

REPORTABLE

CASE NO: SA 69/2019

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

THE STATE

Appellant

and

RAFAEL NAWA ILUKENA

Respondent

Coram: MAINGA JA, SMUTS JA and FRANK AJA

Heard: 07 June 2021

Delivered: 02 August 2021

Summary: This is an appeal by the State against the judgment and sentences of the court *a quo* handed down on 17 November 2017 and 6 April 2018 respectively.

The accused, a serving member of the Namibian police, learnt that his wife was having an affair with the deceased, a Zambian national. After searching for the deceased utilising police resources and eventually finding him, he handcuffed the deceased and took him to his house. The accused locked himself, his wife and the deceased in the house and tortured the deceased to death. After approximately four hours, the accused's wife was able to contact the police who arrived at the house finding the deceased half naked on the floor, handcuffed on

his ankles and wrists with visible bruises and lacerations. He was taken to the hospital where he was declared dead on arrival.

Accused was indicted on three counts, namely kidnapping – count 1, murder – count 2 and assault by threat in respect of his wife – count 3. He pleaded not guilty on all three counts. Accused's defence was that the deceased consented to being transported to the accused's residence. On the other two counts, he raised the defence of severe emotional stress, coupled with anger and heavily intoxicated. After a trial which continued intermittently for over three years, during which the trial court outside the provisions of ss 77-79 of the Criminal Procedure Act 51 of 1977 and at the request of counsel referred the accused during the trial to a Clinical Psychologist for evaluation and subsequently relying on the report of the psychologist for the verdicts, accused was convicted on the three counts but on counts two and three with diminished responsibility. Accused was sentenced to one year imprisonment on count 1, count 2 - 15 years' imprisonment of which six years was suspended for five years on condition of good behavior and one year imprisonment on count 3 wholly suspended for five years on good behavior.

The appellant now appeals against the convictions of murder and assault by threat with diminished responsibility, the sentences imposed on all three charges and the failure to have declared the accused unfit to possess a firearm in terms of s 10(7) and (8) of the Arms and Ammunition Act 7 of 1996.

The appeal is noted with leave of the court *a quo*. The learned judge concedes that she omitted to consider the provisions of s 10(7) and (8) of the Arms and Ammunitions Act.

In summary, the grounds upon which leave was sought are premised on the fact that the court *a quo* misdirected itself on the convictions when it found that the accused acted with diminished responsibility on the murder and assault by threat charges in place of direct intent and the shockingly lenient sentences on the offences so gruesomely perpetuated by a police officer.

During the appeal, counsel for the accused conceded that the two convictions coupled with diminished responsibility were wrong and that on the evidence, the verdicts should have been with direct intent.

Held that, counsel for the accused correctly conceded that the two convictions coupled with diminished responsibility were wrong and that on the evidence the verdicts should have been with direct intent.

Held that, there is no evidence in the instant case that the accused at the time he committed the offences or before that, suffered from a mental illness or defect.

Held that, there was no basis laid before the court *a quo* for a referral for observation of the accused to a Clinical Psychologist. The Criminal Procedure Act 51 of 1977 provides for psychiatrist reports in terms of ss 77-79 for trial purposes. At most if the trial court was satisfied that the psychologist had established the basis for the referral, it should have made the referral then in terms of ss 77-79. The trial court could not be at large to take the course that it considered best in the interest of the accused or by inventing its own procedure to meet the case.

Held that, although it is clear that while the accused was under the influence or had taken a few beers, he knew what he was doing when regard is had to the manner in which the crimes were executed, from the hunt of the deceased, his arrest and the torture that followed, accused had direct intent to murder the deceased and required intent on the threat in respect of his wife.

Held that, the appeal succeeds, the court *a quo*'s verdict on the murder and assault by threat are set aside, and replaced with murder with direct intent and assault by threat. The sentences on three counts are set aside, and replaced with the following; counts 1 – five years imprisonment, count 2 – twenty years imprisonment, count 3 – three years imprisonment ordered to run concurrently with the sentence on count 1. The sentences are backdated to 6 April 2018. In terms of s 10(7) of the Arms and Ammunition Act 7 of 1996 accused is declared unfit to possess a firearm

for five years which order shall become operational once accused is released from custody.

