

NOT REPORTABLE

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

CASE NO: CC 04/2017

In the matter between:

THE STATE

v

ELWEN GAWAXAB

ACCUSED

Neutral citation: *S v Gawaxab* (CC 04/2017) [2018] NAHCMD 293 (20 September 2018)

Coram: SIBOLEKA J

Heard on: 7, 8, 9, 11, 21, 22, 23, 24 May 2018; 4, 5, 6, 7, 11, 12, 14 June 2018; 9, 17, 18, 25, 31 July 2018; 8 August 2018; 5 September 2018.

Delivered: 20 September 2018

Flynote: Criminal law: Murder – accused continuously assaulted the deceased - stabbing her on the upper body with a broken bottle neck and

dropping a stone on her as a result of which she died – guilty murder dolus directus.

Summary: Murder - the accused brutally attacked two ladies one escaped and the other succumbed to the injuries she sustained at the hands of the accused. The finer private financial details the accused shared with the ladies ensnared him into an arrest and prosecution.

Held: The accused's identity as the only male person who was with the deceased and her friends on the night of the incident and being the person who attacked the deceased and her friend proved beyond reasonable doubt.

VERDICT

In the result the accused is convicted as follows:

Count 1: Guilty – Murder – dolus directus.

Count 2: Guilty – Assault with intent to do grievous bodily harm.

JUDGMENT

SIBOLEKA J;

[1] The accused is arraigned on the following charges of the indictment:

Count 1: Murder

In that during the period 18 – 21 August 2015 and at or near Windhoek in the district of Windhoek the accused did unlawfully and intentionally kill Cathy Marlene Gatonye, an adult female person.

Count 2: Attempted murder

In that during the period 18 – 19 August 2015 and at or near Windhoek in the district of Windhoek the accused did unlawfully and intentionally assaulted

Thalitha Patricia Khaigu Mungunda by hitting and/or beating her with fists and/or a bottle in the face and/or by kicking her with shoed feet, and/or by stabbing her with a broken glass bottle in the face and/or head, and/or grabbing and pulling her by her hair/braids with the intent to murder her.

SUMMARY OF SUBSTANTIAL FACTS IN TERMS OF SECTION 144(3)(a) OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977

During the late night hours of Tuesday 18 August 2015 or the early morning hours of Wednesday 19 August 2015 the accused met the deceased and her friends at a bar in the district of Windhoek. The accused, deceased and her friends later left the bar and they drove in a motor vehicle to a service station in Khomasdal. After refueling the motor vehicle and after the accused withdrew money from a nearby ATM machine the group continued on their journey. Along the way an argument and later on a fight ensued in the motor vehicle between the accused on the one hand and the deceased and the complainant in count 2 on the other hand. The motor vehicle was brought to a standstill and the accused continued assaulting the complainant as set out in count 2. The complainant managed to escape and she ran away from the accused. The accused assaulted the deceased by grabbing her on her hair/braids, hitting and/or beating her with fists and/or a stone on the body and head, kicking her over her body and head and/or stabbing her with a broken glass bottle or other unknown objects. The deceased died on 21 August 2015 in hospital due to blunt force trauma to the head.

[2] The accused pleaded not guilty to both counts and did not furnish any plea explanation therefore. He put the State to proof of all the allegations levelled against him.

[3] It must be noted from the onset that in addition to the names of some of the prosecution witnesses, the record of proceedings also relates to their following nicknames: Rosina Tjihero is also referred to as “Kapuwa”; Cathy Marlene Gatonye (the deceased) is also referred to as “Cathy”, and Thalitha Patricia “Khuigu Mungunda is also “Melisa”.

[4] The thrust of the accused’s case is that although he was at Caprivi Bar on the day alleged to be that of the incident by the prosecution witnesses he was in fact in the company of other ladies, but not with Tjihero; the deceased and her friends at all.

[5] I will now look at the evidence placed before court by the prosecution witnesses.

[6] During the day on 18 August 2015 four ladies Tjihero, Mungunda, and the deceased went to Caprivi Bar in a white Tazz owned and driven by Tjihero. Johnson found them there. She only knew Tjihero and she asked her to join their company and was allowed. According to Tjihero it was the accused who bought beers for all of them at that bar.

