

**REPUBLIC OF NAMIBIA**



**IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI**

**JUDGMENT**

**Case no: CC 06/2020**

In the matter between:

**THE STATE**

**v**

**HENOG DIHAKE**

**ACCUSED**

**Neutral citation:** *S v Dihako* (CC 06/2020) [2023] NAHCNLD 97 (14 September 2023)

**Coram:** SALIONGA J

**Heard:** 5, 6, 7, 8 and 9 July; 2, 3, 4, 5, and 6 August; 3 September and 24 September; 4 and 5 October; 9, 10, 11, and 12 November 2021; 21 February; 17 March; 9 May; 18 May and 20 May 2022

**Delivered:** 14 September 2023

**Reasons:** 15 September 2023

**Flynote:** Criminal Law - Accused indicted on four charges namely Murder read with the Combating of Domestic Violence Act 4 of 2003, Defeating or obstructing or attempting to defeat or obstruct the course of justice—Assault by threat and Assault.

Criminal Procedure— Evaluation of evidence – Section 208 on Single witness evidence – *S v Noble* 2002 NR 67 (HC) – Caution must be exercised when evaluating the uncorroborated evidence of a single witness –The court must be satisfied by the credibility of the witness' evidence and it should constitute proof of the guilt of the accused beyond a reasonable doubt.

Criminal Procedure – Mutually destructive versions – Court must have good reason to accept one version over the other and not only consider the merits and demerits of the testimonies of witnesses – Court also to consider the probabilities present – Evidence must neither be considered in isolation but be looked at holistically - *S v Radebe* 1991 (2) SACR 166 (T).

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

**Summary:** The accused was indicted on charges of murder read with the Combating of Domestic Violence Act 4 of 2003, defeating or obstructing or attempting to defeat or obstruct the course of justice, assault by threat and assault. He pleaded not guilty to all the charges and denied stabbing the deceased.

In relation to the murder, assault and assault by threat charges, Rosalia was a single witness. A cautious approach should thus be followed in the court's assessment of the veracity of her evidence. At the onset it must be said that Rosalia Kambathi, as a

witness, was not credible, impressive and her narrative of the incident implicating the accused, does not create the impression of being truthful. Kambathi is a single witness and her evidence was not corroborated. With regard to count 3 and 4 it was impossible to find on the evidence adduced that the complainant's version is truthful and reliable.

*Held*; that the onus is on the state to prove that the accused committed the offences beyond a reasonable doubt.

*Held* further; that, no onus rests on the accused to convince the court of the truth of any of the explanations he gave, even if the explanation is improbable.

*Held*, further; that the test is whether there is a reasonable possibility that the accused's evidence may be true and, in applying that test, the court need not even believe his story.

*Held*, further that it is sufficient if the court is satisfied that the evidence of the accused though not probable may be reasonable possibly true.

*Held* further: that the evidence of the state falls significantly short of satisfying the applicable requirements when assessing the evidence of a single witness, thus rendering it unreliable.

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## ORDER

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1. Count 1- Murder, read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003: The accused is found not guilty and acquitted;
2. Count 2- Defeating or obstructing or attempts to defeat or obstruct the course of justice: Not guilty and acquitted;
3. Count 3- Assault by threat- Not guilty and acquitted;
4. Count 4- Assault: Not guilty and acquitted.

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## JUDGMENT

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SALIONGA, J:

### Introduction

[1] The accused, an adult male, is charged with four counts, namely murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003, defeating or obstructing or attempting to defeat or obstruct the course of justice, assault by threat and assault.

[2] The summary of substantial facts in terms of section 144 of the Criminal Procedure Act 51 of 1977 (CPA) are that the accused and the deceased were at Mushashani village near Divundu in the Kavango East Region. On the 18 October 2018 the accused was assaulting the deceased all over her body by hitting her with fists and kicking her. A witness tried to stop the assault but was warned by the accused that it was a matter between him and the deceased and that the witness will be assaulted if she interferes. After this assault the deceased was not found for three days where after her body was found in a trench. The assault caused the death of the deceased. After the accused murdered the deceased he dragged her to the trench where he left her. The deceased and the accused were in a domestic relationship.

