

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: CC 03/2011

THE STATE

versus

JACKIE JACKSON

KAVETU PONTIANUS KWANDU

ISASKAR NAU-GAWASEB

FIRST ACCUSED

SECOND ACCUSED

THIRD ACCUSED

Neutral citation: *State v Jackson & 2 Others* (CC 03/2011) [2013]

NAHCMD 193 (11 July 2013)

Coram: **SHIVUTE, J**

Heard: **2 – 24 May 2012, 17 – 18 September 2012 and 17 April 2013**

Delivered: **11 July 2013**

Flynote: **Criminal law – Murder – *Mens rea* – Common purpose – Not necessarily to prove – Prior agreement – Causal connection between act of accused and death of deceased – Conduct of one accused – imputed to the other**

- Doctrine applied where two or more perpetrators act together – prerequisites: presence, awareness of crime being committed, common cause with co-accused, some action on part of perpetrator, *mens rea* and intentions to harm or to kill.

Summary: Where two or more perpetrators participate in a crime the state may rely on a doctrine of common purpose – It is not necessary to prove prior agreement or causal connection between the conduct of each accused and the death of the deceased – Conduct of one accused is imputed to the others and accused can still be held liable – however, the State must prove necessary prerequisites – namely:

- (a) The accused must have been present at the scene where violence was being committed;
- (b) He must have been aware of the assault being perpetrated;
- (c) He must have intended to make common cause with those who were actually perpetrating the assault;
- (d) He must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others;
- (e) He must have had the requisite *mens rea*; so in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue.

Accordingly accused persons are found guilty on the basis of the doctrine of common purpose.

VERDICT

1st Count : Each accused is found guilty of murder with direct intent.

- 2nd Count : Each accused is found guilty of robbery with aggravating circumstances.
- 3rd Count : Theft: Each accused is found not guilty and is acquitted.
- 4th Count : Each accused is found guilty of attempting or obstructing to defeat the course of justice.

JUDGMENT

SHIVUTE, J:

[1] The accused persons are jointly charged. They pleaded not guilty to an indictment containing 4 counts, namely: murder, robbery with aggravating circumstances; theft and defeating or obstructing or attempting to defeat or obstruct the course of justice.

The particulars of the charges read as follows:

Count 1: Murder

It is alleged that the accused persons during the period 18-19 April 2010 and at or near Windhoek in the district of Windhoek did unlawfully and intentionally kill Alfons Rijatua, a 42 year old male person.

Count 2: Robbery with aggravating circumstances as defined in section 1 of Act 51 1977.

It is alleged that the accused persons during the period 18-19 April 2010 and at or near Windhoek in the district of Windhoek did unlawfully and with intent to force into submission assault Alfons Rijatua by shooting him with a shot gun in the chest with intent to steal from him a Toyota sedan motor vehicle with registration number

N25483W and its ignition key, a Panasonic car radio and compact disc player, a Nokia 1100 cellular telephone and its battery and SIM card the property of or in the lawful custody and control of Alfons Rijatua /or Barminas Steven Zeraua and that aggravating circumstances as defined in section 1 of Act 51 of 1977 are present in that the accused persons were before, during or after the commission of the crimes wielding a firearm, namely a shot gun and inflicting grievous bodily harm to the said Alfons Rijatua by firing shot(s) at him with this firearm.

Count 3: Theft

It is alleged that during the period 18-19 April 2010 and at or near Windhoek in the district of Windhoek the accused did unlawfully and intentionally steal a Toyota sedan motor vehicle with registration number N25483W and its ignition key, a Panasonic car radio and compact disc player, a Nokia 1100 cellular telephone and its battery and SIM card the property of or in the lawful custody and control of Alfons Rijatua /or Barminas Steven Zeraua.

Count 4: Defeating or obstructing or attempting to defeat or obstruct the course of justice.

It is alleged that the accused persons during the period 18-19 April 2010 and at or near Windhoek in the district of Windhoek did unlawfully and with the intent to defeat or obstruct the course of justice:

1. Dump the deceased's body in dense bushes a distance away from where the deceased was shot; and/or
2. Abandon the Toyota motor vehicle with registration number N25483W a distance away from where the deceased was shot and his body dumped; and/ or
3. Threw away the ignition key of this Toyota motor vehicle in dense bushes a distance away from where the deceased was shot and the body dumped and the Toyota motor vehicle abandoned; and/or

4. Remove the number plates of this Toyota motor vehicle and cover up blood stains inside this motor vehicle; and/or
5. Make false entries in the Occurrence Book of the Jackson Security Company to the effect that during the shift of accused 2 on 18-19 April 2010 accused 2 never left the premises of the Hage Geingob Stadium, and/or that no shooting incident involving the deceased happened on this premises during this period, and/or that accused 1 and 3 and the deceased never entered this premises during this period.

Whereas, these acts were perpetrated whilst the accused knew or foresaw the possibility that their conduct may:

1. Frustrate and/or interfere with the police investigations into the disappearance and death of the deceased Alfons Rijatua; and/or
2. Conceal or destroy evidence that they killed the deceased and stole property in the possession of the deceased; and/or
3. Protect all or some of them from prosecution for a crime in connection with the death of the deceased and the disappearance of property which was in the possession of the deceased at the time of his death; and/or
4. Cover up the true facts namely that the deceased was shot on the premises of Hage Geingob stadium during the shift of accused 2 on 18-19 April 2010, and/or that during this period accused 1 and 3 and the deceased entered this premises, and/or accused 2 left the premises during the shift on 18-19 April 2010.

[2] Ms Ndlovu appears on behalf of the state while Mr Brockerhoff appears for the first accused, Mr Tjituri for the second accused and Mr Uirab for the third accused on the instructions of Directorate of the Legal Aid.

[3] In terms of s 115 Act 51 of 1977, counsel for accused 1 stated that accused 1 had nothing to do with all the charges. Counsel for accused 2 stated that on the night of the incident after accused allowed accused 1; and the deceased and accused 3 into the stadium, they drove up to the pitch of the stadium. Accused 2 followed them. Accused 1 came back to the guard room. Meanwhile accused 2 had visited the toilet under the main pavilion, whilst there, he heard a gunshot. When he came back he saw a shotgun in the hands of accused 1. Counsel for accused 3 stated that accused 3 denied having killed the deceased or being present when the deceased was killed. He denied having robbed the deceased or having stolen the goods. He denied having acted in common purpose with his co-accused persons and puts the State to the proof of all the allegations as contained in the indictment.

[4] The State called several witnesses and I now wish to proceed with the summary of their testimonies.

[5] Johannes Paulus testified that on 19 April 2010 around 06h00, he saw a Toyota Tazz motor vehicle parked next to his house in Golgota 13. He observed that it did not have a registration number. When he returned back from work the said vehicle was still parked next to his yard. Around 18h00 he called the City Police. He noticed that the CD player was not in the vehicle as the wires were hanging outside. He was able to see inside the vehicle because both the front windows were open. Upon the arrival of the police, they started searching inside the vehicle and they discovered the registration number plates in the vehicle. The police also discovered blood stains in the said vehicle.

[6] Constable Silas Mokwena testified that he was called to attend to the complaint. His testimony essentially confirmed what Mr Johannes testified he observed blood at the side of the driver, under the driver's seat. He checked the vehicle registration number on the system, which was N23483W. It was revealed that it belonged to a certain D Zeraua.

[7] Constable Friedrich Niklaas Eigowab's, testimony confirmed what Silas Mokwena testified about. Upon arrival, he took over the scene from the City Police and contacted

a tow-in service. Around 02h00-03h00 the vehicle was towed to Wanaheda Police station for photographs and fingerprints to be taken.

