

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 03/2021

In the matter between:

**THE STATE**

and

**PRICILLA DAUKELINE STUURMAN**

**ACCUSED**

**Neutral citation:** *S v Stuurman* (CC 03/2021) [2022] NAHCMD 401 (11 August 2022)

**Coram:** CLAASEN J

**Heard:** 13 – 16 September 2021; 25 October 2021; 25 April 2022; 27 April 2022 – 28 April 2022; 27 May 2022, 20 June 2022, 30 June 2022, 5 July 2022 and 7 July 2022.

**Delivered:** 11 August 2022

**Flynote:** Criminal Law – Murder – Court to determine whether State has proven that the accused committed murder – Accused’s version was that she fell with the baby – There was no eye witness other than the accused – That means court has to turn to circumstantial evidence – Court endorses the approach that such evidence is not to be weighed in a piecemeal fashion but in its totality.

**Summary:** The accused faced an allegation that she caused the death of her six month old baby by hitting him on the ground multiple times with the intention to kill him. There was no eye witnesses present during the instance and the State relied on the evidence of a relative and an acquaintance of the accused, police officers and a medical practitioner who conducted a post-mortem indicative of severe and multiple intracranial injuries. The accused on the other hand denies the State's hypothesis. She contends that as a result of her drunken state, the darkness in the room and open toe sandals she wore, she stumbled whilst the baby was in her arms. That caused the baby to slip from her arms and fell on the ground which is how the injuries were caused. The main question to be determined was whether the State has proven that the accused committed murder.

*Held:* There was no eye witnesses, other than the accused. That means court has to turn to circumstantial evidence. Court endorses the approach that such evidence is not to be weighed in a piecemeal fashion, but in its totality.

*Held further:* Post-mortem findings indicative of multiple intracranial injuries. It consisted of 3 different fractures namely a depressed occiput which refers to the skull which caved in and the bone was broken in multiple places; secondly, the parietal skull, being the middle of the head, had a fracture that extended from the one side of the skull all the way through to the other side and thirdly the base of the brain was completely fractured. Additionally, there was bleeding in the brain in two locations and swelling of the brain. The gravity of the injuries could not be refuted.

*Held further:* Accused's own version shows that she did not breastfeed the baby that day for several hours, despite knowing that he must be hungry. In the same vein, she abandoned the baby that day, alone at home. Two of the State witnesses attested of physical abuse, neglect and threats to kill the baby. These witnesses are credible with no motive to lie.

*Held further:* After the incident, accused told their neighbour (now deceased) that she threw the baby on the ground. Accused's relative, where she resides, heard

her saying that. Furthermore, accused told a police officer that she threw the baby on the floor. Collectively, the evidence and the sheer magnitude of the intracranial injuries of the baby constitute a compelling conspectus of reasons why the probabilities do not favour the version of the accused. Court rejects accused version as false beyond any reasonable doubt.

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### ORDER

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The accused is found guilty of murder with direct intent.

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### JUDGMENT

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CLAASEN J:

#### Background

[1] The accused is charged with murder in that on 23 December 2019 and at Aussenkehr in the district of Karasburg, she unlawfully and intentionally assaulted her 6 month old biological son, Stiaan Cidio Stuurman, with the intention to kill him, by hitting his head on the ground causing his skull to fracture. He died the following day, 24 December 2019, in the Karasburg State Hospital.

[2] Following this plea of not guilty, the accused handed in a plea statement wherein she stated that she had no intention to harm the baby and that the incident was an unforeseeable accident. She made admissions in terms of s 115(2)(b) of the Criminal Procedure Act 51 of 1977 as amended (the CPA) that on the night in question she stumbled in the dark whilst intoxicated and that the baby who was in her arms fell on the sand surface. She picked him up and laid him outside and went to ask for help from her neighbour. She also admitted the identity of the baby, the content of the post-mortem and that the baby suffered no further injuries until the post-mortem was conducted.

[3] The State is represented by Mr Gaweseb, whereas the accused is represented by Mr Engelbrecht.

#### State's Case

[4] Ms Estina Hanse, (Estina hereinafter) a relative of the accused, testified that the accused was raised by her grandfather and moved in with them in 2006. At the time of the incident, the accused had been living with Estina in Aussenkehr. She testified that around 10h00 on 23 December 2019 the accused went to a certain Amandra's Shebeen for firewood. The accused took Estina's power bank along to charge. The accused left the baby at home. Around midday, the witness and a certain Renate (also known as Zenovia) went to Amandra's Shebeen. The purpose was to give the baby to his mother as the baby was hungry, but the accused refused to breastfeed the baby. Estina also enquired about the power bank and the accused said that she sold it.

[5] Thereafter Estina, the accused, the baby and Zenovia proceeded to the police station, where Estina reported that the accused refused to breastfeed the baby, mistreated the baby when she was drunk and on occasion the accused also slapped the baby. The Station Commander directed the accused to breastfeed the baby and warned that he would lock her up if she ever mistreat the baby again. The accused then breastfed the baby and they all left. The accused went home with the baby and Estina and Zenovia went to the clinic to collect their cellphones which were charging there. Once they collected the cellphones they walked to her house. As they drew closer to the house, she saw a lot of people in front of the house.

