THE STATE versus MICHAEL IVAN OXURUB

O'LINN, J

1996/02/09

Criminal Law

Abberatio ictus.

An accused who intends to kill person A but unintentionally kills person B- will have to be found not guilty and disharged in accordance with existing legal precedent, unless he could be found guilty of Culpable Homicide on the basis of negligence.

This principle need to be reconsidered.

IN THE HIGH COURT OF NAMIBIA

In the matter, between

THE STATE

versus

MICHAEL IVAN OXURUB

CORAM: O'LINN, J.

Heard on: 1996-02-01,2,5,6,7

Delivered on: 1996-02-09

JUDGMENT

O'LINN, J.: The accused is charged with the crime of murder. He is defended by Mr Christians and the State is represented by Ms Hongonekua. The indictments read as follows:

"Michael Ivan Oxurub, a 25 year old male of Namibian nationality, hereinafter referred to as the accused, is guilty of the crime of murder in that on or about 25th September 1994 and at or near Swakopmund in the district of Swakopmund the accused unlawfully and intentionally killed Emma Madam Vries, a female person."

The summary of substantial facts attached to the indictment reads as follows:

"On 26th September 1994 the deceased and one Moses Mabedi

were sitting in a vehicle. The accused came to the vehicle and jumped on the back of the vehicle and opened the passenger door and stabbed the deceased on the chest. The deceased was transported to a hospital where she died as a result of a penetrating stab wound into the chest."

This case as set out in the indictment and in the summary of substantial facts remained substantially the State's case throughout: the hearing.

The accused pleaded not guilty to the charge. His counsel, Mr Christians, gave an oral explanation of plea which appears from the following passages in the record. I quote frcm relevant parts from the record. "The accused's explanation or defence is that he will admit that he struck her with a knife, but it was accidentally." Then Mr Christians continued and I quote: "An accident, it was accidentally, in his effort to stab and injure another person, the man who was with her, who also injured him on his hand. He accidentally struck her when, in his attempt to stab another person, that is the man who was with her in the vehicle, after this person also injured him on his hand with a sharp object. The vehicle was moving at the time. The driver injured the accused with a sharp object in his hand. The accused's intention was to injure this person, this man who was with her." Then Mr Christians confirmed chat he is prepared to admit that she died because of this accidental stab wound and also the identity of the deceased was admitted.

The record of the section 119 proceedings before the magistrate was also handed in by consent as ANNEXURE B. The relevant part, of the proceeding in the form of questions and answers are as follows:

"After the prosecutor put the charge of murder to the accused and after he was warned and the nature of the proceeding explained to him, he pleaded guilty to the charge."

Then the following questions and answers appear from the record:

"Q: Did you kill one Emma Madam Vries on 25th September 1994 at Swakopmund in the district of Swakopmund?

A: Yes, and she died at the hospital.

Q: How did you kill her?

A: I stabbed her with a knife. She was sitting in a car when I stabbed her.

Q: Do you know the identity of the deceased?

A: Yes. She was my girlfriend and her name is Emma Vries.

Q: Do you know what caused her death?

A: As a result of the stab wound.

Q: Did you realise that you could kill her by stabbing her with a knife?

A: Yes, I know if one stabs another, one person with a knife that other person may be killed, but I do not know where I stabbed her.

Q: Why did you stab her?

A: I caught her with another man and I wanted to stab the

man who stabbed me first on the edge of my left hand, but unfortunately the deceased was between me and that man. I did not intend to stab the deceased. I wanted to injure the man and accidentally stabbed the deceased."

As a result of this explanation the learned magistrate entered a plea of "not guilty."

The following witnesses were called by the State to testify on behalf on the prosecution.

1. Dr R J Moisel, the district surgeon who conducted the post mortem examination on the deceased.

2. Mr Moses Mabedi who was the driver of the vehicle in which the deceased was when stabbed by the accused.

3. Ms Klasina Harabes, a cousin of the deceased.

4. Constable Clifford Molander, a member of the Namibian Police who arrested the accused after the incident.

5. James Cohan, the present investigating officer.

For the defence the accused testified as well as his sister, Clementine Sabata. In addition Mr Tommie Petrus, the original investigating officer was called by the Court acting mero moto.

Dr Moisel's main findings and observations contained in his

viva voce evidence appear from the following passages:

> "My findings were the following. There were quite severe blood staining of the clothing. There was single laceration of the right anterior chest. The laceration had straight, clearly defined boarders and it was situated six and a half centimeters to the right of the midline of the chest and **9** centimeters below the clavicle. Round about here, as I'm indicating now, the cause of that injury further down is it enters the chest wall just to the lateral side of the sternum, the breast bone above the fourth rib, so it went only through the muscles. Inside the chest cavity it went through the pleural space, the lung space, without injury of the lung and it enters the heart sac on the interior surface of the heart sac and below that it penetrated the right ventricle, the right main pump chamber of the heart where the track ended. There was blood in the pericardial sac, the heart sac and there was blood in the right lung cavity."

On questions by Ms Hongonekua that the doctor said:

> "The force necessary to cause such a wound I would describe as being moderate, the reason being that no bony or cardial structures were traversed so all the injuries I describe, all the tissues traversed were soft tissues."

It was put to him by the Court that a person could actually have used a lot of force but because of the soft tissue it could also have been done with moderate force. "So no more than moderate force was necessary?" Dr Moisel replied: "That is quite correct." Now it will be noted that in his first answer the doctor used the words "the force necessary to cause such a wound" . That does not mean that in fact that only moderate force had been used. In further answers the doctor said, "The injury does not preclude a severe amount of force . . . . . The direction of the stab was in a medial direction downwards and to the middle . . . . . My

opinion, in this specific case, would be that it must have been a stab wound because the tract of the wound is much longer than the transverse. The longitudinal length of the wound is much longer than the transverse diameter of the wound and also a cut would probably have gone across the ribs." Then he continued, "Or it would have met with resistance from the ribs and you would have seen that. So I would, my opinion would be that this is much more likely a stabbing force than a cutting force."

Under cross-examination by Mr Christians about the length of the wound and the probable length of the blade of the instrument the doctor said: "It could be smaller." This is now when he referred to the 3 centimetres width of the wounds and the possible instrument. "It could be smaller. The maximum and the minimum length, I would say, is 7 centimetres" and he continued, "It could be longer." Further under cross-examination he said, "I cannot agree that there is a really material difference in the length of the blade and the minimum length that I have specified." And on a further question by Mr Christians he said: "So under severe force an assumption I would say it would be more likely that the knife would have gone in up to the hilt, wherever it stopped."

Now in the written post-mortem report which was handed in as EXHIBIT A the doctor said under paragraph 4, page 2, the following wound was present, "Laceration right anterior chest, 3cm long, with straight, clearly defined borders. It was situated 6.5cm to the right of the mid-line and 9cm

below the right clavicle. Further cause of injury described below." He said: "Laceration described under section **4** above enters the chest wall through an incision directly to the right of the sternum and 12mm above the fourth rib. Length of this incision 3cm. Inside the chest cavity it traverses the pleural lung space without injury to the lung. It enters the heart sac pericardium on the anterior surface through an incision of 6mm. The tract of the incision enters the right ventricle main pump chamber, pumping the blood to the lungs and the heart through an incision of 10mm. The tract ends inside the right ventricle. The direction of the tract runs in an infero medio (downwards and to middle direction) . The length of the entire tract was at least 7cm but could have been as much as 15cm."

