CASE NO.: SA 11/2001

IN THE SUPREME COURT OF NAMIBIA

In the matter between

THE STATE **APPELLANT**

And

GABRIEL MATHEUS

RESPONDENT

CORAM:, Strydom, C.J., O'Linn, A.J.A., Chomba, A.J.A.

HEARD ON: 03/04/2002

DELIVERED ON:

APPEAL JUDGMENT

O'LINN, A.J.A.:

SECTION A:

INTRODUCTORY REMARKS

The respondent, one Gabriel Matheus, appeared in the Court a quo before Engelbrecht, A.J., on a charge of Murder in that he allegedly, "on or about the 16th June 1996 and at or near Oshikundu Village in the district of Eenhana, the accused unlawfully and intentionally killed Nghidengwa Twyoleni a male person".

The summary of substantial facts attached to the indictment in accordance with section 144(3)(a) of the Criminal Procedure Act 51 of 1977, read as follows:

> "On the 16th June 1996 the deceased beat up the mother of the accused in a village near Ondangwa. The accused followed and grabbed the deceased. He asked him why he had beaten his mother. He then beat the deceased twice with a fence pole weighing 1,51 kilograms and the deceased fell to the ground. After that the accused took the knife of the deceased but was deterred from assaulting the deceased further by people who held his arms. The deceased did not die at the scene, but was taken closer to his home where he died minutes later. The deceased was 80 years old at the time of the incident."

The accused was defended at the trial by a legal practitioner, Mr. Kauta, on the instructions of the Legal Aid Directorate. The State was represented by Ms. Schnecker.

The accused pleaded "Not Guilty" but made the following two admissions in accordance with section 220 of the Criminal Procedure Act:

> "He beat the accused twice and the exhibit before Court is the instrument used."

The State called three witnesses, one Nadhala Kayoo, the alleged wife of the deceased, one Junius Hangula, the brother of the accused, and Dr. Shangula, a medical practitioner, who conducted the post mortem examination on the body of the deceased.

The accused was the only witness who testified for the defence. At the conclusion of the trial, the accused was found "Not Guilty" and discharged.

The State gave notice of application for leave to appeal against the "acquittal" of the accused and listed the following grounds of appeal:

"The Honourable Judge misdirected herself by not finding:

2.1 That the accused beat the deceased the first time on the hand in order to disarm him of his knife.

2.2 That the deceased, after the first blow, was disarmed and that no situation existed after that against which the accused had to defend himself.

2.3 That the second and third blows were given by the accused on the upper body of the deceased after the deceased was disarmed.

2.4 That no danger or threat existed after the deceased was disarmed and that the second and third blows or both, caused the death of the deceased.

2.5 That either the second or third blows or both, caused the death of the deceased.

2.6 On the acceptance of the facts set out in the preceding paragraph the respondent had committed the crime of Murder and should have been convicted on that charge."

On 31st August 2000 leave to appeal was granted to appeal to the full bench of the High Court. As a result of new legislation enacted before hearing of the appeal by the High Court, this appeal came before this Court for decision. Ms. Harmse appeared before us to argue the appeal and Mr. Kauta for the respondent, *amicus curiae.*

I find it convenient to refer hereinafter to the parties for the purposes of this judgment, as in the Court *a quo.*

SECTION B:

THE MAIN ISSUE:

It was common cause that the accused inflicted two – three blows on the body of the deceased with a relatively sturdy and heavy piece of log described as a "fence pole". One or more of these blows caused a fracture of the deceased's breastbone which caused severe pain leading to acute cardiac arrest.

The State thus proved beyond reasonable doubt that the accused had caused the death of the deceased.

The defence raised by and on behalf of the accused was "self-defence" and this was the main legal and factual issue between the parties.

SECTION C:

THE FURTHER FACTS WHICH WERE EITHER COMMON CAUSE OR NOT SERIOUSLY DISPUTED

1. The deceased was an elderly person whose hair and beard were grey and whose age was estimated at the post-mortem as ± 80 years. He had a normal built for his age and his estimated weight was approximately 60 kilograms. He was apparently relatively strong for his age. The accused on the other hand was a young man whose physical characteristics was unfortunately not enquired into or placed on record by either the State, the Defence or the Court, even though it were very relevant in view of the main issue of "self defence".

2. Apart from the fracture of the breastbone, signs of bleeding from the mouth and an "old closed fracture" of the left forearm, there were no other fractures, wounds or bruises discernable. This meant that there was also no indication whatever of a blow with the "fence pole" on the arms, hands, wrists or fingers of the deceased.

3. Prior to the incident when the deceased was killed, the deceased had assaulted the mother of the accused and of his younger brother Junius Hangula.

4. The mother's name was never placed on record and no particulars were given, except that Junius Hangula stated, when he testified, that his mother still has a hip injury, caused by the injuries she sustained when the deceased assaulted her.

5. On the day of the incident the accused and his younger brother Junius met their mother when they were walking along a road. She was crying and told Junius and the accused that she had been assaulted by the deceased. This report apparently triggered the accused's further action.

The accused went off in search of the deceased. When the mother noticed this, she asked Junius where Gabriel had gone. Junius told his mother that Gabriel was not there. She then instructed Junius to follow Gabriel. When he caught up with Gabriel, the accused, he called him to turn back but the accused ignored him and continued walking. He then stopped the accused again and told him to leave the matter and go back home, but the accused persisted.