[6] At home the baby was seated outside against the house and the accused was not at home. Estina took the baby and returned to the police station to report the incident to the station commander. He advised her to look for an officer to assist her to search for the accused. Though she found an officer he advised her to take care of the baby until accused returned. She left and went to ask her neighbour, Lena (now deceased) for a baby bottle. She poured juice in the bottle

and went home with the baby. She and Zenovia stayed there until the accused arrived later.

[7] A certain Annelie passed by on her way to fetch water when the accused arrived. The witness called Annelie and asked Annelie to convince the accused to breastfeed the baby who was hungry and crying. Annelie pleaded with the accused to breastfeed the baby and said to the accused if she did not want the baby she should give the baby to Annelie. Instead, the accused volunteered to go fetch water for Annelie. Upon her return from fetching the water, the accused breastfed the baby, who then fell asleep. Annelie left and Estina told the accused that she was going to escort Renate.

[8] Upon Estina's return home, she observed the accused standing by Lena's window and heard the accused calling her and Lena. The accused walked towards Estina and uttered the following words "sister, there lies the corpse, so go and report me".<sup>1</sup> The accused uttered that she killed or murdered the baby.<sup>2</sup> Shocked by the words, she ran to Lena's house to ask for light to see whether the accused really did what she was referring to. Lena also asked the witness whether the accused had really done it. The witness, after failing to obtain light, then ran back home searching for the baby. She found him lying in front of her house, next to a stone near the door. Lena and the accused also came running towards the baby, who was still breathing. Lena proposed to take him to the clinic and the witness went to the police station to report the incident. The officer advised that the baby must be taken to the clinic first. Estina then went to the clinic.

[9] At the clinic Estina found Lena and a nurse named Johannes attending to the baby. She waited outside. The accused arrived and her hand was held by a certain boy, Berento, who said he found her in the street. Upon entering the clinic, the nurse asked for the baby's nappies. Estina then went to buy nappies. Upon her return the baby's nappy was changed. Then the ambulance arrived and the baby and his mother boarded.

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<sup>1</sup> Page 54 of record.

<sup>2</sup> Page 71 of record.

[10] During cross examination, Estina was asked about the condition of her house's floor and whether there was any blood spots on the ground or the bed after the incident. She explained that the floor surface comprised of sand that had become hard and it was covered with a plastic. She did not notice any blood spots at home.

[11] Counsel canvassed the reason for her report of the accused to the police. She said it was because of her refusal to breastfeed the baby. Counsel continued that she initially said she reported the accused because of the accused's mistreatment of her baby. She confirmed it and elaborated that the accused's refusal to breastfeed the baby was aggravated when she was under the influence of alcohol and whenever she told the accused to feed the baby the accused would either slap or push the baby. It was put to her that the reason why her statement omitted the information about the accused slapping the baby was because it never happened. The witness responded that she does not know why it was not written down but she did inform the police.

[12] Counsel then postulated an aspect from the defence's version that when the witness found the accused at Amanda's Bar she requested her phone and power bank. The witness rejected that assertion and said she herself collected her phone from the clinic. It was further put to her that on their way home from the police station, the witness was arguing with the accused and remarked that the accused's blood was 'dirty' as she was HIV positive. The witness answered that there was no way she would say that because she and the accused usually go for testing together.

[13] It was further put to the witness that the accused had consumed a 5 litre Overmeer and 2 bottles of red wine with friends on 23 December 2019. The witness agreed that the accused was under the influence of alcohol, but could not say what was consumed. She was told that the accused informed the witness that she could not breastfeed while at Amanda's Bar because she had consumed alcohol. The witness responded that nothing like that was said by the accused.

[14] It was pointed out to her that she was not present at the time of the incident; which she answered in the affirmative but made it clear that she was there after the incident. She confirmed that she did not ask the accused what happened but that she heard Lena asking the accused what had happened and she heard the accused' response that she threw the baby on the ground.<sup>3</sup> She was asked why she did not mention this aspect in examination in chief or to the police. She replied that at the police station she was not asked such specific question and in court a sequence was followed. The accused's version was put to her as that; at no stage did the accused utter words that she killed the baby, nor did she ever slap the baby. The witness insisted that she heard the accused telling Lena that she killed the baby and she slapped the baby.

[15] Zenovia Hansen testified that she knew the accused through Estina. On 23 December 2019, at around 09h00 she went to Estina's house and found the baby crying. Upon enquiring about the whereabouts of the baby's mother, Estina said that she had gone to collect firewood. The witness then remarked that usually when the accused goes on such trips she would be intoxicated when she returns. Estina proposed that they go to Cowboy's Inn (also referred to as Amanda's Bar) and give the baby to the accused. They did that. There, the shebeen owner, Amanda also advised the accused to take the baby and go home. Thereafter, Estina said they should go to the Police to report the accused for abusing or mistreating the baby, which they did. At the Police Station, Estina entered the charge office, the witness stood outside and the accused stopped at the entrance gate.