[7] Johnson was standing with Tjihero inside Caprivi Bar, Mungunda and the deceased were sitting having their drinks when the accused approached them and asked to be taken to an ATM machine to withdraw money. Tjihero told him there was no fuel in the car. The accused said he will buy petrol. Tjihero then inquired her friends’ reaction to the accused’s request and were agreeable that the accused be in their company.

[8] The accused sat in the front seat next to the driver drinking from his 750 ml bottle of Richelieu, while the deceased sat behind the driver, Mungunda in the middle and Johnson behind the accused, also drinking alcohol. Tjihero drove to Gammams Fuel Service Station where the accused bought N\$100 petrol. The

deceased and Mungunda started quarrelling with the accused en route to the Service Station. This came about according to Johnson when the accused told them he had money, and was therefore able to go and sleep, have sexual intercourse with all of them. The intensity of the arguments inside the moving car is confirmed and described by Mungunda saying ‘... chaos erupted ...’ . The deceased and herself found the accused’s utterances to be vulgar and disturbing given the fact that they were married and or they had their own boyfriends. These arguments were mainly spoken in Damara>Nama language which Tjihero and Johnson did not understand. In addition to this, Tjihero was mostly focused on the road as the driver, so she did not listen precisely to get to understand in full what it was all about. She was only able to pick up bits of the argument when the parties changed into Afrikaans, which is also the case with Johnson. The heated arguments were only between the accused, the deceased and Mungunda. When the car stopped, he promised to assault them, hence he first started assaulting Mungunda.

[9] After the accused had put in fuel for N\$100 he asked the driver to park at the nearby Standard Bank ATM at the same fuel station and requested that they should wait there till past twelve midnight to enable him to withdraw money to buy some more alcohol and the driver complied. The three ladies sitting behind were uncomfortable about the long waiting. The accused withdrew N\$2 000 and arguments between him, the deceased and Mungunda that had already started en route from Caprivi Bar now intensified. This resulted in the accused not specifying where he should be dropped off. From the Gammams Standard Bank ATM machine, Tjihero drove to a house (an alcohol outlet) in Khomasdal where the accused paid her debt. At this house the accused, Tjihero and Johnson went and sat in the house, in a lighted area drinking beer for ± 45 minutes. Because of the long waiting one of the ladies in the car hooted and the resulting noise did not sit well with the owner of the house who then ordered them to leave the place.

[10] When Tjihero drove away from this house arguments between the accused the deceased and Mungunda intensified uncontrollably such that the accused hit Mungunda with the Richelieu bottle in the face hurting her. From here the accused started beating around randomly with the Richelieu bottle, and the ladies in the back were blocking and shielding their faces to avoid injuries. This conduct disturbed Tjihero's control of the moving car. She pulled off the road and stopped. The accused got off, removed the T-shirt he had on. Tjihero, the deceased and Johnson also jumped out of the car. Mungunda remained seated and tried to lock the car doors from the inside but she could not succeed. The accused pulled her out and started beating her. They all started pleading with the accused to stop assaulting Mungunda without success. Meanwhile the deceased walked across the street in an effort to stop any of the vehicles passing by to ask for help. This resulted in Tjihero and Johnson driving away in fear for their lives without the deceased and Mungunda who was still being assaulted by the accused. Tjihero reported the matter at a mobile police station, but they did not have transport to render the necessary assistance.

[11] Michael Shapumba, a resident of Shovela Street in Khomasdal, Windhoek, testified that on 19 August 2015 between 00h00 to 01h00 in the middle of the night he walked outside his house into the yard for fresh air. While there on a bench he heard a vehicle stopping along the side in Shovela Street. A quarrel ensued among its occupants, a man was quarrelling about N\$2 000. From the tone of his voice Shapumba could hear that he was very violent. The man became increasingly violent and while so listening he heard something like a person being struck and a lady started crying. The man was very angry and annoyed. He repeatedly told the ladies he was not stupid. Shapumba heard how the ladies were pleading with him to stop beating one of their friends without success. Shapumba then decided to go to the small gate of the yard of his residence to have a better view of what was going on, and suddenly the car drove away. At the small gate he was a bit nearer to where the car was parked, the area was lighted and the vision was good. When he looked he saw a man

without a shirt on, beating a lady, assaulting her more and more. The man said he was not a 'moegoe' meaning he was not a fool. He stated that he has been taken for a fool. Shapumba said to him 'H –e-e don't beat the lady'. He stopped the beating, looked at him, and pointed to the direction down the street, indicating to the lady they should walk down to the Hofsanger Street junction. The lady complied and they started to walk in that direction.

