



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**  
**JUDGMENT**

Case no: CC 02/2017

In the matter between:

**THE STATE**

and

**ANDREW BRITZ**

**ACCUSED**

**Neutral citation:** *S v Britz* (CC 02/2017) [2017] NAHCMD 326 (16 November 2017)

**Coram:** LIEBENBERG J

**Heard:** 06 - 10 November 2017

**Delivered:** 16 November 2017

**Flynote:** Criminal Procedure – Murder, read with the provisions of the Combating of Domestic Violence Act, 2003 – Identification evidence – State witness described her state of sobriety that night as ‘drunk, but not só drunk’ – Whether state witness was intoxicated to such an extent that she was unable to make the observations she claimed – From the facts considered together with the observations made by two other State witnesses, it could reasonably be inferred that the State witness’s behaviour that night was comprehensible and rational in the circumstances.

Criminal Procedure – Alibi – No duty on the accused to prove his alibi – Court found that there was corroborating evidence placing the accused on the scene of the crime.

**Summary:** The accused, an adult male, is indicted on a charge of murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003, for the alleged killing of the deceased. There was no eyewitness to the actual stabbing. Nonetheless, the State relied on the evidence of three witnesses. It was submitted on behalf of the accused that the first State witness was intoxicated to such an extent that she was unable to make the observations she claimed. It was also submitted on the accused's behalf that the credibility of one of the State witnesses was doubtful, because the witness only gave a statement on the morning she testified.

The accused was the only witness testifying in his defence and raised an alibi defence. The accused testified that he left the place where the deceased resided after she requested him to do so and disputed having borrowed money from one of the State witness's husband because, at that particular time, he claims not to have been in Keetmanshoop. His evidence on that point stood to be contradicted by his letter addressed to the magistrate of Keetmanshoop regarding his proposed bail application in which *inter alia* is stated that at the time of his arrest, he was an artisan working at the mall in Keetmanshoop.

*Held*, in regards to the State witness's alleged intoxication, the evidence presented refutes any suggestion that the witness was intoxicated to an extent that she was incapable of making any observations testified on by her.

*Held*, on identification, the accused is well known to both witnesses and had been identified facially and/or on his voice, and the witnesses would not have mistaken the accused for someone else.

*Held*, there was corroborating evidence placing the accused on the scene of the crime and evidence about him having admitted stabbing the deceased with a knife to the investigating officer.

*Held*, that there was no duty on the accused to prove his alibi.

*Held*, the giving of a false alibi in circumstances where there was direct evidence of the commission of the offence, *ipso facto*, tends to strengthen the direct evidence against him as there is no evidence gainsaying it.

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### ORDER

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The accused is found guilty of the offence of Murder, read with the provisions of the Combating of Domestic Violence Act, 2003, having acted with direct intent.

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### JUDGMENT

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LIEBENBERG J:

#### Introduction

[1] The accused, an adult male, is indicted on a charge of murder<sup>1</sup> for the alleged killing of Juliana Sarvanda Garises (the deceased) on the evening of 11 – 12 December 2013 at Keetmanshoop. He pleaded not guilty and denied having inflicted injuries to the person of the deceased that resulted in death.

[2] It is common cause that the accused and the deceased were in an intimate or romantic relationship at the relevant time, which could be construed as a 'domestic relationship' as defined in s 3(f) of the Combating of Domestic Violence Act 4 of 2003. It is not in dispute that the cause of death was due to multiple stab wounds (8),

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<sup>1</sup> Read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

of which the one, severing the subclavian vein, was fatal. Based on medical evidence presented<sup>2</sup> the fatal wound 'was not compatible with life' and death would have ensued within a period of 3 – 5 minutes after infliction. This is consistent with evidence that the deceased died shortly after being stabbed. Wounds on both arms (3) were described as 'defensive wounds', likely to have been inflicted when the victim attempted to fend off the blows. It is further not disputed that the deceased had been lodging with Ms Christellah Minnie at the time and that both were lying back-to-back on the same bed when the deceased got stabbed. Though the accused admits having been in the company of the deceased shortly before the incident, he denies having entered the room on that occasion as he had already left when the deceased was murdered. The alleged identification of the accused as her attacker has therefore been challenged.

