



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI
JUDGMENT**

CC NO: 05/2017

In the matter between:

THE STATE

v

NDAMWENA EVARISTU JOSEF

ACCUSED

Neutral citation: *S v Josef* (CC 05/2017) [2018] NAHCNLD 95 (26 September 2018)

Coram: JANUARY J

Heard: 22 -24 January 2018, 27- 29 March 2018, 15 June 2018, 16 July 2018,
10 September 2018

Delivered: 26 September 2018

Flynote: **Criminal procedure** - Evidence — Circumstantial evidence — Inferences to be drawn from circumstantial evidence — Inference must be consistent with proved facts.

Criminal law: Murder — Mens rea — Intention — Type of intention — Determination of — Court to consider nature of weapon used, position on body where injury inflicted and forced used.

Summary: The accused is indicted for Murder read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003. He was in a relationship with the deceased with whom he has 2 children. On the day of the incident the accused met with the deceased. Both of them visited a cuca shop, had a few drinks and went home. The accused was carrying one of their children. The deceased at some point became angry, insulted the accused and attacked him with a panga. A struggle for the possession of the panga ensued. The accused eventually got control of the panga. He chopped the deceased horizontally on the frontal neck severing the trachea, oesophagus, major veins to and from the head and frontal and side muscles of the neck. The deceased instantly passed away on the scene.

ORDER

The accused is convicted for murder read with the provisions of the Combating of Domestic violence Act, Act 4 of 2003.

JUDGMENT

JANUARY J

INTRODUCTION

[1] The accused in this matter is charged with murder read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003. In that upon or about 4 April 2016 and at or near Ondalayi, King-Kauluma village in the district of Tsumeb the accused did unlawfully and intentionally kill Hilma Ndeyapo Nehale, an adult female person.

[2] The State was represented by Mr Tjiveze and now by Mr Gaweseb and the accused by Mr Adams. The accused pleaded not guilty. The summary of substantial facts in terms of section 144(3)(a) of the Criminal Procedure Act, Act 51 of 1977 (the CPA) are as follows;

'At the time of commission of the crime, the accused and the deceased were in a domestic relationship as defined in section 21 of the Combating of Domestic Violence Act, Act 4 of 2003. In that they were involved in a love relationship and are the parents of two minor children. On or about the 4th of April 2016 and at or near Ondalaye-King Kauluma village in the district of Tsumeb, the accused went to the residence of the deceased where she was employed as a domestic worker. After a quarrel, the accused slit the throat of the deceased with a panga, resulting in her death at the scene. The accused thereafter took their two (2) year old son to the house of Theodor Tate-Atile Daniel where he was employed as a domestic worker, and handed the child over to Naemi Shikongo.'

[3] The following admissions were entered on record in terms of section 220 of the CPA: the identity of the deceased; the cause of death is not disputed. In addition in the pre-trial memorandum the identity of the deceased is admitted; the cause of death is admitted; the post-mortem examination report PM 59 of 2016 is admitted; it is admitted that the deceased's body did not sustain any further wounds or injury in transportation from the scene to the mortuary; an affidavit in terms of section 212(4) of the CPA by Doctor Gudwin Mujosi Lishumba is admitted; the admissibility and contents of an affidavit by Ervin Nestor Kavela; the identification of the deceased's body by Frieda Matias is admitted; the accused admitted that he was at King Kauluma village in the district of Tsumeb on 04th April 2016; the accused admitted that he was in a domestic relationship with the deceased and she was his girlfriend.

[4] A photo plan was handed up by consent. Furthermore a panga and lime-green-dark-blue T-shirt was also handed up as Exhibits.

[5] The accused stated in his reply to the State's pre-trial memorandum that: 'The basis for the accused's defence is as follows; that the accused will state that the deceased, HILMA NDEYAPO NEHALE, in a jealous rage took a panga and attacked him. The accused in order to defend himself against the unlawful attack by the deceased grabbed the panga whilst still in the hands of the deceased, in order to stop the attack. A struggle over the panga ensued between the deceased and accused because the deceased refused to let go of the panga, and in the process during the struggle over the panga, the deceased was cut on the throat by the panga.'

