



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: CC 05/2012

In the matter between:

**THE STATE**

and

**ALBERTINA KAPOLO**

**ACCUSED**

**Neutral citation:** *The State v Kapolo* (CC 05/2012) [2013] NAHCNLD 28 (16 May 2013)

**Coram:** TOMMASI J

**Heard:** 26-28 March 2013, 02, 03, 08,09,15,16,18 April 2013, 08 May 2013

**Delivered:** 16 May 2013

**Flynote:** Evidence – Accused not a credible witness – court however has to determine after consideration of all the proven facts, her version could be reasonably possibly be true - Criminal law – murder - self defence – accused exceeded the bounds of self defense – the State not able to prove that she subjectively knew that she had exceeded the bounds of self defence – convicted of culpable homicide – defeating or obstructing the course of justice – *in casu* only be convicted of attempt - where State relies on an omission to inform police that she assaulted the deceased – not supported by the evidence and sanctioning such conduct setting a precedent for an infringement of the accused right to remain silent guaranteed by the constitution –

allegation of concealing evidence – no direct evidence and not supported by circumstantial evidence found not guilty and discharged

**Summary:** The accused was charged with murder read with the provisions of the Combating of Domestic Violence Act, 8 of 2003 and defeating or obstructing the course of justice in that she killed her boyfriend and with a stick and thereafter: omitted the mention to the police that she assaulted the deceased; and covered a blood stain which was discovered outside her homestead with sand and a log. The deceased died of poly blunt trauma and the medical evidence proved that it was more than twice. The only witness to the actual assault on the deceased was the accused and the State relied on circumstantial evidence. The accused raised private defense as a defense and admitted to having hit the deceased twice with a stick. The Evidence not in dispute gave a background of domestic violence and general aggressive behavior of the deceased. The deceased visited the homestead of the accused where he was requested to leave. He persisted in being verbally abusing the accused. Evidence was adduced that he had a walking stick with him. Although the accused was found not to be a credible witness it was found that her version that the accused was trying to re-enter the homestead after initially leaving it and using his walking stick in a threatening manner is reasonably possibly true. The court however found that she had exceeded the bounds of what was reasonably necessary to ward off the unlawful attack when she went outside her homestead to continue hitting the deceased multiple times fracturing 8 ribs on his right side and 3 on left and lacerating his right kidney and descending aorta. The court held further that the accused by launching the second attack by striking out at the deceased multiple times ought to have foreseen that her actions might result in death, and therefore, by failing to appreciate that, she was negligent and is thus guilty of culpable homicide which is a competent verdict on a charge of murder.

The accused's written statement omitted an admission that she assaulted the deceased – This was not proven by the witnesses for the State and the court held that sanctioning such omission would be setting a precedent for violation of right of an accused not to incriminate herself. The State relied on circumstantial evidence for to prove that accused concealed a blood spot where the assault was perpetrated.

The court found that the proven facts do not justify a conclusion that the accused committed the offence. The accused was accordingly found not guilty on charge of defeating or obstructing the course of justice.

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### ORDER

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1. Count 1  
The accused is convicted of culpable homicide
2. Count 2  
The accused is found not guilty and discharged.

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### JUDGMENT

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TOMMASI J:

[1] In the early morning hours of 26 November 2010, the body of Kashinaeni Shindingeni, was found by the accused in an open field in Eenghete village 65 meters from the gate of her homestead. He had died there sometime during the previous night. He was 71 years old at the time. A daughter was born of the relationship between the accused and the deceased and they were thus considered to have been in a domestic relationship. During the investigation the police took a statement from the accused and found a blood spot covered with sand and a log just outside the gate of her homestead. The accused was charged with his murder read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 and also with defeating or obstructing the course of justice.

