

REPUBLIC OF NAMIBIA



NOT REPORTABLE

IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 9/2021

In the matter between:

THE STATE

and

MANFRED LINKS

ACCUSED

Neutral citation: *S v Links* (CC 9/2021) [2023] NAHCMD 110 (13 March 2023)

Coram: LIEBENBERG, J

Heard: 5, 6, 7 September 2022; 15 – 16, 20 February 2023

Delivered: 13 March 2023

Flynote: Murder – Criminal Law – Charges – Accused indicted on one count of murder – two counts of attempted murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

Summary: The accused person is indicted on three counts namely: Murder (Count 1); and two counts of Attempted Murder (Counts 2 and 3), all counts read with the provisions of the Combating of Domestic Violence Act 4 of 2003. The accused pleaded not guilty to all the counts and elected not to make a statement in terms of s 115 of the Criminal Procedure Act 51 of 1977 (CPA) in which the basis of his defence is set out.

Held that in light of the concession made by accused counsel that the evidence proved that the accused subjectively foresaw the possibility of death when pouring petrol on the deceased and setting her alight, and that he reconciled himself with that possibility, it is evident that the accused abandons his earlier version that he by accident set the deceased alight.

Held further that counsel's earlier argument that the accused at most could be guilty of culpable homicide then equally falls away.

Held that the only reasonable inference to draw from the proved facts is that the accused intended killing the deceased when he doused her with petrol and set her alight, thus acting with direct intent.

Held that in respect of count 2, when looking at the established facts and no clear evidence adduced which proves the allegations in the charge, the concession made by the state that the charge was not proved beyond a reasonable doubt and that the accused should be given the benefit of the doubt is properly made.

Held that in respect of count 3, the baby was undoubtedly exposed to the same danger and assault as the deceased whilst physically in contact with the body of her mother when carried. That explains why the child sustained burn wounds, albeit of lesser degree.

Held that whereas the mother and child at that stage formed a 'unit', the accused's intention undoubtedly included the baby who was physically

connected to the deceased's body. By indiscriminately pouring petrol over the deceased in these circumstances, it seems inevitable to come to the conclusion that the accused acted with direct intent to kill both mother and child.

Held further that as for the child who was fortunate to survive the attack, the accused's actions cover the elements of the offence of attempted murder.

ORDER

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

Count 2: Attempted Murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003 – Not guilty and discharged.

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

JUDGMENT

LIEBENBERG J:

Introduction

[1] The accused person is indicted on three counts namely: Murder (Count 1); and two counts of Attempted Murder (Counts 2 and 3), all counts read with the provisions of the Combating of Domestic Violence Act 4 of 2003. The accused pleaded not guilty to all the counts and elected not to make a statement in terms of s 115 of the Criminal Procedure Act 51 of 1977 (CPA) in which the basis of his defence is set out.

[2] The accused is represented by Mr Engelbrecht while Mr Malumani appears for the state.

[3] The state led the evidence of 10 witnesses, while the defence only called the accused testifying in his defence.

The State's case

[4] Mr Kenneth Blankenberg (Kenneth) is employed at Handelhuis Service Station, Ariamsvlei and on Wednesday 1 January 2020 between 12h00 – 14h00 he and a colleague, Donavin Jaar, were on duty when the accused arrived to buy a cigarette. He noticed a bandage on his arm and enquired what had happened to which the accused replied that he and his girlfriend fought and that she stabbed him on his arm. When asked whether he intended going back home, the accused confirmed and said he was going to burn his girlfriend's clothes and if it reaches that point, 'he would burn her as well'. The accused then moved to a dustbin from where he took an empty 2ltr coke bottle and bought petrol from the witness. He then left. The following day Kenneth heard about the accused having set his girlfriend alight with petrol.

[5] During cross-examination it was put to the witness that the accused was served not by him, but Donavin Jaar, which he disputed. As regards the discussion between the accused and Kenneth about him mentioning the setting alight of his girlfriend, the accused denied speaking to the witness on that day; neither did he utter words to that effect. Kenneth explained that this was said before the accused bought the petrol and that he even tried to discourage the accused from injuring his girlfriend and only to burn her clothes.