[16] Thereafter, the accused went home and Estina and the witness went to the clinic to get their phones. Upon collection of the phones, they headed towards Estina's house. As they walked, they noticed that there were people gazing at Estina's house and they sped up. They noticed that the baby was seated outside on a blanket and he was crying. The accused was not at home. They then stayed with him. At some point the witness departed to her house.

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<sup>3</sup> Page 105 of the record.

[17] Later, in the afternoon, the witness returned to Estina's house. She found Estina, the accused and a certain Anies Kooper. The baby was still crying and the accused said "I will kill you" three times, while pointing at the baby's forehead. The witness testified that she took the accused's threats 'logically' as it was not the first time she had made such remarks. Ms Kooper then left. Estina accompanied the witness to her residence where she gave her a bar of soap. Later that night, Estina called the witness and informed her that she was at the clinic. Sgt. Appolus summoned her to the charge office the next morning. He explained that accused injured the baby and she gave a statement.

[18] The witness also related that two weeks prior to this incident and in the witness' presence, the accused severely beat the baby to such an extent his eyes had swollen up while also threatening to kill the baby. She was asked why she did not report this to the police. The witness replied that she regarded it was Estina's task to report the incident, as Estina is the relative, but that she also gathered that Estina felt sorry for the accused.

[19] During cross examination, Mr Engelbrecht enquired from the witness whether she informed Sgt. Appolus about everything she testified about. She answered in the affirmative but indicated that Sgt. Appolus wanted to keep her statement short and simple. She was pressed as to why she reported the threat to kill the baby to the police but not the severe beating incident of two weeks prior. She stuck to her earlier explanation. Counsel put it to the witness that the accused never uttered words to the effect that she will kill the baby in anybody's presence. The witness vehemently denied it, said that such words were uttered in her presence and it happened repeatedly. She expanded and said that the baby could not cry, without being told by the accused that she will kill him and she did not want him.<sup>4</sup> It was further put to the witness that the accused at no stage abused or mistreated the baby. The witness responded that the accused did beat the baby, left him with the witness and Estina and upon her return the accused would be drunk.

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<sup>4</sup> Page 317 of record.



[20] When asked about the accused's sobriety on the evening of 23 December 2019, the witness responded that there was a smell, but the accused was not that drunk that she was staggering or falling around.

[21] During re-examination, the witness confirmed that Sgt Appolus had not included everything under the guise that it was not necessary to include everything. The issue of whether she was present at both instances when the accused threatened that she would kill the baby was canvassed by the court. The witness confirmed that.

[22] Christina Kawika, also known as Amandra, is the owner of Cowboy's Inn shebeen. She narrated that on 23 December 2019 at 08h00 the accused came and washed the floors of the shebeen. When leaving, the accused asked for red wine and said she will pay for it later. The witness gave her the wine and she left. After a while, the accused returned with two ladies who bought a box of flavour for hubbly-pipe smoking. At some point Estina arrived with the baby and told the accused to breastfeed him. The accused did not breastfeed the baby. The accused and her sister started quarrelling and left the shebeen together. It is the witness' testimony that the accused appeared to be drunk. She formed this opinion because the accused smelled of alcohol, could not stand straight and was very talkative. She explained that the accused is not talkative when sober.

[23] During cross examination, the witness confirmed that the accused worked for her and that she paid her N\$60.00 daily. She further confirmed that the accused arrived sober in the morning but was drunk when she returned later with the two ladies. She reiterated that she was present when the conversation took place between the accused and Estina as they were standing outside. The witness further clarified that the quarrel between the accused and Estina was about the baby and a power bank.

[24] The witness, during re-examination, confirmed that her observation of the accused being talkative while under the influence of alcohol was not a once off observation, but a recurrent pattern of the accused. Further, upon being

questioned by the court, the witness remained persistent that she saw the accused taking the baby, but she did not breastfeed him in the witness' presence.

[25] Constable Laurence Ndongo is stationed at Aussenkehr Police station. He testified that on 23 December 2019, Estina, Zenovia, the accused and the baby came to the police station. Estina reported that the accused had left the baby unattended, that they had gone to the shebeen and when they handed over the baby the accused started arguing. He testified that both him and the Station Commander verbally warned the accused about the consequences of child neglect. The accused responded that she understood and would not repeat it again. He made an entry into the occurrence book.

[26] His recollection that it was 23h48 at night when parties visited the police station was fertile ground for cross-examination. It was challenged because two other state witnesses said it was around lunchtime and because 23h48 was after the incident. The officer insisted it to have been the correct time and said that he had checked the time. However, he admitted to have made the entry into the occurrence book on 24 December 2019 only and not immediately because another officer was using the book at the time.

[27] Sergeant Bronwin Apollus is attached to the Criminal Investigation Unit at Aussenkehr Police Station. On the evening in question, he received a call from Lena Orr who informed him about the incident. He went to the clinic, but the ambulance had already left with the baby. He went to Estina's house. She conveyed to him that the injuries were very serious (the head and face were swollen) and that the mother accompanied the baby in the ambulance. Around 06h00 the following morning Sgt. Shita from Karasburg Police Station communicated the news that the baby had passed on and that the accused was detained at the Karasburg holding cells. The witness then travelled to Karasburg to interrogate the accused.

