"Special Interest" **CASE NO.: CC 02/2010**

IN THE HIGH COURT OF NAMIBIA

HELD IN OSHAKATI

In the matter between:

THE STATE

and

HERBERT CIMU NKASI

CORAM: LIEBENBERG, J.

Heard on: 09-10; 12; 15-19 February 2010; 08-10; 12; 16 March 2010.

Delivered on: 24 March 2010

JUDGMENT

LIEBENBERG, J.: [1] The accused, a San speaking adult male, stands charged with the following: murder (two counts); attempted murder; defeating/obstructing or

attempting to defeat/obstruct the course of justice; c/s 2 Act 7 of 1996 – possession of a firearm without a license; and, c/s 33 Act 7 of 1996 – possession of ammunition without having an arm capable of firing such ammunition.

[2] The background against which the alleged crimes were committed is set out in the *Summary of Substantial Facts* in the following terms:

> *"The accused and the complainant in count 3 were at all relevant times in a domestic relationship as they were married to each other or lived together in a relationship in the nature of a marriage and they are the biological parents of the deceased in counts 1 and 2.*
> *During April 2007 and at the Ncumnca Village at Rundu the accused hit the deceased in count 1 several times with branches and/or a knobkierie over her body and head. The deceased died on the scene due to scull (sic) fracture(s) where after the accused buried the deceased with the intent to defeat or obstruct the course of justice as set out in count 4.*
> *On 9 May 2007 and at the Nkulivere Village in Rundu the accused fired a shot with a Baikal shot gun at the complainant in count 3 with intent to kill her whilst she was carrying the deceased in count 2 close to her body. The shot missed her but struck the deceased in count 2 in the abdominal area. On 10 May 2007 the deceased died at the Rundu State Hospital due to intestine perforation caused by the gun shot wound. The accused did not have a license to possess the Baikal shotgun with serial number 96038565 and its ammunition."*

[3] The accused pleaded guilty on the charges of unlawful possession of the firearm and ammunition (counts 5 and 6) and admitted all elements of both charges; but pleaded not guilty on the remaining charges.

[4] *Ms. Kishi* appeared for the accused on instructions of the Director: Legal Aid whilst *Mr. Wamambo* appeared for the State.

[5] It is common cause that the accused cohabited with Kasiku Sirkka Nokwa, complainant in respect of count 3 and also the mother of his two children, now deceased. Although they were not legally married, their relationship falls within the

ambit of the Combating of Domestic Violence Act, Act No. 4 of 2003 in that a domestic relationship is defined in s.3 in the following terms:

> *"3. (1) For the purposes of this Act a person is in a "domestic relationship" with another person if, subject to subsection (2) –*
>
> *(a) ....*
>
> *(b) they, being of different sexes, live or have lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other;*
>
> *(c) ...."*

Subsection 2 refers to any *"past cohabitation or any other past intimate relationship"* which does not apply to the present facts as there was no cessation of cohabitation between the accused and complainant prior to the commission of the alleged crimes.

[6] Accused tendered plea explanations on those charges where he had pleaded not guilty, which can be summarised as follows:

Count1: He admitted that during April 2007 he beat Nasira Nkasi (the deceased) with a "fresh stick from a tree" whilst chastising her for having vomited onto the food; but denied having caused her death or having had any intention of killing the said child.

Count 2: Accused admitted having fired a shot on the 9th of May 2007 at some dogs; however, he denied having fired a shot at Sigcende Nkasi; that he had caused her death or had the intention of killing her. During the trial the accused further admitted that the cause of Sigcende's death was due to a gunshot wound; also that he had fired the shotgun which inflicted the fatal injury.

Count 3: Accused admitted having fired a shot at some dogs, but denied having had any intention of killing or striking the complainant (Sirkka), who suddenly emerged from behind bushes and came in the line of fire after the accused had already pulled the trigger.

Count 4: Accused admitted having buried the body of Nasira Nkasi at Ncumca village after obtaining permission from the local headman, but denied that his intention and actions were aimed at defeating or obstructing the course of justice.
[7] On both charges of murder the State called several witnesses and I will summarise the facts relating to the different charges separately.

THE FACTS

[8] Sirkka Nokwa ("Sirkka") is the mother of both the deceased children and the only witness present during the incident in April 2007 at Ncumnca village when the accused used a twig to hit Nasira, their daughter of 6 years, with. According to her, the accused forced the child to eat dinner after she had had enough and when she refused, the accused broke off two twigs ("branches") from a nearby bush and started hitting the child severely all over her body until she ran away and the accused giving chase. She did not see the accused hitting the child with anything other than the twigs. In cross-examination she confirmed what was recorded in her witness statement namely, that when she tried to stop the accused from hitting the child, he also wanted to assault her.
When Nasira and the accused returned after a while, the child appeared tired and weak whereafter she started vomiting. Despite it being night time and Sirkka unable to make proper observations on the child, she described the child's condition at the time as "finished" and then started accusing the accused for having "killed the child" to which he replied: "that the child could die, as even better people die."

[9] They retired to bed and during the night Nasira passed away. In the morning Sirkka observed blood on the deceased child's nose and red marks, which had the appearance of burns, all over her body. The child's head also appeared swollen. She thereafter reported the death of their daughter to other people in the village. Three days passed before the accused buried the deceased not far from the shelter in which they were staying at the time. After the burial they went to another village where the accused's father was staying and from there they went to Kasimba village where they stayed for a few days. From there Sirrka proceeded to her mother's village with their

youngest child Sigcende, leaving the accused in the company of Petrus Ncause ("Tami"). Accused later followed her to her mother's village.

[10] From the aforesaid it is then clear that the evidence given by Sirkka pertaining to the death of Nasira, is single. Thus, the evidence of those witnesses who testified about the same incident refers only to the report made to them by Sirkka about Nasira's death and the burial, and not the alleged assault on the child by the accused. In addition thereto is the evidence of police officers involved in the exhumation of the body; and the comments made by a medical doctor on the post mortem conducted by another doctor, who was unavailable to testify at the trial.

[11] It seems common cause that Sirkka reported the incident in the morning to Haupindi Nangura ("Haupindi") and her husband Lazarus Mukuwe ("Lazarus/Rassi"). Lazarus in turn went to call Vilho Hausiku ("Sagarias") in order to accompany them to the accused's place, where they found the deceased lying inside a small hut.

[12] Haupindi said she uncovered the body and then observed wounds on the thighs, upper body, arms and head which had the appearance of burns. When she touched the deceased's head it felt *"like there were no bones."* She did not observe any open wounds on the body. She furthermore said that when she asked the accused and Sirkka for an explanation, both replied that they did not know. This despite Sirkka's earlier report that the accused had 'killed the child'.
Regarding the burial which happened after three days, Haupindi said that, after the grave was dug, the accused laid the deceased's body, wrapped in a blanket, down in the grave and then carefully covered it with sand.

[13] Lazarus's evidence confirms that of his wife (Haupindi) in material respects. Although he did not examine the deceased's body in any detail, he did notice "red marks" from the waistline upwards on the back. He did not examine the head and in cross-examination he said that there could have been wounds like blisters on the body

as testified by the other witnesses, as the ladies seemed to have had a thorough look at the body, unlike him.

During cross-examination certain discrepancies between his *viva voce* evidence and his statement made to the police were pointed out to him, to which his explanation was that the statement did not contain everything he had told the officer who recorded his statement; and, that he did not say what was recorded in some respects thereof. The defence did not pursue the matter any further and did not apply for the handing in of the statement.

As regards the burial, he excluded the possibility that the deceased's body could have sustained any further injuries during the burial, as the accused at first used his hands when covering the body with sand and only later used a spade to fill the grave.

[14] Sagarias's evidence, in material respects, also corroborates that of the other State witnesses. The injuries he observed on the body of the deceased he described as "red marks of beating with a fresh stick" and "blood under the skin" on the chest, ribs (torso) and arms. When questioned in cross-examination why he had made no mention of any injuries in his statement to the police, he explained that it was a mistake on his part. He however denied that the nature of the injuries was conveyed to him by the other witnesses.

When asked by Kambindo (who had accompanied him to the accused's place) what had happened, he heard the accused saying that he just took a fresh small stick and beat the child; apparently because he disapproved of the manner in which she was eating.

[15] Although Sagarias at first said that on that day he did not hear any discussion about the headman from that area, he changed his version during cross-examination where he said, that there was a discussion between the accused and the headman and that accused showed a small thin stick to the headman whilst saying that it was the one he had used to hit the child with.

[16] Sagarias accompanied the police officers to the burial site and assisted in the exhumation of the corpse. He stated that when they came close to it, they no longer

used spades but continued digging with their hands in order not to inflict any injury to the corpse.