APPEAL JUDGMENT

MAINGA JA (SMUTS JA and FRANK AJA concurring):

[1] In this appeal the events that culminated in the death of Christopher Chisanga Chishimba to whom I shall henceforth refer as the deceased unfolded as follows:

[2] On 28 May 2012, the respondent who I will refer as accused missed money from his safe at home. He confronted his two sons Paul and Romeo. They denied taking the money. Notwithstanding their denials he decided to punish them by spanking them. He started with Paul who was ordered to lie down and got his hiding. When Romeo's turn came, Romeo admitted taking the money. But he went on to say he was not the only one who did naughty things at home, his mother (Philna Namangolwa Ilukena) had an affair with a man called 'Chris' (the deceased) who lived in the same informal settlement Choto where they also resided and that he knew Chris' house. Accused asked Paul and Romeo to take him to Chris' house. They left and at the house they knocked. The person who could only be the deceased inside answered and said he was coming. After a while, when the person did not open, Paul who had a torch went around the muddy house. The person had made a hole through its muddy wall and ran away. At that house they collected a cooler bag, clothes that belonged to the accused, clothes that belonged to accused's wife, plates of the common home and a wallet that contained photographs and some documents. They placed all these items in a

bag, the locals of the Zambezi Region have termed 'no problem'. They returned home. Accused confronted the wife about the said goods. In the process he slapped her. The marriage which had shown cracks, deteriorated, the wife temporarily left the common home. At some point, the wife returned to the common home – accused took her to her brother where he apologized for the assault of his wife.

[3] But since Romeo disclosed the infidelity of his mother, the hunt for the deceased commenced. Although it does not come out very clearly from the evidence, it appears that accused opened a case of fraud or money laundering against the deceased, which he himself was the investigating officer. Accused was a detective sergeant in the Criminal Investigation Department (CID) of the Police at Katima Mulilo.

[4] On 20 July 2012, accused reported for work at 07h30. He attended a meeting of his unit. After that meeting he approached a colleague, Constable Ronety Lungowe Nyambe, to help him trace a suspect he was looking for when he was on standby. He needed to be driven around as his authority to drive police vehicles was withdrawn. Accused secured a vehicle from another unit of the police as the CID did not have a vehicle at that time. Accused informed Constable Nyambe that he did not know the suspect very well, they will first have to drive to Choto to pick up persons who could identify the suspect. They then drove to the house of Joseph Siyambango and wife Loveness Mwansa. According to the two, accused threatened them to say if they don't find the deceased that day there would be trouble in their home. The two obliged. The four drove to Macaravan

informal settlement (Macaravan). Accused and Siyambango alighted and went into the settlement in search of the deceased. Accused arrested a person whose name and why he was arrested does not feature in the record. The two and the arrested person walked on foot across the Transkalahari road to Old Musika which is in the north east direction of Macaravan. It is also not clear why they went there. While at Old Musika they called Constable Nyambe to pick them up at Engen Service Station. They were picked up and they drove to Cow-boy and Diary informal settlements where they conducted a further search for the deceased. When they could not find him, they drove back to the CID offices via accused's wife's work place where he asked for N\$100 from his wife which he was given. Accused bought a sim card which he used in Siyambango's cellphone to call the deceased. They called and deceased picked-up suspecting that he was being sought, deceased told Siyambango that whoever is looking for him he has left for Zambia. Accused was not convinced, they returned for the hunt of the deceased. Constable Nyambe dropped accused and Siyambango at Macaravan again and she dropped Loveness Mwansa at her home and she drove back to work. At Macaravan, accused released the person he had arrested earlier on. They left Macaravan on foot but got into a taxi in between which dropped them at Cow-boy. While conducting the search the two came upon a jail-bird accused once arrested. They enquired from this person where they could find the deceased. He directed them to a place which turned out to be Sergeant Patrick Mwikanda's residence. At this place they found the deceased. Accused arrested and handcuffed him, hands at the back. Accused said I am done, my mission is over. He took out a beer, started drinking and dancing. Sergeant Mwikanda asked accused as to what was going on. Accused said he should keep quiet, it is a long story and that the deceased

was a wanted man. Sergeant Mwikanda enquired from the deceased whether he had a case. Deceased said they will talk later. Accused, Siyambango and the deceased then left. I must pause here to say Siyambango disputes Sergeant Mwikanda's evidence on the fact that at that point accused had a beer. According to Siyambango it was after they left that scene, they went to Shakuma Bottle Store where accused bought two 750ml bottles of beer and bought one coke for Siyambango. Accused opened the one bottle and started drinking.