[8] Laurencia Charmaine Jackson in her testimony testified that she knows accused No 1 who is her brother. On 19 April 2010 around 16h00 she saw a grey and black Nokia 1100 cell phone with accused 1 at their home. She testified that she received a call from the police on her cell phone MTC number 0812198900. They came at her residence and informed her that they were looking for Jacky Jackson. One of the officers entered a number being 081620305 in her phone and asked her who the number belonged to and she confirmed that it belonged to accused 1. She was in the presence of her father when the police questioned her. They asked for accused 1's whereabouts but she was unable to tell them where he was. The police left their contact details. When accused 1 came home her father telephoned the police. The police arrived and questioned accused 1 about the deceased's cell phone and where he got it from. He handed the cell phone to the police and informed them that he got it from an unknown person at Soweto Market. Thereafter the police took him to the police station. She identified the cell phone in Court and it was marked "Exhibit 1".

[9] Augustinus Jackson in his testimony confirmed what Charmaine Jackson testified about. He testified that accused 1 is his son. Accused 2 is his employee and accused 3 is a friend to accused 1. He stated that he owns a security company by the name Jackson Security Services and that accused 1 was working for him. Accused 1 and 2 were stationed at the Rugby Stadium. On that day accused 1 was not on duty. A certain Mateus and accused 2 were on duty. When the employees come on duty they enter their particulars and items such as firearms and the bullets that they are receiving in the Occurrence Book. One firearm and 3 bullets are issued at every site. At that specific site a shotgun firearm with serial number 05013505 was issued. A copy of its license was produced in court and marked "Exhibit A". The witness identified the shotgun and it was marked "Exhibit 2". Accused 2 admitted in his presence that he was given the fourth bullet by a friend called Ndumba, who was Mr Jackson's former employee. Ndumba was questioned about the bullet in the presence of accused 2 and denied

having given accused 2 such bullet. The bullets were identified by the witness and jointly produced as "Exhibit 3".

[10] Doctor Simasiku Kabanje explained the post-mortem report in respect of the deceased that was compiled by Doctor Estrada who had returned back to Cuba. The cause of death was stated as gunshot on the chest.

[11] Petrus Dumeni testified that he had known accused 1 for a long time as they reside in the same residential area. During April 2011 he bought a Panasonic CD player from accused 1 and 2. It was black and silver on the back side and grey in front. It is a type of CD player that can be used in a vehicle. Accused 1 and his friend (whom the witness identified as accused 3) approached him and told him that they were selling the CD player for N\$450-00. He told them he did not have money. They left and returned again. Accused 1 was holding it and doing the talking. He was told that the price had been reduced to N\$300-00 and that if he did not have the said amount he could give N\$250-00. When he enquired from accused 1 where he got the CD player from accused 1 replied that it belonged to accused 3, and that they got it from his vehicle. Accused 3 confirmed these two statements. Subsequently, he gave accused 1 the money and they handed the CD player over to him. On 28 April 2010, he received a telephone call from the police and he narrated how he came into possession of the CD player. The CD player was handed over to the police.

[12] Barminas Steve Zeraua in his testimony said that he knew the deceased for two months before he was murdered. He had employed him to drive his mother's taxi. He identified the vehicle a Toyota Tazz, 1998 model. He observed that the CD player was missing from the vehicle. It was Panasonic make, black and the part that goes inside was silver. He positively identified the CD player at the police station in the presence of Sergeant Afonso as that was missing from his mother's vehicle. After a couple of days, the police called him to collect the CD player and the vehicle. Thereafter they sold the vehicle with the CD player.

[13] Chief Inspector Gerrit Johannes Viljoen testified that on 21 April 2010 at 14h37, he was telephonically contacted by Warrant Officer Amakali to facilitate a pointing out, which accused 1 was willing to make. Accused 1 was taken to his office by Constable Ndokosho. Constable Nawatiseb acted as an interpreter in Damara language and English. Chief Inspector Viljoen prepared notes on a pointing out in respect of accused 1. Before accused 1 pointed out a scene of crime, the Chief Inspector explained the accused's rights as contained in the proforma that he used. Accused 1 led Chief Inspector Viljoen, Constable Nawatiseb and Sergeant Serogue and Sergeant Iyambo who was taking photographs to different scenes of crimes. First he took the police officers to the place where the vehicle stopped, when the body of the deceased was off loaded and dumped into the bush. He pointed out where the body was found and from there they proceeded to Hage Geingob Stadium. Accused 1 pointed out accused 2 and he was arrested. Accused 1 pointed out where the taxi was parked when he, accused 3 and the deceased went to the stadium. Accused 1 also pointed out the place where the vehicle was abandoned and the place where the key to the vehicle was thrown away.

[14] Apart from the pointing out by accused 1, a confession by accused 1 in terms of s 217 of the Criminal Procedure Act 51 of 1977 was handed in by consent. According to the confession, accused 1 was employed by his father as a guard. On a Sunday accused 1 and his friend accused 3 got into a taxi to go to the club. They decided to get a jacket from accused 1's work place. Accused 1's friend gave N\$30.00 to the driver of the taxi. They arrived at the work place. Accused 1 met his colleagues who were on duty. They parked the vehicle in the yard. Accused 1 came out of the vehicle to fetch his jacket. He heard a gunshot. Both of them turned around to see where the noise was coming from. While they were on the way, he saw one of his colleagues coming from opposite direction. Accused 1 inquired what was going on. His colleague said he shot the driver. They walked up to the car. The driver was leaning against the car door. Blood was flowing from his chest and stomach. The guy that shot the driver opened the door. The rest of the body fell off the car but his leg was still inside. Accused 1 asked: "What are we going to do with him?" The guy who shot the driver said: "We can just carry him and put him somewhere." The person who shot the deceased and accused 1's friend carried the deceased to the boot of the car.

[15] Since accused 1's friend and his colleague could not drive, accused 1 then drove the car. At the time his friend and the colleague carried the body to the boot, accused 1 picked up the mat and put it in on the driver's seat because it was covered with blood. He found a cell phone on the driver's seat and put it on the dashboard. Accused 1 and the other two drove away. On the way they were asking each other where they should put the deceased's body. They drove to the direction of Rocky Crest at the turn off where the gravel road starts and dumped the body there. Accused 1's friend and accused 1's colleague carried the body into the river bed whilst accused 1 remained seated in the car. When they came back accused 1 asked them where they put the body and they said they put it deep down where it was dark. They drove back to the stadium and dropped accused 1 there. Since accused 1 was shocked, he forgot about the jacket. Accused 1 and his friend drove to a place called Penduka in Golgotha and the petrol ran out. According to accused 1 the name of his colleague is Kwandu Pontius, accused 2 in this matter. There was no other money in the car apart from the N\$30.00 they paid the driver.

[16] When accused 1, the deceased and accused 3 went to the stadium there were two of his colleagues on duty, the other security guard was in the guard room and he did not see what was happening. When accused 1 came out of the car at Golgotha, he removed the cell phone from the car.

[17] The State called Jeremia Gideon Kashima a colleague to accused 1 and accused 3. He testified that on 19 April 2010 he was on duty at Hage Geingob Stadium. He explained that each security guard who reports for duty has to make entries in the Occurrence Book and also make entries of what occurred whilst on duty when knocking off and sign against his name. When the witness reported for duty he received three bullets and one gun from accused 2. The witness identified the gun and the bullets and they were admitted in evidence as exhibits. According to the witness if an incident happens at the duty station, the person on duty is required to record the incident in the Occurrence Book. On that particular date he took over from accused 2 and one Nambahu. Accused 2 made entries in the Occurrence Book that everything was in

order. No incident was reported by accused 2. According to the witness, there has never been an occasion where the bullets are received whilst they are on the firearm. The witness did not check whether there was a bullet on the chamber. According to the witness it has been their practice that a security guard who is going on patrol has to carry the gun and bullets with him.