[6] Although Mr Donavin Jaar (Donavin) confirmed that he was on duty as pump attendant on that day, he said he was not feeling well and went to lie down inside the kiosk. He was thus unaware of the accused's arrival and denies having spoken to him or serving him as alleged. He said he only later heard from Kenneth about the accused having told him that he wanted to burn

his girlfriend's clothes as well as her. The witness did not divert from his version during cross-examination and his evidence corroborates that of Kenneth as far as it concerns the latter having met with the accused at the service station.

[7] Ms Merelise Eiman (Merelise) lives across the home of the accused and the deceased and were neighbours. She testified that on 1 January 2020 at around 22h00 she was watching TV inside the house when she got the smell of fuel. She went outside and while standing at the front door she saw the accused and the deceased approaching her. She asked the couple what smelled of petrol and the deceased replied it was the accused dousing her in petrol. Merelise said she saw the accused whilst pouring petrol on the deceased and told him to stop, but that he just continued. The deceased asked whether she had a phone to call the police to which she replied that she did not, but would ask Penny.

[8] She turned around to ask her other neighbor Penny, and at that stage the accused and deceased were still outside her yard. She turned and called out for Penny and when she looked back to face the accused and deceased, she saw the deceased throwing down her baby at the gate and came running towards her, covered in flames. Penny came closer and as there was a bucket of water nearby, they poured it over the deceased. The accused then kicked the deceased, causing her to fall down whereafter it appeared as if he tried to strangle her with his bare hands. He thereafter left the scene.

[9] They took the deceased into the house of Ms Cecilia Sanzila and the deceased's son brought the baby inside. She covered the deceased with a blanket. The accused later arrived crying and wanted to see the deceased but she told Merelise not to allow the accused inside the house.

[10] It is common cause that the accused sought assistance from the driver of a passing vehicle and returned with Warrant Officer (W/O) Arnold and a certain Nico who accompanied him inside the house to attend to the deceased. W/O Arnold later returned with another vehicle and Sister Morkel, who attended to the deceased.

[11] In cross-examination it was put to the witness that the accused pulled the deceased down in order to roll her body in the sand to put out the flames. Merelise disputed this, saying that by then the flames were already extinguished and that the accused indeed kicked her on the legs, causing her to fall down.

[12] Ms Peneyambeko Pius (Penny) confirmed that she was at home when called by Merelise and told to call the police. When she went outside she saw the deceased was lying on the ground and on fire. She jumped the fence and fetched water from a nearby tap which she poured over the deceased to put out the flames. According to her the deceased was down on the ground and, although she stated that the accused was standing there, she was not certain as to what he was busy doing.

[13] Mr Vladimir Dawids (Dawids) said he was at home when approached by the accused on 1 January 2020 and he attended to an open wound on his arm before the accused left for the clinic to receive treatment. The accused reported that he was stabbed with scissors by his girlfriend. He later returned and they stayed at his place where they drank beer until the accused returned home at around 22h00. After the accused had left, Dawids went to a shebeen to make use of their Wi-Fi and again met with the accused who was leaving. Upon asking where he was going the accused replied that he messed up and started crying while saying that the woman was just lying there and should be assisted. This prompted Dawids to approach W/O Arnold who sat in his car parked outside the shebeen and reported as to what the accused had just told him, and that they should check up on what was going on at his place.

[14] In cross-examination Dawids said he was not aware of a bag with clothes belonging to the accused that he brought to his house during the day; neither did the accused confront or speak to him about a container with petrol. Dawids further disputed that the accused came to his house for help and was adamant that he again met the accused at the shebeen and not at home.

[15] Ms Susanna Morkel, a nurse by profession and working at the clinic in Ariamsvlei, was summoned by W/O Arnold to the house of Ms Sanzila where she found the deceased lying on the floor with burn wounds on her back and down; she was in pain. She assisted to get the deceased to the clinic from where she arranged for an ambulance to transfer the deceased to Karasburg state hospital.