[2] It was the State's case that: the accused had unlawfully beaten the deceased multiple times (more than twice) with a wooden stick with the intention to kill him; he fell down outside the gate of her homestead, he got up and walked approximately 65m where he eventually died of the injuries the accused inflicted. The State presented evidence that the deceased died of blunt force poly trauma in that he sustained fractures to the frontal bone of his skull, 8 right ribs and 3 of his left ribs; laceration of the descending aorta and right kidney; a blunt wound to his head and bruises on his left eye. The State further contended that the accused covered the blood of the deceased outside her gate with sand and a log in an attempt to conceal the fact that the deceased was injured and bled at her gate and gave a false statement to the police in an attempt to defeat or obstruct the course of justice. There were no witnesses who saw the actual assault and the State relied mainly on the circumstantial evidence adduced by the son of the accused, the doctor who conducted the post mortem medical examination and the police officers who arrived at the scene the next morning when the deceased body was found. I shall deal with the two counts separately.

#### Count 1 murder

[3] The accused's 15 year old son, Petrus testified that the deceased was his stepfather and the father of his younger sister although the accused and the deceased lived separately. He described the relationship in the following terms: "they had this tendency to quarrel" and the deceased, "had that tendency of chasing his mother with a *panga*". He recalled a specific incident at the homestead of the deceased when the deceased chased his mother with a *panga*. The deceased would stop his violent behavior for a day or two and would start again. The deceased however was not abusive toward him. He was aware of the fact that his mother had taken the deceased's *panga* to the headman of the village. This evidence was corroborated by the accused who elaborated that she had also suffered physical abuse at the hands of the deceased. She admitted that the smallest thing would spark a quarrel between them.

[4] It is evident that the accused and the deceased were in a domestic relationship albeit a very unhappy one. It may also be accepted that the deceased, physically, mentally and verbally abused the accused during the subsistence of the relationship and that she had reported his conduct to the village headman.

[5] It is important to mention at the outset that it was apparent during the trial that the accused was visually impaired. Petrus testified that the accused was able to see "but not easiest". According to him she navigated her way around the village without assistance. The accused called Dr Manyeruke, a principal medical officer in the department of Ophthalmology at Oshakati State Hospital, as a witness. He testified that he had examined the accused. His examination revealed that the accused eyesight was severely impaired in that she is completely blind in her right eye and suffers a disease termed "glaucoma" in her left eye. The latter disease gradually leads to blindness and allows limited or tunnel vision. He estimated that at the material time she had suffered approximately 60% damage to her left eye. In his opinion she would be able to see someone close to her but would have difficulty identifying the person. He was of the opinion that darkness would aggravate the poor vision but that in most cases of poor eyesight, patients acquire the ability to navigate their natural environment. During the trial the accused was able to navigate the court environment unassisted. She no doubt became accustomed to the environment during the trial. She relied extensively on the voices of the parties to locate their respective positions in court. At some point the accused was able to discern a shape which was approximately 2 m from her. She was however unable to see any details on the photographs which was presented to her. I am mindful of the fact that this was during the day and that the courtroom was well lit. She testified that at the time of the incident she was unable to see during nighttime and I have no reason to disbelieve her testimony in this respect.

[6] The accused gave a detailed account of the quarrels which started on the Monday preceding the accused's death and which continued every subsequent day until Thursday, 25 November 2010.

[7] What follows is a summary of the accused's version of the events which occurred on 25 November 2010. The accused, early that morning, discovered that the money which the deceased, according to her, practically forced her to keep the previous day, was missing from her dress' pocket. At around 7H30 she went back to the *cuca* shop where she had been drinking the previous day to search for it. She was unable to find it but remained at the *cuca* shop drinking traditional beer.

[8] At around 9H00 the deceased came to the *cuca* shop, looking for her and his money. He had a *panga* and his walking stick with him. He became verbally abusive when she informed him that she had lost his N\$600. They argued and at some point he chased her around the *cuca* shop throwing his walking stick in her direction. During cross-examination she testified that he drew the stick but did not throw her with it. She left the first *cuca* shop and walked to another *cuca* shop close by and continued to order drinks at around 14H00. The deceased followed her but he was stopped by patrons of this *cuca* shop from joining them. The deceased left the *cuca* shop. Her son Petrus came to fetch her to go home at around sunset. She could not recall the time when Petrus arrived but testified that he arrived after the deceased had already left.

