

REPUBLIC OF NAMIBIA



NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 14 /2020

In the matter between:

THE STATE

and

DAWID NOWASEB

ACCUSED

Neutral citation: *S v Nowaseb* (CC 14/2020) [2021] NAHCMD 65 (23 February 2021)

Coram: LIEBENBERG, J.

Heard: 01 - 04 February 2021.

Delivered: 23 February 2021

Flynote: Criminal Law – Murder, read with the Combating of Domestic Violence Act 4 of 2003 – Accused prepared a statement in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 – Accused admitted having acted with intent, but in the form of *dolus eventualis* – State rejected the plea of guilty with *dolus eventualis* – Contradictions between plea statement and testimony of accused – Accused's *viva voce* evidence of having merely dropped the deceased rejected as false beyond

reasonable doubt, in light of the totality of the evidence presented – Evidence showed that accused held the deceased by both legs when forcefully striking the back of his head on the ground – The impact led to multiple skull fractures – In determining the accused's mind-set regard must equally be had to events immediately preceding the assault on the deceased – Found that state proved murder with *dolus directus*.

Criminal Law – Assault with intent to do grievous bodily harm – Common assault – Single witness – Section 208 of the Criminal Procedure Act 51 of 1977 – The court is to exercise caution in the evaluation of such evidence – Witness should be credible – The evidence should be of such nature that it constitutes proof of the guilt of the accused beyond reasonable doubt – Evidence of the single witness need not be satisfactory in every respect as it may safely be relied upon even where it has some imperfections – Such evidence may only be safely relied upon if the court can find at the end of the day that, even though there are some shortcomings in the evidence of the single witness, the court is satisfied that the truth has been told – Found that the complainant's evidence is clear and consistent and that in cross-examination her version remained unshaken – The complainant's evidence is corroborated by medical evidence – Court satisfied that the complainant is a credible and reliable witness – Complainant is convicted of assault with intent to do grievous bodily harm and common assault.

Criminal Law – Assault with intent to do grievous bodily harm – Determining whether the accused acted with the intent to cause the complainant grievous bodily harm – Stone thrown at the complainant, directed at her head which she blocked with her hand – In the process the complainant sustained minor injuries on the posterior aspect of the right hand – Medical proof submitted – It is immaterial whether grievous bodily harm is inflicted on the victim when determining liability for assault with intent to do grievous bodily harm – It is only the intention required to do such harm that is essential – The crime may still be committed when the physical injuries sustained are slight – Accused found to have had the required intent to do grievous bodily harm.

Law of Evidence – Deviation from a police statement by a witness when *viva voce* evidence is led – Purpose of a statement made to the police is to obtain the details of an offence in order to decide whether or not prosecution should be instituted – It was never intended to anticipate the testimony of the witness when giving evidence at the trial –

The discrediting of a witness who deviates from a previous statement limited to instances where there is a material deviation from a previous statement made by the witness after acknowledgment of the content as being correct – In determining whether the truth has been told regard must be had to the rest of the witness's evidence, considered against the totality of evidence presented – Deviations found to be immaterial.

Summary: The accused faced charges of murder, assault with intent to do grievous bodily harm and common assault, all read with the provisions of the Combating of Domestic Violence Act 4 of 2003. The accused also faced a charge of escape from lawful custody. It was alleged by the state that the accused murdered his 10 months old child by hitting him against the ground. The complainant in the charges of assault with intent to do grievous bodily harm and common assault is his girlfriend, and the mother of their now deceased child. It was alleged that the accused threw a stone directed at the complainant's head, which she managed to block with her hand. Before that incident, it was alleged that the accused assaulted the complainant by slapping her once in the face when they were drinking at a shebeen. The accused pleaded not guilty to the count of assault with intent to do grievous bodily harm and the charge of common assault. The accused prepared a statement in terms of section 112(2) of the Criminal Procedure Act 51 of 1977, in which he pleaded guilty to the charge of murder on the basis of having acted with *dolus eventualis* and the charge of escape from lawful custody. The state accepted the plea of guilty on escape from lawful custody and rejected the plea of guilty on a charge of murder, acting with *dolus eventualis*. The matter proceeded to trial. The state and the defence both called witnesses. After a careful evaluation of the evidence presented before court in its totality, of which some is single evidence in respect of the charge of assault with intent to do grievous bodily harm and common assault, the court found that the State proved its case beyond a reasonable doubt and rejected the evidence of the accused on the basis that it is not reasonably possibly true and false. Consequently the accused was found guilty as charged on all the counts.

