

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGEMENT

CASE NO: CC 18/2018

In the matter between:

THE STATE

and

VICTOR ELIA

ACCUSED

Neutral citation: *S v Elia* (CC 18/2018) [2021] NAHCMD 148 (31 March 2021)

Coram: RAKOW, AJ

Heard on: 09, 10, 14 – 18 October 2019; 20 - 24 January 2020; 03 – 05 March 2020; 06, 26 May 2020; 20 July 2020; 15 September 2020; 26 – 28 October 2020 - 03, 16 November 2020; and 15 February 2021.

Delivered: 31 March 2021

Reasons: 7 April 2021

Flynote: Criminal law – Unlawful and Intentional killing - Robbery with aggravating circumstances – Defeating or obstructing or attempting to defeat or obstruct the course of justice – Evidence - Circumstantial - Inferences to be drawn from

circumstantial evidence - Court must be satisfied that the inference sought to be drawn is consistent with all the proved facts; and that the proved facts are such that they exclude every reasonable inference from them save the one sought to be drawn – Court must consider cumulative effect of all the evidence as the law does not require court to act upon absolute certainty - State proved the facts beyond a reasonable doubt.

Criminal law – Text messages sent and calls made between persons are identifiable by proximity – MTC cell phone towers – Able to identify whether persons were together or in the same area by virtue of their phones picking up similar towers at similar times.

Summary: The accused was indicted in the High Court on charges of unlawfully and intentionally killing Iyaloo Ndapandula Hainghumbi, who was his girlfriend, during the period of 16 – 17 January 2017 at or near Windhoek in the district of Windhoek, (count 2); robbery with aggravating circumstances in that he forced the said Iyaloo Ndapandula Hainghumbi into submission by hitting her with an unknown object on the head and/or by beating and kicking her over her body and then unlawfully and intentionally stole from her a cellular telephone, a sim card, a handbag, a jacket and a pair of shoes, and (count 3); defeating or obstructing or attempting to defeat or obstruct the course of justice. He pleaded not guilty to all counts.

The accused was the boyfriend of the deceased and who last seen during the early afternoon on 16 January 2017. Her body was found on 17 January 2017 next to the B1 road between Windhoek and Okahandja. Although no one saw the deceased and the accused together their cell phone records recorded the same cell phone towers and sectors, making it a possibility that they were in the vicinity of one another. DNA evidence collected from the vehicle of the deceased indicates that there is very high possibility that the deceased was the primary donor of this DNA

and some of the samples were collected from areas where there was clearly blood marks.

Held that, circumstantial evidence should not be assessed in isolation but should rather be considered in its totality. The inferences to be drawn from such evidence should be consistent with proven facts and should exclude every other reasonable inference.

Held further that, the evidence in this matter was mainly circumstantial and the proven facts showed that the only reasonable inference to be drawn is that the accused was guilty on all three counts.

ORDER

1. The accused is found guilty on count 1 of unlawfully and intentionally killing Iyaloo Ndapandula Hainghumbi, who was his girlfriend, during the period of 16 – 17 January 2017 at or near Windhoek in the district of Windhoek.
2. He is further found guilty on count 2, a charge of robbery with aggravating circumstances in that he forced the said Iyaloo Ndapandula Hainghumbi into submission by hitting her with an unknown object on the head and/or by beating and kicking her over her body and then unlawfully and intentionally stole from her a cellular telephone, a sim card, a handbag, a jacket and a pair of shoes.
3. The court convicts the accused further on count 3 - defeating or obstructing or attempting to defeat or obstruct the course of justice.

JUDGMENT

RAKOW, AJ

Introduction

[1] The accused, Mr. Elia was charged with unlawfully and intentionally killing Iyaloo Ndapandula Hainghumbi, who was his girlfriend, during the period of 16 – 17 January 2017 at or near Windhoek in the district of Windhoek. He was also charged on a second count of, robbery with aggravating circumstances in that he forced the said Iyaloo Ndapandula Hainghumbi into submission by hitting her with an unknown object on the head and/or by beating and kicking her over her body and then unlawfully and intentionally stole from her a cellular telephone, a SIM card, a handbag, a jacket and a pair of shoes.

[2] The accused faces a third count of, defeating or obstructing or attempting to defeat or obstruct the course of justice in that during the period 16 – 20 January 2017 at or near Windhoek and/or Otjiwarongo and/or in an unknown district in Namibia, the accused dumped the body of Iyaloo Ndapandula Hainghumbi in a bushy area in the vicinity of the western bypass road, cleaned a motor vehicle with registration number N22855W and/or removed blood from inside this vehicle, or instructed others to do so and/or remove, destroy, set alight or otherwise dispose of a pair of shoes, hand bag, cellular telephone, SIM card and a jacket or instructed others to do so and/or remove, destroy, set alight or otherwise disposed of a head rest which was inside the motor vehicle with registration number N22855W or instructed others to do so, whilst the accused perpetrated these acts he knew or foresaw the possibility that his conduct may frustrate and/or interfere with the police investigations into the disappearance and/or death of the deceased and/or his conduct may conceal and/or destroy physical evidence of an assault on the deceased and/or destroy physical evidence linking him to the disappearance and/or death of the deceased and his conduct may protect him from being prosecuted for a crime in connection with the disappearance and/or death of the deceased.

[3] The accused pleaded not guilty to all three counts and declined to provide a plea explanation. The state called several witnesses that were either with the deceased before her disappearance or at some stage involved with the

investigation of her death. The accused admitted to being the owner of two cellphone numbers and during the trial, his defense seemed to be that he did not see the deceased after meeting with her on Friday 13 January 2017 although they spoke on the phone and via text messages.