It is clear from his evidence that the blade of the knife used was at least 7 cm in length and its width at the hilt 3 cm, or slightly less, but not substantially less.

Now Mr Mabedi's evidence was to the following effect. For some time prior to the incident he had developed a relationship with the deceased. On the day of the incident he made an appointment with her to meet her later that evening. He actually met her and after certain of her friends had left who were present at some time she was sitting in a parked vehicle, on the passenger side, and Mr Mabedi was sitting behind the steering wheel and they were talking about their relationship. According to him they were not necking or kissing or hugging at any time immediately prior to the incident. Whilst they were sitting

talking the accused was noticed and when the deceased noticed the accused she said there is the person, or words to that effect and the deceased then apparently told him to move the vehicle. He started his vehicle and moved forward but before he did so he noticed that the accused had moved from roughly the left side of the vehicle to the driver's side and when the vehicle started moving off the accused jumped onto the back of the pick-up truck from the right-hand side. From that position the accused shifted to the left hand side of the vehicle and whilst still inside the vehicle opened the left front door of this bakkie, put in his hand into the cabin, of the cabin of the vehicle through the open door and stabbed the deceased who was at that time sitting straight up in the passenger side of the front seat of that particular vehicle. According to Mabedi he did not see whether the stabbing instrument was a knife or a screw driver.

Some particular points of relevance in his evidence that need to be mentioned in addition to this general picture is the following. Mabedi said: "That's right, Your Lordship, and after the accused stabbed the deceased she grabbed her, (it means him), on his hand. Your Lordship, in order to avoid that he, she couldn't stab her the second time or again." He said that at that time the vehicle was in movement, but very slowly. He further said that then the accused jumped from the vehicle and ran away. As to why he did not see precisely what the weapon looked like. He said, "I saw an object in the accused's hand, Your Lordship, but most of the time I was looking forward, or in front, and **I**

could not make out, Your Lordship, whether it was a knife or whether it was a screwdriver." Then he was asked whether the accused said anything to him or to the deceased before the stabbing and he said, "Nothing, Your Lordship." It was put to him, and yes, he was asked was there any fight between you and him and he answered, "No, not at all, we didn't even talk to each other." It was then put to him, "And if the accused person says that you first stabbed him and he wanted to stab you, that's why he accidentally stabbed the deceased, would that be a correct version?" and Mabedi replied emphatically and firmly, "Then he will be lying, Your Worship.". He was asked about the alleged kissing and hugging and he said, "No, I didn't kiss. I did even not hug her, Your Lordship, and she was not even seated against me, Your Lordship, or next to me." As to what the deceased had said immediately upon noticing the accused before the stabbing the witness said, "She said, Your Worship, here is the person. She said watch out, drive, here's the person" and when it was put to him by Mr Christians. "Yes, she became frightened. She told you to drive off because she was scared. She knew there might be trouble, this is her boyfriend," he said: "Yes, Your Lordship, I drove off for the reason that it wasn't my vehicle, Your Lordship, it was my work vehicle, Your Lordship." As to this point it later became quite clear that he wanted to get away from the accused and in his mind there were two considerations and those were that the deceased was afraid and she suggested he must drive off and at the same time he knew he was using his firm's car and he did not want any incident to happen which may damage the

vehicle. And basically for those two considerations he pulled away and he pulled away slowly and he drove slowly, relatively slowly until the deceased was actually stabbed.

During cross-examination Mr Christians put it to Mr Mabedi that the accused had actually jumped onto the vehicle, "he actually dived into the vehicle, into the back." And the Court wondered what that might mean and the Court asked, "He dived into the vehicle?" and then Mr Christians did not manage to explain what he meant by diving onto the vehicle, but the witness, Mabedi, reiterated that the accused jumped cnto the vehicle. The other term used by Mr Christians was that "he threw himself onto the back of this pick-up" and it's that proposition that he followed up, that the accused actually dived onto the vehicle. Mr Mabedi further affirmed that the doors and the windows on both sides were closed on the relevant day, but the doors were not locked. He also explained that it was not a hot day in Swakopmund and at a later stage that the wind was blowing to some extent. It was put to him by Mr Christians that he had pulled away at great speed and was driving in a zig-zag manner, trying to get the accused off the vehicle and Mabedi again reiterated "**I** didn't pull away on a high or fast, **I** didn't drive in a zig-zag manner." **I** pulled away slowly, turned the car and **I** drove ahead, nor did **I** attempt to drive or to yes, to drive the accused off from the vehicle."

Then, on the issue of where the deceased was sitting at the particular stages it was put to him that if the door slammed closed when he turned the vehicle it must have been as a

result of the turning and the witness agreed with that. Then it was put to him or he was asked where the deceased was sitting at that stage, that is when Mabedi turned the vehicle and Mr Mabedi said "she leaned" against me. He explained further: "Your Lordship, from the time I started driving the deceased was seated straight up. At the time **I** was making this turn up to the stage when the door slammed closed, it's then when she leaned against me, Your Lordship." In his further evidence in explanation he said that he thought "that she became weak and that this is the reason why she leaned against me." This statement must be seen in the context of .a fact which is common cause or not in dispute, namely that the deceased at that stage had a fatal wound and that she was helpless in due course. She was carried into the hospital and she was probably unconscious and died soon afterwards. Then the witness said: "The accused jumped, Your Lordship and after he jumped off, it's when I drove the vehicle and made a turn, Your Lordship and in the process of making a turn **I** looked in my rear mirror and in this mirror, it's when I saw the accused standing, however I couldn't see the object he had in his hand." Then Mr Christians put it: "Yes, it is like I have it. He in fact, he fell on the ground, he fell flat on the ground and thereafter he stood up." So that was a propositioning put by Mr Christians, that the accused fell flat on the ground and thereafter he stood up. And again the witness reaffirmed that the accused actually jumped from the vehicle and he saw him running, but he does not know whether he actually fell flat after jumping from the vehicle. He also explained that "What I said is that

accused jumped while the vehicle was in a standstill position and when I made the turn I looked in my rear mirrors and at that stage it's when I saw him then running." And later on he explained on further questions "Your Lordship, after he jumped off I again looked in my mirror and I saw him running, Your Lordship, I don't know whether he had fallen flat to the ground or what." And he also explained subsequently that in the cabin of the vehicle there is a rear mirror, a rear view mirror actually and through that one can see what's going on the back of the vehicle. And he also explained that on occasion he looked into the mirror, the rear view mirror to see and sometimes he actually looked backwards. Mr Christians also put to him "So if the accused say that he did not jump off the vehicle, he fell, you cannot, you are not in a position to dispute that. Do you agree with me?" And the answer was, "Yes, Your Worship, I don't know whether it is a misunderstanding between me and the interpreter but I will repeat once again that when one is in a vehicle, Your Lordship, one can look forward, quickly backwards and it's through the rear view mirror as well and one in that short time, Your Lordship, ycu can see what's happening on the backside of the vehicle." It was put to him that the window was not closed, the window was open and "the accused leaned over to your side, shouting to you to stop." "Thereafter", according to Mr Christians, "he put his hand through in order to pull out the keys, but you stabbed him with something on his hand." The witness denied that and subsequently Mr Christians indicated that there was some mistake about this and that actually the accused did not try and pull out the keys. Mr