Held, that the provisions of the Combating of Domestic Violence Act 4 of 2003 are applicable because the complainant in the assault charges is his girlfriend and the deceased, their child.

Held, that the accused's testimony and narrative of events that led to the killing of the deceased is not only contradicted by three state witnesses, all being eyewitnesses, but is self-contradicting as far as it concerns admissions made in his section 112(2) plea explanation.

Held, that the accused's testimony with regards to his actions towards the deceased is irreconcilable with his earlier plea explanation and has the makings of an afterthought. He stated in his plea statement that he *threw* the deceased down onto the ground out of anger, but changed this during his testimony to say that he *dropped* the child onto the ground from waist height out of fear and wanted to get away from an approaching person armed with a panga.

Held, that with regards to the events immediately preceding the accused's actions which resulted in the deceased's demise, there is a significant difference between the version of the accused and that of the state witnesses.

Held, that whereas the accused's alleged intention is inconsistent with established facts and therefore cannot be relied upon, the court has to infer the accused's intention from evidence relating to his outward conduct at the time; as well as the circumstances surrounding the events.

Held that, the accused's *viva voce* evidence of having merely dropped the deceased can, in light of the totality of the evidence presented, safely be rejected as false beyond reasonable doubt. The established facts are that the accused held the deceased by both legs when forcefully striking the back of his head on the ground.

Held, that the court is satisfied that it had been proved beyond reasonable doubt that the accused unlawfully and intentionally killed his child, having acted with *direct intent*.

Held, that when evaluating single evidence the court is to exercise caution; that such a witness should be credible; and the evidence should be of such a nature that it constitutes proof of the guilt of the accused beyond reasonable doubt.

Held, that the complainant's evidence was clear and consistent and in cross-examination her version remained unshaken. Her evidence is furthermore corroborated by medical evidence showing an injury to her hand. Complainant found to be a credible and reliable witness.

Held, that the accused's intention when throwing a stone aimed at the complainant's head, was to cause her grievous bodily harm.

Held, that there are no material contradictions between the complainant's statement made to the police, and her *viva voce* evidence, adversely affecting her credibility.

ORDER

Count 1: Murder, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 – Guilty.

Count 2: Assault with intent to do grievous bodily harm, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 – Guilty.

Count 3: Assault, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 – Guilty.

Count 4: Escape from lawful custody – Guilty.

JUDGMENT

LIEBENBERG J:

[1] The accused, a 27 year old male, pleaded guilty to two of the four counts preferred against him and not guilty to the remaining charges. Although the state

accepted the plea of guilty in respect of count 4, being that of escaping from lawful custody, it declined the guilty plea on a charge of murder (count 1) on the basis tendered. I will revert to the accused's plea on the latter, in due course. Counts 2 and 3 involve alleged assaults perpetrated on the complainant and which the accused disputed. The matter proceeded to trial.

[2] The accused is represented by Mr *Shiikwa* on the instruction of the Directorate: Legal Aid, while Mr *Andreas* appears for the state.

The Charges

[3] The charge against the accused in count 1 is that of murder in that between 18 – 19 October 2018, in Gobabis, he unlawfully and intentionally killed August Geinamseb, a 10 month old boy (hereinafter 'the deceased'). It is common cause that the accused is the biological father to the deceased.

[4] In count 2, the accused faces a charge of assault with intent to do grievous bodily harm, read with the provisions of the Combating of Domestic Violence Act 4 of 2003, in that during the time and place stated, the accused unlawfully assaulted Lusia Erna Geinamseb (Lusia) by hitting her with a stone on her hand and/or throwing a stone at her with the intention to cause the said Lusia grievous bodily harm.

[5] The accused faces a further charge of common assault in count 3, when he during the same period, unlawfully and intentionally assaulted Lucia by slapping her with his hand in the face and thereby causing her to fall down and suffer some wounds, injuries or hurts. I pause to observe that this incident took place earlier in the day to the charge described in count 2.

[6] The charge in count 4 is that of escape from lawful custody, in that upon or about 29 August 2019 and at or near Gobabis in the district of Gobabis, the accused did unlawfully and intentionally escape from lawful custody after he was arrested and detained by the police at the Gobabis Police station holding cells on a charge of murder.

