



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 13/2016

In the matter between:

THE STATE

and

IVAN HOEBEB

ACCUSED

Neutral citation: *S v Hoebeb* (CC 13/2016) [2017] NAHCMD 218 (10 August 2017)

Coram: LIEBENBERG J

Heard: 03 – 07 July; 07 August 2017

Delivered: 10 August 2017

Flynote: Criminal law – Murder, Rape, Robbery with aggravating circumstances and Defeating or obstructing or attempting to defeat or obstruct the course of justice – Accused tendering an admission in respect of the offences to a commissioned officer – Accused not informed of rank of officer – Accused's rights duly explained and understood – Accused tenders statement after rights has been explained –Statement admissible regardless of accused informed of rank of police officer.

Criminal law – Accused admits causing death of the deceased but denies intent to kill – Court rejecting accused's explanation of the circumstances as to how the deceased died – On proved facts court entitled to draw inference that accused committed the assault with direct intent to kill.

Criminal law – Rape (c/s 2(1)(a) of Act 8 of 2000) – Expert evidence that deceased's injuries in the vagina were inflicted after death – Sexual act does not apply to deceased persons – Offence of rape not proved.

Criminal Law – Robbery with aggravating circumstances – No evidence about application of force during taking of cell phone – Offence of robbery cannot be inferred from proved facts – Accused obtained possession unlawfully – Made no attempt to return the cell phone to deceased's family or hand over to police – Inference drawn that accused intended to appropriate deceased's property – Such deprivation constitutes theft.

Criminal law – Defeating or obstructing the course of justice – Accused admitted to having caused the death of the deceased – Inferred that body of deceased set alight to destroy evidence or identity – Neither body or the identity of the deceased destroyed to extent that course of justice defeated or obstructed – Constitutes an attempt to defeat or obstruct the course of justice.

Summary: The accused pleaded not guilty on charges of murder, rape in contravention of s 2 (1) of the Combating of Rape Act 8 of 2000, robbery with aggravating circumstances, and defeating or obstructing, or attempting to defeat or obstruct the course of justice. Regarding the murder count the court rejected the accused's evidence about him and the deceased having been in a romantic relationship at the time. His explanation as to how he came under attack from the deceased and how he during the ensuing struggle grabbed the deceased on both arms before losing his balance and falling over and hitting his head, rendering him unconscious, was equally found untrue. Though accepting that he has brought about the deceased's death by the manner in which he held her whilst unconscious, the court found that it was impossible that the accused could have applied any degree of force to the

airway of the deceased, resulting in suffocation as he claimed. On the evidence adduced it was concluded that the accused murdered the deceased, having acted with direct intent. On the charge of rape, though semen was detected on swabs taken from the deceased's genitalia, it could not be linked to the accused. The possibility can also not be ruled out that it could have been deposited during consensual sexual prior to the incident in which the deceased was killed. The insertion of a sharp object into the vagina of the deceased post-mortem, though constituting a sexual act, does not amount to rape. As regards the robbery charge, the evidence does not prove that any force was applied at the time of taking the deceased's cell phone. This could have happened after the deceased was murdered. The evidence however proves that the accused unlawfully obtained possession of the cell phone with the intention of keeping it, constituting the offence of theft. With regard to the charge of defeating or obstructing the course of justice, or an attempt to do so, it could be inferred from the fact that the deceased's clothing was positioned on or near the face before set alight, that it was intended to destroy the body or identification features thereof. Though the course of justice had not been obstructed in any way, there was a clear attempt to do so.

ORDER

Count 1: Murder – Guilty.

Count 2: Rape, contravening s 2 (1)(a) of Act 8 of 2000 – Not guilty and discharged.

Count 3: Robbery with aggravating circumstances – Not guilty.

In terms of s 260 of Act 51 of 1977 – Guilty of the offence of theft.

Count 4: Defeating or obstructing or attempting to defeat or obstruct the course of justice – Guilty of Attempting to defeat or obstruct the course of justice.

JUDGMENT

LIEBENBERG J:

Introduction

[1] The accused is before court on charges of murder (count 1); rape, in contravention of s 2(1)(a) of the Combating of Rape Act 8 of 2000 (count 2); robbery with aggravating circumstances (count 3); and defeating or obstructing, or attempting to defeat or obstruct the course of justice (count 4). He pleaded not guilty on all counts and elected not to disclose the basis of his defence, and to remain silent on allegations set out in the indictment.