When his evidence was put to the accused, he merely said that he did not know about this, but there was no outright denial from his side. The accused however made the following concession: "The only time he stopped me from doing anything is when I hit the man that's when he told me: 'Leave the man alone. Lets go home'". The learned trial judge made no finding on this issue, but found that all the witnesses, including that of the State and the accused were credible.

It follows from the above evidence however that both the mother of the accused and his brother Junius, were concerned about the accused's intentions and tried to dissuade him but he persisted. The accused was clearly not in a good mood.

Nadhala Kayoo, the widow of the deceased, according to her uncontradicted testimony, was present when the accused's mother was beaten by the deceased and was also subsequently present at the scene at least immediately after the deceased had been beaten by the accused and was lying on the ground. According to her, she was "a little bit creeping away" because "after he had beaten the old man, he also wanted to beat me". She further testified that she could not say in what

mood the accused was, “because he came from the shebeen ... he was not happy”.

Although the learned trial judge made no finding on the issue and apparently wrongly ignored this testimony, the evidence shows that the accused was in a stubborn and aggressive mood at all relevant times, before and immediately after he had assaulted the deceased with the stick.

6. When the accused followed the deceased, he had no weapon in his hands.

7. Immediately after the accused had beaten the deceased, the accused was found with a traditional knife in his one hand and the fence pole in his other hand.

8. The accused at no stage sustained any injuries and no blow was struck at him.

9. The force used to cause the fracture with the fence pole was from “moderate to excessive force”.

The fractured breastbone however, was a thick bone compared to other bones in the body and although other bones in the body could be brittle as a result of the deceased’s old age, the breast bone would not and was not brittle.

SECTION D:

RELEVANT FACTS IN DISPUTE

1. The accused's motive for following the deceased

The accused testified that his reason for following the deceased was that his mother had told him to ask Nghidengwa, who had assaulted her, to give her money so that she can go to hospital or alternatively, to take her to hospital. Junius however, testified that he did not know of such a request and as mentioned under B.3 *supra*, his mother instead wanted to know where Gabriel had gone and when he told her that Gabriel had gone, she requested Junius to follow Gabriel. When Junius caught up with Gabriel, he asked him to turn back, but to no avail.

This undisputed evidence, makes it at least improbable that the mother had sent Gabriel to obtain money from Nghidengwa to pay for the hospital or otherwise to take her to hospital himself. The accused's evidence in this regard was incomplete and unconvincing and in conflict with that of Kayoo in regard to what he had said to Nghidengwa when he first confronted him.

Neither Junius nor Kayoo knew of a "demand" or heard a demand being made by the accused to Nghidengwa. But what Kayoo heard was that the accused asked: "Why did you beat my mother". Considering the accused's mood and aggressiveness and the evidence of Junius about their mother's worry about the whereabouts of the accused and Junius's efforts to persuade the accused to return and leave Nghidengwa alone, the Kayoo version is probably the true version of what the accused said to the deceased.

The Court however, accepted the whole version of the accused, including his evidence on this point, notwithstanding the fact that the learned judge also accepted the evidence of the State witnesses as credible. In doing so, the Court misdirected itself.

2. The issue of the alleged knobkierie and the alleged "running away" of the accused

The accused testified that when he first accosted Nghidengwa, and gave him his mother's message, the latter took a knobkierie. He, the accused then ran away.

The accused's evidence about the "knobkierie" and the "running away" was vague, contradictory and difficult to comprehend. Prior to the accused's testimony when Junius testified that accused "ran away", the running away story appeared to be a misunderstanding between witness and interpreter and probably caused by the inability of the interpreter to translate properly, alternatively the inability of the witness to express himself properly and the failure of counsel and the Court to clarify the issue satisfactorily. The relevant part of the evidence of Junius was:

> "We proceeded we walked together for a short distance. I then stopped him again and told him to leave the matter. He should go back home. Then the deceased made a movement. Then the accused ran away."

Q: "So, where was the deceased then at that stage?"

A: "He was ahead of us. He was in front of us."

Q: "You said then further the accused ran away?"

A: "Yes."

Q: "Where did he run to?"

A: "He run going in front…"

Q: Yes, what happen then?"

A: "I then followed him. Run after him. I cannot catch him because I was caught (indistinct). I then hear the sound of a stick. A stick that was used when he assaulting the deceased."

Q: "What do you mean you heard the sound of a stick. Could you be more specific?"

A: "My Lady, I heard the sound of a stick. A stick that was used when he assaulting the deceased."

Q: "Did you see anything?

A: "No, My Lady, I did not see anything."

Q: "So, what happened after you heard the sound?"

A: "I went there and met the accused… the deceased and the wife … the deceased's wife."

Q: "What were they doing?"

A: "My Lady, the accused had a knobkierie on his right hand and on the left hand a homemade knife…"

Q: "And what was the deceased doing?"

A: "The deceased was lying on the ground."

It appears therefore that according to this witness, when he said – "he run going in front", he may have meant that the accused ran to get in front of Nghidengwa to head him off, i.e. to prevent Nghidengwa from getting away and in so doing actually ran away from Junius who until

then, had walked with the accused, and now followed behind the accused.

When the accused was asked by his counsel where he ran to, after Nghidengwa took the knobkierie, he said according to the record: "I just moved behind (indistinct)". The following questions and answers then appear on the record:

Q: "Did you move backwards?"

A: "No, … I didn't move backwards."

Q: "What happened then after you ran away?"

A: "Then he kept coming, then I returned back (indistinct)."

Court question: "We kept what?"

A: "We kept calm and then I went back to him again.

Q: "Who became calm?"

A: "The deceased."