[16] Ms Edwillindie Kennedy (Edwillindie) is related to the accused and resides in Karasburg. Her evidence primarily turns on the events of 2 January 2020. It is not in dispute that the accused spent the night of 1 January 2020 at her house and after they greeted in the morning, the accused told her that he was not feeling good as he 'burned' his girlfriend. When asked how it happened, he said he poured petrol over her and set her alight. He explained that he was not himself at the time and started crying. He asked from her to look after the baby as he wanted to go to the hospital. She observed blisters on the baby's hand and foot. The police arrived in the meantime looking for the accused and he was arrested after his return from the hospital. When the baby became feverish in the afternoon, Edwillindie took her to the hospital for treatment.

[17] In cross-examination it was put to the witness that the accused merely told her that the deceased had 'burned' and not that he had poured petrol over her. This she disputed and rejected as being a lie.

[18] The evidence of Ms Petrina Komeya, a registered nurse, merely corroborates that she treated the baby at the hospital.

[19] Ms Cornelia Cloete, a registered nurse at Karasburg hospital, testified that on 12 January 2020 she noticed that the deceased's medical condition was deteriorating and after consultation with a doctor, it was decided to transfer the patient to Keetmanshoop state hospital. She accompanied the patient in the ambulance to Keetmanshoop and after handing her over to the medical staff at the hospital, they returned to Karasburg, but learned on the way of the passing of the deceased.

[20] On the 16th January 2020 Dr Uahindua performed an autopsy on the body of the deceased and compiled a post-mortem report¹ in which the following main findings are noted:

- 80 – 90% total surface body area burns; deep partial to thickness burns;
- Loss of normal renal Paranchyma;
- Kidneys enlarged, with marked pallor of the cortex.
- Cause of death: Acute kidney injury, consequential to burns.

[21] Dr Uahindua in amplification of the report opined that, given the seriousness and extent of the burnt areas being above 81% of the entire skin, the chances of survival was low. The impact of the burns were such that the skin, as an organ, primarily lost its function which, in turn, impacted on the other organs causing damage non-compatible with life. That ultimately resulted in kidney failure and subsequent death.

The defence case

[22] The accused was the only witness testifying for the defence and stated the following: At the relevant time the accused was employed as a health assistant working at the clinic of the Ministry of Health and Social Services at Ariamsvlei. He and the deceased were in a romantic relationship from which a girl was born, then aged 14 months. The accused gave a detailed account of verbal altercations between him and the deceased which started on New Year's morning and which became physical at around noon. For purposes of this judgment there is no need to repeat the accused's narrative on issues which are irrelevant to the outcome of the trial and will only focus on what is considered relevant and material.

[23] It all started when the deceased tried to take the accused's wallet from him and he pushed her away, causing her to fall down onto the floor. They both ended up on the bed where the deceased slapped and punched him, but with little impact, until she became tired. The accused started packing two backpacks as he decided to leave with their daughter and visit his parents in

¹ Exhibit 'E'.

Karasburg. When he told the deceased that he no longer cared about her she tried to stab him with a bread knife and he hit her with a belt on her hand to disarm her. He succeeded to take the knife from her hand and threw it into the neighbour's yard. She again charged at him, this time trying to stab him with a fork. He continued hitting on her hand with the belt and managed to take the fork from her and threw it onto the roof. After the deceased threw the backpacks outside, the accused entered the room to fetch the baby and, as he passed her at the door, she stabbed him with scissors in the left elbow. After handing the crying baby to Merelise he proceeded to the clinic but as nurse Morkel was not around, he decided to go to the service station to buy cigarettes.

[24] According to the accused he there met with Raymond Jaar (Donavin) at the filling station who asked about the cloth tied around his arm; he informed him that he was stabbed by his girlfriend. He bought two (2) litres of petrol as he intended to set the deceased's property alight, forcing her to leave that same day. He disputes having spoken to Kenneth on the day, although he saw him around. At the service station he also met a certain "Ou Stok" to whom he handed the petrol and asked him to take it to the accused's place and put it in the outside toilet. He then returned to the clinic for medical treatment. On his way home he again met "Ou Stok" who said that Vladimir had taken the petrol from him. Vladimir came out and confirmed having taken the petrol and said he had thrown it away. Vladimir persuaded him to come along to the bar for drinks where they stayed until late. His baby was brought to him by Vladimir's brother, whilst at the bar; also the two backpacks he had earlier packed for him and the baby. At around sunset the accused took the child home to her mother and told the deceased to leave the house. He then returned to Vladimir's place.

