

“SPECIAL INTEREST”

CASE NO. CC 10/2006

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

JOSEPH HAKOONDE NGOYA

CORAM: DAMASEB, J.P.

Heard on: 2006.05.12

Delivered on: 2006.05.12

SENTENCE

[1] **DAMASEB, J.P.:** Mr Ngoya, I found you guilty and convicted you of murder with direct intent to kill another human being. You are a first offender, and you are married with your second wife, after the first one had left you - which is the source of the trouble you are in now. You have one child with your second wife. You essentially fended for yourself until your arrest, by ploughing your field, and looking after your cattle; and on your own version you look after five children of other

relatives. You have been in custody now for eight months since your arrest, and you have parents; if I understood you properly both of whom are blind and in respect of whom you have responsibilities. You also stated that you contributed to the funeral expenses of the deceased, and, although with the help of others, paid compensation of twelve head of cattle to the family of the deceased. You are a young man of thirty four years. Such are your personal circumstances.

[2] Mr Ngoya, the crime you committed is very serious. You committed, in my view, a murder most foul and heinous in the annals of Namibia's criminal history. As I found in my judgment - you sought out the deceased in order to kill him. I must agree with counsel for the State that you were after the deceased's head; and you sought it out and got it. Such conduct, Mr Ngoya, as counsel for the State rightly submitted, cannot be tolerated in a civilised society. A clear message must be sent out to all and sundry, that this Court will not shirk in its responsibility to protect the public against those who commit crimes such as you have committed. Those who may

be like-minded must know that when caught this Court will deal with them.

[3] You decapitated another human being causing his death, but you did not stop at that: You went around displaying the head of a man you had killed; which I consider an act of utter contempt and desecration of the dead. Your crime, Mr Ngoya, is without precedent and has offended the sensibilities of all right thinking and law-abiding members of our community. You also chose to think out a bogus defence to try and escape the consequences of your evil deed. That you represent a serious danger to society is a moot point.

[4] Retribution is the only answer for what you have done, and your personal circumstances pale into insignificance compared to the barbarity of your crime. You have shown no remorse for what you did. Accordingly, Mr Ngoya, I sentence you to sixty years imprisonment.

DAMASEB, J.P.

ON BEHALF OF THE STATE

Ms Miller

Instructed by:

Office of the Prosecutor-

General

ON BEHALF OF THE ACCUSED

Mr

Basson

Instructed by:

Directorate of Legal

Aid

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JUDGMENT

DAMASEB, J.P.: [1] The accused is charged with murder in that upon or about 3rd September 2006, and at or near Ongumi

village in the district of Eenhana, he did, wrongfully, unlawfully and intentionally kill Elias Kahandja Shoombe, a male person. The

summary of substantial facts in terms of Section 144 (3) (a) of the Criminal Procedure Act, 51 of 1977 reads as follows:

“On the 3rd of September 2005 at Ongumi village in the district of Eenhana the accused informed the deceased’s wife that she should warn her husband that once he meets the deceased someone will die. When the accused later met with the deceased he stabbed the deceased with a knife on the chest and severed his head from his body. The deceased died as a result of the injuries inflicted by the accused. The accused subsequently took the deceased’s severed head to the cuca shop in the area and showed it to several people.”

[2] The accused pleaded not guilty to the murder count in the indictment and, through his learned counsel, made the following admissions in terms of Section 220 of the Criminal Procedure Act: the identity of the deceased person; that the severed head belonged to the deceased; the contents of the post-mortem report in respect of the deceased; that the body of the deceased did not sustain any injuries when removed up to when the post-mortem was conducted; the contents of the photo plan although reserving the right to challenge aspects thereof should the need arise; and that he

stabbed the deceased first with a traditional knife, whereafter he dispossessed the deceased of a panga and used the same to cut off the deceased's head.

[3] Counsel for the accused, Mr Basson, then stated in terms of s 115 of the Criminal Procedure, that up to the point where the accused stabbed the deceased he acted in private defence, but that at the point where he dispossessed the deceased of the panga and cut off his head, he was blinded by anger to such an extent that he did not realise what he was doing; that he was not aware of his surrounding and did not realise he was walking around with the head, and that the accused, in his defence to the murder count, will rely on *temporary non-pathological incapacity*.

[4] The first state witness who testified was the investigating officer, sergeant Erastus Kamati, now of Eenhana police station. He was stationed at Okongo police station at the time. He received a report about the killing at Ongumi village and went there with Constable Iyambo. This was at about 21:30 in the evening of 3rd September 2005. They went to the homestead of the headman, Ndailikana. When they reached there one Louisa Lamoth pointed out a headless body to them. They found the head in a bag. A panga was leaning on that bag and the accused came forward to own up to the deed.

Kamati said that he then warned the accused of his rights and told him that he was under arrest, whereupon the accused said that he killed the deceased over a love affair with his wife which took place in

2003. He then took the accused into custody and the next morning returned to the scene with him.

[5] On the scene, Kamati testified, he observed the footprints of the accused and those of the deceased. He was able to do so from observing the shoe prints of the deceased and the boots of the accused - both of which he saw. He said that he further observed that from where the two met, the deceased was retreating followed by the accused; and that the deceased's backward movements were towards the homestead of the headman. The accused's backward movements, Kamati testified, stretched for about thirty metres. (I need to add in passing that Kamati did a full measurement of the various points at the scene of the crime based on his observations.)