[9] Petrus was unable to recall the time he arrived at the *cuca* shop but testified that his mother was already there when he arrived. When he was asked what had happened at the *cuca* shops he responded that he: "will not know anything". He however testified that the deceased was quarreling with the accused at the *cuca* shops over money.

[10] The quarrel between the accused and the deceased at the *cuca* shop in essence was not in dispute. It was further not in dispute that the deceased was very unhappy about the fact that the accused lost his money and that he demonstrated his unhappiness by verbally abusing the accused in public. I am however of the view that the accused may have somewhat exaggerated the deceased conduct.

[11] It was common cause that Petrus and the accused arrived at her homestead close to sunset. Both Petrus and the accused testified that the deceased was at her homestead when they arrived home; that he again demanded his money from the accused despite her assurance that she would endeavour to repay him the next day. Both testified that the deceased was reluctant to leave.

[12] The testimony of the accused and Petrus in respect of the events which followed differs.

[13] Petrus' version was that although the deceased initially refused to leave, he eventually walked to the gate and his mother followed him. He heard the gate close. He also heard the quarrel continue for some time. He heard something fall although he was unable to say what it was. After hearing this sound, his mother called him and his younger sister.

[14] When he arrived at the gate it was open and the deceased was lying outside near the gate. He gave a detailed description of the deceased's position and testified that he observed blood dripping from his head. He stood there with his mother for without talking and just looked at the deceased. The deceased was also not saying anything. After approximately five minutes, the deceased got up and walked away unsteadily. The deceased was still quarreling but in a lower voice. He saw the deceased sat down at the pond not far from their homestead. They went inside the homestead and he at this stage saw the deceased was lying down at the same place. He did not inform his mother that the deceased was bleeding from his head or that the deceased was lying down at the pond. During cross-examination he recalled that his mother informed him that the deceased refused to leave and that they have to leave the homestead. He testified that he had just forgotten to mention this.

[15] The accused gave the following version of the events which occurred at her homestead after they arrived home. She found the deceased inside her homestead. The earlier quarrel continued when she wanted to know what he was doing at her homestead instead of his own. The deceased verbally insulted her and she likewise

returned the insults. This continued for about two hours until approximately 22H00. The deceased in response to something she said, started chasing her around the homestead. It was already dark but she was able to tell that the deceased got up from his sitting position from the sound of his voice and heard his quickened steps to determine that he was chasing her. The deceased was about 3 to 4m when she saw him throwing his walking stick at her but it did not strike her. She heard the stick falling against the other sticks and this enabled her to retrieve the stick. She threw it outside the fence of the homestead.

[16] She locked the gate when the deceased went to retrieve his stick. She went to her sleeping room and heard the chain of the gate. She was under the impression that she had locked the gate properly but realized when she heard the chain that she did not do so. She concluded that the deceased had entering the homestead. She picked up a stick and returned to the gate. Her intention was to scare the deceased. She discovered later that the gate was in fact still open.

[17] The sequence of events hereafter is not clear from the testimony of the accused..It was not clear whether she again tried to close the gate as she testified that the deceased was hitting on the gate with his stick while she was trying to lock the gate. During cross-examination she mentioned for the first time that the deceased stick fell at the gate and she threw it outside once more. The deceased attempted to gain entry by pushing at the gate and entering with the side of his body. At this stage she was able to see his shadow despite her initial testimony that she was unable to see at night. He also attempted to hit her with his walking stick although she gave different accounts of how many times he was hitting on the gate with his walking stick,

[18] She struck twice with her stick at the time the accused was hitting his stick on the gate. She maintained that she only heard it striking the gate and mistakenly hit his head. She was unable to see where she was hitting the deceased. She however admitted that it was possible that she may have struck him on his head twice. During her examination in chief she testified that he did not succeed in hitting her but during



cross-examination she testified that he struck her with his walking stick although she did not sustain any injuries. She changed this version shortly thereafter stating that it was not that evening but another occasion when he struck her.