Q: "And then what happened when you returned back to him, Sir?"

A: "And then he came and that's when he took out the knife."

It must be noted here that the alleged knobkierie which according to the accused, Nghidengwa took hold off or had with him, had suddenly disappeared. At any event it was never alleged by the accused that Nghidengwa had threatened him with the "knobkierie" and even the accused did not allege that he hit Nghidengwa to deprive him of the knobkierie as the learned judge found when she stated in her judgment: "He was adamant that the only reason for his attack was to defend

himself and get rid of the knife and knobkierie the deceased was holding when the latter approached him. (My emphasis added.)

The Court misdirected itself in the latter regard. Instead of finding that the accused's allegation about the "knobkierie" did not fit into the rest of his story, and was not supported by the evidence of any other witness who was on the scene or who arrived on the scene immediately after the assault.

This story of the accused was, to say the least, entirely unconvincing. The Court wrongly assumed that the accused had said something which he had never said and by implication, (having accepted the accused's story) found that the deceased was in fact "armed with both a knife and knobkierie and intended to use at least the knife against the accused and that the only reason for the attack by the accused was "to defend himself and get rid of the knife and knobkierie that deceased was holding when the latter approached him."

The Court also dealt with the issue of the initial confrontation and the cross-examination of Junius in this regard in an unsatisfactory manner which in itself amounts to a misdirection.

The witness Junius had testified that when confronted, Nghidengwa made a "movement". Later, when Junius was further confronted by counsel as well as the presiding trial judge with what he had allegedly said, he insisted repeatedly that he had not said that Nghidengwa had made a "movement" but only that the deceased "had made a sound".

He explained further that he meant the deceased made a sound “like he’s shouting”.

At the stage and almost at the outset of the cross-examination by Mr. Kauta for the defence, the cross-examination was interrupted by relieving the interpreter from her duties because she was apparently ill and a new interpreter sworn in. As soon as the hearing resumed, the learned presiding judge intervened by expressing her opinion that it seemed that Junius “didn’t actually see the actual incident” and asked: “So, is there any use in putting to him what happened?” Mr. Kauta for the accused happily concurred, and so stopped his cross-examination.

All this happened notwithstanding the fact that Junius had already testified that he was present when the accused Gabriel first caught up with Nghidengwa and Nghidengwa made the “sound” already referred to and the accused “ran away”. Junius was never asked whether or not he saw Nghidengwa with a knobkierie or a knife at the stage when Nghidengwa made the sound and the accused ran away.

When the accused later testified, he said that Junius was present when he hit Nghidengwa; that Junius was about three (3) – four (4) meters away. Junius was with the accused at least when the initial confrontation took place and this was a relevant part of the “actual incident” and was wrongly ignored and not further investigated during cross-examination, mainly due to the intervention by the trial judge.

It follows from the above that the Court also wrongly found that: "When the accused made his demands to deceased the latter took out his knobkierie and the accused retreated". (My emphasis added.)

To accept the accused's allegation on face value without considering the above evidence of Junius and Kayoo, was misdirection by the Court.

3. The continuation of the confrontation

The Court held: "When the accused approached deceased again, deceased took out a traditional knife and came towards accused. (My emphasis added.)

The question arises and should have been considered and decided by the Court, why the accused "approached the deceased again, in view thereof that according to the accused, he had already conveyed "the message" to Nghidengwa and Nghidengwa had already reacted aggressively by taking out his knobkierie, forcing the accused to "run away".

The further question which arises is whether Nghidengwa in fact at any stage "came towards the accused" as found by the Court. It is true that in this regard the evidence of the accused stands alone. But that evidence should not have been accepted merely for that reason. It should have been analysed and judged in the context of the other factual allegations which are in dispute and where in some cases the accused's evidence is unsatisfactory and where in another he has clearly lied and/or where his version is against the probabilities.

The following evidence in chief of the accused in this regard reads as follows:

Q: “What happened then after you ran away?”

A: “Then he kept coming, then I returned back (indistinct).

Q by Court: “We kept what?”

A: “We kept calm and then I went back to him again.”

Q: “Who became calm?”

A: The deceased.”

Q: “And then what happened when you returned back to him, Sir?”

A: “And then he came and that’s when he took out the knife. And then I took the stick and beat off the knife from him."

At best for the accused, the only basis in the accused’s evidence in chief for finding that the deceased came towards the accused, was the words – “and then he came and that’s when he took out the knife.”

The scenario sketched was that when the accused moved towards the deceased, the deceased in turn moved towards him.

In cross-examination the accused, when asked what the deceased did with the knife, said: “He was walking towards me.”

In response to the question – “and then what did you do?” he replied: “And then I hit the knife off and then it fell down.” When asked in evidence in chief where on his body he hit the deceased, he had said:

“On the left hand side of his body across the heart area on the ribs”. He also stated that he hit the accused in the same area one more time – i.e. a total of two blows.

In the first part of the cross-examination the accused persisted with this version but later in the cross-examination he conceded that he inflicted three blows and now insisted that the first blow, to dislodge the knife, was aimed at and inflicted on the deceased’s hand.

The learned trial judge completely ignored this evidence and found that: “In order to defend himself the accused grabbed the fence-pole and beat the deceased on the chest in order to disarm him.” (My emphasis added.) This notwithstanding the fact that the Court purported to accept the version of the accused and the accused had been adamant in the latter part of his cross-examination that he hit the deceased on the hand to dislodge the knife.

