

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case No: CC 5/2016

THE STATE

v

PIET KONDJEJE NAKANENE

Neutral citation: *S v Nakanene* (CC 5/2016) [2018] NAHCMD 276 (6 September 2018)

Coram: USIKU, J

Heard: 01 – 04 August 2017, 02 – 05 October 2017, 12 February 2018, 16 – 18 April 2018 & 16 – 17 & 19 July 2018.

Delivered: 6 September 2018

Flynote: Criminal Procedure – Evidence – Similar facts evidence – The principle of similar facts evidence applied – Section 211 A (1) of the Criminal Procedure Act (Act 51 of 1977) – Evidence during criminal proceedings of similar offences by accused – (1) Subject to the provisions of subsection (2), in criminal proceedings at which an accused is charged with rape or an offence of an indecent nature, evidence of the commission of other similar offences by the accused shall, on application made to it, be admitted by the court at such proceedings and may be considered on any matter to which it is relevant – Provided that such evidence shall only be so admitted if it has significant probative value that is not substantially outweighed by its potential for unfair prejudice to the accused – In this matter, showcasing the accused's *modus operandi* in the several charges of attempted rape and rape itself.

Criminal Procedure – Evidence – Circumstantial evidence – Inferences to be drawn from circumstantial evidence – Inference must be consistent with proved facts – Inference must exclude any other inference – Law not requiring court to act upon absolute certainty – When dealing with circumstantial evidence, court must consider cumulative effect of all the evidence.

Summary: The accused herein is charged with several counts. In respect of count one, the accused and the complainant are cousins and during September 2006 they resided close to each other in Kuisebmond Walvis Bay. On the evening of Saturday, 2 September 2006 the accused, complainant and others were socialising where after the accused escorted the complainant back to her room. During the early morning hours of Sunday, 3 September 2006, the accused kicked open the door gaining entrance to the complainant's room and entered the room whereafter he attempted to rape her.

In respect of count two and three, during April 2013 the accused and the complainant both resided in separate outside rooms situated on the premises of the accused's parent's house at number 1770/79 Sitrien Street in Kuisebmond Walvis Bay. During the evening of 5 April 2013 the accused, complainant and others were socialising whereafter the accused and complainant returned to their separate rooms. During the early morning hours of Saturday 6 April 2013 the accused kicked open the door giving entrance to the complainant's room and raped her. The accused also strangled the complainant with his hand(s) in an attempt to kill her, causing the complainant to lose consciousness at some stage during the rape.

In counts four and five, the complainant was on her way home on foot during the early morning hours of Tuesday, 15 October 2013, using the route she normally takes which passes nearly the premises where the accused resided at number 1770/79 Sitrien Street in Kuisebmond Walvis Bay. On this occasion the accused followed the complainant and when he caught up with her, he pushed her to the ground and attempted to rape her. The accused also strangled the complainant with his hand(s) in an attempt to kill her.

In relation to counts six, seven and eight, during the evening hours of Wednesday, 12 March 2014 or in the early morning hours of Thursday, 13 March 2014 the

accused raped the deceased in his outside room situated on the premises of his parent's house at number 1770/79 Sitrien Street in Kuisebmond Walvis Bay. The accused also strangled the deceased with his hand(s) and she died in his room due to asphyxia. He then proceeded to dump her body in the dunes where it was later found. The accused further defeated or obstructed the course of justice as set out under count eight in the indictment.

ORDER

Count One : Guilty – Housebreaking with intent to contravene section 18 (1) of the Riotous Assemblies Act 17 of 1956.

Count Two : Guilty – Housebreaking with intent to contravene section 18 (1) of the Riotous Assemblies Act 17 of 1956.

Count Three : Guilty – Attempted Murder

Count Four : Guilty – Attempted Rape

Count Five : Guilty – Attempted Murder

Count Six : Guilty – Murder read with the provisions of Combating of Domestic Violence Act 3 of 2003.

Count Seven : Guilty – Rape read with the provisions of Domestic Violence Act 3 of 2003.

Count Eight : Guilty – Defeating or obstructing to defeat the course of justice.

JUDGMENT

USIKU J:

[1] The accused stood charged with the crimes of housebreaking with intent to contravene section 2 (1) a of the Combating of Rape Act 8 of 2000 – Rape and attempting to contravene section 2 (1) a read with sections 1 – 3 and 5 – 8 of the Combating of Rape Act 8 of 2000 read with section 18 (1) of the Riotous Assemblies Act 17 of 1956 – Attempted Rape on the first count.

[2] On the second count accused faces charges of housebreaking with intent to contravene section 2 (1) (a) of the same Act.

[3] He also faces a charge of attempted murder on the third count.

[4] On the fourth count accused is charged with an offence of attempting to contravene section 2 (1) a read with sections 1 – 3 and 5 – 8 of the Combating of Rape Act 8 of 2000 read with section 18 (1) of the Riotous Assemblies Act 17 of 1956.

[5] Accused further faces charges of attempted murder on the fifth count.