[19] She described the stick she used as being approximately 1.6m in length and about 4cm in width. The deceased after he was struck left her homestead still quarreling. She did not dispute that human blood was found at the gate just outside her homestead. She denied that the deceased fell down at the gate but admitted that the blood could only have been that of the deceased.

[20] She repeated several times that she just wanted the accused to leave her homestead. Under normal circumstances she would flee from the deceased but that evening she was under the influence of alcohol and she reasoned that she wanted him to leave her property instead of her leaving her house and fleeing to neighboring places. She reasoned that the deceased would continue fighting with her if he was allowed to enter. She testified during the incident at the gate she was inside and the deceased outside the homestead at all material times. She denied that she at any point called her children.

[21] The cause of death, according to Dr Ricardo was multiple blunt force trauma given the different locations on the body and that considerable force was used to inflict the injuries. He opined that the blow to the right kidney was most likely administered to the deceased's side or back and that the deceased suffered more than two blows to his body. All other injuries are located on the frontal upper part of the deceased body. The medical evidence is therefore inconsistent with only two blows.

[22] The version of the State witness Petrus and that of the accused is mutually destructive in material respects. Logically only one version can be true. In evaluating the evidence of Petrus the court has to apply caution as he is not only a single witness but also the biological son of the accused. This court was impressed with the unbiased manner in which he testified. His evidence was concise and to the point.

When called upon to provide details of what he saw he did so confidently. He testified of the abuse his mother suffered at the hand of the deceased but testified that he did not suffer abuse at the hand of the deceased. I have no doubt that if he had witnessed the deceased chasing his mother around the homestead that evening he would not have withheld it from the court. He did not see the actual assault on the deceased and frankly stated this. His testimony that the deceased was lying outside the gate with blood dripping from a wound to his head is consistent with the physical evidence of human blood which was found in the sand near the gate. The accused conceded that it could only have been the blood of the deceased. It was not put to this witness during cross-examination that he had recently fabricated his testimony despite the accused testimony that he was coached prior to testifying. Minor discrepancies were highlighted during cross-examination but these do not relate to material issues. He confirmed during cross-examination that he omitted to mention that the accused told him when he came to the gate that they should leave as the deceased refused to leave the homestead. He explained that he had forgotten. This omission was adequately explained given the time lapse between the incident and the trial. I found his evidence to be frank, consistent, unbiased and satisfactory in every material aspect.

[23] The accused on the other hand contradicted herself on almost all of the material aspects of her testimony, amended her version of what transpired at the gate and became evasive when cross-examined in respect of the finer details of the actual assault. Her testimony of hitting the deceased only twice flies directly in the face of the medical evidence considered with other proven facts.

[24] Given the fact that I found Petrus to be a credible witness and the accused not to be credible I shall accept the evidence of Petrus in respect of what transpired before and after the assault and reject the accused's testimony insofar as it conflicts with that of Petrus as being false beyond reasonable doubt.

[25] This leaves the court without a credible version of what happened at the gate. Mr Wamambo urged this court to under the circumstances to apply the dictum in R v

Mlambo 1857 (4) 727 A at 738 A-D to the effect that: "... an accused who deliberately takes the risk of giving false evidence in the hope of convicted of a less serious offence or even perchance escaping conviction and his evidence is declared false and irreconcilable with the proved facts, a court will in suitable cases be fully justified in rejecting an argument that, notwithstanding that the accused did not avail himself of the opportunity to mitigate the gravity of the offence, he should receive the same benefits as if he had done so."(my emphasis) The court however, in evaluating the evidence, must have regard to all the evidence and bear in mind that where an accused should not be convicted merely because for giving false evidence<sup>1</sup> In S v HN 2010 (2) NR 429 (HC) the court held that caution must be exercised not to attach too much weight to the untruthful evidence of the accused when drawing conclusions and when determining his/her guilt. This court should be satisfied that the accused's testimony of the assault is false beyond reasonable doubt.

