

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: CC 26/2008

In the matter between:

THE STATE

and

DA COSTA DUMINGU ZUZEE

1ST ACCUSED

JOSEPH WASUKA NUNDA

2ND ACCUSED

Neutral citation: *State v Zuzee* (CC 26/2008) [2013] NAHCMD 247 (16 August 2013)

CORAM: **NDAUENDAPO, J**

Heard on: 07 August 2013

Delivered on: 16 August 2013

ORDER

The accused are convicted as charged. On the count of murder the accused are convicted of murder with *dolus directus*.

JUDGMENT

NDAUENDAPO, J

[1] The accused are arraigned in this Court and charged with the following crimes

COUNT 1: MURDER

The state alleges that upon or about **26 December 2005** and at or near **Windhoek** in the district of **Windhoek** the accused did unlawfully and intentionally kill **Ralph Köhnke**, an adult male person.

COUNT 2: ROBBERY WITH AGGRAVATING CIRCUMSTANCES AS DEFINED IN SECTION 1 OF ACT 51 OF 1977

The state alleges that upon or about **26 December 2005** and at or near **Windhoek** in the district of **Windhoek** the accused did unlawfully and with the intention of forcing him into submission assault **Ralph Köhnke** by hitting him several times with a brick and/or other unknown object(s) on the head and body and with intent to steal take from him the goods listed in **annexure "A" to the indictment**, the property of or in the lawful possession of the said **Ralph Köhnke**.

And that aggravating circumstances as defined in section 1 of Act 51 of 1977 are present in that the accused were before, during or after the commission of the crime wielding dangerous weapons, namely a brick and/or other unknown objects and were inflicting grievous bodily harm to the said **Ralph Köhnke**.

COUNT 3: DEFEATING OR OBSTRUCTING OR ATTEMPTING TO DEFEAT OR OBSTRUCT THE COURSE OF JUSTICE.

The state alleges that on that **between 26 and 29 December 2005** and at or near **Windhoek** in the district of **Windhoek** the accused did unlawfully and with the intent to defeat or obstruct the course of justice set the deceased body of **Ralph Könhke** alight and thereby causing it to become charred.

Whereas this act was perpetrated whilst the accused knew or foresaw the possibility that:

1. Their conduct may frustrate or interfere with police investigations into the disappearance and/or death of the deceased; and/or
2. Their conduct may conceal the death and/or may destroy the physical evidence of an assault perpetrated on the deceased; and/or
3. Their conduct may protect one or both of them from being prosecuted for a crime in connection with the assault, disappearance and/or death of the deceased.

ALTERNATIVE CHARGE TO COUNT 3: VIOLATING A DEAD HUMAN BODY

The state alleges that **between 26 and 29 December 2005** at or near **Windhoek** in the district of **Windhoek** the accused did unlawfully and intentionally physically violate the dead human body of **Ralph Köhnke** by setting it alight and thereby causing the body to become charred.

[2] SUMMARY OF SUBSTANTIAL FACTS

‘On Monday 26 December 2005 the accused and the deceased were at the deceased’s residence situated at number 131 Sam Nujoma Road in Windhoek-West. The accused hit the deceased several times with a brick and/or other unknown object on the head and body. The deceased suffered a skull fracture and died on the scene due to head injury and subdural haemathoma. The accused loaded the deceased’s body into the

deceased's motor vehicle and dumped his body in the vicinity of the Goreagab Dam where they also set it alight with the intent to defeat or obstruct the course of justice as set out in count 3 of the indictment. The accused drove back to the deceased's residence where they stole the items as set out in annexure 'A' of the indictment. The accused abandoned the deceased's motor vehicle and ignition key in the Havana location in Katutura. The accused acted with common purpose at all material times.'

[3] Accused 1 was initially represented by Mr Makando and later by Mr Nambahu. Accused 2 is represented by Mr Christiaans. The state is represented by Ms Wantenaar.

Accused 1 pleaded not guilty to all the charges. He submitted a plea explanation which was a bare denial of all the allegations against him.

He made the following admissions: that between 26-29 December 2005 he was in Windhoek; the cause of death and identity of the deceased, that during the transportation of the remains of the deceased no further injuries were sustained and the property in annexure "A" to the indictment belong to the deceased. His cell no is 0812261249 and all the print out of calls made and or received on that number are correct and they relate to him.

Accused 2 also pleaded not guilty. He denied all the charges preferred against him.

