

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case No: CC 12/2018

In the matter between:

THE STATE

v

**MALAKIA
ACCUSED**

PENDA

NANYEMBA

Neutral citation: *S v Nanyemba* (CC 12/2018) [2021] NAHCNLD 20 (09 March 2021)

Coram: SMALL AJ

Heard: 2, 5, 6, 7, 8, 9,14,15,16, 27 October 2020 and 18 November 2020,

Delivered: 9 March 2021

ORDER

(1) Count 1: Not Guilty;

- (2) Count 2: Guilty Culpable homicide;
 - (3) Count 3: Guilty Assault by threat;
 - (4) Count 4: Guilty Assault by threat;
 - (5) This matter is postponed to 11 March 2021 at 14h00 for submissions prior to sentence;
 - (6) The accused is remanded in custody.
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JUDGMENT

Small AJ:

Introduction

[1] The accused is charged with assault by threat, read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003, murder and two further charges of assault by threat.

[2] In count one the State alleges the following:

‘In that upon or about the 6th day of August 2017 and at or near Onyaanya village, Ondonga, in the district of Ondangwa the accused did unlawfully and intentionally assault Rauna Hambeleleni Nanyemba by waking her up demanding that she open the door of her sleeping room while accused held a panga and stated that he will cut off her head thereby causing the said Rauna Hambelelni Nanyemba to believe that accused intended and had the means forthwith to carry out his threat.’ The date of this charge was on application amended to the 5th day of August 2017.

[3] In count two the State alleges the following:

‘In that upon or about the 7th day of August 2017 and at or near Onyaanya village, Ondonga, in the district of Ondangwa the accused did unlawfully and intentionally kill Anno David, a male adult by hitting him with a wooden plank on the head and an died at Onandjokwe Hospital on the 8th day of August 2017.’

[4] In count three the State alleges the following:

'In that upon or about the 7th day of August and at or near Onyaanya village, Ondonga, in the district of Ondangwa the accused did unlawfully and intentionally assault Suama Alupe by running chasing her while holding a panga in order to assault her thereby causing the said Suama Alupe to believe that accused intended and had the means forthwith to carry out his threat.'

[5] In count four the State alleges:

'In that upon or about the 7th day of August 2017 and at or near Onyaanya village, Ondonga, in the district of Ondangwa the accused did unlawfully and intentionally assault Aina Kapiye by running chasing her while holding a panga in order to assault her thereby causing the said Aina Kapiye to believe that accused intended and had the means forthwith to carry out his threat.'

[6] The State was represented by Ms. Nghiyoonanye and the accused by Mr. Aingura. When charges were put to him, accused tendered a plea of not guilty on all charges. Mr. Aingura read the written plea explanation into the record and after it was confirmed by the accused it was handed in and marked as Exhibit A.

[7] In respect of count one the accused denied that he unlawfully and intentionally assaulted Rauna Hambeleleni Nanyemba by stating that he will cut her head off. He also summarized his version of what transpired between him and Rauna on the evening of 5 August 2017.

[8] In respect of count two the accused denied that he unlawfully and intentionally killed the deceased Anno David. He also summarized his version of what transpired between him and the deceased as well as some of the witnesses on the evening of 7 August 2017.

[9] In respect of count three and four the accused denied that he unlawfully and intentionally assaulted the complainants Suama Alupe and Aina Kapiye.

[10] Several documents were placed before Court by agreement and marked as Exhibits. Exhibit B1 was the handwritten report on a Medico-Legal Post-Mortem, Death Register No; 179/2017 conducted 14 August 2017 by Dr Godwyn M Zishumba

on the body of Anno David indicating that the deceased died of a head injury after he suffered a linear fracture of dome and base of his skull with intracerebral hemorrhage.

Exhibit B2 is a typed version of Exhibit B1. Exhibit B3 is an affidavit in terms of section 212(4) of the Criminal Procedure Act by Dr. Godwyn M Zishumba dated 14 August 2017 stating that he conducted the post-mortem on Anno David.

[11] Exhibit B4 is an affidavit of Shivute Jeremia dated 17 August 2017 stating that he on 13 August 2017 transported the body of David Anno from Onanjokwe Mortuary to Tsumeb Mortuary and there handed over and identified the body to Sgt Oxurus. He further stated that the body sustained no further injuries while it was under his care and during the transportation.

[12] Exhibit B5 is an affidavit by Josef Mwetunyeka Shikesho stating that he on 14 August 2017 in the Government Mortuary Tsumeb identified the body of Anno David, his cousin, to Sgt Oxurus.

[13] Exhibit B6 is an affidavit by Sergeant Annalise A. Oxurus stating that the body of Anno David was handed over to her by Sergeant Shivute at the Tsumeb Mortuary and allocated Mortuary PM no 179/2017 to it. The body was identified to her on 14 August 2017 by Josef Mwetunyeka Shikesho as that of Anno David. On 14 August 2017 she identified the body to Dr G.M. Zishumba as that of Anno David before the Doctor conducted the post-mortem examination on it.

[14] Exhibit B7 is an affidavit by Josef Shikesho stating that he on 9 August 2017 at the Onanjokwe Mortuary identified the body of Anno David to Detective Sergeant Niinkoti. Exhibit B8 is a sworn statement dated 9 August 2017 by Josef Shikesho the next-of-kin of the deceased indicating that he was born on 30 January 1981.

[15] Exhibit C is an affidavit by Detective Warrant Officer Elifas Amutenya stating that he on 9 August 2017 visited an alleged Murder scene at Onyaannya A Oniipombo Shebeen accompanied by Sergeant Jonas. A witness Alupe Suama Paulina pointed out certain points to him which he photographed. He subsequently

compiled the attached photo plan with a key to it. The photo plan contained 10 photographs of which only 6 were taken on the scene. Photographs 7 to 10 were of other objects.

[16] Exhibit D is an affidavit of learner Detective Sergeant Richard Kakuva stating that he on 14 August 2017 at the Tsumeb Police Mortuary attended a post-mortem examination conducted by Dr. Zishumba with assistants Sergeant Oxurus and Constable Phillip where he took the attached 5 photographs and compiled a key thereto.

[17] The aforesaid Exhibits B1 up to Exhibit D were admitted under either section 212(4)(a) or section 213 of the Criminal Procedure Act 51 of 1977 as prima facie proof of its contents.

Viva Voce evidence

Suama Paulina Alupe

[18] Suama Paulina Alupe was the first state witness. She resides in Onyaanya village Oshikoto Region. She conducts a business in a cuca shop in the village, baking and selling what she labelled fat-cakes. She also sells tombo and kapana meat.