[17] Detective sergeants De Celestino and Ngishitelwa were directly involved in the exhumation of the corpse and both exclude any possible injury inflicted to the corpse during the process of exhumation. That includes any possible contact between the corpse and the spade used to dig out the sand or a stone being dropped onto the corpse at any stage.

[18] Sgt De Celestino had also compiled photo plans and sketches, relating to both murder charges handed up in support of their evidence. Nothing contained therein were disputed. Of note is the knobkierie depicted in photo no. 4 of exhibit 'N' and the accompanying explanation given to them by Sirkka namely, that when she tried to stop the accused from beating the child, he picked up the knobkierie whereafter she fled, leaving accused and the child behind. This explanation does not accord with her evidence in Court i.e. that the child had run away and that the accused gave chase. The police decided to seize the knobkierie as the nature of the injuries inflicted is such, that it was suspected that it might have been used during the assault on the child.

[19] Whereas a post mortem report in respect of Nkasi was compiled by a certain Dr. Ricardo, who in the mean time had returned to Cuba and therefore was no longer available to give evidence, the report was handed in by agreement. The State called Dr. Shchegolevatzy to explain the content of the report and he then gave his own opinion pertaining to the cause of death and what possibly could have caused such injury.

[20] According to the post mortem report, the corpse was in a state of decomposition; and two skull fractures i.e. the parietos-occipital bones, were observed. The report states that the skull fractures were the cause of death.
Despite the scanty information contained in the report, Dr. Shchegolevatzy was of the view that, severe blunt force to the back of the head was required to have fractured the base of the skull; which, possibly could have been caused by a hard knock to the head

against the floor when falling down; or a fist blow of an adult person on the child's head. He said, to fracture bones require "serious force" and as such excluded the possibility of a child having inflicted the said injury; or that it could have been caused during the subsequent burial. He was furthermore of the view that it was a severe head injury and that the mortality rate of patients with this type of injury, was very high.

[21] From the medical evidence it would thus appear that, given the circumstances of the case and the lack of medical treatment, death was an (almost) certain consequence of the injury inflicted.

[22] As mentioned, after the accused and Sirkka left Ncumnca village, they went to the accused's father and from there to Sikumba village where they stayed with Petrus Ncause (also known as Tami), until Sirkka proceeded to her mother's place at Nkulivere village. According to Sirkka her mother had sent for her because of the killing of their child by the accused, which her mother (Helvi Andreas) during her testimony denied. This however is not material.

[23] It is not clear exactly when Sirkka left for Nkulivere village, but at some stage thereafter, the accused and Tami went to Jonas Mpasi with the view of borrowing his shotgun to shoot ant-eaters causing damage in his fields. At the same time it was decided that Tami should keep the shotgun with him until the next day when he would set out looking for some missing cattle, belonging to Mpasi. Darkness fell on their way home, preventing them from hunting. Tami placed the firearm and two shot-cartridges given to him by Mpasi in his room and retired for the night. In the morning he left his room for a while and upon his return realised that the shotgun and cartridges were missing. From the footprints entering his room he deducted that it had been taken by the accused, who was no longer around. Accused only returned in the evening and was then told to return the shotgun directly to Mpasi, which he did.

[24] During cross-examination it was put to Tami that he and the accused had set out hunting in the morning whereafter he permitted the accused to carry the shotgun with

him to his in-laws. This Tami disputed and he was adamant that the taking of the shotgun by the accused from his room, was without his consent.

[25] Mpasi's evidence does not add anything to the case and merely confirms the handing over of the shotgun to Tami for purposes of collecting his missing cattle and to hunt ant-eaters. He is the lawful owner of the shotgun in question (Exh '1'), which is licensed in his name.

[26] It is common cause that the accused arrived at Nkulivere village on the 9th of May 2007 where he found Sirkka and others from the village busy harvesting mahangu on the field of a neighbour. He was carrying an axe with him and joined in the harvesting until they finished work for the day. He thereafter proceeded to Helvi's (Sirkka's mother's) house where he sat down under a tree waiting until Sirkka (carrying their baby Sigcende), and her sister, Eino Kapango ('Eino") arrived from the field. The mother to Sirkka and Eino was already seated at home as she had stayed at home.

[27] According to Helvi the accused arrived at her place earlier during the day carrying a firearm and an axe, but kept his distance. He enquired from the children at home about his "fire" (apparently a lighter) and was told to wait for the elder sisters to return home from work. He then left and when he later returned, he was still having the firearm which he laid down in a nearby bush. Sirkka and Eino were not aware that the accused was having a firearm and only noticed it the time when the accused picked it up from the bush where he had placed it earlier.

[28] Sirkka said that upon their arrival home the accused asked for his lighter. She stood up and gave it to him and he then said to her that he wanted his child. She queried this request as he had already killed their one child and refused him the child; whereafter he stood up and fetched the firearm from the bush. Sirkka then grabbed the baby and all of them started running away from the accused who gave chase. She and Eino were out in front, followed by Helvi. The accused managed to pass them and blocked them from going to a neighbouring house. From a distance of

approximately 4 metres he took aim at them and fired one shot whereafter he ran away. At that stage she was holding Sigcende with both hands on her left hip. She continued running to the house of one Risto and it was only after she had reached that house when she realised that the child had been wounded on the left side of her abdomen.

[29] With the help of others the child was taken to Nkurenkuru Health Centre; from where she was referred to Nankudu hospital and from there, again transferred to Rundu State hospital where she died later that same day.

[30] During cross-examination it was put to Sirkka that she, Eino and Helvi attacked the accused, beating him with objects; causing him to run away. Helvi thereafter incited the dogs to go after him. This was denied. Regarding Eino's involvement, Sirkka confirmed that her mother had said to the accused something to the effect that "he was useless; had already killed one child and would not get the other child".

[31] Eino's account of the events of the 9th of May 2007 corroborates Sirkka's evidence in all material respects. She said that when Sirkka refused to give the child to the accused she heard him saying: *"If it is like that ……"* whereafter he stood up and picked up the firearm; causing them to run away. She and Sirkka were running in front, followed by their mother and the dogs, which were chasing the accused. She confirmed that the accused managed to cut them off at a road, which, as depicted on photo 4 of exhibit "L", is a narrow (off-road) path leading through the bushes. From a distance of about 4 metres the accused took aim at the baby and fired one shot. She furthermore said that after Sirkka had run away, the accused loaded the shotgun and pointed it at her face. At that stage two men had come from the pastor's house shouting at him, whereupon he ran away. According to her, the accused did not say anything before he fired. Regarding the position of the dogs immediately prior to the shooting, Eino said that when the accused ran past them, some of the dogs turned back, leaving just one standing behind them. This dog was hit on its front paw during the shooting. She denied that her mother had incited the dogs to bite the accused at

any stage. She furthermore denied that the accused took aim at and intended shooting the dog(s).

[32] Helvi's version relating to the shooting incident supports that of Sirkka and Eino. She confirmed that when the accused picked up the firearm they all started running away; she running behind the others. Near the house of Risto the accused managed to block them and whilst facing one another, the accused fired. She said Sirkka continued running while she and Eino turned back to fetch the children. The accused then ran towards Eino and pointed the firearm at her; but ran away the moment Risto came out and told him not to do that.

[33] According to Helvi the accused was in a foul mood when he arrived there that day and had raised his voice when he asked Sirkka for the child. Before the accused went to pick up the firearm, she also heard him saying: *"If it is like that ……/ today you will see ……"* When it was put to her during cross-examination that Sirkka made no mention about any threats uttered by the accused against her, she replied that the accused indeed uttered those words and that Sirkka just might have forgotten about it. She furthermore denied that she interjected when the accused had asked for the child, contradicting Sirkka's evidence on that point. She denied having incited the dogs against the accused and that he aimed at them when he fired the shot. It also emerged under cross-examination that Helvi observed the accused throwing down the axe he was carrying whereafter he took one round from his pocket; loaded the shotgun and then ran around the others to block them in front.

[34] When the injured Sigcende was brought to the medical centre at Nkurenkuru on the 9th of May 2007 at around 18:00, she was seen by nurse Iyevera, who immediately referred the child to Nankudu hospital, as there was no doctor available at the centre. At Nankudu hospital x-rays were taken of the child and after a doctor examined her, he transferred the patient to Rundu State hospital by ambulance where she arrived two hours later.

[35] It was now one day after the shooting incident and by then the medical condition of the child had deteriorated to a stage described as "close to death" – no blood pressure; no pulse and the patient gasping. Dr. Emam stabilized the patient for laparotomy surgery during which he discovered perforation of the intestines caused by a small bullet; resulting in septicaemia. The child died shortly after surgery and in Dr. Emam's view, the child had no chance of survival.