[2] On the morning of 31 October 2015 the lifeless body of the deceased, Elizabeth Ganses, an adult female, was found lying in an open area on the outskirts of the town of Otjiwarongo. The lower part of the body was naked while the clothes covering the upper body were partly destroyed by fire. The buckle of a belt positioned in the neck area is visible from photos handed into evidence.¹ It is however not clear whether it had been used to strangle the deceased with, as the belt was virtually destroyed.

Count 1: Murder

[3] Josef Hoxobeb's testimony is that the deceased was his life partner and they had been living together at Erf 731 Ombili, Otjiwarongo at the time of her

¹ Exhibit 'N' – photoplan.

passing. During the afternoon of 30 October and after he had returned from work that day, he met up with the deceased where after they withdrew money from the bank. From there they went to Rugby Bar in the informal settlement of Tsaraxai-Aibes and separated ways at around 17h00. She had been sending him text messages (SMS's) saying he must come home and at around 02h00 he phoned her on her cell phone. She again told him to come home and during the conversation he could hear the voice of a male person in the background before the phone was switched off. There was no further contact between them. In the morning when she had not returned home and her family also unaware of her whereabouts, it was decided to report her as missing with the police. By then the deceased's body had already been discovered where after he identified her to the police.

[4] When confronted by defence counsel with the accused's assertion that he and the deceased had been in a sexual relationship at the time, Josef said that he had no knowledge thereof as he and the deceased were living together up to her death; neither was he aware that she had been one of the accused's dancers; had that been true, he would have known about it.

[5] On information received from the public, Chief Inspector Snewe and Deputy Commissioner Makwatikizo approached the accused on 03 November 2015, enquiring into his whereabouts on the night of 30 – 31 October. He explained that he visited a bar in DRC (informal settlement) where he met with a lady from Outjo and when the bar closed they moved to another bar. At this bar he was for no reason assaulted by some of its patrons from where he ran home. He did not report the incident to the police. He had bruises on both arms which he explained was inflicted during the attack on him. Subsequent enquiries made at the relevant bar did not confirm the alleged assault on the accused. A search conducted of the accused's residence did not yield any evidence that linked him to the crime, and he was therefore released.

[6] The investigation then shifted to cell phone printouts obtained from a local service provider (MTC) which showed that the accused's SIM card had been inserted into the deceased's cell phone and used as from 04h42 on 31

October. This evidence is not disputed. The accused was arrested and charged on 09 November 2015 on a charge of murder. It is common cause that the deceased's cell phone was subsequently retrieved from a certain Johannes Nanub.

[7] It was put in cross-examination to Makwatikizo that the accused denies having told the police that he had run home and went to sleep after being assaulted at the bar. However, the officer was adamant that this was the accused's explanation at the time. A further assertion was that the deceased was known to the accused which Makwatikizo countered, saying that neither the deceased's family, nor her partner, had known about the accused by then. With reference to the lady the accused claimed to have met at the bar, he disputes having told the police that she was known to him, only that she was from Outjo.

[8] The day after his arrest the accused was questioned by Deputy Commissioner Khairabeb. After informing him of his rights, the accused elected to give a statement without having a legal representative present. The accused's statement was recounted by Khairabeb as follows:

'Charge me, I did it. Maybe I am cursed. I will also tell the court I was alone. I gave her N\$400 for sex but when her boyfriend called, she wanted to go home. We fought. She had a small pocket knife and I had a big one. I strangled her, raped her, put her trouser on her face and burned it with a cigarette. I took her cell phone and left.'

[9] During oral submissions Mr *Engelbrecht*, for the accused, took issue with the accused's statement made to Khairabeb, submitting that it should be ruled inadmissible for reasons that Khairabeb failed to inform the accused before making the statement, that he is a commissioned officer and that whatever he said would be used against him in a court of law. This argument was countered by Mr *Muhongo* representing the State, arguing that the accused was duly informed of his rights and that he, notwithstanding, chose to give a

statement. From a reading of the record of the proceedings, more specifically the testimony of Deputy Commissioner Khairabeb, the witness's testimony in chief reads that before the accused gave a statement, the officer had warned him in accordance with the Judges' Rules, during which he was informed of the crimes being investigated against him; that he has the right to remain silent but if he wished to say something, it would be reduced to writing and could be used as evidence against him in a court of law. It was further explained that he has the right not to implicate himself, followed by the right to be legally represented during the making of the statement. The accused responded by saying that he did not require legal representation at that stage. This was followed by the statement quoted above.