[5] From Shakuma Bottle Store, accused stopped a taxi that took them to Choto. Bebi Botha Lumaibile, the taxi driver who transported accused, Siyambango and the deceased from Cow-boy to Choto states that accused stopped him and asked him to take them to Choto. It was after that, when accused went to buy the two beers. Lumaibile drove them to Choto. Siyambango disembarked first and for another 500 metres in the same street accused and the deceased disembarked. Accused and the deceased entered accused's house. Accused enquired from Namafuka, one of his children who had a room outside the main-house, whether he needed something from the house as he was going to lock the house. Namafuka said no and he went and sat under a tree.

[6] Accused locked the door. In the house it was only the accused, his wife and deceased. He made deceased sit in a chair which was meant for the accused. He went in the bedroom, brought the wallet containing photos and documents which accused retrieved from the deceased's house on 28 May 2012; a chamber pot accused uses to urinate in at night, a sjambok, a grinder and pair of handcuffs and handcuffed deceased by the ankles. He spilled the contents of the wallet on

the ground, picked the photos one by one asking the deceased to explain each photo, until he came to accused's wife's photo which bore the engraving at the back 'my wife to be'. Deceased said 'your wife told me she was going to divorce you; she has filed for divorce – she is a woman I am going to marry'. Deceased explained how that photo got to him – he got it while he and accused's wife had a relationship. With that reply accused got angry, he pushed deceased to the ground and the torture began. He sjamboked the deceased hard all over the body, kicked him repeatedly with hard sole boots all over the body and jumped on him, placed a loaded firearm in his mouth. At one point he went out, called Namafuka and opened the door a little gave him money to go and buy beers. He went and brought two beers. At another point he went out to call Precious Likezo who came in and advised him to halt the assault; but he continued. Deceased who was screaming could not scream anymore. Deceased at one point asked for water, but he instead gave him his (accused) urine. When Precious Likezo went out, accused's wife wanted to go out but he ordered her to remain. He threatened to shoot her. At that moment he fell in the sofa as if he was pushed. He fell asleep holding the firearm in his hand. The wife took the gun from him and went outside and started calling for help.

[7] Detective Sergeant Chris Sibinda arrived on the scene first. He met accused's wife outside. She had a pistol which she handed to the Sergeant. He entered the house, accused recognised and greeted him. Accused voluntarily went on to say 'look I killed this person, I killed this person because he used to sleep with my wife on many occasions'. Accused was pointing to a dead body lying on its stomach. I pause here again to say it was at this point of the trial the court

ordered a trial within a trial to determine the sobriety of the accused at the time. I return to this *infra*. Sergeant Sibinda came closer to the body and he could see that the person was not breathing. He could see bruises all over the body. He decided to alert his seniors. He left and drove to (Inspector) Liomba's house. He brought him to the scene. Scene of crime unit was called, in particular Constable Ashipala arrived on the scene and many other police officers arrived on the scene. Photographs were taken of the scene. After that the body was removed and taken to the hospital. Warrant Officer Sidakwa picked up from the scene two empty and one half full bottles of beers, the sjambok, photos and wallet. Warrant Officer Sidakwa, Insp Liomba and the accused drove to the police station where they left the accused. The two left for the hospital. At the hospital Dr Adeniyi Taiwo Amos certified deceased dead. Warrant Officer Sidakwa gave the doctor the names of the deceased as Christopher Chisimba, which names she got from accused's wife. The names were used on the J88, the health passport and mortuary register. Thereafter they returned to the police station. Accused was charged for the murder of the deceased and was taken to the Ngoma police station that same evening. The items removed from the scene of crime were booked as exhibits except for the wallet and photos Warrant Officer Sidakwa kept in her office.

[8] Gerald Mainga Maila (not related), a Zambian national in the police force, arrived in Katima Mulilo on 3 August 2012. He was taken to the mortuary by W/O Munyondo. He identified the deceased by his features and gave his full names as Christopher Chisanga Chishimba and that the names appeared on the national registration card. Deceased was his uncle.