[6] Kamati also testified that the accused pointed out to him the traditional knife hidden in the traditional fence of the headman's homestead, meaning it was not lying around the scene of crime, or around where the body of the deceased lay. The accused also told

him, he said, that the knife was used to stab the deceased. According to Kamati the panga belonging to the accused was found near the spot where the accused and the deceased originally met up and the scuffle between them commenced. Kamati testified that he observed a cut wound on the lower part of the accused's neck - which the accused

said was inflicted by the deceased. The accused was then taken to hospital for treatment and thereafter charged.

[7] In cross-examination Kamati said that when the accused came forward to own up to the deed he was in a 'good condition' and cooperative, and that the accused said he killed the deceased over a love affair. Kamati denied the suggestion that the accused told him, on the spot he first took him into custody, that he was cut with a panga by the deceased. He testified that he did not even see the cut wound on the accused at that point in time, and only took notice of it much later when the accused told him.

[8] Kamati persisted that on the night he arrested the accused the accused did not mention that there was a fight between him and the deceased. When put to him that the accused did in fact tell him that he was defending himself against the deceased, Kamati denied being told as much by the accused. Kamati also confirmed that the

accused told him that his panga- later found to be bloodless- was found at the place where the two initially started to wrestle some distance away from where the accused eventually killed the deceased. He also testified that the accused told him that after the panga of the accused fell, the deceased tried to cut the accused- at which point the accused took out his traditional knife and stabbed the deceased. Kamati also

testified that the accused pointed out to him his shoeprints at the scene of the crime from which he also came to the conclusion that the accused was pursuing the deceased after they initially met up, while the deceased was retreating.

[9] It was suggested to Kamati in cross-examination that at some stage the accused was running away from the deceased who was cornered by the deceased against the traditional fence of the homestead of the headman Ndailikana. Kamati stated that according to his observation the converse was the case; that is, the accused had cornered the deceased against the traditional fence. Kamati further testified in cross-examination that when he formally charged the accused the latter refused to divulge further details about the incident to him. I need to observe at this point that it was clear from Kamati's evidence that none of the eye witnesses (whose evidence I shall deal with presently) told him the identity of the

person who screamed for help as between the accused and the deceased.

[10] Under questioning by the Court Kamati satisfactorily described the manner in which he came to the conclusion that the deceased was moving backwards pursued by the accused after the duo initially met up near the headman's homestead.

[11] The next witness to testify was detective sergeant Cloete, the scene of crime officer, who took pictures of the scene of crime. He prepared the photo plan and took the measurements of the distances between various points at the scene of the crime. He gave a detailed description of the photo plan which was then admitted in evidence. He was cross-examined extensively on behalf of the accused. Under questioning by the Court, Cloete testified that while at the scene of the crime he could -placing himself at the spot where the two eye witnesses allegedly stood- clearly see the areas around which he was told the deceased and the accused met up and had a scuffle. He stuck to this version even in cross-examination.

[12] The next witness to testify was the forensic pathologist, Dr Armando, a Cuban national who works in Namibia. This witness was

extremely inarticulate and it was very difficult to follow his evidence. His post-mortem report was however admitted in evidence by agreement. Having regard to his written post-mortem report and his rather garbled *viva voce* evidence, I found the following established: That the head of the deceased was cut off; that about two centimetres of the lower lip of the deceased was also cut off; that the cause of death was internal bleeding due to the cutting off of the head by the neck; and that the spine of the deceased had been cut off. Dr Armando testified that he observed a cut wound to the right armpit (or

axilla) of the deceased which, it is common cause, was inflicted with the traditional knife but was not the fatal wound. Dr Armando testified that in his opinion the cutting off of the head was done with a very hard and heavy weapon, and said it was consistent with the exhibit - being the panga - displayed in Court as belonging to the deceased. He said that it was more than likely that the severing of the head was done with the panga instead of the traditional knife both of which he saw in evidence. He also said that the cutting on the nose and the lip were consistent with having been done with the traditional knife. (This is significant in view of the fact that, as it will later appear, the accused's version is that he bit off with his teeth the lower lip of the deceased. It is also further significant because it is in contrast to the version of one of the minor witnesses, although

somewhat backtracked, that the head was cut off with a traditional knife.) The doctor was firm in his professional opinion that the cutting off of the head must have been done from the front and not from the back.