[18] William Onesmus Nambahu testified that he is a ballistic expert. He received exhibits which he analysed under laboratory reference number 398/2010, CR 785/04/2010. He received 1 shot gun serial number 05013505, which he labelled as exhibit A; one spent shell, which he labelled exhibit B; 1 plastic fragment/piece of tissue exhibit C; 27 metal pellets, exhibit D. He analysed the exhibits and made the following findings: Examination of the firearm showed that the shotgun was in working condition. Three shells were test fired from the shotgun serial number 05013505 and the spent shell compared with that in exhibit B. From the chamber marks, he found sufficient agreement of individual and class characteristics. A spent shell exhibit B was fired from the shotgun with serial number 05013505. He did not analyse exhibit C and D, which were retrieved from the body of the deceased and they were never compared to the spent shell Exhibit B. He performed a trigger force test to determine if the trigger mechanism is defective or not. His finding was that the trigger force pull was 2.2, this trigger force pull of 3.24kg force, is within the range of normal trigger pull force, for this particular model. It is normal for this particular shot gun.

[19] Fillemon Haimbodi testified that on 19 April 2010, in the evening, he was on duty at the Namibia Police workshop. He was called by a member from Wanaheda CID to go and tow a vehicle which was in Claudius Kandovazu Street, which he did. He did not tamper with the vehicle. He observed that the radio was removed and there were blood stains on the driver's seat.

[20] Charl Renton testified that he is stationed at Nampol Mortuary, Windhoek. He received the pellets on 22 April 2010, and handed them to the investigator. He further testified that he collected the deceased's body and transported it to the mortuary.

[21] Sergeant D. E Skrywer told the Court that he is a Scene of Crime investigator. On 31 October 2010, he took photographs of a scene of crime and compiled a photo plan marked Exhibit "C".

[22] The investigating officer Sergeant Joao Afonso testified that whilst he was on duty on 19 April 2013, he received a report of murder that took place on 18 April 2010. He took the details of the deceased and his cell phone number. He went to Wanheda police station where he observed a Toyota Tazz that was allegedly driven by the deceased. He observed blood on the driver's seat. Mr Zeraua gave him the deceased's cell phone number which was 0813083001. The witness made an application to MTC to get print outs of the deceased's cell phone number from 17 – 19 April 2010. The print outs were accompanied by a declaration in terms of s 213 of Act 51 of 1977.

[23] According to the information provided by the print outs, the deceased's missing cell phone was last used on 19 April 2010. A different SIM card with number 0816203065 was inserted into the deceased's cell phone. The SIM card belongs to accused 1. The accused was in contact with two contact numbers, namely 0812593440 and 0812190900. The witness called cell phone number 0812198900 and he was answered by a lady by the name Charmaine, accused's 1 sister. The witness met with Charmaine and entered cell phone number 0816203065 which registered on Charmaine's cell phone as that of Shacks. Charmaine informed the investigator that Shacks is accused 1. At a later stage the police met with accused 1 and recovered the deceased's cell phone from accused 1. Accused 1 told them that he bought the cell phone from an unknown Oshiwambo speaking man at the price of N\$50.00. The cell phone was admitted in evidence.

[24] Accused 1 was taken to a police station. Whilst Sergeant Afonso was questioning the accused 1, he observed that accused 1's clothes had bloodstains. There was blood on his sports shoes, T-shirt and shorts. The investigator inquired how bloodstains came to accused's clothes and he said that he had a blister on his buttocks.

[25] On 21 April 2010 the investigator and his colleague went to Hage Geingob Stadium to arrest accused 2. They set up an ambush and they saw accused 2 wearing a uniform coming through the corrugated irons of the stadium he was running and taking off his shirt. He removed a green shirt and hid it under his T-shirt. Accused 2 was arrested. The shot gun that was allegedly used in the commission of the offence and three bullets were confiscated. When Sgt. Afonso checked the shot gun, he found a spent cartridge on the chamber. The shot gun, the bullets and pellets were sent for forensic analysis. The witness identified the shot gun, spent cartridge and three bullets in court.

[26] After accused 3 was arrested, he was informed of his rights to get a legal representative, the right to remain silent and the right to apply for legal aid. Accused 3 informed Sergeant Afonso that he knew accused 1. Accused 1 and accused 3 went to the stadium by a taxi. At the stadium they were opened by the security guards who were on duty. Upon arrival, Accused 1 informed accused 2 that he had forgotten his jacket. The taxi driver was told to wait. Accused 1 and accused 3 went up in the building. Accused 3 and accused 1 heard a gunshot. When accused 1 and accused 3 went to the vehicle they found accused 2 at the vehicle and the taxi driver was bleeding. Accused 1 offered to drive the vehicle. Accused 1 – 3 removed the body from the driver seat and put it behind the vehicle. They went to the Western side of Rocky Crest where they dumped the body. They came back to the stadium where they dropped accused 2. Accused 1 and accused 3 drove to Golgota in Katutura where the vehicle was abandoned.

[27] The investigating officer observed that a CD player was missing from the deceased's vehicle because wires were hanging. Accused 1 explained that they took a CD player and sold it to Dumeni. Accused 1 and accused 3 went with the police to Dumeni's place. Dumeni said that accused 1 and accused 3 sold him the CD player. The Panasonic CD player was recovered from Mr Dumeni. The CD player was returned to Mr Zeraua. The Toyota Tazz was also given back to Mr Zeraua.

[28] It was put to the witness that accused 2 saw accused 3 for the first time on the day of the incident. The witness responded that after accused 2 was arrested he identified accused 3 as a person who went with accused 1 to the stadium. Counsel for accused 3 put it to the witness that accused 3 went with accused 1 to Hage Geingob Stadium to steal alcoholic beverages. The witness replied that he was not informed about the alcohol. Further instructions were that accused 1 and accused 3 took a taxi in question and went to Hage Geingob Stadium. Accused 3 paid N\$30.00 to the driver. The witness responded in the affirmative. It was again put to the witness that when they reached the gate an unknown security guard opened the gate and got into the vehicle and the four of them drove around the stadium and parked the vehicle. The witness said that he was told so. The instructions went further that after they parked the vehicle, accused 1 and unknown security guard came out first, there was a conversation, accused 1 and accused 3 went up to the pavilion to complete the mission that was to steal alcohol. The witness said that he was told that they went to pick up a jacket. Further instructions were put to the witness that accused 1 never told the witness that he went to pick up the jacket. The witness was adamant that that was what he was told. Accused 1 and accused 3 proceeded to the tuck shop, on their way to the vehicle they found accused 2 with a shot gun in his hands, standing at the driver's side of the vehicle. The deceased was already shot. The witness replied that he was not told about the tuck shop but about the jacket. Otherwise the rest of the version was correct. It was put to the witness that accused 3 informed the witness that he was shocked, scared because accused 2 was still in possession of the shotgun. At accused 2's request he assisted accused 2 to dispose of the body at Rocky Crest after which they came and dropped accused 2. The witness stated that that is what he was told. Further instructions were that accused 3 did not kill the deceased. The witness replied in the affirmative that, that was what he was told. It was put to the witness that it was the first time for accused 3 to be at the stadium. The witness replied that he was not informed to that effect. Lastly it was put to the witness that accused 3 was not a friend to accused 1 they were just acquaintances. The witness replied that accused 1 told him that they were friends.

[29] Constable Salatiel Murumendu's testimony corroborated the testimony of Sgt Afonso concerning how they traced the deceased's cell phone and that they recovered it from accused 1. He also corroborated the testimony of Afonso that accused 1 and accused 3 were identified by Dumeni as the people who sold him a CD player; that bloodstains or something that looked like bloodstains were observed on accused 1's clothes; that when he and Afonso went to arrest accused 2, accused 2 wanted to run away, and that he took off his shirt.

[30] It was put to Const. Murumendu that accused 2 was not trying to run away; he was on patrol. The witness replied that accused 2 was running away. It was again put to the witness that accused 2 did not know that Afonso and Murumendu were police officers. The witness replied that there was a possibility that he knew them.