The movements of Iyaloo Ndapandula Hainghumbi in the days before her death

[4] The first state witness that was called was Maria Ndeendelao Hainghumbi, the sister to the deceased Iyaloo Ndapandula Hainghumbi. She testified that on Sunday 15th January 2017 she received a call from the deceased from an unknown number asking her to bring a certain USB belonging to their cousin from Swakopmund to the Hakahana service station. She and a certain Ms. Pineas went there and found the deceased who called them from a silver Mercedes Benz motor vehicle. She was in the passenger seat and an unknown male was in the driver's seat.

[5] Ms Hainghumbi and the deceased then went home. The deceased left again with a certain Ms. Medusalem in the afternoon. When Ms Hainghumbi returned, the deceased gave her a phone to charge, and at that stage, she noticed photos of the deceased and the male she earlier saw at Hakahana service station. The next morning the deceased got up and said she was going to school, the International University for Management (IUM), with Ms Pineas. She left the house and that was the last time her sister saw her.

[6] The next witness that was called to testify was Elizabeth Pineas, a friend of the deceased. On 15 January 2017, she met Ms Hainghumbi on her way to the Hakahana service station to take a USB to the deceased. They found the deceased with an unknown man in a vehicle. On the 16th of January 2017, Ms. Pineas and the deceased went to school (IUM) to get their academic records. The deceased informed her that they must go to Polytech (The Namibia University of Science and Technology, formerly known as Polytechnic of Namibia) since she also needed to

collect a certificate from there. From Polytech, they went to Wernhil Park for shopping. Each went their way in front of the Ackermans shop. Before parting ways the deceased informed Ms Pineas that she was going to meet someone but the witness could not remember the name of the person.

[7] Monica Medusalem was called next. She is the cousin of the deceased and they were good friends. She testified that the deceased told her on the 13th of January 2017, the Friday that she had a new boyfriend with whom she will visit for the weekend. The new boyfriend's name was Paavo and he lived in Swakopmund and worked at the mine. Ms Medusalem asked what happened to the previous boyfriend of the deceased, who according to the deceased was a bus driver and lived in Otjimuse, and the deceased said that she did not want him anymore because he was boring. Thereafter, she told Ms Medusalem that she was blocking the calls from the ex-boyfriend as well as the numbers of his relatives because she did not want to be bothered. Later that evening the deceased spoke with someone over the phone and directed the person to come and pick her up. She informed Ms Medusalem that it was Paavo from Swakopmund and she and the deceased met Paavo at the road.

[8] She was introduced to Paavo by the deceased. The deceased did not return that evening and only informed Ms Medusalem that she was in a guest house in Windhoek West. On Sunday at about 13h00 when Ms Medusalem returned from church, she found the deceased at her house. On Monday the 16th around 13h00 – 14h00 she received a text message from the deceased and when she tried to call her at about 15h00, her phone was off. The mother of the deceased called her at some stage the next day asking if the deceased was with her but she was not. She mentioned it to one of the persons at home; a certain Johannes Nghitikwa, and he said that he saw the deceased the previous day shopping at Hochland Spar. He was later called by the state and testified that he indeed met the deceased at the Hochland Spar between 14h00 and 15h00. She was alone and came from the shop with a shopping bag. Ms Medusalem later heard that the body of the deceased was

found. The deceased had an iPhone and an engagement ring and she told the witness that Paavo bought those items for her.

[9] Paavo Kondjela Mbweshe testified that he knew the deceased; he met her in December 2016 in Swakopmund when she and some friends came for a holiday to the coast. On Friday 13 January 2017 he decided to come to Windhoek to meet her and he found her at Goreangab with her cousin, Ms Medusalem. They left the cousin but the deceased stayed with him the whole weekend from Friday to Sunday and they stayed at a guest house in Windhoek West.

[10] He returned to Swakopmund and arrived there the same day in the afternoon. Upon his arrival, he contacted the deceased. Early Monday morning the deceased called him and told him that she was on her way to school, IUM to register. She again called him at 12h00 and he said he will call her back. When he did, her number was just ringing and went unanswered. He tried calling her a second time but it again just rang. He tried telephoning her up to Tuesday but her phone was off and he was very worried because it was the first time her phone was off. He then phoned one of the numbers she dialed from his phone and spoke to her sister, the first witness who could not tell him the whereabouts of the deceased. He was investigated as a possible suspect in the murder of the deceased but the police investigations eventually cleared him.

[11] Emilia Klephas testified that she was a friend of the deceased and that she knew that the deceased had a boyfriend named Victor Elia as the deceased had told her this. It was her testimony that the last time she saw the deceased, she was with Paavo Mbweshe at the Grove Mall on 14 January 2017. She however received a call from the deceased at about 14h00 - 15h00 on 16 January 2017 after she tried to call the deceased but her call did not go through to the phone of the deceased. She could not remember the number the call came from, but it is an unknown number and when asked which number she was calling from the deceased said it belongs to her friend. The call registered on her phone, with number 0814006631.

[12] She was subsequently contacted by the investigating officer who asked her to come in and asked her if she could remember the number from which the deceased called her. She said she did not save it on her phone and was informed that it was the number used by Victor Elia, which the deceased had used to call her. It was the number 0817800955 and it was provided to her by the investigating officer. She further testified that she contacted the accused on 18 January 2017 to enquire as to whether he knew the whereabouts of the deceased. She got the number of the accused from a certain Zelda. He informed the witness that the last time he saw the deceased was the previous Friday at the Hakahana service station.

