

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

CASE NO: CC 11/2016

In the matter between:

THE STATE

v

SIMION TOBIAS NDESHIFA

ACCUSED

Neutral citation: *S v Ndeshifa* (CC 11/2016) [2019] NAHCMD 160 (22 May 2019)

Coram: SIBOLEKA AJ

Heard on: 16, 17, 18, 20, 23, 24, 25, 26, 27 October 2017; 11 June 2018; 17, 18, 19, 21 September 2018; 22, 24 October 2018; 06, 07 November 2018; 15 April 2019;

Delivered on: 22 May 2019

Flynote: Criminal law: Murder – committed while under influence of alcohol – this credible evidence has not been displaced – *mens rea* for the murder not established – Guilty of Culpable Homicide.

Summary: The accused and his wife resided at a Cattle Post, at Farm Dornputz in the district of Outjo. On the day of the incident the accused became intoxicated after drinking alcohol 'Overmeer'. On their way back from the alcohol outlet, the deceased was reluctant to walk back home at night preferring to do so the next morning. The accused started beating her with a stick as a result of which she later died.

Held: *Mens rea* accordingly, displaced by intoxication, the accused is only guilty of Culpable Homicide.

VERDICT

In the result the accused is found not guilty of Murder read with the provisions of Act 4 of 2003.

He is nonetheless found guilty on Culpable Homicide.

JUDGMENT

SIBOLEKA AJ:

[1] The accused is charged on the following count of the indictment: MURDER, read with the provisions of Act 4 of 2003. In that during the period 1 November 2014 – 2 November 2014 and at or near Outjo in the district of Outjo the accused did unlawfully and intentionally kill Hinautiele Kandeke Ndemupandula, a 17 year old girl.

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

At the time of her death the deceased and the accused were involved in a domestic relationship as they were in an actual or perceived intimate or romantic relationship and they resided together at a cattle post on Farm Dornputz in the district of Outjo. During the evening of Saturday 1 November 2014 the accused and deceased were socializing and drinking alcohol with other farm workers at a cattle post on farm Dornputz. The accused returned to his residence on this farm and later during the night he received a telephone call from a witness informing him that the deceased is sleeping in a hut at the cattle post where they socialized earlier in the evening. After threatening to harm the deceased the accused set off to collect her. Upon locating the deceased the accused demanded that she accompany him home and he started to assault her by hitting her with stick(s) and/or other unknown objects and/or kicking her over her body and/or dragging her until she collapsed and she died on the scene due to head injuries caused by the assault on her. At the time of her death the deceased was approximately two months pregnant.

[2] The accused pleaded not guilty, but however admitted assaulting the deceased while heavily under the influence of alcohol. He excessively consumed alcohol namely 'Overmeer'. According to the accused he was called and told that his wife, the deceased, was at another cattle post sleeping at John's room. He went there and found her asleep. He woke her up and told her they must go back to their residence. It was already at night and the deceased found it appropriate if they could overnight there and only go back the following day, but the accused insisted they must go.

[3] The prosecution's case.

[4] Selma Immanuel testified that at the time of the incident she was visiting her brother Johny Immanuel who worked together with the accused at Farm Dornputz in Khorixas. The deceased was the accused's wife, and she came to know both of them as they used to visit her brother. On the day of the incident, she saw the accused and the deceased walking out of a drinking outlet near her brother's residence. They were on their way back to their workplace at ± 15h00 in the afternoon. However, during the night she heard dogs barking and her brother woke her up. She could hear how something was falling down near her house door and on inquiry who it was: the deceased told her "... it is me Kendele".

[5] Selma and her brother Johny offered the deceased a sleeping place in Marcus's room who was not at the post at the time. Johny, Selma and Marcus's rooms were all in one brick three bedroomed house. Selma's brother Johny called and alerted the accused about the presence of his wife at Marcus's house. Later that same night the accused arrived accusing Johny for having an affair with his wife. They were talking in Otjiherero, a language Selma also understands. Johny told the accused his wife was sleeping in the absent Marcus's room and he fetched her from there. Selma heard the accused telling the deceased, they should go home and the deceased said '... no I am not going to go, let us sleep and go tomorrow.' Selma thereafter heard the sound of the beatings, she did not see that physically as she was in bed and it was during the night. The deceased continuously said to the accused '... do not beat me, leave me'. Both the accused and the deceased are Angolans but they were both Oshiwambo speaking persons and she heard all what they were saying to each other. Selma could hear from the tone of the deceased's voice that she was also drunk.