[31] Inspector Zachariah Amakali in his testimony essentially confirmed what detective Afonso and Constable Murumendu testified about. He is the one who arrested accused 3 at an open field in Golgotha 13 on the same day the deceased's body was found. Accused recognised the detective and he started telling him that he knew everything and he will say everything and that he was not involved. He explained his legal rights and he was driven to Windhoek Police Station. After his rights were explained to him, he still insisted that he wanted to tell everything he knew. However, before he could hear what accused 3 had to say, he was called to attend to a robbery scene.

[32] Matheus Nambahu testified that on 18 April 2010 at around midnight he heard a vehicle hooting at the gate whilst he was on duty with accused 2. Accused 2 went to open the gate. The vehicle drove to the side of the stadium. Accused 1 came to the guard room where the witness was. He took a firearm and told him to sleep. Accused 1 and accused 2 followed the vehicle. After a while the vehicle came back. The witness went out of the guard room. Accused 1 was driving the vehicle. There was a man whom he did not know sitting next to accused 1. Accused 2 was at the back seat. All the occupants of the vehicle left the Stadium. After sometime but before the sun rose

accused 2 came back alone. The witness asked accused 2 where he was and accused 2 told him that they went to search for their alcohol.

[33] The witness testified that when he was on duty with accused 2 they had one shot gun and three bullets. Two bullets were on the table and one bullet was on the chamber. He saw the bullet on the chamber when accused 2 opened the firearm. When accused 1 came to fetch the firearm he also took the two bullets that were on the table. However, when accused 2 brought the gun back, the witness did not see the bullets again. Before the witness and accused 2 knocked off on 19 April 2010, accused 2 made entries in the Occurrence Book that they had left the place in order and that they had left one gun three bullets. He further stated that at all material times, he was in the guard room when the taxi came at the gate until it entered the stadium. He did not see where the taxi was parked. The witness only went outside the guard room when the taxi was leaving the stadium.

[34] During cross examination Mr Brockerhoff put it to the witness that the reason why he indicated that accused 1 came to fetch that firearm was because he wanted to revenge against accused 1's father because he had fired him without reason. The witness responded that it was not revenge and that he told what he saw. Counsel for accused 1 asked the witness what accused 1 was wearing. The witness said that accused 1 was wearing a short.

[35] Mr Uirab asked the witness whether he went to see the vehicle when it drove in and whether he heard a gunshot. The witness replied that he did not go to the vehicle when it drove in and that he did not hear a gun shot. He was asked whether someone who is at the guard room would be able to hear a gun shot fired from the field of play in the stadium. The witness answered that one would be able to hear it. It was then put to him that the reason why he did not hear the gunshot was because he was sleeping. The witness responded that at that stage he was not asleep.

[36] Mr Joseph Katjingisiua testified that the deceased was his brother. He was employed as a taxi driver and that he last saw him on 18 April 2010 at around 21h00. The deceased did not return home and he reported him as a missing person. That concludes the summary of the evidence of State witnesses. I turn next to the presentation of the summary of the evidence of the defence.

[37] Accused 1, Jackie Jackson, testified that on 18 April 2010 he and accused 2 boarded the deceased's taxi to go to Hage Geingob Stadium. They paid N\$30.00 to the taxi driver. They told the taxi driver that they were going to steal. Accused 2 opened for them after the taxi hooted. Accused 1 called accused 2 who also got into the vehicle. They drove around the stadium up to the lawn. Accused 1 told accused 2 that they came to steal some goods therefore he should pay attention to his friend who was with him on duty. Accused 1 and accused 3 went upstairs at the pavilion to steal. Whilst accused 1 was busy unlocking the door of the room where the liquor was kept, he heard a gunshot. They did not manage to open the door. They went back to get an iron bar. On their way back, they saw accused 2 standing near the driver's seat. Accused 2 told them that he had shot the deceased. When accused 2 opened the door to the vehicle the deceased's body fell out.

[38] Accused 2 asked accused 3 to assist him to load the body into the boot. Accused 2 also requested accused 1 to drive the vehicle. Accused 3 was sitting next to accused 1 and accused 2 occupied a back seat. Accused 1 drove the vehicle whilst accused 2 was giving him instructions where they should go. They drove up to a certain place. Accused 2 requested accused 3 to assist him to off load the body and they dumped it a few meters away. At that stage accused 2 was carrying the firearm on his shoulder. After the body was dumped, accused 2 told them to drop him back to work. They dropped him off at the road near the work place. Accused 1 and accused 3 agreed to drive the car and inform accused's 1's father of what had happened. Whilst they were driving in Golgotha the fuel ran out. Accused 1 took the deceased's cell phone and accused 3 took the deceased's CD player. The reason why they took these items was to prevent them from getting stolen. They then abandoned the vehicle. That evening they spent a night at a certain house. The following day accused 1 and

accused 3 were asking each other about what they were going to do concerning what happened the previous day. They decided not to tell the police because they knew that the police would not believe them. They then decided to sell the cell phone and the CD player. They sold the CD player to Dumeni and shared the proceeds. Accused 1 did not inform his father of what transpired the previous day because he was scared.

[39] Later on the police went to accused 1's house asking about the cell phone. Accused 1 gave the cell phone to the police and told them that he bought it from an unknown man. Police officer Afonso searched accused 1 when they were at the police station and confiscated his clothes. Accused 1 was wearing the same clothes when the incident happened. Accused 1 decided to tell the truth and as a result he was taken to the magistrate to give a confession. He also pointed out the scene of crime and where the deceased was dumped. He further assisted to point out accused 2. Accused 1 pointed out certain points as depicted in Exhibit "F". Accused 1 said he pointed out photograph No. 4 as the point where he was standing when he heard a shotgun. But that was a wrong point. He was supposed to point out a point on top of the pavilion. The reason why he pointed out a wrong point was because he was scared of a police officer who was in charge of the pointing out. Accused 1 further stated that he had informed the magistrate in his confession that he was going to fetch his jacket when he heard a gunshot because he was afraid to tell the magistrate that he was going to steal. Accused 1 testified that he never accompanied Afonso to show him scenes of crime. Accused 1 only came to see the firearm in possession of accused 2 for the first time when they came back to the taxi after they heard a gunshot. Accused 1 testified that he and accused 3 were friends. Accused 1 disputed that he had entered the guard room. Accused 1 further testified that although he was wearing a short it was under the trouser. It was put to accused 1 by counsel for accused 2 that accused 1 was the one who pulled the trigger. Accused 1 replied that accused 2 told him that he shot the deceased by accident at the time accused 1 and accused 3 allegedly found him at the deceased's car.

[40] Counsel for the State asked accused 1 why his clothes were confiscated by the police. Accused 1 replied that there were spots of blood on them because he was sitting

on a blood stained seat in the vehicle. Accused 1 was further asked why he told Afonso that there was blood on his pants because he had blisters on his buttocks. Accused replied that he was scared. It was put to accused 1 by counsel for the State that during bail application, accused 1 said he was not threatened in any way to assist accused 2. Accused 1 replied that he did not threaten him but he was scared of him. As to the question what he did with the ignition key, accused 1 replied that he threw it away.