He admitted the identity of the deceased, the cause of death, that the body did not sustain further injuries during transportation and that the properties in annexure "A" to the indictment belong to the deceased.

MAIN TRIAL

The state called the following witnesses and the **summary** of their evidence is as follows:

[4] **Helmut Riddle**

He is the General Risk Manager at MTC and he compiled a chart to illustrate the radio towers of Windhoek (exhibit X) MTC means mobile terminating call, meaning you have received a call. Column 2 reflects the number who received or makes the call. Column 3 reflects the IMET number of the column 6 is the call duration; column 5 the time, number, column 8 indicates the call originator. Column 9 indicates incoming calls, column 10 indicates the sms, voice mail, call forwarding and the last column indicates the tower where the caller or the receiver of the call was. He further testified that the radio tower Polytech 3 shows in a south westerly direction from the Polytech side in the direction of Louis Botha supermarket. The Polytechnic tower has 3 sections divided into Polytech 1, 2, 3. Sectors are overlapping to allow a signal if one sector gives in.

[5] **Johannes Nawemab**

He testified that he resides at Havana Kabila Street. On 27th December 2005 around 2 am he heard a vehicle being driven at high speed in his street. Early in the morning he woke up and found a white Toyota Condor parked in the street. The key was in the ignition He drove the vehicle to Wanaheda police station and handed it to the police N40126 W. He found bricks in the boot of the vehicle. He identified the vehicle depicted in the photo plan as the vehicle he found in Karas street and also the loose bricks he saw in the boot of the vehicle.

[6] **Segearnt Tjinani Maharero**

He is a sergeant in the Namibian Police. He has 13 years in the Namibian Police force and attached to the scene of crime unit. He took photographs at the scene of crime and the body of the deceased at Goreangab dam. He also collected evidence at the scenes which was sent for forensic analysis. The blood found on the brick was of the same origin as the blood found on the floor of the house. The brick found in the vehicle

recovered by witness Nawemab was taken to the house and compared to the wall where the safe was removed at the deceased house. The colour of the paint on the comparison was the same.

He also lifted 28 sets of folien at the house of the deceased. Two sets (21 and 22) lifted on a glass were identical to thumb print of accused 1 (pol 31 received from Shaduka on 11 January 2006).

A comparison was done and his finding was that the fingerprints that he lifted at the scene/house match the fingerprint of accused 1

[7] **Phillemon Shaduka**

He is a detective sergeant attached to serious crime unit. On 29 December 2005, he was summoned to a scene of crime at Goreangab dam they found a body which was a bit decomposed. He further testified that he visited the house of the deceased and he was involved in the investigation of the case. From information received they identified the deceased as Ralph Kohnke residing at 131 Sam Nujoma drive opposite Louis Botha. At the house of the deceased he saw a brick on the floor and walls, a bottle with blackish substance, a knife, a plastic with papers in the size of money and black bottle. They traced accused 1 at Spur restaurant in Independence Avenue. They drove to Spur restaurant and found accused 1. They took him to their offices. He was with Tjitemisa when they entered the office Scott was seated on his chair accused 1 and the lady were offered chairs. Scott read accused 1 rights to him, the right to silence, right to contact a lawyer of his own choice, that anything he says may be written down and used as evidence. He told Scott that he understood his rights to a lawyer, but he did not need one at that stage, but at a later stage. He testified that accused 1 told them that accused 2 was also involved in this case and he was staying in Rundu. The name of accused 2 given to them was Jerry Nyatu. He, Scott, accused 1 and the pilot flew to Rundu. In Rundu they were directed by accused 1 to the house of accused 2. They found the house and knocked the door. A lady opened the door and they introduced themselves and told her they were looking for Jerry Nyatu. They searched in the

bedroom and found accused 2 hiding in the wardrobe. He came in the bedroom and saw accused 2 and Scott tussling, he assisted and they manage to handcuff accused 2. Scott informed him that he has a right to silence; that he has a right to get a lawyer accused 2 said he understood. They flew back to Windhoek with accused 2. They came to their office. He was not there full time when the accused 2 was asked questions.

He testified about a Motorola cellphone that belongs to accused 1 that he took it from him on the day of arrest the IME1 No is 35625809968706 (exhibit "3")

[8] **Warrant officer Scott**

He was in second in charge of the Serious Crime Unit until 2005. On 29 December 2005 went to a scene of crime at Goreangab dam and found a body which was burnt out. He got involved in the investigation and they established that the deceased was Ralph Köhnke. They went to his residence at 131 Sam Nujoma Drive, opposite Louis Botha. Through their investigation they established that accused 1 was at Spur restaurant in independence Avenue.