[26] It was not in dispute that there was prior domestic abuse, Petrus's evidence corroborates the accused's testimony that the deceased was quarreling with the accused at the *cuca* shop over his money. The deceased on the available evidence already demanded his money at the *cuca* shop and was clearly unhappy with not having received it. On the available evidence it is unlikely that his reason for visiting the homestead of the accused was to collect a debt as was submitted by Mr Wamambo. He came to the homestead and continued his verbal abuse which had by that stage had become an almost daily occurrence. He was certainly not a welcome visitor at the house of the accused and he initially refused to respect the accused's request for him to leave. The accused was vulnerable during nighttime given her poor eyesight and given the history of domestic violence, she was justified to believe that his continued presence posed a threat to her safety; and to believing that she would have to flee her own home in order to avoid harm coming to her, if the deceased was allowed to enter the homestead. The deceased disturbed the peace and tranquility which the accused was rightfully entitled to at her own home. The accused however fabricated an elaborate story of being chased in the darkness around her house and being thrown with the walking stick exaggerating the deceased's conduct and her impaired eyesight. This does not detract from the fact

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<sup>1</sup> See Goodrich v Goodrich 1946 AD 390

that the deceased's presence had the potential of robbing the accused of the comfort of her own home and threatened her safety.

[27] The key question is whether the constant threat of domestic abuse persisted that evening. The evidence of Petrus was that the deceased eventually decided to leave. This court, in view of the untruthful testimony of the accused does not have the benefit of direct evidence and must rely on the circumstantial evidence to determine what happened thereafter. Petrus heard the gate closed. He later found the deceased lying outside the gate. From this evidence the court may reasonably infer that the deceased exited the homestead and that the accused must have assaulted the deceased at the gate. The verbal abuse continued for some time after Petrus heard the gate close. The deceased was still within hearing distance of the homestead and did not leave the homestead and at the time of the assault he was in the vicinity of the gate. It was not disputed that the deceased was in possession of a walking stick. The deceased may have exited the gate but did not leave the immediate vicinity of the accused's homestead.

[28] In view of the aforementioned proven facts this court cannot with certainty conclude that the accused's evidence that the deceased tried to re-enter the homestead and that he had used his walking stick in a threatening manner was false beyond reasonable doubt. If the deceased was prepared to accept the accused's promise of repaying him the next day he would have left at the time he was escorted to the gate and would not have persisted with the verbal abuse. Her admission that she might have struck the deceased on his head twice furthermore consistent with the medical evidence that the deceased sustained injuries to his head. It is furthermore plausible that she was inside the homestead and the deceased was on the opposite side of the gate at the time and her evidence in this respect must be accepted as reasonably possibly true.

[29] Petrus testified that he found the gate open when he arrived at the gate and the accused was standing outside the gate at the time. It was not disputed that the deceased was not injured prior to going to the gate. Petrus testified that he saw the

deceased lying down on the spot where he was found the next day. The accused's evidence that he did not fall down contradicts that of Petrus and is thus rejected as being false. This fact support a conclusion that the deceased had already at that point, suffered all the injuries which were recorded in the post mortem report. Ms Mugaviri's submission that it may have been caused by a fall is, with respect, ludicrous. In *S v Van Wyk* 1993 NR 426 (SC) at page 438 G – J -439 A, the court cited with approval the following from *S v Sauls and Others* 1981 (3) SA 172 (A) at 182G et seq:

'The State is, however, not obliged to indulge in conjecture and find an answer to every possible inference which ingenuity may suggest any more than the Court is called on to seek speculative explanations for conduct which on the face of it is incriminating.' A passage in a minority judgment given by Malan JA in *R v Mlambo* 1957 (4) SA 727 (A) at 738 is apposite. I may add that two paragraphs in this passage were cited with approval by Rumpff JA in *S v Rama* 1966 (2) SA 395 (A) at 401:

"In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused.