[6] On the sixth count, accused is charged with murder read with provisions of the Combating of Domestic Violence Act 4 of 2003. Accused also face charges of contravening section 2 (10) a read with sections 1– 3 and 5– 8 of the Combating of Rape Act 8 of 2000, read with the provisions of the Combating of Domestic Violence Act 4 of 2003 on the seventh count.

[7] Accused is further charged with the crime of defeating or obstructing or attempting to defeat or obstruct the course of justice on the eighth count.

[8] When charges were put to him, accused tendered plea of not guilty on all charges and through his attorney Mr Dube offered no plea explanation. The state is represented by Ms Nyoni.

[9] The summary of substantial facts, the Pre-trial memorandum and the reply thereto were all admitted into evidence as Exhibits "A", "B" and "C" respectively. In relation to counts six, seven and eight, other items handed in as Exhibits were the accused's blanket, marked Exhibit "1", a peach night thrill marked Exhibit "2". These items were positively identified by Ms Theresia Jessica Doeses a former girlfriend of the accused as the accused's properties. Accused did not dispute that the blanket and the night thrill were his properties.

[10] I intend to firstly deal with the first count to count five, whereafter I will proceed to deal with counts six, seven and eight in respect of the deceased Benedine Letesia Baumgarten.

Count One

[11] Ms Emgardt Nakanene's testimony, being the complainant herein, is that her mother and the accused's mother are cousins. She and the accused grew up together and used to socialise together. They were very close. Their relationship changed only after the accused tried to rape her on 3 September 2006 after they returned from a bar. She testified that she requested accused to take her home because she felt drunk, to which accused agreed.

[12] According to her, upon arrival at the accused's mother's house, he tripped her, and as a result she fell down, whereafter accused started to pull her towards his ghetto. She started to scream calling the accused's mother who finally came to her rescue. Accused's mother suggested to her that it could be just because of drunkenness. She pleaded with her to leave everything. She then left for her room.

[13] At her room, she informed her boyfriend about what had happened and he told her that she must have been drunk. In the meantime, her boyfriend decided to go and sleep with one Akwaake because he wanted to rest. She was locked up in the room.

[14] Emgardt remained in her shack and underdressed herself because she was feeling hot. She only had her panty and a bra on. Whilst about to sleep, accused entered the room and started to undress himself. He got on top of her as she lay on

her bed. Accused then placed his knee on her stomach and put his hand on her throat. She could not breath properly neither could she scream as accused's hands were on her throat. She started to bump on the boards that make up her ghetto in order to alert people about what was going on. As she continued to bump the boards, she saw her nephew and her boyfriend entering the ghetto. She could see clearly because there were electrical lights inside the ghetto.

[15] Emgardt further testified that even though she was drunk, she was able to appreciate right and wrong, thus she called the accused, to escort her to her ghetto. Whilst accused was on top of her, she could see his private parts. She had opened a case, but withdrew it. The reason why she gave a withdrawal statement was only because accused was her cousin and she forgave him because of their family ties.

[16] Ms Elizabeth Wakumbwa confirmed to have heard someone screaming and suspected that there was a break in. When she went out to investigate, she found the shack's door locked from inside. After the door was kicked open, she saw Emgardt on her bed dressed only in a bra and panty, whilst the accused was on top of her. Wakumbwa's evidence is that accused's trousers were down to his feet and after he saw them, stood up and put on his trousers as he asked where his t-shirt was. At the point in time Emgardt was crying. She too could see clearly because of the light inside the room.

[17] Mr Nelson Tjivahu who at the time was sleeping with Wakumbwa also confirmed to have heard a commotion whereafter he heard Emgardt screaming. It was him who kicked Emgardt's door open. He too saw accused on top of Emgardt, whilst accused's trousers and underwear were down to his knees. When he questioned the accused what he was doing, there was no response from the latter.

[18] Accused on his part denied having attempted to rape the complainant Emgardt, his testimony is that he went to her in order to collect N\$50 he had been promised for having escorted her from the bar. He does not dispute to have gone into the ghetto of Emgardt. Accused further testified that they fought over a handbag as he wanted to see if he could get the money he had been promised. Accused confirmed to have bumped the door to Emgardt's ghetto with his shoulders in order to gain entrance. He also confirmed to have entered the ghetto whereafter he

wrestled with the complainant as a result of which she fell down on her back, after which a struggle ensued between them.

[19] In order to constitute housebreaking with intent to rape or attempted rape, there must be a breaking which is a displacement of part of the premises. Accused in his own version admits to having bumped the door to Emgardt's room in order to gain entry, that act constitutes house breaking. Accused was found on top of the complainant with his trousers below his knees as testified to by the complainant Emgardt who at the time was half naked. Accused's private parts were exposed. In my view, the stage of attempt is reached as soon as the assault takes place and before any direct effort is made to effect penetration. The accused in this case had already removed his trousers and was unlikely to change his intention towards the complainant who was naked, laying on the bed. There is therefore sufficient evidence to prove that accused attempted to rape the complainant herein.