[19] When the accused arrived on 7 August 2017 at 20:00, the witness was in the shop with the deceased called Baghdad, Nangola Sakeus, Martha Shigwedha, and Kapiye Aina. When the accused entered, he asked for a cigarette, and she inquired whether he had money to pay for it.

[20] She declined to give him a cigarette when he indicated that he did not have money to pay for it. The deceased then gave him a cigarette. According to the witness, the accused had a panga and an axe when he entered the cuca shop. The accused went outside, and the witness alleges she heard him sharpening his panga. The accused said that a lot of blood would be lost today, and that he would cut off

the head of the 'bitch' from their house and take the head to her husband in Swakopmund.

[21] She was coming from behind the counter when the accused pushed open the door with the panga and entered. The panga fell on the ground. The deceased pushed the accused out of the door. The accused hit the deceased once with a fist and then chased the latter, running around the cuca shop. The accused was still holding the panga while he was chasing the deceased. The deceased and accused wrestled on the ground outside the cuca shop. While the deceased was on top of the accused, he managed to pin the accused's hand holding the panga on the ground with his knee.

[22] He called Aina to remove the panga from the hand of the accused. Aina took the panga from the accused and threw it aside. The accused then ran and picked up what the witness called a plank. The deceased attempted to hold the plank, and the accused hit him. The deceased fell. She did not see the deceased with a knife that day.

[23] After that, the accused picked up his panga and chased the witness and Aina, saying he will kill them. The accused turned back and bit the deceased again with the plank. She identified the panga, the plank, and the rope on photo 10. She said point P in photo 3 is where the deceased fell and where the accused tried to lift the deceased afterwards. Accused was at point D when he was sharpening the panga. These were pointed out on the photo plan Exhibit C.

[24] When she was asked in cross-examination whether the accused still had the panga when apprehended, she said he did not have it as he threw it away. The witness confirmed that the deceased pushed the accused out of the cuca shop to prevent him from doing bad things at the place. She did not see the deceased having a knife. When the deceased pushed the accused outside, the latter had the panga with him. When the accused ran to pick up the plank deceased followed him and attempted to hold the plank, but the accused turned around and hit him with the plank.

[25] The accused had the panga when he chased the witness and Aina. Later in cross-examination, the witness stated that Fillemon and Haikali took the panga from the accused. After the deceased pushed the accused outside, the accused punched the deceased but did not cut him although he had the panga. She cannot tell what happened to the axe. She saw it the last time when the accused went out of the cuca shop to smoke the cigarette outside. She denied that she and her family beat up the accused and said he was only caught and tied up.

Aina Kapiye

[26] The next witness was Aina Kapiye. She resides in Onyangya Village. She was at her grandmothe's house on 7 August 2017. At 20:00, she was on her way to the shebeen of Suama Alupe. When she arrived there, she found the owner Suama, the accused, the deceased, and Sakeus. On her arrival, she heard the accused asking for a cigarette and Suama saying she will not give him a cigarette if he cannot pay for it.

[27] The accused said he would not go to sleep before killing someone. The owner warned the accused from uttering these words, but the accused repeated it. The accused then said he would cut off Raina, his sister's head, and send it to her boyfriend in Swakopmund.

[28] Accused went outside and sat at the veranda sharpening his panga. They were seated in the shebeen and heard the accused who was then outside saying that he would not be going home before killing someone. After pushing the door, closed by Suama, open with the panga, accused came back inside saying he would not sleep without seeing a person's blood. The witness, Suama, the deceased, and Sakeus, went out of the cuca shop and they were followed by the accused.

[29] Outside accused once again said he would kill a person, and the deceased moved to the accused and advised him by saying: 'the words are bad, go home and sleep'. The deceased then escorted the accused between 80-100 meters away. After accompanying the accused, the deceased came back. They were seated in the

shebeen and heard the accused saying loudly that he would not be going home before killing someone.

[30] She went outside and found the accused outside the cuca with his panga in his hand. The accused approached the deceased and punched him. When the deceased asked the accused why he was hitting him accused said nothing and lifted the panga to cut the deceased. The deceased then ran around the cuca with the accused in pursuit. The deceased stopped and faced the accused, saying he is tired and is running no more. Accused lifted the panga again, and the deceased grabbed the hand with the panga. They wrestled and eventually fell on the ground, where the deceased overpowered the accused and sat on top of the accused, pressing the accused's arm and called the witness to come and take the panga.

[31] She struggled a few minutes to take the panga from the hand of the accused. After she got hold of the panga, she moved away 13 meters and threw the panga down. When she came back, she saw the accused with the plank raised in his hand. The deceased did not see the accused with the plank, and the witness shouted to the deceased to warn him before the accused struck the first blow. After the second blow, the accused dropped the plank.

[32] The accused then picked up the panga and said he finished their friend, but they remain. She and Suama ran away from the accused when he raised the panga, saying he would kill them. They ran to Selma Uushona's home. They told Fillemon. The accused said he is going to finish the deceased and went back to the cuca shop. When the accused went back, she, Suama and Fillemon followed the accused. They found the accused with the plank in his hand, hitting the deceased again. She however did not see where the blows landed. Fillemon shouted to the accused to stop and asked if he can't see he already injured the deceased. The accused grabbed Fillemon and asked if the witness wants to also kill him.

[33] The police took the plank and panga when they arrived and loaded the deceased and the accused into a van/vehicle. The wooden plank was identified and handed in as Exhibit 3. This witness also did not hear the deceased saying to the accused that he chased out his sister from her home and that she slept in the

bushes and that accused killed his mother. In cross-examination, the witness stated that the panga did not fall out of the accused's hand after he pushed open the door and entered the cuca shop.

[34] The accused punched the deceased while he had the panga. She did not see the deceased attempting to hold the plank. According to her, the deceased was not even aware of the plank until she alerted him by screaming. She reiterated that the accused threatened to kill them and came at them with the panga causing them to run away.

Fillemon Alupe

[35] The third State witness was Fillemon Alupe. He was in bed at home in Onyaanya village on 7 August 2017 when he heard his sister Suama calling him, saying people are fighting at the cuca shop. He stood up. Suama and Aina were at the door/gate when he went out. He woke up Haikali, who went with him to the cuca. On his way the accused approached him, took a stick out of the fence, and hit him on his leg. The accused grabbed him and said he is going to kill him. He fled and the accused went back saying he would finish the person he was fighting. The accused did not have a panga at that stage.