THE FACTS

[6] Limbo Wiggins Simalumbo is a police officer at Oshivelo. On 4th April 2016 at about 21h00 he was called to the police station at Oshivelo and informed about fighting that occurred at King Kalume village. The witness rushed to the police station where he was called from. He collected another police member, sergeant Shihepo, a nurse from Ministry of Health and Social Services and drove together to the scene where the incident happened.

[7] Upon arrival at the scene the witness found members of the public, one of the members of the public was Ms Naemi Shikongo who was with the accused. Ms Naemi Shikongo briefed the witness about the incident. The witness observed a female body on the ground and close to the body was a panga with a wooden handle. The body had a serious injury on the neck. The witness introduced him to the accused and arrested him.

[8] The nurse declared the deceased dead. The witness thereafter collected the body and with the accused and other members drove to Oshivelo police station. He handed the body to sergeant Katondoka to transport it to Tsumeb. The accused was amongst others wearing a green T-shirt stained with blood. The witness also collected a blood stained panga. Afterwards the T-shirt of the accused was also collected and handed up in court as an exhibit. The T-shirt had 3 faint reddish dots resembling bloodspots.

[9] Naemi Shikongo is the witness who was mentioned by the arresting officer at the scene where the incident happened at King Kauluma village. She is staying at the same village where the accused stayed. The witness knows the accused as they stayed in the same village. She used to see the accused at cuca shops and at the house where the deceased stayed. She knows that the accused person has children with the deceased. She also knew the deceased. The house where the deceased was employed and the house of the witness are neighbouring each other with only a small road in between.

[10] The witness testified that on a day the date of which she could not remember before the incident the deceased and accused came to her cuca shop. The accused requested to buy liquor (Wambo Liqua) on credit.

[11] On 4th April 2016 the accused and deceased found the witness at another cuca shop. The accused approached the witness and greeted her. He said that they would settle the debt on a later date as they did not have money at the time. The witness went home.

[12] Whilst at home she heard a commotion at their kraal as if the goats were breaking out from the kraal. She told her husband and children to go to the kraal because the goats were breaking out. Her husband is Theodor Daniel. The children are Shipandeni and Mohongela. While she was alone at the house she heard a voice of someone calling her, 'Ms Naemi! Ms Naemi!' The kraal is about 30 to 40 meters from their house. The witness recognized the voice of the accused. She thought the accused was coming to pay his debt. She invited the accused to come in because it was dark outside. The witness met the accused at the gate of their homestead.

[13] At the gate the accused said: 'Ms Naemi take my child and stay with my child because myself I am going to commit suicide because I killed Hilma.' The accused left after giving the child to her. The witness pleaded with the accused to come back to tell her what happened. The accused turned back and said: 'Stay with this child of mine I am going to hang myself because I killed Hilma.' The accused told her that he killed the deceased with a panga. He did not say why he killed the deceased. The accused then left. She saw blood on his T-shirt. The accused was in a rush and it was as if he was throwing the child to the witness.

[14] The witness started calling her husband and requested him to run and follow the accused and get hold of him because he was alleging that he killed his wife. Her husband followed the accused. The witness sent someone to bring a light and she also followed with the light in her hand. She shouted and asked where the accused killed the deceased. The accused answered that it was near the goat kraal of Hilma's house. She eventually found her husband and the accused in a land field. She in the meantime

phoned an owner of a vehicle requesting for assistance. This person informed her to call the police. She thought that may be the deceased was still alive.

[15] She eventually reached the place where the deceased was lying on the ground with blood stains on her. She called the deceased's name. She phoned a police officer with the name of Kafidi. The deceased did not show any signs of life. She was lying on her stomach. The accused said that it was not the place where he left her. The deceased was lying outside a fence whilst he alleged that he left her inside the fence.

[16] The police officer Kafidi was not on duty but he promised to phone another officer who was on duty. The police arrived with an ambulance later. They put the body in a car. The witness then went home with the child of the deceased.

[17] Daniel Theodor Tate-Atile is the husband of the previous witness. He resides at King Kauluma village near Oshivelo with his wife. He knows the accused who also stayed in the aforementioned village.

[18] On 4th April 2016 the witness was at his house. His goats broke loose from the kraal. He and his son went to the kraal and while they were putting the goats back into the kraal, his wife called him and asked him to run as she was with the accused who handed his child to her. The accused allegedly said that he killed his wife. The witness followed the accused and found him at a fence of their land field. The witness called the accused. The witness asked the accused what was wrong and he responded that he killed Hilma and she was lying near a kraal about 80 to 100 meters away. The accused also said that people bring others problems.