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

[30] The proven facts and the false denial of the accused leads this court to conclude that it is the only reasonable conclusion to be drawn is that the accused inflicted all the injuries which caused the death of the deceased. Logically flowing from this inference is that her evidence that she administered only those two blows, is beyond reasonable doubt false.

[31] I am further satisfied that the State has proven that it was dusk at the material time and that the accused exaggerated her impairment. I bear in mind the evidence of Dr Manyeruke and accept that he sight was limited to objects within two meters

from her and that it was limited to shapes and movement. The accused certainly would have been in a position to determine the shape of the deceased given the 1m distance which was between them and she must have seen and heard him falling. I have to dismiss Ms Mugaviri's suggestion that she did not hear him fall as the accused herself throughout her evidence emphasized her ability to hear. Contrary to her evidence that she did not leave the homestead, Petrus found her outside the homestead. This court would under these circumstances be justified to conclude that after she administered the blows to his head and that she went outside the gate and further assaulted the deceased whilst he was incapacitated.

[32] The accused raised the defense that she acted in private defence. In *S v JONKERS* 2006 (2) NR 432 (SC), at pages 444, G – I and 445 A-C, the Supreme Court cited with approval the following from *S v Naftali* 1992 NR 299 (HC) at 303:

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

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

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

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

The second leg of the enquiry is then whether the State has proved beyond reasonable doubt that the accused did not genuinely believe that he was acting in self-defence and that he was not (sic) exceeding the bounds of self-defence. Here the test is

purely subjective and the reasonableness or otherwise of such belief, whether or not it is based on or amounts to a mistake of fact or law or both, is only relevant as one of the factors in the determination whether or not the accused held the aforesaid genuine belief. (See Burchell and Hunt (op cit at B 164 - 81 and 330 - 2); S v De Blom 1977 (3) SA 513 (A).)

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

In the book South African Criminal Law and Procedure vol II 3 ed by Milton, the offence of culpable homicide is defined as follows at 364:"

[33] When the above principles are applied to the facts of this case I find that the deceased when he tried to re-enter plainly understood that he was not welcome and yet persisted to impose his unwelcome presence at the homestead of the accused. I further find that he had used his walking stick in a threatening manner. His conduct was clearly unlawful. The accused was justified to ward off this unlawful attack on her person by hitting the deceased with a stick which she found close to the gate.

[34] It is my considered view that the threatening attack was sufficiently averted when the deceased fell down. The accused despite her denial, saw and hear this. She previously relied on the locked gate to stop the deceased and she had the opportunity when the deceased was incapacitated to lock the gate which would deny the 71 year old injured deceased entry to her homestead. She however continued with her attack and in doing so exceeded the bounds of what was reasonable to avert the attack.

[35] Petrus during cross-examination testified that when he arrived at the gate, the accused informed him that they have to leave as the deceased refused to leave. Although she knew that the deceased was on the ground her statement suggests that she subjectively believed that the deceased was capable even after the second attack of renewing his attack. Mr Wamambo argued that the verbal abuse that evening and prior domestic abuse motivated the accused to seek revenge and that

she acted intentionally. I found that the accused was able to see shapes and movement close to her. It is however plausible that she could not see where the blows landed or the wound she inflicted when she struck the deceased multiple times given the limited vision. For the same reason the court cannot draw a negative inference from her failure to render assistance. Petrus did not inform her of what he was able to see i.e the blood on the head of the deceased; that he was staggering and that he was lying down at the pond. It is reasonably possibly true that the accused could not see this. All she heard was the continued quarreling of the deceased. When all of these facts are considered I am not convinced beyond reasonable doubt that the accused, at the time she launched the second attack, genuinely believed that it was not necessary.

[36] The accused by launching the second attack by striking out at the deceased multiple times ought to have foreseen that her actions might result in death, and therefore, by failing to appreciate that, she was negligent and is thus guilty of culpable homicide which is a competent verdict on a charge of murder.