[36] The accused ran away, but they caught him and tied him up with a rope belonging to his mother Selma Uushona. The witness denied that he or anyone else assaulted the accused after he was tied up. He looked at the deceased in the light of a cellphone as saw blood coming from his head. The witness at no time that evening saw the accused with a panga. He agreed that he did not tell the police that the accused beat him with a stick in cross-examination.

Lena Nangolo Kapalwa

[37] The fourth State witness was Lena Nangolo Kapalwa, a police officer stationed at Okatope Police Station. The incident was reported to the witness, and she and two other police officers drove to the village where they found the deceased and the accused and took them to the Okatope Police Station to get J88's for both.

After that, they took the deceased and the accused to the Okatope Clinic. Both accused and deceased were seen by the nurses. Afterwards, the accused and the deceased were taken to Onandjokwe Hospital. She did not see injuries on the accused, just a bloodstain. She does not know if it was someone else's blood or that of the accused.

Lea Nampala

[38] The fifth state witness was Lea Nampala, a nurse at Onyanya Health Centre. On 7 August 2017, two persons were brought to the clinic by the police. The accused walked in himself, but the deceased was on a trolley. The deceased was bleeding from his left ear. The face or side of his head was swollen. He had an injury on his hand, and his eyes were protruding. She cleaned the wounds, put the deceased on a drip and gave him a tetanus injection. She arranged for an ambulance and accompanied the deceased to Onandjokwe Hospital. Exhibit E1-E21 was handed up through this witness. The witness stated that she observed that the accused also required treatment but did not attend to him. Marietha Uxas treated the accused. She treated the deceased at 23:25 on 7 August 2017. The ambulance arrived at Onandjokwe at 1:00 on 8 August 2017. The deceased did not sustain any further injury between the clinic and Onandjokwe Hospital.

Marietha Uxas

[39] The sixth state witness Marietha Uxas was a nurse at the Clinic where the police took the accused and the deceased. The police arrived at around 23:00 on 7 August 2017. She examined the accused. He had multiple lacerations, which she listed as a laceration on the forehead, a laceration on the left arm muscle, a laceration on the left ear and a laceration on the abdomen. Her notes appear on Exhibit F. She gave him medication which included painkillers and antibiotics. After she gave him a tetanus injection, she referred him to Onandjokwe Hospital. She stated that the lacerations did not have the appearance of stab wounds. The defence confronted her with her statement to the police, Exhibit G in which she said the wound on the ear appeared to be a stab wound. She also confirmed that the doctor

in Onandjokwe Hospital sutured one of the wounds. It appears to be the wound on the ear of the accused.

Rauna Hambeleleni Nanyemba

[40] The accused's sister, Rauna Hambeleleni Nanyemba was the only State witness to give evidence in respect of count one. She said on 5 August 2017 during night-time and while she was sleeping in her room with four small and young children, the accused knocked on her window and asked her for 'owambo liquor'. He went to the door and demanded that she open the door and give him the liquor through the door. She grew suspicious and looked through the window at the accused while he was standing at the door of her sitting room. She saw that he had a glass in his hand but also observed him having a panga.

[41] The panga was clenched between his torso and left upper arm with the handle facing the front and the point to the back and a bit downwards. She was scared and did not reply when he asked her to pour the liquor in his glass after opening the door. The witness observed this through her bedroom window. She believed the accused wanted her to open the door so that he could assault her. She believed that he used the request for liquor as a tactic to get her to open the door. The witness denied that the accused came to her room to ask her for his money. The witness then took the children, opened her sitting room's door, and ran into a nearby mahangu field after the accused left. After a while, she left the children and moved back to the homestead.

[42] While moving closer to the homestead she moved behind palms and a marula tree to prevent the accused from seeing her. She heard the accused saying: 'Rauna I have to kill you. I will chop off your head and send it to your boyfriend in Swakopmund...'. The accused also shouted that he had a grudge against her as she had him arrested. The witness stated that the accused could not see her while uttering these words. He just shouted out the words while he was inside the homestead. In cross examination she conceded that when the accused was requesting the liquor she was inside a room with a locked door and if the accused wanted to harm her, he would have to break down the door.

[43] While she was inside the accused did not attempt to break the door or window. On a question by the Court, she reiterated that while the accused was at her window and door, he did not verbally threaten her.

Defence case

[44] The defence made the following admission in terms of section 220 of the Criminal Procedure Act 51 of 1977 and it was recorded as such after the accused confirmed it:

‘The deceased died on 8 August 2017 at Onandjokwe Hospital of a head injury inflicted by the accused.’

The State then closed its case.

[45] The Defence brought an application for the discharge of the accused in respect of count one. I refused the application in a separate judgement on 14 October 2020 as there was a case on which a reasonable Court, acting carefully might have convicted the accused on the charge.

[46] The trial continued. The only witness for the defence was the accused Malakia Penda Nanyemba. He stated that he, during the 5th of August 2017 worked on a basket he was making at his grandmother’s homestead. He returned home around 21:00. He went to his sister’s room and requested his N\$500 from her. She indicated that she spent it on groceries. He went to sleep.

[47] On the 7th of August 2017, he went to work again. He knocked off between 17:00 and 18:00 and went to a nearby shebeen where he found his friend Elias Elias. The friend was on his way to Ongwediva, and the accused requested his friend to drop him off at Suama’s Shebeen. He went into the shebeen after he was dropped off there. He handed his panga to Suama, ordered a cigarette and tombo and paid N\$5.00. He smoked the cigarette and drank the tombo.

[48] The deceased accused him of chasing Rauna from the house, and alleged that she slept in the bushes. He answered this accusation by asking if the deceased

was present when it happened. The deceased said he [the accused] was not a man and that he will beat him up. The deceased slapped him and attacked him with a knife. They struggled and fell to the ground. While they were on the ground, the deceased stabbed him on the left arm, on the head and left ear. He managed to get out from under the deceased and ran away and got the plank. The deceased followed him. He struck the deceased with the plank, and the deceased fell. He saw the deceased struggling and tried to help him stand up, but he could not. He went home. He was caught and tied up. Those who caught him and some of the witnesses assaulted him.

[49] Several other exhibits were handed into Court during the course of the trial after being identified by witnesses. These included exhibits 1, the rope, exhibit 2, the panga and exhibit 3, a plank.

Burden of proof and Evidence by Single Witnesses

[50] It is trite law that the State carries the onus of proving an accused's guilt beyond a reasonable doubt. There is no onus on an accused to prove his innocence.¹

[51] To fully understand the onus on the State and what is meant by reasonable doubt it is important to consider the applicable principles approved by the Namibian Supreme Court.