[41] Accused 2, Kaveto Pontianus Kwandu, testified that on 18 April 2010 he was on duty when he was approached by accused 1 who was in the company of accused 3 and the deceased. Accused 1 told him that he had come to collect his jacket. Accused 2 opened the gate and they drove to the lawn section of the stadium. They did not stop the car. At the time accused 2 opened the vehicle he had nothing on him. He waited for about an hour for accused 1 and his companions to come back but they did not come back. He closed the gate and went to the bathroom. Whilst he was in the bathroom he heard noise as if people were walking towards the guard room. After a while he heard a gunshot. He got scared. He came out of the bathroom and went to the place where the vehicle went. He found accused 1 and accused 3 standing and inquired from them what had happened. Accused 1 told him that "we shot the driver". He asked them why they shot the person but they did not answer him. Instead, they told him to keep quiet. Accused 1 and accused 3 told accused 2 that they should put the deceased behind the vehicle. They again told him to carry the body. Accused 2 was scared and he carried the body with accused 3 and put it in the boot. Accused 1 and accused 3 spoke in their language which accused 2 did not understand. Accused 1 put the firearm at the back seat of the vehicle. Accused 1 wanted to drive, the car could not start and accused 3 fixed it. Accused 1 drove the vehicle up to the gate. When they came at the gate, the vehicle hooted and Nambahu opened the gate and they drove away. It is accused 2's testimony that he did not instruct accused 1 to drive the vehicle. Accused 2 further testified that he did not drive together with accused 1, accused 3 and the deceased to the lawn section of the stadium.

[42] Accused 2 testified that accused 1 never told him that they came to steal alcohol at the stadium. Accused 1 drove to a certain place and stopped the vehicle. He opened

the boot. Accused 2 and accused 3 carried the body and dumped it. They went back but whilst they were still on their way accused 1 stopped the vehicle. Accused 3 alighted from the vehicle and removed the number plates. Accused 1 drove for a while and stopped again. Accused 3 got off the vehicle. Accused 1 and accused 2 remained in the vehicle and drove to the filling station. Accused 1 refueled the vehicle. After that accused 1 drove and stopped again. They drove up to the stadium but not at the gate. They warned accused 2 not to tell anyone about what transpired. Accused 2 was dropped at the tar road near the stadium. He took the firearm with him. Accused 1 and accused 3 drove away after they dropped him off. According to accused 2, he was afraid at all material times when he was with his co-accused persons and this prompted him to make false entries in the Occurrence Book when he knocked off. In the evening when he reported for duties again accused 1 asked him whether his father said anything concerning a missing bullet. Accused 1 told accused 2 that he brought another bullet therefore accused 2 should just keep quiet concerning what had happened. Accused 2 testified that he never said that he was given a bullet by Ndumba. He also never told accused 1 that he shot the deceased by accident. Concerning his arrest, he testified that whilst on duty he saw people armed with guns whilst he was patrolling and they stopped him telling him that he was under arrest. He was patrolling outside the stadium and that he did not run away. Accused 2 stated that he did not see the CD player and the cell phone. He did not steal the goods as stated in the charge or robbed the deceased. Accused 1 and accused 3 did not tell him where they were taking the deceased's vehicle.

[43] Accused 2 further stated that during 2010, he did not know Windhoek very well. Therefore it was not possible for him to give directions to accused 1 where to drive to. He never planned with his co-accused persons to commit the offences they are charged with.

[44] Accused 3, Nau-Gawaseb, testified that he and accused 1 went into a taxi to take them to accused 1's work place to go and steal beer. They agreed that they were going to share the proceeds from the deal. Accused 3 knew accused 1 as a son of "Ou Steyn" and before this incident they last met three months previously. Accused 3 paid N\$30.00

for the taxi. They drove up to accused 1's work place at the gate. Accused 1 instructed the deceased to drive inside. Accused 2 was instructed by accused 1 to climb into the vehicle. Accused 1 and accused 2 occupied the rear seat and they drove to the lawn. After the vehicle was parked, accused 1 and accused 2 left the vehicle and disappeared. After two to three minutes they came back. Accused 1 called accused 3 and the two of them went to the pavilion. Accused 3 was not aware if accused 2 knew that they were going to steal beer. Accused 2 was left at the vehicle when accused 1 and accused 3 went to the pavilion. At the time accused 1 and accused 3 were going to the pavilion, accused 3 did not observe anything in the hands of accused 2. They went back to the vehicle. Accused 2 was standing with a gun near the driver's door and the deceased was lying on the lawn bleeding. Accused 2 told accused 1 that he shot the deceased.

[45] Accused 1 said he was drunk and requested accused 3 to drive the vehicle. Accused 3 told him that he could not drive. Accused 2 requested accused 3 to assist him to put the deceased's body in the boot. Since accused 2 had a firearm accused 3 was scared and helped accused 2. Accused 1 jumped on the driver's seat accused 2 sat on the back seat and accused 3 sat next to accused 1. At that stage accused 2 still had a firearm. Accused 3 was shocked to see the deceased's body. Accused 1 drove to the gate and another person who was in the guard room opened the gate. They drove up to the place where the body was dumped. Accused 2 and accused 3 off loaded the body and dumped the body in the darkness a distance from where the car was parked. Accused 3 helped accused 2 because accused 2 killed the deceased and he was also scared to be killed. After the body was dumped, they drove to the stadium and dropped accused 2 who went with the shotgun. Accused 1 and accused 3 drove away with the intention to tell accused 1's father but the vehicle ran out of fuel.

[46] Accused 1 removed the CD player from the vehicle and took it along. Their intention was not to steal it but to protect it from thieves. Accused 1 and accused 3 spent a night at a certain house. The following day they met Dumeni who was interested in buying the CD player. When accused 1 told accused 3 that Dumeni was interested in the CD player, accused 3 replied that he had nothing to do with the deceased's goods

and that if accused 1 wanted to sell the CD player he was free to do as he pleased. After accused 1 sold the CD player, he shared the money with accused 3. He also bought some beer which they shared. Accused 1 and accused 3 did not report to accused 1's father because in the morning accused 1 informed accused 3 that he was going to report to his father. Accused 3 did not report the matter because he was scared to tell the police and he thought the police would arrest him. Accused 3 testified that he did not remove the number plates of the vehicle. He never planned with his co-accused persons to rob and kill the deceased. He was not aware that accused 1 took the deceased's cellphone.

[47] Accused 3 was asked by counsel for accused 2 as to how accused 2 came to possess a rifle if at the time accused 1 and accused 3 went to the pavilion accused 2 had no gun. Accused 3 replied that he did not say that accused 2 had no firearm. Counsel for the state asked accused 3 whether he was the person who paid for the taxi and he replied that he paid for the taxi because he was going to be refunded with the money that was going to be realised from the sale of the liquor that was going to be stolen. It was put to accused 3 that they bypassed two police stations before the vehicle ran out of fuel and he confirmed it. It was put to accused 3 that according to accused 1, accused 3 was the one who removed the CD player from the vehicle. Accused 3 replied that he knows nothing about vehicles and he did not remove the radio tape. It was further put to accused 3 that at all material times he acted together with accused 1 and accused 2 with the intention to rob and kill the deceased and with the intention to defeat or obstruct the course of justice. Accused 3 replied that he never acted in concert with his co-accused.

That brings me to the end of the summary of the defence evidence. It is proposed to consider counsel's submissions next.

[48] Counsel for the State argued that the three accused persons acted with a common purpose and that it did not matter who pulled the trigger. All three were at the scene when the deceased was shot. They assisted each other in one way or another. They must have been aware of the assaults perpetrated on the deceased. The accused persons after loading the deceased's body in the vehicle proceeded to dump it. All of

them must have intended to make common cause. They drove the deceased's motor vehicle and took articles from it. They must have manifested the sharing of a common purpose with the perpetrator of the assault by each of them performing some act of association in common with others. The dumping of the deceased fulfils that requirement and that they must have had the requisite *mens rea* in respect of the killing of the deceased. Each performed their own act during the robbery and the killing of the deceased. The State does not have to prove a prior agreement or that each accused actually pulled the trigger and shot the deceased if all the elements of common purpose could be proved. Common purpose does not always have to be proved by direct evidence but inferences which are consistent with all the proven facts could be drawn and the proved facts should be such that they exclude every reasonable inferences. The evidence of the three accused persons and the events that followed after the deceased's death prove that there was a plan to rob the deceased. Where there is a plan to rob force could be expected to be used. Accused 1 and accused 3's version that the deceased was taken to the stadium to ferry stolen goods appeared to be improbable and it was a story that was concocted to explain why they went to the stadium. Accused 2 contradicted accused 1 and 3 by saying he was only told that accused 1 came to collect his jacket despite accused 1's version that accused 2 was aware about the plan to steal the liquor. Again if the deceased was aware of the plan to steal liquor, there was no need for accused 1 and 2 to move away from the deceased in order to have a private discussion concerning the theft.

