

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI**

**JUDGMENT**

**Case No: CC 06/2015**

In the matter between:

**THE STATE**

and

**ELIA SHITUWA IIPINGE**

**ACCUSED**

**Neutral citation:** *S v Ipinge* (CC 06/2015) [2017] NAHCNLD 116 (22 November 2017)

**Coram:** JANUARY J

**Heard:** 28 June 2017

**Delivered:** 22 November 2017

**Flynote:** Criminal law – Murder – Circumstantial evidence – No eye witness – Accused admitted to civilian witnesses that he kicked the deceased – Had time to reflect before arrested – On arrest told police officer that deceased fell and hit stomach on stone – Rupture of liver and diaphragm – Admitted that he slapped deceased once after

she slapped him – Court rejected version as an afterthought – In the circumstances convicted of culpable homicide.

**Summary:** The accused is indicted for murder read with the provisions of the domestic violence act in that the deceased was his ex-girlfriend. The accused claimed that they were still in a relationship. There were no eye witnesses to the incident. The accused spent a night with the deceased and early the following day sought assistance when he realized that the deceased was not well. He informed the mother and another witness respectively about the incident that the deceased was not well, they did not sleep well and that he kicked the deceased. He later changed and told the hospital personnel and police officers that the accused went to fetch water at a water well and fell hitting her stomach and chest on a stone. The court finds that this version is an afterthought and a poor attempt to exculpate himself. This court cannot make the inference in the circumstances that the accused intended to kill the deceased (*dolus eventualis* or otherwise) as the only reasonable possible inference. The accused is convicted of culpable homicide.

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## JUDGEMENT

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### JANUARY J

[1] The accused is indicted for murder in that upon or about 21<sup>st</sup> February 2013, and at or near Oluhalu Village in the district of Outapi, the accused did unlawfully and intentionally assault Nangombe Indongo, a female human being, thereby inflicting upon her certain injuries as a result of which the said Nangombe Indongo died at or near Oshakati hospital, in the district of Oshakati on the 22<sup>nd</sup> February 2013 and thus the accused did unlawfully and intentionally kill the said Nangombe Indongo.

[2] Dr Nandjebo conducted the post mortem examination on 28 February 2013. The deceased is Aili Nangombe Indongo, a 33 year old female. The chief post mortem findings are a history of being assaulted by boyfriend with a rupture of the liver with

intraparenchymal haemorrhage with clots and a rupture of the diaphragm. The deceased died of hypovolemic shock. She was swollen on the face and both cheeks. There was 40 ml of blood in the right side of the thoracic cavity and 60 ml of blood in the right thoracic cavity. 100 ml of blood was found in the peritoneal cavity.

[3] Mr Nsundano is representing the accused and Mr Pienaar is representing the State. The accused pleaded not guilty and gave a plea explanation in terms of section 115 of the Criminal Procedure Act 51 of 1977. He stated:

'I the undersigned Elia Shituwa lipinge do hereby plead not guilty on the charge of murder. In amplification of my plea of not guilty I wish to state the following:

1. On 21<sup>st</sup> day of February 2013, I accompanied my Ex-Girlfriend to the water well where she went to fetch water.
2. I helped her to put the bucket of water on her head, however few steps from the water hole she stumbled and fell on the ground on her stomach, to which she fell on the stone.
3. I helped her to get up, I took the bucket and filled it with water and helped her to carry the water home.
4. Upon arriving at her place we went inside her house, well chatting the deceased started vomiting, I asked her if I could seek help for her but she said she will be alright. While chatting the deceased started accusing me and my current girlfriend (at that time) of superstitious (witchcraft) saying that is the reason she even fall down with a bucket of water.
5. While she was talking on the issue of my current girlfriend (by then) I advised her that it's not good that she must talk about another women while with me and that my current (girlfriend) had nothing against her because I'm the one who proposed her. She then slapped me on my face.
6. I slapped her on the face upon which she vomited again and held one hand on her chest and another on the stomach while leaning forward. I said sorry to her and told her that I was leaving, she asked me to stay by saying what if something goes wrong. We

spend the whole night together though she was still vomiting till morning as well she had high body temperature, I went to seek help to take her to the hospital and we went to Okahao Hospital and later she was transferred to Oshakati hospital, still accompanied by me where she passed away.

7. I admit that I slapped her due to the spur of anger when she slapped me, however I had no intention to kill her nor foresaw that my action of slapping her could result in her death.'