'The State is, however, not obliged to indulge in conjecture and find an answer to every possible inference which ingenuity may suggest any more than the Court is called on to seek speculative explanations for conduct which on the face of it is incriminating.'²

[52] 'In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no

¹ *Woolmington v Director of Public Prosecutions* [1935] 1 AC 462 at 481 – 482 as followed in *S v Koch* 2018 (4) NR 1006 (SC) paragraph 10

² *S v Sauls and Others* 1981 (3) SA 172 (A) at 182G et seq as quoted with approval by the Supreme Court in *S v Van Wyk* 1993 NR 426 (SC) at 438-439

reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused.

An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case. ³

[53] Speculation, therefore, cannot create reasonable doubt. Reasonable doubt must rest upon a proper and solid foundation, created either by positive evidence or gathered from reasonable inferences, that is not in conflict with or outweighed by the case's proved facts.

[54] How the evidence of a single witness should be evaluated is also settled law in Namibia. A Court approaches it with caution because she is a single witness, but it is trite law that the exercise of caution should not be allowed to displace common sense. The evidence of the single witness need not be satisfactory in every respect. A Court may still accept and rely on such evidence, although it was not perfect in all aspects, if it concludes that the evidence is materially true. ⁴

Mutually destructive versions

[55] Where a court considers two mutually destructive versions, it is a trite rule of practice that the court must have a good reason for accepting one version over the other. It should not only consider the merits and demerits of the state and defence witnesses, respectively, but also the probabilities. The evidence presented by the state and the defence should not be considered in isolation as an independent entity when assessing the witnesses' credibility and the reliability of their evidence. The court must follow the approach to evaluate the state case and determine whether the defence case does not establish a reasonable hypothesis. The court must not be blinded by where the various components originate from. Instead, it should attempt

³ *R v Mlambo* 1957 (4) SA 727 (A) at 738 and *S v Rama* 1966 (2) SA 395 (A) at 401 quoted with approval in *S v van Wyk* 1993 NR 426 (SC) at 438-439

⁴ *S v Unengu* 2015 (3) NR 777 (HC) paragraph 5 and 11; *S v BM* 2013 (4) NR 967 (NLD) paragraph 26; *S v HN* 2010 (2) NR 429 (HC) paragraph 56;

to arrange the facts, rigorously evaluated, in a mosaic to determine whether the alleged proof indeed goes beyond a reasonable doubt or whether it falls short and thus falls within the area of a reasonable alternative hypothesis.⁵

[56] In *S v M*⁶ the Court said in paragraph 189

‘...The point is that the totality of the evidence must be measured, not in isolation, but by assessing properly whether in the light of the inherent strengths, weaknesses, probabilities and improbabilities on both sides the balance weighs so heavily in favour of the State that any reasonable doubt about the accused's guilt is excluded.’

Contradictions and Credibility

[57] The process of identifying contradictions between the evidence of different witnesses does not provide a rule of thumb for assessing a witness's credibility. It is also trite that not every error made by a witness affects his or her credibility. In each case, the trier of fact must complete an evaluation, considering such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness's evidence.⁷

[58] If different persons make the statements, the contradiction proves only that one of them is erroneous: it does not prove which one. The mere existence of a contradiction does not support any conclusion as to the credibility of either person. It only acquires probative value if one believes the contradicting witness in preference to the first witness. Thus, it is not the contradiction but the truth of a contradicting assertion that constitutes the probative end.⁸

[59] Judicial experience shows that inconsistencies and differences of a relatively minor nature between witnesses regularly indicate honest but imperfect recollection,

⁵ *S v Unengu* 2015 (3) NR 777 (HC) paragraph 11; *S v Engelbrecht* 2001 NR 224 (HC); *S v Petrus* 1995 NR 105 (HC); *S v Radebe* 1991 (2) SACR 166 (T) at 168D – E

⁶ *S v M* 2006(1) SACR 135 (SCA)

⁷ *S v Oosthuizen* 1982 (3) SA 571 (T) 576G – H approved and applied in *S v Teek* 2009 (1) NR 127 (SC) paragraph 19

⁸ *S v Oosthuizen* 1982 (3) SA 571 (T) at 576B – D approved and applied in *S v Teek* 2009 (1) NR 127 (SC) paragraph 19

observation, and reconstruction. In such circumstances, inconsistencies counter any alleged conspiracy theory.⁹

Self-defence/Private defence and Putative Self-defence/Private defence

[60] The following guidelines by the Full Bench of the High Court in *S v Naftali*¹⁰ was approved by the Supreme Court in *S v Matheus*¹¹ and applied in *S v Jonkers*:¹²

'Self-defence is more correctly referred to as private defence. The requirements of private defence can be summarised as follows:

- (a) The attack: To give rise to a situation warranting action in defence there must be an unlawful attack upon a legal interest which had commenced or was imminent.
- (b) The defence must be directed against the attacker and necessary to avert the attack and the means used must be necessary in the circumstances. See Burchell and Hunt *South African Criminal Law and Procedure* vol I, 2 ed at 323 - 9.

When the defence of self-defence is raised or apparent, the enquiry is actually twofold. The first leg of the enquiry is whether the conditions and/or requirements of self-defence have been met, which includes the question, whether the bounds of self-defence were exceeded. The test here is objective but the onus is on the State to prove beyond reasonable doubt that the conditions or requirements for self-defence did not exist or that the bounds of self-defence have been exceeded.

When the test of reasonableness and the conduct of the hypothetical reasonable man are applied, the Court must put itself in the position of the accused at the time of the attack. If the State does not discharge this onus, the accused must be acquitted. On the other hand, if the State discharges the said onus, that is not the end of the matter and the second leg of the enquiry must be proceeded with.

⁹ *S v Auala* (No 1) 2008 (1) NR 223 (HC) paragraph 30; *S v Oosthuizen* 1982 (3) SA 571 (T) at 576G – H; *S v Mkhole* 1990 (1) SACR 95 (A) at 98f – g; *S v Britz* 2018 (1) NR 97 (HC) paragraph 24

¹⁰ *S v Naftali* 1992 NR 299 (HC) at 303F-304D

¹¹ *S v Matheus* (SA11-01A _ SA11-01A) [2002] NASC 7 (2 April 2002) at pages 31-32

¹² *S v Jonkers* 2006 (2) NR 432 (SC) at 444F-445C

The second leg of the enquiry is then whether the State has proved beyond reasonable doubt that the accused did not genuinely believe that he was acting in self-defence and that he was not exceeding the bounds of self-defence. Here the test is purely subjective and the reasonableness or otherwise of such belief, whether or not it is based on or amounts to a mistake of fact or law or both, is only relevant as one of the factors in the determination whether or not the accused held the aforesaid genuine belief. (See Burchell and Hunt (op cit at 164 - 81 and 330 - 2); *S v De Blom* 1977 (3) SA 513 (A).)