Christians also put the actual way in which the accused allegedly leaned over and leaned into the vehicle as follows and I quote from page Gl of the record: "Yes, he moved to the left and then he got hold of this rail and he leaned into the vehicle. The door was never open. The window was open and he leaned through the window and he pushed his arm through and at that stage the deceased was sitting right next to you, against you." Now that question gives the impression that, according to the defence, more than the arm was put through the window, because Mr Christians said "he leaned into the vehicle, he leaned through the window and he pushed his arm through." It was not just an arm pushed through, but apparently the person leaned through the window and put his arm through. And what is important furthermore is that Mr Christians at this stage emphatically put it to the witness that the deceased was sitting against him at that time and the Court even repeated for emphasis this proposition. The Court said: "Against you? You were close together, she was sitting against you at the time when accused put his hand with his knife into the cabin?" Mr Christians said: "Yes." And then the witness said: "Your Lordship, the windows were closed. The deceased was not sitting next to me. I already indicated to the Court where and at which position she was seated." And then Mr Christians continued, again using this strange expression. "And while leaning through", that supposes with his body, to seme extent, "he was at that stage attempting to stab you, to injure you because you also hurt him on his hand and you were driving in a swerving manner, a zig-zag manner when he made that stabbing movement towards you." So there were two

clear propositions again, he was leaning through and that the stabbing movement, the stabbing was carried out when, at the time of the stabbing, the witness Mabedi was driving the vehicle in a swerving and zig-zag manner. Mabedi said, "No, Your Lordship, the accused is lying, Your Lordship. He was not of the intention of stabbing me, he was of the intention of stabbing the deceased, Your Lordship, as he did stab her." Mr Christians placed his proposition beyond any doubt when he repeated as follows and I quote from page 61: "And while in his attempt to stab you he had a knife like you indicated and he made that movement, because you were driving zig-zag and when he stabbed, the knife accidentally moved this side and he stabbed short. That's why he stabbed her on this side." It's clear from that that the defence's version at that stage was is that the stabbing took place at the time when the vehicle was moving zig-zag and this was the cause, one of the causes why the accused stabbed short and so hit the deceased instead of the driver. And strangely enough this came through again and again. So e.g. Mr Christians said: "Yes, I can tell you what his intentions was because you cannot say he wanted to hurt you, that's why he came around the vehicle to you and when he entered, when he leaned into the vehicle, he wanted to hurt you. You cannot say that that is not the truth." So this leaning into the vehicle appears to be something quite different from just saying he pushed or put his arm into the vehicle. Because if it was only his arm and not more of his body leaning into the vehicle or the rest of his body or part of the rest, you would simply only have said time and again, he put his arm through the window. Up to that stage

of all this cross-examination and putting the defence's case, Mr Christians did not put to this witness that the accused was actually sitting with his backside on the side, with his backside hanging over the side of the vehicle, with his head on top of the cabin and with only his arm going into the vehicle. The later version of his head "on top of the cabin" appeared to be an attempt to explain the so-called "accident" by alleging that he could not see inside the cabin.

Klasina Karobes is a cousin of the deceased and when she testified she told the Court when the matter was reported to her she looked into the car and saw: "The deceased actually seated in a fold-up position on the left seat, lying towards the driver. Leaning with her head towards the right side." According to her the deceased was still sitting on the left side but she was in a collapsing position, fold-up position with her head leaning towards and against the driver and she explained that the accused at that time was still breathing, but she was grumbling. I suppose what was meant was that the deceased was rattling and was unconscious. The witness further testified that she saw the accused later that evening at the hospital and as to his condition she testified: "Your Lordship, his speech and his appearance was normal and he appeared normal to me. Even the way he walked was normal, Your Lordship." She also said that he never, in her presence or at any stage said that the driver had stabbed him. Mr Christians questioned her about the relationship between the accused and the deceased and he wanted to have her assurance of how intimate and good this

relationship was. Mr Christians put it this way. "Now, according to what you know about the relationship between the accused and the deceased and from past events and happenings, what would you say, do you think something like this was possible? That the accused would at a certain stage go to such extremes as to kill the deceased or can't you say?" And immediately the witness said: "Your Lordship, actually, in fact, the accused was assaulting the deceased." And the Court said: "What?" and the accused said "The accused was assaulting the deceased on occasions, Your Lordship and also however I didn't see it myself, but she used to come and report it to me and on an occasion he also stabbed her with a knife on her arm, but she didn't report it to the police as well." Now, it was clear that Mr Christians was taken aback by this evidence and he immediately said "but accused will deny this." He says it never happened, he never fought with her, he never assaulted her previously. And the witness said: "Your Lordship, actually I didn't involve myself in their relationship, Your Lordship, so I (indistinct)." The Court pointed out to Mr Christians that he actually opened up this evidence which was now given. I must point out at this stage that obviously, in view of the fact that this witness did not see these assaults, her evidence is in the form of hearsay, but in a sense it's relevant, because she was asked her opinion about the allegedly wonderful relationship between the accused and the deceased. And what is admissible in that evidence is merely the fact that the relationship could not have been that good because the deceased had accused the accused of having assaulted her. So it's not the question

of the truth of the fact of the assaults, but the question of the type of relationship, in the sense that whether true of false, the deceased had complained and made allegations about the accused and the mere fact of those allegations that she made, indicates and is admissible evidence that the relationship could not have been that good because whether these allegations were either true or false. Even if it is accepted that they were false, it nevertheless showed that the deceased made that type of allegation against the accused before the incident and that means that, as far as she was concerned, the relationship was not that good.

Clifford Molander was the policeman who arrested the accused cn the evening of the incident. He saw, according to him, no wounds on the accused at the time of the arrest and thereafter he saw no blood on the clothes of the accused and he described the condition of the accused when he arrested him and when he dealt with him as very normal. Now it "is true that Mr Christians managed to indicate that this witness had a bad memory and could not be relied on. This witness, for instance talked about 2 wounds and sometimes about 3, 2 of which were apparently covered with plaster and seme bandages on the body and on the neck. More particularly he mentioned that the wound on the neck was covered by plaster. Now that may indicate that he is completely confused about the identity of the victim. On the other hand he testified that the nurses were trying to resuscitate, to save the deceased and it may just be that the plaster which he saw on the neck has a simple explanation namely that the medical staff may have given the

deceased some injections or done something surgical to try and assist her and to try and resuscitate her. So although the Court agrees with Mr Christians that this witness apparently had a bad memory and cannot be relied on, one cannot completely ignore his evidence as to the condition of the accused on that evening and whether or not the accused showed him any wounds and gave him any explanation whatsoever. Mr Christians put to the witness: "Are you quite sure about that? You remember not seeing any injuries on the accused?" "It's correct, Your Lordship." "Did you ask him whether he had any injuries?" "No, Your Lordship." So for what it's worth he did not see any injuries. He couldn't remember having seen any. And as far as this witness is concerned accused also gave him no explanation after he had warned the accused in accordance with judge's rules.

The witness James Cowan is not of any importance and no relevant evidence was given by him.