[4] Dr Nandjebo excluded the possibility that the deceased could have sustained the injuries as is alleged by the accused. She stated that it was blunt trauma. The photos that were taken during the post mortem examination depicts that the skin of the deceased was peeling. The doctor ascribed that to the fact that the refrigerator at the mortuary was not functioning properly. It could also be attributed to the fact that the body was not put in the refrigerator within a time span of 2 hours after death. The internal organs were normal apart from the ruptured liver, diaphragm, a haematoma on the left clavicle area and on the right parietal area.

[5] In cross-examination a history of another medical officer, Dr Kalondo, who first treated the deceased was put to Dr Nandjebo in that the deceased informed him that she fell on a stone when she went to fetch water and that is the reason why she was coming to the hospital.

[6] The doctor was asked about the effect on the liver and diaphragm if a person falls on a rock or stone with his or her stomach and chest. Her response was that it depends if the stomach is full or not. She stated that if the stomach was full it may cause a rupture of the liver and diaphragm. She could however not give a satisfactory answer of whether the stomach was full or not during the incident although she found the stomach empty during the post mortem examination. The accused reported that the deceased was vomiting during the whole night before she died the following day. The doctor excluded the swelling of the face to be attributed to a slap with an open hand and stated that something else must have been used. She stated that with the rupture of the liver the prognosis was poor.

[7] Iiyambo Amunyela testified that he knows the accused and the deceased. On 22<sup>nd</sup> February 2013 he came to his house from Omakange. When he came into his house, he found the deceased lying in a room. He greeted the deceased and she made a report to him. The report is hearsay and I ignore it. The witness uncovered the deceased from a sheet she was covered in and saw that her stomach, ribs and face were swollen. He went out of the house and found the accused who arrived with a motor vehicle of one Tate Shikongo. The accused took the deceased to hospital. They had a relationship which ended about five months prior. Both the accused and deceased were in other relationships thereafter. This witness knows that the accused sometimes assaulted the deceased at cuca shops as he witnessed that.

[8] Iikasha Lukas Iikasha knows the accused because they stay in the same village. On the night of 21<sup>st</sup> February 2013 at night at about 21h30 to 22h00 this witness heard screams from a water well. He identified the screams as that of the deceased. The witness could identify the screams because the deceased came to him when she was very small and she grew up with the witness. They used to speak every day. He described her voice as not having 'that big voice and she does not have that thin voice to scream like loud, no. The type of scream like a person who is crying, a person who was like beaten.' After hearing the scream, the witness just went to sleep because it was dark and he was afraid.

[9] The next morning this witness heard a person greeting at about 06h00. He went to the person and saw that it was the accused. The accused reported that he did not sleep well because the deceased was vomiting the whole night. The witness informed his wife, the mother of the deceased. The mother went out while the witness got dressed. He followed to the house of one Amunyela where the deceased was. The mother was already there. The witness greeted the deceased who reported to him that she did not sleep well because she is already killed. Mr Pienaar labelled the statement of the deceased a dying declaration and submitted that it is an exception to the hearsay rule. Mr Nsundano objected to the admissibility thereof.

[10] The deceased was covered in a cloth. The witness uncovered the cloth and observed that the stomach of the deceased was swollen. Thereafter he went out and at

a later stage saw that the deceased was loaded in a motor vehicle of a Mr Shikongo by the accused to be taken to hospital. The witness stated that he was at a kraal about 75 meters away when the deceased was loaded in the motor vehicle but in cross-examination changed and stated that he was at the house of Mr Amunyela when the deceased was loaded in the motor vehicle. He went to the kraal before the motor vehicle arrived but came back before the vehicle's arrival at the house.

[11] Aili Amunyela is the mother of the deceased and the wife of the previous witness. She knows the accused as they are from the same village. She confirmed the testimony of her husband that on 22<sup>nd</sup> February 2013 at about 06h00 the accused greeted outside and her husband went there. The husband returned and informed her that the accused was sitting at the fireplace. She went to the accused. The accused informed her that he did not sleep well because the deceased is not feeling well and she was vomiting during the night. They went together to the house where the deceased was. This witness greeted the deceased. The deceased informed the mother that she is not feeling well and 'no I did not sleep well because Shituwa (the accused) beat me up he found me....Shituwa beat me up. Me I am not alive, he killed me.'