...

If the State discharges the onus to prove beyond reasonable doubt that the accused held no such genuine belief, then the accused must be convicted of the charge of murder. If the said onus is not discharged, then the accused cannot be convicted of murder requiring mens rea in the form of dolus, but can be convicted of a crime not requiring dolus but merely culpa, such as culpable homicide.'

[61] In *S v Mokonto*¹³ where it was described as follows: 'The accused would not have been entitled to an acquittal on the ground that he was acting in self-defence unless it appeared as a reasonable possibility on the evidence that the accused had been unlawfully attacked and had reasonable grounds for thinking that he was in danger of death or serious injury...'¹⁴

[62] In *S v Matheus*¹⁵ the following was added to the Naftali description of private defence:

'It is helpful to refer to the comment of Snyman in Criminal Law¹⁶ where the learned author states:

"The test to be applied is now as follows: If X (the party who was originally attacked) is aware of the fact that his conduct is unlawful (because it exceeds the bounds of private defence) and that it will result in Y's death, or if he subjectively foresees this possibility and reconciles himself to it, he acts with *dolus* (intention accompanied by awareness of unlawfulness) and is guilty of murder. If intention to kill as explained in the previous sentence is absent, X can nevertheless still be guilty of culpable homicide if he *ought* reasonably to have foreseen that he might exceed the bounds of private defence and that he

¹³ *S v Mokonto* 1971 (2) SA 319 (A) at 324G-H quoting *R. v Attwood*, 1946 AD 331 at 340

¹⁴ In *R v Moleko*, 1955 (2) SA 401 (AD) it pointed out that onus of negating self-defence in a criminal case is on the State. Hence an accused is entitled to an acquittal if there is a reasonable possibility that he acted in self-defence, considered in the light of all the foregoing principles.

¹⁵ See Footnote 11 pages 32-33

¹⁶ *Criminal Law*, 2nd ed, 107 see also J M Burchell, *SA Criminal Law and Procedure, General Principles of Criminal Law*, 3rd ed under heading "Putative or supposed defence" 265/266.

might kill the aggressor. He was then negligent in respect of the death. If, subjectively, he did not foresee the possibility of death and it can also not be said that he ought reasonably to have foreseen it, both intention and negligence in respect of death are absent and he is not guilty of either murder or culpable homicide.”

[63] In considering private defence and the evidence presented in each case, it is essential to understand that in a fight, the unlawful attack need not emanate from the original aggressor¹⁷, and the attack might be unlawful even if provoked.¹⁸

[64] The accused would be entitled to an acquittal if it appeared to be a reasonable possibility that the accused had been unlawfully attacked and had reasonable grounds for thinking that he was in danger of death or severe injury. The means of self-defence that he used were not excessive concerning the threat, and that the means he used were the only or least dangerous means whereby he could have avoided the danger.¹⁹

[65] The test is an objective one. The question to be answered is whether a reasonable person in the accused's position would have considered that there was a real risk that death or serious injury was imminent. A Court must be careful to avoid the role of the armchair critic wise after the event, weighing the matter in the Courtroom's security. In judging the issue, it must be ever-present to the judge's mind that, in the circumstances of a case, the person claiming to act in self-defence does so in an emergency created by the person unlawfully attacking. The self-defender is accordingly entitled to have extended to a degree of indulgence usually accorded by the law when judging the conduct of a person acting in a situation of imminent peril. Men faced in moments of crisis with a choice of alternatives should not be judged as if they had had both time and opportunity to weigh the pros and cons.²⁰

¹⁷ The Law of South Africa, First Reissue Volume 6, paragraph 40 quoting *R v N'thauling* 1943 AD 649 at 654; *S v Ndara* 1955 SA 182 (A) at 184; *R v Patel* 1959 3 SA 121 (A) at 123 as authority

¹⁸ *The Law of South Africa*, First Reissue Volume 6, paragraph 40 quoting *R v Attwood* 1946 AD 331 at 340-341; *S v Mokonto* 1971 2 SA 319 (A) at 324 as authority.

¹⁹ *R v Attwood* 1946 AD 331 at 340

[66] The defence must merely be a deterrent and not retributive. The criterion is reasonableness and not whether the defensive act was proportionate with the threatened harm. It follows, for example, that a person is justified in killing an attacker not only if his life is in danger but also if he stands to suffer grievous bodily harm.²¹

[67] The legal position in respect of putative self-defence was set out as follows:

'In putative private defence it is not lawfulness that is in issue but culpability ("skuld"). If an accused honestly believes his life or property to be in danger, but objectively viewed they are not, the defensive steps he takes cannot constitute private defence. If in those circumstances he kills someone his conduct is unlawful. His erroneous belief that his life or property was in danger may well (depending upon the precise circumstances) exclude dolus in which case liability for the person's death based on intention will also be excluded; at worst for him he can then be convicted of culpable homicide.'²²

[68] When an accused raises self-defence in a murder trial, it is thus settled law that the State carries the burden of proving beyond a reasonable doubt that the accused did not act in self-defence. Suppose there is a reasonable possibility that he might have acted in self-defence. He is entitled to be acquitted unless the State proved beyond a reasonable doubt that he exceeded the bounds of such self-defence. If the State demonstrates that he exceeded the bounds deliberately, he is convicted of murder. If it is proven that he exceeded the bounds negligently, he is convicted of culpable homicide. All this should be proven beyond a reasonable doubt by the State. The accused must prove nothing. He only has to create a reasonable possibility as set out hereinbefore that he either acted in self-defence or did not exceed its bounds deliberately or negligently to be acquitted.

Submissions by Counsel

²⁰ *Ntanjana v Vorser and Minister of Justice* 1950 (4) SA 398 (C) at 406A approving and applying *Union Government v Buur* 1914 AD 273 at 286

²¹ *The Law of South Africa*, First Reissue Volume 6, paragraph 46 quoting *Ex parte Minister van Justisie: In re S v Van Wyk* 1967 1 SA 488 (A) at 497 and *S v Jackson* 1963 2 SA 626 (A) at 628 as authority.