[25] When a fight erupted whilst at Vladimir's place, the accused decided to leave and whilst searching for the bags, he found the container with petrol underneath where it was hidden. He said he decided to go back to the bar as he did not want to face the deceased at home where he stayed for a while. Realising that he was too drunk, he decided to return home, carrying the

backpacks and petrol. He did not find the deceased inside the house and started collecting her clothes from where he moved to the outside toilet where he knew some of her personal belongings were. He had the petrol with him as he intended burning out her clothes and belongings.

[26] When he opened the door of the toilet he saw the deceased inside with their baby on her lap and asked her what she was still doing there. She replied that if he did not stop, she will call the police. He then poured petrol over her and she moved out of the toilet, carrying the baby on her hip. The deceased called out at Merelise who was just across the street. He said by then he was drunk and angry. He explained that the reason for pouring petrol over the deceased was to scare her – to show her that he was serious about her having to leave. When Merelise came from her house, the deceased told her to call the police. He had left the petrol behind at the toilet and followed the deceased at arm's length.

[27] The accused explained that because he wanted to burn out the deceased's clothes, he had a lighter with him. Whilst following her, he lit the lighter in order to scare her but she unexpectedly stopped and, as he at that stage was looking back at a sound he had heard behind him, he came too close to her and the petrol ignited. He claims that it was never his intention to set the deceased alight. He disputes the evidence of Merelise and says that there was no one else who saw what happened.

[28] The moment the deceased caught fire she ran into the yard of Merelise and the accused followed, trying to put out the flames. The water poured over the deceased extinguished most of the flames and the accused left to look for help. He first went to Vladimir's place but he was not at home. He then went to the bar where he found Vladimir and told him that he caused 'shit', only mentioning that he 'burned the deceased'. As he walked away, he saw W/O Arnold sitting in his car and went up to him and asked him for help. They proceeded to where the deceased was.

[29] After the deceased was stabilised at the clinic, he and his daughter accompanied the deceased in the ambulance to Karasburg where she was

hospitalised. The accused and his child spent the night at his sister-in-law's house (Edwillindie Kennedy) and early the next morning he took the child to the clinic for treatment. He disputes Edwillindie's version of what he allegedly told her and said he merely told her that he had set the deceased alight.

[30] With regards to the allegations made in count 2, the accused denies that he attempted to kill the deceased by strangulation. On count 3 he equally disputes allegations of attempting to murder his daughter by dousing her with petrol when setting the deceased alight.

[31] In cross-examination the accused disputed evidence about him having tripped the deceased. What he did, as he explained, was to pull the deceased down to the ground in order to roll her in the sand and put out the flames – not to strangle her. On the court's question as to why he required petrol to burn out the deceased's clothes, he stated that it was to expedite the process and that he was not in a rational mindset after he was stabbed. As to why he lit the lighter, he explained that he believed he was in control of what was happening around him. He said when he lit the lighter, he was 'far' from the deceased's body.

[32] That summarises the evidence.

Evaluation of evidence

The undisputed facts

[33] It is common cause that the proven facts are the following: The deceased and the accused were in a domestic relationship as defined in the Combating of Domestic Violence Act 4 of 2003, in that their baby daughter, Mannervah Links,² was born from the relationship. On 1 January 2020 at around noon the accused bought 2 litres of petrol from the service station at Ariamsvlei where Kenneth Blankenberg and Donavin Jaar were on duty as pump attendants. The reason for buying the petrol was to set alight the deceased's personal belongings. On the same day the accused poured petrol

² The 13 month old victim in count 3.

onto the body of the deceased and thereafter lit his lighter. The petrol caught fire causing burn wounds to the body of the deceased in excess of 81 % of the skin area and minor burn wounds to the one hand and leg of the baby. The deceased did not sustain any further injuries when transported to hospitals at Karasburg and Keetmanshoop. The deceased died on 12 January 2020 of kidney failure as a result of the burn wounds.