[19] The witness and accused went closer to the deceased's body to about 20 paces/ meters from the body. They remained there until the witness's wife arrived. She called the police and the ambulance. The police and ambulance later arrived with lights and lighted up the scene. The witness observed that the deceased passed away. He also observed blood spots on the T-shirt of the accused. The police picked up a panga with blood on it near the body of the deceased. The police loaded the body, took the accused and left.

[20] Ndeuya Shihepo is a police officer in the Namibian Police attached to prevention of crime in the charge office. He holds the rank of sergeant and has 7 years' experience. The witness knows the accused from the day he was arrested. On 4th April 2016 the witness reported on duty at around 20h45. He received a report of a death at King Kauluma village from the shift members that booked off duty.

[21] The witness and officer Limbo Eugene attended to the report. Upon arrival they found a body and the accused standing next to the body. The witness spoke to the people who gathered at the scene. Sgt Limbo spoke to the accused. Thereafter nurses from Oshivelo clinic arrived. They confirmed that the person passed away. The body was put into the vehicle of Ministry of Health and Social Services. After the motor vehicle with the body drove away the accused was loaded in the police vehicle and taken to the police station. Sgt Limbo booked the accused as a suspect and detained him in the cells.

[22] The witness observed marks on the ground as if it were struggling marks. He could however not shed light on who caused those marks. He could not remember in what position the body was lying on the ground. He described the marks reflecting as if persons were pulling each other.

[23] Maria Indila Kapofi is the nurse from the Ministry of Health and Social Services from the clinic at Oshivelo. On 4th April 2016 she received a phone call from the driver of the ambulance that somebody was assaulted in a village about 20 km from Oshivelo. Her working hours are from 8h00 to 17h00. The call came through at about past 19h00 and she was already at home.

[24] The ambulance driver collected her and the driver drove to the scene directed by police officers telephonically. On arrival at the scene, the police officers pointed out the body of a female person who was assaulted. The witness took out her instruments that she uses at her place of work and went closer to the body. On closer inspection she noticed that the person was lying motionless and lying in a pool of blood.

[25] The witness put on her safety gloves, looked at the eyes of the person and did not detect any movement of the eyes. She used a stethoscope and listened if the heart

is beating or not. There was no sign of heartbeat or blood flowing from the body. She observed a big open wound on the neck on the throat and small wounds on an arm. She described the wound as a cut wound. She testified that with such a wound sustained the deceased had no chances of survival. All the wounds were no longer bleeding. She observed that the person lost a lot of blood. She informed the police officer that there was no signs of life. The witness observed the police coming with a panga of about 90 cm in length. They loaded the body in the ambulance and drove to the police station. The police officers took the accused and drove to the police station.

[26] At the police station the body was transferred to another police vehicle. Thereafter the witness and driver of the ambulance went back to their places. They left the police who were ready to transport the body to Tsumeb.

[27] The witness indicated that the wound is a cut wound from ear to ear horizontally. On degrees of seriousness 1 to 3, she described the wound as a 3rd degree wound, the most serious on the scale. She stated that a person having sustained such a wound has no chances of survival. In cross-examination the witness stated that the deceased was lying on her left side. She otherwise confirmed her evidence in chief.

[28] Ms Regina David is a witness staying in Tsumeb and a police officer at the Ministry of safety and security. She knows the accused as he was her employee at her homestead at King Kauluma village in the Oshikoto Region for close to 2 years. When the accused came to her house he was with the deceased and their child. There were no problems between the accused and the deceased until in December 2015 when the witness received word that the accused wanted to commit suicide. The witness went to the farm to investigate.

[29] She enquired from them what was wrong. The accused stated that he and his girlfriend no longer understand each other. At a later stage he informed her that they can separate for her to go to her family members. The separation never occurred as the accused at a later stage informed the witness that they forgave each other.

[30] In January 2016 the witness's friends who also had property in the village of King Kauluma wanted a person to look after their property and enquired about the

availability of the accused's girlfriend. The witness talked to the accused and the deceased. They both agreed and the deceased commenced working from February 2016. The witness only heard the news on 4th April 2016 that the accused injured the deceased.