Now the accused testified. Obviously his evidence, his explanation is crucial. He seemed to accept that the deceased told the driver that he should drive off and the accused said: "She strutted because she got frightened, Your Worship or in a frightened manner." So it is quite clear that he accepted that the deceased was frightened. Then, according to the accused, he not only talked to the driver when he was standing on the right hand side of the right hand window of the vehicle, but after he, the accused, had shifted on the back of the bakkie, from right to left,

he again spoke to the driver and he said, "Well, let's talk or not." And then he continued: "Then I take out my knife, I hold on the-bar with my right hand, I put in my left side hand with the knife in order to stab the man. I then stabbed the deceased and when he turned I fell off from the car." It's quite clear from this that there were two occasions when, according to the accused, he spoke to the driver. And then the accused said: "At the time I stabbed the car was, as your witness indicated, driving in a zig-zag manner" which was in line with the position taken by Mr Christians in cross-examination. Then the Court asked the accused, "Why did you stab when the car was going in a zig-zag manner? Why did you stab?" And the accused said: "Before I stabbed the car was riding straight, at the time when I said he should stop the car and this way I came to think that, at the time that the car started moving in a zig-zag manner I thought that I had stabbed the man." So that seems to indicate that, according to the accused, after he had stabbed, the vehicle went in a zig-zag manner and because of that he thought that he had stabbed the driver. In other words the zig-zag driving was now caused by the fact that the driver was injured. This came out later again. The Court asked him: "I thought you said a moment ago that you stabbed, when I asked you why did you stab when the vehicle was going in a zig-zag manner, you said but you stabbed when the vehicle was still going straight." And he said: "Yes, Your Worship." The Court said: "Is that correct?" And he said: "It's correct, Your Worship." Then the Court tried to get some clarity on this ambiguity and the Court specifically asked him again, "But when you

actually stabbed, is it right that you said when you actually stabbed the vehicle was going straight and not in a zig-zag manner at that stage?" And he answered: "That's right, Your Worship, it was moving straight." And later on he said: "Your Worship, actually at the time I was in the car, at the time I was in the car and I put in my arm into the cabin side I couldn't see there." And he further said: "I couldn't see inside the cabin" and he continued: "And by then the deceased led", (that means in correct grammar, "was leaning towards the man,) Your Worship, the time perhaps when I put in my hand." Then the Court asked him: "We have got it now. Can we accept now that when you stabbed a person, whoever it was, the car was going straight and had not yet started to go zig-zag?" "That's right, Your Worship, it was moving straight." "And you say you stabbed, ycu couldn't see who you stabbed because it was dark?" "It was dark, yes, Your Worship." And then, on further questions he said: "They were both seated on the sides, Your Worship, of the vehicle and just before I placed in my hand, it is when she moved to the side of the man, of the driver." "So at the time you put in your hand to stab, according to you, she was sitting close and against the driver?" "It was the time when she started shifting, Your Worship, towards him." So that now is the further point which became clear, that the allegation at that stage was that the deceased was sitting next to the driver at the time of the stabbing and had shifted towards that position just before the accused had placed his hand through the window with the knife. But then at a later stage on questions by Mr Christians the accused said: "I was very aggressive,

Your Worship, very aggressive." And later on the question was "And after you stabbed, what happened?" "It's when the car then moved in this zig-zag manner, Your Worship, made a turn, I fell off from the car." Now here again it becomes clear that his case there is that the zig-zag movement began after the stabbing.

The accused also testified that the injuries he sustained was an abrasion and at one stage he said it is the ones between the knee and the "bobeen". He later said, when he dealt with what he told his sister shortly after the incident: "I told her. that I found my girlfriend with another man and that the man injured me with a sharp object on my hand and that I stabbed a blow into the car, but I dcn't know if anyone had been injured." It was then, to make it clear again, the Court asked him: "So at that stage when you told your sister the story, you did not know whether anyone had been injured?" "I didn't know, Your Worship." Then on further questions, he said: "There was no blood on the knife. If there would have been any blood there would only be blood from the injury on my hand." Now that's a strange answer, because anyone would know that if ycu stab somebody and you pull out the knife there could be blood on the knife as well as on your hand, particularly if you pushed the weapon up to the hilt into the body of the victim. And there he said: "There was no blood on the knife as I've indicated." A moment later he said: "There was blood on the knife, Your Worship." And the third effort was he didn't look at the knife, it was dark, so he doesn't know.

And about what happened to the knife on questions by his counsel he said: "Your Worship, there at the scene he asked me where the* knife is and he took the knife." So the allegation is that the original investigating officer, Mr Petrus, at the scene of the alleged crime asked him for the knife and Petrus then took the knife. So the issue of whether or not Petrus raised the question of the knife is quite clear. It's common cause therefor that Petrus must have asked for the knife and that, in fact, he did visit the scene together with Petrus. Petrus is also referred to as Sergeant Thomas. And as to the wounds he said he showed this Sergeant Thomas the wounds, but Thomas said it is not serious.

Mr Christians asked his client, the accused, did you want to kill him and the answer was: "No, I just wanted to injure him as he injured me." And he continued by replying to a question as follows: "Actually I stopped him and actually I wanted to ask this man as to what is the relationship between him and the girl." And then he gave the following explanation for jumping onto the vehicle: "Actually the woman, this lady was under my responsibility, Your Worship, and if they could have driven off and anything happened to her then they will come to me." So that is his explanation for jumping onto the vehicle. When he was cross-examined by Ms Kongcnekua on what was his intention on jumping into the car, he said: "I only wanted my girlfriend, Your Worship." And then further, the question was put to him "So what were you going to do?" and the answer was "Thus for her to tell me as to what the relationship between her and the man, and

then we can then separate also or end up our relationship." How this fits into an allegation that he was very angry and the fact that*it was common cause that he never spoke to his girlfriend when he was at the left of the vehicle, before he jumped onto the vehicle and also, he never spoke to her when he shifted to the left before he stabbed her. The accused admitted that the driver actually looked backwards on occasions. The accused said in response to a question "Your Lordship, I could see he was looking backwards and continued driving." The accused also said that actually he, (the accused) had a long arm and "If I just sit on the edge of the vehicle and place my arm into the vehicle I can reach him easily." On questions by Ms Hongonekua he said that "What I said is, at the time I placed my arm into the car in the cabin I don't know, perhaps at that stage the deceased shifted towards the man, but what I can tell is the time I arrived there at the car the deceased was seated towards or against the driver, Your Lordship." Now that appears to be an explanation that he actually did not see the shifting and the sitting of the deceased against the driver and therefor the Court attempted again to make absolutely clear what the accused is trying to say. This happened in the following way. Ms Hongonekua put it the accused as follows: "So you could see them?" And he answered: "Your Lordship, at the time I opened my knife, but the time I placed my arm into the cabin she moved or shifted to the man's side, Your Lordship." And the Court then asked: "That you saw?" and the accused answered: "Yes, I saw it, Your Lordship." And Ms Hongonekua asked: "How did you see them? Was it through the windscreen or through the left hand side window and the

answer was, from the rear screen, Your Lordship." So now it was again placed beyond doubt that he saw this movement, he saw her sitting in this position next to the driver and he saw this through the rear screen, that's the rear window of the vehicle. He again explained that he placed his left arm into the cabin of the vehicle "and I stretched my arm to full length" and that the width of the vehicle is not that wide. Now he made it clear that, according to him, he was sitting inside the bakkie, but on the side of the bakkie at the time when he stabbed. And then on a question by the Court he said: "I went up, say up to the shoulder." So the part of his arm he put into the vehicle was, according to him, right up to the shoulder. In other words, not the shoulder put through the door or the window, but up to the shoulder. And that was further clarified by saying the whole arm. If was now quite clear that according to him his head was on the cabin and so, for that reason he could not see inside. He explained why he wanted to stab this man. He said: "What I wanted actually to state is that this man stabbed me, I wanted to injure him as well." And on further questions "I wanted to take revenge." Ms Hongonekua put it to him "And during your evidence-in-chief you said that you could not see inside the cabin because it was dark. Is that what you said? You remember that?" "It's what I said about 5 to 10 times, Your Lordship." Now one must keep in mind, if he couldn't see into the cabin because it was dark, that's a different thing from saying that he couldn't see into the cabin because at the crucial time his head was on top of the cabin. He also said "It's what I said about 5 to 10 times, Your Lordship." He was emphatic that he couldn't