[13] Sam Hainghumbi was the next state witness. He is the brother of the deceased and works with Paavo Mbweshe. On 16 January 2017, his sister sent him a WhatsApp text message asking to speak to him. He phoned her back between 16h00 and 17h00 and she indicated that she needed him to pay the registration fees for her studies but he needed to see her results first. From the evidence presented to the court, this was the last contact that any of the deceased's friends and family had with her. After hearing that his sister is missing from his mother, he phoned her friend Emilia Kleophas and was told that she saw his sister together with Paavo Mbweshe. He called Paavo Mbweshe and he confirmed that he and the deceased were together during the weekend but that he returned to Swakopmund on Sunday.

Recovering the body of the deceased

[14] Petrus Simaneka Ilonga testified that he is was a police official assigned to the Criminal Investigations Unit of the Katutura police station. He and his colleague Sergeant Coetzee received a report of a body which was found next to the road and that the body belonged to a lady. They proceeded to the scene and found Chief Inspector Simaho there. He testified that he was the first investigation officer assigned to the case.

[15] Christiana Simaho testified that she is a police officer with the rank of inspector and she was the crime officer for the Khomas region on 17 January 2017. She received a call from the radio control office, indicating that a body was found next to the B1 road. She proceeded to the scene and found the body of a 25-year-old female dumped next to the road. The deceased was wearing black trousers and her face was bloody. It also seemed as if she was dragged on the ground as a bruise or drag mark were visible on her abdomen. Members of the Katutura scene of crime unit arrived at the scene and pictures were taken. Exhibit C, the photo plan of the scene was handed to the witness and she indicated that those photos were indeed the ones from the scene.

[16] Julieta Christine Masedu testified that she is a police officer attached to the Scene of Crime Unit and stationed at Katutura police station and has training as a photographer and dealing with the collection of forensic exhibits. On 17 January 2017 she was called to take some photographs of a body found next to the B1 main road between Windhoek and Okahandja. She found Inspector Simaho at the scene who pointed out the scene of crime. She afterward completed a photo plan, which was handed in as exhibit C. The photos in the photo plan show various photos of where the deceased was found and close-up photographs of her injuries.

[17] Sara Monica Mutota testified that she is a police officer stationed at the Police Mortuary under the division of forensic pathology. She was the docket owner and tasked with collecting the body of the deceased from where it was found. She also submitted some specimens collected by the pathologist to the National Institute of Pathology. She received the body from Sergeant Nilenga of the Katutura Criminal Investigation Department and transported it to the mortuary. The body did not sustain any further injuries. She also handled the identification of the body by the family of the deceased.

The autopsy and its findings

[18] The autopsy of the deceased was done by the late Dr. Yuri Vasin on 18 and 19 January 2017. The State called Dr. Mamadi Fordina Guriras to testify regarding the autopsy as she indicated that she was in a position to testify regarding the post-mortem examination. Dr. Vasin indicated that he examined the body of a young woman identified to him as Iyaloo Ndapandula Hainghumbi by Constable Matota. He observed a lot of dried blood on the clothing and head as well as lacerated wounds and abrasions placed on the hairy surface of the head. On the face, massive subgaleal contusions were observed and the base of the skull had a hinge fracture. Extensive brush skin marks were visible on the right side of the chest. The exact time of death could not be determined but the deceased body displayed secondary post-mortem changes and partial skin slippage and skin-drying were present. The cause of death was indicated as blunt force trauma to the head of the deceased.

[19] Dr. Guriras explained that when they refer to blunt force trauma to the head, you can observe it from the number of lacerated wounds on the head. A laceration is a tear in the skin caused by any blunt object and which causes the skin to tear. Under the skin of the scalp, Dr. Vasin further found bleeding under the skin itself and then underneath the skull, bleeding on the brain itself. Dr. Guriras explained that any blunt object could have caused these injuries. The skull fracture at the base of the skull which ran from one ear to the other was also caused by blunt force trauma.

[20] Various specimens of blood and histology were taken and sent to the National Forensic Science Institute by Warrant Officer Tjitombo, who received the sample from Dr. Vasin. Sergeant J Matias and Warrant Officer Tjitombo took various photos during the autopsy and a photo plan of the said photos was handed in as exhibit G.

The arrest and detention of the accused

[21] The accused was arrested on Wednesday, 18 January 2017. Frans Nakangombe, a Warrant Officer in the Namibian police attached to the Serious Crime Unit, testified that they received a phone number from Chief Inspector Amakali which was the phone number of the brother of the accused, a certain Freddy. Warrant officer Nakangombe, called Freddy and informed him that they are looking for his brother. Freddy informed them that he does not know where his brother was but that he will get hold of the accused. They arranged to meet at Goreangab Dam and the accused came with a White Toyota Quantum bus with registration N22855W. Upon his arrival, he was asked whether he knows a girl named Iyaloo Ndapandula Hainghumbi and he said yes, she was his girlfriend for the past three years.

[22] After his arrest, the accused was taken to the Wanaheda police station and was handed over to Chief Inspector Amakali. The police took possession of the keys of the vehicle as well as the phone of the accused. They then proceeded to the house of the accused to search the house but did not find much except for an old T-shirt of the deceased. The accused was informed by Warrant Officer Nakangombe that the deceased passed away and he said that he had no knowledge about it before but his brother Freddy informed him when he was called by a family member of the deceased.