Count Two and Three

[20] Count two is in relation with complainant Marikie Haimbodi. Her testimony is that she had visited some bars in the company of one Kaipewa and the accused on 6 April 2013. They returned home from the bar and 'Shoe' opened the ghetto for her where after he left. The door to the ghetto was slightly closed. She went to sleep but was awakened when she saw the accused on top of her strangling her. Accused pressed her throat and she could not scream for help. She later on passed out and did not know where she was. Accused then took off her tight and panty and had sexual intercourse with her. After she had regained her consciousness, she saw the accused standing in front of her pulling up his trousers. She saw sperms coming out from her vagina. She was naked at the time.

[21] Mr Edward Kamaturiri known as 'Shoe' confirmed to have opened the door for Marikie in order to go and sleep in her ghetto, as he went to relieve himself and also to look for a cigarette. He personally pulled the door in order to close it. Upon his return to the ghetto, he found many people gathered as Marikie screamed saying that she had been raped. Marikie lifted up her dress and he saw sperms flowing down her legs. He then grabbed the accused and they wrestled. Elizabeth Wakumbwa confirmed that she visited Marikie's ghetto and found everything upside

down. She also observed Marikie lifting up her dress and she had no panty on. Adam Mbundueva corroborated the evidence of Elizabeth with regard to the ghetto of Marikie having been in a mess.

[22] Accused's version is that Marikie found her at Kizomba bar where he had been drinking until the bar closed about 04:00 am. After the security had asked them to leave, they went to stand outside the bar with a male person who was deaf. The deaf male person then told him that he was interested in Marikie but he informed him the (deaf male) that she was his uncle's girlfriend. They left for another bar where the deaf male person bought some beers and requested them to go to his room. They finally got to the deaf male's room.

[23] At the room, the deaf man offered him a beer and indicated that he wanted to speak to Marikie. He told him to go out but he refused because the complainant was his uncle's girlfriend. Marikie also refused to accompany the accused as she wanted to drink more. Accused then left to buy a cigarette. Whilst busy chatting outside, he heard the complainant calling him in the street. She joined him and they shared a cigarette. When he confronted her about what she was doing, she told him that it was none of his business. He reprimanded Marikie about going out with other men. They left for their respective rooms thereafter.

[24] According to the accused, he later went to the ghetto of Marikie where he found the door half open. Inside the shack he met Shoe. Accused sat where he usually sat on a bench. There were no lights inside the shack. He observed a male person seated on the bed with his hand inside his trouser holding his private part. Accused started to play his favourite music loud which prompted Marikie to question him why he was doing so. She started to throw things towards him. He then got up and held Marikie's clothes as they started to wrestle whilst in the standing position.

[25] Accused questioned Marikie why she was fighting him and pushed her towards a sofa set whereafter he went outside. Accused identified the house of his mother as depicted in the photo plan as well as the shack where Marikie and her partner Adam resided at the time. He also identified the door to the shack of Adam as well as the bed and the mattress.

[26] During the scuffle with Marikie, accused was fully dressed in a grey hoodie and a pair of jeans. He wore All Star shoes. Accused denied to have strangled Marikie in an attempt to kill her, claiming that he was only stopping her. He also denied to have had sexual intercourse with her. They were never on the bed. Accused further denied the presence of Shoe in the room claiming that no one came to the ghetto.

[27] Accused also testified that he was thrown with bottles by Marikie but was not struck. He went towards Marikie in order to beat her and it was that time when people came out of their ghettos, including his parents and Elizabeth Wakumbwa. Shoe also came out of his ghetto and asked Marikie what was going on. It was then that Marikie told Shoe that accused wanted to rape her. A scuffle broke out between him and Shoe. Accused's claim is that Marikie and Shoe had been involved in a secret relationship.

[28] From the testimony before Court there is no dispute that accused entered Marikie's room on the date in question. Contrary to accused's version that he went to the room in order to play music, there is corroborated evidence of Elizabeth Wahumbwa and Adam Mbundueva who saw that Marikie's ghetto was in a mess. Marikie immediately reported to her partner that accused was on top of her and had strangled her. Elizabeth Wahumbwa saw Marikie lifting her dress up and she had no panty on.

[29] Although the presence of sperm from Marikie's legs could not be confirmed by scientific evidence, the evidence presented indicated an attempt having been made by the accused to have sexual intercourse with her. The reason for such finding is that he was found inside the complainant's room after he had pushed the door open. That act constitutes housebreaking in itself. In fact accused did not deny to have forced the door to Marikie's ghetto open. He also testified that he wanted to beat her before people came to the ghetto in order to find out what was going on. Accused was seen on top of Marikie and her tight had been taken off her body in preparation to have sexual intercourse. That is indeed sufficient prove that accused had an intent to have sexual intercourse had he not been interrupted by people who came to the room after Marikie had screamed for help.