[10] The explanation of the accused's rights as testified by Khairabeb (and other police officers before him) had not been disputed. This probably explains why the admissibility of statements made by the accused subsequent thereto was not challenged, only the content of those statements. The admissibility of statements alleged to have been made by the accused would depend on whether the accused, being a lay person, was properly informed of his rights and understood the significance of what had so been explained to him. In this instance the accused was informed of his right to remain silent and not to say anything implicating himself, and that his statement could be used as evidence against him. This explanation in my view sufficiently informed the accused prior to the making of the statement of his rights and the import thereof. Whether or not the accused at that stage had been informed that the officer to whom he would be giving a statement is a commissioned officer, in my view, makes no difference. The point raised is accordingly found to be without merit and there is no basis for ruling inadmissible the accused's statement made to Deputy Commissioner Khairabeb.

[11] In view of the statement made to Khairabeb, it was decided to bring the accused before a magistrate in order to make a confession, as same should

not be taken down by police officers. An appointment was made and the accused was brought before a magistrate that same day. In cross-examination it was said that the accused never made any statement to Khairabeb as testified, and that it was he (accused) who insisted on appearing before a magistrate. The witness was however adamant that what he said in his testimony is what transpired and reflects the accused's explanation at the time.

[12] As mentioned, the accused on that same day appeared in chambers before magistrate Shikongo at Otjiwarongo for purposes of making a confession. The admissibility of the statement made by the accused at the relevant time has not been disputed. The gist of the statement is as follows: On Friday 30 October 2015 the accused and the deceased went home and had consensual sexual intercourse where after she told him that she had infected him with HIV. They decided to go to Bar/Club 435 and whilst on the way he asked her to confirm what she had earlier said, which she did. She then started fighting him and during a struggle he grabbed her on the neck and held her (in that grip) for about 15 – 20 minutes *until she stopped breathing*. He let go of her and realised she had no pulse, was not breathing and lay motionless. He thereafter went home. That as far as the so-called confession goes.

[13] On 12 November 2015 the accused appeared in court before the same magistrate on five counts to which he pleaded guilty in terms of s 119 of the Criminal Procedure Act, 51 of 1977. Except for count 4 in which he was required to plead on a charge of violating a corpse, the charges are identical to those for which he is before this court. The record of those proceedings reflects the following:

In count 1 he pleaded guilty on a charge of murder for the unlawful and intentional killing of Elizabeth Ganses (deceased), by strangling her. On the court's questioning pursuant to the provisions of s 121 he admitted having caused the deceased's death by strangulation. Though admitting that he strangled her for about 15 – 20 minutes, he said he did not realise she could

die as a result thereof, and had no intention of killing her. The court then noted a plea of not guilty.

Despite having pleaded guilty on each of the remaining counts, the accused denied his involvement in the commission of the alleged offences where after the court entered pleas of not guilty in respect of each count. Regarding the count of robbery, he explained that the deceased had given her cell phone to him earlier that day to use, and that he did not take it from her by force. On the rape charge he raised the defence of consensual sexual intercourse whilst on the counts of violating a corpse and obstructing the course of justice, he denied his alleged involvement.

[14] It was argued that from the accused's explanations given to the magistrate as well as in court during the s 119 proceedings, it is evident that the accused at all times denied having acted with intent to kill the deceased which clearly shows that it did not come as a mere afterthought. In view thereof, it was submitted, the accused lacked the intention to kill or foresaw such possibility and should therefore be convicted of the lesser offence of culpable homicide. I will return to the element of criminal liability later.

[15] The medical and forensic evidence presented at the trial amounts to the following:

Dr Betancourt is a qualified forensic pathologist who conducted a post-mortem examination on the deceased and noted the main findings in a report received into evidence.² These findings are the following:

- Severe burns located in the face, scalp, neck, upper chest and upper limbs without signs of vitality.
- Infiltrated [haemorrhage] in right occipital region of the scalp.

² Exhibit 'C'.

- Subarachnoid haemorrhage on the back of right parietal and occipital regions.
- Multiple bruising in the neck.
- Tardieu spots observed on the visceral pleurae of the lungs and on epicardium.³
- Systemic venous visceral congestion.
- Laceration of 120mm long and 12mm deep, without signs of vitality located on the back wall of the vagina.
- Bruising on the anterior wall of the uterus.
- Defensive stab wounds on the inside of the 4th and 5th fingers of the right hand and 2nd, 3rd and 4th fingers of the left hand.

As to the cause of death, it was reported to have been suffocation by strangulation.

[16] In amplification of the post-mortem report Dr Betancourt explained that burn wounds to the body and a laceration injury on the inside of the vagina were inflicted after death. Regarding the latter, he said a pointed object like a stick penetrated the vagina for 120mm, causing a laceration of 12mm deep on the back wall of the vagina.