[36] Dr. Shchegolevatzy is a specialist and was the anaesthetist during surgery which, in his view, was the only option as the patient was bound to die within the next 24 hours. It was however too late, as serious infection, as can be expected within six hours, had already set in and the patient died four hours later.
The post mortem examination was again done by Dr. Ricardo and due to his unavailability, Dr. Shchegolevatzy was asked to comment on and explain the findings noted in the report, to the Court. This he did based on the findings in the post-mortem report handed in.

[37] The chief post-mortem findings were: "small intestine perforation; septic peritonitis", while the cause of death is reported as: "small intestine perforation for (sic) shot gun." Two orifice (openings) of approximately 0,5 cm were observed externally on the left side of the abdomen.

[38] The accused was brought to Kahenge police station on the 13th of May 2007 after he had been apprehended by members of the community. He was formally charged and elected to only give an explanation in court.
[39] The accused testified in his defence and also called William Nambahu, a chief forensic scientist and Dr. Vasin, a pathologist in the employ of the State at Oshakati, to give evidence.

[40] Regarding the first incident in April 2007, at Ncumnca village which resulted in the death of his first born, Nasira, the accused said that he had been out drinking with his friend Rassi that day and when they returned late afternoon/early evening, he and his wife and children proceeded home. It was already dark when they had dinner and

at one stage Nasira became nauseous and vomited on the food. Thereupon the accused took (what appears to have been) the stem of a spinach plant which he used to hit the child with on her legs and lower back. Nasira jumped up and ran into the bushes and only returned after the accused had called and threatened that he would go after her and hit her again. I interpose here to point out that it was put to Sirkka during cross-examination (as an instruction from the accused), that Nasira never ran away and that the accused did not follow her; which clearly, is a contradiction from his evidence in Court. This notwithstanding, he said that when she returned, she went behind her mother and then fell down, hitting her head against a log used as fire wood rendering her unconscious. She came round again but fell unconscious for a second time. He then laid her down inside the hut where she passed away.

[41] According to the accused he did not apply severe force when hitting the child which, in his view, amounted to nothing more than him chastising his child. He denied that he at any stage used the knobkierie later found at the scene; in fact, he denied that it was his and suggested that it must have been left there by someone else afterwards.

[42] Accused said the headman visited them the following day and after enquiring what had happened, he undertook to issue the accused with a letter regarding the burial of his child, which he then had to take along when reporting the death to the police. He never received the letter and when three days had passed, he decided to bury the child. His explanation for not reporting the death before the burial is that his wife refused to stay behind alone with the corpse. After the burial they went to Kasimba village where they stayed at Tami's place. Sirkka departed the following day to her mother's village but the accused stayed on for two more days.

[43] He confirmed Tami's evidence that they were given the shotgun to hunt ant-eaters, but they never came to that as, according to him, Tami was too tired after dinner and told the accused to keep the firearm with him for the night. In the morning he told Tami that he still had to report the death of his child and wanted to go after his wife to see how his other child, who was sick, was doing. It was then that Tami told

him that hé had carried the firearm from Mpasi's place and therefore he had to return it himself. Tami then handed him the two rounds of ammunition whereafter he proceeded to Nkulivere village where his mother-in-law, Helvi, resided.

[44] It was put during cross-examination to Tami that the reason why the accused carried the firearm with him was because he wanted to protect himself on the way; however, according to the accused he merely took it with him because Tami refused to keep it at his place where it would be unguarded. Accused said he had never used a firearm before and that day was his first time to use a firearm.

[45] At Nkulivere he went to Helvi's house where he left the firearm before going to the mahangu fields where he found Sirkka and Eino busy harvesting. They knocked off at lunch time and he returned first to Helvi's place with Sirkka and Eino following. He said that on his arrival he took the firearm and carried it over his shoulder. The accused's version of the events taking place thereafter differs markedly from that of the State witnesses.

[46] Accused said he asked Sirkka for his lighter which a child then brought to him. He furthermore told her that they should talk as he would not return soon, but Sirkka did not respond and just kept quiet. Eino then said that she heard that he had killed their firstborn at which stage Helvi intervened. He said she picked up an axe and approached him while Eino picked up a stick. He fled but did not regard the situation as serious as he realised that he would easily outrun them. It was only after Helvi incited about twenty dogs to chase him that he became scared and decided to shoot them. He said he specifically took aim at the dogs, firing down at them as they were behind him. Helvi, Eino and Sirkka followed; the latter some thirty metres away. He only saw Sirkka after he had fired the shot. Helvi, he said, was still giving chase, following him over some distance before she turned back. He proceeded to Tami's place.

[47] He asked Tami about the firing capability of a shotgun and then realised that there was a possibility that someone might have been hit when he was firing at the

dogs. However, he did nothing to establish that. He thereafter returned the firearm to the wife of Mpasi and from there he went to report the incident to his father who advised him to wait and see what came from it.

[48] The accused denied having had the intention of killing either of his children and said he merely chastised Nasira by hitting her with a small stick/stem; whilst Sigcende was accidentally struck when he fired with the shotgun at the dogs.

[49] Pertaining to his reply to the State's Pre-trial Memorandum (Exh. 'E') set out in par.5.2 - 5.5.3, the accused denied that it was in accordance with his instructions and said that his former counsel, after consulting him, never confirmed the content of the document with him. According to him the content only became known to him during the trial. I shall return to this aspect of his evidence later herein.

[50] The evidence of William Nambahu involved the firing capacity of a shotgun and the composition of the shell (cartridge), containing small pellets. In his opinion, when firing a shotgun, the pellets will come out from the muzzle as a group, close to each other over a distance of approximately 10 metres, whereafter it will start dividing (spreading out). At close range, he said, the pellets would enter the object as a group but, as the distance increases, the pellets would strike in smaller groups of between one and three pellets while objects in the vicinity of the target would be struck randomly.
When asked to comment on the State's case where the shot was fired from a distance of approximately 4,2 metres and inflicted only two small wounds on the victim's abdomen, Nambahu was of the view that the firearm was either not aimed directly at the target, or that it ricocheted; because he would have expected to find a much bigger entrance wound, had the child been directly hit. It was thus possible that the victim could be struck if there was a deflection or when the shot was not aimed (directly) at the victim. On the accused's version he said, it was possible that aim could have been taken at dogs in the foreground and that the victim was struck whilst standing behind them at a distance.

[51] In his evidence in chief Dr. Vasin, from the post mortem report compiled in respect of Nasira (Exh. 'H') and the photo plan (Exh. 'N'), opined that due to decomposition that had set in at the stage when the autopsy was conducted, one would not have been able to determine whether, what have been found to be fractures, were indeed fractures of the skull bones, or whether the separation of the skull bones was due to decomposition. Therefore, he would rather have concluded that the cause of death was "undetermined". Although the doctor in chief said that the fractures correspond with the connecting lines (joints) of the skull, he conceded in cross-examination that, as indicated on the sketches attached to the post mortem report, the fractures were not *on the connecting lines*, but *corresponds with the pattern of the lines.* In other words, the fractures as indicated on the different sketches were *next to* the connecting lines of the skull and not *on* them. He agreed that Dr. Ricardo, who performed the autopsy, was in a much better position than himself to make observations, as he only had the post mortem report and the photo plan to base his opinion on. Therefore, he conceded that he could not exclude the possibility of skull fractures observed by Dr. Ricardo and thus, was unable to say that there were no fractures. This is a complete turn about from what the doctor had said earlier in his main evidence. He agreed that it would require severe force to separate the skull bones although less force was required when it involves a child, as the skull bones would not have consolidated at such young age. In the present case however, it was not a *separation* of the skull bones, but the *fracturing* of the said bones which, from the medical evidence led, requires substantial force. In his view the prognosis of someone who sustained such injury, was not good.

[52] At the close of the defence case *Ms. Kishi* applied for the re-calling of the first State witness Sirkka, to give evidence on the alleged falling down of Nasira when she returned from the bush as she, despite having received instructions to that effect, failed to cross-examine her specifically about that. The application was granted and in addition thereto, the Court called as witness, the person referred to during the trial as 'the headman'.

[53] When recalled, Sirkka denied that Nasira at any stage fell down after she had returned from the bush. She stated that the child sat down by the fire whereafter she started vomiting and that the accused retired to bed only after the child had passed away.