[6] At some stage the deceased ran away from the accused and passed the front of her door crying. She detected the running from her footsteps. Selma also heard how the deceased hit herself against the fence and then fell down. In the morning she saw the deceased's shoe that fell off as the accused was chasing

her around.

[7] John Immanuel corroborated the evidence of Selma saying at night he heard the deceased telling the accused '... why are you beating me, you are killing me'. He knew the accused and the deceased very well as they worked together at Farm Dornputz but they stayed at separate cattle posts which are a walking distance from each other. The following morning he observed the spoor of the accused and the deceased as well as spots that appeared to be where a person had fallen on the ground.

[8] Simon Hamukwaya is the accused's friend. They worked together from 2008 to 2011 at Farm Cecilia. Although the accused left him there in 2011 to go and work at Farm Dornputz they were still in contact. Hamukwaya visited the accused, and he also knew the deceased very well. On 2 November 2014 the accused called him to say he and the deceased went to a certain farm for drinks. On the way back to their Cattle Post the deceased was so drunk that she could not walk anymore. He started to beat her for not wanting to go along with him back to their residence. During that telephone conversation the accused told Hamukwaya that he left the deceased in the veld (bush) with a view that she would go back to the post where they were drinking. This is in reference to the Cattle Post where Selma and her brother Johny Immanuel resided. According to the accused, he went alone to their residence and spent the night there. The following morning when he went back to look for her, he found her in the bush dead. The accused asked Hamukwaya for money to enable him to run away from what he had done but Hamukwaya refused.

[9] George Wohler testified that he is a farmer, burning charcoal at Farm Dornputz in Outjo district. The accused was his employee who resided at his farm. He worked burning charcoal like all others. His workers usually take monies to their families at their respective homes and would then come back to continue with the work. The Saturday on the day of the incident, Johny, one of his

employees, also a resident of his farm who works for Wohler's elder brother, called him during the night saying the accused came, armed with two sticks and collected the deceased. They agreed to look into the matter the next day. The next morning between 06h00 and 07h00 one of Wohler's workers by the name of Padkos (Johannes Paulus) gave him a miscall. When he called, he was told that the accused's girlfriend was found laying along a footpath near the gate and was not responding to the calling of her name.

[10] Wohler told Padkos not to go near the body, but to stand apart and wait for him which he did. Wohler informed the Khorixas Police and told them about the incident, but was referred to Outjo Police. He called and told them what had happened. He went together with the said Outjo police officers to the scene where the deceased was laying. He told them he knew the deceased as the accused's girlfriend. They found Khorixas police officers already there as well as other farm workers such as Padkos and Keyman were also there. While at the scene, Wohler called and requested the accused to come at the scene, but he did not, saying he was afraid to come there as his co-workers may assault him. Wohler also suggested to the accused that he should come at his house (the farm homestead), so that he can hand himself over to the police but he instead switched off his cellphone, and he never pitched up. The accused never came back to his workplace nor did he tell Wohler that he was proceeding to look for work elsewhere.

[11] According to Wohler, the deceased was laying on her side, her body was full of sand as if she was rolling on the ground. The accused and Johny are residing at two different posts, which are a walking distance apart. Johny and the accused were friends and Wohler did not hear anything suggesting otherwise to that effect. Wohler, Johny, Keyman, Padkos, Johannes and Outjo police officer went to Johny's residence where the beating up of the deceased started. The next morning the accused's tent was found cut open and all his belongings were removed. Wohler got on his bakkie and drove along the road while the farm

workers followed the footprints but they never found the accused.

[12] Tarah Kalunga testified he is a police officer stationed at Outjo as a Crime Investigation Unit Commander. On 7 November 2014 the then investigation officer, Sgt. Shimafo asked for assistance from him to track down a murder suspect who committed the crime of murder at Dornputz. This witness organized officers among them Shimafo, himself, Tsuweb, and Ipinge. They were five in total. They first went to Farm Volunteer where Simon Hamukwaya, the best friend of the accused resided. Hamukwaya told the officer the accused had phoned him on 02 November 2014 saying he had assaulted his girlfriend to death, he was asking for money to move away from Farm Dornputz where the incident had happened.

[13] Hamukwaya gave Kalunga the contact cellular number for Ferdinand Goraseb who owned the farm in the district of Kamanjab where the accused had decided to go and work. Hamukwaya verified that the accused was indeed expected to start work there, but he was still by a certain Peri-Peri, also known as Linus Ruhozu. The officers were at all times still in the company of the accused's best friend, Hamukwaya, in order to point him out to them because none of them knew him. The officers did not find the accused as he had temporarily left Peri-Peri's house to another residence. Peri-Peri took them to Rasta Mulilo's house where he identified the accused to the officers. He looked tired and shocked. Kalunga approached the accused, showed him his appointment certificate saying he was a police officer looking for him in connection with a murder case at Farm Dornputz. There were movements of people in the vicinity. The arrest of the accused there and then was confirmed by Peri Peri himself.