[17] Part of the investigation involved the collection of exhibits from the scene of the crime as well as the deceased's body which were forwarded to the National Forensic Science Institute for forensic analysis. These exhibits *inter alia* included respective rape kits of the deceased and the accused, as well as the blade and handle of a knife found at the scene.

³ Tardieu spots/ecchymoses: subplural subpericardial petechiae or ecchymoses as observed in the tissue of persons who have been strangled, or otherwise asphyxiated. (The Free Dictionary by Farlex).

[18] The blade of the knife (Exhibit 'C') tested positive for human blood and yielded sufficient amplifiable DNA which resulted in a partial profile that cannot exclude the deceased ('Female-1') as a possible contributor to the said profile. As for a swab taken from the knife handle (Exhibit 'D'), it yielded sufficient DNA which resulted in a complete profile that cannot exclude the deceased as a possible contributor to the profile. Two swabs taken from a pair of long trousers seized by the police on 09 November 2015 from the accused's home (Exhibit 'H') yielded sufficient DNA that resulted in a partial profile that cannot exclude the accused as a possible contributor to the profile.

[19] The accused testified in his defence and said in 2004 he put together a dancing group in which the deceased was one of the dancers. Ever since the group broke up in 2008 he and the deceased were in a sexual relationship during which period they were cohabiting. On the evening of 30 October 2015 he met the deceased at DRC Bar where she asked him to buy her beer. He had N\$800 on him of which he gave her N\$500 where after she left. Whilst on his way home during the early hours of the morning he again met with the deceased on the street and she said that she was on her way to his place. According to him they were both drunk. They proceeded to his house where they had consensual sexual intercourse three times. Accused explained that although by then they had been living apart, they would still meet secretly during which they would have sexual intercourse.

[20] Whilst still at his place the deceased's cell phone battery ran down and it was agreed that they switch SIM cards. The deceased suggested that they go to Club 435 and after getting dressed, they set out towards the club. They had left the deceased's cell phone at his place and on the way to the club the deceased's boyfriend (Josef) called on his phone which he handed to the deceased. Upon ending the call the deceased accused him of being stupid and then started fighting him. He pushed her away but she again moved forward and stabbed the accused on his forearm. He managed to grab her from behind on both wrists but then lost his balance and fell onto his back, still holding on to the deceased. He hit his head and lost consciousness. When he regained consciousness the deceased was still lying on top of him and he

realised that she was no longer alive. By then the deceased was still fully dressed. Though he initially thought of making a report to the police he decided against it and went home where he took money and went to a drinking place and continued drinking until morning time.

[21] Accused confirmed the evidence of the police officers regarding their investigation and him having been a suspect. He however denies having made a statement to Khairabeb in which he admitted guilt.

[22] Regarding the whereabouts of deceased's cell phone that remained at his place, he said he had given it to his neighbour (Johannes Nanab) in order to recharge the battery, but never got it back from him. In a statement made by Johannes that was handed into evidence by agreement, he confirmed having been given the cell phone by the accused who told him that it was *his* phone. He could not get hold of the accused earlier in order to return the phone prior to him being contacted by the police.

[23] In the court's assessment of the accused's explanation it is evident that the accused contradicted himself when saying that he and the deceased were cohabiting up to the time of her passing. This he later changed to say that she was actually living in with her parents and that they only occasionally met. Evidence to the contrary shows that she was in a continued relationship with Josef Hoxobeb for many years and two children born from the relationship. According to Josef neither he nor the deceased's family were aware of the alleged relationship between the accused and the deceased. The accused again changed course during cross-examination by saying that he and the deceased had already broken up when she fell pregnant about 11 years ago, where after she had a second child. The contradictions in his version remained unexplained and the only conclusion to come to is that the reason why the accused said he and the deceased were in a relationship and even cohabiting up to her death, is to explain why he was in her company and at the crime scene that night. In my view his explanation about him and the deceased having been in a relationship until the day of the incident is not

reasonably possible when considered with the totality of the evidence. It therefore falls to be rejected as false.

[24] Carefully tied in with this falsehood is his evidence that he met with the deceased on the street in the small hours of the morning whilst on her way to his place; that they had sexual intercourse thrice before they decided to go to Club 435. Also the reason why the deceased's SIM card was inserted into his phone and the deceased's phone ending up with the neighbour, to whom he had said that it was his phone. The accused was unable to satisfactorily explain why he did not inform the deceased's family about her passing or return the cell phone and SIM card to them instead of keeping it with him. His explanation about the deceased's family wanting to kill him without giving any reason for their intentions, makes no sense. Equally his reasons for not wanting to inform the police on the day of the deceased's passing or even thereafter, when they approached him on two occasions during the police investigation. Failure on his part to report the incident that led to the deceased's death to anyone, could only mean that he did not want to expose himself and kept his involvement a secret until after his arrest. This can hardly be seen as reasonable behaviour on the part of a person being the victim of an unlawful assault. He forfeited several occasions to explain the unfortunate incident leading up to the deceased's death, from which it may safely be inferred that he appreciated the wrongfulness of his actions and by keeping quiet, evaded apprehension.