[28] Upon his arrival at Karasburg Police Station, he introduced himself and gave the purpose for the visit to the accused in the Damara>Nama language, which she is well conversant in. He warned her about her rights, that she was not

forced to say anything and anything she says will be written down and used in court against her. He further informed her that she had the right to engage a private lawyer if she so wished, but if not, she could apply to the Directorate of Legal Aid for a State funded lawyer. The accused identified herself and informed him that she had killed the baby by throwing him once on the ground inside the room and he rolled out of the room next to a stone. She conveyed that she went to Lena Orr's house and told her that she had killed the baby. The accused also said that she would like to give a confession. That led him to contact the prosecutor who proposed that it be done in Keetmanshoop. The witness prepared a warning statement and repeated her rights as mentioned earlier to the accused, upon which she indicated that she wants legal aid. He charged her and transported her to Karasburg for a court appearance.

[29] On 27 December 2019, he took her to Keetmanshoop Magistrate' Court for the confession. That did not materialise and he was informed through a piece of paper that she changed her mind. They returned to Karasburg Police Station. Upon being questioned about the accused's saying she threw the child on the ground the witness stated that the accused had voluntarily told him about the incident and he did not induce or threaten or promise her anything.

[30] Cross-examination canvassed the investigations and the procedures of charging the accused. He explained that on the night in question he went to Estina house, he opened a docket the next day after the news that the baby had passed on and sent the CR number to the police in Karasburg. Counsel probed whether there was any affidavit when the docket was opened to which the witness responded in the negative. The witness further indicated that though he recorded the statement from Estina Hanse, he requested his colleague, Constable Libereki, to rewrite it due to his illegible handwriting and he then commissioned it. When asked on what evidence he relied on to arrest the accused, the witness indicated that it was based on what the accused had told him. It was put to the witness that the accused denies making any admission about the incident to him, but he persisted with the explanation he gave earlier. Questions pertaining to adequacy of explanations given to the accused before she made this purported oral statement also surfaced, but the gist of the witness' answer was that he fully

explained it but did not comprehensively write down the explanations in the statement.

[31] The witness also explained that on 24 December 2019, he directed the scene of crime officers for a photo plan. Upon being queried about the surface of the floor, the witness responded that it was sand and also stated during his observing the scene he saw no marks of blood. Upon being prompted about the possibility that the baby could have rolled out of the room he opined that it was possible because the house stood on a hill. Counsel confronted the witness about Estina's stance that she told him that the accused slapped the baby, and accused said she will kill the baby, but he omitted it from her statement. He denied being given those details.

[32] The State also presented the evidence of Dr. Herold Uahindua. He is a Medical Officer with a Bachelor's degree in Medicine and Surgery. He now works at Lady Pohamba Hospital, but was employed at the Keetmanshoop District Hospital when the incident happened. At the time he practiced in general medicine, anaesthesia, surgery and forensic pathology. On 3 January 2020, he compiled a post mortem, report no. PM 146/2019. It was admitted in evidence and marked as exhibit 'E'.

[33] During the examination of the body, he observed multiple skull fractures namely a depressed comminuted occiput; parietal fracture, (bilaterally, linear connected); and an anterior base of skull fracture. He was requested to simplify these findings. He explained that with the term 'depressed occiput' he means that the baby's skull caved in and the bone was broken in multiple places. The parietal skull, he said, refers to the middle of our head and the baby had a fracture from the one side all the way extending to the other side. In respect of the third fracture, his explanation was that the base refers to the part of the skull where the brain sits and that the front part thereof was completely fractured.<sup>5</sup> These were not the only injuries. He also observed diffuse cerebral oedema; right subdural haematoma; and left sub-arachnoid haemorrhage. Again, he simplified it as that cerebral oedema means that the brain was swollen. Finally, he explained that haematoma

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<sup>5</sup> Page 123 of record, lines 4-10, lines 14-17 and lines 25-29.

means blood collection. He observed that in two locations. He elaborated that a human brain has a cover that protects and cushions it. He observed blood on the right side underneath that cover as well as between the layers that covers the brain on the left side.<sup>6</sup>

[34] He concluded that the cause of death was 'traumatic head injury: multiple intracranial bleeds with overlaying fractures. He opined that the fractures, swelling and bleeding was caused by blunt traumatic injuries to the baby's head. He stated that trauma may result from being thrown on the floor, but that a sheer quantity of force is needed to exert this type of injuries, thus such injuries are not consistent with a child falling from about 1 metre.<sup>7</sup>

[35] During cross examination, Mr Engelbrecht put it to the witness that he was not in a position to say, with certainty, how the baby sustained the injuries and the witness agreed that he cannot confirm the mechanism of the injuries. Counsel confronted the physician with accused's version that the injuries were sustained as a result of the accused stumbling whilst intoxicated and the baby who was in her arms also fell on to the sand surface. The witness then responded that if the baby was to fall from a height of being carried, on the first impact a fracture could have been sustained, but the baby had 3 fractures at different sides. He also said that if the baby was to have dropped from a height of 1.2 metres, the magnitude of the fractures would not be as much.<sup>8</sup>

[36] Counsel took issue with the witness' speculation and put it to him that he was not sure what happened, to which the witness responded that the baby had multiple skull fractures. Upon enquiring whether it was possible for the baby to still have been alive for a few hours after the impact, the witness responded that the magnitude of the injuries had a bad prognosis (probability to live). The witness reiterated that the skull of the baby had injuries at three places, the front, middle and back (the dome, parietal bones, the occiput and the base), respectively. The injury to the back of the skull was sustained by direct trauma and the injuries to the base of the brain were caused by either a high velocity injury or a heavy object.

