CASE NO.: CC 12/2011

IN THE HIGH COURT OF NAMIBIA:
NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

In the matter between:

THE STATE

and

BERNARD MAFENYEHO LIFATILA

CORAM: LIEBENBERG, J.

Heard on: 22 – 24; 29 – 30 May 2012
Delivered on: 05 June 2012

JUDGMENT

LIEBENBERG, J.: [1] The accused, an adult male, stands charged with murder and defeating or obstructing or attempting to defeat or obstruct the course of justice, both offences read with the provisions of the Combating of Domestic Violence Act.[1] In respect of count 1, it is alleged that the accused unlawfully and intentionally killed Silky Nasilele Simubali by assaulting her, subsequently dying of her injuries. As for count 2, it is the State's contention that the accused thereafter performed certain acts and made false utterances regarding the assault perpetrated on the deceased, knowing same to be false. By so doing, it is contended, he knew or foresaw the possibility that his

1 Act 4 of 2003

conduct may frustrate or interfere with police investigations into the death of the deceased; that physical evidence may be destroyed in the process; and that his conduct may protect him from prosecution.

[2] The accused is represented by Ms *Mugaviri* while Mr *Shileka* appears for the State.

[3] The accused pleaded not guilty to both charges and in his plea explanation raised private defence in respect of the murder charge; whilst on the second charge he explained that the false reports about the deceased having been attacked by unknown men was made at the insistence of the deceased. He admitted having stabbed the deceased with a kitchen knife once on the neck and twice on the arm, but specifically denies having inflicted any further injuries to the deceased. He further denied having acted with the intention to kill. It is neither disputed that the accused and the deceased were co-habiting and lived together in a relationship in the nature of marriage although not married. They are also having a child together. Hence, for purposes of the charges the accused is facing, the Combating of Domestic Violence Act makes plain that a domestic relationship existed between them at the time the alleged offences were committed.[2]

The facts

[4] It seems common cause that the deceased, when brought to the Katima Mulilo State hospital on the morning of 19 August 2008, was seriously injured

2 See s 3 (1) of the Act for the definition of a domestic relationship.

and upon admission diagnosed by Drs Matos and Bwalye with stab wounds in the chest, abdomen, face and both upper limbs. On examination it was found that the patient had a deep wound in the right side of the neck[3]; another deep wound on the right/back side of the abdomen; open wounds on the right and left forearms; and three wounds in the face. An emergency operation was performed (laparotomy) during which two perforations in the small bowel and one in the ascendant colon were found and sutured. The other lacerations were also sutured. Due to the depth of the neck wound which was bleeding actively, it was suspected that the big vessel (main artery) in the neck could have been damaged. Because conditions at Katima Mulilo State hospital were not conducive to attempt an exploratory examination on a wound of that nature; and the required instruments and equipment neither available to do vascular surgery, it was decided to transfer the patient to Rundu State hospital, which was equipped to have an operation of that nature performed at that hospital. The deceased was accordingly transported to Rundu by ambulance that same evening.

[5] At Rundu State hospital the deceased was examined by a surgeon, Dr Yuri Yangazov, and found to be in a critical condition. She was operated on the same day (20 August) due to a condition called hemoneumothorax[4] that developed. In his report (Exh 'E') the doctor describes the patient's post operative condition as follows:

"Post operative period complicated by developing empiema pleura

3 This wound was at the base of the neck and found to have penetrated the chest cavity, hence referred to as a chest wound.

4 Blood and air in the chest cavity.

both sides. Esophageal and pleural fistulas, generalized sepsis duo to seropositive status. On 18/09/2008 gastrostomy was performed. Patient received intensive treatment but not responding for (sic) it and 20/09/2008 certified death." (sic)

When elaborating on this report during his testimony, Dr Yangazov said that the patient, a few days after the operation, developed septic complications on both sides of the chest (pleural cavities) forming puss that had to be drained. This was an unexpected development and because the patient did not adequately respond to the treatment, it was decided to determine the patient's status as it was suspected that she might be HIV+. Tests were done and the results proved positive. The patient went into a septic state and according to the post mortem report the cause of death was due to sepsis of the chest.

[6] The findings made and conclusions reached on the medical condition of the deceased by both Drs Yangazov and Bwalye were not challenged during their respective testimonies by the defence in any significant way; neither was it shown to be unreliable through other evidence presented. When asked whether or not the deceased would have survived her injuries without medical intervention, Dr Yangazov replied that, due to the neck injury there was continuous bleeding and air entering the pleural cavity at the apex where it punctured the lung; and that the person therefore would not otherwise have survived. As for Dr Bwalye, he was of the view that, had they not performed a laparotomy at Katima Mulilo during which the two perforations of the bowels were sutured, then the patient would not have survived the transfer to Rundu

State hospital. It seems to me that in the absence of evidence showing otherwise, that it can safely be accepted that the injuries inflicted to the person of the deceased were of such serious nature that, without medical intervention, she would not have survived.