[12] The accused requested the deceased to stand up so that they can go to hospital. The witness uncovered the deceased from a sheet and observed that the stomach was swollen. The accused dressed the deceased in a traditional dress and whilst holding her the deceased walked out of the room. The deceased did not have the power to walk and told the accused to leave her because he has already killed her and to leave her to just go lay down. The accused took the deceased back into the room and went to look for transport at Tate Shikongo. The deceased was loaded on a mattress on the motor vehicle and they departed to hospital. The accused was holding her with both hands and assisted her to the motor vehicle because she was unable to walk. The accused told this witness that he kicked the deceased and broke her ribs. This witness confirmed that when the motor vehicle arrived her husband was not present and was at the kraal.

[13] Paulus Asino testified that on 22<sup>nd</sup> February 2013 he was at the house of Tate likasha (likasha Lukas likasha). He left this house at about 07h00. He met with the accused. The accused told the witness that the deceased did not sleep well. That they

slept together but she did not sleep well because he kicked her. Thereafter the witness went away and eventually to a certain cuca shop from where he observed a motor vehicle coming to Mr Amunyela's house. The witness observed the accused and deceased embarking the motor vehicle to hospital. In cross-examination this witness testified that the accused told him that he fought with the deceased and kicked her.

[14] Rauna Hishiposha Shikalepo testified that she is from Oluhalu Village, the same village from where the accused and the deceased are. She knows the accused. On 21<sup>st</sup> February 2013 she heard a person screaming from the direction of the water well. The screaming was by a lady. The witness informed her uncle likasha Lukas Shalimba. Thereafter she went to sleep. The following morning the witness heard a person greeting from outside the house. Mr Lukas likasha went to the person. The witness however, does not know who the person was. After a while Aili, the mother of the deceased, went to the house of Mr Amunyela where the deceased was. The witness went also to the house where the deceased was. She greeted the deceased but received no answer. Thereafter she went to the water well and never returned to the house of the deceased. The person screaming was saying: 'come please assist me somebody is killing me.' The witness does not know who was screaming. In cross-examination the witness was confronted with her witness statement to the police. She denied almost everything contained in the statement.

[15] Festus Shikongo is also from Oluhalu. He knows the accused and the deceased from the same village. He confirms that on a day in February 2013 when he was on his way to Windhoek, the accused stopped him and requested him for transport to take the deceased to Okahao State Hospital. The accused told the witness that the deceased is not well because they fought the previous night. The witness drove to Mr Amunyela's house where the accused went inside and collected the deceased. The accused had to assist her to walk to the motor vehicle because she could not walk on her own. The deceased also had to be assisted to embark the vehicle. She was put on a mattress at the back of the bakkie. The accused also boarded the motor vehicle and sat near the deceased.

[16] Mr Shikongo drove to Okahao Hospital and offloaded the accused and the deceased. The accused put the deceased on a trolley and pushed her into the hospital. The witness could see that the deceased was not well as she could not walk on her own and her face was swollen. She was dressed in a reddish Oshiwambo dress. The witness did not drive fast but about 100km/h. He did not experience any problems on the road to Okahao.

[17] Reinhold Johannes is a police officer and the Unit Commander of the criminal investigation unit. He is a Chief Inspector and one of the police officers who arrested the accused on 25<sup>th</sup> February 2013 at Oluhalu Village. The witness warned the accused about all his rights. The accused was very co-operative and told the witness that all he knows about the incident is that he was at the water well with the deceased. She fell down at the water well. She hit herself on a stone and that is all, she was not beaten. The accused thereafter took the police officers voluntarily to the place where the incident happened. It was at a water well that is surrounded by stones. The accused pointed 3 different points. One point where he was standing and two stones where he suspected the deceased fell down. Photos were taken where after the witness handed the accused to Sgt lithete for further investigation.

[18] Selma Mutumbulwa is the Scene of Crime officer who took photos at the scene where the incident occurred, pointed out by the accused to Chief Inspector Johannes and by Chief Inspector Johannes to her. She compiled the photo plan that was handed up as an exhibit. She was also responsible to take the photos when the post mortem examination was conducted which photos are included in the photo plan of the pointing out. In cross-examination it emerged that there were two photo plans with statements that differ. In the one it was stated that Inspector Johannes pointed out the points to the scene of crime officer and in the other it states the accused pointed it out to her. There was also a discrepancy in relation to the date on when the post mortem photos were taken. The witness testified that the post mortem photos were taken on the 27<sup>th</sup> February 2013 whereas the post mortem dates it to be conducted on the 28<sup>th</sup> February 2013. The witness conceded that she made mistakes on those aspects and corrected it. I do not consider these discrepancies as material.