The accused's section 112(2) statement

[7] In a statement prepared by his counsel in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 the accused admitted guilt on counts 1 and 4 and amplified the pleas of guilty with an accompanying explanation. There is no need to go into the explanation in any detail at this stage – at least not as far as it concerns events that took place earlier in the day when he, together with Lusie Geinamseb, his ex-girlfriend and complainant in counts 2 and 3 and his sister Rebekka, visited several shebeens where they imbibed homemade brew throughout the day. At some point during the day the complainant left their two boys in the company of the accused and returned home. She later returned and fetched two of the children from the accused who was still at the shebeen and returned home. The accused then took the other boy, Cheppies, who had remained with him throughout, to Rebekka's house and left him in the care of one Mina Aguses. He and Rebekka then returned to the shebeen and continued drinking.

[8] In the evening, upon his arrival home and after having fetched Cheppies, he asked the complainant for blankets in order to make his bed outside. She told him that he would not be sleeping at that house and threw sand in his face. A scuffle ensued between the two and the complainant ran from the house screaming that the accused wanted to kill her. Fearful of an attack by her family, he then took the deceased and his other son Johannes (8 years old) and went into the veld, carrying the deceased in his arms. At par 5.15 of his statement, the accused stated the following:

'I realised that my ex-girlfriend's relatives were following me. We had a confrontation and out of anger I intentionally threw the deceased on the ground injuring his head before I left the scene to my brother's house where I went to sleep.' (Emphasis provided)

At par 5.17 he further stated:

'Even though I did not have the intention to kill the deceased I foresaw that by throwing the deceased's on the ground I could cause his death and as such I am guilty for having caused the deceased's death *dolus eventualis*.' (sic)

[9] In respect of count 4 the accused admitted all the elements of the offence of escaping from lawful custody when he escaped from the Gobabis Police station holding

cells on 29 August 2019. The state accepted the plea and the accused stands to be convicted on this charge.

The State Case

[10] The prosecution led the evidence of the witnesses Lusia Gainamses, the accused's ex-girlfriend and mother of their four children; Paul Goeieman and Erika Uiras, the neighbours to the house where Lusia and the children were residing with an elderly lady called Lena.

[11] In respect of count 1 the essential evidence presented by the state amounts to the following:

It is common cause that the accused worked on a farm but when in town, would sleep over at his girlfriend Lusia's place. That seemed to have been the arrangement on that fateful evening. Centre to the testimonies of Lusia and the accused is that they, accompanied by Rebekka, had been consuming homebrewed beer at different shebeens during the day until an argument started among them when Rebekka refused sharing her beer with Lusia. After an altercation with the accused during which Lucia got a slap in the face, she returned home alone, leaving the children with the accused. At sunset she went looking for the accused and the children and found them at a shebeen. She collected the deceased and one of the boys and proceeded home.

[12] With regard to count 2, the complainant testified that she arrived home from the shebeen while the accused arrived home some time during the evening. Upon his return the accused suggested that he and Lusia make their bed outside, but she refused. She was already in bed when the accused uttered words to the effect that she would see and then picked up a stone and threw it at her. She managed to block the stone with her hand which otherwise would have hit her on the left side of her face. The stone struck her on the back of her hand and inflicted some injury as recorded in the medical report (J-88)¹ as: 'mild swelling and tenderness over the right dorsal aspect of the hand'. This alleged assault, according to the accused, never took place. In cross-examination the complainant stood by her version. She then got out of bed and the accused followed her outside armed with the stone.

¹ Exhibit 'F'.

[13] The one neighbour called Rasta then took the stone away from the accused, whereupon the accused turned back and re-entered the house. He emerged with two of the boys, the deceased and Johannes and moved in the direction of the veld. Lusia woke Lena (the landlady) and the two of them followed the accused, calling after him to bring back the boys. She heard the accused saying: 'Today I will kill these two boys and then myself'. At that stage they were about 20m apart.

[14] The commotion outside woke the neighbours Paul Goeieman and his wife Erika Uiras, who came from their house and started following the accused. As Lusia caught up with the accused, he threw down the deceased, head first, whilst holding the boy by the legs. The accused then fled the scene. This gave the other boy, Johannes, the opportunity to run away. Lusia picked up the deceased and saw blood coming from his nose and mouth; also that his head was swollen. They managed to get the child to hospital by taxi but was informed that he had passed away.

[15] The evidence of Paul and Erika corroborate that of Lusia in material respects as far as it concerns the incident where the accused held the deceased by his legs, raised him above his head and forcefully swung him forward and downward with the back of the boy's head hitting the ground. Paul said what initially drew their attention was the crying of a child and the shouting of Lusia. He followed the accused whilst telling him not to hurt the boy, to which he responded that he does not care and will hurt the boy. Erika's version of the incident corroborates that of Paul. All three eyewitnesses observed and described the manner in which the deceased was flung to the ground and therefore disputed the accused's version that he simply dropped the child from the cradle position he held him in before fleeing the scene.