[13] The next witness who testified was inspector Elsalvador Ndeuyama, a commissioned officer based at Okongo police station. He was the station commander at the time of the incident and took the purported confession from the accused. He said he had no

connection with the investigation of the case. The voluntariness of the purported confession was not placed in dispute although it was clearly

pointed out by Mr Basson on behalf of the accused that aspects of it would be challenged. The accused, in that purported confession, said the following, amongst others: On Saturday 3 September 2005 at about 17:00 at Ndailikana Moses' mahangu field I meet Elias Shoombe. I greeting him then he greeting me too. Then I asked him, Elias Shoombe, why are you forcing my wife while you are also having your wife? Then he raised his panga against me. I told him that I also have my panga, and the deceased said if so we will kill each other today. Then he cut me with his panga from left finger to my neck. I took my panga throws to him then it fell to the ground. I

ran away then he blocked me against the fence. I came closer to him then I stabbed him with a traditional knife on his right ribs. After I stabbed him I put him down. I then managed to take the panga from him and the same panga I used to cut off his head. I took the head with me to the cuca shop. From the cuca shop I went home with it. I put it in the bag with the intention to take it to the police station at Okongo. Then I decided to take it back to the body. From there someone phoned the police and then the police came and take me with the deceased to the station.” (sic)

[14] In cross-examination Mr Basson said that the accused agrees with most of the statement but that one or two things are missing. Mr Basson focussed on paragraph four of the statement which reads: “I

took the head with me to the cuca shop. From the cuca shop I went home with it, and I put it in the bag with the intention to take it to the police station at Okongo. Mr Basson continued, and I quote (at page 101 of the running record: *“Now the accused person’s instructions are, that when he got home he realised he had this head and he said he put it in the bag because now take it to the police station and then he decided no let me take it back to the*

body where he was going to wait for the police.” Mr Basson continued, now is it possible that you had shortened the accused person’s version, I mean is it possible that the accused person could have said, when I realised at home that I have the head I put it in a bag and wanted to take it to the police station but thereafter I decided to take it back to the body. I mean you just said, then I decided to take it back. “ He did not tell me that he did not say that to me”, Ndeuyama answered.

[15] From the above quotations the following becomes apparent: the accused confirms he made a statement to Ndeuyama. That he agrees with what is in the statement except that it excludes a reference to the fact that he only became aware at home that he was carrying the head with him. Nowhere in that statement, however, is there any reference

to the fact that the accused blacked-out when first struck by the deceased.

[16] The next witness to testify was Antonius Ipuakena, a court interpreter who translated from English to Oshiwambo and *vice versa* when the purported confession statement was made. He confirmed that the purported confession was taken by Ndeuyama from the accused, with him acting as interpreter, and that he indeed

accurately translated. Not much emerged in cross-examination of him, and he specifically denied that there was any possibility that the things the accused said were excluded from paragraph (4) of the statement.

[17] The next witness who testified was the wife of the deceased, one Lovisa Reinoldt. She said that when the accused met her on the 3rd of September 2005 at the cuca shop, he asked her whether the deceased had gone to report him to the traditional authorities, and that if the two of them meet somebody will die. She said that the accused was carrying a panga and a traditional knife at the time. She was able to make a dock identification of both weapons. She testified that the accused returned not long afterwards and was carrying something in his hand, and told her it was the head of her husband whom he said that if they meet someone will die. She ran away in fright and said she never really saw the head. She testified that when the accused

returned with the thing he said was a head he was 'normal as he used to be.' She testified that the accused at that point was going in the direction of his house. She then raised the alarm. She later went to

the place where the body of the deceased was, and was able to identify his remains from the clothes and shoes. She testified that

the accused later came where the body was but this time carrying a bag although she could not tell what was in it. She testified that the accused said that it was the head of the deceased, and that he was taking it to the police station. She testified that the accused was told that the police had already been called for, and he remained there.

[18] Lovisa Reinoldt also testified that around 17th August 2005 she found the accused with a panga at their house. She confirmed that the in 2003 deceased had an adulterous relationship with the accused's wife, and that the matter was taken to the traditional authorities and resolved in January 2005 when all compensation due by the deceased to the accused had been paid. She added *"so they gave each other peace and it was like the matter was solved. I don't know how it restarted again."* She testified that her husband was turning 58 years when he died. In cross-examination Reinoldt testified that the deceased had at some point in the past beaten her with a panga- once on the forehead and on the arm on another occasion. She said the deceased, when angry, could 'chop with a panga.' With

this she seemed to confirm the general reputation that the deceased had for the use of a panga against others as suggested on behalf of the accused.

[19] In further cross-examination it was put to Reinholdt that the death threat against her husband to which she testified, was never made by the deceased. She insisted it was made and also persisted that the accused looked 'normal' when he came with the head to the cuca shop, although she said carrying around a head is not normal and that it was the reason she ran away out of fear. It was then put to her that the accused denies that he was aware that he was carrying a head and that when carrying that head he did not know what he was doing. She expressed doubt if that were the case. It was even put to her that the accused cannot even dispute that a conversation about the head took place, as he was not aware of what he was doing. When the Court sought clarification, Mr Basson on behalf of the accused, said: *"He is not in a position to dispute whether he did mention anything to the people that was at the cuca shop because he does not even realise he was carrying that head."*

[20] In cross-examination of Reinholdt Mr Basson sought to make her admit that the accused behaved, or appeared, abnormal when he returned with the head. She persisted that he looked normal.