[25] I turn next to consider the accused's explanation as to what led to the deceased's death.

[26] From the accused's narrative and demonstration in court, it is evident that after he grabbed the deceased on both wrists, he managed to turn her around and positioned himself behind her whilst still holding her with his arms around the neck and crossed on her chest. She tried to free herself and almost managed when he lost his balance and fell backwards, hitting his head, rendering him unconscious. He is therefore unable to explain how the deceased was suffocated, but seems to accept that this came about due to

his arms still wrapped around the upper body and neck of the deceased when they fell to the ground. On his account the deceased's death was unintentional and he only realised that she was no longer breathing after he regained consciousness. Again on his version, this was only after some 15 - 20 minutes when he awoke with the deceased's body lying on top of him.

[27] From the medical evidence adduced it would require at least 4 – 6 minutes of constant compression on the arteries and airway to cause blood loss to the brain before death would ensue.

[28] Accused said he had almost lost his grip on the deceased when they fell over. This seems to suggest that he no longer held her in as tight a grip prior to the fall. Common sense dictates that once the accused lost consciousness and the deceased falling onto him, any degree of pressure he had applied to the neck of the deceased would be relieved, allowing the deceased to free herself from his grip. On the accused's explanation, this never happened and there is no reasonable explanation as to how he would have been able to sustain any degree of pressure to the deceased's neck whilst unconscious. The accused's explanation is therefore highly improbable.

[29] Evidence equally inconsistent with the accused's version concerns stab wounds to the fingers of the deceased which, in the opinion of the pathologist, were consistent with defensive wounds inflicted whilst trying to ward off an attack in which a knife is used. The conclusion reached in this regard is consistent with evidence about the deceased's DNA having been found on the blade and handle of the knife found on the scene. These injuries were sustained whilst the deceased was still alive and the proposed manner in which it could have been inflicted fits nowhere into the accused's narrative of events that took place between him and the deceased that night.

[30] Whereas the deceased, according to the accused, was still fully dressed when he regained consciousness and remained as such until he left the scene, it would imply that someone afterwards arrived on the scene and after undressing the deceased, penetrated her genitalia with a sharp object,

positioned a belt around the neck area and thereafter set the body alight. Given the time limits provided by the accused and the fact that the body was discovered at 05h00 by a passer-by whilst still smouldering, this must have happened immediately or shortly after the accused had left the scene. From the accused's evidence he only heard about the body having been set alight during his court appearance. He would therefore not have known about any injury inflicted to the deceased's body after he had left the scene.

[31] However, the accused two days prior to his first court appearance on 12 November 2015 made a statement to Khairabeb in which he admitted having strangled and raped the deceased where after he put her trousers onto her face and set it alight. He could only have been privy to these facts if he was present when the body was set alight. Furthermore, had the accused been unaware or not involved in the commission of the offences charged in the lower court, why would he plead guilty to a charge of violating a dead body during the s 119 proceedings or, for that matter, to any of the charges formulated against him? It seems to me that the accused's behaviour, from the outset, is consistent with that of a guilty mind where he tried to evade the arms of the law for as long as possible, but which ultimately manifested itself in him admitting guilt upon realising that he had been caught out.

[32] When considering the earlier admissions made by the accused, together with the improbabilities alluded to in his explanation as regards the circumstances surrounding the incident leading to the deceased's death, the only reasonable conclusion to come to is that the accused's evidence is a mere fabrication and is therefore false beyond reasonable doubt. It accordingly falls to be rejected where in conflict with the evidence of State witnesses.

[33] The next step will be to decide whether the accused had acted with the subjective intent to kill or whether his actions, objectively viewed, were merely negligent. I have been referred by defence counsel to the unreported case of *The State v Monika Hamukoto*⁴ in which the deceased, an adult female, died

⁴ CC 8/2013 [2014] NAHNLD 59 (7 November 2014).

of manual strangulation and where the pathologist expressed the view that it could take as little as 30 seconds of pressure to the neck to bring about death in some cases of manual strangulation. Though I have no reason to doubt the expertise of the pathologist when testifying in that case on manual strangulation and the time it would require for a person to succumb, it must be borne in mind that much will depend on the circumstances of the case and the variables present. Firstly, the extent of force applied to the main vein and airway may differ. Secondly, the continued or interrupted application of force is a crucial factor which is also likely to differ from one case to the next and would largely depend on the resistance put up by the victim. That much is evident from the judgment where it reads that it could take 30 seconds of pressure to the neck to bring about death 'in some cases of manual strangulation'.