[3] Accused pleaded not guilty to all charges and chose to remain silent. In the reply to the State's pre-trial memorandum, as well as in his written formal admissions in terms of section 220 of the CPA, accused admitted the identity of the deceased being that of Rugharo Mayemi, that the deceased passed away at Mushashani village in the district of Rundu where the corpse was found and that the deceased and the accused were in a domestic relationship of a boyfriend and girlfriend. He also admitted the identity of the complainant in count 3 and 4. The accused having admitted the aforesaid, the only

issue for determination is whether the state had proved its case beyond reasonable doubt on all counts.

### The State case

[4] The State in proving its case called 5 witnesses and their evidence can be summarised as follows. The first witness Albertina Kandambo Mutero testified that on 21 October 2018 while walking near the fence of the Correctional Service Facility, she came across the body of the dead person in a trench. According to Mutero the body was naked and covered with some soil. At a later stage she also saw an orange dress on the other side of the Correctional Facility fence, after it was pointed out by people who came there. After the discovery she ran home and reported the matter to her sister Ester who later went to the scene and confirmed the report she made to her. She only came to know afterwards that the body was for a young lady Maemi who was missing in the village.

[5] The next witness is Sophia Mbangi, the mother of the deceased. She testified that she knew the accused because her young brother is married in their house and she used to go visit at their house or village. She had known the accused longer than a year before the incident. She also know Maemi as her daughter (now deceased) and was aware of the accused's relationship with the deceased. On a morning she could not remember the date, she woke up to go home at Mushashani village after spending a night at her boyfriend's place in Divundu a village across. On her way she met her nephew Buti who informed her to go straight to her house because there had been a fight between the deceased and the accused the previous night. She then went home to drop her bag and proceeded to the accused's mother's residence to find out what happened. When she arrived there she got accused's mother at their residence. She was told that the accused just left and that she should go and check if her daughter was still sleeping inside. She confirmed that her daughter was also not at home and she left.

[6] After she could not find her daughter, Mbangi went to church where she overnighted. From the church she went home. Whilst sleeping she heard a person calling her and when she opened the door it was her uncle who was calling her. The uncle informed her to go and see what was at the prison fence. Together with her

mother and a sister she went to the prison fence. She found her daughter's body lying in a trench. She identified her body by the beads around her waist and bracelets on the wrist that she gave her. According to the witness, the deceased at a time of her death was staying at her grandmother's house during the day and overnighted at the accused's place. She recalls it was a Sunday when she saw the deceased's body in a trench. She last saw the deceased alive at 10h00 on Thursday when she found the deceased and Kakove fetching water at the water point. She only started looking for her daughter on Friday, the day she went to their house looking for the deceased and she did not find them at home.

[7] In cross-examination the witness conceded that she did not witness the fight. That the deceased's grandmother would know better where the deceased used to sleep as the witness was not staying with them and only used to go visit them. She could not confirm or deny that the accused last saw the deceased on Thursday morning because she was also looking for her daughter. Nor could she dispute that at the time of the incident, the deceased and the accused were staying at the deceased's grandmother's house and not at the accused's parent's house. The witness made it clear that Kakove is married to her son and she is not related to the accused.

[8] Rosalia Kambathi of Mushashani village was the next witness called to testify. She testified that she got to know the accused as he was dating her elder sister Marte in 2015. Her sister introduced the accused to her and he relocated together with his parents from Andara to Mushashani village. She was with the deceased on the 16 October 2018 when they spent a night at Buffalo Camp and again on the evening of 17 October 2018 when she allegedly witnessed the accused assaulting the deceased and when she was also assaulted and threatened to be assaulted by the accused.

[9] Kambathi testified that on the 17 October 2018, together with the deceased, and Sunny, she left her house to the Green House bar. On their way to the bar they met Jenita who joined them. When they got there, they went to the greenhouse bar where they got the Chinese nationals inside that bar. One of the Chinese man called the deceased and they went behind the bar in the darkness. Maemi now the deceased came back saying she was not going to sleep at their house and they must go and

sleep with the Chinese so that they come and buy similar clothes. All four of them got into a car and went up to Buffalo. When they got at the house of these Chinese men, each of these girls had a partner or a boyfriend. They all went to separate rooms at Buffalo Camp where they spent a night.