[16] Although this happened at night, out in the veld where there was no artificial light, the witnesses and the accused are in agreement that the moon was up and provided sufficient light enabling them to make the observations testified on. Although the defence hinted that the witnesses' view might possibly have been obstructed by some nearby bushes, this was dispelled by the respective witnesses. The photo plan² handed into evidence, depicting the scene of the crime, further shows that there were no nearby

² Exhibit 'D'.

bushes that could possibly have obstructed the witnesses' view. They were close to the scene and despite it being night time, they had a clear view of the accused's actions towards the deceased.

[17] Also handed into evidence by agreement is the medical post-mortem report³ compiled and issued on the 24th October 2018 by Dr Leonard Kabongo, who conducted an autopsy on the body of August Geinamseb, a male infant aged 10 months. For purposes of the court's verdict in the end, the chief post-mortem findings made on the body are significant:

- Infant
- Pallor++++
- Transparietal skull fractures
- Subdural and subgaleal haematomas.

The cause of death was reported as: Hypovolemic shock; traumatic multiple skull fractures. Sketches appended to the report reflect bilateral fractures on the posterior aspect of the skull; ranging from the top of the skull right down to the base. Though no evidence was led as to the amount of force required to inflict injuries of this nature to the deceased's body, purely based on the nature and extent of the skull fractures, it is my considered view that substantial to excessive force was required for the infliction of such injury to the head.

[18] In respect of count 3, the complainant testified about an incident that took place earlier that day at Poro Shebeen when she was with the accused and his sister Rebecca, who bought a jar of home brewed beer but which she refused to share with Lusia. At some point there was an exchange of words between Lusia and the accused where insults were exchanged. A friend of the accused then told him that he should beat her because she was disrespectful towards him. The accused then slapped the complainant once on her ear with an open hand. In cross-examination, the complainant denied having insulted the accused first and repeated that the accused insulted her and she then insulted him back. In cross-examination, the complainant further added that after the accused slapped her, she fell to the ground and removed the deceased from her back fearing that the child might get hurt.

³ Exhibit 'B'.

The defence case

[19] The accused's narrative of the events that day preceding the death of the deceased briefly amounts to the following:

The accused during his testimony did not dispute that he, Lusia and his sister visited several drinking places earlier in the day and that they parted ways after an altercation between him and Lusia, where after she went home. According to the accused Lusia, during this altercation, rolled on the ground while carrying the deceased on her back. When she got up, she put the deceased on the accused's lap and left; going home. The accused, clearly dissatisfied with the manner in which Lusia conducted herself when rolling on the ground whilst the deceased was strapped to her back, deemed it necessary to report her to a police officer who works at the Gender Based Violence Unit. He said that he sought help, hoping that the police officer will reprimand the complainant for rolling on the ground while carrying the deceased on her back. Unfortunately, the police officer could not provide any assistance. He then left Cheppies (his son) at Rebekka's place and went with his other two children, including the deceased, to a shebeen where he and Rebecca continued drinking.

[20] While they were there the complainant arrived and collected the children. He told her to also collect Cheppies from Rebekka's place but she did not do so. Upon his arrival at home the complainant threw sand in his face and said that he is the reason she was not given beer by Rebekka earlier. He then decided to take the children with him to go and sleep at Rebekka's place.

[21] The accused admits having left the house carrying the deceased on his arm while holding Johannes's hand as he walked into the veld. He said he intended going to Rebekka's place where they would overnight. Prior thereto and whilst still at home, he made a gesture towards Lusia, pretending to slap her; causing her to run outside. This gave him the opportunity to take the two boys. He overheard Lusia telling her sister that the accused wanted to kill her where after she went to call her brothers and sisters who, seemingly, lived nearby. He was some distance into the veld when he saw three men approaching at a distance of approximately 20m. He gained the impression that they were going to attack him; he did not say what caused him to come to such conclusion.

[22] As he was moving away, he met Paul Goeieman and Erika Uiras. Paul had a panga in his hand and Erika spoke to him, telling him to hand her the baby. He responded that Lusia must come and fetch the child, saying that he feared that Paul would strike him with the panga. When he realised that they were getting closer, he *dropped* the deceased to the ground and ran away. According to him he held the baby in the cradle position at chest height and merely dropped him. He denied ever raising the child above his shoulders and hitting his head on the ground whilst holding him by the legs. He further denied having had the intention to kill the boy. The following morning he learned about the boy's death and waited for the police to fetch him.