[19] Silvanus Shaanika Hamukwaya stated that he was an outreach driver meaning, at Okahao State Hospital, the driver who assists patients going to villages and/or taking medication to the villages. I understood it as the driver who drove out of town when the need arises. He was responsible to transport the deceased with an ambulance to Oshakati State hospital and did so. He was accompanied by a nurse and the accused with the deceased. When they reached a certain place in Oshakati, this witness noticed the nurse standing upright in the ambulance. He continued driving to Oshakati Casualty at the hospital. When he opened the door for the nurse and the deceased, the deceased already passed away. A doctor confirmed the death. The witness then transported the body back to Okahao. It was the body of Nangombe Indongo. At Okahao he handed the body to a mortuary assistant to take to Indira Gandhi mortuary.

[20] David Kene is the mortuary assistant who received the body of the deceased from the previous witness on 22<sup>nd</sup> February 2013. At about 10h00 that morning he saw the accused entering the hospital pushing the deceased on a trolley. The accused approached this witness who was working at reception and handed a hospital card to him. The witness registered the deceased in their registers and handed the hospital card to the accused for the deceased to receive treatment. The accused at that time was talking although not to anyone in particular but said the deceased just fell down with a bucket of water and then she fell on a stone on her own, she was not beaten.

[21] Between 16h00 and 17h00 the witness was called to the Okahao mortuary. The mortuary at the time was not operating as the hospital was under renovation. The witness assisted to remove the body from the ambulance, covered it in a plastic bag and loaded it on a bakkie. They called another person Petrus Iiyambo who took the body of the deceased to Indira Gandhi mortuary. The body was dressed in a reddish traditional Oshiwambo dress.

[22] Petrus Iiyambo is the person who transported the body of the deceased on 22<sup>nd</sup> February 2013 from Okahao Hospital to Indira Gandhi mortuary because Okahao mortuary was under renovation. He covered the body in a plastic bag. The body was dressed in a reddish dress. He put the body in a drawer in the mortuary. He entered the name of the deceased in a book. Thereafter the witness returned to Okahao. The body

had a paper label with the name of identification on it when the witness received it at Okahao. He copied that name into the register at Indira Gandhi mortuary with the drawer No. 3 wherein the witness put the body.

[23] In cross-examination the witness confirmed that he never reported to another person Aron Amukwaya who was responsible for the mortuary in Indira Gandhi mortuary. The witness was confronted with the fact that he took the body on the 22<sup>nd</sup> February 2013 and the person Aron's statement that states that he only received the body on 27<sup>th</sup> February 2013. The witness could not shed light on the discrepancy. He stated that he was just assisting and does not work in the mortuary. He assisted with a lot of other bodies and followed the same procedure of just collecting the keys to the mortuary, putting the bodies into a drawer and entering the identification in the register without informing Aron.

[24] Aron Amukwaya is employed at Indira Gandhi mortuary as a cleaner. On the 27<sup>th</sup> February 2013 he was approached at the mortuary by Kaunda Shipwata who is a police officer. The police officer requested for the body of Nangombe Indongo. The witness collected the key to the mortuary and entered with the police officer. He collected the book for the mortuary, found the name registered to be in drawer No. 3 and collected the body. It was covered with plastic. He assisted the police officer and loaded the body in a police motor vehicle. The police officer drove off.

[25] In cross-examination the witness confirmed that the name of the body was on top of the plastic bag in which the body was. He also stated that he did not receive the body on the 27<sup>th</sup> February 2013 but handed it to the police officer Shipwata on that date. This witness stated that when people from Okahao bring in bodies they must talk to the person on duty to open the mortuary at Indira Gandhi before the body is placed in the mortuary.

[26] Ruben Kaunda Shipwata is the police officer who collected the body of the deceased from Indira Gandhi mortuary. He received the body of Nangombe Indongo from Aron Amukwaya on 27<sup>th</sup> February 2013 after the body was removed from drawer No. 3. The body was covered with plastic with the name of the deceased, the age, and

the name of the doctor on top of it. The witness transported the body to Okahao Police Mortuary. On the 28<sup>th</sup> February 2017 the post mortem examination was conducted by Dr Nandjebo. The body was dressed in a red traditional dress.

[27] In cross-examination the witness testified that the body was that of Nangombe Indongo and not Nandombe. This witness was confronted with issues relating to words or phrases that he needed to scratch out or not on a certain form labelled a Pol 54, the fact that he did not state the condition of the body, errors and mistakes the witness made when completing the form, the chain of custody and the fact that the name Nandombe Indongo appeared on the form. This is the name that appeared on the Identification document. The abovementioned issues, in my view unnecessarily protracted the cross-examination and eventually the trial whereas the issues should have been sorted out at the pre-trial conference. The crux of the cross-examination is that there was a dispute on the identity of the body on which the post mortem examination was conducted on. That is whether it was the correct body or whether a post mortem examination was after all conducted on the deceased.