[7] Attempts by the prosecution to have two statements allegedly made by the deceased, first to her step-mother, Evestina Simubali on or about the 26th of August; and another statement made to Sergeant Peggy Munangisa of the Woman and Child Abuse Unit, stationed at Rundu, admitted into evidence as exceptions to the hearsay rule, were abandoned as counsel conceded that the evidence the State was able to present, would not satisfy one of the requirements set out in *S v Qolo*[5] namely, the deceased's definite expectation of death. The evidence of these two witnesses otherwise, adds no value to the State case.

[8] Detective Sergeant Susan Sidakwa, a member of the Namibian Police and attached to the Department of Internal Investigation, is the investigating officer. She testified that during 2008 the accused was a member of the Namibian Police and attached to the Special Field Force. On 28 August 2008 a report was received from Rundu State hospital upon which a certain Inspector Simbyayi travelled to Katima Mulilo and effected the accused's arrest. Sergeant Sidakwa became involved in the investigation when she accompanied Detective Sergeant Mafwila of the Scene of Crime Unit, Inspector Simbyayi, and the accused to the latter's home. There the accused

5 1965 (1) SA 174 (AD) at 179A-B

made certain pointing out to Detective Constable Mafwila who photographed the scene and subsequently compiled a photo plan with explanatory notes, same handed in as evidence by agreement (Exh 'D2'). It is not disputed that the points depicted in the photographs in the photo plan were pointed out by the accused on the scene, together with the accompanying explanations as set out in the key notes. In fact, it is the accused's case that several additional points he had pointed out to the officers, were not photographed and included in the photo plan handed in.

[9] Sergeant Sidakwa further testified that she formally charged the accused during which she completed a warning statement. The accused, during pre-trial proceedings, intimated to the Court that he would object to the admissibility of the statement during the trial on grounds, firstly, that his rights to legal representation were not duly explained to him; secondly, that the content of the statement was not read back to him, as was legally required, before he was asked to append his signature to the statement. Besides these objections, the Court was informed that the content of the statement is disputed *"in that what is recorded thereon (sic) is not what the accused informed the police officer who recorded same".* However, during the trial defence counsel informed the Court that she received "further instructions" that the accused no longer disputes the admissibility of the statement on the basis that his rights to legal representation were not duly explained to him; and that there was no objection to Sergeant Sidakwa testifying on the content of the statement. The accused clearly changed course on this point and no explanation was forthcoming for this turn-about. The content of the warning

statement (Pol 17) will be discussed in more detail later herein.

[9] Sergeant Sidakwa said she communicated with the accused in his vernacular (Totella) and that they understood one another. Further, that the accused understands English as he told her that he can also read English[6]. Although she acted as interpreter when reducing the statement to writing, the accused was reading what was recorded as she progressed. He had briefed her before she started writing and where she would not understand what he was saying, she would put clarifying questions to him. After she had finished, she handed him the statement to read on his own and after he had indicated that he was satisfied, he appended his signature to the document. I interpolate to say that at the time the warning statement was obtained (28 August) the deceased had not yet died (20 September) and that the accused was charged with (i) attempted murder; and (ii) defeating the course of justice. When asked in cross-examination whether the accused was asked in which language he would prefer making the statement, Sergeant Sidakwa answered in the affirmative, saying that accused chose to speak Totella which, according to the witness, is 'like' the Subiya language, her vernacular. The evidence on this aspect of the witness' testimony was not challenged under cross-examination, though the accused disputed the similarity of the two languages during his testimony. The warning statement was received into evidence by agreement; however, the content thereof is in dispute and to what extent, will become apparent in the course of the judgment.

6 Before the trial commenced defence counsel informed the Court that the accused understands English, but would prefer proceedings to be interpreted to him, allowing him to follow same properly.

[10] The gist of the statement is the following: On the 28th day of August 2008 the accused voluntarily made a statement to (then) Constable Sidakwa on charges of (i) attempted murder; and (ii) defeating the course of justice. After his rights were duly explained to him, he elected to make a statement which was reduced to writing. The statement reads that on the evening of 19 August the accused and the deceased were at home and already in bed when an argument between them started over a text message he received from a friend. The deceased got out of bed and moved to the kitchen area of the room where she perched on a chair, from where she started insulting the accused and threatened to kill him. He stood up, took a small knife from amongst the dishes and stabbed the deceased several times on her body. The reason, he said, was because he thought she might be having something in her hand. Because it was dark he was unable to say how many times he had stabbed her. She was bleeding and asked the accused to take her to the hospital. They retired for the night and in the morning he took her to hospital. When he came to visit her the next day he learned that she was transferred to Rundu and he also left for Rundu still that same day.

[11] I have already alluded to the handing in by agreement of the photo plan and explanatory key, and that the accused has no objection to it forming part of the evidential material. It is common cause that those points depicted in the respective photographs were pointed out by the accused and the accompanying explanatory notes made in respect of each, were also not disputed.