[23] When asked in cross-examination why he only mentioned the presence of three other men approaching him and why this was never put to any of the state witnesses that he felt threatened by their presence, he said that he never mentioned this to his counsel as he was too heart-broken to mention it. Equally, with regards to his version of Paul approaching him with a panga in hand, this was never put to any of the state witnesses in cross-examination. The accused's explanation on this score is that he only informed his legal representative about this earlier that day and not before. Even then, one would have expected of his counsel to raise it with those witnesses who were at the scene and must have seen Paul with a panga in hand. It was put to the accused that his allegation of him having been under threat by the presence of these persons is a mere afterthought, which he denied.

[24] The defence also led the evidence of two police officers, Detective Sergeant April and Inspector Guim, whose evidence mainly concerns the taking of witness statements from Lusia at different stages of the investigation. Also about a stone that was pointed out by Lusia and collected from the scene and booked in for forensic analysis; however, that came to naught. Sergeant April testified that when he reduced Lusia's statement to writing, she made no mention of injuries sustained in her face during the stone throwing incident. The evidence of these two witnesses as regards the recording of the statements made by Lusia clearly did not take the defence case any further; neither does it show any material deviation from her oral evidence in court. It would appear that the fact that the complainant had no injuries to the face is used as corroboration for the accused's version that he did not strike Lusia with a stone. This

contention clearly loses sight of her testimony that she blocked the blow with her hand which got injured in the process.

Evaluation of evidence

[25] In *S v HN 2010 (2) NR 429 (HC)* the approach to the evaluation of evidence was stated as follows at page 458, paragraph 113:

'The question that must be answered is whether the State's case has been proved beyond reasonable doubt when measured against the accused's conflicting version or — putting it differently — is the accused's version reasonably possibly true even if the court does not believe him? Is there a reasonable possibility that it may be substantially true? (*S v Jaffer* 1988 (2) SA 84 (C); *S v Kubeka* 1982 (1) SA 534 (W).)'

[26] It is common cause that the accused and the complainant in counts 2 and 3 were in a domestic relationship as defined in section 3 of the Combating of Domestic Violence Act 4 of 2003; furthermore, that the victim in count 1 was their 10 month old baby, born from the relationship. Counts 1, 2 and 3 therefore fall within the ambit of Act 4 of 2003, under which the accused was charged.

[27] It was argued on the accused's behalf that the court is faced with two mutually destructive versions and in light of the uncorroborated evidence of the complainant (Lusia), considered together with her history of alcohol consumption and the differences in her statements made to the police, compared with her evidence in court, no reliance should be placed on her version of the events on that fateful day. As for the accused's intention on the murder charge, it was submitted that he did not act with intent when dropping the child and rather acted negligently or recklessly. His guilt should therefore be decided on the admissions made in the section 112(2) statement as he never intended killing his child. He therefore disputes evidence about him having uttered words to the effect that he would kill his children and then himself.

[28] The accused's testimony and narrative of events that led to the killing of the deceased is not only contradicted by three state witnesses, all being eyewitnesses, but is self-contradicting as far as it concerns admissions made in his section 112(2) plea explanation.

[29] How a court ought to approach a criminal case on fact where there is a conflict of fact between the evidence of the state witnesses and that of the accused, was stated in the oft-quoted case of *S v Singh*⁴ where the learned judge says the following at 228F-G:

'It is quite impermissible to approach such a case thus: because the court is satisfied as to the reliability and the credibility of the State witnesses that, therefore, the defence witnesses, including the accused, must be rejected. The proper approach in a case such as this is for the court to apply its mind not only to the merits and the demerits of the State and the defence witnesses but also to the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond all reasonable doubt.'

See also: *Sakusheka and Another v Minister of Home Affairs*⁵ where the court, endorsed the *dictum* enunciated in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others*.⁶

[30] The accused's testimony with regards to his actions towards the deceased is irreconcilable with his earlier plea explanation and has the makings of an afterthought. Though claiming in the end that he *dropped* the child onto the ground from waist height out of fear that allowed him time to get away from the approaching Paul Goeieman who was armed with a panga, he was unable to explain why his statement reads differently. Therein he stated at para 5.15 that he *threw* the deceased down onto the ground out of anger. The latter is more consistent with evidence given by the state witnesses that his actions towards the child were wilful and malevolent.