The brother of the Accused and the White Toyota Quantum bus

[23] Frederick Mondestus testified that he is self-employed and runs a transportation business. He is also the older brother of the accused. He met the deceased through his brother, the accused, and knew that she was the girlfriend of the accused. He found out that she was deceased on 18 January 2017 at around 12h00 when his sister phoned him and informed him. He then called the accused and asked him whether he heard about the deceased's death and was informed by the accused that he last saw her on 13 January 2017. He used his number 0812379952 and he phoned the number of the accused with the 7800. The

prosecution provided a number 0817800955 and he agreed that that was the number he phoned. He also asked his brother if there was a misunderstanding between him and the deceased and he said no, only that she rejected his calls.

[24] He further testified that to his knowledge, his brother was in Otjiwarongo when he phoned him with the news as he had taken the bus for a test. His brother Natangwe went with him. They left for Otjiwarongo on Tuesday at about seven in the evening and arrived in Otjiwarongo at about nine. Tuesday was 17 January 2017. He arranged for the accused and the police officials to meet each other. Thereafter, the police drove the Quantum bus to the police station. At the police station they gave the witness the keys to the vehicle and he, in turn, handed it to another brother and told him to take it to the house of the accused's twin brother. On 20 January 2017, he received a call from Warrant Joseph who asked him to bring the car to the Windhoek Police Station, which he then did.

[25] At the police station, they informed him that they were going to do some tests on the vehicle that same evening. The vehicle belonged to his brother, the accused, but it was registered in his name as he had a transportation permit which his brother did not have. His brother drove trips between Windhoek and Oshakati and the last time he drove to the North was on 14 January 2017 and he returned on 15 January 2017.

The forensic evidence.

[26] During the investigation into the matter, the investigating officer asked the brother of the accused, Frederick Mondestus who at that stage was the registered owner of the Quantum taxi with registration number N22855W to bring the said vehicle to the Windhoek police station for further investigation. Mareen Swart, chief forensic scientist and head of the genetic section at the National Forensic Science Institute testified that she conducted a scientific investigation on the vehicle the

which the accused allegedly drove and compiled a report in line with her investigation and photos she took during the evening of 20 January 2017.

[27] It was her testimony that she found the vehicle N22855W at the police station in Bahnhof Street. She applied Blue Star Forensic, a chemical that detects latent bloodstains as it reacts with haemoglobin, to the inside of the vehicle N22855W to reveal possible latent bloodstains which may have been cleaned or which are invisible to the naked eye. She observed strong luminescence during the process and she marked these areas and obtained swaps from these areas.

[28] She marked the areas where she obtained these swaps with numbers and in her report entered corresponding swap numbers next to these area numbers. For example, marker number 1's position can be seen on pages 14, 16, and 17 of the photo plan. She would then take two swaps at each of these marked areas and they would be marked for example 1A and 1B. She further identified two reddish areas which could be possible bloodstains. These were area 2, which was on the lower left-hand side of the seat near to the wheel arch and this is visible on photo 20 and the area marked 3 on the wheel arch inside the passenger area. This is also visible on page 20 of the report that she prepared. She identified 10 possible bloodstains, either with the naked eye or by using the luminescence.

[29] The Blue Star test is however a presumptive test. She further noticed a flow of blood, indicating that the vehicle might have been washed at some stage and some markings on the seats indicating that the blood might have been rubbed. She further marked each swap clearly and the numbers of these swaps were entered on her report next to the swap number. The evidence was then handed over to Inspector Amakali, the investigating officer.

[30] She was also involved in doing the quality assurance of the report that was issued by Ms. Lucas and Ms. Nakalemo and verified that the information contained in the said report as correct. She then prepared the final report which interprets the

findings. She, therefore, compared the reference sample of DNA received from the deceased with the DNA recovered from the vehicle, if any. She also had a reference sample from Victor Elia, the accused to compare to the data she retrieved. When interpreting her report she explained for example that the swab taken from exhibit B#1 yielded insufficient amplifiable DNA to proceed with the analysis. When compared with her photo plan, it is clear that B#1 is a part of the pants the deceased wore at the time her body was recovered, which was tested for possible semen.

[31] Exhibit B#4 which tested positive for human blood, the jacket found with the deceased was then further tested and the DNA of the blood found on the jacket yielded a positive profile and the deceased cannot be excluded as the contributor of the said profile. The estimated probability of selecting an unrelated individual at random from the FBI Caucasian population with the same profile is 1 in 976 sextillion individuals and from the FBI's black population with the same profile, the probability is 1 in 43.8 sextillions.

[32] From the swabs collected from the vehicle examination, swab 1A was a mixed profile but the deceased was the major contributor of the DNA found, the point marked 1 was the back headrest area. Similarly, the yield of swab 1B but the major and minor contributors to this DNA is indistinguishable. Swab 2A and 2B, which were taken from a reddish stain that was partially visible yielded a complete female profile and the deceased cannot be excluded as a possible contributor to this profile. The chances of selecting an unrelated individual with similar DNA are the same as the probability above.

[33] No other DNA was observed when this sample was analyzed. Sample 3A taken from the wheel arch yielded a partially mixed profile but sample 3B yielded the DNA profile of the deceased. Swabs taken from point number 4, the seatbelt area underneath the back seat again yielded a DNA profile from which the deceased cannot be excluded. The estimated probability reduced in this regard as it

was a partial female DNA profile to 1 in 62.4 quintillion individuals according to the FBI's database. Swab 5A was taken from a possible bloodstain on the leg part of the seat and yielded a complete female profile and the deceased cannot be excluded as a possible contributor to the said profile. Swab 8A and 8B were taken from the floor near the door and yielded a mixed profile from at least two individuals. This mixture could not be deconvoluted and therefore the result is inconclusive. Similarly, the swab which was taken at point 10 also remained inconclusive.