Accused 1 was arrested at Spur. He explained to him that he was a police officer and he is investigating a murder case and also the Judges rules, the right to remain silent, the right to legal representative of his own choice and if he cannot afford a lawyer that the state will provide one for him upon application. They got into the vehicle and drove to office of serious crime unit. In the office he was given a chair and before questioning the rights were again explained to him. Sass, Tjitemisa and others were there moving in and out of the office. Accused 1 said he felt bad. He said accused 2 was responsible for the actual murder. Accused 1 was emotional and crying at one stage. He gave the name of accused 2 as Jerry Nyatu and that he was in Rundu.

They flew to Rundu and arrested accused 2 at the house which was pointed out by accused 1. They arrived at the house knocked at the house and a lady opened the house. They searched the house and found accused 2 in a wardrobe hiding behind the clothes, he tried to fight, but was overpowered and handcuffed. He informed accused 2

of his right to remain silent, right to legal representation of his own choice or legal aid. Accused 2 did not answer anything. They flew back to Windhoek with accused 2. In Windhoek at the office accused 2 was questioned and before being questioned his rights were again explained. The following day they went to court. Accused 1 tried to shift the blame to accused 2 on the murder charge.

[9] **Shaulione Tjitemisa**

He is a constable for 9 years and attached to the serious crime unit. He knows accused 1 very well. He was present when Scott arrested accused 1 at Spur restaurant. Scott introduced himself and informed him of his rights. The right to remain silent, he has a right to a lawyer of his own choice and if he cannot afford one he can apply for legal aid. From there they proceeded to their offices, at the serious crime unit. Scott went into his office and again informed the accused of his rights. He answered by saying: 'why do I need a lawyer now, I did not kill the person? If I need one I will be was interrogated and Scott took notes.

TRIAL WITHIN TRIAL

At the end of the trial within a trial I ruled that the confession of accused 1 made to Chief Inspector Brune and the pointing out to Chief Inspector Louw and the confession of accused 2 made to Chief Inspector Oelofse and the pointing out to Chief Inspector Van Zyl admissible. I indicated that my reasons for so doing will be provided at the end of the trial. Herein below are my reasons.

[10] **Objections**

The accused raised objections against the admissibility of the confessions and pointing outs on the grounds that,

In respect of accused 1;

1 there was a violation/breach of the rights of the accused,

2 the confession and the pointing outs were not taken freely and voluntarily from accused 1,

3 Lack of animus confidenti i.e intention to confess.

In respect of Accused 2

Mr Christiaans objected on the following grounds:

- 1 taken in contravention or violation of his constitutional rights.
- 2 he was induced, not taken freely and voluntary.
- 3 lack of intention to confess

EVIDENCE IN RESPECT OF ACCUSED 1

[11] **Geofrey Scott**

He testified that on 4 January 2006 he arrested the accused at Spur restaurant. Independent Avenue. At the time of arrest he explained the Judge's rules to him. These were the right to remain silent; anything that he says could be used against him in a court of law. That he has a right to have a legal representative of his own choice at his own expense, including his right to legal aid. He further testified that when the accused was taken to the offices of the serious crime unit and before the interrogation started, the rights were again explained to him.

The accused told him that he did not need a lawyer because he did not kill anyone, he will get one later.

[12] **Shauline Tjitemisa**

He was present when Scott arrested accused 1 at Spur restaurant. He testified that Scott explained his rights to him. Again at the offices of the serious crime unit, Scott explained his rights to him. He said he did not need a lawyer because he did not kill a person and that he will need a lawyer at a later stage.

[13] **Philemon Shaduka**

He testified that he was present when accused 1 was taken into custody at the serious crime unit. He was present when Scott explained his rights to him before the interrogation started. Accused 1 replied that he did not need a lawyer at that stage, but would need one at a later stage.

He took the warning statement of accused 1 on 5 January 2006 at 14h25 and his rights were explained to him in terms of the proforma warning statement.

[14] **Michael Unandapo**

He testified that on 4 January 2006 accused 1 was brought to his office at the Serious Crime Unit. He introduced himself and informed the accused of his rights. He informed him that he had a right to call a lawyer and he told him that he did not need a lawyer at that stage. Accused 1 told him that he was involved and he could therefore not proceed with the interrogation because he thought that amounted to a confession.

The accused looked normal when he was brought to him. He spoke to the late Sass about accused 1 wanting to give a confession and Sass contacted Chief Inspector Brune to take the confession.