[9] Dr Amos also did the post mortem. The body was identified by W/O Munyondo as Chisanga Chishimba. The whole body was covered in abrasions of different dimensions. The cause of death was internal hemorrhage due to trauma.

[10] Accused was arraigned on three charges of kidnapping, murder of the deceased and assault by threat of Philna Namangolwa Ilukena (accused's wife) read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

[11] Accused pleaded not guilty to all three charges. After a long protracted trial which lasted over three years, accused was convicted on all charges as follows:

- a) Count 1: Kidnapping
- b) Count 2: Murder with diminished responsibility
- c) Count 3: Assault by threat with diminished responsibility.

[12] Accused was sentenced as follows:

Kidnapping - one year imprisonment which was ordered to run concurrently with the sentence for murder.

Murder - Fifteen years imprisonment of which six years was suspended for five years on condition of good behavior.

Assault by threat - one year imprisonment wholly suspended for five years on good behavior.

[13] The appellant appeals against the convictions on murder and assault by threat with diminished responsibility, the sentences imposed on all three charges and the failure to have declared the accused unfit to possess a firearm in terms of s 10(7) and (8) of the Arms and Ammunition Act 7 of 1996 (Arms and Ammunition Act).

[14] The appeal is before us with leave of the court *a quo*. The trial judge concedes that she omitted to consider the provisions of s 10(7) and (8) of the Arms and Ammunitions Act.

[15] The grounds upon which leave was sought, summed up, are premised on the fact that the court *a quo* misdirected itself on the convictions when it found that accused acted with diminished responsibility on the murder and assault by threat charges in place of direct intent and the shockingly lenient sentences imposed on the offences so gruesomely perpetuated by a police officer.

[16] Counsel for the accused concedes that the two convictions coupled with diminished responsibility were wrong and that on the evidence, the verdicts should have been with direct intent. We agree. The concession was wisely made. The concession rendered it unnecessary for counsel for the appellant to address the court on the convictions.

[17] Accused did not dispute assaulting the deceased and causing his death. His reasons for pleading not guilty on the kidnapping charges was that the deceased consented to being taken to the house of the accused, disputed the

identity of deceased as not Chisanga Chishimba but that he knew the deceased as Christopher Chisanga and further that prior, during and after the crimes, accused was suffering under severe emotional stress, coupled with anger and heavily under intoxication. Stress, anger and indulging heavily in liquor are said to have their origin when on 28 May 2012, accused discovered the infidelity of his wife.

[18] Nothing turned on the defences of the deceased having consented to accompanying the accused to his house and the disputed identity of the deceased. It is my opinion that to have relied on such defences was to turn the trial into a game. Deceased could not have consented to kidnapping. He once escaped when he suspected it was accused who was knocking on his door on 28 May 2012. His identity was not in dispute. Accused's wife knew him as Christopher Chisanga the names she provided to the police, Warrant Officer Sidakwa in particular. A document found in his wallet carried the names Chisanga Chishimba. His nephew Maila confirmed that Christopher Chisanga and Chisanga Chishimba was one and the same person. State witnesses' statements are disclosed to the defence before the commencement or during the trial. That being the case, accused could only dispute the identity of the deceased by playing games.

[19] What occupied the trial court was whether accused was intoxicated to the extent of not appreciating his actions. That court appears to have anchored its finding of diminished responsibility on the conclusion arrived at by the clinical psychologist Dr Mudzanapabwe who was called by the accused and some other

fragmented evidence on accused's insobriety before the commission of the crimes in question.

[20] Dr Mudzanapabwe's conclusions were:

- a) Mr. Ilukena suffered from significant emotional stress and provocation as noted in section 9 of [his] report.
- b) Mr. Ilukena was intoxicated by alcohol and that impaired his judgment and behavioral control.
- c) The aforementioned stressors coupled with the excessive alcohol intake are significant factors to have impaired or diminished Mr. Ilukena's ability to distinguish right from wrong and the ability to control his actions.