[3] Though there was no eyewitness to the actual stabbing, the State relies on the evidence of three witnesses implicating the accused as the person who had been with the deceased immediately prior to the stabbing; also that he made certain admissions to the investigating officer the following day.

#### The State case

[4] Ms Minnie's evidence is that she arrived home<sup>3</sup> from a night out but was not sure of the exact time she had reached home. When the accused showed up at the door and enquired about the deceased, she told him that she might be at a club where after he left. Though she initially testified that the accused and deceased arrived about two minutes later, it turned out in cross-examination that after the accused's departure, she had gone to the house of Petrus Swartbooi (Pous) in order to tell the deceased that the accused was looking for her and that she rather had to come home. The deceased then accompanied her back home but did not stay long before leaving again. It was on this occasion when the deceased and the accused returned in each other's company shortly thereafter. It is common cause that she has

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<sup>2</sup> Post-mortem Examination Report issued by a forensic pathologist, Dr Maksym.

<sup>3</sup> Comprising a single room linked by a door with a second room at the back occupied by tenants.

had an earlier relationship with Pous prior to her relationship with the accused, which was ongoing up until that day. Also that during this period the accused would regularly sleep over at Minnie's place when he and the deceased would make themselves comfortable on the floor where they would spend the night.

[5] According to Minnie the deceased entered the room first and lied down next to her on the bed with her head facing the wall, while she faced the door. She saw the accused smoking a cigarette outside and entered after he had finished. He went to the side of the bed where the deceased was lying. She assumed he tried to kiss the deceased who rejected his advances and told him that he should leave her alone as she no longer loved him; also that she loved Pous to which he responded saying that, if he cannot have her, then no one will, as she belonged to him. Next she heard the accused fiddling with the cutlery and on her question what he was looking for, he replied that he was looking for his nail clipper. The deceased then interjected by asking who the accused wanted to stab with the knife he was having, but to which he did not respond. He then moved back to the door and repeated the same words before moving back to the deceased. She heard several thud sounds like fist blows to the chest and assumed that the accused was hitting her with his fist. She became afraid and did not turn around and face them to see what was happening in fear of her also being assaulted. During the assault on the deceased she was quiet; neither did the accused say anything further up until he stepped out of the room.

[6] The deceased then spoke to Eveline Hartung who was in the back room, telling her to call the police as she was bleeding to which Eveline replied that she had no credit on her phone.<sup>4</sup> Minnie then jumped up and switched on the light to see what was going on. However, the bulb fused where after she went around to the window of Eveline's room to ask a candle from her but she had none. She then went to her friend's house<sup>5</sup> who lived down the street about six houses away where she got a candle. She told Pous and his cousin, also named Petrus Swartbooi (Chico),

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<sup>4</sup>This is a two bedroom dwelling with Eveline and her family residing in an adjacent room separate from Minnie's room.

<sup>5</sup> The mother to Pous.

that the deceased had been stabbed by the accused where after they went with her. Back home she lit the candle and at first could not see any injuries on the deceased but when she touched her chest, her hand was covered in blood. The deceased was no longer breathing. Pous and Chico then left and returned with a certain Bruce who took the deceased to hospital.

[7] Minnie said she was shocked, not knowing what to do. When Sergeant Apollus (as he then was) later arrived she made a report to him where after she retired for the night. At some point she became upset with the blood stained pillow on the bed next to her and took it outside and soaked it in water. In the morning she noticed that the accused's knife was no longer among her cutlery. She described the knife as having a brown wooden handle about 25 – 30 cm long. The deceased had found the knife in their bedding the previous morning after the accused had slept over at her place. This evidence was not disputed.