The post-mortem examination by the doctor however, revealed no fractures, bruises or wounds on any of the hands or fingers of the deceased and only an old and joined fracture on the right forearm. If a blow with the heavy fence pole was in fact struck at the hands of Nghidengwa and landed on the hands or arms so as to dislodge the knife, one would have expected the doctor to have found a fracture or bruise of the hand or arm during the post-mortem examination.

There was also no knife handed in at the trial and no questions asked why not.

Nghidengwa had a knife and pulled it from his waist, it should have been found at or near the prostrate body of Nghidengwa.

The question arises, if the accused had the knife seen by Junius in his hand and if Nghidengwa had pulled this knife from his waist to attack the accused and if the accused had managed to take this knife from the deceased, then why was it not produced by him when the others arrived on the scene, to show that the deceased attacked him with the knife. On the other hand, if he had thrown it away, why would he have done so?

Unfortunately, neither the accused's counsel, nor State counsel nor the learned presiding judge asked the accused what happened to the knife which according to him had fallen on the ground. One would have thought that it was elementary to attempt to establish, in a case where the defence of self-defence is the crucial issue, what the fate of the allege knife was. The nearest that the State advocate came to such an enquiry was to put it to the accused that the people arriving at the scene said that the deceased "was already lying and you were standing with t he stick and the knife". The accused answered: "I don't know whether they found him on the floor or the ground". The accused did not respond to that part of the statement relating to the stick and the knife in his hand.

Neither State counsel nor defence counsel put to him the evidence of Junius to the effect that when he arrived, the accused was standing with the traditional knife in his one hand and the stick in the other. Neither of them put to him the evidence of Kayoo that he removed, what she

believed to be the deceased's traditional knife, and threw it into the bush a few meters away. State counsel did not call any policeman to explain whether a knife, allegedly used by the deceased, was ever mentioned by the accused during the investigation; whether the scene of crime was searched and whether or not a knife was found or if found, what had happened to it.

The accused's story is that he left the scene even after he had struck the deceased and while the latter was till standing. He did not explain how he then came in possession of the traditional knife. If the deceased had threatened the accused with a traditional knife it would have been the obvious thing for him to testify that he in fact picked up the knife from the ground after dislodging it from the accused's grip or that he took it from the body or the prostrate body of the deceased after the latter had fallen to the ground. But instead of that he says that he left with his brother immediately after hitting the deceased and left when the deceased was still standing. This evidence left no place for the stage when the accused stood at the scene with a knife in one hand and the fence pole in the other and the deceased prostrate on the ground.

The fact that the accused for a substantial part of his testimony failed to testify how he hit Nghidengwa on the hand to dislodge the knife, is a further indication that the claim that Nghidengwa had a knife in his hand and wanted to stab the accused and even lifted his hand in a stabbing position, was a fabrication by the defence.

This inference is further strengthened by the accused's vague evidence in re-examination when he then for the first time demonstrated how the

accused allegedly, not only took the knife from his hip, but lifted it high up towards his shoulder and stabbed at the accused.

In this part of the re-examination, the accused *inter alia* said: "I did not really recognize the knife because it was dark" ..."I only saw him going into his waist and when he did this, its when I thought to myself that he had a knife..." In re-examination by State counsel he said: "Looking at it I thought it was a knife. Looking at it I concluded that it was a knife."

In re-examination by his own counsel it was recorded that he gave the following demonstration. "The accused indicates a movement from the hip or waist upwards to the shoulder and then with the fist a stabbing movement". (My emphasis added.) The question immediately arises why this story was only told in re-examination. If Nghidengwa even went so far as to stab at the accused, he would certainly, with the help of his counsel, have been able to say that in his examination in chief. This was clearly an afterthought and a lie.

Again the learned trial judge never mentioned this part of the accused's defence, which, if she gave it any consideration, should have led her to different conclusions in regard to the credibility of the accused. This failure by the trial Court amounted to a further misdirection.

The only explanation of what probably happened to the knife was contained in the testimony of the wife of the deceased, Nadhala Kayoo. She said that she also followed Nghidengwa after he had beaten the mother of the accused and Junius. According to the record, the accused said: "Sir, don't follow us." The words "don't fool us" then appears on

the record and were probably meant in substitution of the words – “don’t follow us.” Alternatively, the words – “Sir – don’t follow us”, may have been intended as the words spoken by Nghidengwa. Whatever the correct position this important evidence was not cleared up by counsel or the Court.

The following questions and answers followed:

Q: “Yes, what happened then?”

A: “And then I just heard the pop sound and that’s when I followed to the scene and what had happened.”

Q: “What pop sound are you referring to?”

A: “It’s a stick that moved. That had beaten the deceased.”

Q: “Did you see the beating?”

A: “No – I did not see it.”

Q: “And what happened then afterwards?”

A: “And then I found the deceased next to (indistinct). When I came to the scene area then the deceased was being held in his waist by the accused.”

Q: “In what position was the deceased? Was he standing up straight or lying or sitting?”

A: “He was injured, he was lying on his back.”

Q: “And what was the accused doing?”

A: “When I came there I just found the deceased in the arms of the accused and then his younger brother was saying: “Please leave the man alone. …”

Q: "And when you got onto the scene and you saw your husband lying on his back in the arms of the accused – did you see the knife?"

A: "The accused was holding something in his hand but I did not see what it was … I did not find him with anything else. Or I did not see him with anything else …"

On further questioning about the knife, the witness said that when she arrived on the scene she saw the accused pulling something from the waist of the accused. On questions by the Court she said that when she saw the accused holding the deceased in his waist, she saw him throwing something into the bush. She continued: "And then the kid said, the boy sitting over there said: "Stop it, leave the man alone and come over here." She explained that it was the brother of the accused who said so.