see inside the cabin because it was dark. The Court asked him: "What" and he answered: "That is what **I** said about **5** co 10 times."- Ms Hongonekua then said: "That you could not see, it was dark?" "That's right, Your Lordship." And then he explained again that the time when he couldn't see because it was dark was when he put his arm into the cabin. And then he said he could not see then because his head was above and that's why he said he could not see. Then later on he again said that he would correct himself: "As my head was on top of the roof or higher than above the roof, Your Lcrdship, I could not see what was their positions inside the cabin." And he was. asked: "So the question is simply, was it then incorrect when you said that she had shifted up to a position next to and against the driver?" Answer: "It was not correct, Your Lordship."

As to what he told his sister, he said, "What **I** told her is that I found my girlfriend with another man. I was struck with a sharp object on my hand, but I also striked once into the cabin of the car, but I don't know if I did strike anyone." And then, belatedly, on a question by the Court he said: "I wanted to strike him on his left arm, Your Lordship, on his left arm." He was asked "Are you saying then that you didn't care whether you would inflict a fatal wound or not, because you were angry?" And his answer was: "It was just one and the same. If I would have fallen from the car and died or even if I could have been nearer and he would have stabbed me." And he was warned: "Can you try and answer the questions. It's very important to concentrate on what I ask you and to give your best possible

answer and a true answer, can one then accept that you didn't care when you stabbed? You didn't care whether or not you inflict a fatal wound, a wound from which a person could die?" The answer was: "I knew that a knife and a weapon or a firearm, Your Lordship, could kill a person." "So when you stabbed you knew at the time that you could kill a person by stabbing him?" "No, I didn't know, Your Worship." And then about what he said before the magistrate, he said the following: "Your Worship, the manner in which I answered the questions actually comes up due to the fact that I didn't see where I exactly stabbed her or where I struck her." The Court the asked the accused: "And even today when I asked you a few minutes ago the question, you made it quite clear that you realised that if you stab a person with a knife that person can die?" It's correct, Your Worship. Then the question was put: "Yes, now that is so, on what ground do you say that you didn't realise that one of the persons could die as a result cf your stabbing?" And the answer was: "Your Worship, what I said is I didn't know that I struck anyone." So that answer was obviously completely evasive of the crucial issue. The Court also asked him, "But you know your body and you know the vehicle there, did you have any ground to think that you could in that way ensure that you would strike the driver?" And the answer was: "I wanted to do it like that, I wanted to strike him, but it happened like that, Your Lordship, now how can I put it again?" And then he said: "But I don't know how it came that she ended being there, I didn't stab at a short distance in order to strike her." And on a further question: "But did she move towards

the driver?" the answer was: "That I cannot tell, Your Worship." Mr Christians asked him: "And now, just in conclusion, now when you executed this stab wound towards the driver, did you know at that stage exactly, precisely, what is now marked off space where he was sitting or what did you think, what was your consideration?" "No, **I** cannot tell that, Your Lordship, because I was opposite and I only placed in my arm." And then further, the Court followed up the question and he then said: "Your Lordship, but I conclude that the lady was on the left side and the man on the right side so I placed in my arm in the cabin and I screeched my arm towards him." A further questions was now: "When you reached out, did you at any stage touch the lady there, when you reached over or whatever. If you had stretched out, did you at any stage come into contact with her, your body?" And he answered: "Your Lordship, **I** felt something here as the witness indicates, somewhere here on the upper arm. It's where I felt something." And the Court noted: "He now demonstrates on the inside of the upper arm from the elbow higher up, there he felt something." Now, it must be noted at this stage that that cannot be true, because we know that the deceased was actually stabbed. So the front part of his forearm must have been across her body when he stabbed in actual fact and his allegation that he felt something from the elbow up to his shoulder is apparently just another effort at deceiving the Court.

The issue whether he would land on his back and not on his knee or on his feet if he fell backwards, as to that he explained "After I struck with the knife inside and actually

it was at that stage when I removed my arm at the stage when the man also started driving in a zig-zag manner, it's when I fell out from the car." And then he came with another explanation that actually what happened is that when the car started turning zig-zag, driving in a zig-zag manner, he fell not backwards over the side, but he first fell backwards into the bakkie and that is how he now attempted to explain that he wasn't actually falling backwards over the side, he was falling backwards into the bakkie at first. And that was, it seems, a fabrication just to explain why he didn't fall flat on his back or on his side. If this was so, the version of the driver, Mabedi, that he jumped off the vehicle becomes even more probable.

Now that concludes the main elements of the evidence of the accused. His sister, Clementine Sabata testified that she was a nurse and that the accused, apparently shortly after the incident, came and told her that he had injured someone, that he found his girlfriend with another man in the vehicle and that he had also injured someone as well. Note, not that he may have injured somebody, but that he in fact had injured someone as well. What is further significant is that in her first evidence she said, "I asked him actually as who he injured and how he injured that person. He told me that he stabbed the girl or the man." In other words he stabbed somebody but he doesn't know whether it was the girl or the man. He didn't say that he thought he had stabbed the man. And then, according to her, she told him that he had better wait for the police if those are the circumstances and he indicated that he would go to the

police station himself but he never did so. Then she testified that she saw blood on his left hand and that he had an injury on the hand which was bleeding and she actually cleaned up the blood and tied his hand with a handkerchief. She says there was also an abrasion on his leg. Then it turned out that she was in Court for most of the time, at least when all the crucial points of the evidence of the accused were made. This came up because the Court actually noticed her sitting in the Court whilst the accused was testifying and raised that issue with Mr Christians and with her. According to Mr Christians who gave an explanation to the Court, he had told the witness to be outside, precisely at what stage is not quite clear. According to this witness, Mr Christians actually walked up to her in Court and told her to go outside at the time when the accused was actually testifying. Now, the Court put on record that the Court never noticed that Mr Christians stood up whilst the accused was testifying and that he had gone to the back of the Court to warn the witness to go outside. All this doesn't mean that I do not accept Mr Christians' assurance that he at some stage or other warned the witness to be outside. The point is just that it seems also quite clear that she was in Court at all the crucial stages of the accused's evidence and that may detract from her evidence, because it was her brother, he was charged with a serious crime and now she knew what points he made in his evidence here in Court. It was also strange that when it was put to this witness that surely a person who puts a knife into another person's body and when you know the knife had gone in deeply and in the upper part of the body and he withdraws

that knife there should be blood on the knife, on the blade and she said no, she is not trained for that. She can't say whether there would be blood on the knife. She again reiterated that the accused actually told her that he had stabbed someone and that makes it then clear that what he told her, according to her evidence, was that he had stabbed someone, but he doesn't know whether it was the one of the other. Now unfortunately for the State, Ms Hongonekua who possibly did not have the evidence before her properly recorded or noted when she put her question and she put it to this witness that the witness had said that "When the accused came to you he said that he had stabbed someone, the man whom he found with his girlfriend. Is that correct?" Now that is not what the witness had said. But nevertheless, Ms Hongonekua put that incorrect version of what witness Sabata had said to her and Sabata then said: "That's right." Then subsequently she again gave the answer: "Your Lordship, upon his arrival, while I was still interrogating him, he told me that he stabbed someone." And then she held onto the answer given to the leading question by State counsel, namely that "He told me that he stabbed a man." And it also appeared then, according to this witness' evidence, that the accused had not told her that he found the deceased and driver in a compromising position, kissing or hugging or anything else. One would have expected that the accused would tell her why he was so angry and that is, namely, that he found them hugging and kissing if in fact they were hugging and kissing when he found them.