[54] I pause here to reflect on the comments made by defence counsel regarding the credibility of Sirkka. It was submitted that Sirkka was bias and during her testimony gave the impression that all she was interested in was to see the accused being convicted; and, already on the night of the incident, did she accuse him of killing Nasira. The same argument was pulled through to the evidence given by Tami and the headman, Sikongo, who, according to the argument, were not prepared to speak the truth as they would incriminate themselves to a certain extent.
Although the Court should always be alive to such possibility, it cannot simply be accepted to have been the case without good reason shown why such evidence should be approached with caution or not at all be relied upon. Where a witness does not say what the cross-examiner would like the witness to say, then it cannot, for that reason alone, be said that the witness was bias and therefore unreliable. This is normally done through effective cross-examination and if unsuccessful, it cannot be assumed to have been the case. A court would only come to such conclusion after considering the evidence given by that witness in relation to the evidence as a whole; and, when the witness's demeanour in court supports such inference. I am unable to find in this case that any of the witnesses referred to, were bias or tried to mislead the Court merely to protect themselves. Merely because Sirkka, as the mother of her two deceased children, testified against the accused, certainly does not mean that the Court should approach her evidence differently from that of any other witness. Had that been the case, then it would mean that the evidence of all complainants should be approached with caution, as they have a special interest in the outcome of the proceedings.
Therefore, no distinction is made between the evidence given by these persons and that of other witnesses who testified at the trial.

[55] During April 2007 Sagarias Sikongo ('Sikongo") was the headman at Ncumnca village where the accused and his family had been residing and currently still holds

that position in the community. He confirmed that he was informed by Sagarias (Vilho Hausiku) about the death of Nasira and he then went to the accused's place where he observed the deceased child and noticed that her head was swollen. Upon his inquiry into the death of the child, the accused related to him that she was crying for his food whereafter he beat her with a "fresh stick" of the same size as testified on by Sirkka; that she was not well after that and later died. In his opinion it would be impossible to kill someone with a stick of that size. In the presence of the accused he then informed them that the police had to be notified as he had no power to authorise the burial. Sikongo then attempted to find horses in order to have the police notified; however, on his return he found the accused busy digging a grave and he then learned that the accused decided to bury the corpse on the advice of Sagarias's parents. After the burial, the accused said that he would go and report the child's death to the police; whereupon Sikongo said that he should be accompanied by Rassi and the accused's brother-in-law, Kaboy, as he feared the accused instead, might run away. He did not receive any feedback. In cross-examination he denied that the purpose of his visit was to grant authorisation for the burial and denied having given same or that he would provide the accused with a letter to be handed over to the police.

THE LAW

[56] It is a well-established rule of practice that, where a witness gives single evidence, that such evidence must be corroborated or approached with caution, although, such caution should not be allowed to displace the exercise of common sense (*S v Snyman* 1968 (2) SA 582 (A); *S v Sauls and Others* 1981 (3) SA 172 (A) and must be clear and satisfactory in every <u>material</u> respect (*R v Mokoena* 1932 OPD 79; *S v Artman* 1968 (3) SA 339 (A)). Evidence of the single witness need not be satisfactory in <u>every</u> respect as it may safely be relied upon even where it has some imperfections, provided that the Court can find at the end of the day that, even though there are some shortcomings in the evidence of the single witness, the Court is satisfied that the truth has been told.

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

> *"(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.*
>
> *(2) The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct."*

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

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

[59] The State thus carries the burden of proving the allegations contained in each charge against the accused beyond a reasonable doubt and in *Miller v Minister of Pensions* [1947] 2 All ER 372 at 373 Denning J (as he then was) stated it in the following terms:

> *"It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it*

is possible, but not in the least probable', the case is proved beyond reasonable doubt."

The law does not require from a court to act only upon absolute certainty, but rather upon just and reasonable convictions. When dealing with circumstantial evidence, as in the present case, the court must not consider every component in the body of evidence separately and individually in determining what weight should be accorded to it. It is the cumulative effect of all the evidence together that has to be considered when deciding whether the accused's guilt has been proved beyond reasonable doubt. In other words, doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation, but those doubts may be set at rest when it is evaluated again together with all the other available evidence (*S v Hadebe and Others* 1998 (1) SACR 422 (SCA) at 426e-g).

[60] From the aforegoing it is clear that there is no *onus* on an accused to convince the court of any of the propositions advanced by him and that it is for the State to prove the propositions false beyond reasonable doubt (*R v Difford* 1937 AD 370).

EVALUATION OF THE EVIDENCE

The medical evidence

[61] Both autopsies were performed by Dr Ricardo who was unavailable to give evidence and the Court thus finds itself in the unenviable position of not having heard *viva voce* evidence on his observations and explanation of the findings but instead, has to rely on the interpretation of the post mortem reports by two other doctors; the one dissenting from the other.

[62] Unlike Dr. Vasin, Dr. Shchegolevatzy did not challenge the findings made by Dr. Ricardo in the autopsy report compiled in respect of Nasira (count 1). Both had the opportunity of considering the report and the photo plan relating thereto on which they based their evidence and drew inferences from; but came to different conclusions.

[63] Dr. Vasin was of the view that due to the deceased being a child and the body decomposed, it was possible that the connecting area (joints) of the skull bone could have separated as a result of decomposition and not as a result of injury. From what he could observe from the photos he concluded that what is depicted therein is merely the separation of the skull bones along the connecting joints. Therefore, in his view, the cause of death was indeterminable and not due to skull fracture. This opinion is obviously based solely on the separation of the skull bones *along the joints* and excludes any (other) skull fractures.

[64] The problem with this opinion is that the fractures drawn (in red ink) on the sketches annexed to the autopsy report, are <u>not along the connecting lines</u> but <u>next to</u> them, corresponding with the pattern of the lines. Although Dr. Vasin at first testified that the "fractures" *are* the connecting lines, he, in cross-examination changed his evidence to say that the fractures were *next to* the connecting lines. This much is clear from the sketches on which the fractures are clearly indicated with red ink, quite separately from the connecting lines. It must be said that the fractures, as indicated on the sketches, correspond with the pattern of the connecting lines but, there is nothing apparent from the sketches from which Dr. Vasin could have come to the conclusion that it was one and the same thing. He clearly erred in this regard. He also conceded that Dr. Roberto was in a better position of making these observations.

[65] Section 212 (7A)(a) of the Criminal Procedure Act, 1977 (as amended by s.4 of Act No. 24, 2003) states that: " *Any document purporting to be a medical record prepared by a medical practitioner who treated or observed a person who is a victim of an offence with which the accused in criminal proceedings is charged, <u>is admissible</u> at that proceeding and **prima facie** proof that the victim concerned suffered the injuries recorded in that document.*" (Emphasis added) The admission of both post mortem reports in this case in terms of s. 212, thus, is *prima facie* proof of the content of the reports and in order to rebut those findings, it would require evidence showing otherwise, on a balance of probability. This the defence attempted to do through the evidence of Dr. Vasin; however, when regard is had to the

unsubstantiated conclusions he had reached and concessions he had made during his testimony contradicting his earlier findings, I do not deem the evidence of Dr. Vasin sufficiently reliable to the extent where it deviates from the report (Exh. "H"), or from the opinion of Dr. Shchegolevtzy, who based his conclusions on the findings contained in the report.

[66] From the medical evidence as a whole, there is nothing creating doubt in the Court's mind pertaining to the conclusions reached by Dr. Ricardo during the autopsy and his finding of the cause of death namely, skull fractures. There is also no evidence showing that the skull fracturing occurred subsequent to the passing of the deceased. I accordingly find that the cause of death of Nasira was due to skull fractures.

[67] As regards the second post mortem report (Exh. "J") also compiled by Dr. Ricardo which was handed to Dr. Vasin to comment on, he agreed that injury to the abdominal wall and intestines are life threatening and that such injury require immediate medical intervention as the prognosis without treatment within twenty-four hours, is very poor. Dr. Shchegolevtzy shared this view.
When asked to generally comment on the nature of shotgun wounds in relation to the distance fired from, Dr. Vasin at first held the view that the injuries inflicted in this instance are not consistent with "bird shot" fired over a distance of 30 metres; meaning, that he would not have expected the pellets over that distance to have penetrated the deceased's body in the manner it did. He thereafter changed his mind on the same issue and came to the *opposite* conclusion because, he said, it involved a small child. He did not explain what would have been the difference between a child and an adult victim being wounded over the same distance and why he at first held a different opinion. The reason for this probably lies in the doctor's concession in cross-examination that he is not "qualified" in the use of firearms and as such a ballistic expert. His expertise therefore was limited to *gunshot wounds* from which he could draw certain inferences; and not as an expert in the use and firing capabilities of firearms itself. Obviously there is a big difference.