Count Four and Five

[30] Counts four and five relate to Hilma Alugodhi. Accused does deny to have confronted Hilma Alugodhi on the night of the incident allegedly for having bumped at his ghetto and insulting him. Hilma testified that she came from a bar in the early morning of 15 October 2013. She had known the accused by sight only because they resided in the same neighbourhood. Hilma testified further that accused finally caught up with her and pushed her down to the ground and strangled her whereafter she lost consciousness for a while. Accused then opened his zip with one of his hands whilst holding her on the throat with his other hand. She managed to kick off the accused whilst screaming. Her screaming attracted some people who converged on the scene.

[31] She was taken to the hospital where she received some medication. The matter was reported to the police and the accused was arrested at his home. Mr Licuis Haufiku testified that during the early morning hours sometime in October 2013 he was awakened by screams. When he went outside to investigate, he saw Hilma Alugodhi laying on the ground. She was full of sand and was bleeding from her mouth.

[32] Mr Onesmus Shiweda, a police officer confirmed that he was tasked to reconstruct the scene of an alleged attempted rape case on 24 November 2015 accompanied by Hilma Alugodhi, the complainant.

[33] Mr Teretius Nakapumba also testified that during early morning hours of 15 October 2013 he was awakened by screams. He went outside and saw a male person on top of a lady. When he asked the male person about what he was doing, the man ran off. He could not identify the male person because it was still dark and he stood a distance away. He recognise the lady as Hilma and when he asked her if she knew the male person, she responded in the positive. Mr Nakapunda observed some injuries on Hilma's neck. She appeared exhausted.

[34] From the evidence adduced there is no dispute that the accused and the complainant Hilma met during the early morning hours of 15 October 2013. Accused however denied to have attempted to kill, Hilma claiming to have only chased after

her after she had bumped on his shack. He further denied to have attempted to rape the complainant. Two state witnesses testified that the complainant lay on the ground whilst the male person was on top of her. Accused does not deny to having grabbed the complainant. In fact accused places himself on the scene.

[35] In order to constitute an attempt, there must be an act of preparation which must be at a stage where it has become dangerously close to success. Evidence by the complainant is that accused had opened his trouser's zip and was holding her to the ground. Accused only ran off after the arrival of Mr Nakapunda who confronted him by questioning him what he was doing on top of the complainant. Had it not been for his intervention, accused was unlikely to have changed his intention, which was to have sexual intercourse with the complainant after unzipping his trousers.

[36] With regard to attempted murder, evidence of the complainant is that after the accused had strangled her she had difficulty to breathe and blood started to come out of her throat. In my view, the act of strangling the complainant, until she could no longer breathe indeed is sufficient proof that an attempt was made to kill the complainant. An attempt is reached as soon as the assault takes place and before any direct effort is made to effect the killing. The accused only stopped the assault on the complainant after he was questioned by Mr Nakapunda who came to the complainant's rescue.

The principle of similar facts evidence

[37] I now move to consider the principle of similar facts evidence. Similar fact evidence is as a rule inadmissible and is admissible only in exceptional circumstances. It may be admissible to prove the identity of an accused person as a perpetrator where such evidence is relevant to an issue. In the case of *S v Nduna*.¹ The reason for the exclusion of similar facts evidence is due to the fact that it is inherently unreliable, prejudicial or unfair. The Court is therefore required to consider the admissibility of similar fact evidence, before allowing a party to adduce such evidence. It ought to allow the admission of such evidence if the probative value outweighs its prejudicial effect.

¹ S v Nduna 2011 ISACR 115 (SCA).

[38] All the three complainants in their respective cases testified that they were strangled by the accused, whom they each had known prior to their respective incidences. The issue of identity does not therefore arise in this present case.

[39] The three complainants each testified that they were strangled before the accused attempted or raped each one of them. It was also confirmed by State witnesses who found the complainants who each made a report of attempted rape immediately after the incident. Though there appears to be no evidence of actual penetration in respect of one Marikie, an attempt was made by the accused to rape her on the date of the incident. Accused lay on top of the complainant after he had removed her light, which constitute an act of preparation.

[40] Furthermore, the deceased in count six, seven and eight, although I am yet to deal with the said counts, died as a result of strangulation as confirmed by the post-mortem examination report compiled by the doctor who performed an autopsy on the body.

[41] I am of the view that the similar facts evidence in this matter is not aimed at showing that the accused was of bad character and therefore must be ruled irrelevant and inadmissible. The probative value of similar fact evidence regarding the procedure adopted by the accused during his treatment of all the complainants in this case warrants its reception and does not in the light of the accused's own corroborative evidence in that regard operate unfairly against him.

[42] In all the cases accused does not deny to have been associated himself with any particular complainant in one way or the other. He places himself on all the three scenes. The treatment of each complainant bears such striking similarity to each other in that they were each strangled before the accused attempted to commit a sexual act with each one of them during the separate incidences. The three victims at the time when accused confronted them were under the influence of alcohol which made each one of them vulnerable.

[43] I am of the view that even though a Court should be cautious when drawing inferences from similar fact evidence, there is no reason why this Court should not rely on similar facts evidence duly established and relevant to an issue in dispute

and where the accused has maintained that the complainant each were merely fabricating evidence against him. The complainants in the three different incidences were each clear in their respective testimony as to how they were each treated by the accused in their cases.