[14] The police took the accused to Rasta's house. Kalunga asked for his name and he confirmed to say he was Simion Tobias, but he did not have his identity document with him. The officer explained his legal rights such as the right to remain silent. To satisfy himself, Kalunga asked the accused where he had

come from. He said he came from Dornputz, walked on foot up to Kamanjab, a distance of 150 km. When asked about his girlfriend, he told the officer that they had an argument and he assaulted and left her in the veld. After these questions and answers, Kalunga was satisfied that he was dealing with the right person.

[15] Asser Mbangu testified that he is a Scene of Crime officer stationed at Otjiwarongo. Some of his duties for which he was trained include attendance of crime scenes, searching of fingerprints, photo taking, and collection of evidence. On 02 November 2014 he attended a murder crime scene at Farm Dornputz. The farm owner identified the deceased to him. She was laying in the bush next to a slightly open gate. The deceased was full of dust and had bruises all over her body. She was laying on her side, with her head resting on a black jacket. There were no blood stains leading to where she was laying or near her body. She did not have open wounds.

[16] According to Mbangu there were footprints that came along a footpath in the bushes from the direction of the cattle post leading to where the deceased was found laying on the ground. Mbangu was then escorted to the said cattle post where the tracks he found at the scene were coming from. At this post Selma showed him the room where the deceased was sleeping when the accused came to collect her. He was also shown the stick that was used by the accused to beat the deceased. Mbangu was also shown the direction the accused and the deceased took when they left the homestead. Struggle marks which appeared as if somebody fell on the ground and stood up again were visible. Mbangu followed the two sets of footprints, one had shoes on, and the other was bare footed. He followed the two footprints and they suddenly left and disappeared in to the bushes.

[17] Mbangu followed the tracks only for ± one hundred meters. He then walked back to the car and drove back to where the deceased was laying. Here Mbangu saw the same shoeprint that he earlier on saw together with a bare

footprint leaving the homestead where the deceased was sleeping. However, the bare footprint was nowhere to be seen around, near or in the nearby vicinity where the deceased's body was laying. It was only the shoeprint that came up to the scene and left going in a different bushed direction. There were no other shoe or footprints around the place where the body of the deceased was found. There were also no blood spots around, near or at the scene itself. Mbangu only observed dry blood in the mouth and nostril area of the deceased that is all. The terrain where the deceased's body was found is sandy, mixed with small rocks making it easy for any other tracks to be easily seen but there was nothing. The deceased's body was just laying there still, she did not move any of her limbs such as legs or hands, nothing. During cross-examination Mbangu testified that the stick which Selma pointed out to him at the post where the deceased was sleeping for the night was taken by the investigators. According to this witness, he did not observe blood on it and neither did he see an open wound on the body of the deceased. Mbangu was correctly, in my view not able to say whether the stick was used to beat the deceased or not.

[18] Evaristus Shimafo is the investigation officer who drove and picked up Simon Hamukwaya, the accused's friend who related to him how he refused to give the accused money to enable him to run away. When he came at the scene he met Wohler, the farm owner. According to the investigation officer only one track of shoe print came from the footway (footpath) up to where the body was laying and the same one track shoe print disappeared in the bushed veld where there was no footpath. From the scene the shoe track did not pass the gate to go to the couple's residence. According to this officer the deceased was barefoot but her spoor was nowhere to be seen at the scene where her body was laying. The accused's folded jacket was under her head as a pillow.

[19] Shimafo drove to the Cattle Post where John Immanuel resided, and it was confirmed to the officer that the deceased spent a night there. John told the officer it was him who called and informed the accused his wife (the deceased)

slept at their residence. The accused sounded angry about this matter. The officer also confirmed from John that the deceased was reluctant to go back to their residence as it was late, she suggested they should sleep over and go back the next day, but the accused refused, insisting they should go back home there and then. Like Insp. Gawiseb this officer also believed that the deceased's body was carried and dropped at the scene of crime.

[20] Shimafo's evidence regarding the observations at the scene is corroborated by other police officers and the Station Commander of Outjo Police Station. This officer only saw one track of foot print that came up to the scene and then left in a different bushy direction which made him suspect that the deceased's body was lifted and placed at the scene of crime. D/Sers. Tobias Gauseb transported the body to the mortuary, no further injuries were occasioned to it. Nangolo, a mortuary attendant received the body in the normal condition.