[34] The court in *Mamukoto* further took into account evidence of the accused who said that she never intended killing the deceased as she merely wanted the deceased to 'release' her and that she only intended to strangle her 'a little bit'. The facts of that case are clearly distinguishable from the present facts where the court has rejected the accused's explanation and by way of inferential reasoning, has to determine the accused's intention when he acted.

[35] The Supreme Court in *S v Shaduka*⁵ endorsed the approach of Malan JA in the *Mlambo*⁶ case which essentially amounts to the following:

'When an accused causes somebody's death by means of an unlawful assault and only the accused is able to explain the circumstances of the fatal assault, but he gives an explanation which is rejected as false, then the Court can make the inference that the accused committed the said assault with the intention to kill rather than with any other less serious form of *mens rea*.'

⁵ Case No SA 71/2011 (unreported) delivered on 13.12.2012.

⁶ 1957 (4) SA 727 (A) at 738B-D.

[36] Though such conduct does not in itself establish the accused's guilt, it is indeed a factor the trial court is entitled to take into account, together with all other relevant and material factors as part of the totality of the evidence in deciding whether the guilt of an accused has been established beyond reasonable doubt. The court will however be cautious in its approach and the weight accorded to the factor in question depends upon the facts of a particular case and the nature of the conduct being enquired into. (*S v Henning, supra*, at 549. See also: *R v Nel* 1937 CPD at 330; *R v Du Plessis* 1944 AD 314 at 323 and *R v Gani*, 1958 (1) SA 102 (AD) at 113 B-E)

[37] In the present instance the accused is the only person in a position to explain the circumstances of the assault that led to the death of the deceased but chose to give an account that is patently false. In these circumstances the court is entitled to draw an inference that the accused committed the assault with the intent to kill, opposed to a less serious form of *mens rea*.⁷ In the statement made before magistrate Shikongo, the accused admitted having 'grabbed [the deceased] on the neck for about 15 – 20 minutes until she stopped breathing'. This explanation is consistent with medical evidence that the cause of death was suffocation by strangulation. Though Mr *Engelbrecht* argued that the accused's explanation should be interpreted to mean that he held the deceased in the same grip for the period during which he was unconscious, the argument respectfully loses sight of the fact that a person cannot exert any pressure on the throat of another whilst unconscious. This is not an instance where he fell onto the deceased and in the process suffocated her. She was on top of him and virtually out of his hold when they both fell down. In any event, the court found his explanation of events leading to the death of the deceased to be false. Therefore, from the proven facts it can reasonably be inferred that the act of manual strangulation was committed with direct intent to kill (*dolus directus*).

[38] In the absence of evidence to the contrary, and the court having rejected the accused's explanation as being false, the only reasonable conclusion to

⁷ *S v Rama* 1966 (2) SA 395 (A).

come to is that the accused unlawfully and intentionally killed the deceased, having acted with direct intent.

[39] I turn next to consider the charge of rape, in contravention of s 2 (1)(a) of the Combating of Rape Act 8 of 2000 (the Act).

Count 2: Rape

[40] According to the evidence of the pathologist, Dr Betancourt, injury was inflicted to the vagina after death as there were no infiltration of blood to the wound which, in his opinion, was caused by a sharp pointed object inserted into the vagina. Though vaginal swabs were taken from the deceased's body for purposes of forensic analysis and semen detected on the swabs, the results show that the sperm fraction extracted yielded insufficient amplifiable DNA, hence no possible contributor could be identified.

[41] The accused admitted having had consensual sexual intercourse with the deceased shortly before her death which might explain the presence of semen on vaginal swabs taken from the deceased. However, I have already rejected as false the accused's evidence about him having been in a romantic relationship with the deceased at the time of her death which consequently discounts the possibility of consensual sexual intercourse. The contributor of sperm subsequently detected on swabs taken from the deceased's body therefore remains unknown.

[42] Mr *Muhongo* submitted that when regard is had to facts such as the position of the deceased's body when found lying naked with the legs spread open, and that some injury was inflicted to the genitalia post mortem, it could reasonably be inferred that the same person who committed the murder, also had sexual intercourse with the deceased. Mr *Engelbrecht*, argued to the contrary, saying that, whereas evidence as to last time the deceased had consensual sexual intercourse and with whom, is lacking, the possibility cannot be ruled out that any traces of semen detected during the forensic examination could relate to such last incident of consensual intercourse.