It must be remembered that the said brother Junius had also testified that when he arrived on the scene, the accused had the fence pole in his one hand and a traditional knife in his other hand and the deceased was lying on the ground. The wife of the deceased, the witness Kayoo, was then already on the scene.

Against this testimony by Junius and Kayoo, the accused testified that after he had hit the deceased, his brother Junius told him to leave the deceased alone and they left. At the time, according to the accused, the deceased was still standing and in fact never fell down after he was

struck by the accused during the time that the accused was still on the scene.

It must have been obvious that the accused's version that the deceased did not fall down while he was on the scene was not only in clear conflict with the testimony of Junius and Kayoo, but a blatant lie.

The trial judge in her judgment apparently did not consider these defects and inconsistencies and even the latter obvious lie. Although finding all the witnesses credible, she accepted as she said "the accused's version", even though it was inconsistent with testimony of the other witnesses, whom she also found credible. This was clearly another misdirection.

4. The question whether or not the blows struck by the accused were inflicted in the heat of the moment and in quick succession:

The Court found that the blows struck were inflicted in the heat of the moment and in quick succession and were consequently not exceeding the bounds of self-defence in the circumstances.

The first misdirection which the Court committed in this regard is that as the evidence evolved, the accused had conceded that he had inflicted three (3) blows, not two (2).

As to the "heat of the moment", I have already referred to the accused's own evidence *supra*, that there was the initial confrontation when he conveyed his mother's message, then followed the story of his "running

away", the allegation that the deceased then became calm and the allegation that the accused then returned to Nghidengwa.

Furthermore when the accused returned, according to his own testimony, Nghidengwa no longer had the alleged knobkierie and the only alleged weapon now available to Nghidengwa was the knife. But the knife was knocked out of the hand of Nghidengwa with the accused's first flow and he saw it fall onto the ground. If the accused could observe this, and he obviously had to lift the heavy fence pole the second and third time, then he was not acting as an automat, who could not control himself if he wished to do so.

It is noteworthy that when the accused was asked repeatedly why he hit Nghidengwa the second and third time when he no longer had a knife he gave the following answer: "I had found him with a knife."

The "quick succession" story was also only voiced in response to leading questions to the accused by the Court. Up to that stage the accused, when asked why he had beaten the accused, only managed to say that he beat Nghidengwa in self-defence, because Nghidengwa had taken out a knife whenever asked why he inflicted two further blows after the knife had been knocked from the hand of Nghidengwa. The Court's question which elicited this story during the cross-examination by State counsel followed after two immediately preceding, but futile efforts, by the Court. The question and answer were phrased as follows:

> Q: "I have one more question. Mr. Matheus, how long in time-span how long did it take from the first to the second blow?

Were it two blows in quick succession or did you hit him the first time and wait for a long time and hit him again?"

A: "Okay, after I hit off the knife or after I hit him on the hands to let go of the knife then I gave him a second blow again."

Q: Yes, the question is how long between these two blows?"

A: "No time. There has not been any time difference between."

It must be noted that the choice the Court gave him was between – "two blows in quick succession" and "did you hit him the first time and wait for a long time. (My emphasis.) There was no third choice allowed such as e.g. or "did a short time elapse between the two blows?" Be that as it may – the answer did not explain why Nghidengwa was beaten a third time. When the State counsel put that question the accused said that there also elapsed "no time" between the second and third blows. But when asked why he hit the deceased a third time he failed to answer and his silence was noted on the record.

The accused never said that he was not in control of his actions and neither he nor his counsel pleaded automatism. If the Court had a defence of automatism in mind, it should have held that such a defence was not raised. Alternatively, that if raised it had to fail.

To inflict a number of blows in quick succession, when a person is in control of his actions, can never amount to automatism. There was no evidence to the effect that the accused had lost control of his functions at any stage and that he was unable to stop the assault at any stage when he perceived that the danger, if any, had ceased.

It is unfortunate that the handling of these issues by counsel and the Court was inept and unsatisfactory.

Whether the fence pole used by the accused broke in two as a result of the power with which the accused struck the deceased was never properly examined by counsel and the Court. Two pieces of wood were presented to Court and it was described by the Court as follows: "It is about one metre in length. Then there is a smaller little piece that may or may not be an off-cut of the first one which seems to be another about 30 centimetres in length and the width is probably about five centimetres". (My emphasis added.) The Court further remarked: "...It looks quite heavy... It's a sturdy piece of log".

No effort was apparently made by Court and counsel to try and see whether the two pieces appear to be part of a pole which broke in two as a result of the blow, rather than being an "off-cut" whatever that may mean. The accused was not asked by counsel for the State or the Court whether or not the pole broke in two when he hit the deceased and if so, whether it broke at the first, second or third blow. No effort was made to establish where the two pieces or stick were found.

Similarly counsel for the State did not in cross-examination of the accused ask him to demonstrate how the blows, allegedly struck in quick succession, were in fact struck – i.e. how he held the stick – with one or both hands – how high he lifted the stick in order to strike etc. The learned presiding judge also failed to put any questions to clear up these issues.

Questions in this regard were relevant to establish the power of the blows as well as how quick in succession the blows were actually struck.