[49] Accused 1 and 2 were not discussing the theft of the liquor, therefore an inference could be drawn that they were discussing the murder and robbery of the deceased. They were planning and they did not want the deceased to hear. Their actions showed that accused 1 and 3 were not on a mission to steal liquor. Accused 1 and 3 did not even have breaking instruments to the room where the liquor was allegedly kept. Accused 1 and 3 could not have risked leaving evidence of a break-in at the place where accused 2 was on duty. Accused 2 denied that he was involved in the plan to steal liquor. Counsel for the State further argued that the story of fetching the jacket was also a lie. Accused 1 made it up when he was giving a statement to the magistrate. According to Nambahu, accused 1 was the one who went to the guardroom

to fetch the shotgun. This part of his evidence corroborated accused 1 and 2 that accused 2 went to the gate without a fire arm. If accused 1 had come to get the liquor there was no need for accused 1 to take the firearm. The firearm was taken to be used in the commission of offences namely to kill and to rob the deceased. Accused 1 knew both accused 2 and 3. Accused 1 was the common denominator.

[50] Counsel for the State argued further that it is not a requirement for the State to prove the motive why the deceased was killed. The killing of the deceased was never an accident. The post-mortem result showed that the deceased was shot on the chest at a close range. If the death was an accident all three accused persons would have reported the matter and would not have concealed the deceased's body and taken away his car as well as other property. The deceased obviously did not consent to the taking of his vehicle, cell phone and CD player. Therefore an inference could be drawn that there was robbery. The fact that all accused acted in common purpose could be indicated by the manner the firearm was taken from the guard room; how the body was disposed of, and how the deceased's property was taken. From the evidence led during bail application, it is the State's submission that after accused 1 took the firearm from the guard room, he gave it to accused 2 who pulled the trigger. Accused 1 and accused 3 lured the deceased to the stadium for him to be killed. None of the accused persons acted under duress. When the deceased was killed, accused 1 asked: "What are we going to do with him". The use of the word "We" could only come from a person who is acting in common purpose with the people he was talking to. Accused 1 further testified that when they were driving on the way they were asking each other as to where they should put the deceased's body. If accused 1 and 3 were forced they could not engage in such a conversation. Accused 2 testified that he was under duress from accused 1 and 3. Accused 3 is alleging that the mere presence of the firearm created fear in him. When the deceased's car was recovered, the number plates were removed and put inside the vehicle. According to accused 2, it was accused 3 who removed them. These numbers plates were removed because of the team effort that the three were putting in what they were doing; thus they acted in common purpose. Accused 2 also testified that when the vehicle could not start accused 3 opened the bonnet. He did something and the car started. This was never challenged on behalf of accused 3.

Accused 2's version that he went to the toilet and came out when he heard a gunshot is improbable.

[51] The events after the deceased was shot showed that they were acting in common purpose. Their actions could serve as an indication as to their state of mind at the time of the offence; that is far from distancing themselves from the killing of the deceased by accused 2. Accused 1 and 3 remained with accused 2. Accused 1 and 3 participated right from the start until the end. After accused 1 was confronted about the cell phone he lied to the police that he bought it from an unknown man. Accused 1 even lied about the blood that was on his clothes. If he had nothing to hide he was not going to lie. Accused 2 made false entries in the Occurrence Book to conceal the crimes. Accused 1 and 3 threw away the ignition key, took away the cell phone and the CD player. There is also evidence that they made the fourth bullet to be available in order to conceal their actions. The State argued that it has proved its case beyond a reasonable doubt against the three accused persons in respect of all counts. Counsel referred me to case law concerning principles regarding common purpose.

[52] Counsel for accused 1 submitted that they admit that accused 1 was at the stadium on 19 April 2010. He was in the company of accused 3 when he travelled with the deceased's vehicle. Accused 1 does not dispute that he removed the cell phone and CD player from the vehicle after it was abandoned. He admitted that they sold the CD player to Dumeni. He does not dispute that he had disposed of the motor vehicle's keys and failed to report the matter. He argued that at no point did accused 1 kill the deceased or acted in concert with his co-accused persons to kill the deceased. Accused 1 and 3 went with the deceased to the stadium to steal alcohol. The deceased was informed of the plot and had reconciled himself to it. Accused 1 had no motive to kill the deceased. The court should admit the evidence adduced during bail application. He further argued that it has not been proved that accused 2 went in the guard room to collect the shotgun because witness Nambahu was sleeping and that he was implicating accused 1 because he had been fired from work. He again argued that, the fact that Nambahu did not hear the gunshot was because he was sleeping. Accused 2 and 3 testified that accused 1 did not come out of the taxi when they came at the gate.

Accused 1 was the person who knew the place and he was supposed to direct accused 3 and the taxi driver to the place where the liquor was kept. He urged the court not to invoke the provisions of s 208 of Act 51 of 1977 and accept the evidence of Nambahu who is a single witness. Nambahu's evidence should not be relied upon because it is not conclusive and credible. However, the court should accept the version of Nambahu when he testified that when they came at the gate whilst they were leaving the stadium, accused 1 was driving, accused 3 was seated next to him and accused 2 was at the back seat in possession of a firearm. Accused 2 was the only person who knew about the fourth bullet if one has to consider the evidence of the investigator and the owner of the company.

[53] For accused 2 to hand over three bullets to Kashima is contrary to the version that accused 1 brought the fourth bullet in the afternoon. The court should accept that the fourth bullet came from Dumba. Accused 2 was the shooter. Counsel further argued that nothing was placed before court that there was a prior plan between the accused persons to kill the deceased nor was anything presented that they acted in common purpose. Accused 1 and 3 did not associate themselves with the action of accused 2 because they acted on the instructions of accused 2 who at the time was in possession of the firearm. When accused 1 drove the vehicle he did not do so freely and voluntarily. Therefore the court cannot find that accused 1 was an accessory to the fact or after the fact. Accused 1 and 3 were under shock and fear. Accused 1 was not at the place where the deceased was shot. Accused 1 was busy with his criminal enterprise of stealing alcohol. The act of accused 2 by shooting the deceased could not be attributed to accused 1 and 3. Accused 1 told the magistrate that he went to fetch the jacket because he was afraid to be arrested if he said he went to steal and he was also shocked. Concerning robbery, the State did not show that there were "threats of violence" towards the deceased when his car and other property were taken. When the property was appropriated there was no act of violence. When accused 1 took the vehicle the deceased was already dead. Counsel further argued that the appropriation of the cell phone and CD player only happened at the time the car ran out of petrol. The initial idea was to safe guard the property and it only turned to be theft after they sold them. Accused 1 did not appropriate the motor vehicle or attempt to deprive the owner

of his property. Counsel further argued that because accused 1 disposed of the ignition key, he could only be convicted of obstructing the course of justice.

[54] Counsel for accused 2 argued that accused 2 was in possession of the gun because he was on duty and the gun was entrusted to him. Accused 2 should be found guilty of obstructing the course of justice because he made false entries in the Occurrence Book. Concerning the fourth bullet; Dumba was not called to testify. There is no evidence suggesting that if accused 2 was the shooter, he had benefited from the crime. Accused 1 and 3 claimed that they went to steal liquor but there is no evidence of a break-in. Accused 2 did not take the cell phone or the CD player. He did not abandon the vehicle. Accused 2 was at the stadium because he was on duty. The State did not prove the doctrine of common purpose. There was no prior agreement between accused 1, 2 and 3. When accused 1 was in the toilet he was not aware that accused 2 went to the guard room. No motive to link accused 2 to the commission of murder. Therefore accused 2 should be acquitted. As to the robbery charge, accused 2 did not appropriate the deceased's property.