[8] As regards the identity of the attacker, Minnie was adamant that it was the accused who had entered her room that night. He was well known to her and besides having spoken to him at the time, she could see his face when he stood in the doorway before entering. The area was lit up by a street light across the street from her house which shone partly into her room when the door was open. She was extensively cross-examined on her state of sobriety and discrepancies between her witness statement and her testimony in court.

[9] Eveline having been in the adjacent room and therefore unable to see what transpired next door, testified that she and her husband had been asleep when she woke up to voices coming from Minnie's room and recognised the voice of the accused, whom she knew very well. This was confirmed by the accused. Because the accused had borrowed money from her husband three days before and had not paid it back as promised, she took the opportunity to remind him of his debt and he replied that he would get money from his employer and settle his debt the following

day. Next, she heard the accused declaring his love for the deceased and her replying words that she did not want him anymore. The witness confirmed that the deceased shortly thereafter asked her to phone the police saying she was bleeding. She could not have made the call as she was without airtime. Because she heard nothing untoward prior thereto and the deceased having been a cheerful person, she took it that she was joking when asking her to call the police. She also confirmed that Minnie came asking for a candle where after Eveline went back to sleep.

[10] Evidence that directly linked the accused to the murder came from Detective Warrant Officer Apollus, the investigating officer. When he visited the house of Minnie in the early hours of the morning she told him that it was the accused who had stabbed the deceased. Later that morning with the help of a police informer he managed to track down the accused (unknown to him at the time) and immediately after he had informed him of his rights, the accused admitted that it was him who had stabbed the deceased. Prior to taking him in, he asked the accused what had happened to the knife. He responded that he had thrown it away in the same street where the incident took place and then directed Apollus there. Though they searched for the knife, they were unable to find it.

[11] The accused initially denied ever making any admission or pointing out to the investigating officer. However, Eveline corroborated Apollus' evidence about her seeing them searching for a knife across the street of Minnie's house in the morning. It was only thereafter that the accused during his testimony confirmed this, but denied that he had pointed out that particular spot and claimed that a search for the knife was the officer's own initiative and did not come from him.

[12] The evidence of Petrus Swartbooi (Chico) mainly concerns him having found his cousin Pous at home with his mother when he (Chico) returned from a party and Minnie shortly thereafter turning up at their place asking for a candle. He and Pous accompanied her home having been told that the accused had stabbed the

deceased. To him Minnie appeared sober and even managed to break into a jog on the way. In cross-examination he admitted having met the accused on the way home, but disputed allegations of him having told the accused that the deceased was at their place and that he agreed to call her. His evidence about having found only Pous and his mother at home and not the deceased, was left unchallenged.

### Material evidence in dispute

[13] The testimonies of the three State witnesses implicating the accused were attacked on different fronts. *Firstly*, it was submitted that Minnie, on her own evidence, was drunk and as such unable to make the observations she claimed, particularly, the identification of the person who killed the deceased. As for Eveline, her voice identification of the accused was questioned as she had no reason to speak to him at the time and it was doubtful why she only heard part of the interaction between the accused and deceased and not everything that was said at the time. Her passivity when told by the deceased that she was bleeding and that the police must be called was also questioned. *Secondly*, the defence took issue with the fact that Minnie in her evidence in chief omitted to say that after sending the accused away to go and look for the deceased, she actually went to call the deceased herself where she had been drinking with Pous. The latter version forms part of her witness statement, though. *Thirdly*, the filing of two witness statements by the investigating officer (Apollus) and the stage at which this was done was found suspect. Also, despite accused having been informed of his rights and everything he were to say would be recorded, the alleged subsequent admission and pointing out by the accused were neither reduced to writing nor was he afforded the opportunity to confirm same as being correct.