[21] The next witness to testify was Ngoshi Ndailikena, the headman of the Ongumi village where the alleged offence took place. He

confirmed the adulterous relationship between the deceased and the accused's wife and that eventually, the deceased having paid compensation to the accused, the matter was resolved. He confirmed that the adulterous relationship was exposed by the wife of the deceased. This witness - who is the headman of the area - said that after the wife of the deceased left the common home following the exposure of the adulterous relationship with the deceased, the accused took in another wife. The headman stated that the accused and his adulteress wife were no longer married and no longer together. He went as far as to say that the adulteress wife, when she returned eventually, was pregnant. In context, it was clear that this pregnancy was not that of the deceased or of the accused. This testimony was not challenged in cross-examination. (And as for failure to cross-examine, I refer to *R v M* 1946 AD 1023 at 1027; *R v Katsa* 1957 (2) SA 191 E; and *Small v Smith* 1954 (3) SA 434 (SWA) at 438 F where it was said:

“It is in my opinion elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns the witness. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved.”

This is very significant, because central to the accused's case is the assertion that he was emotionally hurt by the adulterous

relationship. Now, not only is the version that he was aware of another adulterous relationship between the deceased and the former wife unconvincing; that is following the incident in 2003- but it throws grave doubt on the depth of emotional hurt he felt on or about 3 September 2005 because of the adulterous relationship.

[22] Under further cross-examination of the headman it was elicited from him that he became aware, through his wife (as he was in Windhoek at the time), of the complaint laid by the deceased against the accused for wanting to hit the deceased with a panga and that (the headman's wife) referred the complaint of the deceased to the junior headman in the absence of her husband; and that the accused refused to cooperate with the junior headman in respect of the complaint against him. This complaint was reported, according to the headman, in the same month that the deceased was killed. I grant this is hearsay evidence -but it was elicited in cross-examination. Therefore, although hearsay, the existence of a complaint against the accused to the authorities by the deceased around the time of the killing was confirmed by the headman who testified that when he returned from Windhoek in August of 2003, he was informed of such

a complaint by his wife: See *R v Bosch* 1949 (1) SA 5489, *De Klerk v Sagoti* 1943 EDL 44 in support of the following proposition in Hoffman

& Zeffert, *The South African Law of Evidence* (4th edn) page 458-59, where the following is said:

“If a cross-examiner succeeds in eliciting inadmissible evidence which would ordinarily be inadmissible he is not entitled to object to its being received. The principle applies whenever the witnesses’ reply is a legitimate answer to the question whether the cross-examiner expected it or not.”

[23] The next witness was a ten year old girl, Elizabeth Ndailikana, the daughter of the headman. She and her elder sister Ndilimeke, were the only two eye- witnesses to the fight between the accused and the deceased. I duly admonished her to tell the truth, as I was, after an enquiry, not satisfied that she was capable of taking the oath. She is in Grade 5, can read and write and knows both the deceased and the accused as they both hailed from her village. She says that the accused used to come to their home. She said that she knew the deceased was dead because his head was cut off by the accused; and that she saw it. On the 3rd of September, she said, she was with her sister outside the home washing clothes. They were near the zinc room sometime that afternoon when she saw the accused and the deceased both lifting up their pangas. She could

not make out what they were talking about, but she saw the accused throw down the

deceased. Before that, she said, “the deceased was walking, moving backwards and Mr Ngoya was following him”. She testified that when

the deceased fell he landed on his back and the accused sat on his stomach and started cutting the deceased with a traditional knife on the neck; and that he cut off the head and went with it in the direction of the cuca shop but kept looking behind.

[24] Elizabeth testified that when she saw the accused and the deceased, they had pangas. She says that she also heard the deceased cry out for help as she knew his voice, and that he spoke with difficulty (not properly). She also testified that she was able to observe the events through the fence of their homestead; a fence which, in traditional Oshiwambo fashion, was made using sticks. The Court had the opportunity through the display of the close-up pictures in the photo plan to look at this traditional fence to confirm Elizabeth’s version that she was able to see what transpired beyond the fence.

[25] In cross-examination, Elizabeth denied the suggestion that the person who cried out for help was the accused and insisted it was

the deceased. Asked why she did not mention that in the police statement, she said she was not asked about it. She also testified that when the deceased and the accused first met they pushed each other,

both holding pangas. She says that she did not see the deceased hit the accused with a panga, but that she, however, saw the accused

throw his panga in the direction of the deceased, but missed- this being the point where the deceased was retreating from the accused in a backward movement whilst facing the accused. Elizabeth testified that at some point the deceased and the accused went behind the hut of their homestead and that she could not see what was happening although she heard a sound of beating but could not tell who hit who. Although pressed hard Elizabeth throughout maintained that she was able to clearly see what the deceased and accused were doing, and added, for good measure, that she even at one point peeped through the fence to see more clearly what was happening. Towards the end of her cross-examination, she conceded that she was not sure if the deceased's head was cut off with the traditional knife.