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<sup>6</sup> Page 125 of record lines 23-24, lines 26-27, Page 127 lines 15-16.

<sup>7</sup> Page 138 lines 27-30.

<sup>8</sup> Page 140 lines 9-10.

The witness further indicated that the baby also had discolouration of the skin which indicates bleeding under the skin from the impact.

[37] During re-examination, Mr Gaweseb dealt with the issue of whether the accused version that the baby fell out of her arms was probable. The gist of his reply was that each of the individual fractures was extensive and based on his working experience in the Emergency Unit, babies fall every day, but do not get such extensive injuries and are just fine.

#### Defense case

[38] The accused testified in her defence and called no witnesses. Her evidence can be summarised as follows: She went to Aussenkehr in November 2018 to help her sister, Estina Hanse. She got a job at Amandra's Bar to clean the floors on weekdays and she did that continuously for a year. When going to Aussenkehr she had left her three daughters with Estina's mother and went with her 6 month old baby, Stiaan.

[39] She testified that on the day in question around 08h00 she left the baby with Estina and left to Amandras' Bar to buy fire-wood. She took along a powerbank. She left the powerbank at a house situated before the Bar, which house belonged to coloured men. At the Bar she met five children who were drinking a 5-litre alcohol named 'Orange River' or 'Leeukop'. She asked Amandra for a bottle of red wine. Once she received it she joined the children who sat outside the bar and they drank the alcohol.

[40] Later that day, Estina and Zenovia arrived with the baby who was crying. Estina instructed the accused to breastfeed the baby, but the accused declined. Estina told the accused that she will lay a complaint of mistreatment of the child against the accused at the police station. Estina, Zenovia, the accused and the baby then walked to the police station. There Estina went inside and Zenovia was at the door. The accused and the baby stayed outside at the gate. The accused decided to walk back home before Estina and Zenovia came out of the police station.

[41] It became afternoon. Upon Estina and Zenovia reaching the house Estina and the accused got into an argument wherein Estina accused her of giving 'dirty milk' to the baby. The accused denied that she has HIV/AIDS. Estina also told the accused to leave her house and throw out her belongings, but Zenovia intervened, which resulted in the accused being permitted back in the house. She then gave the baby breastmilk.

[42] Around sunset, a certain Annelie Kooper arrived. The accused went to go and fetch water for Ms Kooper. Ms Kooper made a remark about the baby being left alone when the accused went to drink and asked the accused to give the baby to her. Thereafter, Ms Kooper left and a while later Estina and Zenovia walked from the house. Estina took the powerbank along. They ordinarily use that to make light in their house as there are no municipal lights in the area of Estina's house.

[43] The accused decided to go and buy cigarettes at a house nearby. During that time she left the baby at home. It took the accused approximately one hour to go and buy the cigarettes. Upon her return she found Estina and Zenovia at home. This was around 22:00 p.m. She breastfed the baby again and they laid on the bed. Estina decided to escort Zenovia and they left.

[44] It was dark inside the house. The accused felt like smoking a cigarette. She stood up, wearing Havaianas sandals. She picked up the baby who was crying. Whilst the baby was in her left arm (in a cradling position) and the cigarette and matches in her right hand, she stumbled and the baby fell out of her arms to the ground. She picked up the baby. His heartbeat and breathing were faster. She put him down and went to the neighbour's house to ask for help.

[45] The neighbour, Lena Orr came. They took the baby to the clinic. The nurse enquired as to what happened and the accused said that she fell. The nurse applied two drips and oxygen. An ambulance came and took the accused and the baby to Karasburg Hospital. At the hospital, despite the doctor attending to the baby, he passed on early that morning. She was arrested by a Sergeant Appolus of Karasburg. He enquired what happened. She said she does not know but he

told her that she is lying and that she killed her baby. He took her to the Keetmanshoop Magistrate's court, but no statement was recorded at the court as she said she wants a State lawyer.

[46] The accused denied ever mistreating the baby. In particular, she denied the evidence that she slapped the baby so bad that his eyes were swollen or that she said she does not want the baby nor that she will kill or murder the baby. Estina's evidence was put to her that after the murder she ostensibly said 'Take the corpse and take me to the police.' The accused refuted that by saying that Estina was not at home after the baby fell. The accused also disagreed that she told Sgt Appolus that she killed the baby as she only said to him that she fell with the baby. The State's version was put to her, namely that she hit the baby several times on the ground with the intention to kill him. She denied that to be so.