[10] It was Kambathi's further evidence that the next day the driver of the Chinese men took them back at around 06h00 in the morning and dropped them off at the sports field. From there each of them went to their respective houses. That when she got home that morning, she took a bath and went to school. She came home during lunch and the deceased who was on her way to go fetch water, saw and called her. The deceased told her that when she got home she found her boyfriend (the accused in this matter) sleeping, they had an argument and he moved out.

[11] After that, the witness told the deceased that she was going back for afternoon study and went back in the house. She returned at around four o'clock. While she was home the deceased again passed by their house, called and asked her to accompany her to Divundu Location in order to go and get 20 dollars from her mother Sophia Mbangi. The witness agreed and accompanied the deceased to Divundu and they returned the same day. In the evening they went to Mushashani in a bar behind the Green House bar. The deceased gave her N\$20 dollars, she bought some traditional beer and were busy drinking. The accused got them inside and went out of that bar again. Then Maemi told the witness to finish drinking so that they should go to the other bar and go home from there. As they walked out leaving the bar going to the other bar but before they reached the accused called the deceased. The accused and deceased were discussing while the witness was waiting under a tree about four steps from them. While sitting and waiting, the accused angrily called her to go to him. When she got to him the accused said 'if you do not know someone is going to ask you.' When asked why she thought the accused was angry the witness replied that accused did not tell her she just assumed he was angry because the deceased did not sleep home and from what the deceased had earlier in the morning informed her that they had an argument, accused got angry and he left or moved out from the house.

[12] After the accused had told her that he left to different direction. The witness and the deceased went to Olivier bar. When they got into the bar, the deceased gave her money again to go and buy some traditional alcohol and they started drinking. While drinking the accused also got into the bar, went to the counter and bought cigarettes. He did not say anything, he just walked out of the bar. After the accused had walked out of the bar the witness and the deceased were still drinking alcohol. Thereafter the deceased asked the witness to escort her to the bushes to help herself and then go home from there. She escorted the deceased and as they were passing the mini shop on their way to the bushes, the accused approached them and held the deceased by her left arm. He slapped the deceased in the face, tripped her on the legs, slapped her again in the face and she fell down. At that point in time Kambathi was standing three steps away from them.

[13] According to Kambathi it was a bit cloudy in the night, however there was moonlight and it was clear enough for her to see. The time the accused slapped the deceased for the second time in the face, he also said that if you play with me I will kill you and tripped her down again. The deceased just said my father had already passed on do you want to kill me also. The deceased stood up, trying to remove sand from her body and walk away from him. The accused grabbed her arm and tripped her to the ground. The accused was kicking the deceased five times whilst on the ground and was kicking on the side of the ribs.

[14] It was her evidence that she tried to stop the fight but accused told her that there was nothing she could do, she should just go home and he pushed her on her chest. She did not feel anything from the push nor did she sustain any injuries. As there was nothing she could do, she went and stood 15 steps away waiting for the deceased. At that distance she could no longer see what was happening because it was dark. Yet she could hear the sounds of kicks and the deceased screaming and crying saying do you want to kill me like how my father had died. The beating took some time and while waiting by a tree a certain Mr Haingura came asking what she was waiting for to which she explained. Thereafter Haingura told her to go home as it was a couple fighting. They left the scene to the deceased's house in order to go report but when she got there people were already sleeping. She just went home and slept. She last saw Maemi

that Thursday night and she never saw her again. She saw the accused on Friday a day after the incident at the bar with his sister but did not talk to him.

[15] In cross-examination the witness admitted that she was scared of the accused's threats. She stated that she did not go and seek for help because she wanted to be there in order to see what the accused will do to her friend. She however left the accused and the deceased at the scene to go tell the relatives and not because Haingula told her to go. They could not assist the deceased because according to the witness, Haingula was drunk and she was afraid of the accused. When asked why she never mentioned this in her statement to the police at first she said she forgot to report. She denied having told the police that the accused punched the deceased all over her body instead she told them accused slapped and kicked her. In her second statement she testified that she left her friend there because she realised there was nothing she could do. She denied telling the police that where she stood under a tree part of her view was blocked by the building. That when she tried to intervene accused told her the matter was between them. She conceded that she did not put that in her statement blaming the interpreter of misinterpreting and she was afraid of the accused.