Count 1 - Murder

[34] Mr Engelbrecht, in his closing submissions, conceded that the evidence proved that the accused subjectively foresaw the possibility of death when pouring petrol on the deceased and setting her alight and that he reconciled himself with that possibility. He therefore acted with intent in the form of *dolus eventualis*.³ In light of the concession made it is evident that the accused abandons his earlier version that he by accident set the deceased alight. Counsel's earlier argument that the accused at most could be guilty of culpable homicide then equally falls away.

[35] Mr Malumani, however, is of the view that the evidence proved that the accused's actions were premeditated and that he acted with direct intent when pouring petrol over the deceased and setting her alight. This argument is based on the following established facts: Earlier during the day the accused revealed to Kenneth Blankenberg, when buying the petrol, that if things – referring to their relationship – between him and the deceased became worse, he would set the deceased on fire, not only her personal belongings. The buying of petrol is indicative of pre-meditated murder, counsel argued. State witness Merelise Eiman saw the accused following the deceased when he poured petrol over her and after looking away for a moment, she saw the deceased was set alight. In a subsequent report made by the accused to Edwillindie Kennedy he admitted that he poured petrol over his girlfriend and set her alight. This, counsel argued, is consistent with the accused's pre-meditated plan to murder the deceased by setting her alight.

³ *S v Humphreys* 2015 (1) SA 491 (SCA).

[36] The counter argument advanced on behalf of the accused is that the thought to force the deceased to leave, only entered the accused's mind after she stabbed him with scissors. It was then that he decided to buy petrol to burn out her personal belongings, but disputes that he expressed the intention to set his girlfriend alight. Counsel further argued that, if the accused intended to kill the deceased, he could have set her alight when she exited the outside toilet.

Did the accused act with direct intent?

[37] Mr Engelbrecht fervently argued that the accused was a credible witness who honestly answered all the questions put to him during cross-examination and that his version of the events preceding the incident in which the deceased was set alight, should be accepted by the court as the truth and not that of the state witnesses. In all fairness to counsel, this was said before conceding that the accused in fact acted with intent in the form of *dolus eventualis*, a complete turnabout from the earlier position that the accused accidentally set the deceased alight, thus acting negligently. The accused's change of heart clearly constitutes a material deviation, not only from instructions put to state witnesses during cross-examination, but is irreconcilable with his testimony in court. This would inevitably impact on the accused's credibility.

[38] In light of the concession made by the accused as regards his intention at the relevant time, there seems to me no need to evaluate the evidence in any detail, except where relied upon by the state to suggest that the accused is guilty of pre-meditated murder and therefore acted with direct intent.

[39] Despite the accused's testimony to the contrary, Kenneth's evidence about him serving the accused when he bought petrol at the service station, was indirectly corroborated by Donavin who disputed the accused's version about him having served and spoken to the accused. Although the accused said that there were ill feelings between him and Kenneth and wherefore the latter fabricated incriminating evidence against him, this was not the case with

Donavin who had no reason to lie and falsely implicate the accused. Furthermore, as argued by the state, Kenneth only came to know about the deceased having stabbed the accused when the accused told him when asked. That supports Kenneth's evidence about the accused explaining why he bought petrol and what he intends doing with it; moreover, where the accused ultimately executed his intentions. I accordingly accept Kennedy Blankenberg's evidence on this point and reject the accused's exculpatory version as being false.

[40] The report made to Edwillindie about the accused having poured petrol over the deceased and setting her alight is significant in determining what the accused's intention was at the time he so acted, albeit after the fact. Other than admitting to Edwillindie that he poured petrol over the deceased and setting her alight, he did not elaborate on what his intention was at the time. That needs to be determined on the established facts and the surrounding circumstances.