[12] In respect of count 2, evidence was presented about reports made by the accused to the taxi driver, Mr Masene, and persons at the Katima Mulilo hospital concerning the cause of the injuries inflicted to the person of the deceased. The nature of the report made to Masene is dealt with under the accused's evidence *infra.* Bernard Matengu worked as a porter on the day the deceased was brought in and he overheard the accused saying that the deceased was stabbed by some boys at Kasheshe village. Alphonsina Situnda is a nurse at the hospital and received the deceased when brought in. She noticed fresh stab wounds on her body and asked what had happened, to which the deceased explained that she was attacked when going to the bush (to relieve herself); whereafter the accused added that the deceased was attacked by two boys and that he went to recue his wife.

[13] Accused was the only witness for the defence and his evidence amounts to the following:

On the evening of 18 August 2008 the accused, together with the deceased and their baby, were at home when an argument started between the accused and deceased about a text message sent to the accused on his cellular phone. The deceased took his phone and hit him with it on his chest, whilst uttering threats towards him. He gave different accounts in his evidence in chief about what happened next. He first said that, *after* the argument the deceased took the baby, locked up the house and left only to return at around 22h30 when she started attacking him. He then changed this version to say that, during the argument, he was hit with the phone whereafter he went to

sleep. The deceased was with him in bed when she rose, and whilst he was still in bed, he came under attack from the deceased who hit him first with a radio, and then with a small table of which one leg broke off in the process. He managed to cushion the impact of the blows by covering himself with the blanket. On a question by his counsel whether the attack on him followed *immediately* after the argument when he was hit with the phone, he answered in the affirmative. The accused's evidence on the events leading up to where he came under continuous attack, is not at all clear and conflicting as to whether or not the deceased first left the room and only returned; and whether both of them were in bed prior to the assault perpetrated on him.

[14] He said he got out of bed and was trying to put on his trousers when the deceased hit him with the blunt side of an axe in the ribs. He managed to push her away and when he tried the door, he realised that it was locked. The deceased then tried to hit him with a stick but he blocked the blow with both his arms, causing him to fall down. The deceased next took petrol from a container inside the room which she threw into his face, blinding him. He washed his face with water in a basin (also inside the room) as his eyes were burning. He was then hit on the side of his head with a pot and when the deceased again tried to pour petrol over him and her ready to strike a match, he picked up a knife '*from the dishes*' and stabbed her. He said he throughout tried to get out of the room but was unable to do so, as the door was locked; this made him realise that he had to defend himself. They were about 30cm apart and he stabbed her once on the *left side* of the neck and twice on the left *upper* arm. He said he stabbed the deceased *after* he was hit with the pot. He had no intention of killing her and could not see on which part of her body he was stabbing her, because it was dark inside the room. Immediately after he stabbed the deceased started apologising and the fighting stopped.

[15] However, and still in his evidence in chief, the accused gave a different account of events which led up to the deceased ending her assault on the accused. He also said that *after* he had stabbed her, she *picked up the stick* and when trying to hit him, he dodged and she then fell onto a bicycle, hurting herself in the process on her abdomen. She stood up and said they must sort out their problems amicably and both sat down on the bed. Deceased then lit a candle.

[16] When asked by his counsel to explain the conflicting versions, accused narrated yet another version, different to what he had testified before. He said that after he stabbed the deceased, she *wanted to go and pick up a stick* to hit him with, but then fell onto the bicycle, hurting herself. The accused proffered no acceptable explanation which explained these discrepancies in his testimony.

[17] Accused said the deceased did not receive medical attention that night for the injuries she sustained, besides cleaning the wounds herself with warm water. They spent the night in the room and the following morning he contacted Mr Masene, who transported them to the Katima Mulilo State hospital. On the way he told Masene that his wife *had followed him to work*

and that she was attacked on the way. Accused admitted that when he told Mr Masene this, he *knew* that he was committing an offence, but that he did not do so 'out of his own free will' as the deceased had told him to say this and he was merely following her instructions. I interpolate to remark that this differs markedly from what he and the deceased agreed on the previous evening after the incident namely, that she would tell people that she went to relieve herself during the night and was then attacked – the latter a completely different version from what he told Masene, and clearly not in compliance with the deceased's 'instructions'. Whether the deliberate lies of the accused to members of public and nursing staff at Katima Mulilo hospital, pertaining to the cause of the injuries inflicted on the deceased, constitute an offence, remains to be decided and I shall return to this vexed question later.

[18] Accused confirms that the deceased was admitted and later transferred to Rundu State hospital where he followed her the following day and stayed on until he returned to Katima Mulilo on the 24th of August. He was arrested on the 28th. He denied having tampered with the scene by cleaning it in any way, as alleged, and said he had left it like that up until the police came to his house.

