable and convincing that both the warning statement and confession were made freely and voluntarily, without undue influence in compliance of the requirements for admissibility. The evidence further is overwhelming that the accused was properly warned of his right to legal representation and right to silence. On the contrary, the accused was not a reliable witness. It is clear that he was evasive in cross-examination, self-contradicting, exaggerated fabricated incidents and was inconsistent with his evidence. I accordingly found both documents to be admissible in the trial.

The evidence continuing

[73] Marcellos Mwanyangapo is the investigating officer who took down the warning statement of the accused. He in essence repeated his evidence about his service in the Namibian police, how it came about to take the warning statement and who was present in the office. His evidence relating to the admissibility of the warning statement was already dealt with in paragraph 52 above.

[74] He read into record the contents of this statement reflecting as follows:

1. ' On Friday the 24.10.2013 at about 11h00 I went to Omayela location whereby I drink Richelieu brandy and traditional brew (Otombo) until night time.
2. Because I was very hungry after I got drunk, I went to the cuca shop of Mrs Kamanya where they were selling pork (meat for the pig). I found a cooked meat in a clay pot which was on the table. I took two pieces of meat valuing N\$10.00 because each piece they, she was selling it at (N\$5.00) five dollars only.
3. Mrs Kamanya started to argue with me said that I ate her meat but I didn't wanted to give her money. I told her that I will pay her tomorrow but that time I have already ate the meat. She continued arguing with me.
4. I pushed the table then the clay pot that was having the cooked meat falls down and got broken into pieces then the meat scattered on the ground. Mrs Kamanya phone my father. I then went nearby thorns to assist myself (went to the toilet) and when my father arrived at Mrs Kamanya's cuca shop, I was still at the said thorns.
5. I could hear what they were talking because where I was, was not far from the cuca-shop. I heard Mrs Kamanya said that they must go to my Aunt's house in order to come and see how the meat was on the ground.
6. My father was having a vehicle, and after they left, I went back to the cuca-shop. I found Katopi & one lady name unknown to me, sitting outside of the cuca-shop. There was a paraffin lamp with the light on at Mrs Kamanya's cuca-shop. I took it and threw it on the sofa which was inside the cuca-shop.
7. The lady whom I found at the cuca-shop said to me that what more if her mother's cuca-shop got burn (fire). I then told her that it will not got burn/fire. She further added that the properties that is inside the shebeen was not born by my mother.
8. I beat her with open hand on her arms. I took an empty bottle of Windhoek Lager from the karate (crate) and beat her with it on her left shoulder once. I put the bottle down on the ground and took a stick, started to beat her but I cannot remembered as to how many times because I was very much drunk.
9. Katoi whom I found together with the lady whom I have assaulted, was also present but I cannot tell of what he was doing. Katopi left the cuca-shop but I didn't know where he left too.
10. The lady was standing on her knees. I then pushed her down on her back, undressed her tight or underwear (pant) until to her ankles. I then inserted my penis into her vagina and after I finished having sexual intercourse with her, I took a stick and beat her with it

but I don't know where on her body. I have kicked sands (soil) to her at the side of her legs.

11. Before I left the cuca-shop, I picked up the stick and threw it to her but I know that it hits her on the side of her head. I then walked away facing to home.
12. On my way to home, I lost balance like I am feeling dizzy, I then falls down, lying down there a couple of time and later on I stood up and went home.
13. I went/entered in my sleeping room, light the candle and I found out that the clothes that I was putting on was having a blood stain. I removed the clothes, went outside of the house and burned it. I then informed Taimi that I was provoked but I did not told her by whom and where. I went to sleep in my room and later on while I was sleeping the police came and woke me up, and they were asking me why I have burned the cuca-shop. They brought me to Okahao police station where I was detained.'

[75] In cross-examination, nothing materially emanated. He materially confirmed his evidence in chief.

[76] Rosalia P Uugwanga is the official interpreter for English/Oshiwambo and vice versa. She confirmed that she interpreted on the 19th June 2013 when the magistrate took down the confession of the accused. She was called by the magistrate to interpret. Whilst seated the accused came into the office with a male police officer. The officer went out leaving only the accused, the magistrate and the witness in the office. The magistrate introduced himself and assured the accused that he may speak freely. His right to legal representation was explained where after the accused opted to make the confession and only later apply for legal aid. She interpreted all questions by the magistrate and answers thereto by the accused as well as the content of what the accused said in his statement. She identified the confession in court and also read the certificate of correct interpretation into record.