### Identification



[14] Pertaining to identification evidence, it will suffice to quote from the learned authors *Zeffert and Paizes: The South African Law of Evidence* (2<sup>nd</sup> ed.) at 152 -153 where it is said:

'It is generally recognised that evidence of identification based upon a witness's recollections of a person's appearance is dangerously unreliable unless approached with due caution<sup>6</sup>. The Appellate Division in *S v Mthetwa*<sup>7</sup> laid down:

"Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest. The reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait and dress; the result of identification parades, if any; and of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities." (At 768, per Holmes JA)

The average witness's ability to recognise faces is poor, although few people are prepared to admit that they have made a mistake. . . . And it follows that "a witness's honesty and own conviction as to the correctness of his or her identification can never be allowed to take the place of an independent enquiry into the reliability of the identification itself."<sup>8</sup> ' (Emphasis provided)

[15] As correctly submitted by Mr *Wessels*, representing the accused, the evidence of Minnie on identification was corroborated by Eveline and is therefore not that of a single witness that has to be approached with caution. However, the court must still follow a cautious approach in its assessment of evidence on identification

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<sup>6</sup> To cite a few decisions at random in the last two decades: *S v Jochems* 1991 (1) SACR 208 (A); *S v Pretorius* 1991 (2) SACR 601 (A); *S v Zitha* 1993 (1) SACR 718 (A); ....

<sup>7</sup> 1972 (3) SA 766 (A).

<sup>8</sup> *S v Miggel* 2007 (1) SA 675 (C) at 678e citing *S v Mlati* 1984 (4) SA 629 (A) at 632H-I.

as testified by the two witnesses, moreover for the reasons of poor visibility and intoxication raised by the defence.

[16] Though witness Minnie described her state of sobriety that night as being 'drunk, but not só drunk', in cross-examination later qualified this to say that 'it did not even go to my head'. In an attempt to ascertain from the witness what she perceived to be 'drunk but not só drunk', she explained that a person who is staggering would be drunk whilst a person walking by himself and upright would, in her view, not be considered drunk. According to her on that night her condition would fall in the latter category. The evidence of Chico on this point was that when he and Pous accompanied Minnie home, she did not appear drunk. In turn, Warrant Officer Apollus testified that when he visited the crime scene and spoke to Minnie, she appeared sober and talked sense. She was able to stand on her own and was not unsteady on her feet. Contrary thereto, the accused's observation on Minnie when found at home earlier that night was that she was visibly drunk. It is on the strength of his evidence that it was contended that Minnie was too drunk (and probably asleep) to have made any observation on the identity of the attacker. It was submitted that she had likely come to the conclusion that it was the accused because he was the last person she had seen at her place that night.

[17] Besides the conflicting evidence on the state of sobriety of Minnie that night, the evidence of the respective witnesses must be considered in context. It is common cause that Minnie had been drinking traditional liquor ('tombo') that evening with friends. Though she said she did not drink much, the quantity of liquor consumed by her is not the determining factor, but the extent to which her faculties had been affected, if at all. This may be deduced from her movement, speech and behaviour at the time and whether it was coherent and rational in the circumstances.

[18] The evidence presented established that Minnie walked home on her own; she had a meaningful conversation with the accused thereafter as to the deceased's

whereabouts; she walked over to the house of Pous in order to call the deceased; she appreciated the fact that the accused was looking for his girlfriend who was with her former boyfriend and likely to cause a problem for the deceased; after the stabbing incident and the deceased mentioning that she was bleeding, she arose and switched on the light; she then went over to her neighbour's room asking for a candle and managed to get one from her friend who lives a short distance from her; she was seen leaving in a hurry (almost jogging); and lastly, she was capable of making a report to Apollus about the incident shortly thereafter.

[19] From these facts, when considered together with the observations made by Chico and Apollus, it could reasonably be inferred that Minnie's behaviour at different stages that night was comprehensible and rational in the circumstances. She was lucid when making the first report at the Swartbooi house and again thereafter to the police. I am therefore of the opinion that not too much should be made of her evidence that she was 'drunk' as that is not borne out by her conduct and appearances that night. Her subsequent qualification that she was not seriously affected by the liquor therefore appears to me to be more correct. For the aforesaid reasons, evidence on this point clearly refutes any suggestion that the witness Minnie was intoxicated to the extent that she was incapable of making any of the observations testified on by her. I am accordingly satisfied that, despite the witness Minnie having consumed liquor earlier that evening, there is no reason for this court to rule her version of the events that night unreliable.