[34] During cross-examination, she explained that there are various methods in which DNA can transfer, for instance when a person scratches his/her attacker, the DNA of the attacker will be under that person's fingernails. Also, you can transfer blood from one person to another when they are for example stabbed. Even when you shake someone's hand in greeting them, you can transfer DNA. However, the strong luminescence reaction she got when she sprayed the areas in the vehicle is to her a clear indication that there was haemoglobin present on the areas she marked. She explained taking into account that the vehicle was used commercially, she would have expected to find more DNA profiles and she believed that the car was cleaned when she looked at the movement of the stain that she found.

[35] She further referred to the two visible stains that were not cleaned properly and from which she also took swaps. She testified that no DNA of the deceased was found on the clothes handed to them which belong to the accused and similarly no DNA of the accused was found on the clothes that they recovered from the body of the deceased.

[36] Anna Lucas testified that she is employed at the National Forensic Science Institute as a forensic scientist and she received the exhibits in the current matter for screening. She received them from the area where they are stored after being booked in and being allocated with a lab reference number. She received a swab collected from the deceased, clothing collected from the deceased, a swab collected from the accused, swabs collected from inside a white Toyota Quantum

with registration N22855W, an adult sexual assault evidence collection kit and a light blue jean trouser and a red sleeveless sweater belonging to the accused. She then screened all these items and issued a genetics report. This was then the report used by the previous witness.

The calls made from the police cells

[37] The accused was arrested on 18 January 2021 and detained at the Katutura Police cells. During that same time, a certain Jacob Katara Quill was also detained in the same cell as the accused. He was called to testify by the state and indicated that he was in custody during 2017 and the accused found him in the cells when he entered. The witness and some other inmates took items of clothing from the accused when he entered the cells, and Mr Quill indicated that he took the red T-shirt the accused wore that day. That was how they initiated new inmates into their cell. He testified that he told the accused to come and lay next to him after he stopped the others from taking more items from the accused. Mr Quill at that stage had an illegal cell phone with him in the cell that he and the other inmates used from time to time. The accused asked him to use it as he wanted to text his brother. He then said that his brother will call him back.

[38] When the brother of the accused returned the call, he could hear what was being said as they were lying next to one another. The accused informed the person on the phone to go to the service station and buy paraffin as well as N\$60 worth of recharge voucher for the phone. The person on the phone then informed the accused that he got the paraffin and is on his way home. The accused then informed the brother to go home and burn the things and nothing must remain behind. After some time the brother informed the accused that he burned the things.

[39] The accused informed him that he was being accused of murdering his girlfriend but did not say the name of the girlfriend. The accused told Mr Quill that the girlfriend was also in a relationship with another guy who drives a Mercedes

Benz and comes from Walvisbay or Swakopmund. The accused further told the witness that he and his girl were together on the day that she died but that he dropped her off before he went to Otjiwarongo to register his car. The next day the accused went to court and when he returned he had a newspaper with some part that was torn out. Another inmate also had the same newspaper and Mr. Quill realized that the part that was torn out related to the murder of the deceased. He realized that he knew the girl and that she was from the same location as him. He then insisted that the police remove the accused from their cell which they then did.

[40] At some stage later that year the brother of the deceased, Haufeni Hainghumbi was also arrested and placed in the same cell as Mr. Quill. He then related to the brother what had transpired regarding the phone calls made by the accused and the information he received. After his release, Mr. Hainghumbi provided this information to the investigating officer, who then, in turn, interviewed Mr Quill and took down his statement. This happened on 25 October 2017. The cellphone number that belonged to him is 0818013714. This phone was not recovered and initially, Mr. Quill told the police that the phone is with his mother but she denied having the phone.

The cellphone and cellphone numbers of the accused and messages between the accused and the deceased

[41] Wycliff Pandipara Kauuova testified that he is employed at the Anti-Corruption Commission as an investigating officer focusing on digital electronics forensics. From time to time the Namibia police would ask them for assistance and in this instance, they asked to be assisted with recovering data from a phone which was recovered from the accused. He was requested to do this by Chief Inspector Amakali on 20 January 2017. He did so and compiled a forensic report which was handed in as an exhibit. He also took various photos of the phone before any work was done on it, it shows the serial number and the IMEI numbers of the SIM cards found in the mobile phone.

[42] The phone was then plugged into the universal extraction device and data was generated. These include WhatsApp messages, normal phone messages, call logs, pictures, videos, etc. In this instance, he extracted the SMS messages and the call logs. This report was also handed in as an exhibit. He found a Samsung phone with two ports to hold cell phone SIM cards. The IMEI numbers of these ports were IMEI 352223/06/824587/9 and IMEI 2 352224/06/824587/7. The serial number of the phone was RV1FA31ESAP. He also received three sim cards, two MTC SIM cards, and one TN Mobile SIM card.

[43] He further made an extraction between all the messages that happened between My Ndeshi - +264816424143, which we now know is the phone number of the deceased and the one phone number of the accused, which SIM card was in the handset recovered from the accused. He read out a number of the messages between the accused and the deceased, to whom the accused referred to as My Ndeshi. The report shows SMS communication between the deceased and the accused as far back as of 14 January 2016 and mostly is short messages between them declaring their love for one another or saying that the one will see the other shortly etc.