[41] With regards to the submission that the accused could have killed the deceased earlier in the day if he intended doing so, there is only the accused's version before court. Upon closer scrutiny of this version, there appears several inconsistencies and improbabilities embodied in, what appears to be, a well-rehearsed fabrication. It started off with several physical altercations between the accused and the deceased in the morning where he was portrayed as the victim and his decision to take the child and visit his parents in Karasburg. This was followed by him being stabbed in the arm by the deceased which changed his mind to informing the deceased to leave their common home. It was submitted that he was angered by the deceased having injured him. After leaving home the idea came to mind to buy petrol to burn the deceased's personal belongings which, according to him, was his intention all along. He was out drinking most of the day and when he became drunk, he returned home whilst still angry. Upon noticing the deceased's clothes inside the house, he deduced that she did not leave as told and then started gathering her clothes to burn them.

[42] The accused's explanation for going to the toilet to collect personal belongings of the deceased has a hollow ring to it. Seemingly to his surprise, he found the deceased with the child on her lap inside the toilet. He asked her why she was still there and why she stabbed him. When she did not reply, except for saying that if he did not stop she would summon the police, he poured petrol on her (side) as she stepped outside. On his version he was bent on forcing the deceased to leave by burning her clothes and not to injure her. However, he transferred his initial intention to only burn the deceased's belongings to the deceased, pouring petrol over her without further provocation.

[43] From the evidence of Merelise – which in the end was not disputed – it is evident that the accused did not leave the container with petrol at the toilet as testified, but continued pouring petrol over the deceased whilst following her. Though the accused did not say how much of the two liters of petrol he poured over the deceased, the sketches of burn wounds noted in the post-mortem report shows that the entire back, the greater part of the front upper body down onto the legs and the side of the left leg sustained burn wounds; covering more than 81% of the skin surface. The injuries inflicted suggest that the deceased was doused with a significant quantity of petrol when set alight. What is further evident is that the deceased was doused with petrol from the front, side and back which refutes the accused's version of a single incident at the toilet when he poured petrol on her side when leaving the toilet. The accused's evidence in this regard is clearly false and falls to be rejected.

[44] It is settled law that an accused cannot be convicted on the mere strength of his own falsehood. The court is still compelled to investigate the defence case with a view of determining whether it is demonstrably false or inherently so improbable that it must be rejected as false when considered together with the rest of the evidence.⁴

⁴ *S v Oosthuizen* 1982 (3) SA 571 (T) at 576; *S v Mbwale* (unreported) CC 7/2013 NAHCNLD 36 delivered 26 June 2013.

[45] In Hoffmann & Zeffertt, 4th Edition at p 602 the learned authors discuss the view taken by South African courts when considering the circumstantial effect of an accused giving false evidence and at p 603 states:

‘... Everything depends on the facts of each case; but in a criminal case, the evidence of an accused may form an essential part of the entire evidentiary material. ... A proper application of the Mlambo dictum merely signifies that an accused cannot complain if, because of his falsehood, the trier of fact does not give him the benefit of the doubt in this context, that he killed the deceased without intending to kill him or that he killed him with a lawful purpose.’ (Emphasis provided)

See also: *S v Rama*⁵ and *S v Engelbrecht*.⁶

[46] When faced with the situation where the court must infer from the established facts and circumstances what the subjective state of mind of the accused was at the time of committing the offence, the court is guided by facts such as the type of weapon or instrument used (in this instance petrol), at which part of the victim’s body the assault was directed; and the nature of the actual injury sustained by the victim (*S v Beukes*).⁷ The court may then draw inferences from these indicators.

[47] When applying the principles stated above to the present facts, the only reasonable inference to draw from the proved facts is that the accused intended killing the deceased when he doused her with petrol and set her alight, thus acting with direct intent. I accordingly so find.

[48] Next I turn to count 2 in which it is alleged that the accused attempted to murder the deceased by inter alia strangling her manually with a belt.

Count 2 – Attempted Murder

[49] In proving the charge against the accused, the state’s case rests entirely on the evidence of Merelise Eiman. She testified that whilst the deceased was still standing and covered in flames, the accused kicked her on

⁵ *S v Rama* 1966 (2) SA 395 (A).