[68] From the aforestated it is clear that Dr. Vasin lacked knowledge and experience in ballistics and was not in a position to give credible evidence in that regard as he did. I deem it necessary at this stage to comment on the evidence given by Dr. Vasin. To me it seems inevitable to come to the conclusion that the doctor failed to give an *independent opinion* on those issues raised with him and instead, clearly tried to favour the defence who called him as a witness. For that reason the Court should follow a cautious approach when considering his evidence and rely thereon only as far as it is consistent with the evidence given by other witnesses.

EVALUATION OF THE EVIDENCE

Count 1

[69] It does not appear from the evidence (and neither was it suggested), that Nasira was ill at the time she had dinner with the accused that evening. According to the accused she only became nauseous after she had too much to eat and not before. Also, that he chastised her by hitting her on her legs and lower back with the stem of a spinach plant which could not have caused her death.
Sirkka's account of the events of that evening differs markedly from that of the accused, in that the accused had beaten the child severely with a stick all over her body and when it broke, he took a second one and continued hitting her until Nasira ran away and the accused giving chase. It seems common cause that Nasira had not been away for long; and according to Sirkka, when she returned, she appeared tired and weak or "finished" as Sirkka described her condition. She immediately blamed it on the accused and said he had "already killed her" to which the accused retorted: *"Let her die, even better people die."* It is not disputed that the child died soon thereafter.

[70] Sirkka's observations of the injuries inflicted on the body of Nasira was more or less corroborated and elaborated on by the State witnesses who viewed the body the following day and described the injuries as "bruises"; "blisters all over the body"; "many red marks on the back above the waist line"; "red marks of beating with a 'fresh stick' on the arms and chest appearing like blood under the skin" and "a

swollen head". In the morning Sirkka noticed that the deceased had bled from her nose.

[71] The only person who hit Nasira that evening was the accused and the injuries observed by and testified on by the State witnesses do not conform with the accused's version that he administered only five strokes when chastising his child – three on the legs and two on her lower back - whilst denying having used severe force. On his own version the spinach stem he had used to strike Nasira with, could not have caused injuries resulting in her death. The headman to whom he the following morning showed the stick he had used, was of the same view namely, that it could not have killed the child. Although Dr. Shchegolevatzy said that he could not exclude the possibility that a small, thin stick was used to hit the child with on her head resulting in skull fracture, he held the view that it required something more substantial to cause such injury for example, an adult fist blow to the head of the deceased.

[72] The strokes as described by Sirkka were violent – "like hitting an adult" – and not at all mild as described by the accused. This notwithstanding, it seems unlikely that the strokes were so forceful that it would have caused skull fractures, particularly at the base of the skull, as that, according to the doctor, required severe *blunt* force, which evidence is lacking.

[73] It must be clear that injuries were observed on the deceased's body beyond the accused's admissions; and in the absence of evidence of outside intervention by someone else, it must be reasonably inferred that the accused's beating of the child amounted to more than what he was willing to admit. Furthermore, that it happened when the accused had followed the child into the bushes. When she returned, followed by the accused, she was notably weak. This could only have been due to injury and the only person present who could have inflicted such injury, was the accused. I pause here to consider the accused's evidence that when Nasira returned, she fell down knocking her head against a log.

[74] Firstly, this only came out during the accused's testimony and whether he had raised it with his counsel during consultation, in my view, makes no difference. It formed the *basis* of his defence and according to the accused, the only possible cause for the head injury sustained. So, one would have expected thát to be raised already in his plea explanation and not during his testimony for the first time. Neither was it taken up with the only eye witness Sirkka, during her testimony. For that reason she was recalled and in any event denied such incident. Neither did the evidence of Dr. Shchegolevatzy, who made specific reference to the possibility of someone falling over and bumping his head on a hard surface, spark questions by the accused regarding his defence. It also contradicts an earlier instruction from the accused to his counsel namely that, after he and Nasira had returned, he retired to bed and that Sirkka *called the accused saying that the child fell down and that he thought the child had collapsed.* Thus, he did not observe this himself. It was only after the Court pointed out the contradiction to counsel that the accused claimed to have been present and actually saw the deceased falling down. Had that been the case, what would have been the need to call the accused and inform him about the child falling down? The accused's version on this score lacks candour and rather has the appearance of an afterthought; and, when regard is had to Sirkka's evidence and the accused's own version that he, by then, had already beaten the child; that he threatened to continue doing so and his unsympathetic attitude towards Sirkka when she returned injured, it strengthens the only reasonable inference to draw from the proved facts namely, that the accused assaulted Nasira in the bushes in a manner unknown to the Court. I accordingly so find.

[75] In coming to that conclusion I took into account that Sirkka gave single evidence and although I would not describe her as the perfect witness, her evidence was clear and satisfactory in all material respects. Even when the Court follows a cautious approach when considering all the evidence relating to count 1 as a whole, it is satisfied that she had spoken the truth. Therefore, the accused's evidence on this charge of murder (count 1), where in conflict with that of the State witnesses, is rejected as false beyond a reasonable doubt.

[76] The injury undoubtedly was serious as not only did she appear to be weak, but also started vomiting and soon thereafter passed away. On the accused's version he did not do anything that could have caused Nasira's death. This however, begs the question, what then could have caused her death so soon after the beating? The answer lies in the post mortem findings and the evidence given by Dr. Shchegolevatzy namely, that due to the two head fractures, severe brain contusion would have set in, followed by acute brain oedema and subsequent death. I have no doubt that that is what had happened in the present instance and explains why Nasira died so soon after the incident. The causal connection between the assault and the victim's subsequent death, in my view, had properly been established.

[77] *Mr Wamambo* submitted that if regard is had to the amount of force that was required to fracture the skull of the six year old child and that the accused did nothing to save her life, it irresistibly leads to the conclusion that the accused acted with intent in the form of *dolus eventualis.* For such finding it must be proved that the accused (i) subjectively foresaw the possibility that Nasira's death may flow from his actions, and (ii) that he reconciled himself to this possibility; or putting it differently, that he was reckless of whether the result would ensue.

[78] The latter requirement, in my view, was proved by the evidence of Sirkka when she testified that when she accused the accused of having 'killed' her child, he replied that she could die *"as there are better people who also die."* This is further evident from his conduct, in that he made no attempt to find medical help to save the child – not that it would have been of any help, as the child died soon thereafter. That the accused stood reckless of whether death would ensue, in my view, was duly proved.

[79] Regarding the first requirement, did the accused when he assaulted the child subjectively foresee the possibility that she might die; and can it be inferred from the proved facts? If the accused did not foresee the results of his acts, then there can be no *dolus eventualis.* What is required is that the possibility that the result (death in this instance) may ensue, must be *substantial and reasonable* and not merely remote or exceptional.

[80] Looking at the present facts where the accused's initial intent was to chastise his child – which boundaries he clearly exceeded – it seems to me impossible to draw a single inference from the proved facts that the accused, when he so acted, subjectively foresaw the possibility that death may ensue. The exact cause of the blunt force applied to the deceased's head which caused the fractures is unknown and it could have been caused in various ways i.e. by hitting her with an object; a fist blow or even where the victim was hit or pushed down to the ground, hitting her head on something hard. What has been established is that severe force was applied to the deceased's head, resulting in the skull fracture. Whereas the Court rejected the explanation advanced by the accused as false, the circumstances surrounding the attack itself, remains unknown.

[81] Because the accused gave false evidence which was discarded, the Court may draw the same adverse inferences as if he had not given evidence at all; including the inference that there is something about the incident that he wishes to hide. It does not however mean that, because he had lied or had something to hide from the Court, that therefore, he is guilty. I am mindful of what this Court has said in *State v Gerald Kashamba* (unreported) Case No. CC 05/2009 delivered on 03.04.2009 when the Court considered the consequences of the accused's evidence being discarded as false and the subsequent inference drawn from the facts that he had acted with *dolus.* It must be said that the accused in that case was a ranked police officer who had killed his wife by using a fire arm. The facts therefore differ substantially from the present facts.