SECTION D

THE EFFECT OF THE MISDIRECTIONS ON THE FACTS IN ISSUE

The trial Court misdirected itself in material respects and it is therefore justified to reassess the evidence in view thereof that the said misdirections impacts on the findings of fact made by the trial Court and the conclusion of innocence arrived at by that Court.[1]

In the result I arrive at the following conclusions as to the correct findings relating to the credibility of the witnesses and the facts in issue:

1. The trial Court erred in finding that it had “no reason to disbelieve the version of the accused” and to accept his evidence in its totality, in view of it being contradicted in important respects by the testimony of his brother Junius and the mother of the deceased whom the Court had also found to have been credible.

2. The evidence of the accused that his mother had sent him to the deceased to ask for money to take his mother to hospital, and in the alternative, to ask the deceased to take the accused’s mother to hospital should have been rejected in the light thereof that it was contradicted by both Junius and Kayoo, who were correctly found by the Court to have been credible witnesses. In fact, the

[1] R v Dhlumayo and An, 1948(2) SA 677 at 705 – 706;
S v Tshoko, 1988(1) SA 139(a) at 142 F – J.

evidence of Junius had to be accepted that after the accused had left, their mother was anxious about the whereabouts of the accused and entreated Junius to find him and when Junius found the accused, he repeatedly entreated him to return and not to follow the deceased.

The deceased however, ignored these requests until after he had beaten the deceased and the deceased was lying prostrate, injured and helpless on the ground.

3. When the accused followed the deceased he was angry, because his mother had been beaten by the deceased and was determined to confront the deceased and at least enquire why he had beaten his mother.

It was a natural and reasonable reaction for him to have been angry and wanting to confront the man who had beaten his mother.

4. When the accused found Nghidengwa, he asked him why he had beaten his mother.

5. The accused hit the deceased at least two blows with a relatively heavy fence pole on the chest causing the fracture of the breastbone.

6. The fence pole was a formidable and dangerous weapon if wielded to strike a person.

7. It would have been obvious to any reasonable person that to strike an elderly person, estimated at about 80 years with this fence pole on the chest would cause serious injury and even death.

8. The deceased did not have a kierie in his hands, when first confronted by the accused; alternatively, even if he had, it was not used to threaten the accused in any manner. The accused did not hit the deceased to dislodge a knobkierie from the hand of the deceased.

9. After the accused had first confronted the deceased and asked "why the deceased had beaten his mother", there was no confrontation forcing him to retreat and he did not retreat. But even if he "ran away", the words used probably by the interpreter, that was probably a manoeuvre to get in front of the deceased; at any event it was clearly only a movement over a short distance, the length of the inside of the Court wherein the trial took place and could have lasted only for a very short period, probably counting in minutes.

Whatever the nature of this particular movement, the accused again approached the deceased immediately afterwards as testified by him and corroborated by his brother Junius. The purpose could only have been to continue the confrontation with the deceased. Even if the accused had in fact "run away" or moved away to the front of the deceased, there was no

suggestion that he, as a young man, was prevented in any way from continuing the “running away” or “moving away” movement or that his life or limb was endangered in any way if he continued the said movement.

10. The deceased fell down on the ground after being hit by the accused and the accused was still at the scene when the deceased was already lying on the ground. At one stage, he was even holding the deceased whilst the deceased was lying on the ground as testified by Kayoo.

11. The evidence of accused in re-examination by his counsel that Nghidengwa had not only pulled out a knife from his waist, but had lifted the knife to shoulder height and had attempted to stab him, is rejected as an afterthought and a deliberate fabrication.

12. However, it must be accepted in favour of the accused as reasonably possible, in view of the fact that the accused is the only witness on these points and his evidence in this regard cannot be rejected as obviously false, that: Nghidengwa pulled out the knife when the accused advanced on him and Nghidengwa more or less at the same time took a step or two towards the accused before the accused struck him with the fence pole.

This action by the deceased did not constitute an attack on the accused and is, objectively speaking, consistent with a

preparatory defensive step against an anticipated aggression by the accused.

This notwithstanding, it is also reasonably possible that the accused may have interpreted this action by Nghidengwa as a preparatory step in an imminent attack on him.

SECTION D:

THE LAW RELATING SELF-DEFENCE:

Both parties referred to the approach outlined in the full bench decision of the Namibian High Court in State v Naftali[2] as well as to some further authorities.

None of counsel argued that any of the dicta in Naftali was incorrect and there is no reason to take a different view in this case. The guidelines set out in that decision are the following:

> "Self-defence is more correctly referred to as private defence. The requirements of private defence can be summarized as follows:
>
> (a) The attack: To give rise to a situation warranting action in defence there must be an unlawful attack upon a legal interest which had commenced or was imminent.
>
> (b) The defence must be directed against the attacker and necessary to avert the attack and the means used

[2] NR 1992 at 299

must be necessary in the circumstances. See: Burchel and Hunt South African Criminal Law and Procedure, vol I 2nd ed at 323 – 9.

When the defence of self-defence is raised or apparent, the enquiry is actually twofold. The first leg of the enquiry is whether the conditions and/or requirements of self-defence have been met, which includes the question, whether the bounds of self-defence were exceeded. The test here is objective but the onus is on the State to prove beyond reasonable doubt that the conditions or requirements for self-defence did not exist or that the bounds of self-defence have been exceeded.

When the test of reasonableness and the conduct of the hypothetical reasonable man is applied, the Court must put itself in the position of the accused at the time of the attack. If the State does not discharge this *onus,* that is not the end of the matter and the second leg of the enquiry must be proceeded with. The second leg of the enquiry is then whether the State has proved beyond reasonable doubt that the accused did not genuinely believe that he was acting in self-defence and that he was not exceeding the bounds of self-defence. Here the test is purely subjective and the reasonableness or otherwise of such belief, whether or not it is based on or amounts to a mistake of fact or law or both, is only relevant as one of the factors in the determination whether or not the accused held the aforesaid genuine

belief. (See Burchell and Hunt (*op cit* at 164 – 81 and 330 – 2); S v De Blom, 1977 (3) SA 513 (A).)