[21] The trial court further believed Sergeant Mwikanda who testified that at the time accused arrested the deceased he had a beer, meaning he was drinking before he arrested the deceased contrary to what Joseph Siyambango testified to that accused bought two beers after he arrested the deceased. That evidence is corroborated by Bebi Lumaibile the taxi driver who transported accused from Cowboy to Choto. The trial court further accepted the evidence that accused's alcohol abuse may have reached a level for concern on the basis that he was once seen in a bar and went to work whilst under the influence of liquor, his wife and son testified that he squandered his money on alcohol and that on 20 July 2012, the day of the crimes in question, accused started drinking whilst on duty and that there is evidence of the emotional stress, anger and intoxication on the day in

question. Consequently the court held the view that accused's actions were voluntary but persuaded that the accused's appreciation of wrongfulness was weakened substantially and therefore he acted with diminished criminal responsibility caused by non-pathological incapacity when he committed the murder and assault by threat.

[22] The report of Ms Nangolo, a State Clinical Psychologist, on the accused was outright rejected it would appear. For interest's sake, that report concluded that accused felt that his masculinity and pride as a man was threatened by his wife's infidelity and he wanted to assert control over the victim. However, anger seems to have overpowered him to the extent that he lost control which led to the excessive beatings.

[23] The verdict of murder with diminished responsibility is not clear whether accused caused the death of the deceased with direct or indirect intention or *dolus eventualis*. In every crime requiring intention the State would be expected to prove any of the three forms of intention. Diminished responsibility is a psychological factor which may be taken into account which may warrant a less severe punishment. Section 78(7) of the Criminal Procedure Act 51 of 1977 (the Act) provides that, 'if the court finds that the accused at the time of the commission of the act in question was criminally responsible for the act but that his capacity to appreciate the wrongfulness of the act or to act in accordance with an appreciation of the wrongfulness of the act was diminished by reason of mental illness or mental defect, the court may take the fact of such diminished responsibility into account when sentencing the accused.'

[24] There is no evidence in the instant case that accused at the time he committed the offences or before that, suffered from a mental illness or defect. Mental illness or defect is what was previously known as the defence of insanity. In fact when counsel for the accused sought an order from the trial court to send accused for psychological evaluation, he pointed out that he was not seeking that order in terms of ss 77-79 of the Act but that he wanted or that Legal Aid was reluctant to pay for the evaluation without a court order, which authority the trial court did not have but notwithstanding the protestation by the State on the procedure adopted by counsel for the accused, that order or permission was granted.

[25] Even in cases of mental illness or defect there must be a basis for referral for observation, namely an allegation that the illness or defect rendered the accused not criminally liable or if it appears to the court that the accused might for such a reason not to be so responsible or when it appears to the court that the accused is not following proceedings.¹ For trial purposes, the Act sanctions psychiatrist reports and prescribes how the report should be acquired.² At most in this case if the trial court was satisfied that the psychologist's report had established the basis for referral in terms of s 77, should have made the referral as provided for by that provision. As it were, there was no basis on which the trial court could have made the 'order' for a psychological evaluation unless the defence required a psychologist report or testimony of a psychologist in mitigation of sentence. To have relied on the psychologist reports for the finding of

¹ Sections 77 and 78 of the Act.

² Section 79 of the Act.

diminished responsibility caused by non-pathological incapacity was a misdirection. Referrals for mental observation/evaluation not related to sentencing are regulated by ss 77-79 of the Act. I must pause here to say accused never raised the defence of non-pathological incapacity. The court put the words in the mouth of the defence counsel. At no point did the accused raise the defence of being intoxicated to the extent that he did not know what he was doing. Again the court put those words in the mouth of defence counsel. Accused's explanation of the plea which was provided from the bar was that of 'emotional stress, anger and heavily intoxication' (sic). A person may be intoxicated yet nevertheless be able to appreciate the wrongfulness of his conduct and act in accordance with that appreciation.³ Therefore the trial court could not be at large to take the course that it considered best in the interest of the accused or by inventing its own procedure to meet the case.

[26] Against this background I now turn to the issue the trial court was saddled with. It is unnecessary to embark upon a detailed description of the evidence. At the point when Detective Sergeant Chris Sibinda, who of all police officers arrived on the scene first, was to disclose in his testimony what accused informed him about the death of the deceased, the court *mero motu* ordered a trial-within-a-trial to determine the sobriety of the accused at the time of the commission of the offences. But at the end of that trial the court failed to give a ruling stating that the sobriety of the accused would be determined on the totality of the whole evidence. But the evidence led in that trial overwhelmingly was that accused was not under

³ CR Snyman LR: *Criminal Law* 5th ed (2008) at 176.

the influence of liquor or if he was, he was not so drunk that he did not know what he was doing.