Now, the Court called the witness, Tommie Petrus, who was

the original investigating officer and who was at the time a member of the Namibian Police force, but at the time he gave evidence he was no longer in the police force, but employed by Transnamib. Now this witness was called to tell the Court about the knife and about whether he saw any wounds or injuries on the accused. His evidence was absolutely emphatic about these two things. He said that, as to the knife, he requested the accused person to hand the knife over to him, but the accused had said he threw it away. They went back to the scene to look for the knife, but they couldn't find it. Then he also indicated that that is the usual procedure .that if somebody admits that he had scabbed somebody with a knife, he as a policeman, immediately asks him for the knife. And furthermore that is what he did on this particular occasion. He asked him for the knife and that is not in dispute. And then he explained that what he would have done with the knife is that he would have booked it in at the police station as an exhibit and afterwards he would have taken the number of the exhibit book and he would write it on the docket and that was the usual regular procedure. He also said as to the wound that accused couldn't have had a wound on the left side of his hand, because after arrest and probably within 48 hours he took his fingerprints and in addition one of the forms of prints that they take in murder cases is this side of the palm of the hand of a person and if there was any injury or bandage or anything like that, he must have noticed it and it would have impeded the taking of those fingerprints and palm prints. It is true that it was pointed out that the actual prints received back does not show that the side of

the hands were taken or were printed. Some enquiry was made and it turned out that no such record is available. However, this witness, when he was confronted by Mr Christians, explained that, although the print before the Court was taken some two weeks after the arrest, almost the same time or approximately more or less the time when accused appeared before Court, that was not the first time the fingerprints were taken and this was a second set of fingerprints. That the original set was taken at the normal time just after the arrest and was sent back because they were improper. And on further questioning he said that the accused knows that he had taken the prints the second time and he told Mr Christians that he could ask the accused and the accused would confirm it. He said that the accused actually asked him: "Why do you want to take my fingerprints again? And he explained to the accused that the first set was not in order and therefor he had to take the second set. Mr Christians did not however put it to his witness that his client denies that. Mr Christians also refrained from asking his client, the accused, whether or not it's true, as alleged by the witness Petrus, that the fingerprints were taken a second time and that the accused actually queried that. So it seems to be beyond all doubt that the fingerprints were taken a second time and that the fact that no record can be found of the prints of the side of the palm, does not detract much from the assertion and the evidence of the witness, Petrus.

The Court also held an inspection in loco where the accused had to demonstrate the various positions he took up at the

time when he first moved to the right of the vehicle, at the time when he jumped onto the vehicle, at the time when he shifted from right to left, at the time when he put his hand into the vehicle with the knife and when he stabbed. It was clear from the inspection that the accused at no stage dived onto the vehicle. It was also at least clearly established that even if he put in his arm and his hand into the vehicle, straight up to the shoulder with his head leaning on the furthest edge of the cabin on the left, then he could barely reach a point a few inches across the middle line of the seat and that position would be at least 6-12 inches short of the side of the driver. If he stood inside the vehicle or sat inside the vehicle and not with his buttocks across the side, then the possibility of reaching the middle would even be less and less and when, if he stood up straight when he stabbed into the cabin, then his ability to reach further than the seat of the passenger, would be non-existent. So it is a fact then that at best for the accused he could not have managed to stab the driver, not even on his left shoulder as he stated at a very late stage of his evidence and examination. That obviously does not mean that it was impossible for him to have contemplated that he could reach that person and that he could reach the driver, but the fact that it was in fact impossible makes it improbable that he ever thought that he could reach the driver in the way he alleged he intended to reach the driver.

Now, my observation of the various witnesses are as follows. The State submitted that the eye witness, Mr Moses Mabedi was an excellent witness. The response of Mr Christians was

a bit uncertain. He first hesitated to refer to any points where the witness was unsatisfactory. However, what can be said without -doubt is that he was not unable to make any convincing submission about the untrustworthiness of the witness Mabedi and why the Court should not accept his evidence in the context of all the other evidence. The Court is in full agreement with the State that the witness, Moses Mabedi was throughout an excellent witness. He was firm, he answered questions very well provided those questions were clear and not ambiguous. He answered those questions with conviction. So he appeared in every way to be a very reliable witness and the Court was impressed by this witness and has no reason to doubt his veracity.

The witness Klasina Harobes, the cousin of the deceased did not testify about very crucial points in dispute. She however did not see any injuries on the accused and he appeared normal. Now if, by then, the accused had a bandage around his hand or was bleeding, she should have seen that. It was not suggested that she was lying when she said that his appearance was normal, he walked normally, his condition was normal.

Constable Clifford Molander, although he was only the arresting officer, would have noticed if the accused had an injury, had a bandage and if the accused suggested to him or told him that he was injured by the driver. Of course it is possible that in the light of the fact that he handed over the accused to another investigating officer later that evening, that he did not give the matter his full attention

and he may be mistaken as to whether or not the accused had given him an explanation and had shown him wounds and so on.

The accused, as I have indicated, shifted his evidence and the basis of his defence repeatedly. The reason how it came about that he stabbed the deceased, given by him, was ambiguous and contradictory from time to time. There were stages when, according to him he saw the deceased actually sitting next to the driver and close to him and that was just before the stabbing and he actually saw that. It seems that he then, from time to time realised that this is a dangerous statement to.make because then it would be said that if she was sitting next to the driver then surely he must have known that his blow could strike her. And then his alternate position was to say well, I didn't see that, the last time I saw her she was sitting on the left and so on. This story about how he sat on the side of the vehicle and how he leaned into the vehicle with his arm and tried to scab the driver on his right hand side is completely improbable. He was not drunk, he was not out of his senses at the time, according to his own story and according to all the available witnesses and how he could have thought that he would strike the driver by acting in the fashion that he did, is totally improbable. At least he must have realised at all times that it would be extremely risky and that he could stab anyone if he proceeded in the manner he did. The accused was not a good witness, but on the other hand one cannot say that he made a very bad impression. His whole explanation however of what he wanted to do on the vehicle, what he wanted to achieve from time to time and how he

managed to stab the deceased, were not only conflicting, but all his different versions were improbable.

The sister of the accused was really unimpressive. A sister who has some education and training as a nurse, who says that she does not know whether, if you stab into the body of a person, deep into the upper body, that the blade of the knife would have blood on it when withdrawn from the body, is inconceivable. It seems that she wishes to evade the question in this manner in an attempt to avoid the obvious conclusion that the accused must have seen blood on the blade of his knife and must have known that the blood came from the fatal wound inflicted on the deceased. Her evidence, however, also in conflict with the evidence of the accused on the important aspect of what he told her immediately after the incident. The crux of her evidence-in-chief is that he told her that he found his girlfriend with this man in the car, he caught them in the car and "he actually stabbed and injured either his girlfriend or the driver. So he did realise and he did know at the time, if her evidence is to mean anything, that he had stabbed one of them. So his whole story that he didn't know whether he had injured somebody is not only improbable but is one of the more emphatic lies. Knowing what is common cause and considering the fact that the weapon he used went into the body, it was a fatal wound, a direct stab movement, he must have felt that his knife had gone in, that he had hit, succeeded in hitting the body and in all probability would have had the blood on his hand, on the side of his left hand where he held the handle of the knife. If there was any

sort of cut on his hand it could have been caused by the blade of his own knife when he drove it into the body of the deceased right up to the hilt.