It seems that the learned authors of Criminal Law and Procedure (*supra*) are correct when they say in a footnote at 332 that the *dictum* of Schreiner ACJ in R v Ndara 1955 (4) SA 182(A) at 185 is both *obiter* and incorrect in the light of S v De Blom*, supra*, in so far as Schreiner stated that 'the accused's belief must be reasonable'.

If the State discharges the *onus* to prove beyond reasonable doubt that the accused held no such genuine belief, then the accused must be convicted of the charge of murder. If the said *onus* is not discharged, then the accused cannot be convicted of murder requiring *mens rea* in the form of *dolus*, but can be convicted of a crime not requiring *dolus* but merely *culpa*, such as culpable homicide.

Culpable homicide will be a competent verdict where eg the accused, although he genuinely believed that he acted in self-defence and within the bounds of self-defence, was not, objectively speaking, acting reasonably in holding the aforesaid belief. See S v De Blom 1977(3) SA 513(A); South African Criminal Law and Procedure (*supra* at 180); S v Ntuli 1975(1) SA 429(A) at 435H – 438A: S v Ngomane 1979(3) SA 859(A) at 863A – 865C."

There can be no difficulty in understanding and applying the traditional approach regarding the test for justifiable private defence, i.e. what was referred to in State v Naftali, *supra*, as the first leg of the enquiry. The second leg, dealing with the subjective element of *mens rea* and knowledge and/or appreciation of the unlawfulness of the act on the side of the accused became more pronounced since the decisions in State v Ntuli,[3] and S v De Blom[4].

It is helpful to refer to the comment of Snyman in Criminal Law[5] where the learned author states:

> "The test to be applied is now as follows: If X (the party who was originally attacked) is aware of the fact that his conduct is unlawful (because it exceeds the bounds of private defence) and that it will result in Y's death, or if he subjectively foresees this possibility and reconciles himself to it, he acts with *dolus* (intention accompanied by awareness of unlawfulness) and is guilty of murder. If intention to kill as explained in the previous sentence is absent, X can nevertheless still be guilty of culpable homicide if he *ought* reasonably to have foreseen that he might exceed the bounds of private defence and that he might kill the aggressor. He was then negligent in respect of the death. If, subjectively, he did not foresee the possibility of death and it can also not be said that he ought reasonably to have foreseen it, both intention and negligence in respect of death are absent and he is not guilty of either murder or culpable homicide."

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[3] 1975(1) SA 429(A)
[4] 1977(3) SA 513(A)
[5] Criminal Law, 2nd ed, 107 see also J M Burchell, SA Criminal Law and Procedure, General Principles of Criminal Law, 3rd ed under heading "Putative or supposed defence" 265/266.

State counsel appearing for the appellant argued *inter alia* that even if the accused had faced an imminent attack, he should have fled rather than kill the deceased.

It is therefore apposite to make a few comments on the relevant principle in our law.

It is trite law that a person need not flee, if in doing so it would be dangerous or it would expose him to a "stab in the back".[6]

However, there are decisions of our Courts indicating that where it is not dangerous to flee, the person attacked should flee, rather than to kill the attacker in self-defence. But as Snyman points out, this has not been unambiguously stated.[7]
I am not aware of any authoritative decision by Namibian Courts, certainly not since our Courts have become independent at Namibia Independence in 1990.

Snyman in his discussion of the issue, points out that in the legal system of several western democracies, such as e.g. in England and Germany, a person attacked is not required to flee. In the USA the Model Penal Code provides that a person must rather flee than kill a person in self-defence, unless he is threatened in his dwelling or place of employment or is a public officer whose duty is to maintain justice.[8]

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[6] Criminal Law, IBID, p 102 and the decisions there referred to.
JM Burchell, SA Criminal Law and Procedure, vol I, 3rd ed, 77.
[7] Criminal Law, IBID, p 102.
The decisions in: Zikalala, 1953(2) SA 568(A) at 571/572
Patel, 1959(3) SA 121(A) at 123F.
[8] Criminal Law, IBID 102- 103
Van Wyk, 1967(1) 488(A)

It can also be argued that since the decision of the Appellate Division of the South African Supreme Court, in the Van Wyk decision, there is no longer any room for perpetuating the principle that the person who is attacked or where persons are attacked whose life and limb he/she has a duty to protect, must rather flee than kill the attacker, appears to have lost much of its validity.

In these times when violent crimes such as murder, rape and robbery have increased ominously and where the police forces and the criminal justice system are finding it increasingly difficult to protect the victims effectively, the potential murderers, rapists and robbers will be further encouraged if they know that the law expects the victim to flee rather than to use violence to repel the aggressor.

The reality is that the need for self-defence and/or private defence, has become more pronounced and urgent than ever before and unnecessary obstacles should not be placed in the way of any person to protect his or her life, physical integrity, dignity or property and those of third persons where there is a duty to protect also such persons.

Of course the right to adequate and effective self-defence and/or private defence cannot be boundless and limitless. But the existing principles and rules are adequate to ensure order and justice, without being burdened with a requirement that victims unlawfully attacked, must rather flee than kill, even where their lives and/or bodily integrity or property or those of third persons for whom they are responsible, are gravely endangered. Obviously no person may kill a thief when only a petty theft is involved.