[31] Godwin Munjodzi Zishumba is the doctor who did the post mortem examination on the deceased on 5th April 2016 at Tsumeb. The body was identified to the doctor by Sergeant Kavela as that of Hilma Ndeyapo Nehale. The chief post mortem findings on the body made were; body of an adult female; clothes soaked with blood; a chop wound on anterior part of the neck reaching the cervical spine. General vessel and mucosal pallor. As a result of observations the doctor found the cause of death was a neck chop wound. On general observation the physic of the deceased was normal and nutritional look was good. There were no special identifying features and the only secondary post mortem change was rigor mortis.

[32] The external appearance of body and condition of limbs were:

Clothing- White shirt soaked in blood

- Blue denim trousers with blood
- Large wound on anterior part of neck reaching the cervical spine.

The skull was intact; the intracranial content was unremarkable; The orbital, nasal and aural cavities were pale; The mouth, tongue and pharynx were pale;

[33] The neck structures – transacted neck structures which were the trachea, the oesophagus, all major vessels, and muscles on anterior and lateral sides of the neck. The doctor explained that it means all the above mentioned structures were cut i.e. the trachea which is the windpipe was totally cut. The oesophagus is the food pipe which was also totally cut and the major vessels is the blood vessels which take blood to the head and from the head. They were all cut and the muscles on anterior and lateral sides of the neck which are muscles on the front part and sides, they were all cut.

[34] All other organs were intact except that they were pale, showing loss of blood. The doctor stated that a person with such a wound will at most die within 1 minute. The

brain does not receive blood and will die within 30 seconds. The brain is the driver of all other organs in the body. The breath in and out, the heart, lungs, and all other organs in the body will stop functioning. The chances of survival are zero.

[35] The doctor further testified that the likely object causing such injury should have been something that is very sharp and used with great force to cause such injury. The object should have been bigger than a knife. The doctor demonstrated that the wound was inflicted horizontally from the front into the neck structure. The doctor differentiated between a stab wound, chop wound, and an incised wound. He stated that each type of wound has its own characteristics. A stab wound is when something goes straight into the body. An incised wound is a cut superficially into the body. A chop wound is caused by a sharp object that is large going once into the body with force. He further elaborated if one swings a knife, the wound will be a cut wound. When an object with sharp edges is pushed onto the body or when the surface area of the object, usually thick, that gets contact with the skin of a person or body, it is a chop wound. The force for a chop wound is usually coming from somewhere and a person stationary, whereas where a person makes contact with the stationary sharp object and sustain an injury, it is a cut wound.

[36] The State closed its case after the testimony of the doctor. The accused opted to testify in his defence and did not call any witnesses.

[37] The accused testified and confirmed that he was arrested on 4th April 2016. Prior to his arrest he was employed to take care of the house of a certain Mr Haufeni and ploughing for him. The deceased was his girlfriend from 2008. He has 2 children aged 1 year and 2 years old respectively from the relationship at the time of his arrest. At the time of the incident the deceased was employed at a different employer and stayed at that house also at King Kauluma.

[38] On the day of the incident the accused was at the place of his employment with the 1 year old child. The deceased called him on the telephone and asked him to meet her at the road. The accused waited for a while to get dark for him to put the livestock in the kraal. After he put the livestock in the kraal, the accused left and went to the cuca

shops. He left the child in the care of other people and walked to the road to meet the deceased. On the way he met with the deceased who was already in a motor vehicle. The vehicle stopped and he got into it. They reached the cuca shops.

[39] The deceased bought a beer for her. They stayed at the cuca shop having a few drinks until sunset. The accused corrected himself after the court alerted him that he earlier stated that he put the goats in the kraal when it was dark. He stated that it was completely dark when they reached the cuca shops. They then left going home to the place where the deceased was employed. The deceased said that they must go and pass by Ms Naemi's house for her to get 'ombike' which is what is called Wambo liqua. The accused said that he did not have money but will try to get it on credit. He eventually got the liquor on credit, drank some of it and gave more or less a nippy to the deceased.

[40] The deceased continued drinking until she finished the liquor. Thereafter they proceeded going to the house where the deceased was employed and stayed. The accused was carrying the child. They walked peacefully. After a short distance the deceased started provoking the accused by insulting him. She allegedly said that the accused must not think that the bitch the accused is having an affair with is his mother's vagina. If he want to have sexual intercourse he must go do it with his mother's vagina.