[12] When Shapumba noticed that the lady did not protest at the time he reprimanded the man, he thought that maybe they were a couple, quarrelling about money. The man held the lady by the hand and they started walking down the street. Shapumba went to sit on a bench in the yard. The two went to an open space around house no. 5396. Suddenly the lady started screaming for help saying 'somebody help me, help me'. Shapumba then called the police and directed them to the Hofsanger Street junction. He was told there was a police patrol nearby in the area and they will send it there. Shortly thereafter he saw the response team, the ambulance drove past flickering its emergency lights. Shapumba exited his yard and went to the scene where the ambulance, the police and neighbors were already standing. At the scene he saw a lady laying on the ground. A white sedan came at the scene with two ladies inside. They told the police that the lady who was laying there on the ground was in their company and is their friend. The evidence of the three prosecution witnesses Kwenani, Amakali and Shapumba, the residents of Shovela Street who witnessed the incident from inside their residents in the early hours of the morning on 19 August 2015 in Shovela and Hofsanger Street junction respectively, credibly and beyond reasonable doubt connects and corroborates the evidence – Tjihero, Johnson, and Mungunda about what happened.

[13] As already stated Shapumba, Amakali and Kwenani reside in Shovela Street in Khomasdal. The latter two witnesses were woken up by the intensive barking of their dogs in the early morning hours of 19 August 2015. Kwenani looked outside the window and saw a lady running along Shovela Street towards

Hofsanger Street junction past his house. He did not pay much attention because he thought the lady was just running. However, in hardly some few minutes the barking of his dogs intensified. He went to see what was going on. He observed a black man without clothes on his upper body holding a seemingly resisting lady. The two were on the same route the first lady came running along past his house. The man had a long bottle in his hand, his arm was around the groaning lady's neck. Kwenani could hear how she was groaning, resisting to go along with the man. He thought they were two drunk lovers. Visibility was good, it came from street lights. Shapumba, Kwenani and Amakali testified that there were no other road passerby's at the time.

[14] At the four way of Shovela and Hofsanger the man started pulling the lady to the left side along Hofsanger Street and the lady continued resisting. It was at that moment Kwenani saw the man beating the lady with a bottle such that it broke. He could not see precisely where the blow landed. The two moved away towards Hofsanger Street.

[15] According to Kwenani when the man and the lady were in Hofsanger Street he realized the lady was laying down on the ground, but he did not observe what brought her down. This was at the time he was trying to call City Police. When he looked at them again he saw the man first raising up his two hands in which he held an unknown object, and then dropping it on the lady who was already laying down. Kwenani could not see precisely what the object was, and where it landed on the body of the lady. He saw his neighbor Amakali driving to the scene, and he also went there. At the scene all three prosecution witnesses, Amakali, Kwenani and Shapumba were present.

[16] A lady was seen laying on the ground on her back. She had an injured face, and on her chest where her shirt was torn (she was open chested). A blood stained stone which in Kwenani's recollection was the object he earlier on while looking through the window, saw the man dropping on the body of a lady who

was laying down. The lady was still alive but she was not moving her body in any way. Breathing could only be noticed from her chest.

[17] Laina Amakali, is a resident of Shovela Street Khomasdal, Windhoek. On 19 August 2015 in the middle of the night, she, like her neighbor Kwenani, was awoken by her barking dogs. She got to the window of her room to see what was going on. She saw a bare chested man grabbing a lady by the hair, and pulling her towards him, such that she started screaming. This was happening at the fore way. The man started beating the lady such that she fell down, but she cannot say whether he used an open hand, a slap, or a punch. The man kicked the lady while she was on the ground. The kicks were hard because the man moved his leg far back to kick her. Amakali woke up his brother so that they could do something about the matter. When she came back to the window she saw the man across the street. She could hear how he broke a bottle, and saw him walking back to the lady who was still laying on her back on the ground. He bend down over her and started stabbing her with a broken bottle on her upper body. The man thereafter walked back to where he got the bottle and picked up a stone. He again walked to where the lady was laying, he lifted up both hands in which he held the stone and hit the lady by dropping it on her.