He and Ndikoma then took accused 1 to Brune. After the confession was taken, Brune called him to come and collect accused 1 and he then handed him to the investigating officer.

He also testified that on the day of the pointing out, he drove the bakkie to the pointing out places. Accused 1 was seated in the middle and Louw on the left and Nahambo the photographer in the bakkie. The bakkie did not have a canopie.

After the accused pointed out the various scenes and points he drove back to the office and he left accused 1 in the hands of Louw.

[15] **Felix Ndikoma**

He confirmed that he took accused 1 to the office of Brune with Unandapo. After the confession was taken he was contacted on the radio to go and fetch the accused. He took him to the office of Serious Crime Unit.

[16] **Derek Brune**

He was a Chief Inspector in the Namibian Police until July 2008 when he retired. He has 42 years of experience in the police force. On 4 January 2006 he took a statement from accused 1 who was brought to him by Inspector Unandapo. He completed exhibit 'CC' personally.

He testified that the accused's rights were explained as per Exhibit "CC" as follows: *"you have the right to consult a legal practitioner of your own choice and if you cannot afford a legal practitioner the state will appoint on application by you one to represent you. The application can be directed to the director Legal Aid, Private Bag 13370 Windhoek. You can also do the statement on your own. You must keep in mind that the statement can be used as evidence either in favour of you or against you"*

Q: *What do you elect to do now?*

A: *I wish to make a statement.*

Do you understand the warning I have given you?

'yes'

Do you nevertheless wish to make a statement?

'yes'.

Where you assaulted or threatened by any person in order to influence you to make a statement? 'No' Where you in any way influenced or urged by anyone to make a statement? 'No' Where you promised anything by any person if you should make a statement? 'No' Do you expect any benefits from making a statement? 'No'

The statement was taken in English and at no stage did it appear to him that there was misunderstanding. They started with the statement at 15h55 and completed at 17h00. He denied that accused ever told him that what he was telling him what police officers told him to narrate.

The signatures on the bottom of each page is his and that of accused 1.

Mr Makando, put it to the witness that the accused rights were not explained. There was no explanation whatsoever, it was just a reading of the form and no question was asked, as to does he wants a lawyer.' The witness replied "my lord, I was always very careful on this particular matter and I took into account that a person who appeared before me did not always know what their rights were and it was my task to inform them properly and completely and to make sure that they understood.'

[17] **Marius Louw**

He testified that he is Chief Inspector in the Namibia Police. He has 25 years' experience in the police force. He is the Unit Commander, Crime Investigation Unit (CID) stationed at Windhoek.

He testified that he was approached by the late Sass who asked him to take charge of pointing out. On 4 January 2006 Accused 1 appeared before him and he was in his sound and sober senses. *He testified that he informed the accused as per the proforma form (exhibit EE) that he 'is not compelled to point out the scene(s) or points (s) or to say anything about such scenes. The said person is further warned that what he may point out or what he may say will be noted down and photos of the scenes and/or points pointed out will be taken and may be used as evidence during a subsequent trial. He is asked whether he knows and understands the warning given' answered: yes, I want to point out the scene. You have the right to consult a legal practitioner of your own choice and if you cannot afford a legal practitioner, the state will appoint on application by you one to represent you. You can direct your application to. The director Legal Aid Private Bag 1370. You can also do the pointing out on your own. But you must keep in mind that the pointing-out can be used in evidence, either in favour of you or against you,*

What do you elect to do now?

Answer: 'I want to point out the scene. I do not need a member of legal aid or any other legal practitioner now. On a later stage. 'Do you still wish to point out the scene(s) and or points?

Answer: yes

Q: 'As you are still prepared to continue with such pointing out, I would like to know the source of your knowledge concerning that which you wish to point out?

A: 'I was present when the incident took place'

Q: where you in any way assaulted, threatened or influenced by any person to point-out the scenes and or points?

A: I was about to report the matter to the police. I was not influenced

Q: Do you have any injuries or bruises of any nature whatsoever?

A: No'

He testified that they drove with a bakkie, Unandapo was driving, accused 1 was seated in the middle and the photographer at the back and he was seated between the driver and accused 1. That was on 4 January 2006 at 16:30. There was heavy rain on that date and they could not continue with the pointing out and it was postponed to 6 January 2006.

On the 6 January 2006 before they proceeded, he again went through this whole procedure with the accused and he still asked him if he wanted to proceed, after his rights were read to him again and he said he wanted to proceed, so they drove.