[47] During cross-examination, the accused was predominately confronted with aspects in her version that was not put to certain state witnesses whilst they were on the stand. In respect of the love she professed to have for her baby she was told that Estina would have been in the best position to corroborate that but it was not put to Estina to comment thereon. She said she does not know why. Similarly, it was put to her that the version of the baby having bottled food was not put to Estina, to which she said Estina knew as Estina was the one who buys the food. Her evidence as to the powerbank being left at the coloured guys' house was also challenged as it was not put to Estina, nor Amanda. She answered that she cannot answer why it was not done, but insisted that there was no story of selling it.

[48] In respect of the journey from the police station, she was confronted about the version that was put to Estina during cross-examination which was that Estina and the accused argued all the way home. It was put to her that it is different to the version that emerged during accused's evidence in chief namely that the argument erupted at home. The accused answered that the argument was at home.

[49] She was also prompted as to why the plea explanation did not mention sandals to have contributed for her stumbling nor was there anything about



matches. These, it was said, point to it being a fabrication of details. She denied that. A proposition was put to her that would it not have been sensible to light matches first before picking up the baby if indeed it was as dark as she claims it to be? She answered that she did not think at the time, as she wanted to go outside and smoke. Her state of sobriety at the time of the accident was also challenged in that although she smelled of alcohol she was walking normally. She answered that though that night she stumbled and fell she is the type of person who does not fall around, even though she is drunk.

[50] She was also confronted with the reality of the grave injuries to the baby's brain and that in Dr Uahindua's opinion those types of injuries were caused by a lot of force. She answered by saying it was dark and she cannot answer as to how the baby injured his head. It was postulated that her version is very suspicious in view of Estina's evidence that she heard the accused's explanation to Lena that she threw the child, as well as her oral statement to Sgt Appolus. That evidence, it was said, is consistent with the forensic findings of skull fractures and the doctor's opinion that it was caused by a lot of force. She answered that if she would have thrown the child on the floor there would have been blood and his head would have been damaged. She was told that the doctor said it was blunt force trauma, but she repeated that she did not throw him on the ground but that she fell with him. It was put to her that two weeks prior or alternatively on the day of the incident she said she will kill the child. These words, it was said, are indicative that she formed the intention to murder the baby. She denied having such thoughts.

[51] During re-examination she was asked about why she did not first light a match to make light in the room. She answered that it did not come to mind. She also reiterated that the alcohol was not the only reason for the fall that the other factors that contributed were the sandals and the dark environment. She repeated that she never said to Estina, in the presence of Lena, words to the effect that there is the body, go and report me and furthermore that there is no intention on her part to kill the baby.

### Closing Submissions

[52] Counsel for the State argued that the accused's version cannot be believed in the light of the surrounding evidence. He emphasised the recurrent threats to kill the baby, the accused's words after the incident to both the neighbour and the police officer as well as the findings in the post-mortem and the opinion expressed that for a baby to have fallen from a height of approximately 1 metre to the ground would not have caused such major brain injuries. He submitted that if it had been an accident, that version would have been borne out by the evidence, and that is not the case herein. He referred to the method stated in *S v Engelbrecht*<sup>9</sup> and *S v Petrus*<sup>10</sup> when dealing with mutually destructive versions that courts should have good reasons for accepting the one version over the other and not only to consider the merits and demerits of the testimonies, but also consider the probabilities present.

[53] Counsel for the defence argued that the accused version provides for a reasonable explanation as to how the incident occurred that caused the intracranial injuries, essentially that it was dark, the accused was intoxicated and slipped whilst wearing open toe sandals, which resulted in her baby falling out of her arms. He reiterated the onus on the State and cited *S v Mbwale*<sup>11</sup> wherein Liebenberg J stated that:

'The accused cannot be convicted on the strength of his false evidence alone and even where the court does not believe the accused's story it must still investigate the defence case with a view to discerning whether it is demonstrably false or inherently so improbable as to be rejected as false when considered with the rest of the evidence.'

[54] He concluded that the State has not proven any form of criminal intent and the accused ought to be acquitted on murder. However, should the court find that the accused is responsible for the baby's death, the accused could be found guilty on culpable homicide.

### Evaluation of evidence

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<sup>9</sup> *S v Engelbrecht* 2001 NR 224 (HC).

<sup>10</sup> *S v Petrus* 1995 NR 105 (HC).

<sup>11</sup> *S v Mbwale* CC 07/2013 NAHCNLD 36 (26 June 2013).

[55] The court proceeds to consider whether the State has proven its case beyond reasonable doubt. The State construes the incident as murder with direct intent, whereas the defence sees it as an accident with tragic consequences. The court intends to follow the approach as set out in the cases of *Engelbrecht (supra)* and *Petrus (supra)* as regards to mutually destructive versions.

[56] Furthermore, given that there was no eye witnesses, other than the accused, this court has to turn to circumstantial evidence to draw inferences. In this regard the golden standard was set out in *R v Blom*<sup>12</sup> as that the inference sought must be consistent with all the facts. If it is not, then the inference cannot be drawn. Secondly, the proved facts should be such that they exclude every reasonable inference save the one to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct.