As the learned authors Hoffmann & Zeffertt: The South African Law of Evidence however point out, everything will depend on the facts of each case and that: *"A proper application of the* ***Mlambo*** *[1957 (4) SA 727 (A)] dictum merely signifies that an accused cannot complain if, because of his falsehood, the trier of fact does not give him the benefit of the doubt in this context, that he killed the deceased without intending to kill or that he killed him with a lawful purpose."*

[82] However, caution must be exercised not to attach too much weight to the untruthful evidence of the accused when drawing conclusions and when determining his guilt. The principles enunciated by Smalberger, AJA in *S v Mtsweni* 1985 (1) SA 590 (A) serve as valuable guideline and the following appears in the Headnote:

> *"Although the untruthful evidence or denial of an accused is of importance when it comes to the drawing of conclusions and the determination of guilt, caution must be exercised against attaching too much weight thereto. The conclusion that, because an accused is untruthful, he therefore is probably guilty must especially be guarded against. Untruthful evidence or a false statement does not always justify the most extreme conclusion. The weight to be attached thereto must be related to the circumstances of each case. In considering false testimony by an accused, the following matters should,* ***inter alia****, be taken into account: (a) the nature, extent and materiality of the lies and whether they necessarily point to a realisation of guilt; (b) the accused's age, level of development and cultural and social background and standing insofar as they might provide an explanation for his lies; (c) possible reasons why people might turn to lying, e.g. because, in a given case, a lie might sound more acceptable than the truth; (d) the tendency that might arise in some people to deny the truth out of fear of being held to be involved in a crime, or because they fear that an omission of their involvement in an incident or crime, however trivial the involvement, would lead to the danger of an inference of participation and guilt out of proportion to the truth."*

[83] When applying the aforestated principles to the facts *in casu*, it has been proved that the accused initially intended to chastise Nasira for a wrong she had committed (in his view) and when she ran away from him, he followed her. Whatever force he thereafter applied to her person remains an unknown factor and the Court is not in any position, by means of inferences, to conclude what exactly transpired, except that from the medical evidence, excessive (severe) force was applied to her head. Accused was not prepared to tell the Court the truth on that aspect and fabricated evidence about the child having hit her head against a log. But, can it be said that he at the time when he acted *foresaw* the consequences of his action? In deciding the question regard is had to him being an unsophisticated person, who was living, what appears to be, a primitive life style with his wife and children in the village. Against

this background and taking into account the reason for hitting the child, it seems to me impossible to find beyond reasonable doubt, that the accused indeed foresaw the consequences of his actions i.e. that there was a reasonable possibility that death would ensue. His subsequent denial and fabrication of evidence was nothing else than a cover-up for what he had done. In these circumstances, it cannot be said that the accused acted with intent in the form of *dolus eventualis.*

[84] Whereas the connection between the accused's actions and the death of the deceased had been established beyond reasonable doubt, what remains to be determined is whether the accused was negligent in causing Nasira's death. The Court found that severe blunt force was applied to the head of the deceased, causing the skull fractures; and, given the fact that the deceased was a young child aged 6 years; the accused ought to have foreseen that his actions might result in death, and therefore, by failing to appreciate that, he was negligent.

<u>Count 2</u>

[85] It is common ground that when the accused walked to Nkulivere village, he carried with him a shotgun belonging to Mpasi; and from which he later fired a single shot and as a result, his youngest child, Sigcende, died the following day in Rundu State hospital. What is in dispute however, are the events which led to him firing the fatal shot. There are two irreconcilable versions before Court as regards the events taking place prior to the shooting and in its assessment of these conflicting versions of fact, the proper approach of the Court in a case as the present is: *"…to apply its mind not only to the merits and demerits of the state and the defence witnesses but also to the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond reasonable doubt."* (*S v Singh* 1975 (1) SA 227 (N); *S v Engelbrecht* 2001 NR 224; *S v Petrus* 1995 NR 105). The respective versions should not be viewed in isolation and weighed up one against the other; but rather that the Court must strive for a conclusion in its determination whether the guilt of the

accused has been proved beyond reasonable doubt, when considering the totality of the evidentiary material.

[86] The witnesses Sirkka, Helvi and Eino corroborated each other in material respects regarding the events which took place at Helvi's residence where they found the accused already seated under a tree upon their return from the mahangu field. According to them, what sparked the situation was when the accused asked Sirkka for the child and she refused. They differed on what was exactly said during the exchange of words between the accused and them, but are in agreement that the accused at the end used words which they interpreted as a threat; hence, when he thereafter reached for the firearm, they fled with Sirkka and Eino running out in front and Helvi following. It is common cause that some dogs ran along.

[87] According to Helvi the accused threatened Sirkka by saying: *"If it is like that…"* whereafter he picked up the firearm and started loading it. This undoubtedly could be seen as a threat against the lives of all those present. From the State case it would appear that the accused tried to prevent the complainant from reaching the neighbour's house by cutting her off before she got there and then, without any warning, fired one shot at her. She continued running and after he reloaded the shotgun he pointed it at Eino, but nothing happened, as Risto appeared on the scene and called out at him. He then ran away.

[88] On the accused's version, he was the victim and not the attacker as portrayed by the State witnesses when he was told to leave the village and then came under attack from Helvi and Eino. Whilst running away, Helvi incited some twenty dogs to attack him and when realising that they would get to him, he turned around and fired one shot at the dogs. He then continued running. He said he had no intention of firing at any person but later on realised that someone might have been hit as his pursuers were in the background, some thirty metres away. However, up to his arrest he had made no enquires to determine whether that was the case.

[89] When viewed in isolation, the defence version might reasonably explain the need for the accused to have fired a shot at the dogs which, according to the witnesses, were amongst them. However, except for the accused's evidence that the dogs were incited, there is nothing supporting his version. Eino did say that the dogs, out of their own, were chasing the accused the time they started running away from the accused, but she was clear that once the accused had passed them, the dogs, except for the one that was hit, turned back. When the shot was fired the injured dog was standing behind them. The witnesses were in agreement that the accused did not take aim at the dogs, but at Sirkka.

[90] As mentioned, the opposing versions should not be considered individually but in totality; whilst having due regard to the merits and demerits of the witnesses on either side, as well as the probabilities. Only thereafter would the Court be able to determine whether the accused's version is reasonably possibly true.

[91] The accused's explanation for carrying the firearm with him on that day certainly has a hollow ring to it, as he easily (as might have been expected of him to do in the circumstances) could have returned the firearm to its lawful owner instead of carrying it along over some distance to Nkulivere village. It seems strange that he was forced by Petrus to return the firearm, to whom it was actually given, simply because he had carried it home the previous night. The reason why Petrus had been given the firearm was not only to hunt ant-eaters, but to take it with him the following day when he set out looking for Mpasi's missing cattle. Petrus was clear that the accused disappeared in the morning taking the firearm and ammunition with him and only when he returned with it later, he was told to take it back to the owner. The accused's explanation furthermore contradicts his earlier instruction to his counsel namely, that the reason for having the firearm with him was because he and Petrus were *still hunting that morning*, from where he decided to go to Nkulivere and *asked* the firearm from Petrus for protection. This he denied in cross-examination and claimed it to have been a misunderstanding between him and his counsel – one of many I may add.

[92] Thus, from the accused's side there was no reason why he took the firearm with him that day. I do not think the evidence sufficiently supports an inference that the accused was actively involved in obtaining the firearm from Mpasi in order to use it in the commission of crime. But, I find the reasons advanced by the accused for having taken the firearm and ammunition with him that morning unconvincing and improbable; and it seems to be nothing else than a (poor) attempt to explain his possession thereof in circumstances where there was no need to have come with a firearm because, according to him, the purpose of his visit was merely to fetch his lighter and see his sick child. The latter raises a further discrepancy in his evidence.

[93] Although the accused said that the purpose of his visit was to get his lighter and to see his child, it contradicts what is stated in his reply to the State's pre-trial memorandum where in par. 5.1 it is stated: *"He will inform the court that he went to visit his family at his mother-in-law's house in order to persuade his wife and child to return home."* (Emphasis added)

In his plea explanation at the beginning of the trial the reason for his visit was not stated; however, during cross-examination of Helvi and Eino it was put to them that when the accused *asked for his child* it was refused and this sparked the shooting incident. Not only is this aspect of his evidence consistent with his earlier plea explanation contained in the pre-trial memorandum, but the asking of the child from her mother was never disputed and neither did the accused himself explain why he had asked for the child. It should not simply be assumed that he merely wanted to hold his child because, according to Eino, the accused already that afternoon stayed with her until they had finished harvesting.

[94] At this juncture it seems necessary to consider what value, if any, should be given to the explanation advanced by the accused in his reply to the State's pre-trial memorandum which contains certain admissions, as it would also have some bearing on the charge set out in count 4.