[16] She maintained that the deceased was screaming and crying and there were bars and houses nearby but no one came to their rescue. On the question whether she did tell anybody about the incident Kambathi stated that on Friday morning the 19 October 2018 on her way to school she met Mbango Kathiku and Anna Cathy who told her that the deceased did not sleep home. She then told them that she left the accused and the deceased fighting the previous night. On the accused's version of the events that she is accusing him falsely because she wanted to go out with him and she was asking for money, she denied the accusation saying she never asked any money from the accused.

[17] Another witness called to testify was Kathiku Meriam Mbambo the deceased's grandmother. Her evidence was that on Thursday the deceased slept home but the following day she did not see her. She then went to her friend Kambathi to ask because they were always together. She met Kambathi on her way to school who told her that the deceased and the accused fought on Thursday night. She last saw the deceased on

Thursday early in the morning and on Friday she went to look for the deceased. She did nothing after she heard the news. On Sunday the body of the deceased was discovered in a trench.

[18] In cross-examination she was unable to say when the deceased spent a night out. She could recall the day she went to look for her. She testified that it was after she asked Kambathi of her friend's whereabouts that she told her of a fight. She however confirmed that during the accused and deceased's relationship she did not witness any fight between them and she never heard accused threatening the deceased or any of his other girlfriend. She was not sure if the deceased slept home on 17 October 2018 but confirmed the deceased was not home for two nights before she disappeared. She also did not see the accused packing his goods but she knew accused left her premises that day.

[19] Puso Huster Mumbone, is a Sergeant in the Namibian police who went to the scene on 21 October 2018 after the body of the deceased was discovered alongside the Divundu Correctional Facility fence. Upon his arrival at the scene he saw the body of a female person in a trench. The body was decomposed but the mother of the deceased who was also present at the scene identified it by the clothes and the beads around the deceased's waist as that of her daughter. He obtained witness statements that led to the arrest of the accused person. He thereafter called the Scene of Crime Officer Sgt Samoka and Serious Crime Unit from Rundu who came and took over the investigation as this was a murder case. That was the evidence led and thereafter the State closed its case

[20] Accused elected to testify and called no witness. He admitted to have been dating the deceased in 2017, separated in December 2017 and reconciled in February 2018. Since then there has been no problems until 17 October 2018 when the deceased spent the night out. On that day, the deceased told him that she was going to the bar. He was used to her going to the bar and coming back but that day the deceased only returned the next morning around 08h00 am. Upon her arrival he asked her where she had been or where she spent the night. The deceased did not answer him, she just left the house again. At that point in time the witness concluded that the

deceased was no longer interested in the relationship and decided to go back to his mother's residence. He packed his bags, informed the deceased's grandmother that he was leaving and left to his mother's place, ending the relationship. The day he left the deceased's grandmother's place, he was just at his mother's home the whole day. He last saw the deceased that day she came home in the morning.

[21] It was his evidence that on 21 October 2018 the police came at his mother's home and took him to the police station for questioning. He denied the allegations levelled against him explaining that Kambathi is accusing him because she was the first person he proposed and she rejected him. He then went and proposed her friend who accepted his proposal. Thereafter, she also asked him for some coins which he refused to give her. He never argued or fought with the deceased. He denied killing the deceased because she terminated the relationship or for any other reason. He denied having assaulted the deceased and/or Kambathi on the day of the incident or any other day. He did not know where the fight took place and where the body was dumped.

#### Law applicable and evaluation

[22] It is a fundamental principle in our law that in a criminal trial, the state bears the onus of proving the guilt of the accused beyond reasonable doubt. The accused is presumed innocent and does not carry any burden to prove his innocence; but his version need only be reasonably possibly true should he decides to give explanation or to testify. However care should be taken that proof beyond doubt does not mean proof beyond any shadow of doubt (*See S v Auala* 2008 (1) NR 223 HC at 236).

[23] Section 208 of the Criminal Procedure Act 51 of 1977 provides that an accused may be convicted of any offence on the single evidence of any competent witness. This court considered the provisions of that section in *S v Noble*<sup>1</sup> and held that, when evaluating the uncorroborated evidence of a single witness, caution must be exercised. It is trite law that the exercise of caution should not be allowed to displace common sense.<sup>2</sup> The court must be satisfied that the witness is credible and his/her evidence

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<sup>1</sup> *S v Noble* 2002 NR 67 (HC).

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

should be of such nature that it constitutes proof of the guilt of the accused beyond reasonable doubt.

[24] In *S v HN*<sup>3</sup> the court stated 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'.