[20] The accused placed himself at the scene of crime shortly before the deceased was killed, but claimed to have already left by the time the murder took place. He therefore partly corroborates Minnie's evidence but according to her, he only departed thereafter. She saw him standing with the deceased at the door before he entered following her shortly thereafter. Though it was night time and the light inside the room not switched on, a street light illuminated the area; also partly inside of her room as the door stood open. Not only did she see him on his face, she also identified him on his voice when he answered her when she asked him what he was

looking for; and when he said that the deceased was his and he would not allow anyone else to have her. Part of these utterances were overheard and corroborated by Eveline from whose evidence it is clear that she had been speaking to the accused whilst inside the room next door. Though neither of the two was able to testify on the actual stabbing, both placed the accused at the scene immediately before it happened.

[21] It was submitted on the accused's behalf that the credibility of these witnesses is doubtful, moreover that of Eveline who only gave a statement on the morning she testified. I enquired from counsel whether it was implied that she had been briefed on what Minnie had said and to concoct her testimony accordingly, which was denied. Eveline in cross-examination denied that she and her husband was outside their room when the accused allegedly came there enquiring about the deceased's whereabouts; they were already asleep when she heard the accused's voice coming from Minnie's room. As for her not hearing everything that was said between the accused, Minnie and the deceased, she explained that much would depend on the tone of voice they spoke in. It is clear that there were no cries for help by the deceased or any preceding argument between her and the accused. As for Minnie, after realising that the accused was – as she believed at the time – only hitting the deceased with fists, she was too scared to look, in fear of coming under attack herself. She only reacted after the accused had left and the deceased said that she was bleeding.

[22] The accused was well known to both witnesses as conceded by the accused and therefore would not have mistaken him for someone else, either facially or on his voice. Neither harboured any grudge against the accused or had reason to falsely implicate him. The only reasonable inference to draw from the proven facts is that the accused had positively been identified as the person who was with the deceased as testified by Minnie. I accordingly so find.

[23] I briefly turn to discuss the contradictions in Minnie's evidence and her witness statement.

[24] I find it apposite to once again refer to *S v Auala (1)*<sup>9</sup> where the court cited with approval a passage from *S v Oosthuizen*<sup>10</sup> where at 576G-H is stated:

'...it is stated that not every error made by a witness affects his credibility; in each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness' evidence. ... In my view, no fault can be found with his conclusion that what inconsistencies and differences there were, were "of a relatively minor nature and the sort of thing to be expected from honest but imperfect recollection, observation and reconstruction". One could add that, if anything, the contradictions point away from the conspiracy relied on.' (Emphasis provided)

[25] Though Minnie failed to mention during her evidence in chief about her first having gone to call the deceased prior to the accused's return, this aspect of her evidence was already included in her witness statement and would therefore refute allegations of her having fabricated such evidence. It rather appears to be an instance where she merely forgot about it until she was reminded whilst under cross-examination. Neither does it, in my view, support counsel's contention that Minnie's omission to testify about it, serves as proof of her having been under the influence that night; that issue has already been resolved.

[26] I am for the aforesaid reasons unable to find that the discrepancies between Minnie's witness statement and her testimony are material, rendering her incredible. Differences about where exactly on the bed the deceased was positioned and whether the attacker had been seated on the bed or not, are immaterial to the question of identity. What falls to be decided in this case is not 'how was the murder committed?', but 'who done it?'

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<sup>9</sup> 2008 (1) NR 223 (HC).

<sup>10</sup> 1982 (3) SA 571 (T).