[41] As they were walking the accused was in front and the deceased was walking behind quarrelling. The accused stopped at some point waiting for the deceased. The deceased repeated the same words as stated earlier. The accused testified that he pleaded with the deceased to stop and he apologized for what he did. The accused knew at the time that the deceased was referring to one Ndapewa who was also staying in King Kauluma village. The deceased was referring to Ndapewa because the accused also had a sexual relationship with her while he was in the relationship with the deceased. It was not the first time that the deceased quarrelled about the relationship the accused had with Ndapewa.

[42] When the accused stopped the deceased came towards him. The accused crossed a fence going through a gate. The deceased remained at a kraal for goats. The

accused turned to fetch the deceased to go home. He realized that she was angry. When the accused approached her he saw her lifting up a panga and saying 'You bitch you are fucked.' The accused did not see where the deceased got the panga from. He was about between 3 and half paces meters from the deceased when he saw the deceased with the panga.

[43] The deceased was in a land field. She passed through a gate and came towards the accused. The accused grabbed her arm holding the panga whilst the arm was lifted up and he was carrying the child. The accused put down the child on the ground holding the arm with the panga on the wrist. A struggle for possession of the panga ensued causing the swinging of the panga hence and forth, left and right. At some point the accused just saw blood spattering on him when the panga swung right. The deceased fell down. The accused wanted to get hold of the panga to disarm the deceased and throw the panga away and avoid injuring each other. The deceased was also struggling to get hold of the panga.

[44] After the deceased fell down she got up. The accused went a distance away. The panga remained at the place where the incident occurred. The deceased walked a few steps and succumbed to the ground. The accused called the deceased but she did not respond. The accused first wanted to go to the police but decided against that but rather to go to a place nearby because he realized that he could not leave the deceased in a condition like that. He went to Ms Naemi's place having the child. He called Ms Naemi who answered. He asked Ms Naemi to take the child because he was fighting with Hilma and it seemed that he injured her. He also asked Ms Naemi if she had a number for the police whereupon she said that she had such number. The accused denied that he told Ms Naemi that he killed Hilma and that he was going to commit suicide.

[45] The accused thereafter left and was followed by Ms Naemi and her husband. They went to the place where the incident took place. Ms Naemi and her husband went to the place but they remained about 30 meters away from where the incident occurred and where the body of the deceased was. The accused went to where the deceased was lying. Ms Naemi called the police. The police arrived and arrested the accused. The

accused stated that he never had the intention to hurt the deceased and never intended to kill or murder her. He feels bad about the incident.

[46] It is clear that there is no direct evidence in relation to the critical moment when the deceased sustained the fatal injury. This court thus needs to adjudicate the matter on circumstantial evidence and what the accused said happened.

[47] This court needs to consider if at the critical moment of executing the cut with the panga, the accused version is reasonably possibly true that he acted in self-defence. I caution myself against arm chair reasoning in the calm atmosphere of this court.

THE LAW

[48] 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.

[49] In *S v Mtsweni* 1985 (1) SA 590 (A) at 593E – G Smalberger AJA (as he then was) referred with approval to the remarks of Lord Wright in *Caswell v Powell Duffryn Associated Collieries Ltd* [1939] 3 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 . . .'

[50] The requirements of private defence as stated in the case of *S v Goliath* 1972 (3) SA 1 (A) are as follows: In order for the accused to succeed with private defence, the following requirements must be met:

- (a) The attack must be unlawful;
- (b) The attack must be directed at an interest legally deserving of protection;
- (c) The attack must be imminent but not yet completed.¹

[51] I agree with Hoff J (as he then was) where he states in *S v Mwanyekele* and refer with approval to authority reflected hereunder:

[24] It is axiomatic that the act of defence may not be more harmful than necessary in order to ward off the attack but much depends upon the varying circumstances in each case in deciding the question whether the bounds of self-defence have been exceeded. In the consideration of this question the courts adopt a robust approach.²

[25] In *Ntanjana v Vorster & Minister of Justice* 1950 (4) SA 398 (C) at 406A – D Van Winsen AJ stated the following:

“The very objectivity of the test, however, demands that when the Court comes to decide whether there was a necessity to act in self-defence it must place itself in the position of the person claiming to have acted in self-defence and consider all the surrounding factors operating on his mind at the time he acted. The Court must be careful to avoid the role of armchair critic wise after the event, weighing the matter in the secluded security of the Courtroom. . . . Furthermore, in judging the matter it must be ever present to the mind of the judge that, at any rate in the particular circumstances of this case, the person claiming to act in self-defence does so in an emergency, the creation of which is the work of the person unlawfully attacking. The self-defender is accordingly entitled to have extended to him that degree of indulgence usually accorded by law when judging the conduct of a person acting in a situation of imminent peril.”