[18] According to Amakali the man then sat on top of her, he held both sides of her face and started moving her head. There were no movements of people on the street at the time. Amakali's brother drove her to the scene, and she was the first person to arrive there. She found the lady laying in the middle of the four way in a critical condition. She had a torn T-shirt on. Her assailant was gone. The lady did not talk and neither could she move her body. Amakali and her brother were too scared to come out of their vehicle. The second people to arrive at the scene were two ladies in a white car. The police and the ambulance found Amakali there, and so did her neighbors and other people. Nobody touched the lady except the ambulance personnel and the police who removed her from the scene to the hospital at Katutura.

[19] Reinaldo Koopman, an employee of the City of Windhoek Emergency Services testified that on 19 August 2015 at about one o'clock in the early morning hours him and Alastair Nakale were dispatched to an assault scene in Hofsanger Street in Khomasdal. They found a female person laying on her back in a pool of blood. She had a torn blouse and a trouser on. Next to her was a dark in color broken beer bottle neck. She had multiple lacerations (open cut wounds) on the left side of her chest. The whole right side of her face was swollen. She was not moving her body and neither was she responsive when they talked to her. They stopped the bleeding by putting bandages on her wounds and loaded her on the ambulance. They were unable to get her vein due to a lot of blood she had lost. They took her to Katutura State Hospital where she was received by the nurses and a doctor. Afterwards her family members furnished him with her full names as Cathy Gatonye and her residence.

[20] The above evidence relating to the manner how and the objects which Amakali saw the deceased being assaulted with, is credibly supported by the medical description of findings of Dr. Fred Gartner who received the deceased's body on 19 August 2018 at 04h00 at Katutura State Hospital. At the time of her admission to the Medical Centre she had multiple stab wounds in the face, head, breast, and abdomen. She did not react to light, both pupils of her eyes were fixed and dilated. No lid, no cornea reflex, no gag reflex. She had massive brain oedema, small subdural hemorrhage on her left side. She had multiple dislocated skull fractures especially in her face. She was not reacting to any stimulus and had no brainstem reflex. Her condition did not allow any surgery to be done on her. The doctor tried to stabilize her, but breathing and the heartbeat stopped. She was declared dead at 05h55 that same morning.

[21] Dr. Vusin examined the body of the deceased on 25 August 2015. The chief post mortem findings were that the deceased had a lacerated wound on the left side of her head; fourteen stab and incised wounds on her head, chest, and

abdomen. A single penetrating stab injury on the left pleural cavity; a base skull hinge fracture. She had a left side subdural hematoma. Diffuse subarachnoid hemorrhages on the frontal and right temporal aspect of the brain; a marked cerebral oedema; a moderate systemic visceral pallor and pulmonary oedema. He concluded that death was caused by a blunt force head trauma coupled with multiple incised and stab injuries. According to him the deceased's wounds were caused by a sharp pointed object, markedly varied in their shape, width, and depth; 'the wounds may be considered to have been inflicted by a broken bottle.'

[22] Bounty Byron Awaseb testified that the deceased was her niece. In the morning after the incident they went to the hospital as family members to see her. While there, a relative Janet Rina Haipare was talking to others regarding the whereabouts of the scene of the incident. Awaseb quickly figured out the area because his brother stayed hundred metres away from there some few years back. This is how he came to know the area. He went there to see if there could still be some evidence. At the scene he saw a big pool of blood and blood spatters from the main pool going as far as four metres outwards. Close to that was a white big stone full of blood and a broken bottle neck also full of blood. He did not touch them. He instead called and asked a family member to contact the police. He then took photographs to illustrate what he saw at the scene. He did this in case it had not yet been done, and that was indeed the case. The police did not take photos of these items at the scene of crime.

[23] Awaseb compiled a photo plan which he read into record, and was handed in as exhibit 'N'. He waited for roughly half an hour before the police arrived, to collect the items. In court Awaseb recognized the blood stained whitish stone and the broken bottle neck that he found and took photos of at the scene of crime. He saw the police officer Mujoro putting his hands in a plastic paper before he removed the stone and the broken bottle neck from the scene and placed them in another plastic paper. Mujoro materially corroborated the

evidence related to the revisitation of the scene during the day at the request of Awaseb.