### Count 2

[37] The State based their charge of defeating or obstructing the course of justice on the following facts as contained in the summary of substantial facts: The accused defeated or obstructed the course of justice by denying any knowledge of the assault on the deceased and made a statement under oath to that effect; and the accused tampered and or concealed the blood spot and/or covered the blood stain with sand a wood at the entrance of her homestead where the assault leading to the death of the deceased took place. The accused disputed the admissibility and the contents of the Statement and denied that she had in any way tried to conceal the blood spot. The State correctly conceded that the accused can only be convicted of an attempt to defeat or obstruct the course of justice.

### The Statement



[38] Kaveruru Tjirazo who, at the time was a constable in the Namibian Police testified that he arrived on the scene in the company of Constable Nehemia. According to him he interviewed the accused and Constable Nehemia acted as a translator. He ascertained from the accused that there was a quarrel the previous day at a cuca shop and that the deceased had a panga. She further informed him that she found the deceased at her homestead and that he wanted to fight with her and that she chased him out of the house. He however testified that she informed them that she had assaulted the deceased but that she could not remember with what she had assaulted him as she was drunk. He admitted that he entertained the thought that the accused was the one who assaulted the deceased.

[39] Constable Nehemia testified that he interviewed the accused and she informed him that they had an argument the previous day over money and she ordered the deceased to leave her place as she and her kids wanted to sleep. She discovered the body of the deceased the next day. The defense objected only to the contents of this statement and therefore the admissibility was not adjudicated on in a trial within a trial. It was noted that it was not recorded in the statement that the accused denied that she had any knowledge of the assault. She omitted mentioning this fact. He denied that he interpreted to Constable Tjirazo that she admitted having assaulted the accused.

[40] The State relied on a statement, the contents whereof was denied by the accused under oath wherein she omitted to mention that she had assaulted the deceased. If the court would sanction her omission in other words her silence, this court would be setting a precedent in violation of article 12(1)(f) which specifically stipulate that no person shall be compelled to give testimony against themselves. It in any event is apparent from the evidence of Constable Tjirazo that she indeed mentioned that she had assaulted the deceased but this however was not recorded by Constable Nehemia. There is thus no merit in the State's contention that this was an attempt by the accused to defeat and or obstruct the course of justice.

The covering of the blood spot with sand and a log

[41] Sergeant Johannes testified that they had questioned the accused and she pointed out a place near the gate where she had pushed the deceased and that he fell against a stick. Upon receiving this information she shifted the log lying near the entrance. She then observed a place where it appeared that someone had covered something with sand. The sand was gathered like a hill. She then called Sgnt Jackson who removed the sand with a small stick and uncovered what appeared to them as a bloodstain. They then called Sgt Taapopi who photographed the scene only after the original scene had been tampered with. The accused testified that she had not seen the blood at that spot at the gate. Her poor eyesight was not disputed. Although she had exaggerated her poor vision, it is not improbable that she would not have been able to identify a bloodstain on the wet sand.

[42] Petrus testified that there was a stick which was used to block the space underneath the gate so that dogs may not enter the homestead. Mr Wamambo argued that he testified that the log was not in the position where it normally used to be. I agree only to the extent that the log would be placed in front of the gate when it is closed. When it is opened for traffic it seems logical that the log would be removed and placed aside. The accused indeed was the only person with an interest in hiding evidence. She however pointed out the scene to police officers.

[43] I am unable to conclude from these facts that the accused had tampered with the evidence either by placing a log over it or by piling sand on top of it in an attempt to defeat or obstruct the course of justice.

[44] In the result the following order is made:

1. Count 1  
The accused is convicted of culpable homicide
2. Count 2  
The accused is found not guilty and discharged.

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MA Tommasi  
Judge

APPEARANCES

THE STATE :

Mr. Wamambo

Of the Office of the Prosecutor-General, Oshakati.

ACCUSED:

Ms. Mugaviri

Of Mugaviri Attorneys, Oshakati