[26] The next witness was Justina Simon who also hails from Ongumi village. She knows both the accused and the deceased; the accused

being her son in law and the deceased her uncle. Her attention was directed to the events of the 3rd of September 2005. She testified that on that day she went to the cuca shop of one Hilaria Kashunga and found the accused there. She either found or met the wife of the deceased there too. She testified that the deceased's wife came to the

cuca shop with the former wife of the accused. (It is significant again to point out that there is a reference here to the 'former wife' of the

accused, implying that the two had not considered each other as husband and wife, or did not live together as husband and wife, at the material time.) Simon testified that the accused then said to the wife of the deceased, "Kwanyoka, is it me your husband is taking to the traditional court, does he know what he did?" She said that the accused then added that if he and the deceased meet the mother of one of them will 'wear black clothes': an apparent Oshiwambo expression which was clarified to mean that one of them will die. According to Simon the deceased thereafter left and came back later carrying a head she identified as that of the deceased. She testified that she started crying upon seeing the uncle's head. She testified that the accused also said that somebody must go to the body at Ndailikana's house before the body is eaten by the dogs. The accused then left, she said. She and others then went to

Ndailikana's house and found the body of the deceased. She testified that when the accused came to the cuca shop with the head, he looked his normal self. She stuck to that version even in cross-examination. She testified that when she went with others to the body of the deceased she saw the panga belonging to the deceased, and that the panga had blood on it. The accused later came back carrying the head in a bag

wearing fresh clothes and no longer talking too much as he did when he came to the cuca shop with the head.

[27] The next witness to testify was Ndilimeke Ndailikana, the daughter of headman Ndailikana. She is thirteen years of age and is in Grade 7, and also knows both the accused and the deceased. On the 3rd September 2005 she also saw the accused and deceased near their homestead. She confirmed seeing the deceased moving backwards followed by the accused, both lifting their pangas. She later heard the sound of somebody being beaten although she could not make out whom. She confirmed that in addition to the panga the deceased had a kerie and the accused a traditional knife. The next thing she saw was the accused walking away carrying a head and looking back several times. She also testified that at some

stage she heard the deceased cry out for help. She was washing clothes at the time of the incident.

[28] In cross-examination Ndilimeke initially denied that her sister was also washing clothes but said later that the sister too was washing clothes. She testified that she did not see everything that Elizabeth saw and gave as the reason for this the fact that at some point she went to hang clothes and Elizabeth was peeping through the fence at the time. When pressed why she did not tell the police in her

statement that the person who screamed for help was the deceased, she said she forgot, but denied that it was the accused who screamed for help. She also testified that she saw the accused throw a panga in

the direction of the deceased but missed, and that the accused still had a traditional knife at the time. She testified that after the accused's panga fell, the deceased still had his panga lifted up while the accused wielded a traditional knife.

[29] At this point in time, I need to make a brief observation about the testimony of these two young girls: Quite clearly the version that it is the voice of the deceased that they heard screaming for help must be taken with a pinch of salt. I say so because the very

person who one would have expected to record such a statement, being Kamati, had no knowledge of that being said to him. In the context of the evidence overall, however, I do not consider that to be a very crucial aspect of this case. In evaluating their evidence I am left with the impression of two young girls trying their best to recollect and recount as best they could what they saw and heard, in a court room environment which quite clearly they were not accustomed to and did not look comfortable in. Their versions are not identical and have some discrepancies- a clear sign, in my view, that they were not coached. I take the view that their versions are overall logically consistent with each other.

[30] Next the State handed up the s119 proceedings by agreement, containing a plea taken from the accused on 17th November 2005 in terms of which the accused pleaded:

“not guilty because I just met the deceased on the road greeted him and asked him one question. Why you forced my wife you also have your wife? Upon that the deceased attacked me with a panga and chopped me on the left side of the neck. I ran away on the fence side. The deceased followed me, pushed me against the fence and aimed to stab me again so I stabbed him in self defence.” (sic)

[31] At the end of the state’s case, the accused testified but called no other witnesses. He testified that in 2003 the deceased had an

adulterous relationship with his wife; a relationship which was exposed by the deceased's wife. At the time that the illicit relationship happened, he was away from home. He became aware of it when he came back. He testified that his wife had in fact left the common home because of this relationship. He testified that the matter was then reported to the headman Ndailikana. According to the accused, the deceased was adjudged guilty and made to compensate him - which the deceased did. (The matter was therefore considered settled, although I get the impression that the accused implied that he had not forgiven the deceased for the adultery.) According to the accused,

on 3rd September 2005, he met up with the deceased near the household of the headman and wanted to know of him why he was 'forcing his wife when he had his own wife'. The deceased then raised a panga against him and cut him on the neck, whereafter he said to the deceased: 'why are you raising your panga at me when you are the one who slept with my wife?' He testified that he was angered by this, for the same man who had done wrong to him by sleeping with his wife now cut him with a panga. He also added that he was afraid because he knew 'the deceased cuts people with pangas'.

[32] The accused seemed to accept in his evidence that the deceased moved backwards after he cut him (the accused). He said he then wanted to cut the deceased but his panga fell, whereupon he retreated. The expression he used in evidence was 'to run away from the deceased'. He testified that he retreated towards the fence of the homestead wanting to escape by climbing through it into the homestead. His panga having fallen, he still had his traditional knife with him when he was cornered near the traditional fence of the homestead by the deceased who was still raising his panga wanting to cut him. At that point he stabbed the deceased with the traditional knife in the right ribs which, as we now know, was under the armpit of the right hand of the deceased. He said that during the fight he also bit off with his teeth the deceased's lower lip. The accused

testified that he realised when he got home that he was carrying the head of the deceased, whereafter he returned to the spot where the body was and was arrested by the police.