[95] In par.35 of the Consolidated Practice Directives issued by the Judge-president of this Court on the 2nd day of March 2009, is set out the procedure in which pre-trial

hearings should be conducted and the procedure to be followed, amongst others, in the exchange of information and documents between the State and the accused or his or her legal representative. Where the accused is represented by a legal practitioner, subparagraph (4)(b) states that:

> *"…the accused may deliver to the prosecution and the Registrar not later than ten days before a pre-trial hearing (at) a pre-trial memorandum containing in sequential order factual allegations he or she makes in his or her defence and which he or she wishes the prosecution to consider for purpose of indicating whether it intends to take issue therewith at the trial and the accused may refer to such memorandum when he or she considers the extent of corroboration required to establish such an allegation at the trial."*

The purpose of pre-trial hearings, generally speaking, is to set the matter up for trial and to ensure that all legal requirements for a fair trial have been met. At the same time it provides for a process during which the trial could be curtailed through the exchange of documents or information; which is usually set out in the accused's reply to the pre-trial memorandum. Obviously, what has been stated in the reply should be in accordance with the accused's instructions to his counsel. The format of the reply to the State's pre-trial memorandum does not require from an accused to affix his signature to the document as confirmation of the content being correct and only requires the signature of the accused person's legal representative.

[95] In this case the accused, only during his testimony, informed the Court that the pre-trial memorandum (Exh. "E") handed up when the trial commenced, was never discussed with him and that it contained self-incriminating admissions and a plea of guilty on count 4; which are not in accordance with his instructions to his former legal representative. Although the accused in this Court tendered a plea of 'not guilty' on count 4, there was no objection raised against the handing in of his reply to the pre-trial memorandum; neither was the State nor the Court informed that the content thereof would be disputed and challenged. It was only when the accused testified that this issue arose. Is the accused bound by the admissions made on his behalf as contained in his reply to the State's pre-trial memorandum?

[96] In my view each case must be considered on its own facts and I do not believe that a general rule should be laid down in this regard. In the present case the accused seems to have had no quarrel with the exculpatory explanations set out in the reply as these are consistent with the evidence he had given in Court. Whereas his complaint only lies against the incriminating parts of the reply, it implies that his former legal representative either made this up; or possibly misunderstood some aspects of the accused's instructions or acted completely against it. According to the accused he only came to realise it during the trial. Except for saying that his reply to the pre-trial memorandum was never read back to him, no evidence was led supporting that contention and in the circumstances it might have been prudent for the accused to have called his former legal practitioner to substantiate his claim. In the absence of a reasonable explanation as to why the accused's former legal representative would have acted against his instructions only on certain aspects thereof, one is inclined to take the document at face value. Furthermore, one would have expected from the accused to disclose this discrepancy to the Court at the soonest possible opportunity and not leave it to the very end before raising it.

[97] It is, in the words of Claassen J, stated in *Small v Smith* 1954 (3) SA 434 (SWA) at 438 *"…elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and if need be to inform him, if he has not been given notice thereof, that other witnesses will contradict him, …… It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved."* In *S v Boesak* 2000 (1) SACR 633 (SCA) at 647c-d Smalberger JA held the same view and said: "*…, it is clear law that a cross-examiner should put his defence on each and every aspect which he wishes to place in issue, explicitly and unambiguously, to the witness implicating his client. A criminal trial is not a game of catch-as-catch-can, nor should it be turned into a forensic ambush."*

[98] There can be no doubt that those issues contained in the accused's replying memorandum, and which he now disputes, must have been dealt with during

consultations with his current counsel; or at least, that the consequences thereof were appreciated as the trial progressed with witnesses giving evidence contrary to what the accused would come and say. To keep quiet in the circumstances appears to have been a tactic to see where the evidence was leading to and to use it either way to the benefit of the accused. As stated, a criminal trial is not a game and if an accused at the end of the day wants the court to believe him, then he should take the court fully into his confidence. Neither should he in those circumstances complain if the trier of fact does not accord him the benefit of the doubt. See: *S v Chigova* 1992 (2) ZLR 206 (S) at 217.

[99] It has been said that once an accused has placed his case in the hands of his legal representative, the latter has full control over the case and the accused cannot afterwards repudiate the conduct of the legal representative (*S v Matonsi* 1958 (2) SA 450 (A) at 458).

[100] After all is said and done, I am unable to find that what has been stated in the accused's reply to the State's pre-trial memorandum was without his knowledge and *contra* the instructions he had given to his erstwhile legal representative. Neither am I convinced that the alleged improper conduct by his former legal representative only came to his attention during the trial and that he could not have addressed the issue sooner. In the absence of exceptional and compelling circumstances showing otherwise, I see no reason why the admissions made and the explanations advanced by the accused relating to the charges preferred against him, must not be taken as evidence. Therefore, for purposes of this judgement, it will be considered with the rest of the facts.

[101] Returning to the facts relating to count 2, the evidence of the State witnesses is supportive and corroborative of each other in all material respects namely, that they fled when they saw the accused picking up the shotgun; that the accused followed them and at some stage passed them and blocked their way; that he fired one shot at Sirkka from a distance of about 4,2 metres; that he then reloaded and pointed the firearm at Eino but ran off when Risto called out at him. They were in agreement that

the dogs were not incited to attack him; and that at no stage had they attacked the accused with objects as alleged.

[102] There are minor discrepancies in their respective versions but these are immaterial and should not affect their credibility as witnesses adversely, for example, whether the accused spoke in a normal manner or appeared annoyed; the exact position of those running away as well as that of the dogs at specific stages. These were tense moments where persons were fleeing from a gun wielding person and as such, it was a fast moving scene where there was little time for detailed observations. This possibly explains why Eino was unable to say at what stage Helvi came to stand behind the accused when facing her and Sirkka. Minor differences in the evidence of the witnesses could therefore be expected. Other than that, the witnesses stood their ground and were not shaken or discredited during cross-examination.

[103] According to the accused, he decided to leave the moment when Helvi approached him with an axe and Eino picked up a stick; but made no mention of Sirkka joining them in the attack. It would therefore seem strange that soon thereafter she was out in front carrying her baby, chasing after the accused and suddenly emerging from behind a bush. However, during cross-examination of Sirkka it was put to her as an instruction coming from the accused, that she, Eino and Helvi beat him with objects whereafter he started running. Furthermore, that he then picked up the firearm and shot the dogs. This version differs markedly from what the accused had testified. The shooting did not take place at Helvi's house but in the bushes, some distance away. He furthermore testified that he did not feel threatened by the women as he knew he could easily outrun them, but not the dogs, which were twenty in number.

[104] On the accused's version the sole reason for firing that day was to protect him against the attacking dogs. Had that been the case, as Helvi rightly asked, why did he then not shoot the dogs from the beginning whilst still at her place? Neither would it have been necessary for the others to run after the accused as he would outrun them easily. I find it surprising that when the accused fired at the attacking pack of dogs,

numbering twenty, that he only hit the one and not more. This seems to support the evidence that once the accused had run passed the witnesses, two of the three dogs turned back leaving one remaining behind Sirkka and Eino. The number of dogs testified on by Helvi namely three, was not disputed and the accused's version of them being twenty, came as a total surprise to all, even his counsel. This appears to be an exaggeration in order to give more credence to his reasons for having fired the gun on that day.

[105] Regarding the scene where the shooting took place, the State relied on a photo plan (Exh. "L"), particularly photo 4, which was pointed out to Detective Sergeant De Celestino by Sirkka on the 11th of May 2007, as the exact spot where each one stood at the time of the shooting. The photo plan was handed in without any objection by the defence and at no stage during the trial, did the accused dispute the correctness of the scene and the points depicted in photo 4.

[106] *Ms. Kishi* however, submitted that these points had to be shown to Sergeant De Celestino afterwards, because he was not present during the incident; therefore, it had to be confirmed under oath by the witness (Sirkka). For the following reasons I find counsel's submission surprising. Firstly, from the outset the accused did not dispute the admissibility and content of the photo plan and in par. 24 of his reply to the State's memorandum this is clearly stated. Secondly, during the trial no objection was raised based on the grounds of hearsay as regards the scene of the crime or the points depicted in the photo plan. Thirdly, this issue was never raised with the witness De Celestino during his testimony. Fourthly, when Sirkka was recalled to give evidence on another aspect of her evidence, counsel, with leave of the Court, could easily have clarified any uncertainty with her as regards the pointing out done by her to De Celestino. In fact, ever since disclosure was made, the accused must have realised that the scene depicted in the said photograph was not the right one and therefore, he should already have taken it up with Sirkka and the other State witnesses during cross-examination and not to have waited until he was under cross-examination to put it in dispute. To do so at such late stage is grossly unfair and improper (*Small v Smith supra*).

[106] I am in full agreement with the comments made by the Constitutional Court of South Africa in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at 36J-37E where it is stated:

> *"[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in* ***Brown v Dunn*** *(1893) 6 R 67 (HL) and has been adopted and consistently followed by our Courts."* (Emphasis added)

[107] Both Sirkka and De Celestino were witnesses to the proceedings and the accused's failure to cross-examine them on conflicting issues, which only he had knowledge of, cannot count in his favour afterwards. I can think of no reason why his counsel would not have raised it with the witnesses at the relevant time; and therefore, it would appear to me that this came as a mere afterthought during his testimony.