[26] In *Ntsomi v Minister of Law and Order* 1990 (1) SA 512 (C) at 529C – D Van Deventer AJ stated the following:

¹ *S v Naftali* 1992 NR 299 (HC).

² 2014 (3) NR 632 at 636 C.

“As both Snyman and De Wet and Swanepoel point out, it would be nonsensical to require equilibrium between weapons used. An assailant selects his method of attack and picks his weapon. A victim can only employ the weapon that happens to be at hand. An offender who uses an object such as a stone to attack a policeman who is armed only with a shotgun is certainly not entitled to expect the policeman to lay his shotgun neatly aside and to take up the challenge to a fight with a stone in his hand.”

[27] In *S v T* 1986 (2) SA 112 (O) at 128D MT Steyn J stated that the true legal position is that where a person who is being attacked does not find himself in a life-threatening situation, but who can only escape mutilation or serious bodily injury by using a firearm against his attacker, he may do so and if necessary even kill the attacker.

[28] In my view, in the final analysis, and as was stated in *Ntsomi* (supra), the question is not whether there were other methods of defence which might have been successful in averting the unlawful attack but whether the method in fact adopted can be justified in the circumstances. (my emphasis)

[52] I find that the accused tailored his evidence as the case progressed and he was not consistent in his evidence. It was for instance never denied in cross-examination that when he handed the child to Ms Maemi that he said that he is going to commit suicide. In his evidence in chief the accused denied having said so. Further the accused testified that he was going back to the scene followed by Ms Naemi and her husband as if he wanted to show them the scene. The evidence of the witnesses is to the contrary. The witnesses and specifically Ms Maemi testified that the accused handed the child and turned around after he told her that he is going to commit suicide. Ms Naemi instructed her husband to follow the accused preventing him to commit suicide, not invited by the accused to show them the scene.

[53] In his cross-examination the accused did not deny that he stated that he said he killed the deceased. In his testimony he denied having said so. The accused testified that he bought liquor on credit from Ms Naemi on the date of the incident whereas Ms Naemi testified that it was on a different date. The accused did not confront her in cross-examination about the contradiction. Ms Naemi found the accused and deceased at another cuca shop when there was a discussion about the outstanding debt. There was

further no discussion to obtain liquor on credit on that day between Ms Naemi and the accused.

[54] The accused testified that the deceased was injured whilst he and the deceased were struggling for the possession of the panga. In the process the panga was swinging hence and forth, left and right. The accused was not consistent about who was in possession of the panga at the critical moment when the chop wound was inflicted. He stated that soon after the chop he had the panga in his hand and he threw it on the ground. In his evidence his hand was over the hand of the deceased with her hand holding the panga on the handle. It is a mystery when his hand/hands crept under the hand of the deceased to suddenly have held the panga on its handle. I infer that the accused was in control of the panga before the infliction of the critical wound.

[55] The doctor stated that when an object is swung to a person it will cause a cut wound. If the struggle for possession of the panga occurred as the accused testified to, one would have expected a cut wound. The wound is a chop wound aimed at a very vulnerable part of the body. In the circumstances I find that the testimony of the accused of how the deceased sustained the wound improbable. I have already found that the accused was in control of the panga at the critical moment. The only inference is that he inflicted the chop wound well aimed at a vulnerable part of the body of the deceased. It was deliberately aimed and intentional.

[56] This court must consider the nature of the weapon used, the position on the body where the injury was inflicted and forced used to determine with what type of intention the crime was committed. The wound was inflicted with a panga on the frontal neck with great force. I find that it was with direct intent to kill the deceased.

[57] In the result:

The accused is convicted for murder read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003

H C JANUARY

JUDGE

Appearances:

For the Appellant:

Mr Adams

Of Directorate of Legal Aid, Tsumeb

For the Respondent:

Mr Gaweseb

Of Office of the Prosecutor-General, Oshakati