[43] Besides the pathologist's evidence about a sharp object that was inserted in the vagina post mortem, there is no other evidence of a sexual act having been committed with the deceased before or after her death. A sexual act as defined in s 1 (1)(b) of the Act includes the insertion of any object into the vagina of another person except when consistent with sound medical practices carried out for proper medical purposes. The offence of rape under the Act is described as:

'2 Rape

(1) Any person (in this Act referred to as a perpetrator) who intentionally under coercive circumstances-

- (a) commits or continues to commit a sexual act with another person; or
- (b) causes another person to commit a sexual act with the perpetrator or with a third person,

shall be guilty of the offence of rape.'

(Emphasis provided)

[44] From a reading of the definition as to what constitutes a 'sexual act', and the offence of rape as set out in s 2 (1), it is clear that where reference is made to 'another person' in the Act, the Legislature intended such person to be a living person, thus excluding a sexual act being committed with a corpse. Consequently, though evidence in the instant matter about the insertion of an unknown object in the genitalia of the deceased would constitute a sexual act as *per* the definition, it does not constitute the offence of rape in that the act was committed after death. In circumstances as the present, the accused should have been prosecuted (in the alternative) with the offence of violation of a corpse under common law, as it is not one of the competent verdicts of rape provided for under s 261 of the Criminal Procedure Act 51 of 1977, or when read with s 18 of the Riotous Assemblies Act 17 of 1956.

[45] In deciding, on the strength of evidence adduced on the circumstances under which the body was found and the presence of semen on swabs taken

from the deceased's genitalia, whether it could reasonably be inferred from the proven facts that the accused had sexual intercourse with the deceased before murdering her, the court, when encountering circumstantial evidence, must be satisfied that the 'two cardinal rules of logic' set out in *R v Blom*⁸ have been met. These rules require that (i) the inference sought to be drawn must be consistent with the proven facts and (ii) the proved facts should be such that they exclude every reasonable inference from them, save the one to be drawn. If they do not exclude other reasonable inferences, then there must be doubt in the court's mind and the inference sought to be drawn cannot follow.

[46] As for the naked body of the deceased, I raised the question with counsel whether the only reasonable inference to draw therefrom is that she was undressed for purposes of having sexual intercourse, and whether the possibility could be excluded that the deceased was undressed in order to set the clothing wrapped around the neck and face alight, thereby mutilating the face and making identification difficult. Also whether the position of the legs would be consistent with the commission of a sexual act if the person was thereafter manually strangled and could reasonably be expected to have put up resistance? Mr *Muhongo* conceded that on the present facts the drawing of other reasonable inferences cannot be excluded and that the inference sought to be drawn can therefore not be correct. The concession in my view is properly made.

[47] The detection of semen on swabs taken from the genitalia of the deceased is indicative of a sexual act committed and even more so bearing in mind that the body was found naked. Whereas the evidence proved the accused having murdered the deceased, could it be inferred from these facts that the accused also had sexual intercourse with the deceased before murdering her?

[48] The contributor of semen found on the deceased's body is unknown and, as argued by defence counsel, because it is also unknown when the deceased last had consensual sexual intercourse, the possibility cannot be

⁸ 1939 AD 188 at 202-3.

excluded that the semen was that of another person. It seems to me that, in the absence of evidence to the contrary, this is reasonably possible and would therefore exclude the inference sought to be drawn, namely that the deceased was raped by the accused.

[49] As for the accused's admission made to Deputy Commissioner Khairabeb about him having raped the deceased, this must be considered in the light of all the evidence adduced. It must further be borne in mind that it was not a confession made by the accused, but an admission which, in sequence, only followed after he said he had killed the deceased. The State still bears the onus of proving the commission of the offence charged and where evidence of a sexual act committed with the deceased prior to her death is lacking, then the admission so made falls short from proof beyond reasonable doubt of rape committed by the accused.

[50] It then follows that it had not been proved beyond reasonable doubt that the accused raped the deceased and he should accordingly be acquitted on this count.

Count 3: Robbery with aggravating circumstances

[51] The offence of robbery consists of theft of property by the unlawful and intentional (a) use of violence to take the property from someone else; or (b) use of threats of violence to induce the possessor of property to submit to the taking of the property.⁹ From the definition it is clear that there must be a causal link between the violence and the taking of the property.