[44] With regard to the complainant in the first count, she was confronted whilst in her bed after the accused had forcefully, and without permission entered her shack which had been locked.

[45] Accordingly the accused is found guilty in respect of the first count of housebreaking with intent to contravene section 18 of the Combating of the Riotous Assemblies Act 17 of 1956 in respect of Emgardt Nakanene, is attempted rape has been proven beyond reasonable doubt.

[46] Coming to the second count, in respect of the complainant, Marikie Haimbodi. She too testified that the accused whom she knew well broke into her shack after he had escorted her from the bar. Her testimony is further, that accused raped her, though it could not be established through forensic evidence that what she claimed to have been sperm coming from her private parts was indeed sperm, there appears to be credible evidence which would support a charge of attempted rape, a competent verdict on a charge of rape. Section 256 of the Criminal Procedure Act 51 of 1977 provides:

'If the evidence in criminal proceedings does not prove the commission of the offence charged but proves an attempt to commit that offence or an attempt to commit any other offence of which an accused may be convicted on the offence charged, the accused may be found guilty of an attempt to commit that offence or, as the case may be, such other offence'.

[47] After Marikie had entered her shack, she closed her door, and slept, evidence is that the entry door was forced open by the accused. Similarly on charges of attempted murder, all the three complainants, where each throttled by the accused person, as he attempted to commit a sexual act with each one of them. Their respective testimony is that they could not breathe properly thereby, their life being compromised. Accordingly the accused is found guilty of attempted murder in respect of each of the two complainants.

Counts six, seven and eight

Background

[48] On 13 March 2013 a female body was found laying in the dunes. That discovery was made by Mr Rupembo and his wife Kazake. A report was thereafter made to the police.

[49] Ms Susana Nandjila Shipingana testified that she and other officers departed to the scene where they found a body of a female aged between 25 – 30 years. The body was covered in an orange bed sheet, which was marked Exhibit “2” before Court. Tracks of a dustbin brought them to house number 5509. A dustbin, orange in color was found at that house. The dustbin was identified by Ms Shipingana as Exhibit “3” before Court.

[50] She further testified that after the dustbin was found at house number 5509 they visited the house of one David Shikulo in order to familiarise themselves with the house and to see where the dustbin had been placed. From Shikulo’s house they followed the bin tracks up to a place where rubbish was dumped. It was from the dumpsite that they followed the bin tracks up until house number 79 Sitrien Street, Kuisebmond.

[51] It has become common cause that house number 79 Sitrien Street belong to the accused’s parents and it is where the accused had been residing. Alfred Auchab corroborated Susana Shipingana’s evidence about the female body having been found in the dunes. Also that the body was covered in an orange bed sheet. His further evidence was that the body was dressed in a blue tracksuit jacket and black tight pants. There where tracks of a rubbish bin as well as shoe tracks.

[52] Whilst on the scene where the body was found, information was received from fellow police officers that the bin was found at house number 5506. Upon his arrival

at the house, Mr Alfred Auchab saw the bin inside the yard. In the meantime Mr Shikulo David identified the bin as his. Tracks were again followed from house number 5506 to David Shikulo's house where they went up until an open space, which was used as a dumpsite and where some rubbish had been dumped. The tracks from the dumpsite moved up to the road next to house number 79 Sitrien Street.

[53] House number 79 Sitrien Street was found to have been recently raked. It was the only house where the yard had been raked. The accused's ghetto situated in the yard of house number 79 Sitrien Street, was pointed out by a resident of that house number to Warrant Officer Kauvi. More observations were made about the accused's ghetto, whereby it was found that at the entrance of the ghetto there was a plank with marks that were going upwards which was suspected to have been made by a dustbin. The reasons for the suspicion was that the marks made by a dustbin as seen on the Photo Plan Exhibit "D" photos 17 and 18 clearly indicate the movement of the dustbin from the accused's ghetto.

[54] Mr Alfred Auchab identified the orange bed spread that covered the deceased's body as Exhibit "2", the dustbin itself as Exhibit "3" as well as the plank, Exhibit "4". Some blankets were collected from the ghetto of the accused. The scene was photographed by Warrant Officer Kauvi who compiled a photo plan. A sketch plan was also drawn. The contents of the photo plan compiled by warrant officer Kauvi was admitted and received as Exhibit "D" before the Court.

[55] The Photo Plan compiled by Warrant Officer Kauvi depicted the following:

1. The deceased's body as found.
2. Photograph of the body before its removal from the scene.
3. Photograph of tracks of a bin and a shoe print appear to have been pulling the bin.
4. Photograph of the accused's residence.

5. Photographs of the dustbin tracks and the shoe print in the vicinity of the accused's residence.
6. Photographs of the blankets of the accused.
7. Photographs of the used condom found in the ghetto of the accused as well as photographs of a plank found at the entrance of the ghetto of the accused with marks on it.