²² *S v De Oliveira* 1993 (2) SACR 59 (A) at 63i – 64b; See also *Director of Public Prosecutions, Gauteng v Pistorius* 2016 (1) SACR 431 (SCA) (2016 (2) SA 317; [2016] 1 All SA 346; [2015] ZASCA 204) para 52 and *S v Rossouw* 2018 (1) SACR 179 (NCK)

[69] Ms Nghiyoonanye submitted that the Court should convict the accused respect of all charges. In respect of count one, she submitted, relying on *S v Waterboer*²³ that the accused stood at the window of the complainant trying to coax her out of her room under the pretext of requesting vambo-liquor to harm her. His conduct and the utterances that he made that night instilled fear in the complainant. This prompted her to flee from the house with the kids and spend the night in the bush.

[70] Mr Aingura submitted the complainant was a single witness and that her evidence therefore warrants special scrutiny. He further submitted that on the evidence important elements of the alleged crime were not proven.

[71] In respect of count two, the Murder charge Ms Nghiyoonanye submitted that he accused was the aggressor. There was no assault on him by the deceased. The deceased only tried to defend himself from the relentless onslaught by the accused. There was no assault on him to defend himself against. The accused was therefore not acting in self-defence. She submitted that the deceased moved towards the accused in desperation. The accused targeted the head of the deceased, thereby intentionally and without justification striking the deceased's head, resulting in the deceased's death. She submitted that the accused should be found guilty of murder with direct intent. In the alternative, and if the Court found that he acted in self-defence, she submitted that the accused exceeded the bounds of self-defence.

[72] Mr Aingura submitted that there were material inconsistencies and discrepancies in the testimonies of first and second state witnesses. These inconsistencies and discrepancies are material if one considers the accused's version and self-defence. He also submitted that he is entitled to his acquittal if the accused's version is reasonably possibly true. This is the case even if the Court does not believe him. If there is a reasonable possibility that it may be substantially true, the Court cannot convict him.

Evaluation of Evidence

²³ (CC16/2009) {2013} NAHCMD 148 (4 June 2013)

Count one-Assault by threat

[73] If the State's evidence and that of the accused are perused and considered in respect of count one, it is apparent that the versions differ in important aspects. The versions differ as to why the accused was outside the complainant's room on 5 August 2017. The complainant says the accused requested owambo liquor from her, but the accused stated that he was there to ask for his N\$500.00. According to the state witness, the accused only threatened to cut off her head and send it to her boyfriend later. The accused denies saying these words. Whether the accused was outside her room to request his N\$500.00 or owambo liquor takes the issues to be decided not further.

[74] On the State's version, the accused did not utter these words when he was at the window or door of the witness. It also became apparent that the accused on the State's version could not see the complainant when he uttered the alleged words. The *Waterboer*²⁴ case's facts relied on by Ms Nghiyoonanye differ from those of the present matter. In the aforesaid quoted case, the accused threatened to stab the witness whilst chasing the deceased. The accused, at the stage of the threat, had already stabbed the deceased. The witness believed that the accused could carry out his threats against him because he saw the deceased bleeding.

[75] Insofar as count one is concerned, it is common cause that for assault by threat to take place, there must be a threat of immediate personal violence, in circumstances that lead the person threatened reasonably to believe that the other intends and has the power immediately to carry out the threat.²⁵

[76] A threat that one will assault another person sometime in the future, cannot be said to constitute an assault by threat.²⁶ At the time the complainant, opened the door and ran into the veld the accused had not uttered the offending words and on

²⁴ *S v Waterboer* (CC 16/2009) [2013] NAHCMD 148 (4 June 2013) paragraph 45.

²⁵ *S v Miya and others, 1966 [4] SA 274 (N)*

²⁶ *S v Miya and others, (supra) and S v Vries* (CC 11/2015) [2017] NAHCMD 47 (28 February 2017) paragraphs 63-64

the evidence he was unaware of her leaving the room. On the evidence he was unaware of her being nearby when he uttered the alleged words.

[77] The framing of the charge contained the averment 'that she open the door of her sleeping room while the accused had a panga and stated that he will cut off her head' suggests that this happened at the same occasion. The relevant part of summary of substantial facts states:

'Accused went to knock at the door of the room in which the victim in Count 1 was sleeping. He demanded that she should open the door of her room to give him 'ovambo liquor' and at that time he was holding a panga in his hands. While at the door he threatened that he will kill her by cutting off her head. Accused thereafter went to open the water tap located in their homestead and stated that he will kill anyone who goes to close that tap.'

[78] This clearly suggests that the accused had the panga in one of his hands outside the room and uttered the threat at that stage. This was not the case. The witness stated that he did not have the panga in his hands while he was outside her room. The accused was unaware of the witness's presence in his vicinity when he spoke the offending words on the evidence presented to Court.

[79] On the evidence presented, I cannot find that the State proved beyond a reasonable doubt that Rauna Hambeleni Nanyemba was threatened by the accused with immediate personal violence or that she could have sensed a threat of immediate personal violence required for a conviction on this charge.

Count two-Murder

[80] Mr Aingura submitted that there are inconsistent versions and discrepancies in the testimony of Suama and Aina, which inconsistencies and discrepancies are material considering the accused's version and/or defence. He listed some of the inconsistencies and discrepancies.

- (a) The manner in which the deceased left the cuca shop. Suama testified that it was on the deceased's pushed or pulling him by the hand, whilst Aina stated that accused came out by himself.

- (b) Suama testified that once outside, accused punched the deceased causing deceased to run around the cuca shop. Aina stated that the deceased escorted the accused and deceased returned and thereafter the accused also returned.
- (c) According to Suama, once the accused punched deceased, deceased ran around the cuca shop. Aina stated that the deceased after being punched asked the accused as to why he is punching him. Accused thereafter raised his panga with attempt to cut the deceased causing the deceased to run away and around the cuca shop.
- (d) Suama and Aina's testimony differ on the position of the deceased in relation to the accused when struck by the accused. Aina stated that the deceased was not aware that accused was about to strike him whilst Suama's evidence is to the effect that the deceased ran towards the accused to hold the plank when struck.

[81] Ms Nghiyoonanye conceded that there are discrepancies in the evidence of the eyewitnesses, but then limits it to the chronology of events that occurred before the actual fight between the accused and the deceased which culminated in the death of the deceased.

[82] The State in argument suggested that the accused falsely alleged that the deceased accused him of chasing Rauna from the house and alleged that she slept in the bushes. She submitted that the deceased could not have done this as only the accused had this knowledge. The conclusion and submission, however, is based on an incorrect supposition. The evidence presented does not indicate that the accused was aware that Rauna left her house or slept in the bushes. As this was not proved the argument can go nowhere and cannot assist the Court in its evaluation the evidence.