[31] It is not in dispute that the accused was being followed going into the veld by some persons. However, on the state's version these were only Lusia and her neighbours, Paul and Erika, calling out after him to bring back the child(ren) and not to do them any harm. Contrary thereto the accused's testimony is that he was first approached by three men, all family of Lusia, which created the impression in his mind

⁴ *S v Singh* 1975 (1) SA 227 (N).

⁵ *Sakusheka and Another v Minister of Home Affairs* 2009 (2) NR 524 (HC).

⁶ *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) 11 (SCA) at 14I-15D.

that they came to attack him. However, on his own version, these figures seemed to have faded away into the background and no longer a factor when Paul became his main focus point and threat, as he was armed with a panga and getting all the closer. This was the first time the accused brought an *armed* Paul onto the scene as no mention had been made of this important fact at any earlier stage. When asked why he had not mentioned it sooner and whether he had informed his counsel accordingly, he replied that he only informed him the previous day. As for his failure to mention him having felt threatened by the three men, he explained that he did not tell his counsel about them as he was very heartbroken.

[32] With regards to the events immediately preceding the accused's actions which resulted in the deceased's demise, there is a significant difference between his version and that of the state witnesses. During their cross-examination it was never put to them by defence counsel that Paul was armed with a panga and posed a threat to the accused, causing him to let go of the deceased and take flight for his own safety. It is settled law that there is a duty on counsel when intending to argue that a witness is not speaking the truth on a particular point contrary to the accused's instructions, to direct the witness's attention to the particular differences during cross-examination and to afford the witness the opportunity to give an explanation open to the witness and of defending his or her character.⁷ This was not done in the present instance which brings about that the state is entitled to assume that the unchallenged witnesses' evidence is accepted and correct i.e. that the accused was not under any threat by either three unknown men, or Paul, when he directed his actions towards the deceased he was carrying in his arms.

[33] Besides the evidence of three witnesses who saw how the accused held the deceased by the legs and raising him above his shoulders before bringing him forcefully down, hitting the ground head first, the accused's *viva voce* evidence is also irreconcilable with his earlier plea explanation where he claims to have merely thrown the boy down to the ground in anger. In the absence of any reasonable explanation forthcoming from the accused which could possibly explain these discrepancies in his version, the only reasonable conclusion to come to is that he adapted his version and evidence in an attempt to justify or ameliorate the assault perpetrated on the deceased.

⁷ *President of the RSA v South African Rugby Football Union* 2000 (1) SA (CC) at 36J-37B.

As alluded to earlier, the three state witnesses were present and witnessed the incident. They were not discredited during cross-examination and corroborate one another in material respects. There is thus no basis in law for a finding that their evidence is unreliable and thus fall to be rejected as false. Contrary thereto, the accused's version remained unsubstantiated. In light thereof, there is no merit in defence counsel's argument that the court should solely rely on the admissions made by the accused as set out in his plea explanation.

[34] Turning next to the issue of the accused's intention during his actions which led to the death of the deceased, this must be decided on the proven facts. Whereas the accused's alleged intention is inconsistent with established facts and therefore cannot be relied upon, the court has to infer the accused's intention from evidence relating to his outward conduct at the time; as well as the circumstances surrounding the events. The test is a subjective one and in order to decide by way of inferential reasoning what the accused thought or foresaw when committing the prohibited acts, the court looks at objective factors such as the type of weapon used; at which part of the body the attack was directed; the nature and seriousness of the injuries inflicted and the objective probabilities of the case.

[35] From the accused's plea explanation it is evident that he admitted having acted with intent, but in the form of *dolus eventualis*, though the evidence adduced by the state established that he acted with direct intent. His *viva voce* evidence of having merely dropped the deceased can, in light of the totality of the evidence presented, safely be rejected as false beyond reasonable doubt. The established facts are that the accused held the deceased by both legs when forcefully striking the back of his head on the ground. The impact of the blow fractured the skull bilaterally, resulting in almost instant death. In addition, this incident, in my view, should for purposes of establishing the accused's mind-set at the relevant time, neither be considered in isolation and regard must equally be had to events immediately preceding the assault on the deceased.

[36] According to Lusia the accused became angry at her and threw a stone aimed at her head but which she managed to block. Although disputing her evidence on this score, the accused admitted that he made a gesture towards Lusia pretending to slap

her, causing her to run outside crying out for help whilst saying that the accused wanted to kill her. He said he merely wanted to frighten her. The accused's actions at this stage already has the element of assault by threat which is consistent with Lusia's evidence that the accused by then had thrown a stone at her, causing her to run outside seeking help. According to Lusia this was the time when the accused uttered words to the effect that he will kill the boys and himself. Though Paul and Erika did not hear the extent of the accused's utterances, their version is that they heard the accused saying that he would hurt the boys. This prompted them to intervene and tried to persuade him not to do so, but instead, to hand over the boy. This he refused to do and insisted that Lusia must fetch the child but, before she could do that, he went into action and struck the boy's head on the ground. The only reasonable inference to be drawn from his conduct is that the motive behind the killing of their child was to get back at Lusia as revenge for the manner she had treated him earlier.