[25] Judge Beck in his article *Prosecutors Bulletin* Vol. 1 No 1 at page 18, advises that:

'In assessing the quality of the single witness' evidence (in order to decide whether X should be convicted on the basis of this evidence,) the court should take the most attentive note of the witness. It should take particular note of his apparent character, his intelligence, his capacity for observation, his powers of recall, his objectivity and things like that. The evidence should be carefully weighed against the objective probabilities of the case, and against all the other evidence which is at variance with it. The court must have rational grounds to conclude that the evidence of the single witness is reliable and trustworthy and is a safe basis for convicting X.'

[26] It is common cause that the evidence against the accused is solely based on Kambathi's evidence who was the only witness present when the accused allegedly assaulted the deceased in a murder case and when he also assaulted and threatened her with assault.

[27] At the onset, it should be noted that Kambathi gave two statements, the first given on 21 October 2018 three days after the incident, another statement on 29 January 2019 three months later. She also testified in court on 6 July 2021 and with the passage of time so was the versions amplified with new facts.

[28] In her statement to the police marked exhibit Q (First statement), Kambathi stated that the accused grabbed and assaulted the deceased while they were on their

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<sup>3</sup> In *S v HN* 2010 (2) NR 429 (HC) at 443E – F

way home because the bars were closing. She further stated that when she tried to intervene, the accused told her the matter was between him and his girlfriend. She then walked and went to stand under a tree where her view was blocked by a building and could not see what was happening. She did not also mentioned that she heard the deceased screaming and crying.

[29] While in exhibit R (Second statement of Kambithi) she stated that the incident happened when they went to help themselves in the dark. The accused grabbed, punched and kicked the deceased all over the body and when she rushed in between to separate them the accused pushed her aside telling her that he will beat her if she intervene. It was in the same annexure R, in which Kambathi stated that the accused threatened to stab the deceased with a knife but in her evidence in chief she testified that the accused threaten to stab her with an unknown object. While in court Kambadhi testified that she saw the accused slapping the deceased 4 times in the face, tripped her 5 times on her legs and kicked her all over her body. It is not clear whether the deceased sustained injuries as a result of these vicious assault.

[30] It is trite that before placing any reliance on the evidence tendered by a single witness any other corroboratory evidence is a pre-requisite. Kambathi was the only witness in all counts and there is no independent witness to corroborate her evidence. She is a single witness and admitted to have been drinking homebrew alcohol prior to the incident although the extent of her sobriety could not be determined/established. According to her evidence she was not the only person who witnessed the assault as a certain Mr Haingura also did. Yet Mr Haingura who attentively listened to her explanation and who was able to walk on his own and gave her an advice which she heeded but was not called to testify. It appears to this court, Kambathi was preoccupied by what she and the deceased did the previous night. No wonder she testified that accused was angry without stating any basis for saying that.

[31] It appears that the only time the witness narrated/talked about the fight she witnessed, was when she was confronted by the deceased's grandmother who was looking for her grandchild. In the circumstances of the severity/brutal assault she

described, her conduct does not give an impression that she was being truthful or perhaps that she was probably recollecting of what happened.

[32] The court was not only faced with a single witness's evidence, it was also presented with mutually destructive versions. What remain to be considered is the version of Kambadhi linking the accused to the commission of the crimes and that of the accused denying to have had a hand in the commission of all charges. The court must have a good reason for accepting one version over the other.

[33] The approach the court should take when faced with mutually destruction versions was articulated in *S v Radebe*<sup>4</sup> at 168D-E where the court said:

'The correct approach is that the criminal court must not be blinded by where the various components come from but rather attempt to arrange the facts, properly evaluated, particularly with regard to the burden of proof, in a mosaic in order to determine whether the alleged proof indeed goes beyond reasonable doubt or whether it falls short and thus falls within the area of a reasonable alternative hypothesis.'

[34] From the evidence before this court it was testified that the deceased was assaulted at Mushashani location or around that area allegedly by the accused. The area is densely populated with bars and houses close to each other, yet only Kambathi heard the deceased screaming and crying. If the evidence of Kambathi is to be believed that really heard the sound of kicks, screaming and crying 15 steps away, it is equally logical that other people from the nearby cuca shops or houses could have heard. In cross-examination when Kambathi was asked why there were so many discrepancies between her police statements and her evidence in chief at first she stated that she had forgotten to mention it, secondly she blamed the interpreter of not interpreting properly and lastly she said that the statements were not read back to her. I find it strange that amongst people who were at Mushashani location, only the witness who saw the accused assaulting the deceased. It is also strange that samples were taken and submitted for forensic examinations but no report was made available or no forensic evidence was led.