[33] He testified though that when he returned to the cuca shop with the deceased's head people started running away from him, and that he thought that they must be running away because of the head he was carrying; this being before he got home. The accused stated that he had no intention to kill the deceased and that he does

not know how it came about for him to kill him. As for making a statement to the police, he testified that he recalls some things only about it. He says that he does not remember cutting off the head of the deceased but remembers that he at some point dispossessed the deceased of his panga. He came to the conclusion that he must have cut off the head of the deceased because when he came home he realised he had it in his hand. He also testified that after the incident he was confused throughout until he appeared in Windhoek during the pre-trial hearing from which point onwards only he came back to his senses in the sense of being able to 'make out directions'. He repeatedly stated that when he made the statement to the police he was in a confused state of mind.

[34] In cross-examination the accused said that the deceased had compensated him after the adulterous relationship, and that the deceased had no reason to be angry with him. He also suggested in cross-examination that after the 2003 adultery was resolved, the wife of the deceased told him that the deceased still continued the illicit liaison with his wife. This led him to confront the deceased again. This appears to have been, on his version, the reason why around 17th of August he was at the homestead of the deceased-an accusation which the deceased denied, and the matter ended up

with them peacefully sitting down to have a drink. (I also need to point out that this version was not raised in cross-examination of the wife of the deceased and is inconsistent with the evidence of the wife of the deceased who has no recollection of it.

[35] The accused also testified that when on 3rd September 2005 he met up with the deceased he was angry with the deceased. He denied uttering the death threats against the deceased at the cuca shop before meeting the deceased. He stated further in cross-examination that just before he stopped being aware of the events around him, i.e. during the fight with the deceased, he and the deceased fell to the ground. He then held the deceased down on the ground in a prostate position. While the deceased lay in that position (which he described in Court) he dispossessed the deceased of the panga. The traditional

knife was lying next to them at that point in time. All this happened close to the traditional fence of the headman Ndailikana's homestead. The accused stated that at that stage he was sitting on top of the

deceased, and that he did not observe the accused carrying any other weapon on him. From that point onwards he testified, he does not remember what happened.

[36] As regards the s119 plea, the accused stated that he does not recollect what he said because he was confused at the time. The accused denied that on 3rd September 2005 he was looking for the deceased. He admitted though that he met the wife of the deceased and Justina Simon at the cuca shop before he met up with the deceased near the homestead of headman Ndailikana. When questioned about the blackout he says he suffered whilst fighting with the accused, the accused stated that it was the first time that he had such an experience.

[37] I will now briefly summarise the legal principles governing private defence insofar as they are relevant to the facts of the present case. A person is perfectly entitled to act in private defence even if he was the original aggressor. If the person first attacked reacts by using disproportionate force out of kilter with the danger or harm presented by the original aggressor, the victim of such an attack is entitled to a

pre-emptive strike in order to avert imminent harm to him. The victim of an attack acts unlawfully if he attacks the aggressor when the attack on him is already over and the threat of injury discontinued.

The victim of an attack may ward off an attack even by killing the attacker even if it is not his life which is endangered but a lesser

interest such as his physical integrity. According to Snyman, *Criminal Law, 4th* edition at p106:

“only if there is an extreme discrepancy between the threatened and the protected interest does the right to act in private defence fall away.”

Only if it is possible in the circumstances and in that way avoid killing an attacker does the duty to flee upon the victim of an attack arise. The victim of an attack is, however, not required to expose him self to any danger by fleeing or using a less dangerous method in defence. If a victim of an attack, in response to a potentially fatal attack, uses an equally potential fatal method in own defence, the original aggressor does not act in true private defence by killing the victim in order to ward off the victim’s defensive attack. Further, as stated by Snyman op cit at page 112 (and I agree):

“a person who suffers a sudden attack cannot always be expected to weigh up all the advantages and disadvantages of her defensive act and to act.”

[38] In the present matter the accused relies on non pathological incapacity at the time that he inflicted the fatal blow cutting off the head of the deceased. It is important for me, therefore, to set out the

scope of this defence before I proceed to discuss and analyse the evidence. A helpful discussion of this subject is to be found in Snyman *op cit* at pp 163 -176, and the authorities there collected. First, if an accused is found by a Court to have suffered from a non pathological incapacity at the time of the commission of the offence, he must be acquitted. A non-pathological incapacity needs not be established by expert medical evidence and need not arise from a mental disease. To quote from Snyman *op cit* at p165:

“the cause may perhaps be what can be called “emotional collapse”, “emotional stress”, “total disintegration of the personality”, or it may be attributable to factors such as shock, fear, anger or tension. Such a condition may be the result of provocation by a wife or somebody else, and the provocation may in turn be linked to physical or mental exhaustion resulting from insulting behaviour towards X over a long period, which increasingly strained his powers of self control until these powers eventually snapped - a condition which is sometimes present in an unhappy marriage which is on the point of disintegrating. Intoxication may also be a cause of the inability. The inability may furthermore be the result of a combination of factors such as provocation and intoxication. Different psychiatrists or judges may use different expressions to describe the cause of X’s incapacity, but the exact description for the cause, of the condition is not important.