[37] The accused's explanation that he merely took the two boys with him in order to go and sleep with his family as he was concerned over their safety, seems highly unlikely in circumstances where he left the two remaining children in Lusia's company. Why then only take the two younger ones? Had the safety of his children were at risk as he claims, he would not have allowed Lusia to be with them alone that day; neither would he have returned home with Cheppies.

[38] After due consideration of the evidence as a whole, I am satisfied that it had been proved beyond reasonable doubt that the accused unlawfully and intentionally killed August Geinamseb, having acted with *direct intent*. He accordingly stands to be convicted of murder.

[39] With regards to count 2 the complainant's evidence is single. In respect of this count the state submitted that, despite the complainant being a single witness, the court may convict on the evidence of a single and competent witness in terms of section 208 of the Criminal Procedure Act 51 of 1977. The defence to the contrary submitted that the complainant has a history of alcohol abuse, so it is possible that she cannot clearly recollect what transpired on that day. Further, that the alleged photo of the stone that was seized from the scene and identified by the complainant is not part of the photo plan; furthermore, there is no results of the DNA analysis of the stone presented.

[40] In *S v Noble*⁸ the court held that when evaluating the evidence of a single witness, the court is to exercise caution; that such a witness should be credible; and the evidence should be of such nature that it constitutes proof of the guilt of the accused beyond reasonable doubt.

[41] Though true that the complainant gave single evidence as regards the charge of assault with intent to cause grievous bodily harm, her evidence was clear and consistent and, in cross-examination, her version remained unshaken. Her evidence is furthermore corroborated by medical evidence showing an injury to her hand. This could not be recently created evidence favouring the complainant's version, as this stone was pointed out to the police officer who visited the scene and which was seized for further investigation. The fact that it produced no scientific evidence, does not support the accused's blunt denial of the assault ever happening. The injuries to the complainant's hand is sufficient corroboration in the absence of any other reasonable explanation that could have caused that injury. As already mentioned, on the accused's own evidence there was an altercation which prompted the complainant to flee the house in search of help; corroborating the complainant's evidence in material respects. To this end, the probabilities rather favour the version of the state. Defence counsel's submission that the complainant has a history of alcohol abuse and likely not clearly remembering the events that took place on that day, is nothing more than an opinion and is not supported by the facts. If regard were to be had to the complainant having consumed beer on the day, the same would apply to the accused who seemed on the day to have indulged in drinking even more than the complainant. Though the complainant's evidence is not perfect, the court is guided by what was stated in *S v HN*⁹ where the court said that the 'evidence of the single witness need not be satisfactory in every respect as it may safely be relied upon even where it has some imperfections, provided that the court can find at the end of the day that, even though there are some shortcomings in the evidence of the single witness, the court is satisfied that the truth has been told'.

[42] When considering the complainant's evidence together with all the evidence adduced, I am satisfied that she is a credible and reliable witness. On the contrary, the

⁸ *S v Noble* 2002 NR 67 (HC).

⁹ In *S v HN* 2010 (2) NR 429 (HC) at 443E – F.

accused's blunt denial of the charge is not reasonably possibly true and falls to be rejected as false.

[43] Turning to the question as to whether the accused, when he threw the stone at the complainant, acted with the intent to cause her grievous bodily harm, regard is had to the following: The complainant's evidence is that the stone thrown at her would have struck her in the head, had she not managed to block it with her hand, during which she sustained minor injuries on the posterior aspect of the right hand. The reliability of her evidence on this score, the court has already accepted.

[44] The general principle applicable is that it is immaterial whether grievous bodily harm is in fact inflicted on the victim when determining liability for assault with intent to do grievous bodily harm, as it is only the intention to do such harm that is material.¹⁰ Even though the physical injuries are slight, the crime may still be committed. Various factors, such as the nature of the weapon or instrument used, and the manner in which it was used, the degree of violence, the part of the body the application of force is aimed at and the nature of injuries inflicted may indicate that the accused had the required intention to do grievous bodily harm.¹¹

[45] In *State v Katjivi*¹² it was held that 'it is trite law that the actual inflicting of injury is not a requirement for the offence of assault with intent to do grievous bodily harm. What is required is proof that the accused intended to cause it'. When applying the afore-stated to the present facts, it seems inescapable to come to the conclusion that the accused's intention when throwing a stone aimed at the complainant's head, was to cause her grievous bodily harm. This conclusion is consistent with the accused's intention to scare off the complainant, compelling her to flee from the house. Consequentially, on count 2 the accused stands to be convicted.