Warrant officer Kauvi's testimony corroborated Alfred Auchab's evidence in respect of the observations made at the accused's ghetto. The blanket recovered from the accused's ghetto Exhibit "5" was forwarded to the National Forensic Science Institute which is marked as Exhibit "F" in the application for forensic examination, Exhibit "G" before Court. The greenish blanket recovered from the accused's ghetto was marked as Exhibit "1".

[56] All exhibits were placed in evidence bags before they were forwarded to the National Forensic Science Institute (NFSI). The condoms and its cover were also placed in forensic bags which were renumbered and were packaged separately. The shoe print of a person that was pulling the dustbin led the police officers to the accused's residence at house number 79 Sitrien Street Kuisebmond.

[57] After the dustbin was recovered, which is now Exhibit "3", it was forwarded to the National Forensic Science Institute by Warrant Officer Kauvi who personally recorded it in the application for scientific examination as Exhibit "A". The bin though described in the form as being yellow in colour, whereafter yellow was cancelled and replaced with colour orange, Warrant officer Kauvi signed for the correction and that correction could not have been made after it had been submitted to the laboratory which is apparent from the fact that the form is a copy and the original form that was sent to the laboratory also bears the correction made by Warrant officer Kauvi.

[58] It is important to note that all exhibits were properly sealed at the scene in order to dispel any suspicion that any DNA could have been transferred from the exhibits to the dustbin. It is further now common cause that accused lived in a ghetto marked "C" in the phot plan. Exhibit "D" photos 78 and 79 in the photo plan

Exhibit “D” depicts Sergeant Shipingana pointing out a spot where a shoe print of a person pulling the bin close to point “C” which is the accused’s ghetto.

[59] Tusnelda Matias testimony is that she had followed the dustbin tracks up to a point near point “C” which is the accused’s ghetto.

[60] Investigating officer Marine’s testimony is that he received a report of a murder and proceeded on to Sitrien Street where he met other police officers. His involvement was to follow the tracks of a dustbin which ended in the premises of house number 6719 Kilimanjaro Street. He decided to follow the tracks again upwards until the dunes where the body of the deceased was found. At that point in time the body had already been removed whereafter he again followed the tracks backwards up to the new National Housing Enterprise houses till house number 5506. The dustbin was no longer at that house. Tenants of house number 79 Sitrien Street were then interviewed.

[61] One Kaapeli was spoken to and a search was conducted in the accused’s ghetto by Warrant officer Kauvi without the necessary search Warrant having been obtained. It is trite that the Criminal Procedure Act 51 of 1977 does allow search without a warrant to be conducted in certain circumstances. Accused on his part did not take issue with the items recovered from his ghetto by the police. Neither does he dispute forensic evidence found on any of the items recovered from his ghetto. He admits that the items found in the ghetto were his properties.

[62] Accused’s former girlfriend Teresia Tebele testified that the blanket marked Exhibit “1” and a peach bed spread/night thrill marked Exhibit “2” are the accused’s properties. That pieces of evidence was left unchallenged. During the trial, there was no point when the accused had objected that the items recovered by the police from his ghetto did not belong to him.

[63] Accused’s own defence witness Kaipewa Petrus testified that accused’s mother is the one who often cleaned the yard. Another witness Tileinge Titus testified that whilst she was washing clothes in the morning of the 13 March 2014 she saw the accused cleaning the yard. She related that to a lady called Nambahu who had approached her looking for her dustbin informing her that accused had

cleaned the yard. It is also now common cause that the dustbin was being sought on the same date the body of the deceased was discovered in the dunes. Her evidence was never challenged.

[64] Further evidence was that of Ms Swarts from the National Forensic Science Institute. She testified that all the exhibits received were reflected in her report marked 982/2014/R1. The exhibits were properly sealed in the evidence bags. That R1 report was received and marked Exhibit "Y1".

[65] All the exhibit were analysed and their findings revealed the following:

The report marked 982/2014/R2 which was received before Court as Exhibit "Y2" Ms Swarts found that the accused was the major contributor of the DNA found on the handle of the dustbin. It is important to note that the body of the deceased was conveyed in a dustbin to the dunes. Further, the DNA of the accused was found in the fingernails of the deceased as per the Laboratory References number 982/2014/R2 marked Exhibit "Y2".

[66] Furthermore, the DNA of the deceased was found on the bed spread Exhibit 2, and the blanket Exhibit "5" all belonging to the accused. Accused on his part had explained before Court that his DNA landed in the deceased's fingernails whilst she was squeezing his pimples. At the same time evidence before Court is that at the time of his arrest by the police, the accused was found to have scratch marks on his body. Those scratch marks were photographed by Warrant officer Kauvi.

[67] When questioned about the presence of scratch marks on his body, accused explained to the police that he had been involved in a fight with someone he did not know. It has now emerged from the accused's own witness that he had a fight with a well-known male called the Lion of Otjituwo. It therefore means that the accused lied about having been involved in a fight with an unknown man when he testified before court.

[68] Furthermore, when the accused was questioned by some of his relatives after his arrest he told them that he did not know the deceased, whilst the deceased at the time of her death was indeed his girlfriend. Accused's father also testified that after

the accused was arrested, he personally asked him if the deceased was his girlfriend to which he responded in the negative.