The accused pointed out places/scence(s) and or points to them and after the pointing out, they returned to the office and he continued with the completion of the form.

Accused 1 then told him that he did not want to sign the form as he first wanted to sort it out with his lawyer. He gave him the opportunity to do that.

On 15 November 2006 accused 1 was again brought to his office and informed him that he now wanted to sign the form. He completed the form and again explained his rights to him and read the statement back to him. He then signed the form.

The witness was asked to explain how he went about to complete the form and he stated: 'You start writing the form until para 11 on P. 4. Then normally you drive and you do the pointing out, you come back with the accused and then you start to complete everything on this form and you write the whole pointing out. And then you read it through, read it back to the accused and asked him whether he understood it properly. After he understood it properly he was fully aware of everything, then he signed it.

Trial-within a-trial

Evidence in respect of accused 2

[18] **Scott**

He arrested accused 2 in Rundu on 5 January 2006 after he was informed about his involvement by accused 1. Accused 2 was found in the closet trying to hide behind the clothes. He resisted arrest, but was overpowered and was hand cuffed. At that time Scott explained his rights to him. His rights to remain silent, anything he said will be taken down in writing and will be used against him in a court of law, his right to legal presentation including his right to legal aid. When accused 2 was brought to Windhoek and again before he was interrogated at the offices of Serious Crime Unit, he the explained the rights to him. Accused 2 did, however, not give an indication regarding his rights, but instead blamed accused 1 and that he would give testimony to that effect. After questioning accused 2, he realised that the statement was equivalent to a confession and he stopped with the interrogation and arranged for Oelofse to take the confession.

[19] **Fillemon Shaduka**

They were informed by accused 1 of the involvement of accused 2 and that he was residing in Rundu. Himself, Scott and accused 1 flew to Rundu. Accused 1 showed them the house of accused 2. He confirmed that accused 2 was found hiding in the wardrobe and that he resisted arrest. They overpowered him and handcuffed him. He confirmed that Scott explained the accused rights to him. He also confirmed that his rights were again explained to him in Windhoek at the office of the Serious Crime Unit

[20] **Felix Ndikoma**

He testified that he took a warning statement from accused 2 on 5 January 2005 and he explained his rights to him as per the pro forma form.

[21] **Peter John Oelofse**

He is a Chief Inspector in the Namibian Police. He has been in the police force for the past 33 years. On 5 January 2005 he was requested to assist in taking a confession with regard to a murder case. He testified that on 5 January 2006 at 14:45 at Katutura Police station accused 2 as per exhibit 'DD' was brought to him by Sergeant Kantema to his private office. He and accused 2 were present in his office. *He testified that as per exhibit "DD", he informed accused 2 that he was in the presence of a Justice of the Peace, who is a Peace officer and that he had nothing to fear and that he should therefore speak the truth. He cautioned accused 2 that he is not obliged to make a statement and that should he wish to make a statement, it would be taken down and used in evidence. He informed accused 2 that he has a right to a legal representative. Accused 2 thereupon replied as follows to the following questions:*

'Q: do you understand the warning I gave you?

A: yes

Q: Do you nevertheless still wish to make a statement?

A: yes

Q: *Where you assaulted or threatened by any person in order to influence you to make a statement?*

A: No

Q: *Where you in any way influenced or urged by anyone to make a statement?*

A: No

Q: *Where you promised anything by any person if you should make a statement?*

A: No

Q: *Do you expect any benefits after making a statement?*

A: No'

He testified that they were communicating in Afrikaans. He translated the statement into English and thereafter it was written down, he re-read it in Afrikaans back to the accused. Accused 2 then affixed his signature on each and every page of the document and he initialed each and every page.

During cross examination the following was put to him by Christiaans: Q: 'What I do not see here, or what this proforma does not make provision for, firstly that you inform him should he not be able to afford a lawyer, out of his own pocket, he can apply to the state so that the state can provide him with a lawyer. Now that apart is not contained in this confession.'

A: *that is, it came up now my lord*

Q: *Now can one assume that because that is not contained here he was not informed of that part of his rights?*

A: *that is correct*

Q: *So, you did not ask him whether he wants a lawyer or not?*

A: *That is correct*

Q: *you just inform him about his rights*

A: *That is correct*

Q: *It was not in issue at that stage*

A: *No'*

[22] **Frans Kantema**

He took accused 2 to Oelofse on 5 January 2006 at Katutura police station and collected him again after the statement was recorded. He did not discuss the case with accused 2 on his way.