[77] The content of the confession was there after finally received as an exhibit and marked as exhibit proper as "Exhibit V" by consent. The confession reflects as follows:

1. 'I know I am charged with murder, rape, arson and defeating the course of justice.
2. On that date I went to a certain cucashop, the owner of the cucashop was Ms Kamanya. She was selling pork meat. I told her that I wanted meat. I then took two pieces myself from the pot.

3. I told her that I was going to pay for the two pieces the following day. She then started arguing.
4. I then pushed the table where the pot meat was. The pot meat fell down and it was broken. The meat also fell to the ground.
5. On the day I was very drunk.
6. Ms Kamanya then took a cell phone and called my father. My father then arrived and Ms Kamanya told my father that I had broken her pot saying: "Your son broke my pot and the meat fell down." I was hiding at a certain bush and could hear them talking.
7. My father then told Ms Kamanya they should go and collect my grandmother so that she could also come and see how the pot got broken and how the meat fell down.
8. They went and collected my grandmother.
9. By the time they went I came back to the cucashop. There was a lantern lamp which was on. I then took it and threw it on the sofa inside the shebeen.
10. There was one girl and another one who was a friend of mine at the cucashop. When I threw the lamp on the sofa it got fire.
11. The girl said: "You are burning my aunt's cucashop." And I told her that it was not going to burn.
12. The girl told me that the goods in the cucashop it were not my mother who gave birth to them.
13. I then took an empty Windhoek Lager bottle and hit her with it on the left shoulder. I was holding the bottle with my right hand. I put it down and I then took a stick and started beating her with it all over her body.
14. My friend was also present but did not touch me but I was seeing as if there were four people present.
15. My friend then left the scene and went to his house.
16. I continued beating the girl and she knelt down to the ground. I then pushed her down to the ground
17. I removed her clothes and I started having sexual intercourse with her. She was alive at the time. I did not ejaculate because I was drunk. The girl was fighting me when I was having sexual intercourse with her.
18. I lost my balance and I was lying for twenty minutes.
19. When I woke up the girl was still lying there. I then took the stick that I was beating her with and threw it at her and I do not know whether she was hit.
20. I then left the scene and went home into my room. I then realised that my clothes I was wearing were full of blood. I then decided to burn the clothes and I did so.

21. I then told the girl called Taimi that stays at our house that I was provoked. I did not tell her the details. I then went and sleep
22. Whilst I was asleep I then saw myself being handcuffed. I was brought to the police station. Thats all.'

[78] Nothing materially turned up in cross-examination. It is remarkable that both the contents of facts in the statements materially are corroborated by the evidence aliunde. I have no doubt that the accused is the author thereto and rejects the suggestion by the accused that he was foretold as to what happened and what to state.

[79] The State then closed its case and Mr Shipila thereafter applied in terms of s 174 of the CPA for the discharge of the accused on count four, assault by threat in respect of Isaack Wilbard. He submitted that the witness during his testimony never testified that he was threatened with assault by the accused. Mr Shileka did not oppose this application. Consequently the accused was acquitted on count four, assault by threat.

[80] The accused testified in his defense and called no witnesses. He testified that he was 19 years old at the time of the alleged crimes. He is now 28 years old and in custody for about eight years, trial awaiting. He testified that he was informed by the investigating officer about the crimes. He denied that he set the cucashop of Ndinelaio, the owner, on fire. He denied that he raped and murdered the victim and testified that he was only told about the crimes. He knows that he was arrested for meat he had eaten and insulting a person.

[81] He testified that on the 24 May 2013 he left home and went to the cucashops of Ms Ndinelaio Kulo at Omahela in Oshkuyu village, Omusati Region, Okandjera at about 19h00. He found the owner who is Ndinelaio Kulo, Tobias, Hamaria, Uushona, another person who are all witnesses who testified for the State and two Angolan boys. Ndinelaio was selling pork meat from a pot on a table. After he greeted people, he took two pieces of meat from the pot. He did not have money and said he will pay the day after. Ndinelaio confronted him for taking the meat when he did not have money to pay. He pushed the table with the meat and the meat fell on the ground. The pot broke.

[82] He testified that Ndinelao called his father where after he insulted her. He stated that after grabbing the meat, he ran a distance, ate the meat and went to a toilet. His father came to the cuca shop. At the time he was at the bushes relieving himself. He overheard his father saying that the grandmother must be informed about the incident of the meat. He observed his father's motor vehicle driving from Ndinelao's cucashop in the direction of his grandmother with Ndinelao.