[83] The State also referred to *S v Van Wyk*²⁷ and submitted that the court should as in that case consider the fact that the attack was directed to the head of the deceased, a vulnerable part of the body, the injuries inflicted and the sustained nature of the assault and find that the accused had the direct intent to murder the

²⁷ *S v Van Wyk* (CC 12/2016) [2019] NAHCMD 40 (27 February 2019)

deceased. It is thus submitted that I should similarly convict the accused of murder with dolus directus.

[84] However, perusal of *S v Van Wyk*²⁸ shows several differences from the present case. In this case, there were at best two blows to the side of the head. The *Van Wyk* case referred to, involved many impacts to the head. This case has no evidence of the force of the blows to be considered as it was in the *Van Wyk* decision.²⁹

[85] The evidence in this matter shows that the accused used a plank to inflict the injuries. When the State placed the plank before Court, it appeared to be what I would instead have called a short beam. This exhibit appears in photographs 7-10 of Exhibit C. When it was handed into Court during the evidence of the second state witness, I enquired from Ms Nghiyoonanye whether the weight, length, and thickness of Exhibit 3 were going to be placed before Court by agreement or if necessary through the investigation officer. However, the State did not lead any evidence about the weight, length and thickness of Exhibit 3. This failure severely limits the Court to find that the accused used extreme force or a heavy object to inflict the deceased's injuries. The doctor who conducted the post-mortem examination did not give evidence and could not indicate what amount of force was probably required to inflict the deceased's wounds, which further exacerbates this.

[86] *S v Shekunyenge's* facts³⁰ concluding that the accused's conduct is more indicative of dolus eventualis than direct intent, contains much more similarities with the present case where the accused, after hitting the deceased twice, attempted to

²⁸ Supra

²⁹ Paragraph 31 of *S v Van Wyk* (CC 12/2016) [2019] NAHCMD 40 (27 February 2019)

³⁰ *S v Shekunyenge* (CC 05/2015) [2015] NAHCMD 270 (13 November 2015)

assist him and lift him.³¹ That is exactly why its facts were distinguished from those of the Van Wyk case.

[87] It is now necessary to evaluate the evidence presented concerning Count 2, 3 and 4 in line with the authorities quoted hereinbefore. In doing so, the Court must assess the evidence presented in this regard and consider whether any inconsistencies or contradictions are considered minor of material in the context of the case.

[88] The summary of substantial facts in terms of section 144(3)(a) of the Criminal Procedure Act, 51 of 1977 contains the following description of the facts surrounding charges set out in Count 2, 3 and 4. The summary is supposed to contain the substantial facts the Prosecutor-General considers necessary to inform the accused of the allegations against him.³² Although the provision is not too be construed to bind the State,³³ it is trite that the summary is normally compiled from the statements of all the witnesses.

‘In the evening of 07 August 2017 the accused was in Oniipombo Shebeen located in Onyaanya village, Ondonga in the District of Ondangwa together with the owner of the shebeen Suama Alupe (the victim in Count 3), Anno David (the deceased) and Aina Kapiye (the victim in Count 4). While in the shebeen, in the presence of the deceased and the victims in counts 3 and 4 accused mentioned that he wants to cut off the head of his sister Rauna and at take it to her boyfriend in Swakopmund. The deceased and the victim in Count 3 advised the accused to desist from talking about such violence. When the accused insisted the victim in Count 3 and deceased expelled the accused from the shebeen and he left the shebeen with his panga. The accused came back inside the shebeen after a short while holding his panga and stated that he wants to see somebody’s blood and that he will cut somebody that day.

³¹ *S v Shekunyenge* (Supra) paragraph 24: [24] ‘When the deceased fell silent the accused was overheard apologising to her which, objectively viewed, tends to show that he lacked direct intent to kill. Besides that, the evidence pertaining to the accused’s outward conduct, in my view, does not support a finding that he had direct intent to kill (*dolus directus*) when assaulting the deceased. After the fight he dragged the deceased inside the shack and put her to bed. Though not too much should be read into his behaviour subsequent to the assault, his actions seem inconsistent with someone who, just prior thereto, wanted to bring about the victim’s death.’

³² Section 144(3)(a) of the Criminal Procedure Act, 51 of 1977.

³³ Section 144(3)(a)(i) of the Criminal Procedure Act, 51 of 1977.

The deceased persuaded the accused to leave the shebeen but the accused did not go far from the shebeen. He sat outside sharpening his panga on a stone. The victim in Count 3 closed the door of her shebeen and they remained inside together with the deceased and the victim in Count 4. The accused forcefully opened the door of the shebeen and entered.

The deceased left the shebeen. The accused grabbed the deceased on the arm and dared the deceased to fight him. The deceased freed himself and ran away. The accused holding a panga chased the deceased around the shebeen. The deceased stopped running and told the accused that he is tired of running. The accused and the deceased wrestled for the panga and both fell to the ground. In the process the victim in Count 4 managed to get hold of the panga and moved it beyond the accused's reach.

The accused got up, picked up a wooden plank that was near-by and hit the deceased with it on the head. The deceased collapsed and the accused again hit the deceased on the head.

The accused turned to the victims in counts 3 and 4 and shouted saying that now that he has killed the deceased they will follow. Accused chased them and they ran way in fear.

The deceased died at Onandjokwe Hospital on 08 August 2017 as a result of the head injuries inflicted on him by the accused.'

[89] The summary above is different from the evidence presented to the Court by Suama Alupe and Aina Kapiye. To mention a few, Suama Alupe and the deceased according to the summary expelled the accused from the shebeen during his first visit to the shebeen. The accused came back into the shebeen later but was persuaded by the deceased to go outside again, where he allegedly sat sharpening his panga. The accused afterwards entered the shebeen for the third time. The evidence never suggested that the accused entered the shebeen three times, and Suama had a part in expelling him on the first occasion. In Court, witnesses said nothing about the accused grabbing the deceased on the arm while the latter was leaving the shebeen and daring the deceased to fight him. Nor that deceased freed himself and ran away. The accused punching the deceased before the wrestling

between the two is commenced is also absent from the summary and was therefore probably absent from the statements.

[90] The accused raised a defence of self-defence in his plea explanation. The objective evidence shows that the accused had injuries when he was seen and treated at the clinic by Nurse Uxas. They were described as lacerations. At least one, perhaps more, needed suturing and thus stiches. These injuries had to come from somewhere. The State witnesses who were at the scene provide no explanation for these injuries. They in fact even deny that the accused had injuries. They deny any assault by the deceased or any of them assaulting the accused.