What is important is not the cause of the inability or the description of this cause but the inability itself.”

[39] The State bears the onus to disprove the defence of non pathological incapacity beyond all reasonable doubt. But the accused must lay a foundation sufficient to create a reasonable doubt for the State to disprove it. I can do no better than once again refer to the following observations of Snyman op cit at page 166 (with which I agree):

“The Court will approach this defence with great care and scrutinize the evidence with great caution. The chances of X’s succeeding with this defence if he became emotionally disturbed for only a brief period before and during the act, are slender. It is significant that in many of the cases in which the defence succeeded or in which the Court was at least prepared to consider it seriously, X’s act was preceded by a very long period—months or years—in which his level of emotional stress increased progressively. The ultimate event which led to X’s firing the fatal shot can be compared to the last drop in the bucket which caused it to overflow. When assessing the evidence, it should be borne in mind that the mere fact that X acted irrationally is not necessarily proof that he lacked the ability to direct his conduct in accordance with his insights into right and wrong. Neither does the mere fact that he cannot recall the events or that he experienced a loss of memory, necessarily afford such proof. Loss of memory may for example be the result of post-traumatic shock which arises in X as a defence mechanism to protect

him from the unpleasantness associated with the recalling of the gruesome events.”

[40] Now, armed with this understanding of the law, I will proceed to analyse the evidence in this matter. The evidence of Lovisa Reinholdt and Justina Simon that the accused expressed the intention to kill the deceased was not shaken in cross-examination, nor has it been contradicted by any other evidence led in the trial. They were very satisfactory witnesses in every respect. Reinholdt even gave evidence which was not complimentary of her deceased husband, such as what appears to have been his reputation for violence, and the fact that he on occasion assaulted her with a panga. Because of their affinity to the deceased, Mr Basson has asked me to reject the testimony of Reinholdt and Simon about the alleged death threat uttered by the accused before he met the deceased on the day of the killing. I do not share that view. What strengthens their version is the fact that, according to Reinholdt, the threat was preceded by reference to a complaint laid against the accused by the deceased. This shows to me that the accused harboured anger towards the deceased at the point in time. The fact that, in the case of Reinholdt, she says the accused said he will kill the deceased while Simon says he used an idiomatic Oshiwambo expression, is also neither here nor there. The message remains the same and there can be no doubt about what was

intended. In fact, it displaces any possibility that these two witnesses rehearsed their evidence.

[41] Central to the accused's case is the suggestion that the deceased (not he) was the initial aggressor, and that he initially acted only to ward off a murderous attack on him by the deceased. That version cannot be reasonably possibly true for the following reasons: As I found, the accused was out looking for the deceased in order to kill him. When the two met, according to the evidence of Detective Sergeant Erastus Kamati, corroborated by the two minor witnesses and in fact admitted by the accused (which I accept as the truth beyond reasonable doubt), the deceased was retreating pursued by the accused after they met up. It is not in dispute that the accused had two dangerous weapons on him at the time. I can come to no other conclusion than that the deceased must have been in fear for his life and would in no doubt have been perfectly entitled to act in private defence in accordance with the principles of the law that I set out earlier. The uncontested evidence too is that the weapon used to kill the deceased belonged to the deceased. The accused's weapon fell at point "D" as shown on the sketch plan - a distance from where the deceased was killed and was in fact found. What this means is that the accused had taken the panga belonging to the deceased from him

(when the deceased was unarmed) and the fatal blow or blows were inflicted.

[42] I am satisfied beyond reasonable doubt that the accused was not in any way acting in private defence when he killed the deceased. In fact, on the accused's own version, it was the wound to the axilla which was inflicted in self defence. The issue is whether he suffered a non pathological incapacity of such kind as to deprive him of the criminal intent necessary to have committed the crime charged? Quit clearly, the accused was angered by the fact that the deceased went to report him to the authorities as a result of the fact that he had come to cause some trouble at the deceased's house in August 2005. It is difficult for me to say, on the evidence, what the cause of his going to the deceased's house was at that point in time. The accused suggests that it was as a result of a further report that he had received from the wife of the deceased that the adulterous relationship was continuing. But as I already stated in summarising the evidence, there is evidence which points to the fact that an intimate relationship did not exist between the accused and the adulterous wife at that point in time. On the evidence, he in fact lived with another woman. And as I earlier stated, that throws grave doubt on the depth of emotional hurt he must have felt about the adulterous relationship.

[43] The defence of non-pathological incapacity cannot be had for the mere say- so of an accused person. There must be cogent evidence revealed during the evidence before a Court can find such a defence in favour of an accused person. The reason is obvious: it is such an easy defence to put forward and one it would be very difficult for the State to disprove; yet it remains the State's duty to disprove it beyond reasonable doubt if the evidential foundation for it has been laid.