[83] He came back from the bushes, found some people amongst them a certain lady who asked why he was arguing after he let the meat fall to the ground as if the meat was born by his mother. The lady started to argue with him. He took an empty beer bottle and threw it to the lady hitting her on the shoulder. The lady stood up, approach him and they started to fight. They chased each other around a structure where the other persons were sitting under a shade next to the cuca shop. The structure was made partly from sticks with iron/zinc sheets as the roof. He took what he called a small stick with a length of about 60 cm and thickness of a chair shown out in court (about 3 cm). He started beating the lady with the stick. He testified that she grabbed the stick with both hands and it broke. The lady had one piece of it in her hands and he, the accused had the other piece. He tried to hit her but she blocked the blow with her piece of the stick. Tobias then came and separated them telling both to go home.

[84] He testified that he and the lady were about the same peer group. After he left he did not see her again. He arrived home at about 21h00. He told another lady, Taimi that he was provoked. He ate his food whilst Taimi went to her room. After eating he went to his room to lie down. There were two empty boxes in his room where he used to put his clothes in. He heard some movement in one of the boxes and thought that it could be a snake. He collected a rake, removed the box outside and burned it with the clothes inside. Thereafter he went to sleep.

[85] Further, he testified that not long after going to sleep, he heard a knock on his door. When he responded, he saw Sgt Shipyu, a police officer. He was ordered outside and Shipyu said that he was the boy who ate meat without paying and burned the cucashop. He was handcuffed, loaded into a police vehicle and taken to Omahela at the burned cucashop. He saw people at the shop. He was confronted if he burned the

cucashop but denied. He was thereafter taken to Okahao police station and put in the cells.

[86] The next day, he was taken from the cells between 12h00 and 13h00 and brought into the charge office. There were about seven police officers present. One of them was a female. He was taken to an office of the station commander where the investigating officer, Mwayangapo was. The remainder of his evidence was a repetition of how the interview and resultant warning statement was taken. This evidence was already dealt with in the trial within the trial above.

The law

[87] The evidence involves both direct evidence and circumstantial evidence. It is trite that the onus is throughout on the prosecution to prove their case beyond reasonable doubt and any accused is constitutionally presumed to be innocent until proven guilty. There are, however recognised exceptions in Namibian law.¹ Proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if fanciful and remote possibilities are admitted to deflect the course of justice.² Further, the State is not required to exclude an unlimited number of preferred possibilities which are imaginary and speculative and for which no factual basis has been laid or established in evidence. It needs not to close every avenue of escape open to an accused. It is sufficient for the State to produce evidence with such high degree of probability that the ordinary reasonable man, after mature consideration, concludes that there is no reasonable doubt that an accused committed the crimes charged with.³ It is clear and trite that there is no onus on an accused to convince the court of any of the propositions advanced by him and that it is for the State to prove the propositions as false beyond reasonable doubt.⁴

¹ *S v Van Den Berg* 1995 NR 23 (HC) at p64 H-I; *S v Lifumbela and others* 2022(1) NR 205 (SC) at p232 paragraph 80.

² Per Lord Denning in *Miller v Minister of Pensions* 1947 ALL ER 372 with approval referred to in *S v Lifumbela and others* (supra) at p298, paragraph 327.

³ *S v Van Wyk* 1993 NR 426 at 435 G-J.

⁴ *R v Difford* 1937 AD 370.

[88] However, it is necessary that caution must be exercised not to attach too much weight to the untruthful evidence of an accused when drawing conclusions and when determining his guilt. The principles enunciated by Smalberger AJA in *S v Mtsweni* 1985 (1) SA 590 (A) and with approval quoted in *S v HN* 2010 (2) NR (HC)⁵ serve as valuable guidelines and the following appears in the headnote:

'Although the untruthful evidence or denial of an accused is of importance when it comes to the drawing of conclusions and the determination of guilt, caution must be exercised against attaching too much weight thereto. The conclusion that, because an accused is untruthful, he therefore is probably guilty must especially be guarded against. Untruthful evidence or a false statement does not always justify the most extreme conclusion. The weight to be attached thereto must be related to the circumstances of each case. In considering false testimony by an accused, the following matters should, inter alia, be taken into account: (a) the nature, extent and materiality of the lies and whether they necessarily point to a realisation of guilt; (b) the accused's age, level of development and cultural and social background and standing insofar as they might provide an explanation for his lies; (c) possible reasons why people might turn to lying, e.g. because, in a given case, a lie might sound more acceptable than the truth; (d) the tendency that might arise in some people to deny the truth out of fear of being held to be involved in a crime, or because they fear that an omission of their involvement in an incident or crime, however trivial the involvement, would lead to the danger of an inference of participation and guilt out of proportion to the truth.'