[19] Regarding his warning statement he said that he and Sergeant Sidakwa were unable to communicate as she was speaking Subiya while he used the Totella language – in his view, two completely different languages – and that they could understand one another 'a bit'. He said she explained to him in Subiya what was recorded but that he did not understand her well. She then gave him the statement to read but there were certain aspects thereof that he did not comprehend. Although he brought this to her attention and also informed her that his statement was incomplete in that she omitted to record certain things he had narrated to her, she just told him to sign and he obliged. When the Court enquired from him whether he already *then* realised that the statement was incomplete, he changed course and said he only realised this at Court and that he did *not* bring it to the investigating officer's attention the time he signed the statement. Regarding the pointing out made to Constable Mafwila, the accused said he only pointed out those points as depicted in the photographs as requested, and nothing else.

Submissions by the defence

[20] Ms *Mugaviri* submitted that between Dr Bwalye at Katima Mulilo hospital and Dr Yangazov at Rundu State hospital, there is a contradiction in their evidence as far as it concerns the alleged injuries to the face of the deceased when admitted at the respective hospitals (two days apart). This argument can summarily be disposed of. The report completed upon the deceased's admission at Katima Mulilo reflects that there were stab wounds, amongst others, in the face. When Dr Yangazov was asked in cross-examination whether he had seen any wounds in the deceased's face, he replied in the negative. Although one might expect of him to have observed the same injuries to the deceased's face as reported on by Dr Matos the previous day, I do not think that it can be said that therefore, there were none. His evidence that he did not *see* any wounds does not *per se* mean that there

were no injuries, as he simply could have failed to make any observation in that regard for acceptable reasons, for example, that he focussed his attention on the neck injury, the cause for having the patient transferred to Rundu State hospital. Besides the injuries to the face having been noted upon admission, Mr Masene, whilst driving the deceased to the hospital also observed a wound on the deceased's mouth, which prompted him to enquire about the cause thereof.

[21] From the evidence adduced I am satisfied that there were visible wounds on the deceased's face upon her admission in Katima Mulilo and that same must still have been visible the following day; notwithstanding that these were not observed or testified on by Dr Yangazov.

[22] Counsel further submitted that, had the deceased been provided with the necessary and proper care regarding the neck injury at Katima Mulilo State hospital, she would have had a better chance of survival if the wound had been examined immediately; and that her subsequent death could have been avoided. It was contended that there was medical negligence on the part of the State by not having adequate care facilities available at Katima Mulilo State hospital. In her oral submissions Ms *Mugaviri* argued that this constituted a *novus actus intervenience*. On a different front it was argued that the Court should accept the accused's version as being reasonably possible and find that he had acted in self-defence when stabbing the deceased. Also, that the content of the warning statement be disregarded, because of lack of communication between the accused and the investigating officer who took down the statement.

[23] It appears to me that once the question of the unlawfulness or otherwise of the accused's actions has been decided, depending on its

outcome, the need to determine whether or not there was a subsequent intervening act on the part of someone else, would become superfluous. It is for this reason that I shall first deal with the submissions last made by counsel.

Evaluation of the evidence

The murder charge

[24] The State case, as far as it concerns the murder charge, entirely relies on circumstantial evidence, except for the self-incriminating statements made by the accused to the investigating officer, if same were to be found admissible in evidence, as it would constitute direct evidence, implicating the accused.[7] The approach of the court with regard to circumstantial evidence is that it is *"not [to] take each circumstance separately, and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn".*[8] See also *Kenneth Siambango v The State.*[9] It is with these principles in mind that the Court approaches the evidence presented in this case.

The injuries

7 See *S v Gerson Uri-Khob,*(unreported) Case No. CC 58/2007 delivered on 21.01.2009 *per* Manyarara, AJ; followed in *S v Johannes Mushishi,* (unreported) Case No. 07/2010 delivered on 21.06.2010.

8 *R v De Villiers,* 1944 AD 493 at 508

9 Unreported Case No CA 98/1999 delivered on 23.01.2002

[25] The accused admitted having stabbed the deceased with a knife once on the neck and twice on the same arm, all of which on the left side of the body. He is clearly mistaken as to where on the deceased's body these injuries were inflicted because the medical evidence shows that there was a stab wound on the *right* side of the neck (at the base) as well as wounds on both the arms, which evidence was not disputed. In addition, there were stab wounds to the face and the abdomen. Although not admitted by the accused, the latter injuries could only have been sustained during the altercation between the accused and the deceased, and it seems to me, that the accused suggests that these injuries were sustained when the deceased fell onto the bicycle. The injury to the abdomen was a penetrating wound which perforated the small bowels at two places. Given the nature of the injury, it seems to me unlikely that it could have been sustained in the manner described by the accused. Firstly, it was caused by a sharp object and secondly, it would have required the application of moderate force which, in my view, would be lacking if a person loses his/her balance and falls onto a bicycle. I do not think it is impossible to sustain an injury of this kind when falling onto a bicycle; I consider it unlikely that it would cause penetrating wounds into the abdomen, given the slender build of the deceased. In the present circumstances the accused testified that he had stabbed the deceased three times, but was unable to see *where on her body* she was hurt because it was dark inside the room. However, the warning statement reads that the accused was unable to say exactly *how many times* he had stabbed the deceased because it was dark and could only tell that it was 'several times'. If the accused, on his own version, was unable to see on which part