The question arises whether or not Art. 6 of the Namibian Constitution has changed the principles relating to killing in private defence. Art. 6 provides:

> "The right to life shall be respected and protected. No law may prescribe death as a competent sentence. No Court or Tribunal shall have the power to impose a sentence of death upon any person. No executions shall take place in Namibia."(My emphasis added.)

In my view the aforesaid provision does not affect the existing principles. It is true that the right to life must be respected and protected. This includes the right to life of the victim of an aggressor. The victim's right must also be respected and protected. One way for the victim to protect his/her life or that of others, is to act in self-defence or private defence. The existing principles which the Courts apply set out herein, are in my view adequate to respect and protect also the right to life of the aggressor and no change to the existing approach is required.

In any event, it seems to me that the contention that the person attacked must rather flee than kill the attacker, would not apply to the defender who violently resists, but does not intend to kill but only to injure.

Even though it is not necessary to decide this issue in all its manifestations in this judgment, it is at any event safe to say that a person would be entitled to defend him/herself, if such person or those that he/she is entitled to defend, are attacked and faced with serious threat to life and/or limb in his/her own dwelling or place of work or if such person is a public officer whose duty it is to protect society.

SECTION E

CONCLUSION

In my respectful view the appeal must succeed to the following extent:

1. The State did not prove beyond reasonable doubt that the accused had the direct intent to kill the deceased. What count in his favour is that he did not hit the accused on the head, which would have appeared to the ordinary reasonable member of the public and to the accused, as a more vulnerable part of the body, if he had wished to kill the deceased. Furthermore, he desisted from continuing the attack once the deceased was lying helpless on the ground. In addition, the accused testified that he did not "intend" to kill the deceased.

   The more difficult question however, is whether or not he had the legal intention to kill, by virtue of the principle of *dolus eventualis*, i.e. that he foresaw the reasonable possibility that Nghidengwa could die as a result of his blows and proceeded, reckless as to the consequences and/or that he reconciled himself with that possibility. The accused was unfortunately never cross-examined on the issue of whether or not he foresaw the reasonable possibility that Nghidengwa could die.

   In the circumstances herein set out, I cannot find that the accused had the direct intention to kill, nor can I find that he foresaw the reasonable possibility that the deceased may die as a result of the assault and nevertheless proceeded, reckless as to the consequences or that the accused proceeded, after reconciling him with the reasonable possibility

that the deceased may die as a result. Consequently the accused cannot be found guilty of murder.

However, the accused, objectively speaking as a reasonable person in his position, should have foreseen that Nghidengwa could die and was thus negligent in not foreseeing that Nghidengwa may die as a result of the assault and nevertheless proceeded with the assault. The accused would thus be guilty of culpable homicide, unless the killing was done in justifiable private defence.

In view of the plea of self-defence, the enquiry does not end here.

The Court must now engage in the first and second legs of the enquiry as set out in State v Naftali, *supra*, in regard to the issue of self-defence.

On the first leg, it must be found that the accused did not act in justifiable self-defence or private defence. Although he need not have fled, if he was in fact attacked and in danger of losing his life or being seriously injured - this is a case where the accused persistently followed Nghidengwa, notwithstanding the efforts of his brother to persuade him to turn back. Even when, on his own story, there was no further legitimate reason to continue following Nghidengwa after his original business had been completed and he had seen Nghidengwa's negative and aggressive response, he continued to confront Nghidengwa. If his life and limb was placed in danger, it was of his own making because he persisted in confronting Nghidengwa – and Nghidengwa was entitled to take steps to defend himself against his much younger and stronger

opponent. Even if Nghidengwa pulled out a knife, as a preparatory step to defend himself, he would have been entitled to do so.

I will assume for the purposes of this judgment that the accused was entitled to take some steps – even to use a moderate degree of force, to discourage Nghidengwa from attacking him. But even on this assumption, it must be held that the State had at least proved that the accused exceeded the bounds of self-defence.

The second leg of the enquiry is perhaps the more difficult one because it involves a subjective test.

The accused was adamant that he acted in self-defence. When considering the facts analysed aforesaid, it cannot be said that the State had proved beyond reasonable doubt that the accused did not believe that he was entitled to hit Nghidengwa as he did.

But that does not finally conclude the issue of guilt or innocence. Here we return to an objective test being – that if the accused did not act reasonably or was negligent in believing that he was justified in hitting Nghidengwa as he did, then he will still be guilty of culpable homicide.
In my respectful view, even if it is assumed in favour of the accused that he believed that he was entitled to act as he did, such belief was unreasonable and he was at least negligent in so believing. Consequently he was guilty of the crime of culpable homicide.

In my view this Court should not now consider sentence, but rather refer the matter back to the trial Court for that Court to hear evidence and

argument on sentence and then impose an appropriate sentence. It will of course be necessary to arraign the accused before a different judge because the original trial judge is no longer a member of the Bench of the High Court.

In my respectful view the following order should be made:

1. The appeal succeeds;

2. The following order is made in substitution of the order of the trial court:

    2.1 The accused is found guilty of the crime of culpable homicide;

    2.2 The matter is referred back to the High Court for arraignment before a judge, other than the original trial judge, to consider and impose sentence after hearing relevant evidence in regard to sentence, if any, and the argument in regard to an appropriate sentence.

_____

O'LINN, A.J.A.

agree.

_____

STRYDOM, C.J.

I agree.

_____

CHOMBA, A.J.A.

/mv

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