[89] Direct evidence speaks for itself. In the case of circumstantial evidence, the court may make inferences in accordance with established guidelines thereto. 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.'

⁵ *S v HN* 2010 (2) NR 449 H-J and 450 A-C.

(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.' [At 202 in fin.]

[90] In *S v Mtsweni* 1985 (1) SA 590 (A) at 593E – G Smalberger AJA (as he then was) referred with approval to the remarks of Lord Wright in *Coswell v Powell Duffryn Associated Collieries Ltd* [1939] All ER 722 at 733 which read as follows:

'Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts, which it is sought to, establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture'⁶

Discussion/Evaluation and facts to the law

[91] The accused pleaded guilty to count 1; theft, count 2; *crimen injuria* and count 3; malicious damage to property. His counsel prepared and handed up a statement in terms s 112(2) of the CPA wherein certain facts are admitted narrowing the issues in dispute in the matter. The facts admitted are: that on 24 May 2013, the accused was at Omaela location in the district of Outapi where he unlawfully and intentionally stole two pieces of meat valued at N\$10 belonging to Ms Ndinela Kulo; that he unlawfully and intentionally insulted Ms Ndinela Kulo by mentioning her private parts i.e. her vagina in the presence of at least one other person; that he unlawfully, intentionally and maliciously damaged a table, bowl of meat by pushing the table to the ground causing the bowl to shatter and scattering the meat on the ground.

[92] In relation to count 4; assault by threat, the accused was already acquitted in terms of s 174 of the CPA.

⁶ *S v HN* 210 (2) NR 429 (HC) at 443 G-J and at 444 A.

[93] The accused pleaded not guilty and gave plea explanations on counts 5; arson, count 6; rape in contravention of s 2 of the Combating of Rape Act 8 of 2000 and the alternative thereto; violation of a dead body, count 7; murder and count 8; defeating or obstructing the course of justice. In addition, the accused admitted in terms of s 220 of the CPA that he assaulted Karine Ndinela Sholeleni Iyambo, the deceased, by hitting her with a small stick all over the body and on the shoulder with an empty beer bottle.

[94] The accused, with his admissions, places himself on the scene on the mentioned date. Further on the merits and in relation to the murder count, he admitted that he assaulted the deceased with a stick and with an empty bottle. These facts are further corroborated by the evidence of State witnesses. In relation to the count of obstructing or defeating the course of justice, the accused admitted that he burned a box containing his clothes because he suspected a snake to be in it at the time.

[95] The evidence by State witnesses and the accused is that he was at the cucashop on the relevant date. An altercation erupted between firstly, the owner of the cucashop and secondly the deceased because of him not paying for meat he took without paying, damaging a table, causing a bowl to shatter and meat spilled on the ground. The accused testified that he threw a bottle at the deceased where after she approached him and that they started fighting chasing each other. On the contrary, witnesses testified that the accused exited the cucashop with two empty beer bottles, threw one bottle at the deceased and hit her with the other bottle in the face/on the head whereupon she fell. Thereafter she stood up and run around a certain shade structure with the accused chasing her with a stick. The witnesses did not see any chasing by the deceased. Considering the evidence as a whole in relation to this incident, I find it improbable that there was a chasing of each other and finds that the accused was the aggressor chasing the deceased.

[96] The accused admitted in his evidence that he took, what he referred to as a small stick demonstrating of about 60 cm long 3 cm in width, and started beating the deceased. According to him, the deceased grabbed the stick and it broke. Eye witnesses testified that the accused chased the deceased with a formidable stick of about 1,5 to 2 meters long. It was further testified that the stick was picked from the

shade structure nearby the cucashop. Further, there were items handed up, referred to as sticks but in my view are more like small poles or pieces thereof. The body of the deceased depicted on a photo album clearly shows that an object more like a small pole penetrated her head and is protruding at the front of the head with a length of about 1,5 meters. I find in these circumstances that it is clear that the accused attempted to downplay the object and manner how he assaulted the deceased.

[97] There is no direct evidence of the murder. The circumstantial evidence is that the accused had an altercation with the deceased. He was all along the aggressor in the altercation. He in a sense confirms the evidence when he testified. He at some stage was separated from the deceased but witnesses testified that he ran after the deceased chasing her with a stick. Witnesses, although they also ran away heard a person screaming uttering words to the effect that the accused was attacking her because she mentioned his name to the father. In the circumstances, the only inference is that he is responsible for the death of the deceased and stands to be convicted for murder.

[98] The circumstantial evidence in relation to the count of rape is that the body of the accused was found with her tight/pantie down on her knees and menstruation pads near or at the body. The accused was last seen with the deceased. On his own admission he had sexual intercourse with the victim while she was still alive.