[44] Communication between these phones stopped and again started on 6 January 2017. From 13 January 2017 several messages came from the accused but no answers were received from the number of the deceased. It seems as if the accused informed her that he was traveling to the north and asked her several times why she did not answer him or why text messages or calls are not going through to her phone. There are more than 30 of these unanswered messages. This seems to be in line with the evidence that she blocked the number of the accused.

[45] On the morning of 16 January 2017, she communicated with him for the first time again and assured him that she is fine. The next communication is at 18h30 where the accused asked the deceased where she is, no answer was received and

he again asked her to let him know where she is. An answer was received from her number at 19h21 wherein she indicates that she is with her boyfriend and he has to call her the next day. At 21h32 he answered her: 'ok, sorry for asking you its fine if you are with your boyfriend and how is your boyfriend for me to stop calling you.' To this, there is a reply at 21h32 saying: 'I'm with my joy he is my boyfriend ok I don't want to see you again don't even call me.' The response from the phone of the accused is at 21h35: 'Ok, its fine I will stop to call you then.'

[46] This was the last communication extracted on the report. The report also contains a call log of calls made from the phone and matched up with the names in the contact list of the phone. Two calls were made on 17 January 2017 at 10h13 to My Ndeshi, which is the nickname for the deceased, another at 18h36 on 16 January 2017 and 13h21, 13h45, 13h56, and 13h58 on 16 January 2017 calls were also made to the deceased from the phone of the accused.

Other cellphone evidence

[47] The State called Mark Plaatjie, who is employed at MTC and is attached to the risk department of MTC. He is the manager at this department, he and his team deal with fraud detection and also function as the forensics department. MTC was asked to prepare information regarding the following numbers, their contacts, and their movements: 081 224 0108 (belongs to the accused person), 081 642 4143 and 081 780 0955 (both belonging to the deceased); 081 226 4772 (belongs to Paavo Mbweshe) as well as a handset with the following number 35 2085070292664 during the period 14 January 2017 to 19 January 2017.

[48] The print-out which was prepared from their systems shows a report of all incoming to and outgoing calls from a specific phone number, the incoming and outgoing text messages, the IMEI number of the specific number that was used (which is the number of the specific port where the sim card with the specific phone number is used), the time of the call or SMS transaction and the tower and zone of

that tower though which the specific transaction relayed. This is called the global cell ID. For example, on 16 January 2017 on the records of the deceased's number at 9h46 a SMS was received from 0812240108 (which belongs to the accused person).

[49] This transaction went through the Wanaheda Tower. This means that the deceased was in the vicinity of the Wanaheda Tower when she received the SMS. At the same time, the transaction from the number of the accused shows that it went through the Northern Industry tower, so he was in that vicinity.

[50] At 13h21 a call was made from the accused's number to the number of the deceased and the call went out through the Khomasdal tower and again at 13h45. At 13h56 and 13h59 two more calls were made from the phone of the accused to that of the deceased. Both these calls were routed through the tower at the Carl List Building in town in Independence Avenue. At 18h31 and 18h39 two text messages were sent to the deceased's number using the Otjomuise West tower. Then there was an incoming SMS from the deceased to the accused, again showing the Otjomuise West Tower at 19h21. There was once again an outgoing SMS from the phone of the accused to the deceased at 21h28 using the BPI house tower.

[51] At 21h32 an incoming SMS from the deceased's number was channelled through the Hospital Tower, meaning the accused was in the vicinity of the said tower and an SMS was sent from the accused to the deceased at 21h32 using the hospital tower again. If roughly the same times are compared with the cell number transactions received and made by the deceased, they were in the same area at similar times. The witness explained that you might be picking up one of several towers at any given time, for example, if you are in the vicinity of the Hospital Tower, you can also pick up the tower at Rhino Park hospital. These two towers would hand over traffic between the two of them.

[52] He was further asked to look into the transactions made from and to the phone of Emelia Kleophas – number 081 200 6631. He was asked to compare the number of phone 081 780 0955 with IMEI 352085070292664 (which phone number also belonged to the accused person). At 8h35 on 16 January 2017 the number of Emelia Kleophas 081 200 6631 made a call to the phone of the deceased using the Okahandja tower. At 14h58 on the same afternoon, Emelia Kleophas received an SMS from the number of the deceased using the Concordia Tower which is close to Rocky Crest. At 15h21 Emelia Kleophas received a phone call from the number of the accused, 081 780 0955. This call shows on the records for 081 780 0955 that it was made in the vicinity of Otjomuise West.

[53] The duration of the call was 127 seconds. The IMEI number of the device that called the phone of Emelia Kleophas was 3581380509639. However, this SIM card was up until 14 January 2017 at 22h56 in a device with IMEI number 35 2224 0682 4587 which is the IMEI number of the device found in the possession of the accused when he was arrested. It was further admitted that the number belonged to the accused. The report also indicates that the device and number used the following towers on 14 – 15 January 2021 – Okapuka, Omarassa, Okakwiyu, ChamCham, Casablanca, Klein Omatako, Bergquell and Brakwater, indicating the route this phone and SIM card travelled on those two days. It was then placed in another device on 16 January 2017 and subsequently used four times, one of these to call Emelia Kleophas.