[24] Det/Sergeant Mujoro was the first investigation officer of this matter. On 19 August 2015 at 02h35 in the early hours of the morning he was called and directed from the Police Control Room to attend to a person who was laying on the ground in Hofsanger Street, Khomasdal. He drove to the scene where he found Tjihero and Johnson who were with the deceased. City Police, the ambulance and paramedics were already attending to the victim. The said two ladies told Mujoro that in addition to their female friend laying on the ground at the scene of crime they were also with a male person in their company who related to them that he had seventy eight thousand Namibian Dollars in the bank. On that man's request they drove him to Gammams Service Station where he withdrew N\$2 000 some minutes after twelve in the middle of the night at the Standard Bank ATM machine at the same Service Station. The ladies related the story covering the whole duration the said male person was in their company.

[25] It was the story Tjihero and Johnson related to Mujoro that resulted in the officer obtaining a Standard Bank statement on the particulars the ladies told him. The statement reflected beyond reasonable doubt that it indeed belonged to the accused before court. Mujoro noticed that all the finer details the ladies told him in regard to his finances, such as the substantial amount of money the accused had in his bank account; the exact amount he withdrew at the time he was with them, on 19 August 2015; the date and time of the withdrawal; the specific location of the ATM machine where the withdrawal was made, and the name of the Bank to which the ATM machine belonged were all confirmed by the statement.

[26] On 17 November 2015 Mujoro went with Sergeant Masetu, the photographer, to the scene of crime. There he showed and pointed out certain points to him, to enable him to reconstruct the scene which Awaseb had shown

him. He booked out the exhibits ie. the stone and the broken bottle neck from the Charge Office Pol. 7 and he handed them to W/O Shitunyemba, the officer in charge of the Pol 7 Room. The accused's Bank Statement also reflected his residential address in Nama Location, Katutura. He drove there and found an elderly lady who when asked about the accused's whereabouts introduced herself as his mother. Mujoro asked her to tell the accused to report himself at the police which he did and hence his arrest on this matter.

[27] Samson Haita testified that he is a Det/Sergeant in the police at Katutura Police Station working as a driver assisting the investigators to trace the accused at his residence but he was not there. He however later reported himself at the police station. The witness explained the accused's legal rights, telling him that he was facing serious allegations, he was not obliged to answer questions or to talk about the incident, he may remain silent and say nothing. He has the right to legal representation of his own choice and cost, if he cannot afford it he is entitled to apply for a legal aid funded counsel. The accused understood and elected to remain silent. The set up at the station is that the C. I. D. Department is one hundred metres away from Katutura Police Station. When the accused reported himself Haita was the only male officer and was requested to escort the unhand cuffed accused from the C. I. D. Section to the Police Station. As they approached the Charge Office, a lady he later came to know as Rosina Tjihero shouted in Afrikaans "it is the man; it is the man" referring to the accused before court.

[28] The chain of custody of the stone and the broken bottle neck:

[29] Among the prosecution witnesses it is Laina Amakali who saw how the accused acquired a broken bottle and a stone, the items he used to stab and beat the deceased. Kwenani a neighbor to Amakali saw the accused dropping/lowering an object on the deceased with his two hands. That same day Bounty Awaseb came at the scene and found a pool of blood; a blood stained

broken bottle neck and a stone at the scene of crime. Awaseb found the items after the deceased has already been removed by ambulance and taken to Katutura Hospital. He took photos of them, and instead of touching any of them, he called the police to come and collect them. Mujoro confirmed collecting the stone and bottle neck without touching them. These items were handed in by Awaseb as exhibits 1 and 2 respectively. Both Awaseb and Mujoro identified the broken bottle neck and the stone as the items they found at the scene of crime on this matter. Mujoro handed the stone and the broken bottle neck to W/O Shetunyenda for safekeeping.