[21] Deon Marais, a Deputy Commissioner testified in regard to the photo plan of the accused's pointing out of the crime of scene. The accused took him to the place where he assaulted the deceased with sticks.

[22] Ferdinand Goraseb is a charcoal farmer at Farm Greys. A work seeker who later turned out to be the accused, called him looking for work, and he told him to wait for him at the residence of Peri Peri in Kamanjab. That was also the information he gave to the police and they told him they were tracking the said work seeker.

[23] Johannes Mulili (Rasta) was employed at Agra in Kamanjab. This was where the accused found him and was taken to Peri Peri's house.

[24] Peri Peri confirmed his employer – Goraseb's evidence to say the accused should wait for him at his residence. The police found and arrested the

accused at his place while he was waiting for Ferdinand to come and fetch him for work at his charcoal farm.

[25] Dr. Joseph Bulaya examined the deceased's body and he found bruises all over the body especially on the neck, right chest, lower lips, nose, and mouth bleeding; Cerebral hematoma; right lungs hematoma, black spot on both lungs, uterus bulky with dead foetus. He found the cause of death to be head injury.

[26] Simon Tobias Ndeshifa, the accused, testified he was married to the deceased. He originates from Onjiva province in Angola, but has a Namibian identity document. He testified that he was drinking 'Overmeer' from 07h00 to 18h00 in the afternoon. He went home, but did not find his wife there. He was later told that his wife was at John's place and in the latter's room. He felt unhappy about it, as he thought John had an affair with her. He fetched her and they walked along a footpath in the veld back to their residence. Along the way he fell asleep, the deceased woke him up telling him he had beaten her up, but he could not even recall how he got out of John's residence. They walked up to the third gate. During the walk the deceased told him she could not walk any further as she was feeling cold. He left his jacket with her, went to their residence to collect matches, when he came back to the scene, he found the deceased had died. He called Hamukwaya telling him he beat up his wife after drinking. He did not carry or lift up the deceased. He left the scene to tell the deceased's sister in Kamanjab about the death of his wife.

[27] The accused confirmed during cross-examination that he assaulted the deceased with sticks and that he called Simon Hamukwaya telling him that he had killed his wife. He testified that he did not know whether the deceased had shoes on or not as they walked together to the scene of crime. At the same time he stated that he seated the deceased down, took off his jacket and covered her with it.

[28] There is credible evidence on this matter showing that the accused, while in the intoxicated state started assaulting the deceased with a stick, delivering several blows all over her body as a result of which she later died. This state of the accused's mind credibly displaces the alleged intention to kill the deceased. The prosecution witness, Selma, corroborated the accused's evidence of prior drinking and being under the influence of alcohol when she testified that she saw the accused and the deceased leaving a nearby alcohol drinking outlet. In addition to the above Selma testified that at the time the deceased was being chased around the place and assaulted, she could hear from her voice that she was also drunk.

[29] The accused pleaded not guilty to the charge of murder, and its competent verdict admitting the unlawfulness of assaulting the deceased while heavily under the influence of alcohol. He stated that he excessively consumed alcohol namely an 'Overmeer'. He repeated this version in his evidence under oath and related the same to the prosecution witness Simon Hamukwaya, the first person he told about the incident. Hamukwaya confirmed under oath that the accused indeed told him that before he assaulted the deceased they were both drinking alcohol. It is the accused's evidence that during that night on their way back home he fell asleep in the veld, the deceased had to wake him up and tell him he had beaten her. The accused could not even recall how he left John's residence, and whether the deceased had shoes on or not. In the accused's reply to the prosecution's memorandum in terms of the High Court Practice and Directives, the accused pertinently placed the intention to kill the deceased as well as the foreseeability thereof emanating from the assault. The above credible evidence operates in the accused's favour.

[30] The prosecution's submission that the intention to kill was apparent from its witnesses and the accused's ability to remember what had happened, does not credibly displace his evidence of prior heavy drinking and being under the influence of alcohol shortly before the incident.

[31] This being the case, it therefore follows that on the evidence before court, the accused can only be found guilty of Culpable Homicide.

[32] In the result the accused is found not guilty on Murder read with the provisions of Act 4 of 2003.

He is nonetheless found guilty on Culpable Homicide.

A M SIBOLEKA
Acting Judge

APPEARANCES:

STATE: K. Esterhuizen
Office of the Prosecutor-General, Windhoek

ACCUSED: T. Ipumbu
Directorate of Legal Aid, Windhoek