[27] The positive identification of the accused is further consistent with the evidence of Detective Warrant Apollus who said that, upon his arrest, the accused admitted having stabbed the person referred to, and was willing to point out where the knife was. What led him to the accused as the suspect (a person unknown to him at the time) is the report made by Minnie. Reference to a knife having been used was also consistent with Minnie's evidence that the knife of the accused was found in her room by the deceased the previous morning (among the bedding), and which had disappeared from the room since the incident. Though the accused denied having partook in the search for the knife, he confirmed that he was present at the place where he allegedly said he had thrown away the knife. Apollus' evidence about accused taking part in the search was corroborated by Eveline. If this was all the initiative of the investigating officer, it certainly begs the question what role the accused had to play in the search and why that particular spot was searched and not the whole area up to his house, or why a search of his home was not conducted?

[28] As regards the filing of two witness statements by the investigating officer, the second one only filed after a considerable period of time had lapsed, this was explained by Apollus saying that after the docket had been sent for the Prosecutor-General's decision (section 119), he was requested by the State Prosecutor to file an additional statement in which is set out the facts relating to the accused having been informed of his rights and his subsequent admissions, which he did as set out in the second statement. The accused admitted that he was indeed informed of his rights, but denied having made a statement. Apollus was further criticised for having failed to reduce the alleged statement made by the accused to writing as mentioned during the explanation of his rights.

[29] Mr *lipinge*, for the State, however submitted that the investigating officer was under no obligation to do so, as admissions made extrajudicially is only regulated by the provisions of s 219A of the Criminal Procedure Act, 51 of 1977, of which the relevant part reads:

'(1) Evidence of any admission made extrajudicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in

evidence against him at criminal proceedings relating to that offence: Provided ... ‘  
(Emphasis provided)

[30] The only prerequisite for its admissibility was that the onus was on the State to prove that the admission did not amount to a confession, and was voluntarily made. Whereas the accused denied having made any admission and therefore constituted a factual dispute, there was no further duty on the State other than to lead evidence on the admission alleged to have been made by the accused, where after it remained for the court to decide thereon in the light of all the evidence adduced. In the present instance the admission alleged to have been made by the accused was in fact reduced to writing in the witness statement of Apollus, whilst the truth thereof being disputed. The existence or otherwise of the alleged admission is a fact to be assessed in the light of all the evidence. Nothing further turns on this point.

#### The defence case

[31] The accused was the only witness and denied his involvement in the alleged murder. In his plea explanation he opined that he suspected the deceased's former boyfriend (Pous) to have killed the deceased. This was based on earlier threats uttered at him and the deceased when Pous would come to Minnie's house and threaten the accused; explaining why Minnie forbade him her house. Minnie under cross-examination however denied the contention put to her as an instruction coming from the accused. However, under cross-examination the accused changed course by saying that when Pous used to pass Minnie's house, he would say to the deceased words to the effect that 'he who laughs last, laughs best'. This differs markedly from the accused having been threatened by Pous; in fact, on his own version, Pous did not even speak to him, but to the deceased. Looking at the probabilities, it seems to me highly unlikely that Pous, who continued his relationship with the deceased behind the accused's back, and with whom he had been drinking that evening,<sup>11</sup> had any reason to murder the deceased. It is therefore my considered

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<sup>11</sup> As per the witness statement of Minnie.

opinion that, for the aforesaid reasons, the accused's suspicion about Pous is baseless, and can safely be disregarded.

[32] According to the accused he returned home after the deceased told him to leave and had to return the next day. He accordingly raised an alibi which only emerged during his testimony. He disputed Eveline's evidence in two respects namely, he never borrowed money from her husband three days before as he was not in Keetmanshoop as alleged; secondly, the only time he spoke to them was when he met them outside their place earlier that night, asking whether they knew where the deceased was. His evidence on this point stands contradicted by a letter dated 30 January 2014<sup>12</sup> addressed to the magistrate of Keetmanshoop regarding the accused's proposed bail application in which *inter alia* is stated that at the time of his arrest, he was an artisan working at the mall. In cross-examination it was confirmed by him that the mall referred to is situated in the town of Keetmanshoop. This contradicts the accused's evidence that he had only arrived the previous evening from his work place (Sandfontein Lodge) where he had been since 11 November. He explained this by saying that the company he was employed with worked at various building sites, of which the mall was one. Though that might have been the case, it still did not explain the conflicting versions. The fact stated therein that the accused was working in Keetmanshoop by then and not at a lodge a substantial distance from town, supports Minnie's evidence about the accused having slept over at her place the previous night (which had not been disputed) and also that of Eveline about the accused having borrowed money three days earlier.