[30] Kodula Ndatila Shetunyenga is a Warrant Officer stationed at Katutura Police Station and is in charge of the Pol 7 Room Safe and she is the only holder of the key to it. She confirmed to have received these exhibits from D/Sgt. Mujoro in ordinary plastic paper and in the same way she does to all exhibits received, she booked them in Pol 7 at the Charge Office. Hereafter she booked them out of the Charge Office Pol 7 register, exhibit 'O' before court and placed them in the Pol 7 Room for safe keeping. In court while testifying she recognized a stone and a broken bottle neck. While in her care the two exhibits were never tampered with. The exhibits still had the blood stains they had on the day he received and placed them in the Pol 7 Room. This witness did not change her evidence during cross-examination.

[31] Jona Johannes Iyambo is the scene of crime officer whose duties entail taking fingerprints; photographing; latching; collections; packaging transportation and the dispatch of exhibits. He testified that he made an application for scientific examination on the following:

The swab easy collecting kit exhibit bag NFB 30785;

The dry blood collected from the deceased for grouping in a forensic bag NFB 34724;

One bottle neck forensic bag NFB 14411;

One stone forensic bag NF 014911. Iyambo received all these exhibits from Det/Sgt Haita on 17 February 2016. On 18 February 2016 he handed them to W/O Hamukwaya to send them to the Forensic Laboratory; Each exhibit was in a separate forensic bag excluding any tempering with any of them.

[32] According to Ms. Swartz, the head of The Forensic Science Institute, exhibit 'R', Report No. 607/2016 R1 dated 29 June 2016. The bottle neck exhibit 'C' and the stone exhibit 'D' both tested positive for human blood. This means the blood stains which were found on these objects were that of a human being. The test results of the following samples: the swab easy and the dry blood collected from the deceased on the one hand; the blood stained stone, and bottle neck retrieved from the scene of crime where the deceased was picked up badly injured were all found to belong to one and the same person and that is the deceased on this matter.

[33] Leonard Nghidimbwa is working at Windhoek State Mortuary. His duty is to receive bodies of deceased persons from all hospitals and Police Stations countrywide. On 21 August 2015 he collected the body of a female person at Katutura Head Injuries Division, Second Floor. Her wrist name tag indicated that she was Katonya Cathy Katonye, the deceased on this matter. On Monday, 24 August 2015 the body was handed to Sgt. Loide Pineas of the State Mortuary. The later confirmed receipt as well as the identity of the deceased made to her, by the husband, Robert Gatonye. On the following day, Pineas assisted Dr. Yuri Vasin to perform a post mortem examination. According to these medical findings the deceased died of multiple incised and stab injuries.

[34] Elwen Gawaxab is the accused on this matter. He testified in his defence saying that on the day of the incident he bought groceries for his wife and took it along to Caprivi Bar where he had some drinks with his old friend. He asked for a lift home from a lady he saw locking a car after alighting from it but she refused.

Later the same lady agreed to take him and she was with her two female friends. They boarded the car and were four in total. He asked the driver to inform him when they came to Stockholm Street, but she did not do so. The accused took a nap and when he woke up they were at the fuel station. He went to withdraw money alone and he poured in petrol for N\$200. One of the ladies sitting behind asked him to buy something for her, but he refused. The car drove and stopped at the house where the driver asked him to help pay her debt of N\$460 which he did. Thereafter he boarded the car and again had a nap only to find himself laying on the ground in the bushes near Otjimuisse Fire Station. He traced and found his way back home. The groceries he bought for his wife, his cell phone, his wallet were all gone. He went back to his workplace at Waterberg. His mother called from Windhoek saying the police were looking for him. He asked for permission to come and report himself at Katutura Police Station where he was arrested on this matter. He does not know Tjihero, Johnson and Mungunda who testified against him in court. He also does not know the deceased. He only saw these ladies for the first time, in court when they were giving evidence. He knows nothing about the allegations levelled against him against this matter.

[35] Margaret Mupaseni Gawaxab is the accused's wife. She testified that on 18 August 2015 the accused arrived home at ± 16h00 from Waterberg, his workplace. He was dressed in a green T-shirt, green long trouser with many pockets, and shoes – all were work clothes. She told him that the mechanic who was working on their vehicle was looking for him. The accused left home and only came back in the early hours of the morning. She opened the door for him and saw that he was still dressed in the way he had left. The contrasting feature in their evidence is that the accused did not testify about him being required to attend to the mechanic who was working on their car.