[69] Again when accused was confronted by his uncle Adam Mbundueva, whether he killed the deceased, his response was that he never met the girl even when they had met earlier in the evening at the deceased's house, as confirmed by Jasmine Tobias. Jasmine Tobias went on to testify that accused had told the deceased to go to his house and prepare for him, whereafter the latter refused to go because she had a baby to take care of. The accused did not want to understand. The deceased later on went out after telling her that she was invited by a friend. She never saw the deceased again.

[70] Though accused himself testified that whilst enroute to the deceased's house, one would have to pass by a house frequented by boys who smoke dagga and that it was dangerous and unsafe, having parted with the deceased under those circumstances he never bothered to ascertain that she arrived home safely. Accused communicated telephonically with the deceased from the 9 – 12 March 2014 as confirmed by Chief Inspector Shangula. Their last communication was on the 12 March 2014. He was arrested on the night of the 13 March 2014 and had learnt about the deceased's death from the evening news only.

[71] It is common cause that the deceased was strangled to death by the accused on the night of the 12 March 2014. Accused appreciated the wrongfulness of his conduct by strangling the deceased to death whereafter he went on to place the deceased's body in the dustbin. The dustbin was pulled towards the dunes which was meant to frustrate the police investigation into the disappearance and death of the deceased. It is a notorious fact that in normal circumstances the sand dunes would later on cover the body which would result in the police investigation being delayed or defeated completely.

[72] Accused having left the scene after he had dumped the deceased's body, did not report himself to the police but was only arrested after the tracks of the dustbin had been followed which led the police to the accused's parents' house, which was found to have been recently raked in an effort to conceal the origin of the dustbin tracks.

[73] Coming to the charge of rape, accused does not deny to have committed a sexual act with the deceased. A sexual act in terms of section 1 of the Combating of Rape Act “means the insertion even to a slightest degree of the penis of a person into the vagina, anus or mouth of another person.” It is therefore important to consider the accused’s conduct before and after the incident. The sexual intercourse with the deceased, could not have been consensual because the deceased was strangled to death, and the accused had scratch marks all over his body which is indicative of a disagreement between them prior to the deceased’s death. Jasmine Tobias testified about the accused having been upset when the deceased informed him that she could not go with him to prepare food for him.

[74] It is now common cause that the deceased died as a result of strangulation as confirmed by Dr Vasin who conducted the post-mortem examination on the body of the deceased. It is further common cause that the deceased and the accused were involved in a domestic relationship prior to the deceased’s death between 12 and 13 March 2014.

[75] Accused and the deceased were in each other’s company during the night of 12 to 13 March 2014, as confirmed by the text messages exchanged between them. Accused confirm to have been with the deceased during the night of 12 to 13 March 2014 whereafter the deceased left for her house. Her body was found in the dunes on 13 March 2014.

[76] Indeed there were no eye witnesses to the actual killing of the deceased and as such the state’s case is solely based on circumstantial evidence. In dealing with the reliance of the conviction of an accused on the basis of circumstantial evidence, our courts have invariably adopted and religiously follow the two cardinal principles laid down in *R v Blom*,² where at 202 the learned J Watermeyer JA, as he then was, stated:

‘That in reasoning by inference there are 2 cardinal rules of logic which cannot be ignored:

² 1939 AD 188.

- (a) The inference sought to be drawn must be consistent with all the proven facts. If not, the inference cannot be drawn.
- (b) The proven facts should be such that they exclude every reasonable inference from them save the ones to be drawn.'

If they do not exclude other reasonable inferences then, there must be doubt whether the inference sought to be drawn is correct. As alluded to, the proven facts are that the deceased died by strangulation during the night of 12 to 13 March 2014. The deceased and the accused were in each other's company. Accused lied about the knowledge of the deceased when confronted by his relatives when the news of the deceased's death came out. He also denied that the deceased was his girlfriend when that was indeed the case. Accused's DNA was found on the handle of the red dustbin in which the body of the deceased was transported to the dunes. The red dustbin came from accused's shack at 79 Sitrien Street Kuisebmond.

[77] Accused throughout the trial has denied having killed the deceased who was his girlfriend. It is trite that an accused need not to explain anything to prove his innocence. In *casu* there is sufficient circumstantial evidence which heavily incriminate the accused which calls for an answer from the accused. Failure to answer in the face of the weight of such uncontradicted evidence, the court may safely conclude that such evidence is conclusive to warrant the accused's conviction.

[78] The body had been removed from the accused's shack in a red dustbin, from which his DNA was found as confirmed by Ms Swarts, Chief Forensic Scientists from National Forensic Science Institute in her report marked 982/2014 which was received as Exhibit "Y2" before Court.

[79] According to the Report on a Medico-Legal Post-Mortem examination, Exhibit "R" before Court, the Chief post-mortem findings made by the doctor who conducted the examination of the body of the deceased were:

- (a) Extensive fresh skin abrasions placed on the right aspect of the face.