of the deceased's body he was stabbing due to poor visibility, then it seems to me that he is in no position to say that he did *not* inflict the injuries to the abdomen and face of the deceased. He is clearly not only wrong as to the position of the respective injuries on the deceased's body, but also as to the number of times he stabbed the deceased with the knife. For reasons that will become apparent during the course of the judgment, I do not believe the accused when he says that the deceased fell onto the bicycle and hurt herself in the process.

[26] In the present circumstances, and after applying the "two cardinal rules of logic",[10] the only reasonable conclusion this Court can reach from the proved facts is that all the injuries subsequently found on the deceased's body, were inflicted by the accused when he stabbed her with a knife. I accordingly so find.

The accused's defence

[27] The accused's main defence is that he had acted in private defence and in his narrative to the Court, he describes a protracted incident where he came under attack from his 'wife' (partner) and when he, in the midst of a heated argument, was hit with his cellular phone on his chest. He described to the Court a brutal attack perpetrated by the deceased on him during which he was hit with several objects and petrol being poured over him in order to set him alight. It was only when the deceased tried to pour petrol over him for a second time that he realised that she was serious and that he had to defend himself. He then got hold of the knife and stabbed her. He also

10 *R v Blom*, 1939 AD 188 at 202-3

proffered some explanation as to how the deceased could have sustained some of the injuries not inflicted during the stabbing. According to the accused all this happened in darkness or in conditions where visibility was so poor that when the deceased stood in front of him 30cm away, he could only distinguish a dark figure.

[28] I have already alluded to the conflicting versions in the accused's testimony pertaining to the sequence of events that led to the stabbing of the deceased and what transpired immediately thereafter. He gave conflicting versions about the deceased having left the house after the quarrel; compared to his evidence that the assault immediately followed the argument. Also regarding the fight having come to an end the time he stabbed her; compared to her thereafter still wanting to hit him with a stick but missed, causing her to lose her balance and fall onto the bicycle. It was only thereafter that she ended the attack. Regarding the latter, he also informed the Court that she had swiped at him with the stick but missed, causing her to fall onto the bicycle.

[29] When considering this narrative against the background where it, on the accused's version, happened in almost complete darkness, I find it surprising that the accused would have been able to make the observations testified on in so much detail. For example, he would hardly have been able to see that he was hit with the blunt side of an axe; neither, when a stick was swiped at him and he being able to block the blow with both hands. Amidst everything he found water and a bowl in which he could wash the petrol from

his face. It was particularly when pressed to explain where on the body he stabbed the deceased; or where she had hurt herself when falling onto the bicycle, that the accused reverted to the scene having been shrouded in darkness, and his inability to make proper observations in these circumstances. The picture painted by the accused is one where he is the victim of a merciless attack on him during which he did not defend himself in any way, up to the point when he decided to pick up the knife and stab the deceased. His passivity throughout the attack he explains by saying that he thought she would stop – this despite an increasing intensity in the assault as it progressed.

[30] In the particular circumstances where the accused, in all probability, would have been able to successfully defend himself against the deceased with less far-reaching consequences, for example, by simply overpowering her (already at an early stage of the attack), I find this submissive conduct on the part of the accused most peculiar and unlikely. When considering in isolation the accused's narrative about the assault perpetrated on him and his passivity during the attack; his inability to give a clear and coherent account of exactly what transpired, whilst regard is being had to the contradicting versions on certain points referred to *supra*, then it appears to me, that the accused not only exaggerated the alleged attack on him whilst at the same time down-playing his actions during the incident, but also that he fabricated evidence in order to give credibility to his version; thereby justifying his actions – even more so when his testimony is compared with what is recorded in the warning statement, to which I turn next.

The warning statement

[31] As I have mentioned earlier, the accused gave different instructions to his counsel during the trial pertaining to the explanation of his rights, which he now claims to have fully understood when explained. It further appears that the complete content of the statement is no longer in dispute and is now admitted to be (partly) of his making; but that some things he had said were not recorded, whilst others are incorrect and do not correctly reflect what he said when making a statement. When the Court enquired from him to what extent the statement was incorrectly recorded, he said it was where it reads that he had stabbed the deceased 'all over her body' and that she was sitting on a chair when he stabbed her. As for the rest, he said, this was correct. The statement does not read that the accused stabbed the deceased 'all over her body', but rather *"I stabbed her on her body several time but I don't know whether how many times because it was night time and it was dark" (sic)*. It is not disputed that the accused stabbed the deceased with a knife several times as he admits three independent stab wounds. What has been excluded from the statement according to the accused is what amounts to his defence, namely, that he came under attack and the manner in which it happened. The reason for this, he says, is because of poor communication between the accused and the investigating officer; which evidence is disputed by Sergeant Sidakwa.