[36] Counsel for the prosecution, Lutibezi submitted that the two witnesses Tjihero and Johnson testified that it was the accused who approached them asking to be taken to an ATM machine to withdraw money. Lutibezi asked the

court to convict the accused on both counts as the prosecution has proved beyond reasonable doubt that it was the accused before court who was together with them on the evening of the day of the incident. This counsel submitted that the accused corroborated Johnson's evidence who testified that apart from having seen the accused at Caprivi Bar on that evening, she previously saw him at a shebeen in Otjimuse.

[37] Siyomunji, counsel for the accused requested the court for a discharge on all counts because according to him none of the prosecution witnesses identified the accused. This, according to him includes Mungunda who told the court that she does not know the person who assaulted her. This, according to this counsel could be because of intoxication. Siyomunji argued that all the other prosecution witnesses only saw a shirtless male person whom they did not know, assaulting an unknown lady. This counsel referred to various authorities and stated that there was no duty on the accused to prove anything during his trial and this court is alive to that arrangement.

[38] Tjihero and Johnson were standing while Mungunda and the deceased were sitting having their drinks inside Caprivi Bar when the accused came asking to be taken to an ATM machine to withdraw money. Johnson had just arrived from her residence nearby and had taken only one beer. This encounter was in a lighted area. Tjihero asked for the reaction of her colleagues and were agreeable. They drove to Gammams Service Station as the accused had requested. Although the evidence is that the accused bought alcohol for the three prosecution witnesses including the deceased, he in fact did not sit having drinks with them at one table at all. That is why Mungunda was unable to identify the accused as the person who assaulted her. This inability is not as a result of intoxication, but it is due to the fact that she did not have a sufficient opportunity to have a proper sight of him in a lighted area like Tjihero and Johnson have had in this matter.

[39] The crucial question this court should answer on this matter is whether the accused has been credibly identified beyond reasonable doubt as the male person who was in the company of the deceased, Rosina, Johnson and Mungunda on the evening of the incident. In this regard the court will make the following observations. According to Tjihero's evidence it was the accused who approached and requested her to be taken to the ATM machine to withdraw money, and she granted that request. Johnson confirmed that evidence saying that she was standing with Tjihero when the accused made the request. From Caprivi Bar where the accused bought alcohol for all the ladies up to the scene of crime, the accused sat next to Tjihero as she was driving her own car. Tjihero drove to Gammams Service Station, a well lighted place, visibility is good. It also has ATM machines. It is at the same Service Station where the accused poured N\$100 petrol in Tjihero's car and withdrew N\$2 000.

[40] The accused told the ladies that his competency to make a withdrawal has been exhausted. This is the reason why they all had to sit for a long time inside the car at the ATM machines (Gammams Service Station) waiting for the next day (past 00h00) to enable the accused to withdraw money. When it was 00h08 the accused asked Tjihero to go with him to the Standard Bank ATM machine, which she did. Tjihero saw the accused punching in an amount of N\$2 000 which is indeed the amount he withdrew and is accordingly reflected on the accused's Standard Bank account statement. After withdrawing N\$2 000 Tjihero drove to a house in Khomasdal where herself, the accused and Johnson sat drinking alcohol in a well lighted area for ± 45 minutes in the house. At this house the accused paid Tjihero's debt to the owner of the house.

[41] During heated altercations in the car before the incident Mungunda and Johnson testified that the accused told them he had N\$78 000 in his account, such that he was able to take them to a Guest House and have sex with all of them. During cross-examination the accused confirmed that indeed he received an amount of N\$78,303.95 from Kirsten and Co. Inc. on 18 August 2015. This

amount is also reflected on the accused's Standard Bank account obtained by Sgt. Mujoro and handed in court as an exhibit. The accused's Standard Bank statement obtained by Sgt. Mujoro on 28 December 2015 shows and confirms the accused's receipt of that amount. It further shows that on 19 August 2015 at 00h08 he withdrew an amount of N\$2 000 at Gammams Service Station Standard Bank ATM machine. The accused confirmed the above information regarding his private account as correct during cross-examination by the prosecution counsel.