[27] Accused chose to remain silent at the end of the State's case. The evidence of accused's wife was that on 19 July 2012 after work he came home and left again saying he was on standby duties. He returned before midnight and slept at home. He woke up the next day and went to work. According to the wife, he did not smell of liquor or appear to be under the influence of liquor when he arrived at home the evening of 19 July 2012. The narrative of the whereabouts of the accused from when he reported for duty at 07h30 on 20 July 2021 is taken up by Constable Nyambe a colleague in the same department; Joseph Siyambango and his wife Loveness Mwansa, who accompanied the accused at the different locations around Katima Mulilo looking for the deceased. All three testified that they did not see accused drinking liquor in their presence. Siyambango who was with the accused until he apprehended the deceased testified that accused bought two bottles of beer after they got hold of the deceased and he started drinking from the one bottle. Sergeant Patrick Mwikanda puts that time of arrest at 12h20. Sergeant Mwikanda testified that at that point he saw accused with a bottle of beer suggesting accused was drinking before he apprehended the deceased. Upon Sergeant Mwikanda enquiring what the arrest was all about, accused replied that it was a long story and that he was dancing, saying his mission was accomplished. It is not clear whether the bottle of beer Sergeant Mwikanda saw with the accused, accused drank and finished. The evidence of Siyambango on the two bottles accused bought after the arrest of the deceased is corroborated by Bebi Lumaibile, the taxi driver who transported accused, deceased and Siyambango

from Cow-boy compound to Choto. In fact once deceased was apprehended, accused avoided to call Constable Nyambe to come and pick him up but chose to ride a taxi to his home. Up to that point, even if I were to accept Sergeant Mwikanda's evidence that accused had a bottle of beer at the time of the deceased's arrest, the evidence does not place the accused in the position of being intoxicated, to the contrary he still had his faculties.

[28] Accused arrived at home with deceased at about 13h00. The narrative at home is taken up by his wife, accused's son Namafuka, Precious Likezo and police officers who arrived on the scene when alerted by the wife. He locked out his children. Only him, the wife and deceased were in the house. In the house, accused made sure, his wife did not have access to her cellphone. He further handcuffed deceased by the ankles, in my opinion to render him completely indefensible. According to accused's wife, he then thereafter entered the bedroom and brought a wallet containing photos which he retrieved from deceased's house on 28 May 2012. He confronted the deceased with the photos particularly the wife's photo which carried the writings at the back to the effect, 'my wife to be'. On deceased's reply, that is when the torture of the deceased commenced. This evidence is inconsistent with the allegation of accused being heavily intoxicated.

[29] The torture itself was bizarre. Deceased was stripped naked; sjamboked all over the body, kicked, and jumped on, loaded firearm placed in his mouth. Deceased's penis was not spared. He would pull and bend deceased's penis. This is how angry accused was. In short, he was done to death in the most brutal

fashion. Inspector Nicolaas Veldskoen who transported the body from the scene to hospital could see faeces between the buttocks.

[30] At one point during the torture, he called his son Namafuka to go buy him beers. Accused gave him N\$27. He went and brought two beers. Namafuka testified that accused opened the door a little to give the money and receive the beers. Precious Likezo, whose house was three meters from that of the accused, testified that before and after Namafuka brought the two beers she could hear deceased screaming, the talking and whipping continuing. Much later, accused opened the door and called her inside. Accused opened the door for her and said 'come in and see the destroyer who entered into my house [meaning who has taken over my place as husband] who is in love with my wife'. Accused went further to say to her, 'maybe you will do the same to my son [nephew] as what my wife is doing to me'. She entered and knelt on the floor per the tradition of that region (Zambezi). Precious was married to accused's nephew. She could see there were still some movements on deceased's body. Accused asked her to ask the deceased his name. She was shy to do that, rather she begged the accused to cease the assault. Accused did not respond to her plea. She stood up and left. At that point she heard accused's wife saying deceased needed water. Accused refused to give him water, he instead on the testimony of the wife, accused gave him (accused) his urine to drink. When she wanted to give him water he threatened to shoot her and said to her she was going to go down with the deceased. At the time Precious exited, she testified it was the time accused's wife called the police.