[32] Sergeant Sidakwa was adamant that, despite the difference in their vernacular, she was able to properly communicate with the accused and *vice versa*. Although the accused can speak and read English, he gave his statement in Totella and she translated it to English, which the accused was following as he read what she was busy writing down. For reasons to follow, I have no reason to disbelieve the witness on this point of her testimony.

[33] Firstly, Sergeant Sidakwa had worked with the accused since 2003 and one would expect to find that she would be able to say which language the accused could converse in. Secondly, it was only the position of the deceased during the stabbing which, according to the accused, was incorrectly recorded. As for the rest, it was correct. He now admits that his rights to legal representation were duly explained to him; one aspect of taking down a warning statement which usually provides problems because of the legal terminology; something the accused now claims to have fully understood. Thirdly, it is the accused's evidence that he advanced at school up to grade 10 (the former standard 8), and at the commencement of court proceedings it was said that the accused *understands* English, but prefers an interpretation of the proceedings for a better understanding. Fourthly, when the statement was afterwards handed to the accused to read and append his signature, he testified that he informed Sergeant Sidakwa that there were certain things he did not comprehend *and that she omitted to mention some things*. When the Court sought confirmation as to when he exactly realised

that certain things were not reflected in the statement, he changed his testimony, saying that he only realised this 'at Court'. This, however, is contradicted by his own evidence when he later said that he decided to keep quiet about the statement being incomplete, despite him not knowing why the officer failed to write down some of the things he had told her. Lastly, if the accused felt that he was hard done and that his warning statement did not correctly reflect what he had actually told the officer, then he wittingly missed the opportunity, when afterwards taken to the scene for pointing out, to correct the situation and inform the investigating team what transpired, and point out to them those objects (which were all still at the scene) used by the deceased during the assault on him. This he failed to do and when asked to explain why, he said that he was only asked to point out what is depicted in the photo plan. An explanation, in my view, inconsistent with a man who stands accused of committing serious crimes, for which he has a plausible defence.

[34] For the foregoing reasons, and regard being had to the totality of the evidence adduced concerning the warning statement, I am convinced that the content of the warning statement correctly reflects what the accused narrated to Sergeant Sidakwa when she reduced same to writing; and that there is no credible evidence before the Court to find otherwise. In the circumstances I also find the accused's version on this aspect of his evidence improbable.

[35] The accused incriminated himself in the warning statement to the extent that he admitted to having stabbed the deceased several times with a knife in circumstances rendering his actions unlawful. There can be no doubt that, had the accused at the time acted in self-defence as he now claims, then he would have told his accusers so on the first occasion; instead of allowing two opportunities pass to do so.

Conclusion

[36] The Court, when applying the principles set out in *R v De Villiers (supra)* in its assessment of the evidence, and due regard being had to the merits and demerits of both the State and the defence case, as well as the probabilities, then the inescapable conclusion is that the accused's *viva voce* evidence about the insident during which he stabbed the deceased, is not only improbable, but false beyond reasonable doubt. The poor quality of his evidence and the improbabilities it contains, seriously impacts adversely on his credibility. The more probable version of what happened between the accused and the deceased that night seems to lie in the warning statement.

In *S v Nduli and Others*[11] the Court expressed these sentiments in the following terms:

> "A statement made by a man against his own interest generally speaking has the intrinsic ring of truth, but his exculpatory explanations and excuses may well strike a false note and should be treated with a measure of distrust as being unsworn, unconfirmed, untested and self-serving."

[37] Consequently, the accused's evidence about the events leading up to the actual stabbing of the deceased, and him having acted in private defence, is rejected as false beyond reasonable doubt. In the absence of evidence showing otherwise, the only reasonable conclusion to come to is that the stabbing of the deceased was unjustifiable and thus, unlawful.

Intention with which accused acted

[38] The next pertinent issue to be considered is what form of intention the accused had when he stabbed the deceased. In his testimony the accused said that when he stabbed the deceased he lacked intention to kill. The evidence in my view does not prove that the accused had direct intention (*dolus directus*) to kill the deceased; neither can it be deduced from his conduct afterwards. In order to have intention in the form of *dolus eventualis* it must be proved that *"(a) he subjectively foresees the possibility that, in striving towards his main aim, the unlawful act may be committed or the unlawful result may be caused, and (b) he reconciles himself to this*

11 1993 (2) SACR 501 (A) at 505g

possibility."[12] Applying the aforementioned principles to the present facts, the Court must decide whether the accused, when striving towards his main aim i.e. to stab the deceased, subjectively foresaw the reasonable possibility that death may ensue as a result *and* that he reconciled himself with this possibility.