[44] On my interpretation of the evidence, the accused relies on the following as the evidential foundation for the defence in the present matter: The adulterous relationship between the wife and the deceased which he never saw himself and became aware of through rumours circulating, but eventually owned up by the deceased after being exposed by the deceased's wife. When it happened in 2003 he was not in the village. The headman of the area got involved and the matter was settled and the deceased compensated the accused. On the accused's version, the payment of compensation was evidence that the deceased regretted breaking up his home, and he accepted that. The wife who had left the village and the common home since the adultery then returned although not to the

common home. The former wife upon return stayed at his aunt's house while in the meantime he lived with another woman whom he described as his second wife. He never forgave the deceased for breaking up his home,

and, subsequent to the initial adultery being exposed and settled as aforesaid, he again learned from the wife of the deceased that the deceased had again visited the deceased's wife at the house of the aunt. I have already expressed grave doubt about this. Before the killing he spoke to the deceased about the adulterous relationship, and the matter was settled and the two drank what was called a traditional 'whisky' together.

[45] After this visit the deceased laid a complaint against the accused with the traditional authorities and that complaint was pending on the 3rd of September 2005. The accused never really forgave the deceased for breaking up his marriage when, by off chance according to him he met the deceased near headman Ndailikana's homestead on 3rd September 2005, and asked him 'why are you forcing my wife if you have your own wife?' (The curious thing about this is that on the accused's version the matter was settled.) Be that as it may, when he thus asked the deceased the latter raised his panga and cut him on the lower neck. He then asked the deceased who was retreating still facing him, 'why do you

cut me with a panga when you are the one who slept with my wife?’ Some scuffle ensued and he thrust his panga at the deceased but missed and the panga fell. He then stabbed the deceased with a traditional knife and dispossessed the

deceased of his panga and from that point onwards remembers nothing until he got home and realised he was carrying the head.

[46] On the accused’s version in-chief therefore - although he was unable properly to explain it to the Court when the latter questioned him, the last thing he remembers is when he dispossessed the deceased of the panga. He cannot therefore remember how the cutting off of the head happened.

[47] It is common cause that the cause of death was the severing of the head from the body of the deceased. Under questioning the accused confirmed that he in fact met the deceased’s wife and Reinholdt at the cuca shop where and when they say he met them, although he denies he uttered the death threats against the deceased. It is also clear that he met up with the deceased after he met these ladies. The questioning of the accused made it clear that he is able to recollect that when he came to the cuca shop with the severed head of the deceased, those present there ran away. As the

evidence has shown he was even able to recollect exactly where these people stood, i.e. next to a water place (or a tap) near the cuca shop. He was also able to recollect that the people must have run away from him because of the head he was carrying; and he was able to recollect that at that point he was going towards his house which was not far from

the cuca shop. This, in sharp contradiction to his foundational version that it was only when he got home that he realised that he had

a head in his hand and that, as he put it, he must have caused trouble to the deceased.

[48] I am compelled by the weight of the evidence in this case to accept the State's version, established beyond reasonable doubt, that the accused's version of complete memory loss due to anger, when the killing took place, is a fabrication. I reject it not only as not reasonably possibly true, but false beyond reasonable doubt. I observed the accused in the witness box and he made a very poor impression on me. He had a stock response whenever any uncomfortable question was asked: that he could not remember directions and was in a confused state until he appeared at the pre-trial hearing in Windhoek. He was able, however, to give very clear details about the events, people and other incidents during the

period after the killing and his appearance at pre-trial in Windhoek. The record is replete with examples of those and some of them I have already referred to and do not find it necessary to regurgitate here.

[49] I need to mention only that he was able to remember who arrested him, where he slept, that he ate on the night of the arrest, and that at some point he was taken to Windhoek. What is more, not

only was his evidence contradictory and unsatisfactory as to how he became aware that the weapon used to decapitate the deceased belonged to the latter, but he made it clear that he was aware of that fact immediately after the killing: on his version in fact, when he came back to the body of the deceased with the head. That cannot support his general refrain that he was in a confused state after the incident until he appeared at pre-trial in Windhoek.

[50] It is not clear from the accused's version at what point he says he snapped. It cannot be expected of the State to do no more than prove that before and after the attack on the deceased, the accused appeared no different from his normal self, unless there was other cogent evidence which the State would have been specifically expected to deal with; such as any evidence of previous emotional

breakdown laying the foundation for a sudden emotional breakdown. The accused's own version initially was that just before the cutting off of the head must have taken place, he got a black-out and only came to his senses when he got home and found himself holding the head of the deceased; yet he testified later on that when he came to the cuca shop with the head people started to run away and at that stage he realised that they were running away from him because of the head he was holding. The accused's version that he snapped just before the killing and only came to his senses when he reached home is thus not

only reasonably possibly true, but false beyond reasonable doubt and stands to be rejected.

[51] What adds to the accused's woes is the fact that at no stage prior to it being raised in this Court did he ever give any indication that he had a complete loss of memory due to anger at the time, or just before, he killed the deceased. He always maintained that he acted in self-defence after confronting the deceased about the affair and then being struck first by the deceased. The defence of non-pathological temporary incapacity is therefore an afterthought; and I reject it.

[52] In the result, Mr Joseph Hakoonde Ngoya, I find you guilty of the crime of murder with *dolus directus*.

DAMASEB, J.P.

ON BEHALF OF THE STATE

Mrs

Miller

Instructed by:

Office of the Prosecutor-

General

ON BEHALF OF THE DEFENCE

Mr

Basson

Instructed by:

Directorate of Legal Aid