[33] The accused said that after he sent Chico to call the deceased from Pous' house, he saw her coming out of the house after about 5 – 6 minutes. This implies that Chico then met with the deceased and conveyed the accused's message. However, this was not the evidence of Chico and his version about Minnie turning up at their place shortly after his arrival saying that the deceased was stabbed, was left unchallenged though it materially contradicts the accused's version of events that night.

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<sup>12</sup> Exhibit 'F'.



[34] It is settled law that an opposing party was under a duty 'when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character' (*The President of the Republic of South Africa and Others v South African Rugby Football Union and Others*).<sup>13</sup> This judgement had been endorsed and followed in this jurisdiction in a number of cases.

[35] There is accordingly no basis in law for this court to discredit any of the State witnesses on aspects of their evidence which was left unchallenged in cross-examination, as proposed by defence counsel. To the contrary, evidence that only emerged during the testimony of the accused might be criticised for having the making of an afterthought, or being fabricated evidence.

#### Mutually destructive versions

[36] Where a court is presented with two mutually destructive versions, it is a rule of practice that the court must have good reason for accepting one version over the other, and should not only consider the merits and demerits of the State and defence cases respectively, but also the probabilities (*S v Engelbrecht*).<sup>14</sup> Evidence presented by the State and the defence must neither be considered in isolation as an independent entity when assessing the credibility of the witnesses and the veracity of their versions. The approach the court must follow is to take into account the State's case and determine whether the defence's case does not establish a reasonable hypothesis. In *S v Radebe*<sup>15</sup> the court at 168D-E said:

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

<sup>13</sup> 2001 (1) SA 1 (CC) at 37A-B.

<sup>14</sup> 2001 NR 224 (HC); *S v Petrus* 1995 NR 105 (HC).

<sup>15</sup> 1991 (2) SACR 166 (T).

[37] In the present matter there is corroborating evidence placing the accused on the scene of the crime and evidence about him having admitted stabbing the deceased with a knife. None of the State witnesses who implicate the accused as the perpetrator was discredited during cross-examination and neither is their proof of these witnesses having jointly concocted their respective versions to falsely incriminate the accused. This much was conceded by defence counsel.

[38] As for the accused, though admitting having been with the deceased shortly before the incident that ended her life, he distanced himself from the offence claiming an alibi i.e. that he was at home at the relevant time. There is no duty on the accused to prove his alibi, if it is reasonably true, then he must be acquitted.<sup>16</sup> The alibi must further not be considered in isolation but in the light of the totality of the evidence. When the court is faced with an alibi that is false, the effect thereof on the accused's case is that it places him in a position as if he had never testified at all.<sup>17</sup> The giving of a false alibi in circumstances where there is direct evidence of the commission of the offence, *ipso facto* tends to strengthen the direct evidence against him as there is no evidence gainsaying it.

[39] I find appropriate the remarks of Ebrahim AJ in *S v Zwayi*<sup>18</sup> where the following appears at 778f-j:

'If the accused's defence is that he was not present when the offences were committed but somewhere else it is manifestly an alibi defence. But, the accused does not bear the burden of proving that his alibi is true. The Court is required to assess his alibi in the same way as any other defence, namely whether it can be accepted as being reasonably possibly true or whether it should be rejected as it is obviously false. See *R v Biya* 1952 (4) SA 514 (A) at 521D - E at 521D - E and *R v Hlongwane* 1959 (3) SA 337 (A) at 340H and 341A - B at 340H and 341A - B as well as *S v Mhlongo* 1991 (2) SACR 207 (A) at 210d-f at 210d-f.