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<sup>4</sup> *S v Radebe* 1991 (2) SACR 166 (T).

[35] In his evidence accused testified that on 18 October 2018 he moved to his mother's home to end the relationship with the accused because the deceased spent a night out leaving him at home. According to the accused this was not the first time he had separated with the deceased. In December 2017 they had separated and reconciled in February 2018. On his version accused had no part in causing the death of the deceased raising an *alibi* defence that on the date in question he stayed at his parent's home the whole day. He also denied to have assaulted or threaten the deceased or Rosalia Kambathi on 18 October 2018. He denied dragging the deceased's body from where she was murdered to the trench near the Correctional Facility.

[36] Accused maintained throughout the trial that he left the deceased's grandmother's house in the morning to his mother's residence. That piece of evidence was to some extent supported by the deceased's grandmother who testified that accused left the house that morning. It was also supported by the deceased's mother who went to look for the deceased and was told that accused just left the premises although she could not tell where the accused went. From the evidence it has been established that the deceased and the accused were staying at the deceased's grandmother's place and not at the accused's mother. This court is alive that no evidence was presented on how far was the accused parents' house from the scene. Neither was the distance from the scene to the cuca shops, nor the distance from the scene to the place where the body was found was established. However the accused already in the reply to the state-pre-trial memorandum denied being at the Green House Shebeen or any other place where the deceased was allegedly assaulted raising an *alibi* defence. It is therefore not correct for the State to submit that the defence of *alibi* should be rejected because it was never disclosed on time to the state and its witnesses.

[37] In the same vein, it cannot be said with certainty that the evidence of the accused is without shortcomings in that apart from stating his *alibi* defence in his reply he did not specifically put it to the witnesses to comment. However, no onus rests on the accused to convince the court of the truth of any explanations he had given, even if that

explanation is improbable. What is required is for the court to be convinced that such explanation is not only improbable, but false beyond reasonable doubt.<sup>5</sup> The test remains, whether there is a reasonable possibility that the accused's evidence may be true and, in applying that test, the court need not even believe his story. It is sufficient if the court is satisfied that there is a reasonable possibility that it may be substantially true.<sup>6</sup> I agree and endorse the above *dictums* in those cases.

[38] This court finds that Kambathi was not a credible witness. Her evidence is tainted with material inconsistencies and contradictions which could not be explained. It is also not supported by any medical evidence as the cause of death could not be determined. Her narrative of the incidents implicating the accused, does not create the impression of being reliable and truthful. There is a reasonable possibility that the accused's evidence though questionable may be true.

[39] Applying the above principles to the present facts, and after considering the merits and demerits on both sides, and the probabilities based on the established facts, the evidence presented on count 1 falls significantly short of satisfying the required standard of proof rendering it unreliable. In this regard the accused is entitled to the benefit of the doubt and stands to be acquitted on all counts. I have doubt in my mind and I reject her evidence on count 1.

[40] With regard to count 2 and 3, this court having rejected Kambathi's evidence on the first count, cannot for the reasons given earlier in this judgment accept her evidence as reliable. On defeating or obstructing or attempting to defeat or obstruct the course of justice charge allegedly committed on the same date, there is no speck of evidence that accused had a hand in the commission of such an offence.

[41] Consequently, I made the following order;

1. Count 1- Murder, read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003: The accused is found not guilty and acquitted;

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<sup>5</sup> *R v Difford* 1937 AD 370 at 373.

<sup>6</sup> *S v Jaffer* 1988 (2) SA 84 at 89D.

2. Count 2- Defeating or obstructing or attempts to defeat or obstruct the course of justice: Not guilty and acquitted;
3. Count 3- Assault by threat- Not guilty and acquitted;
4. Count 4- Assault: Not guilty and acquitted.

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J.T SALIONGA

Judge

Appearances

For the State

D T Khama  
Office of the Prosecutor- General, Oshakati

For the accused

P Hango  
Instructed by the Directorate of Legal