The evidence of the witness called by the Court namely the witness ex Sergeant Petrus was very persuasive. Once you have the position that he was an experienced investigating officer, according to an answer elicited by Mr Christians, he had investigated many murder cases, he told the Court of the procedure, he came here without a statement and without knowing what the Court was going to ask him or what counsel was going to ask him and he set out immediately what had happened, namely: that a knife was not given to him; that he did ask for the knife; he did go to the scene, but there it could not be found. Now he is corroborated by the circumstance that the practice is to write that into an exhibit record. The practice is further to note the number of the exhibit and it is impossible to believe that this investigating officer would not have handed in the knife, if given to him. If the evidence by the accused was that this policeman never asked him for a knife, that would be a different scenario. If he was drunk, or was bribed to remove the exhibit as it often happens, then it is a different story, but here it is common cause that this detective did ask for the knife and in those circumstances the fact that no exhibit was handed in, that there is no entry in the records or in the docket, leaves no doubt whatsoever that the Court must accept the evidence of this policeman, Mr Tommie Petrus. That means that on that clear point of conflict the accused had told the Court a lie

without any doubt about at least the exhibit, the knife. Now, the reason and the probable reason why he told a lie is that the knife was not an innocent pocket knife as he told the Court, with about a 5 cm blade, it was a bigger knife, a more atrocious knife if one looks at the uncontested evidence of the doctor who did the post mortem examination. The doctor also said that the edges of the wound were clear cut. So it is not a question of, both edges, not a question of a pocket knife with, on the one side a blunt side and on the other side a cutting side, it was a wound with clear cut edges and so, without finding that it had this effect, it was probably a knife which had two cutting edges. But what it dees help to prove is that the knife was not handed by the accused to the policeman and obviously there can only be one reason namely that he did not want to have that type of exhibit against him before Court if there is a prosecution. And he wanted to have it open to him to say, as usually happens in such a case when the weapon isn't there, oh well, I just had a small pocket knife like this or that. The Court rejects the story that he had a small pocket knife. I must also point out that the entrance wound was 3 cm broad in length, that means wide. 3 cm indicates without doubt a rather large blade of a knife at least where the blade reaches the handle. So 3 cm shows that this is not a small, so-called Red Cross knife with one cutting side, no sharp points and a blunt side on the other side. So here then one can start off with one important fact in the dispute where the accused was clearly lying to the Court.

I have dealt with the impression the witnesses made on the

Court. I have dealt with some of the probabilities and if there was time one could spell out many more. The fact is the accused did strike the deceased. The fact is that there is no evidence against that of the driver that the deceased was sitting on the passenger side of the vehicle. The accused gave several versions about where she was sitting, viz that he saw her sitting, moving up to the driver and so on. In the end the best he could come forward with is that he presumed and it must have been that she had moved on to a position next to the driver. So there is nothing to controvert the driver's evidence that she was sitting as a passenger in actual fact on the passenger side, just before the stabbing. That is further corroborated by the evidence of the witness Klasina Harobes who, when she saw the body still in the car of the deceased, that deceased's lower part was on the passenger seat and she was just leaning with her head onto the driver as a person would who has no control over your limbs because you are partly or wholly unconscious ac the time and you lean against the support that's available. So, the fact then which the Court finds is that the deceased sat on the passenger side when stabbed. Now, if she sat on her side when she was stabbed, then the accused's story that he put in his arm right over the centre of the seat as he wanted to stab the driver, cannot be true, because the deceased was in fact and hit when she sat on the passenger side. So if he ever put in his arm right up to the driver as far as he can and tried to stretch it right up to the driver, he could not have struck her, she wasn't there to be struck. So then the only conclusion there is that he struck her where she was sitting on the passenger

side by deliberately wanting to strike and injure her. And that is the only way he could have struck her. His whole story about a long arm reaching out to the driver is totally improbable. What is further obviously a concoction and a fabrication is his belated allegation that he actually wanted to stab the driver on his left hand shoulder. Now if he wanted to do that, surely he couldn't think that he could do that without looking into the cabin, without knowing where the people are sitting and so on. The accused on all the probabilities was obviously very annoyed, not only with the driver, but certainly equally, if not much more annoyed with his girlfriend, because it is she who now goes out or has some relationship or other with another man. And it was she who said, drive away and she was frightened and that is common cause. So, a great part of his anger and his revenge would have been against her. If not, why did he not speak to her? Why did he not ask her anything? He said he wanted to ask her when he jumped on, but he never did. Why not? So he had the motive to stab her, he was angry, obviously, with her, he was jealous and he wanted to take it out on her. That seems a probability.

There are many other small points in dispute that one could deal with, but to sum up: I accept the evidence of Dr Moisel, Mabedi and Harobes. I accept that the witness, Clifford Molander probably did not see any wound or blood on the accused, but he could have made a mistake. And as I have said I accept fully in toto the evidence of Tommie Petrus. That means also that I reject the story and the defence of the accused in so far as it conflicts with the

version of the aforesaid State witnesses. Before I conclude I must mention that I asked counsel to address me on the following interesting and important legal question: A person who intends to murder A, but by some miscalculation or error now kills B, could he be convicted of the murder of B and if so, on what basis. I am happy to say that on short notice both counsel submitted very valuable and well-reasoned written submissions to me. I have my doubts about the alleged present state of South African law on this issue. It seems to me that it would be the height of injustice if a person can escape proper punishment by intending to kill one person, doing everything possible to kill that person, but then kills another by miscalculation. In substance he has then committed murder, whether it is on cne person or another. The identity of the person should noc be decisive. But that remains a complicated issue. I need not make a finding on that issue of law today. It is my belief however that this type of legal issue should be settled by legislation at the earliest possible time. I don't; necessarily accept the submissions and the conclusion by both state counsel and defence counsel, but I do not say they are wrong and I do not decide that issue now because it is not necessary for the purpose of my judgment.

To conclude: I find that you intended to stab the deceased in the upper part of her body knowing that she could be killed as a result. You intended to kill her whether such intention was in the form of dolus directus or dolus eventualis. i.e. in that you at least foresaw the reasonable possibility that she could die as a result of the stabbing,

but reconciled yourself with that possibility and/or continued recklessly, regardless whether she would die or not.

In the result:

You are found guilty of the crime of Murder.

O'LINN, JUDGE

CASE NO. CC 12/96

IN THE HIGH COURT OF NAMIBIA

In the matter between

THE STATE

versus

MICHAEL IVAN OXURUB

CORAM: O'LINN, J.