It should be apparent that if the Court is properly to assess whether there is a reasonable possibility of the alibi being true, the details thereof should be provided since in its absence the accused's defence is simply a bare denial. In my view, if these details are only disclosed,

<sup>16</sup> *R v Hlongwane* 1959(1) SA 337 (A) at 340H.

<sup>17</sup> *S v Shabalala* 1986(4) SA 734 (A) at 736B-C.

<sup>18</sup> 1997(2) SACR 772 (CKHC).

as in the present instance, at the late stage when the accused testifies, the value to be accorded to the alibi may be adversely affected. I cannot see on what basis an accused can claim that he would be prejudiced in the presentation of his defence if he had to disclose the details of his alibi defence during the cross-examination of the State's witnesses. On the other hand, if he withholds same until he testifies there is prejudice to the State since the State will not have been provided with the opportunity of leading evidence which could expose the alibi as being false.'

I respectfully endorse these sentiments.

[40] Accused in the present instance denied having been present when the murder was committed and it was only during his own testimony that he claimed to have been at home at the relevant time. This had not been put to witnesses for the State during cross-examination which might have prejudiced the State by not affording it the opportunity to call witnesses that could possibly have refuted the accused's alibi. In circumstances where the accused, as in this instance, was not asked to explain why the alibi was not mentioned earlier and the court not able to determine the reasonableness of the explanation, the court will not readily make an adverse inference of credibility on the accused.

[41] When evaluating the alibi defence in the light of the totality of evidence adduced, the court is faced with a conflict of fact and the proper approach in such case is for the court to apply its mind not only to the merits and demerits of the State and defence witnesses respectively, but also to the probabilities of the case.

### Conclusion

[42] The adequacy of proof in a criminal case is whether the evidence establishes the guilt of the accused beyond reasonable doubt. If there is a reasonable possibility that the accused's innocent explanation or alibi which he has proffered might be true, then he is entitled to be acquitted. This would obviously imply that a reasonable possibility has to exist that the evidence which implicates the accused, might be false or mistaken. All the evidence must simultaneously be assessed and not by a process of piecemeal reasoning.

[43] When applying the aforesaid test to the present facts, the State witnesses, despite some imperfections in minor aspects of their evidence, are found credible and reliable. The evidence of the accused on the other hand is not only standing on its own,<sup>19</sup> but is also self-contradicting as regards his whereabouts shortly before the commission of the events. Conflicting evidence pertaining to his employment directly impacts on his credibility, moreover, where it corroborates the evidence of those witnesses who link him to the crime scene and the knife used in the commission of the offence. On the proved facts there is no reasonable possibility that the accused's evidence might be true and therefore, beyond any reasonable doubt, is found to be false. It has duly been established that he had stabbed the deceased several times with a knife and his unlawful acts being the sole cause of her death.

[44] In the absence of direct evidence, the court must by way of inferential reasoning decide whether or not the accused subjectively acted with direct intent when inflicting several stab wounds with a knife. Regard must be had to the weapon used i.e. a knife with a length of approximately 25 – 30 cm; the infliction of eight stab wounds of which five were directed at the upper body of the deceased, and one being fatal, as death ensued shortly thereafter. Bearing in mind the area of deceased's body at which these blows were directed, it may reasonably be inferred that death of the victim was foreseeable. Accordingly, in my view it has been established that the accused, when inflicting these injuries to the deceased's body, had acted with direct intent (*dolus directus*).

[45] In the result, the court is satisfied that the accused is guilty of the offence of murder, read with the provisions of the Combating of Domestic Violence Act, 2003, having acted with direct intent, and is accordingly convicted.

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<sup>19</sup> The court is mindful that there is no onus on the accused to prove his innocence or lead evidence corroborating his explanation.

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JC LIEBENBERG  
JUDGE

APPEARANCES

STATE

H lipinge

Of the Office of the Prosecutor-General, Windhoek.

ACCUSED

J H Wessels

Stern & Barnard,

Windhoek.