[55] Counsel for accused 3 argued that the evidence points to accused 2 that he independently shot and killed the deceased. Concerning the crime of robbery, he argued that theft of property should be preceded by an act of violence. Accused 1 and 3 went to the stadium to steal alcohol. Their version was not farfetched because sometimes events are hosted at the stadium and alcohol was occasionally being stored there. Concerning the theft of a motor vehicle, counsel for accused 3 argued that accused 3 was a passenger in the said vehicle. He only used it as a means of transport. Counsel further submitted that accused 3 helped to dispose of the deceased's body because he was afraid of accused 2 who had a firearm and his actions were reasonable under the circumstances. Furthermore, counsel argued that the mere fact accused 1 and 3 abandoned the vehicle this is an indication that they had no intention to steal it. Counsel proceeded to argue that the three accused persons did not plan to carry out the assault and the State failed to lead such evidence. Therefore, there was no causal link between the death of the deceased and the action of accused 3.

The State has failed to prove common purpose. All counsel for the defence had referred me to authorities concerning the principles of common purpose.

[56] Having summarised the evidence and submissions by all counsel, I will now proceed to consider whether the State has proved beyond a reasonable doubt its case in respect of all the counts. The State is alleging that the accused persons acted with common purpose at all material times. I propose first to deal with the doctrine of common purpose. In terms of s 155 of the Criminal Procedure Act 51 of 1977, persons implicated in the same offence may be tried together. The doctrine of common purpose has been accepted in our law as a basis for the conviction of more than one participants in a crime. The Supreme Court discussed this doctrine in detail in *S v Gurirab and Others* 2008 (1) NR 316, at 322–323, when it referred to *S v Safatsa and Others*, 1988 (1) SA 898 (A) and *Mgedezi and Others* 1989 (1) SA 687 (A) as follows:

“It was there laid down that in cases where the State does not prove a prior agreement and where it was also not shown that the accused contributed causally to the wounding or death of the deceased an accused can still be held liable on the basis of the decision in *Safatsa* if the following prerequisites are proved, namely:

- (a) "The accused must have been present at the scene where violence was being committed;
- (b) He must have been aware of the assault being perpetrated;
- (c) He must have intended to make common cause with those who were actually perpetrating the assault;
- (d) He must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others;
- (e) He must have had the requisite *mens rea*; so in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue."

[57] A common purpose may arise by prior agreement between the participants or it may arise upon impulse without prior agreement. It is seldom that there is direct evidence of such an agreement and the court will have to rely on inferences from the proven facts.

[58] In determining whether the accused persons acted in common purpose, I will therefore approach the present case in the light of the above principles. I propose to state the facts which are common cause first before I deal with issues that are in dispute. It is common cause that between 18 and 19 April 2010, accused 1 and 3 approached the deceased who was driving a taxi to take them to Hage Geingob Stadium. Accused 3 paid the taxi fare. Accused 1 and 3 knew each other prior to this incident. Accused 1 is a son of the owner of the security company that was entrusted to guard the stadium. Accused 1 and accused 2 were employed by accused 1's father as security guards. Accused 1 was not on duty on the date of the incident. Accused 2 was on duty together with State witness Nambahu. When accused 1 and 3 and the deceased went to the stadium the gate was opened by accused 2. All accused persons were present at the stadium where the deceased was killed. The weapon that was used to kill the deceased was a service firearm that was under the custody of accused 2 whilst he was on duty. The deceased died of gunshot to the chest.

[59] It is also common cause that after the deceased was killed accused 2 and 3 loaded the deceased's body in the vehicle. Accused 1 drove the motor vehicle. Accused 1, 2 and 3 rode in the vehicle and took the deceased's body at the place where the body was dumped. Accused 2 and 3 off loaded the body whilst accused 1 was waiting in the car. After the three accused persons dumped the body accused 1 and 3 dropped off accused 2 at the stadium where the murder took place and where accused 2 was on duty. Accused 2 returned with the murder weapon to his work place. After accused 1 and accused 3 dropped off accused 2, they drove off in the vehicle and abandoned it after it ran out of petrol. Accused 1 and accused 3 removed a CD player and a cell phone from the vehicle. It is common cause that the deceased's cell phone was recovered from accused 1. It is common cause that the CD player was recovered from State witness Dumeni after he had bought it from accused 1 and 3. The deceased's

body was recovered at the place that was pointed out by accused 1. On the date of the incident Accused 2 made false entries in the Occurrence Book to the effect that nothing happened whilst on duty and that everything was in order. He also recorded that one shot gun and three bullets had been accounted for.

[60] Issues in dispute are which one of the accused persons pulled the trigger to kill the deceased; whether the accused persons acted in common purpose; whether accused 1 and 3 acted under duress or compulsion when they respectively drove the deceased's vehicle, loaded, off loaded and dumped his body; whether each of the accused persons lacked the necessary intention to commit the crimes they are charged with; whether by taking the deceased's vehicle and abandoning it at a later stage the accused persons committed robbery, and whether the dumping of the deceased's body amounted to obstructing or defeating or attempting to defeat or obstructing the course of justice.

[61] Accused 1 made a statement to the magistrate styled "confession" and a pointing out to a senior police officer. It will be recalled that accused 1 in his statement to the magistrate implicated accused 2 as a person who shot the deceased. In view of this, although the statement is styled "confession", I will not regard it as a confession because it does not meet the definition of "confession" which means an unequivocal admission of guilt; the equivalent of admission of guilt. However, it is evident that accused 1 made some admissions to the magistrate.

[62] Accused 1 and 3 lured the deceased to the place where he met his death. Accused 3 paid for the taxi fare. Although accused 1 and 3 were at some point denying that they are friends, accused 1's father testified that they were friends. This was confirmed by accused 1 when he gave a statement to the magistrate. Accused 1 and 3 also testified in court that they were friends. I am therefore satisfied that accused 1 and 3 are friends.

[63] There is evidence from Nambahu that accused 1 was the person who took the murder weapon from the guardroom. Accused 1 is denying this. However, I am

satisfied that although Nambahu was sleeping when the vehicle arrived at the gate he woke up when it hooted. Nambahu recognised accused 1 when he came in the guardroom because he knew him before. He was even able to state what accused 1 was wearing, namely shorts. Accused 1 testified that although he was wearing a pair of shorts it was under the trousers. The evidence of Nambahu that accused 1 was wearing shorts has been corroborated by the evidence of Sergeant Afonso who confiscated a pair of shorts from accused 1 because it had bloodstains. There is no evidence that a pair of trousers was confiscated from accused 1. I therefore accept the evidence of Nambahu that accused 1 was the person who collected the firearm from the guardroom. I found Nambahu to be a reliable and credible witness. Accused 1's evidence that he did not go to the guardroom and that Nambahu did not see the shorts he was wearing cannot be true and is rejected.

[64] I reject accused 1's version because accused 1 is not a reliable and credible witness. Accused 1 has even confirmed it in this court that he lied to the magistrate when he informed her that he went to the stadium to collect his jacket. He had also told this court that he lied deliberately and pointed out a wrong spot to a police officer who was taking photographs at the scene of crime at the stadium. Accused 1 further lied to a police officer that his clothes were bloodstained because he had blisters on his buttocks. Accused 1 again told an untruth to the police officer that he bought the deceased's cell phone from an unknown Oshiwambo speaking person. All these are indications that accused 1 is not a reliable and credible witness and it is on this basis that I believed Nambahu's version that accused 1 is indeed the person who collected the firearm from the guardroom.