[57] In this matter the common cause facts were as follows:

- a) At the time of the incident the accused and her six month's old baby resided in her relative's residence at Aussenkehr;
- b) The residence had a hardened sand floor;
- c) The house did not have an electric, paraffin or candle light;
- d) Earlier in the day, accused had consumed alcohol;
- e) Earlier in the day the accused declined to breastfeed the baby;
- f) Prior to the incident the accused had left the baby alone at home;
- g) On the day of the incident the accused, the baby, Zenovia Hanse and Estina Hanse were at the police station;
- h) The accused and the baby were alone at home at night during the incident;
- i) The baby's skull was fractured in three different places, in addition to swelling and bleeding in two locations in his brain; and
- j) The baby sustained no further injuries until the post-mortem was conducted.

[58] The main issues material to the dispute related to the following:

- (a) The accused's state of sobriety at the time of the incident;

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<sup>12</sup> *R v Blom* 1939 AD 188.

- (b) Whether the baby's injuries were caused intentionally or alternatively negligently;
- (c) Whether the accused neglected, abused and threatened to kill the baby;
- (d) Whether after the incident the accused said words to the effect of "sister there is the corpse" as well as telling Lena that she threw the baby on the ground and Estina heard her saying these words; and
- (e) Whether the accused told Sgt Appolus that she threw the child on the ground.

[59] The court proceeds to deal with the evidence on the issues respectively. In respect of the alcohol the accused version is that she was in a group of 6 persons that consumed a 5 litre 'Leeukop' and a 750 ml red wine. This occurred between midmorning until around noon. The information of it being a 5 litre alcohol that was consumed behind Amanda's place was never put to Amanda. That creates doubt about that fact. However, Amanda confirmed giving her the 750 ml of red wine and that the accused was more talkative. Estina and Zenovia confirmed that the accused reeked of alcohol but Zenovia testified that the accused was not falling around.

[60] What is of importance is the extent to which her mental faculties, movement, speech and behaviour have been affected. Evidence of the various witnesses has to be considered in context. The evidence was that she had walked to the Police station around 13h00 when she, Estina, Zenovia and the baby had gone there. She then walked home with the baby to their house. She had the mental faculties to remember that it was Zenovia who pleaded with Estina not to throw her out of the house. She offered to go and fetch water for Annalie. There was no evidence that due to staggering she arrived with little or no water in the containers. That implies that she did not stagger or fall around. After the incident, she had the sensibility to approach their neighbour Lena.

[61] From these facts and the time lapse it can be reasonably inferred that her behaviour was rational and coherent in the circumstances. Her faculties, were not seriously affected. I thus agree with the State that the accused grossly exaggerated her level of intoxication in a bid to escape liability.

[62] Next the court considers the issue of possible neglect, abuse or threats to kill the baby. The accused testified that she treated her baby lovingly. According to her, she never slapped or mistreated the baby, nor did she threaten to kill him. In support of that version she testified that she took him to her workplace. She also implied Amanda took care of the baby while the accused was performing her duties and that she only took the baby from Amanda when he was hungry. These contentions were not put to Amanda during cross-examination for her to comment thereon. Similarly, the contention of the accused being a caring mother figure was not put to Estina during cross-examination. I agree that Estina would have been the ideal person to comment thereon, as they resided in the same household. There is sufficient authority for the basic principle that there is a duty to put one's case fully to the opposing party's witnesses, for them to answer thereto and that the failure to do so could have dire consequences.<sup>13</sup>

[63] Evidence was given that two weeks before the incident the accused severely assaulted the baby and on the day in question and before that the accused said that she will kill him. Both Zenovia and Esina have no motive to fabricate a tale of assault, neglect or threats. In fact, they felt sorry for the accused. That can be seen from the answer by Zenovia when she was cross-examined about the failure to report that incident to the police. Furthermore, Zenovia did not waver in her account that the accused uttered words that she will kill the child, which information was also in her witness statement. The court accepts it to be the truth.

[64] The accused's denial of mistreating the baby falls on her own admission of having refused to breastfeed on the day in question. She left home in the morning. It was around noon when the baby was brought to her. He was brought because he was hungry and Estina had no milk. The accused refused to breastfeed him at that time. Even on her own account she had not breastfed the baby for several hours despite knowing that he must be hungry. One has to ask a rhetorical question of whether a loving and caring mother will do that? Another indicator of maltreatment of the baby is that he was abandoned by his mother and left alone at

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<sup>13</sup> *Auala v S* (SA 42/2008) [2010] NASC 3 April 2010.

home later that same day. The accused admitted to have done that for about an hour to go and buy cigarettes. She did not offer why she could not take him along. Furthermore, it was not disputed that Estina, Zenovia, the accused and the baby was at the police station around midday on the day in question. Had there been no mistreatment by the accused, there would have been no need for them to go there. This court accepts that Cst Ndonga's recollection of the time of the visit is mistaken as that is not supported by the other evidence.