[108] Contrary to the accused's evidence that *after* he fired, Sirkka suddenly emerged from behind a bush some 30 metres away, all three State witnesses testified that Sirkka and Eino stood opposite the accused approximately 4 metres away when the accused fired at Sirkka. Their exact positions are indicated on photo 4 of exhibit "L", according to which the distance between the accused and Sirkka was 4,2 metres and that between Eino and Sirkka, 1,1 metre. Also depicted on the photo is the accused's position, and a tree. From the photo it is clear that, in relation to Sirkka's position, the tree was *behind* the accused, more to his right. It therefore could not have had any influence on the trajectory of the pellets when the shotgun was fired, as was suggested by Mr. Nambahu. What is absent from the photo is any bushes in the

immediate vicinity of the positions of those present. This, the accused realised the moment he was handed the said photograph and when asked to explain this phenomenon, he stated that, although he recognised the tree, there were no bushes between him and where Sirkka stood and therefore, it was the wrong spot.

[107] In an attempt to show that the shot must have been fired from a distance (30 m) and not at close range (4,2 m), the defence relied on the evidence of Mr. Nambahu and of Dr. Vasin, as corroboration for the accused's version. I have earlier in this judgment given the reasons why the Court should follow a cautious approach when considering the evidence given by Dr. Vasin and it seems common cause that he is not an expert in ballistics. That leaves us with the evidence of Mr. Nambahu, a ballistics expert.

[108] He was clear that an object fired at with a shotgun at short range, would be struck by a group of pellets; and that these (together), in size, would cause a much bigger injury than a single or smaller grouping of pellets, which have spread out when fired from a distance. However, he said, thát would be the case where there was a direct hit – in other words – where the object got the full load of pellets. When asked to comment on and attempt to explain in the present circumstances, why then was only the baby hit and not Sirkka (or Eino) when fired at, at such short range, he replied that it was possible that (a) the target was missed and not directly hit; or (b) it ricocheted from an object (the tree). As stated, the latter possibility can safely be ignored as the tree was not between the accused and the victim. He did however say that it would have been possible that pellets could have deflected from the ground when the shot was fired (down) at the dogs, as the accused claims. I assume that it still required the shot to have been fired at short range. Thus, from Mr. Nambahu's evidence there are the two possibilities, each based on two mutually destructive versions and the probabilities of each will depend on the accepted proven facts of the case.

[109] The question that must be answered is whether the State's case had been proved beyond reasonable doubt when measured against the accused's conflicting

version or – putting it differently – is the accused's version reasonably possibly true even if the Court does not believe him? Is there a reasonable possibility that it may be substantially true? (*S v Jaffer* 1988 (2) SA 84 (C); *S v Kubeka* 1982 (1) SA 534 (W))

[110] Whilst guarding against 'compartmentalisation' of evidentiary considerations the Court must – as stated above – measure the totality of the evidence, not in isolation, but by assessing properly whether in the light of the inherent strengths, weaknesses, probabilities and improbabilities on both sides, the balance weighs so heavily in favour of the State, that it excludes any reasonable doubt about the accused's guilt in one's mind.

[111] When applying this 'test' to the totality of the evidence presented on count 2, I have come to the conclusion that the accused's version is not reasonably, possibly true and has to be rejected where it is in conflict with that of the State witnesses. The evidence sufficiently proves that the accused, after obtaining unlawful possession of a shotgun and ammunition, went to Nkulivere village to forcibly take Sigcende from his mother's custody and when she refused, he turned to the gun whereafter Sirkka and her family fled. Furthermore, that the accused gave chase and managed to block them and then fired one shot at Sirkka which resulted in Sigcende being hit, with fatal consequences. I accordingly reject the accused's story about him having fired at the attacking dogs and that Sirkka suddenly emerged from behind a bush in the line of fire. He had clearly acted with intent to kill when he pulled the trigger and the reasonable man test applicable to acts involving negligence, as argued, finds no application as the accused's act amounts to murder. It therefore makes no difference whether the intended victim or any other person dies as a result thereof.
When regard is had to the weapon used namely a shotgun, fired at short range at Sirkka whilst holding her baby, then the only reasonable inference to draw from the facts is, that the accused had intent to kill in the form of *dolus directus.*

Count 3

[112] The charge of attempted murder is based on the same facts relating to count 2. Whereas the Court had already found the accused to have acted with intent to kill, the charge, which relates to Sirkka who survived the attack, was equally proved against the accused and he stands to be convicted on the charge of attempted murder.

Count 4

[113] For the reasons given earlier herein, I have indicated that the accused should be bound by the admissions set out in his reply to the State's pre-trial memorandum unless there are good reasons why it should not be relied on.

[114] When pleading not guilt on this charge the accused raised the defence that, before burying the body of Nasira, *he sought and was granted permission by the headman* to bury the corpse and therefore denied that he had any intention of obstructing or defeating the course of justice. From what has been stated, it seems fair to assume that the accused knew (i) that he required permission to bury the deceased; and (ii) that to his mind, he could obtain such authority from the headman. The headman referred to by the accused turned out to be Sagarias Sikongo, a witness called by the Court.

[115] According to Sikongo he informed the accused that the burial could not take place before the police had been informed whereafter he personally tried to find transport in order to notify the police. He was unsuccessful and upon his return he found the accused busy digging a grave and learned that 'permission' was obtained from Vilho Hausiko's parents to proceed with the burial. Sikongo was upset with the situation and after remarking that he had no control over the situation, he dissociated himself from the burial. After the burial the accused said to him that he would now go and inform the police and Sikongo then sent Rassi, and someone by the name Kaboy, with him to make sure that it is done. He later on learned that it was never reported. He furthermore disputed the accused's contention that he promised to provide him with a letter of authority to be handed to the police when he went to report the death of Nasira.

[116] Accused confirmed that he was informed by the headman that he had to notify the police of the death but that he could not do so before the burial, as his wife refused to stay alone with the corpse whilst he went to make the report. Sirkka however, was never confronted with this aspect of the evidence when she testified. It is common cause that the accused did not report the death of his child to the police – with or without the letter from Sikongo – and failed to give a satisfactory explanation why. On his own version he was not sure whether he was responsible for his child's death; he knew the death had to be reported to the police; and although he undertook to report it afterwards, he made no attempt to do so. It is against this background that the admissions recorded in the replying memorandum were made and according to which the accused indicated that he was guilty of the crime of defeating or obstructing the course of justice. The admissions are consistent with the evidence adduced at the trial and as mentioned earlier, there is no reason why the Court should not have regard thereto when considering the accused's guilt on this charge.

[117] In order to convict the accused of the crime of defeating or obstructing the course of justice, the State is required to prove that he unlawfully and intentionally committed any act which defeats or obstructs the administration of justice. Because the scope of the crime deals with interference in the *administration* of justice, the crime can be committed even though justice prevailed in the end. The end result of the act is therefore not material for the purposes of the crime; and where the police in the present case were able to exhume the body and have an autopsy performed, makes no difference. The accused, in par. 5.2 – 5.5.3 of his replying memorandum, admitted all the elements of the crime of defeating or obstructing the course of justice and accordingly stands to be convicted.

Counts 5 and 6

[118] The accused pleaded guilty on both these charges and in a statement handed in under s.112 (2) of Act 51 of 1977, he admitted all the elements of the charges namely, that he was intentionally and unlawfully in possession of a Baikal shotgun and

ammunition on the date stated in the charges. This is the firearm (Exh. "1") used by the accused in the commission of the crimes set out in counts 2 and 3. The Court is satisfied that the accused intended pleading guilty to these charges and that he admitted all the elements of both crimes.

[119] In the result, the Court's finding is the following:

Count 1: I.t.o. s.258 Act 51 of 1977 on Culpable Homicide: Guilty

Count 2: Murder: Guilty

Count 3: Attempted Murder: Guilty

Count 4: Defeating or Obstructing the Course of Justice: Guilty

Count 5: Possession of a Firearm without a licence: Guilty

Count 6: Possession of Ammunition without being in lawful possession of an Arm capable of firing such ammunition: Guilty

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LIEBENBERG, J

ON BEHALF OF THE ACCUSED: MS. KISHI

INSTRUCTED BY: DIRECTORATE: LEGAL AID

ON BEHALF OF THE STATE: MR. WAMAMBO

INSTRUCTED BY: OFFICE OF THE PROSECUTOR-GENERAL