[54] Mr. Plaaitjie also testified about another printout which he was requested to prepare and that was the one for the number 264 81 801 3714, which was the number of Mr Quill. He testified that a call was made from this number to a number 264 91 468 8571 on 19 January 2017 at 18h58. The tower through which this call was channelled is the Hospital tower which is the most likely tower through which calls originating from the Katutura police station would be channelled. The call duration was 204 seconds. The records for 264 91 468 8571 also showed that there was an incoming call from the number of Mr Quill. On 20 January 2017 at 18h56 an

outgoing call was made from Mr Quill's phone to the number 264 91 468 8571 and it lasted 48 seconds.

[55] At 21h13 another call was made from the phone of Mr. Quill to 264 91 468 8571 with the duration of 71 seconds. At 21h18 another call went out from Mr Quill's cellphone to the phone number 264 91 468 8571. It was testified during the examination of the co-investigating officer, Warrant Officer Joseph Dilyowike that during his investigations he found out that this number belongs to the brother of the accused, Festus Elia. During his evidence in chief, the witness for the accused, Mr. Elia also confirmed that this is indeed his number.

Police investigations

[56] Warrant Officer Joseph Dilyowike and Chief Inspector Amakali were in charge of these investigations. The court is not going to repeat their evidence as the result of their investigations were lead as evidence in this trial. There were further some other witnesses also called who aided in the investigation.

The defence's case

[57] The accused elected to testify himself and call two witnesses. The accused, Mr Elia testified that he is a 40 year old male and that he was in a relationship with the deceased when she informed him that she no longer wished to be in a relationship with him and had a new boyfriend, he accepted that and moved on. His evidence was that he last saw her at the Hakahana service station on Friday 13 January 2017 when he gave her money to do her hair and from there he travelled to Oshakati and only returned 15 January 2017. He tried to contact her over the weekend but realised that his attempts were not received because his number was rejected by the deceased.

[58] It was his testimony that he managed to contact her on the morning of 16 January 2017 and they arranged to meet up but when he was asked whether he was driving the bus, he indicated that he was indeed, the deceased informed him that she did not wish to be seen in the bus. He never saw her again. He travelled to Otjiwarongo on 17 January 2017 to renew the licence disk of his Quantum bus and was informed on his way back from Otjiwarongo by his brother Freddy that the deceased had passed away. He denied ever contacting his brother from the cells with the phone of Mr Quill.

[59] He denied that he and the deceased were together during the afternoon and evening of 16 January 2017 as their cell phones registered from the same towers. He insisted that they were not together but could not say if they were in the same vicinity. He spent the day of 16 January 2017 working on his bus to prepare it for the traffic inspection and was testing the brakes of his vehicle during the evening when his cellphone picked up Karl List tower.

[60] He further did not deny that Emilia Kleophas received a call from the deceased using his number but indicated to court that he lost the SIM card for that number some time earlier and did not know who was in possession of the card at that time. He also explained that he was not present when his Quantum bus was investigated and can therefore not add anything regarding that investigation. He testified that the blood in the vehicle could possibly be from passengers who transported meat in bags from Otavi. He was further not angry with his girlfriend for not contacting him over the weekend and did not inform his brother with whom he travelled to Otjiwarongo that the deceased broke it off with him.

[61] The brother of the accused, Joseph Elia testified that he was busy repairing his bus on 16 January 2017 and that the accused was asked to bring him some engine oil. He did so at about 13h00. On 17 January 2017 the accused and Mr. Joseph Elia left at about 17h00 for Otjiwarongo. He met him during the day but cannot recall the time. The next morning they took the vehicle to Natis but it did not

pass. They wanted to fix a few of the errors but eventually had to return to Windhoek. There was a pipe that leaked at the rear wheels and the seat behind the driver's seat was loose. On their way back the accused received a call which informed him that the deceased was found dead. He did not mention that they were no longer boyfriend and girlfriend.

[62] Festus Elia, the twin brother of the accused was also called to testify. He denied that he ever received a call from his brother during the time that he is in detention and does not know the phone number of Mr. Quill. He provided his phone number which is 081 468 8571.

Legal principles for consideration

[63] In the current matter there is no direct evidence to link any perpetrator to the death of the deceased. The court is therefore required to draw inferences from circumstantial evidence. Liebenberg J in the *State v HN*¹ said the following with regards to drawing inferences:

'Where the court is required to draw inferences from circumstantial evidence, it may only do so if the 'two cardinal rules of logic' as set out in *R v Blom* 1939 AD 188, have been satisfied. These rules were formulated in the following terms:

"(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.

(2) The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct."

[58] In *S v Mtsweni* 1985 (1) SA 590 (A) at 593E – G Smalberger AJA (as he then was) referred with approval to the remarks of Lord Wright in *Coswell v Powell Duffryn Associated Collieries Ltd* [1939] All ER 722 at 733 which read as follows:

"Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts,

¹ *State v HN* 2010 (2) NR 429 (HC).

which it is sought to, establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture”

[59] The State thus carries the burden of proving the allegations contained in each charge against the accused beyond a reasonable doubt and in *Miller v Minister of Pensions* [1947] 2 All ER 372 at 373 Denning J (as he then was) stated it in the following terms:

“It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt.”

The law does not require from a court to act only upon absolute certainty, but rather upon just and reasonable convictions. When dealing with circumstantial evidence, as in the present case, the court must not consider every component in the body of evidence separately and individually in determining what weight should be accorded to it. It is the cumulative effect of all the evidence together that has to be considered when deciding whether the accused's guilt has been proved beyond reasonable doubt. In other words, doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation, but those doubts may be set at rest when it is evaluated again together with all the other available evidence (*S v Hadebe and Others* 1998 (1) SACR 422 (SCA) at 426e – g).’