[28] The court recalled Amunyela Iiyambo after an application by the State. This witness is the brother to the deceased. He testified that the name of the deceased is Nangombe Indongo and that the Identity Document has a mistake misspelling the name as Nandombe. That misspelling was done by the Ministry of Home Affairs. In cross-examination the witness testified that the deceased had another Christian name as Ester. The State closed its case after the application for this witness to be recalled.

[29] Mr Nsundano brought an application for a discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977. It suffices to indicate here that the application for a discharge was refused on 30 November 2016. In my view, the State made out a case upon which a reasonable court could convict.

[30] An inspection *in loco* was held on 17 January 2017 on application of Mr Nsundano. He convinced the court that it had to be done before he calls his client, the accused. The court observed a big waterhole, locally referred to as an "Oshana". There was no water in it at the time. Inside the empty 'Oshana', to the North Western corner is

a water well covered with two wooden branches on top of it. These wooden branches do not totally cover the water well and one can still get access to the water through it. The water well is about one and a half meter deep from the top to the surface of the water. The accused indicated where he was and where the deceased was at the time of the incident. Inside the well is a stone ledge where one can bow or sit down to collect water.

[31] The accused indicated how he collected water with the bowl and where the deceased was. His testimony is that he was allegedly in the well on the ledge. He got water with a bowl that used to be there. He assisted the deceased to put the bucket of water on her head. When the deceased turned he heard her falling. When he looked he observed that she fell on a loose stone more like a rock. The loose rock was no longer on the scene but the accused indicated a similar rock measuring in length 0.7 centimetre and in width 0.4 centimetre in size.

[32] The accused indicated that the stone on which the deceased fell was placed on the well to restrict animals from falling into the well. The accused indicated a fixed rock near the well where he was when the deceased fell. He was not really sure about this point and indicated another fixed stone where the deceased could have been. The distance between the water well and the house of the witness who allegedly heard the screams of the deceased was measured with a measure wheel and is 596.5 meters.

[33] The accused testified and stated that the deceased is Nangombe Indongo. The accused was not sure of the date when the incident happened but testified that it was on the 24<sup>th</sup> February 2013. He spent the day in the bush making what he called path rods for motor vehicles. Thereafter he went to Oluhalu cuca shops where he met the deceased. He also had a cuca shop and the deceased came to his cuca shop. The deceased indicated that she wanted to talk to the accused. The deceased wanted to go to hospital to see a doctor and requested assistance with money from the accused. The accused informed her that he first needed to rest and promised to give her money later.

[34] The deceased then asked the accused to accompany her to the water well to fetch water. She wanted to wash a dress that she was going to wear to the hospital the

following day. The accused accompanied her to the water well. The accused filled the bucket with water using a bowl. He climbed down the well and was on a ledge filling the bucket with water. He took the bucket out of the well and assisted the deceased to put the bucket filled with water on her head. The deceased turned and when she wanted to move she fell and hit herself on a stone with her stomach. The accused demonstrated that her chest down to the stomach hit the stone. The accused again took the bucket, went into the well and filled it with water. The accused carried the water to the house where the deceased was staying as the deceased indicated that she hurt herself and was unable to carry the water.

[35] The accused went with the deceased into the house where she was staying. The accused put the water aside inside the house. The deceased went at the fire place and laid down. She stood up thereafter and approached the accused. She confronted the accused and blamed him and his girlfriend of witchcraft causing her to fall down at the well. The deceased held the accused shirt against his chest, pushed him and slapped him. The accused then slapped the deceased once on the face with the back side of his hand. He denies having kicked her or having jumped on her body. The accused stated that although he had another girlfriend, he was still in a relationship with the deceased. The deceased knew about the new girlfriend.

[36] The deceased indicated thereafter that she could not make the bed and requested the accused to do it on the floor with a mattress. The accused went into the room and made the bed on the floor. When he came out he found the deceased vomiting. He stated that that she vomited many times through the night as he could see in the morning that she vomited. The deceased asked for water which the accused gave her to drink. Both of them went inside the room to sleep. The accused fell asleep. In the morning the accused woke up the deceased and saw that she was not well. The accused went to Tate Issacker Shalemba and told him that they did not sleep well. The mother of the deceased was then also informed and she went to the deceased. The accused eventually took the deceased to Okahao Hospital with the motor vehicle of Mr. Festus Shikongo. He paid N\$70.00 for the transport.