[52] It was argued on the accused's behalf that in the absence of evidence to the contrary as to how the deceased's cell phone ended up with the accused, the court has to accept his explanation. However, the accused's explanation on this point is intertwined with his evidence of him and the deceased having been in a romantic relationship which the court rejected as false. Consequently, his explanation about the manner in which the deceased's cell

⁹ *C R Snyman: Criminal Law* (Sixth edition) at 508.

phone came into his possession is bound to suffer the same fate and equally falls to be rejected as being false beyond reasonable. I accordingly so find.

[53] It must therefore be accepted that the deceased was in possession of her cell phone when she was murdered and that it was unlawfully appropriated. Whereas the accused is the only person who has knowledge as to the circumstances leading up to the killing and his intentions at the relevant time, it is not known to the court what the motive was for murdering the deceased. Though robbery cannot be excluded as a possible motive, there are also other possibilities and probabilities that could have led to murdering the deceased. In the latter instance there would be no causal link between the assault perpetrated on the deceased and the unlawful taking of the cell phone. This much was conceded by the State. It must therefore be concluded that there is no evidence supporting a finding of robbery with aggravating circumstances.

[54] What has been established beyond reasonable doubt is that the accused was in possession of the deceased's cell phone and that he handed it to someone for purposes of recharging the battery. Knowing that the deceased had died, the accused made no attempt to return the cell phone to her family or hand same over to the police during their investigation. The said phone was only recovered after it having been used and tracked by a local service provider which led the police to the accused. When applying the principles stated above, the only reasonable inference to draw from these facts is that the accused intended depriving the owner (or beneficiaries) permanently of her property. This constitutes theft of the cell phone, the subject matter of the robbery charge.

[55] In terms of s 260 (d) of the Criminal Procedure Act, the accused may be convicted of the offence proved by the evidence where the accused is charged with the offence of robbery. In this instance the court is satisfied that the offence of theft had duly been proved and the accused should accordingly be convicted of such lesser offence as provided for in the Act.

Count 4: Defeating or obstructing the course of justice

[56] The accused being the first and only person to appreciate that he had brought the deceased's death about and that he was likely to be held accountable – a fact he clearly appreciated when looking at his subsequent behaviour – would have had sufficient reason and motive to destroy evidence relating to his actions i.e. the body itself, the identity of the deceased as well as other forensic evidence. It was submitted on behalf of the State that the accused succeeded in achieving this goal in that, despite the burnt out remains of a belt and the buckle found in the area of the neck, it could not be proved that it was used to strangle the deceased with as it was destroyed by the fire; an important fact that could not be established during the investigation in circumstances where suffocation by strangulation was the cause of death.

[57] Though the argument is not completely without merit, it cannot be ignored that on the strength of evidence presented, the cause of death was properly established and that the actual position of the belt, albeit around the deceased's neck or otherwise, played no material role in reaching this conclusion. Neither was the body or identity of the person destroyed as a result of it being set alight, by which the course of justice was defeated. However, from placing the deceased's clothing close to or on the face before setting it alight, the only reasonable inference that could be drawn from these facts is that it was intended to destroy evidence. The court is accordingly satisfied that these actions constituted an attempt to defeat or obstruct the course of justice.

[58] I have earlier alluded to the fact that the deceased's smouldering body was discovered at around 05h00 by a passer-by and given the time frames testified by the accused, this must have been shortly after the incident during which the deceased was murdered. The setting alight of the body is therefore closely time related to the actual murder. Furthermore, the accused had no intention of reporting the incident to the police and during the investigation provided false information to the police, behaviour indicative of a guilty mind.

[59] When considering the evidence as a whole, the court is satisfied that the facts point at the accused as the person who set the deceased's body alight in an attempt to destroy evidence. Accordingly, he stands to be convicted of attempting to defeat or obstruct the course of justice.

Conclusion

[60] In the result, the court finds as follows:

Count 1: Murder – Guilty.

Count 2: Rape, contravening s 2 (1)(a) of Act 8 of 2000 – Not guilty and discharged.

Count 3: Robbery with aggravating circumstances – Not guilty.

In terms of s 260 of Act 51 of 1977 – Guilty of the offence of theft.

Count 4: Defeating or obstructing or attempting to defeat or obstruct the course of justice – Guilty of Attempting to defeat or obstruct the course of justice.

JC LIEBENBERG
JUDGE

APPEARANCES

STATE

M H Muhongo
Of the Office of the Prosecutor-General,
Windhoek.

ACCUSED

M Engelbrecht
Engelbrecht Attorneys (instructed by Directorate:
Legal Aid), Windhoek.