[65] The court turns to the denial of the oral statements made by the accused after the incident. Estina's recollection of what she heard was as follows: 'But I heard Lena asked her my lady and the reply by the accused person was My Lady that she hit it against the floor or threw it against the floor.'<sup>14</sup> In an effort to portray it as fabricated words Estina was taken to task about why her witness statement did not contain these words. The court does not construe it as an untruth. It must be remembered that a witness statement is a skeleton and is not intended to be all-inclusive.<sup>15</sup> The defence argued that there was contradictions between the evidence of Zenovia and Estina. The court's view of that is that the variance is not material as it only pertained to the sequence of events and not the occurrences itself.

[66] It is also considered that Estina and the accused grew up together. They resided in the same house with Estina's grandfather. The accused referred to Estina as her 'sister' and it was at the behest of Estina that the accused came to Aussenkerhr. Estina gave incriminating evidence against someone who is obviously near and dear to her. That, in my view, is not an easy task, which she did for the truth to prevail. I have already indicated that there was no evidence to suggest bad blood existed between the two or that Estina had other ill motives towards the accused.

[67] In respect of the alleged oral statement by the accused to Sgt Appolus, he was steadfast in his account that the accused told him she threw the baby on the ground. Much was made during cross-examination about issues pertaining to

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<sup>14</sup> Page 103 of record line 25 to page 104 lines 3-4.

<sup>15</sup> *S v Nicodemus* (CC 15/2017) [2019] NAHCMD 271 (6 August 2019).

admissibility. This is at variance with the position of the accused on this purported statement at the time when the pre-trial memorandum was done. Therein her position was merely that she denies that she made such an oral statement to the police officer. No admissibility dispute was raised at that juncture, nor was it done at the outset of the trial when the court canvassed whether a trial within a trial may be necessary in due course. All things considered, the court is satisfied that she volunteered that information without undue influence whilst she was of sound mind. Suffice it to say, the admissibility attack has the markings of an afterthought. It reflects negatively on the credibility of the accused, as she signed for her initial stance and no concrete explanation surfaced for the change in position during trial.

[68] The aforementioned evidence that this mother abused and neglected the baby, the evidence that she threw and hit the baby against the ground and the sheer magnitude of the baby's brain injuries constitute a conspectus of compelling reasons why the probabilities do not favour the version of the accused. The gravity of the injuries could not be refuted. Dr Uahindua attested that it was caused by blunt force. From his evidence it could also be deduced that the blunt force was exerted repeatedly. Incidentally, the accused, when asked, estimated her height to be 1.3 to 1.4 metres tall. This was close in distance to the height as estimated by Dr Uahinua who said if the baby was dropped from a height of 1.2 metres, the magnitude of the fractures would not have been so extensive. Furthermore, the argument that if she had indeed hit the child on the ground there should have been blood and his head should have been damaged, was disproven by the findings in the post-mortem. Indeed there was blood in two different locations, inside the brain and skull. Indeed there were injuries, severe and multiple, inside the brain and skull.

[69] The explanation by the accused as to the cause of the baby's injuries is inconsistent with the objective findings and opinion of Dr Uahindua as well as the oral evidence given by the other state witnesses. In *S v Reddy and others*<sup>16</sup> it was held that:

' In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence

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<sup>16</sup> *S v Reddy and others* 1996 (2) SACR1 (A) at 8g.

to a consideration of whether it excludes the reasonable possibility that the explanation given by the accused is true. The evidence needs to be considered in its totality.'

[70] Thus, on the proven facts, there is no reasonable possibility that the version of the accused as to how the injuries were caused might be reasonably true. I find that explanation to be false beyond any reasonable doubt. It is my view that no other reasonable inference can be drawn from the proven facts, other than that it cumulatively points to the guilt of the accused. It has thus been established that the accused flung and hit the baby on the ground, multiple times, which caused grave intracranial injuries that led to the demise of the baby.

[71] The last issue pertains to intention or absence thereof. The deeds herein are that of repeatedly throwing and hitting a six month old baby against a hardened sand floor. Dr Uahindua described the degree of force to have resulted in this level of injuries as traumatic blunt force which this court understand to be unswerving and direct force. The impact was directed and effected against the skull and brain, which constitute delicate parts of a human body. Undoubtedly, this toddler was unable to fend for himself. The accused, a rational adult, knew and understood the consequences of her actions. Thus, in the court's view it can be reasonably inferred that the death of the baby was foreseeable. Furthermore, a fatal end result is also consistent with the oral evidence that the accused said on that day that she wants to kill the child. The evidence was that it was not the first time that the accused had remarked that she did not want the baby and that she will kill him. Therefore, it has been established that the accused acted with direct intent when she repeatedly and forcefully threw and hit the baby against the floor. Given this finding, there is no need to venture into culpable homicide.

[72] In the result, the accused is found guilty of murder with direct intent.

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**C CLAASEN**  
**JUDGE**





## APPEARANCES:

STATE:

T Gaweseb  
Office of the Prosecutor-General  
Windhoek

ACCUSED:

M Engelbrecht  
Instructed by Directorate of Legal Aid  
Windhoek