[37] At the hospital the accused loaded the deceased onto a hospital trolley and pushed her into the hospital. The accused arranged at the hospital for the deceased to be treated after he handed the hospital health card to hospital personnel. The accused denied having spoken to anybody that the deceased fell on a stone. The accused at some stage went to buy food. When he returned the deceased was already taken to Oshakati. He took a taxi to Oshakati and denied having been in the ambulance that took the deceased to Oshakati hospital. He enquired about the deceased and was informed that she passed away. The accused took a taxi back to Okahao and eventually returned to the village where he informed the deceased's mother about the death. Two days thereafter the accused was arrested.

[38] The accused confirmed the evidence of Inspector Reinhold Johannes that he volunteered to point out where the incident occurred at the water well because there were rumours in the village that the accused killed the deceased. The accused denied that he killed the deceased. The accused told the police that he did not beat the deceased but that she fell at the water well on a stone. He showed the scene to the police.

[39] The accused testified that the deceased did not scream at any stage in his presence nor did he hear a scream from anybody.

[40] In cross-examination the accused admitted that the body of which photos were taken during the post mortem examination dressed in a red/pinkish traditional dress is the deceased Nangombe Indongo. The accused admitted that he dressed the deceased in that dress before they went to hospital. He denied that he kicked the deceased.

[41] Mr Nsundano called Dr Kalondo as a defence witness. The doctor testified about the position of the liver in a human being in the abdominal cavity and that the normal liver is covered by the ribs. He stated that the diaphragm is a strong muscle and that its main function is to assist with breathing. The photos were handed to the doctor and he opined that the body was in an advance state of decomposition.

[42] Dr Kalondo is the first doctor who received the deceased and her health passport from the nurses at the Okahao Hospital. The history of the patient was noted in the

health passport and is that she fell on a stone. He examined the deceased and concluded that she had an enlarged liver and was bleeding internally as she was anaemic with a low blood pressure. He testified that an enlarged liver is not protected by the ribs and is therefore more prone to trauma. He diagnosed her with abdominal trauma. The body had no external bruises or fractured bones. He transferred the deceased to Oshakati Hospital with a referral letter. He confirmed the name of the deceased as Nangombe Indongo, a female. He stated that the deceased was unable to talk and whatever he wrote is information that he gained from the health passport. The deceased was, however able, with gestures to deny or confirm by either shaking in denial her head or nodding it in confirmation.

[43] In cross-examination by Mr Pienaar the doctor stated that one does not need to have food in the stomach to vomit. He confirmed the nodding of the head and that the deceased could not talk. The deceased was dizzy but could communicate with gestures.

[44] The history of assault by the boyfriend is forthcoming from the police officers and is excluded as inadmissible hearsay evidence. Similarly the allegation that the deceased fell on a stone as reported in the health passport, post mortem report and testified to by Dr Nandjebo are hearsay evidence and is excluded in the evaluation of evidence. Likewise the evidence of Dr Kalondo of confirming from the deceased that what was reflected in the health passport was correct with her nodding her head is also excluded as hearsay and inadmissible.

[45] Mr Pienaar introduced evidence of what the deceased told her mother and another witness when they visited her on the morning after the incident. Mr Pienaar claimed that what was said by the deceased constitutes a dying declaration and is an exception to the hearsay rule. The deceased informed the mother that she is not feeling well and 'no I did not sleep well because Shituwa (the accused) beat me up he found me....Shituwa beat me up. Me I am not alive, he killed me.'

[46] The relevant section in the CPA is section 223 which provides:

'223 Admissibility of dying declaration

The declaration made by any deceased person upon the apprehension of impending death shall be admissible or inadmissible in evidence if such a declaration would have been admissible or inadmissible as evidence on the thirtieth day of May, 1961.'

[47] The requirements for a dying declaration are;

- a) The deceased must have died;
- b) The case must be one of murder or culpable homicide;
- c) The declarant must have had a settled hopeless expectation of death;
- d) The declarant must be a competent witness;
- e) The statement must be completed.<sup>1</sup>

I have doubt if the deceased had a settled hopeless expectation of death in the circumstances. I therefore find that the utterance from the deceased is not a dying declaration and is excluded as hearsay evidence.