[99] I found a warning statement and a confession to be admissible in this proceedings. Materially the content of both statements is consistent with the evidence. The accused did not unequivocally admit that he murdered the deceased. It is at least clear from what he told the magistrate and investigating officer that he was the last person with the deceased before the body was discovered the following day. His statements reflect that the deceased was lying on the ground when he left. There is no iota of evidence in his statements that she was running after he dealt with her.

[100] I find that, although, the accused again downplayed his role in the statements, that there is a ring of truth in it. He confessed to have had sexual intercourse with her and was in such a state of mind to remember what he did as far as the rape charge is concerned. He could state that he did not ejaculate.

[101] Likewise, he admitted that he threw a lamp on a sofa inside the cucashop and that it burned thereafter. Witnesses for the State observed that the accused was the one who set the cucashop on fire. This evidence was not convincingly attacked during cross-examination. Some of the witnesses were even present when the accused admitted that it was him when he was afterward brought to the cucashop by the police. All the more, he admitted in both the confession and the warning statement to be responsible. Witnesses differed on what caused the fire. Whether it was a paraffin lamp or a candle. I do not consider the differences material. The fact of the matter is that the cucashop burned down.

[102] In relation to the count of obstructing or defeating the course of justice by burning his clothes, the accused admitted that he burned them. He made an exculpatory statement that it was because he suspected a snake to be in the box where the clothes were. The lady who stayed with him refuted the statement that the clothes were put in a box. She observed that the accused put the clothes on the ground. She was even able to detect a substance on it similar to blood. In the circumstances I do not accept the evidence of the accused that he burned the items on the suspicions of a snake.

[103] Considering the evidence as a whole, I find that the accused tailored his evidence as the case progressed. He was truthful to an extent with facts as to what happened that night. This is evident from his testimony where it corresponds with witnesses for the State and what he told the investigating officer and the magistrate in a warning statement and confession. When it came to the material elements of crimes he faced, he downplayed facts and merely challenged it with a bare denial. In relation to the death of the deceased, there was even a suggestion that he is not responsible and that it must have been someone else, suggesting an alibi. It is also evident that many of his allegations as to the fact were not put to witnesses in cross-examination. This strongly points to fabrication and afterthoughts as the case continued. I find the accused to be a poor witness. In the circumstances, his exculpatory explanations are found not only to be improbable but false beyond doubt and are therefore rejected.

[104] The State witnesses corroborated each other on material aspects and was further corroborated by the accused person evidence, warning statement and confession. I find them to be reliable despite minor discrepancies.

[105] In relation to the killing of the deceased, the manner in which the body was found speaks for itself. Photos of the body depicts a gruesome and horrible scene. To reiterate, the body is lying on its back, arms stretched to the sides, the head turned to the left with a pole about 1.5 to 2 meters and about 5 to 8cm thick protruding from the left frontal lobe above the right eye, a gaping wound on the right cheek, a gaping wound in the mouth with some teeth missing and a gaping wound in the right area of the mouth.

[106] The post mortem report reflects the cause of death as blunt trauma to the head. The chief post mortem findings were multiple facial and scalp contusions and lacerations affecting eyes, nose and mouth; Multiple skull fractures (uncountable) resulting to the damage of both brain and cerebellum; Fractures involved both vault and base of skull in a way that the morphology was unrecordable (irreconcilable); Multiple mandible fractures with 2 missing teeth on the superior maxillae and one tooth on the mandible.

[107] The conclusion that this was murder with a direct intent is inescapable. The accused did not allege consensual sexual intercourse. The circumstances, however are indicative of coercive circumstances

[108] In the result:

1. The convictions on counts 1; theft, count 2 crimen injuria and count 3; malicious damage to property are confirmed.
2. The acquittal on count 4; assault by threat is confirmed.
3. The accused is additionally convicted of:
 - 1) Count 5; Arson.
 - 2) Count 6; Contravening s 2(1)(a) read with ss 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000-Rape.

- 3) Count 7; Murder with direct intent.
- 4) Count 8; Defeating or obstructing the course of justice.
4. The matter is postponed to 12 October 2023 at 10h00 for submissions on sentencing.
5. Accused is remanded in custody.
6. Both counsels are directed to file heads of argument on or before 29 September 2023.

H C JANUARY
JUDGE

APPEARANCES

For the State:

R Shileka

Of the Office of the Prosecutor-General, Oshakati

For the Accused:

L Shipila

Of Directorate of Legal Aid, Oshakati