[39] The accused used a sharp object, namely, a knife approximately 20cm long, to stab the deceased several times on the upper body, inflicting wounds to the face, neck, abdomen and arms. The wounds to the neck and abdomen were penetrating wounds and as such, according to the medical evidence presented, life threatening. Both Drs Bwalye and Yangazov said that without medical intervention the deceased was likely to die as a result of any one of these wounds. It is obvious that serious injuries were inflicted with a dangerous weapon to the upper body of the deceased, an area that would usually be considered as vulnerable in the medical field as well as by the courts. The question is whether the accused was reckless as to whether death may ensue as a result of his stabbing of the deceased? In my view, the answer is 'yes'. By stabbing the deceased as he did, it may reasonably be inferred that the accused *must have foreseen* this possibility but, notwithstanding, continued stabbing the victim, directing blows at the upper body. Thus, the Court is satisfied that the accused had acted with the required intent in the form of *dolus eventualis.*

12 Criminal Law: *CR Snyman* (5th Ed) at 184

Novus actus intervenience

[40] I turn next to consider counsel's submission that the lack of medical treatment at Katima Mulilo State hospital constituted a *novus actus intervenience*. In principle it is assumed that there exists a causal relationship if an act is a *conditio sine qua non* of a result and where there has been no new intervening event (*novus actus intervenience*). Applying this principle to the present facts it is clear that the deceased was hospitalised (whereafter she subsequently died) because of the injuries inflicted by the accused. The accused's act is therefore a *sine qua non* of her death; however, it is the accused's contention that the causal relationship between his act and the deceased's death was broken by a *novus actus* i.e. the lack of medical care at Katima Mulilo State hospital. This view is based on the evidence of Dr Yangazov, as corroborated by Dr Bwalye, namely, that the said hospital did not have the capacity to do an exploratory medical examination of the neck wound, as the hospital is not equipped with a gastroscope; neither does the medical officers at the hospital have the necessary experience to do such examination, something considered to be of high risk. Also, that there are no intensive care facilities at the said hospital. It was therefore decided, telephonically between the said doctors, that it would be best for the patient to transfer her to Rundu State hospital, which is not only equipped with the necessary equipment and facilities, but also has the necessary expertise.

[41] I do not understand defence counsel to say that the deceased was given the wrong treatment when admitted to Katima Mulilo State hospital, for there is no evidence that even remotely supports such contention. The argument that, had the hospital been better equipped, coupled with the required expertise, the deceased could have been treated sooner, thereby

preventing her ensuing death, in my view, is without merit. Firstly, no evidence was adduced showing that, had the deceased been treated differently either at Katima Mulilo or Rundu hospitals, then she would have survived the assault. On the contrary, according to the medical evidence adduced, the deceased was given the correct procedures at both hospitals and received the right treatment from which she was expected to recover; had she not developed septicaemia. Another factor that adversely impacted on the recovery of the deceased was the patient's HIV status. Secondly, I am unable to see how the lack of specific equipment and expertise at a hospital could possibly constitute a *novus actus* interrupting the chain of causation. The injury to the neck was simply too serious to even explore same at Katima Mulilo; hence the decision to have the patient transferred immediately after she came out of theatre. No time was wasted to effect the transfer and from the evidence presented, it seems to me, that given the circumstances, the deceased received the necessary medical treatment available.

[42] Consequently, the Court is convinced beyond reasonable doubt that there was no *novus actus interveniens* and that the accused's act of assault was the direct cause of the deceased's death; therefore he stands to be convicted on the charge of murder.

Defeating or obstructing or attempting to obstruct or defeat the course of justice

[43] I now turn to count 2. According to the learned author *Snyman (supra)*, the crime of defeating or obstructing the course of justice *"…consists in unlawfully and intentionally engaging in conduct which defeats or obstructs the course or administration of justice".*[13] It is not disputed that the accused made more than one false statement to others, knowing same to be false. That these statements were intended to mislead those to whom it was made seems obvious. During his testimony the accused admitted that his conduct constituted an offence when he said: *"I indeed knew that I was committing an offence, but did not do so by my own free will as I was told by the deceased to do so and I was just following her instructions".* This notwithstanding, the

13 At 338

Court must decide whether the accused's misleading reports indeed constituted an offence.

[44] It will suffice if shown that the accused subjectively foresaw the possibility that his conduct, in the ordinary course of events, might have led to a prosecution or an investigation by the police. There can be no doubt that an investigation into the assault of the deceased – on allegations that she was attacked by unknown persons – would have been investigated if reported to the police and that the false information provided by the accused was likely to have frustrated the investigation. However, in this instance the accused did not make a false report to the police, but to a member of the public (a taxi driver) and medical staff at the hospital. It is the State's contention that it was these acts i.e. the making of false reports, which constitutes the crime of obstruction or defeating the course of justice, or attempting to do so. Whereas these reports were not made to a police officer in an investigation of a crime, does it constitute the said offence for which the accused stands charged?