[48] I have hereinbefore alluded to the chain of custody and the identity of the body of the deceased. The defence in the pre-trial proceedings did not dispute the identity of the body and the chain of custody thereof. Both issues became issues in dispute during the trial. When this court alerted counsel thereto, Mr Nsundano informed the court that the issues were not admitted in terms of section 220 of the CPA and it is immaterial that the issues were not disputed. The chain of custody was disputed because the person who transported the body to Indira Gandhi mortuary simply collected the keys to the mortuary and put the body in a drawer without formally handing the body to the mortuary personnel. The identity was disputed because the health passport reflects the name of Aili (the name of the mother) Nangombe, some of the affidavits in terms of section 212 reflect it as Nandombe Indongo and the official identification document as Nandombe Indongo. A witness who is the brother to the deceased testified that the name Nandombe is misspelled by the Ministry of Home Affairs and that the correct name is Nangombe.

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<sup>1</sup> See: *R v Heine* 1910 CPD 371, Swikkard & Van der Merwe, Principles of Evidence, 2 ed (2006) at p 268 paragraph 14 2 3, footnote 12.



[49] The identity of the body was on a piece of paper on top of the body bag and the person who transported it entered the name of the deceased and the drawer number in the register at the mortuary. Most of the witnesses referred to the fact that the deceased was dressed in a reddish Oshiwambo Traditional dress and the post mortem photos reflect that. Moreover, when the accused testified he admitted that it was the deceased depicted in the relevant photos. The disputed facts caused Mr Pienaar to, unnecessarily call witnesses to prove these disputed facts and all those witnesses had to be cross-examined. In my view this caused unnecessary delay in the finalization of the case. The disputes could have been solved in the pre-trial proceedings. After all when the accused admitted the identity it became clear that he was not disputing the identity of the deceased on whose body the post mortem was conducted.

[50] Mr Nsundano, correctly submitted that the practise directives provide for pre-trial proceedings with the rationale to curtail proceedings. In this case it was not effectively applied.

[51] There is evidence of a scream heard by two witnesses in a house a distance from the well at the night of the incident. The first witness in this regard only heard an unintelligible scream which he identified as the scream of the deceased whom he called his daughter as she grew up with him. The second witness was in the house with the previous witness and alerted him to the screams. This witness heard a scream uttering words calling for help saying: 'come please assist me somebody is killing me.' The witness could not tell from whom the scream emanated. The court held an inspection in loco. The distance from the house where the screams were heard from to the water well is 596.5 meters. In my view it is impossible to discern the identity of a person screaming at that distance and I find it unreliable.

[52] It is common cause that the accused was alone with the deceased when she went to fetch water from the well. He spent the night with her after she sustained the injuries. The following morning he realized that she was not well and sought assistance to take her to Okahao hospital. The evidence from the mother of the deceased is that the accused early the next morning reported to her that the deceased is not well and that they did not sleep well because he kicked the deceased and broke her ribs.

Another witness, Paulus Asino, met the accused also early the next morning. The accused also told him that he slept together with the deceased. That they did not sleep well and that he kicked the deceased. In cross examination the witness was adamant that the accused told him that he fought with the deceased and kicked her. He also told Mr Shikongo, the person who transported the deceased to hospital that the deceased is not well because they fought the previous night. Exchanging of slaps, in my view, does not qualify as fighting.

[53] The accused admitted that he slapped the deceased with an open back hand after she pushed and slapped him and accused him and his new girlfriend of witchcraft. It is, in my view, significant that the alleged slapping was not reported to the witnesses who testified that the accused reported that he kicked the deceased. The doctor who did the post mortem excluded the swelling of the face as a result of a slap. Since the face and both cheeks were swollen she stated that a different object must have been used.

[54] I am alert to the fact that the mother and the witness who testified about the report from the accused of having kicked the deceased, are single witnesses in relation to the report from the accused and that I must treat their evidence with caution. Moreover, that the mother might be biased because it is her daughter who passed away.

[55] The incident according to the evidence happened at about 21h00 to 22h00 on the night of the 21<sup>st</sup> February 2013. The first report from the accused of what happened was made at about 06h00 and 07h00 the following day to the respective witnesses who testified about the kicking and to Mr Shikongo who testified about the fighting. The accused had ample time in between to consider the position he found himself in and the condition of the accused.

[56] The evidence indicates that the deceased was unable to speak when she arrived at the hospital. The witness who received the health passport at the hospital only communicated with the accused and testified that the accused, although not communicating to someone specific, stated that the deceased fell on a stone and that she was not beaten. The accused was arrested on the 25<sup>th</sup> of February 2013, 4 days

after the incident. When arrested he informed the police officers that the deceased fell on a stone.