- (b) Numerous nail-like looking linear and semilunar abrasions placed on the right upper antero-lateral aspect and right mandibular area.
- (c) Tardier spots placed on the visceral pleurae of lungs and on epicardium.
- (d) Blood fluidity.
- (e) Systemic visceral venous congestion and moderate pulmonary oedema.

[80] From the doctor's observations he concluded that the cause of death was as a result of asphyxia due to manual strangulation. The injuries described by the doctor in his post-mortem examination report suggest that the deceased and the accused had been involved in a physical confrontation because accused was also examined by a doctor after his arrest and was found with similar injuries on the back of his body, which was also confirmed by the police. Those injuries were documented in the report by an authorised medical practitioner as per Exhibit "L" handed in before Court, dated 14 March 2014.

[81] Further, evidence presented before court is that during the evening of 12 March 2014, the accused visited the deceased's house where he greeted Jasmine Tobias. According to her testimony, she did not respond after which he called out loudly the deceased by her nickname "Didi" in order for her to come out. Accused was heard making threats to hurt the deceased. The deceased then came out and spoke to the accused. Accused requested the deceased to go and make him food but she declined because she was babysitting. Jasmine further testified that at a later stage the deceased wore her jacket and left their house claiming to have been invited out by a friend. That was the last time she saw her alive. When she attempted to stop her from going out, the deceased got angry and told her to stop.

[82] In a criminal case there is only one test and that is whether the evidence establishes the guilt of the accused beyond reasonable doubt. In order to convict, there must be no reasonable doubt that the evidence implicating the accused is true, which can only be so if there is at the same time no reasonable possibility that the evidence exculpating him is not true. In *casu*, there is evidence that accused had made prior threats to hurt the deceased. There is further evidence of the deceased

having been assaulted prior to her being strangled to death. Indeed the killing of the deceased was unlawful and there is proof that the accused individually killed the deceased with a required *dolus by* strangling her manually. The only issue that remains to be determined is whether the accused had the necessary intention to kill the deceased.

[83] Intention can be deduced from the manner in which the accused conducted himself during and after the commission of the crime. It is evident that the deceased was strangled, which act is sufficient to infer that accused did so with a guilty mind. A lot of force must have been applied in order for the deceased not to have sufficient air as a result of which she died due to asphyxia. The accused went on to remove the deceased's body in a red dustbin in order to conceal the deceased's death. His conduct clearly show that he planned the deceased's demise, as such the Court is satisfied that he had a direct intent to kill the deceased. Accordingly he is convicted on a charge of murder with direct intent.

[84] With regard to the charge of Rape in Contravention of section 2 (1) of the Combating of Rape Act, there is undisputed evidence by the accused himself that he had sexual intercourse with the deceased on the night of 12 March 2014 before she left his shack. What the Court has to determine is only whether the sexual intercourse was a consensual one. The deceased's body was found to have had injuries which the doctor had described as numerous nail-like looking on her face, and that the cause of death was as a result of manual strangulation. The accused's testimony that he indeed had consensual sexual intercourse with the deceased who was his girlfriend at the time does not accord with an atmosphere of bliss after a consensual sexual intercourse, let alone his actions of removing the deceased's body whereafter he dumped it a distance away in the dunes.

[85] On all the evidence before me, I am convinced that the State has proved the charge of Rape in terms of the Combating of Rape Act, on the seventh count read with the Provisions of the Combating of Domestic Violence Act 4 of 2003. Consequently, the accused is convicted on a charge of Rape.

[86] Moving on to the charge on the eighth count, the accused is charged with the offence of Defeating or obstructing or attempting to defeat or obstruct the course of

justice. The state led the evidence of one Juliana Kondjeni. Her testimony was not disputed that at the time of the murder, she resided near the accused's parent's house number 79 Sitrien Street. According to her, she saw the accused raking their yard on the 13 March 2014. She was also confronted by the lady by the name Nambahu who was looking for her red dustbin whom she referred to the accused's shack. State witnesses Tusnelde Matias and David Shikulo's evidence corroborate each other with regard to the red dustbin which is Exhibit "3" before Court to have been removed at the latter's house.

[87] It is now common cause that the deceased's body was conveyed in the red dustbin and dumped in the dunes. Accused's own defence witness Kaipewa confirmed that it was usually the accused's mother who raked the yard. It is clear from the evidence presented before court that the raking of the yard by the accused was done in order to frustrate the police in the conduct of their investigations into the death of the deceased, thereby frustrating the course of justice. It is also common cause that had the body of the deceased not been discovered on the morning of the 13 March 2014 it could have been covered by the sand dunes thereby making it difficult to be found as investigations surrounding the reported missing person continued.

Conclusions

[88] Having carefully considered all the pieces of evidence in this case, the court is satisfied beyond reasonable doubt that accused committed the crimes as charged in respect of all the counts, namely count one, two, three, four, five, six, seven and eight.

D N USIKU
Judge

APPEARANCES:

STATE: Mrs Nyoni
Office of the Prosecutor-General, Windhoek

ACCUSED: Mr Dube
Instructed by Directorate of Legal Aid, Windhoek