[45] As far as it concerns the false report made to Mr Masene, I do not believe that it constitutes the crime of obstructing or defeating the course of justice or an attempt to do so, as there is no evidence that the making of the report was intended to mislead the police in an investigation. It should not be assumed that Mr Masene intended passing this information on to the police; neither was it his testimony. However, the false reports made at the hospital

to Ms Situnda (a nurse); and to a lesser extent, Mr Matengu, (a porter), seems to me, must be viewed differently because in this instance there is the expectation that these persons were under a duty to report an incident involving crime to the police – something usually done when a victim is admitted to hospital and the staff referring matters in which the commission of a crime was suspected, to the police for investigation. In these circumstances any false information tendered by the accused was likely to be passed on to the police by the medical staff and likely to direct any investigation in that regard, away from the accused; hence, obstructing the course of justice. This much the accused admitted, but proffered an excuse. I shall return to this aspect shortly.

[46] It appears to me that the Court should also consider whether or not the accused, being a police officer himself, was under any *duty* to report the incident to the police, something he clearly failed to do.

[47] The accused and the deceased were involved in a romantic relationship during which he was her (sole) provider. In the circumstances it seems to me reasonable to accept that the accused had a duty of care towards the deceased (and their child) to provide or arrange for medical treatment in circumstances where the deceased was unable to do so herself. Over and above, the accused being a police officer, also had a *legal duty* to report the incident to the police as a crime was committed i.e. an assault on him, during which the deceased got seriously injured. Even if the Court

accepted his version about him coming under attack from the deceased and him having acted in private defence, he was, in my view, still under a duty to make a report, as someone was seriously injured during his defensive act – more so being a police officer himself. I do not believe the accused when he says that it did not appear to him that the deceased was seriously injured, as she was stabbed several times on her upper body, inflicting penetrating wounds. He saw her bleeding from her neck which ought to have been a strong indication that the injury was serious; something he could not simply ignore; more so when asked by the deceased to be taken to the hospital that same night (as per the warning statement).

[48] Though not argued before me, it cannot be contended that it would be unconstitutional to convict the accused for omitting to report the offence, because of his constitutional right to silence. I fully endorse the remarks made in *S v Phallo and Others*[14] where the following appears at 569a-b:

> "It was further argued by counsel for the appellants that a conviction based on the mere failure to report the murder would be unconstitutional: appellants have a constitutional right to silence, and, therefore, mere silence in the form of a failure to report the murder cannot be unlawful. The argument has no merit. By virtue of their position as police officers, the appellants did not have a right not to report a crime committed in their presence. It is far-fetched to suggest that the Constitution has abrogated *en passant* the duty of a police officer to be honest, or to perform his lawful duties and obligations, or to report a crime committed in his or her presence. If such were to be the case, the administration of law and order would fall into an abyss of dishonesty and corruption." [Emphasis added]

[49] It has not been alleged in the indictment that the accused, by failing to report the commission of the offence to the police, committed the crime charged with in count 2. However, the defect in the charge has been cured by the accused's own evidence in that he did not make such report to the police in connection with the incident during which the deceased was fatally

14 1999 (2) SACR 558 (SCA)

injured. In this regard see s 88 of the Criminal Procedure Act, Act 51 of 1977.[15] Thus, the accused cannot be heard complaining of being prejudiced in that respect. Accordingly, the Court is satisfied that the accused's failure to report the commission of the crime to the police constitutes an offence.

[50] However, I am not persuaded that on either proposition the accused could be convicted of the completed offence as he ultimately was successfully prosecuted; thus, he should only be convicted of an attempt to defeat or obstruct the course of justice.

Accused acting under order

[51] Returning to the accused's excuse that he was merely complying with the deceased's instructions when giving out false information pertaining to the cause of her injuries, the general requirements for this defence to succeed, are the following: (a) The order must emanate from a person who is *lawfully* placed in *authority* over the accused; (b) the accused must have been under a *duty* to obey the order; (c) it should not be an order that is manifestly unlawful; and (d) the accused must have done no more harm than necessary to carry out the order.[16] From the aforementioned it is plain that the accused's excuse does not satisfy *any* of these requirements as he merely acceded to a request made by the deceased to which was he not legally bound. There is

15 The section reads: "Where a charge is defective for the want of an averment which is an essential ingredient of the relevant offence, the defect shll, unless brought to the notice of the court before judgment, be cured by evidence at the trial proving the matter which should have been averred."

16 *Snyman* at 139

accordingly no merit in this argument.

[52] In the result, the Court finds the following:

1. Count 1: Murder, read with the provisions of Act 4 of 2003 – Guilty

Count 2: Attempting to defeat or obstruct the course of justice, read with the provisions of Act 4 of 2003 – Guilty

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LIEBENBERG, J

ON BEHALF OF THE ACCUSED **Ms G Mugaviri**

Instructed by: **Directorate: Legal Aid**

ON BEHALF OF THE STATE **Mr. R Shileka**

Instructed by: **Office of the Prosecutor-General**