⁶ *S v Engelbrecht* 1993 NR 154 (HC).

⁷ *S v Beukes* 1988 (1) SA 511 (A).

the legs, causing her to fall down and thereafter 'it appeared as if he tried to strangle her with his hands on her throat'. The accused disputes this evidence and claims that he pulled the deceased from behind, causing her to fall down whereafter he rolled her over to put out the flames. Although Merelise is adamant that the accused kicked the deceased on her legs, she appeared to be uncertain as to what the accused was doing to the deceased after she fell down.

[50] In these circumstances the accused's version seems reasonably possible, given his behavior of concern over the deceased's well-being thereafter. The state conceded that the charge was not proved beyond reasonable doubt and that the accused should be given the benefit of the doubt. When looking at the established facts and no clear evidence adduced which proves the allegations in the charge, the concession is proper.

Count 3 – Attempted Murder

[51] The charge in count 3 is also one of attempted murder where the victim is Mannervah Links, the baby daughter of the accused and the deceased. Here it is alleged that the accused equally intended killing the baby when dousing both her and the deceased with petrol and setting them alight, whereby she sustained certain burn wounds. It is not disputed that the deceased was carrying the baby at the time and that she threw the baby down after the deceased was set alight. The accused denied that he ever had the intention of killing his baby daughter as alleged.

[52] Based on the admission made by the accused as regards his intention at the time of dousing the deceased with petrol, I raised the question during argument with counsel whether the same should then not apply to the baby who was being carried by the deceased and thus exposed to the same danger as the deceased? Mr Engelbrecht argued that it was not the case as the accused poured petrol on the opposite side of which the child was being carried and referred to the time when the deceased came out of the toilet. With the argument advanced counsel, respectfully, loses sight of the fact that

the accused continuously poured petrol over the deceased and not only once. That much is evident from the extent of the burn wounds as discussed above. The baby was undoubtedly exposed to the same danger and assault as the deceased whilst physically in contact with the body of her mother when carried. That explains why the child sustained burn wounds, albeit of lesser degree.

[53] The fact that the child did not sustain more serious burn wounds is not of the accused's doing, as suggested. Had the accused, as contended by counsel, carefully aimed at throwing the petrol on the deceased only and not the child, then that fact was privy only to the accused. He should therefore have used the opportunity to bring such important fact to the court's attention when testifying; a crucial fact for the determination of his guilt on a charge of attempted murder. I find the submission not only fanciful, but it certainly has the making of an afterthought; one that is not supported by the established facts.

[54] The same legal principles applied to the facts in the murder charge when deciding the accused's subjective intent when dousing the deceased with petrol and setting her alight, in my view, find application in this count. Whereas the mother and child at that stage formed a 'unit', the accused's intention undoubtedly included the baby who was physically connected to the deceased's body. By indiscriminately pouring petrol over the deceased in these circumstances it seems to me inevitable to come to the conclusion that the accused acted with direct intent to kill both mother and child. As for the child who was fortunate to survive the attack, the accused's actions cover the elements of the offence of attempted murder.

Conclusion

[55] The state carries the burden of proving the allegations contained in each charge against the accused beyond a reasonable doubt and in *Miller v*

*Minister of Pensions*⁸ Denning J (as he then was) stated it in the following terms:

‘It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave a remote possibility in his favor, which can be dismissed with the sentence “of course it is possible, but not at least probable”, the case is proved beyond reasonable doubt, but nothing less will suffice.’

[56] After due consideration of all the evidence presented and having applied the law to the facts, the court is satisfied that the state proved beyond reasonable doubt that the accused committed the offences set out in counts 1 and 3 for which he stands to be convicted. The same standard of evidence, however, is lacking as regards count 2.

[57] In the result, the court finds the following:

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

Count 2: Attempted Murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003 – Not guilty and discharged.

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

JC LIEBENBERG
JUDGE

APPEARANCES

THE STATE: Mr I Malumani

⁸ *Miller v Minister of Pensions* 1947 2 All ER 372 at p 373.

of the Office of the Prosecutor-General,
Windhoek

ACCUSED:

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