[91] The State submitted that the injuries are not stab wounds typically caused by a stabbing, but lacerations typically caused by friction or scratching. Suffice to say, there is simply no evidence on record to substantiate this submission as to the lacerations' causes. The onus of proof beyond a reasonable doubt requires the State to confirm this. Thus, the State had to present evidence to prove that this was the cause of these lacerations.

[92] The State also submitted that it has proved that the deceased did not produce a knife and stab the accused because the accused cannot tell the Court which stab wound was inflicted first and in what sequence the wounds were inflicted. This submission disregards several other reasons, as well as the fact that they wrestled in the dark. One of the reasons was given by the accused when he said he only realized afterwards that he was stabbed.

[93] Where the State witnesses provide no explanation for the injuries on the accused, he does. He said it was inflicted by the knife the deceased produced.

[94] The accused said the deceased confronted him with the accused chasing Rauna from the home and that she slept in the bushes. This on the evidence presented could not have come from the accused because he simply did not see Rauna leaving the house or was aware she slept in the bushes. On Rauna's evidence she never confronted the accused with this. This allegation must have

come from someone. This according to the accused came from the deceased and started the argument between the two of them.

[95] The Court further must consider that the state witnesses did not deny that the deceased said this. Their evidence in this regard is quite strange. Suama Alupe said she did not hear the deceased saying this. Similarly, Aina Kapiye said she did not hear deceased saying these words or any of those alleged by the accused.

[96] The accused says that the deceased slapped him and threatened him before he attempted to punch the deceased. Aina Kapiye denies this and says accused followed the deceased and the witnesses out of the shebeen. Sauma Alupe provides some corroboration for the accused by stating that the deceased pushed the accused out of the shebeen. She and Aina Kapiye thus contradicted each other. On the aspect as to how accused and deceased left the shebeen Aina is thus a single witness. If everyone left in the manner she suggests, it seems strange that the accused will now while on her version armed with a panga, punch the deceased out of the blue.

[97] It needs to be pointed out here that Aina Kapiye is the only one that in evidence stated that the accused was in the shebeen three times. She is the only one suggesting that the deceased escorted the accused away from the shebeen and that the accused returned. It needs to be mentioned here when it was put to her that the accused is saying that he found her with Suama and the deceased inside the shebeen when he arrived there first, she denies it. Suama however also in this regard corroborates the accused.

[98] The accused provides a reasonably logical version as to how the matter escalated up to him and the deceased wrestling on the ground. Suama says she saw punch and saw them wrestling. She saw no attempt by the accused to use the panga on the deceased. Aina however says accused did attempt to cut the deceased but the deceased caught his arm holding the panga.

[99] It is common cause that the deceased managed to overpower the accused when they were wrestling. On the state's version the accused was disarmed. On the accused's version the deceased stabbed him with a knife. Both Suama and Aina deny this stating that they did not see a knife or the deceased stabbing the accused. Objective evidence however indicate that the accused after the incident had several lacerations. These injuries cannot be explained by the evidence of these two state witnesses.

[100] The accused said he managed to get away from the deceased and ran away with the deceased following him. He picked up the plank and turned around and hit the deceased who was approaching him with the plank twice. He had blood running into his eye and only then realized he was stabbed. Suama confirms that the deceased followed the accused to where he picked up the plank and attempted to take the plank before he was hit on the head twice.

[101] Aina however paints a completely different picture. She said the deceased was facing her and did not see the accused approaching with the plank. She shouted to warn the deceased and while he was turning was hit with the plank twice. These two versions by the two state witnesses are irreconcilable with each other. One of them however corroborates the version of the accused.

[102] The accused said that he attempted to assist and lift the deceased up after he fell. This is once again confirmed by Sauma. Aina confirmed this but states that this happened after the accused chased them and returned to the deceased. The witness said the accused tried to raise the deceased, but the deceased was powerless. Accused allegedly said my friend get up and beat me with both hands. However, she said this was said to challenge deceased so that they can fight each other.

[103] Aina said when they followed the accused back when he returned back to the deceased she saw him hitting the deceased with the plank again although she could not say where the blows landed. This according to her happened in the presence of Suama and Fillemon. She also alleged that Fillemon said to the accused that he

should stop assaulting the deceased as he has already injured the deceased. Neither Suama nor Fillemon gave evidence about this.

[104] Aina then stated that accused then left the plank and grabbed Fillemon and while shaking him, said: Do you want me to kill you too? Fillemon gave not such evidence nor does Sauma mention anything about this.

Counts 3 and 4

[105] Ms Suama Alupe and Ms Aina Kapiye stated that after striking the deceased, accused picked up the panga from where it was dropped by Aina, walked towards them, stating that, it is now their turn. They ran to their homestead in fear of the accused and accused followed them up to the homestead.

[106] According to the witnesses the accused chased them with the panga. They ran to Fillemon's house. When Fillemon encountered the accused he saw no panga. Only a stick. Suama alleged that Fillemon and Haikali took the panga from the accused when they detained him. This is denied by Fillemon. Fillemon further denies that he ever saw the accused with a panga that evening.

[107] Accused denied chasing them with a panga. The state witnesses contradict each other as to whether the accused had a panga at that stage. The accused should be given the benefit of doubt that exists in this regard.

[108] The state witnesses contradicted one another on several aspects. The contradictions were on vital aspects of the case and even provide some corroboration for the version of the accused. I find that the evidence of Aina Kapiye is not reliable and materially true where she is not corroborated by other evidence. The State carried the burden to prove the alleged offences. In respect of Count two also that there was no self-defence or that the bounds were exceeded either deliberately or negligently. The state also had to prove that there was no reasonable possibility that the accused thought he acted in self-defence.

Conclusion

[109] In respect of count two I find that there is a reasonable possibility that the accused did not have the intent to kill the deceased and believed that he acted in self-defence when he hit the deceased with the plank. He however did not act reasonably in the circumstances of the case and thus negligently killed the deceased.

[110] In respect of Counts 3 and 4 I find that the State did not prove beyond reasonable doubt that the accused had a panga when he threatened and chased the two complainants. He did however chase after them and they were clearly feeling threatened and afraid of being injured by him.

[111] In the result the following orders are made

- (1) Count 1: Not Guilty
- (2) Count 2: Guilty of Culpable Homicide
- (3) Count 3: Guilty of Assault by Threat
- (4) Count 4: Guilty of Assault by Threat
- (5) This matter is postponed to 11 March 2021 at 14h00 for submissions prior to sentence;
- (6) The accused is remanded in custody.

D.F. SMALL
ACTING JUDGE

APPEARANCES

For the State:

Ms. M Nghiyoonanye
Prosecutor General Office, Oshakati

For the Accused:

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Aingura Attorneys, Oshakati