[42] In his evidence in chief and during cross-examination the accused confirmed to have been at all the various places Tjihero, Mungunda and Johnson testified to have visited on the evening of 18 August 2015 leading to the early hours of 19 August 2015 on the day of the incident, except the scene of crime. He however stated that he was in the company of other ladies. It is humanly impossible for a person to be on two different vehicles driven and occupied by different people at the same time. If the accused had at least called some of those ladies to testify in his defence and be cross-examined, such a move could have been in his favour, but he elected not to do so. This, in my considered view is because the accused was not in the company of other ladies other than the deceased, Tjihero, Mungunda and Johnson as the latter had credibly, and satisfactorily detailed in their evidence before court.

[43] In addition to the above crystal clear and credible identifying evidence pointing to the accused as the only male person who was together with Tjihero, Johnson, Mungunda and the deceased on the night of the incident, I make the following further observations:

When the accused hit Mungunda with a beer bottle Tjihero stopped the car. All the occupants got out and Mungunda remained seated. The accused removed his shirt, pulled out Mungunda, his first victim and started beating her. Tjihero and Johnson pleaded with him to stop without success. The deceased was standing across the road trying to stop passing vehicles to ask for help. Tjihero

and Johnson drove off and reported the attack to the police. Shapumba saw a parked sedan vehicle with ladies talking loud, pleading with a man without a shirt on to stop beating a lady without success.

[44] The accused, right through his attack on Mungunda, did not have a shirt on. When Mungunda, the first victim escaped the continuous assault on her by running away, she only left the shirtless accused and the deceased, the second victim at the scene of crime. The running away Mungunda was spotted by Kwenani as she ran past his house. Within five minutes Kwenani again saw a man without a shirt on assaulting a lady along the same route the first lady came running past his house.

[45] The above evidence, holds credibly beyond reasonable doubt that the man without a shirt on testified to by Kwenani, Amakali and Shapumba that they saw beating a lady during the early hours on the day of the incident was the accused before court and nobody else.

[46] There is, in my considered view, no way that the ladies, Tjihero, Johnson, and Mungunda, the prosecution witnesses who the accused testified he did not know; they are not related and do not reside with him at all could have known with precision that during the early morning hours of 19 August 2015 at 00h08 on the day of the incident the accused had ± N\$78 000 in his private bank account; that he withdrew an amount of N\$2 000 from it at Gammams Service Station Standard Bank ATM machine, if the accused was not with them and had personally shared the information with them. In view of the above credible evidence, I hold that the accused before court was in fact the only male person who was together with Tjihero, Johnson, Mungunda, and the deceased in Tjihero's car from Caprivi Bar uninterruptedly up to the scene of crime where Mungunda was beaten up and the deceased was later picked up badly injured. I further hold that it was the accused before court who first assaulted Mungunda and thereafter launched a vicious attack on the deceased Cathy Marlene

Gatonye such that she later died at Katutura Hospital in Windhoek on 21 August 2015.

[47] The account of events placed before court by the accused is rejected not only as a lie, but it is a fabrication; an afterthought, and above all, it is false beyond reasonable doubt.

[48] The accused's intention to murder the deceased is credibly apparent from the way he continuously and savagely assaulted her. Where he started beating her, he realized that he was being observed by residents of some of the neighboring houses. He started pulling her by the hair/braids for a distance such that pieces thereof came out and were seen laying on the road. At the scene proper he beat her till she fell to the ground landing on her back. As if that was not enough, the accused left her laying there helplessly. He walked to the nearby bushes and picked up a bottle, broke it and came back to her. He used the bottle neck and stabbed her several times on her body. He walked back to the same place and picked up a relatively big stone and came back to her. He held it in his two hands, raised them up and dropped it on her. The accused sat on top of the deceased and held both sides of her face and was moving her head. He thereafter stood up and disappeared under the cover of darkness. The accused had thus directly caused the deceased's death.

[49] As regard the second count of attempted murder on Mungunda, it is only a charge of assault with intent to do grievous bodily harm that has been established.

[50] In the result the accused is convicted as follows:

Count 1: Guilty – Murder – dolus directus

Count 2: Guilty – Assault with intent to do grievous bodily harm

A M SIBOLEKA

Judge

APPEARANCES:

FOR THE STATE: Mr. C. K. Lutibezi
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FOR THE ACCUSED: Mr. M. Siyomunji
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