[31] Precious's testimony tends to show that it was at the end of the four hours ordeal, from 13h00 – 17h00 accused had with the deceased. Precious testified that she could see that accused had taken something as his voice was pitched.

[32] Sergeant Sibinda, the first police officer who arrived on the scene confirmed that he spoke to accused on the scene and what accused must have told him regarding the death of the deceased. Inspector Liomba, the most senior police officer on the scene, also confirmed talking to the accused on the scene. In his own words he said accused was normal, he spoke normally not like a person who is heavily intoxicated. He was laughing at home and at the police station. What he could see was that accused was angry. The only incident that surprised him was that on the scene he asked Sergeant Sibinda to escort him to the toilet, but instead he took a bottle which was lying next to the deceased and urinated therein. Warrant Officer Sidakwa testified that after deceased was certified dead at the hospital, they returned to the police station and transferred accused to the Ngoma Police Station which is 68 km away but accused was awake at all times. Warrant Officer Sidakwa further testified that she retrieved two empty bottles of beer and one half full on the scene.

[33] The only evidence contradictory to the description of the evidence above is that of Simasiku Charles Matengu, a police officer whose rank was not provided and the immediate supervisor of the accused who testified that he was also at the scene and that accused was so drunk that he could not recognise him and that he was sleeping and could not open his eyes. He was so drunk and had never seen him like that before. Accused's wife attributed the condition accused was found in

by his colleagues to exhaustion, the way he went about with the deceased for four hours additional to the hunt of the deceased which commenced at about 09h00 to 12h20. Between the various compounds they visited that day they walked on foot. There is no evidence that accused drank more than four or five bottles of beer that day. Moreover, it appears that he did not have money on him that day or his money was kept by his wife. Twice that day he approached his wife to ask first for a N\$100 and then a N\$50. The allegation of being heavily intoxicated and the consultation with a psychologist was an attempt in my opinion, to hide behind the alcohol when there is no evidence supporting same.

[34] Therefore on the evidence as a whole, it is overwhelmingly clear that while accused was under the influence or had taken a few beers, he knew what he was doing, when regard is had to the manner the crimes were executed from the hunt of the deceased, his arrest and the torture that followed, was done with so much vengeance, to the extent that deceased in his dying condition when he asked for water he was instead given urine. Accused made it clear that he murdered deceased out of jealousy – indeed he was very angry and failed to control his anger. On the emotional stress, accused's wife testified that accused was stressed since the day they got married and that he was stressed for no reason. She denied that accused's stress originated from the discovery of her infidelity. The trial court discredited some evidence of accused's wife for the reason that she had an affair with the deceased. We find that, besides her admission of memory loss at times after the accident she was involved, in which almost took her life, she admitted to having had a personal relationship with the deceased, why she had the relationship and she was a credible witness.

[35] Accordingly the trial court's verdict on the murder and assault by threat and the sentences in respect of all three counts must be varied. In considering what would be appropriate sentences, I bear in mind that accused is or was a police officer who abused the police resources to settle a personal score. Society requires protection against people like accused. Further aggravating features include the brutality of the murder already set out and the deliberate manner the accused went about kidnapping and then murdering the deceased. A lengthy period of imprisonment is warranted.

[36] The order of the court is as follows:

1. The appeal succeeds.
2. The trial court's verdicts on the counts of murder and assault by threat are altered to a conviction of murder with direct intent and assault by threat.
3. The sentences imposed by the trial court are set aside and replaced with the following:

Kidnapping – Five (5) years.

Murder – Twenty (20) years.

Assault by threat – Three (3) years which is ordered to run concurrently with the sentence on kidnapping.

4. The sentences are backdated to 6 April 2018.

5. In terms of s 10(7) of the Arms and Ammunition Act 7 of 1996 accused is declared unfit to possess a firearm for five years which order shall only become operational once accused is released from custody or at the end of his imprisonment.

MAINGA JA

SMUTS JA

FRANK AJA

APPEARANCES:

Appellant:

R Shileka

Of the Office of Prosecutor-General,

Windhoek

Respondent:

P Grusshaber

Instructed by Legal Aid, Windhoek