[64] When it comes to the use of circumstantial evidence, the observations of Best on Evidence regarding the approach to circumstantial evidence as quoted by Zulman AJA in *S v Reddy and Others*² are noted. There it is said that:

‘Not to speak of greater numbers, even two articles of circumstantial evidence, though each taken by itself weigh but as a feather, join them together, you will find them pressing on a delinquent with the weight of a mill-stone.’

² *Reddy and Others* 1996 (2) SACR 1 (A) at 8g.

The court further looked at the fundamental issues before it and said, at 8c - d:

‘In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality.’

[65] The learned authors of *Principles of Evidence*, Schwikkard & Van der Merwe,³ state that:

‘Circumstantial evidence is not necessarily weaker than direct evidence. In some instances it may even be of more value than direct evidence.’⁴

Evidential findings

[65] From the evidence produced by the state, it is clear that there are no eye witnesses to the murder of the deceased. The court therefore bases its findings on the circumstantial evidence presented in this matter and makes the following findings.

[66] The last time someone spoke to the deceased was when she and her brother spoke between 16h00 and 17h00 on 16 January 2017. The court accepts that she was still alive at that stage and that her time of death was between 17h00 that evening and the next morning at around 11h00 when she was found next to the B1 road.

[67] At the time of her death, the deceased was seeing a new boyfriend. He drove a Mercedes Benz and came from Swakopmund. This is most probably the man that the accused spoke about to Mr. Quill when he was detained in the police cells in Katutura.

³ 2 ed at 504.

⁴ Also see *S v Reddy and Others* 1996 (2) SACR 1 (A), *S v Shabalala* 1966 (2) SA 297 (A) at 299.

[68] The witness Emilia Kleophas spoke to the deceased at 15h21 using the number belonging to the accused. Until 15 January 2017 at 22h56 this SIM card for the specific number was in the device that was recovered from the accused during his arrest on 18 January 2017. The SIM card and the device received and made various calls during 14 – 15 January 2017 and the towers used are towers towards the north which indicates that the device was travelling to the north and back, similarly to the trip the accused undertook during those two days. According to the evidence of the accused, he saw the deceased the last time on Friday 13 January 2017, and at that stage, or before that stage the SIM card was still in the phone of the accused.

[69] The court is satisfied that the evidence was at all times properly handled and the chain of evidence was proofed. No serious issues were raised regarding the handling of exhibits and the chain of custody.

[70] The cell phone record from both the accused's phone and that of the deceased show that they were at least in the same vicinity or moving in the same direction during the afternoon of 16 January 2017 until that evening. Since the last SMS was received from the accused's number, no other cell phone activity was recorded for the deceased's number and in all probability the phone was switched off at that stage, never to be switched on after that.

[71] There were traces of the deceased's DNA found in the swaps taken from the vehicle of the accused. Some of these swaps were taken from areas that were a rusty colour and looked like dried blood. These places like the wheel well of the vehicle and the underside of the seat only had traces of the DNA of one person. The vehicle was also cleaned at some stage as Ms. Swart testified that she expected to get more DNA profiles as it was a vehicle used for public transport as well as noting the fluid containing the haemoglobin making a flow pattern when sprayed with the Blue Star chemical.

[72] The deceased died from blunt force trauma to the head, which trauma would have caused some bleeding. The face of the deceased was covered in blood as well as her clothes. The court therefore concludes that she was either killed in the Quantum bus or transported after her death in the Quantum bus of the accused. The court does not accept that the reason why the DNA of the deceased was found in the Quantum bus was because she frequent the bus as the girlfriend of the accused. The swabs were all taken from areas that showed traces of haemoglobin when sprayed with the Blue Star chemical that caused luminescence.

[73] The evening after the accused's arrest he was placed in a cell with Mr Quill and he used a cell phone which they illegally had in the cell, belonging to Mr Quill to phone his twin brother and instructed him to burn certain items. Although this is denied by both the accused and his brother, the MTC call records of the phone of Mr Quill clearly indicates that there was calls from that phone to the brother of the accused. The court rejects their version that they are not aware of such calls and never made them as this evidence of Mr Quill is clearly supported by the MTC call records of the said phone.

[74] The court therefore finds that the deceased was indeed in the company of the accused during the late afternoon early evening of 16 January 2017 and after 17h00 the accused killed the deceased by beating her repeatedly over the head. This happened in his vehicle or he then transported her body with his Quantum bus and dumped her body next to the B1 road where it was later found.

[75] He then cleaned the vehicle before travelling to Otjiwarongo on the evening of 17 January 2017. Upon his return he was arrested and during the evening of the 18 January 2017 – 19 January 2017 he contacted his twin brother to ask him for assistance with the destroying of the property of the deceased by burning it.

Conclusion

[76] The court satisfied that the state indeed proved their case beyond a reasonable and therefore finds:

1. The accused guilty on count 1 of unlawfully and intentionally killing Iyaloo Ndapandula Hainghumbi, who was his girlfriend, during the period of 16 – 17 January 2017 at or near Windhoek in the district of Windhoek.
2. He is further found guilty on count 2, a charge of robbery with aggravating circumstances in that he forced the said Iyaloo Ndapandula Hainghumbi into submission by hitting her with an unknown object on the head and/or by beating and kicking her over her body and then unlawfully and intentionally stole from her a cellular telephone, a sim card, a handbag, a jacket and a pair of shoes.
3. The court convicts the accused further on count 3 - defeating or obstructing or attempting to defeat or obstruct the course of justice.

E RAKOW

Judge

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