[57] I find the first explanation from the accused that he kicked the deceased to be the truth in the circumstances. That is what he conveyed to the mother and the witness Paulus Asino that he kicked the deceased. The witnesses are single witnesses in this regard but I do not find any material discrepancies in their evidence to reject it as unreliable. The allegation that the deceased fell on a stone in all probability emanated from the accused as the evidence indicates that the deceased was unable to speak the following day at the hospital. I reject this explanation as an afterthought from the accused and a poor attempt to exculpate himself. I find that he kicked the deceased in the stomach and face.

[58] The State's case is mostly based on circumstantial evidence. There were no eyewitnesses. This court will therefore have to make inferences in the circumstances. Dr Nandjebo testified that the trauma must have been inflicted with much force to the stomach and or chest. The stomach is a sensitive organ and so is the liver. The diaphragm is a very strong muscle. It is common cause that the accused remained with the deceased after she sustained the injuries. He realized the following morning that she was not well. He informed the mother and a witness that he met. He sought assistance with transport and eventually took her to Okahao hospital and eventually accompanied her to Oshakati hospital in the ambulance. In these circumstances the only inference is not that that he assaulted her with the intention to kill her (i.e. *dolus eventualis* or otherwise).

[59] It is well known that accused seldom admit when they acted intentionally.

'There is no rule to the effect that a court may find that X acted with intention only if X admitted that he had intention- in other words if there is direct proof of intention. It is, after all, a well-known fact that many accused who in fact did have intention, subsequently falsely deny in court that they acted intentionally. If this happens, a court may base a finding that X acted intentionally on indirect proof in intention. This means that the court may infer the intention from evidence relating

to X's outward conduct at the time of the commission of his act as well as the circumstances surrounding the events.'<sup>2</sup>

[60] Where the court is required to draw inferences from circumstantial evidence, it may only do so if the 'two cardinal rules of logic' as set out in *R v Blom* 1939 AD 188, have been satisfied. These rules were formulated in the following terms:

' (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.

(2) The proved facts should be such that they exclude every reasonable inference from them 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.' [At 202 in fin.]<sup>3</sup>

[61] In *S v Mtsweni* 1985 (1) SA 590 (A) at 593E – G Smalberger AJA (as I he then was) referred with approval to the remarks of Lord Wright in *Coswell v Powell Duffryn Associated Collieries Ltd* [1939] All ER 722 at 733 which read as follows:

'Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts, which it is sought to, establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture . . .'

[62] Dr Kalondo testified that the deceased had an enlarged liver probably because the deceased was HIV positive and did not use her medication timeously. This made the deceased more prone to injury of the enlarged liver with trauma. This in my view, is something that the accused may not have been aware of. He may not have foreseen that a kick or kicks in the abdomen would cause death. A reasonable person in his

<sup>2</sup> C R Snyman Criminal Law 5 ed (2008) at p 189 paragraph 5.

<sup>3</sup> *S v HN* 2010 (2) NR 429 HC at p 443 to p 444.

position would have foreseen that a kick or kicks on the stomach may cause serious injury and even that death might ensue.

[63] I agree with Fieldend J where he states in *R v John* 1969 (2) SA 560 (RA) at 571;

‘This means that an accused who intentionally assaults his victim by striking him a moderate blow does not necessarily escape liability if death would not have resulted save for some exceptional physical peculiarity of his victim such as an eggshell skull or weak heart. In the end, liability must always depend on whether, in the particular circumstances, he ought to have foreseen some risk of death. As RUMPF, J.A., pointed out in quoting van den Heever's note on D. IX 2. 75,

“a bonus paterfamilias should consider that some human beings suffer from latent ailments and succumb to slight violence which would not kill a healthy person”.

Eggshell skulls, weak hearts and other human ailments which might cause a man to die from a trivial assault are well within the range of ordinary human experience. It will be seen, therefore, that in most cases where death results from an intentional assault, the accused may be held responsible for that death on the basis of foreseeability. This does not mean, however, that, in the quite exceptional case where the fatal result is outside the range of ordinary human experience, the offender should not properly be held guiltless.<sup>14</sup>

[60] In the result the accused is convicted of:

1. Culpable Homicide.

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**H C JANUARY**

**JUDGE**

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<sup>4</sup> At p 571 F-H

**Appearances:**

The State:

Adv Pienaar

**Office of the Prosecutor-General**

The Accused:

Mr Nsundano

**Legal Aid - Oshakati**