Heard on: 1996-02-01, -02, -05, -06 & -07

Delivered on: 1996-02-29

SENTENCE

O'LINN, J. : You have been convicted of the crime of murder in that on or about 25th September at Swakopmund you unlawfully and intentionally killed Emma Madam Uiras, - a female person. The person you killed was actually your girlfriend and this is common cause. When imposing sentence it is trite law that the Court must consider your personal circumstances, the nature of the crime you have committed and the interest of society. Under aims of punishment the the Court must consider in what way through its sentences it can discourage you or persons in your position to act in the same way. And that has become a very important element of punishment for crimes such as murder because this type of crime, like other crimes of violence, rape and robbery, have escalated in the last few years and the Court has a duty as an organ of State to do whatever is possible to also protect

the interest of society and particularly in that sense to protect the victims, including those who have died but also those who may become similar victims in future. The only way the Court can really attempt to discourage this phenomenon of escalating violent crime is by imposing sentences which would deter you and which would deter others. There is obviously also the aim of rehabilitation and that must also be kept in mind.

The personal circumstances you have put before the Court are that you are the father of two minor children. There is no indication whatsoever whether you take the responsibility for these children by maintaining them. There is also no indication that the children will suffer if you go to prison for an unduly long period. In those circumstances the fact that you have two minor children cannot be regarded as a mitigating circumstance of any importance. What is important in your personal circumstances is that you have not previously been convicted of a criminal offence or any crime. The fact that you are a first offender must be taken into consideration as a serious mitigating factor. I must point out, however, that most of the crimes of murder are crimes where the accused persons are first offenders. That notwithstanding, the Courts in the past have often sentenced first offenders to death and subsequently when that could not be imposed, the Courts often imposed a sentence of life imprisonment on people who are first offenders. So although I must take that into consideration as an important mitigating factor, that alone does not mean that you should not go to jail for a long period.

You have also testified that you most of the time had a job and you actually reached the stage of standard ten at school but you failed that standard. It is a circumstance in your favour that you apparently, most of the time, intended to better yourself and to obtain proper employment. It does not seem to me that it can be said you are a person who make no contribution to society and who is just a liability.

Then I must look at the crime, the nature of the crime you have committed. Murder is a serious crime as also conceded by your counsel, Mr Christians and it remains a very serious crime even if I proceed on the basis that your intention to kill is rather in the form of dolus eventualis and not direct intention to actually kill this particular person, the victim. So I will take into consideration that in this crime your intention is in the form of dolus eventualis in that when you stabbed the deceased you at least foresaw that as a result of the stabbing she could die and you nevertheless stabbed her recklessly and without being discouraged by the prospect that she may be killed. The fact is also common cause that the victim was your girlfriend for at least two and a half years and you lived together as man and wife. Mr Christians has argued that you stabbed and in the result killed her basically as a consequence of your jealousy because you realised or must have realised that she now was developing a relationship with some other person. It must be accepted that what you did was spurred on by your jealousy and by your emotions. On the other hand this is a case where you did not find your girlfriend having intercourse with another person. You

found her sitting in a vehicle with another person namely Mr Moses Mabedi and the Court accepted his evidence to the effect that at- the time when you arrived on the scene he was talking to the deceased and there was no hugging or kissing and obviously no intercourse. You were not placed in a position by what you saw which would deprive a reasonable person or even any other person of their control over the situation. Your actual action as unfolded before Court in accordance with the State evidence as well as your own was that in the course of this situation leading up to the stabbing you basically contemplated every step. You knew what you were doing and you decided on going onto the next step. So this was not in that sense a crime of passion where you lost control and where it could even be said that any human being would have been so incensed by the situation which he came upon that he could not control himself or herself properly. When I consider this crime I do regard your relationship, the fact that you must have been emotional, as mitigation to some extent but not a factor of great weight as it may have been if it was a classical situation where husband or wife finds his partner in the act of adultery with another person.

You killed the deceased by stabbing. Stabbing has become and remains and is increasingly a method used by too many people in this society to settle their problems by getting rid of their adversary or someone else by using dangerous weapons such as a knife. The knife was not produced before this Court but the Court found that you lied about the knife and that the knife was probably much bigger, if the Court

considers the medical evidence, as you alleged. The Court also found that the only reason for your lie regarding the knife was probably that it was a much bigger weapon. The crime was also on a person who was undefended. That means a young girl. There is no question whatsoever of self-defence of any sort in this case. That aggravates your crime.

As to the interest of society, this is linked to the nature of this crime. Society legitimately cries out for deterrent action by the Courts because of the phenomenon of continuous and increasing violence in the country. The interest of society will therefor not be served if you get a sentence which is not of a nature which would deter yourself and other people. Although the Court must also consider the possibility of rehabilitation, the overwhelming aim should be deterrence. I accept however, that you are a person who can be rehabilitated and you can be a useful member of society. Unfortunately throughout this trial and particularly during the evidence in mitigation you repeatedly attempted to deceive the Court. You repeatedly told lies deliberately. To mention only some is that during the stage before conviction you, well-knowing that the deceased is dead and cannot controvert what you say, gave out that you had a wonderful relationship with this deceased. There were no quarrels between you. There were no assaults. You emphatically denied that. Here today at the stage of sentence you were confronted by allegations by witnesses who are not dead such as the deceased, but who are alive and who could corroborate to some extent that you

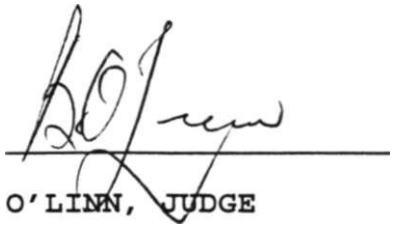
actually had a bad relationship for a substantial period of time with the deceased and that in fact you had actually assaulted her. You admitted in your own words, when confronted, that there were several assaults. Your excuse was that that was in the course of arguments and you further testified or admitted that this was by means of giving her a beating with a belt. Although you denied that you ever previously sat on the deceased with a knife in your hand when she was sleeping, the evidence before Court by Ida Skrywer is that you, in her presence, apologised for having done precisely that, namely sitting on the deceased with a knife and that is how the deceased saw you when she woke up out of her sleep. So although your counsel put it that you deny that you had ever done that, what was not denied and what was not controverted is Ida Skrywer's evidence that you actually apologised for that act. So on the available evidence I must accept that you on a previous occasion was sitting in a threatening position on the deceased. It was also not directly placed in dispute with the witness Ida Skrywer that on one occasion the deceased came to her and showed certain wounds. She had a wound on her head and she had a stab wound on her finger. That the deceased had such wounds was not disputed by you. I accept that the picture of an idyllic relationship drawn by you from the start was false and that you in fact had assaulted the deceased from time to time and that the use of a knife was not out of your mind.

You also tried to get away with lies when you told this Court that the Court should consider that you had already

been in imprisonment for eight months. Eventually, when you were confronted with this lie, you said four months. As a matter of fact, it turned out to be in the region of two and a half months that you were in prison. So unfortunately when you say to the Court that you are sorry, that you have true regret and so on, that was accompanied by trying to deceive the Court about important and relevant facts. The fact that you were lying on several occasions detracts from the possibility of giving any weight to any regret that you may have. It seems to me that, although you may have regret that a person with whom you had a relationship has died, your greatest regret at.the moment is that you will probably face many years of imprisonment.

In all the circumstances it seems to me that the Court will be failing in its duty to society and to the victim if the Court does not impose a heavy sentence of imprisonment. I have seriously considered imposing on you a sentence of life imprisonment, but in view of some of the mitigating factors that I have mentioned I have decided not to impose life imprisonment. In the result the sentence that I impose on you is the following:

Seventeen (17) years imprisonment.



O'LINN, JUDGE