[65] Accused 1 and 2 are incriminating each other as to who pulled the trigger. The State does not have to prove that which one of the accused pulled the trigger if all the elements of common purpose can be proved. It does not matter who pulled the trigger because who ever shot the deceased his conduct is imputed to his co-accused persons. Accused 1 and 3 claimed that they went to the stadium to steal liquor. However, there is no evidence of a break-in. Accused 1 claimed that he could not succeed to unlock the room where the alleged alcohol was kept. He was not in possession of breaking

instruments. It is highly unlikely that the accused persons would set off to go and break into a room which one of them knew was secured and yet they had neither breaking instruments nor the key to the premises. It is also highly improbable that accused 2 who was on duty would allow people to break into the premises he was guarding thereby risking his job. I therefore regard the version of stealing liquor as a concoction and this goes for the version that the pair went there to collect a jacket. No such jacket was collected.

[66] There were no eye witnesses to the killing of the deceased. The court has to rely on the version of the accused persons and inferences drawn from events before and after the commission of the crime.

[67] All three accused persons were present when the deceased was killed. I reject accused 2's assertion that he was in the bathroom when the deceased was shot. This version is rejected because accused 2 is not a credible and trustworthy person. Accused 2 was on duty to look after the property. He witnessed the murder but he made false entries in the Occurrence Book that everything was in order. Accused 1 and 3 again by saying that they were busy trying to break into when they heard a gunshot has no merit and I reject their versions as I have already pointed out that the version of stealing liquor could not be reasonably possibly true in the circumstances. As previously stated, accused 1 and 3 were the ones who took the deceased to the stadium. Accused 3 paid for the taxi fare. At the stadium the deceased met his death.

[68] When the events before and after the deceased's death are carefully examined, an inference can be drawn that accused 1 and 3 planned to take the deceased to the stadium, and acted in cohort with accused 2 to commit offences in respect of the deceased and his property. It must follow from the above findings that the submissions from counsel for the defence that the State did not prove that there was an agreement between the accused persons to commit the crimes and that there was no evidence of causal connection between the accused persons and the death of the deceased cannot be correct in law. Where reliance is placed on common purpose, it is not necessary for the State to prove a prior agreement or causal contribution to the death of the

deceased. The probabilities of the case point to the fact that the three accused persons were present when the deceased was killed. All accused persons were aware of the assault being committed. Therefore prerequisites (a) and (b) stated above have been met. As already mentioned, whoever pulled the trigger, his conduct is imputed to the others. Furthermore, after the deceased was shot, accused 1 asked the others what they were going to do with the deceased. I agree with counsel for the State that such a statement could only be made by a person who was acting in common purpose with others. There is evidence that when accused 1 wanted to start the vehicle it could not start and accused 3 opened the bonnet and fixed it. This evidence was not challenged. It is clear that accused 3 by fixing the vehicle was acting in common purpose with accused 1 and 2. Accused 2 and 3 loaded the body of the deceased in the vehicle. They offloaded it and dumped it in the bush. Accused 1 was the driver. Accused 1 and 3 said they were requested by accused 2 to drive the vehicle, load and off load the body of the deceased. However, they turned around and said they acted under duress because accused 2 was armed with a firearm. Accused 2 on the other hand also claimed to have been forced by the co-accused persons to load the deceased's body in the car. The version that accused 1 was forced to drive the vehicle by accused 1 could not be reasonably possibly true because accused 1 in his statement to the magistrate said that accused 1 drove the vehicle because his friend accused 3 and accused 2 did not know how to drive. Again according to accused 1 and 3 in their own versions they were requested to assist accused 2. If they were forced to do so accused 2 was not going to "request" them. Furthermore, accused 1 in his statement to the magistrate said on the way they were asking each other where they could put the deceased's body. It is hardly conceivable that the accused persons would engage into such a conversation if accused 1 was indeed forced to drive. He could also not have been scared of the firearm because he is the one who took it from the guardroom. The version that accused 2 was forced by the co-accused to load and offload the deceased's body is for the same reasons rejected. The fact of the matter is that the accused persons acted in common pursuit of the criminal enterprise.

[69] Each accused made common cause with the others by participating in the commission of the crimes. Each of them had roles to play. The deceased was shot at a

close range on the chest. His death was not accidental as accused 1 is trying to paint. If the deceased was shot accidentally there was no need for them to conceal the deceased's death. To shoot the deceased on the chest manifests a clear intention to kill him. Immediately after the deceased was killed, the three accused persons drove with the deceased body in the deceased's vehicle and dumped it. Accused 1 and 2 brought accused 2 back to work and they proceeded with the deceased's vehicle. Accused 1 and 3 removed the CD player and the cell phone allegedly for safe keeping. They abandoned the vehicle and accused 1 threw away the key. The CD player was later sold by accused 1 and 3. I am satisfied that the State has proved the remaining pre-requisites (c) to (e) stated above. Concerning the murder charge, I have no doubt that each accused person acted in common purpose with the direct intention to kill the deceased. The charge of murder has been proved beyond reasonable doubt.

[70] Counsel for the defence argued that there was no robbery because when the deceased's property was taken he was already dead. This argument is without merit. Violence preceded the taking of the deceased's vehicle, CD player and his cell phone when the deceased was shot. Again counsel for accused 3 argued that the accused persons did not steal the vehicle. Instead, they just used it as a means of transport. Counsel further contended that the fact that the accused had abandoned the vehicle is an indication that they had no intention to steal it. I find this argument to be misplaced. Although the accused persons had abandoned the vehicle, this does not negate their intention to rob the deceased. The accused persons committed the offence of robbery after they killed the deceased when they took away his motor vehicle and its accessories. They did not have consent to take his property. Accused 1 appropriated the deceased's cell phone as his and he and accused 3 sold the deceased's CD player. The accused persons had intention to deprive the owner of this property permanently. After all they only abandoned the motor vehicle after it ran out of petrol. Again the fact that accused 2 was dropped off at a later stage did not mean that he was not part and parcel to the robbery, because he together with his co-accused took the deceased's motor vehicle immediately after they used violence by shooting him. Accused 2 was only dropped off to go back to work in order to cover his tracks and that of his co-accused persons. I am therefore satisfied that the State had proved beyond a

reasonable doubt that all three accused persons did indeed commit the offence of robbery with aggravating circumstances.

[71] Coming to the third count of theft, I am of the opinion that there has been a duplication of charges. The evidence that is necessary to establish the offence of robbery at the same time establishes the offence of theft. The robbery was committed at the same place and same time. The property which is the subject matter of offence of robbery is the same property being the subject of theft. I accordingly find the accused persons not guilty on this count.

[72] Turning now to the fourth count of defeating or obstructing or attempting to defeat the course of justice, after the murder of the deceased each accused played his role in furtherance of the common purpose. Accused 1 drove the vehicle accused 2 and 3 loaded and off loaded the body of the deceased. Although they claimed that they were shocked and acted under duress, as previously found, there is no evidence that each of them was forced to do what he did. When they drove to dispose of the deceased's body they even removed the number plates of the vehicle. All of them had a chance to report the matter but none of them did. Their conduct is not consistent with the conduct of an innocent person. I am satisfied beyond a reasonable doubt that the accused persons after murdering the deceased and robbing him of his belongings in furtherance of the common purpose, attempted to defeat or obstruct the course of justice by disposing of the deceased's body.

[73] In the result the following verdict is made:

1st Count : Each accused is found guilty of murder with direct intent.

2nd Count : Each accused is found guilty of robbery with aggravating circumstances.

3rd Count : Theft: Each accused is found not guilty and is acquitted.

4th Count : Each accused is found guilty of attempting or obstructing to defeat the course of justice.

N N Shivute
Judge

APPEARANCES

STATE : Ms Ndlovu
Office of the Prosecutor-General

ACCUSED 1: Mr Bockerhoff
Instructed by Directorate of Legal Aid

ACCUSED 2: Mr Tjituri
Instructed by Directorate of Legal Aid

ACCUSED 3: Mr Uirab
Instructed by Directorate of Legal Aid