[46] In respect of count 3, common assault, the state in the same vein submitted that the complainant did not exaggerate her evidence and clearly stated that she was slapped once in the face by the accused who should be found guilty. Defence counsel

¹⁰ Snyman, C. R. Criminal Law 3ed (1995), p 417. See also *Radebe* 1957 2 PH H261 (G).

¹¹ Snyman, C. R. Criminal Law 3ed (1995), p 418. See also *Mbelu* 19661 PH H176 (N).

¹² *State v Katjivi* (CC 01/2016) [2016] NAHCMD 210 (19 July 2016).

argued to the contrary, saying that there are material contradictions in the J-88 medical report and the complainant's statement made to the police. For that reason the court should believe the accused's version, it was submitted.

[47] In relation to the court's approach when considering discrepancies between a witness's evidence in court compared to that witness's statement earlier made to the police, it was held as follows in *State v Unengu at 781C-F*:¹³

'[9] It has been said that the purpose of an affidavit made to the police was to obtain the details of an offence in order to decide whether or not prosecution should be instituted. It was never intended to anticipate the testimony of the witness when giving evidence at the trial (*S v Bruiners en 'n Ander (supra)*). Aspects of the witness's evidence considered of less importance to the witness or relating to peripheral issues, often become the focus point of cross-examination, thereby attempting to get information on record favourable to the accused.

[10] In view of the foregoing, the discrediting of a witness who deviates from a previous statement should thus be limited to instances where there is a material deviation from a previous statement made by the witness after acknowledgment of the content as being correct. Deviations shown to exist must also not be evaluated in isolation. To enable the court to decide whether or not the truth has been told, despite some contradictions, regard must also be had to the rest of the witness's evidence, considered against the totality of evidence presented.'

[48] When considering the contradictions in the complainant's version as pointed out by defence counsel, I am not persuaded that these are material; at least not to the point where it could be said that it adversely impacts on the credibility of the complainant. There is no room in our law to confine a witness when giving *viva voce* evidence, to his or her statement made to the police. The fact that the complainant mentioned a person during her testimony whilst she was unable to do so when giving her statement to the police does not, in my view, *per se* render her an unreliable witness. The possibility cannot be excluded that she only came to hear the person's name afterwards. Where such possibility was not explored and eliminated during cross-examination, not too much should be read into it. The test is not to break down the evidence of a witness in compartments and consider each individually against the accused's version, but to take

¹³ *S v Unengu 2015 (3) NR 777 (HC)*.

a holistic view of the totality of evidence adduced and then decide whether the accused's version is reasonably true.

[49] The court has already indicated that it accepts the complainant's evidence as the truth as regards the other counts relating to incidents following the assault in count 3. The complainant was not discredited or shown to be untruthful during her evidence and, for the reasons stated, the court is satisfied that she told the truth. The offence of assault perpetrated on her has thus been proved beyond reasonable doubt and the accused stands to be convicted.

[50] On count 4, escape from lawful custody, the accused pleaded guilty and whereas the court earlier intimated its satisfaction that the accused admits all the elements of the offence; and the state having accepted the plea on the basis tendered, it follows that the accused should be convicted as charged.

Conclusion

[51] In its assessment of the facts the court has regard to the evidence as a whole, inclusive of the merits and demerits of the state case and that of the defence, as well as the probabilities of the case. The court's approach in the present instance has been not to evaluate the evidence in respect of each count separately with the view of determining whether the accused's version is reasonably true, but to follow a holistic approach and decide the question on the evidence as a whole. Moreover where the counts are closely related in time and place. After considering all the evidence and due regard being had to the merits and demerits of the evidence and being satisfied that the accused's version is not only improbable, but false beyond reasonable doubt, the court finds as follows:

Count 1: Murder, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 – Guilty.

Count 2: Assault with intent to do grievous bodily harm, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 – Guilty.

Count 3: Assault, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 – Guilty.

Count 4: Escape from lawful custody – Guilty.

JC LIEBENBERG

JUDGE

APPEARANCES

STATE

J N Andreas

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ACCUSED

E T Shiikwa

Directorate: Legal Aid,
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