[23] **Isak van Zyl**

Chief Inspector in the Namibian Police. He has 34 years' experience in the police. He is the Commander of the Crime Investigation Unit at Wanahenda police station.

He testified that he was approached by the late Sass on 6 January 2006 at 10 am to assist with a pointing out. On 7 January 2006 at 12:15 accused 2 appeared before him at the offices of the serious crime unit. He was in his sound and sober senses. *He informed him that he was in the presence of the Justice of the peace. He informed him that he has the right to a legal representative; he is not compelled to point out any scene or points or say anything about such scene. He was informed that what he may point out will be taken and may be used as evidence during his subsequent trial. He was then asked whether he understood the warning given to him. He said he*

understood. He was asked whether he still wished to point out the scene(s) or point(s) and he said 'yes'.

He was further asked whether he was assaulted, threatened or influenced by any person to point out the scene(s) or point(s). He answered: 'I was forced to show, but i know where the house is.

Q: force do you mean that they asked you and not actually force you?

A: Yes'

They departed from the office at 12h37. They then proceeded to the scene or scenes pointed out by accused 2. They returned at 13:24. He testified that after the conclusion of the pointing out the notes were read back to accused 2 and interpreted again. He was asked whether he was satisfied that what he pointed out and said has been noted down correctly and he said 'yes'. He then informed the accused that he will finalize everything and allow him to look and listen to the recordings and the photos.

On 20 March 2006 the accused was brought back to him in order to sign, but he refused to sign on the advice of his lawyer.

End of state's case trial within trial.

Case for the accused: trial within trial

[24] **Testimony of accused 1**

He testified that on 4 January 2006 during the morning he was having breakfast at Spur restaurant with his girlfriend. Two police officers, Tjitemisa and Scott arrived there. Scott told him that he was under arrest for murder. He stood up and got in the blue city golf. He denied having been informed by Scott of his rights.

They arrived at the offices of the police at serious crime unit. In the office it was Scott plus 9 nine officers including his girlfriend Helga Malestky. Scott took his cellphone and

his girlfriend's cellphone and started to interrogate him and his rights were not explained. He interrogated him in a threatening and suggestive manner and forced him to say things that he did not know.

One black officer slapped him on the cheek and Scott was spinning his gun on the table Tjitemisa cocked his gun and said 'let me make this bastard speak, placed the gun on his right hand side, against his head'. He was emotional begging for mercy he said 'I will admit to whatever they want me to say'. He was scared and afraid.

Before being taken to the office of Brune he was told to implicate accused 2 by Scott and other officers, they told him "yes just do that it will be better for you than your case on your side will be treated more lightly and we are going to make sure that you are going to get bail in this issue especially talking with the magistrate.' Mr Scott sent Shaduka to by credit of N\$20 so that he could contact accused 2 in Rundu. Shaduka came back put credit in the phone and he called accused 2, they greeted each other'.

Scott made a call to Unandapo and he came in and asked him whether he was ready to make a statement. After that he was taken to another office in the same building by Felix Ndikoma and Unandapo that was around 16:00. They arrived at the office of Chief Inspector Brune and Unandapo left and Ndikoma stayed behind.

When he entered the office of Brune he was busy writing and he asked him whether he was Dumingo Zuzee Da Costa and he showed him to seat. Brune asked him whether he was threatened to give a statement. He said 'yes" He testified that 'we were having a conflict of understanding each other, the only two things I can still clearly remember is that he asked me two times 'do you need a legal representative? Which at that time I felt almost happy to hear what he was saying because I said 'yes I wanted a lawyer'.

'But like I said I am not disputing that it was read to me, because during that time I was emotionally a wreck.'

His counsel asked him whether the following rights were explained to him: 'you have the right to consult a legal practitioner of your own choice and if you cannot afford a legal

practitioner the state will appoint on application by you, one to represent you. The application can be directed to, the Director legal aid Private Bag 13370 Windhoek. You can also do the statement on your own. You must keep in mind that a statement can be used as evidence either in favour of you or against you' He testified 'no, it was never explained'. It may have been read but it has never come for me to understand. He admitted in his testimony that it was read out, but not explained.

He testified that he was taken to another office of Louw after he returned from Brunes' office. When he entered the office, Louw stood up and took some papers and told him that they should leave the office and they left with a white bakkie at around 17h00 or 17h30. He was seated at the back of the bakkie with two officers, Louw was the left passenger and Unandapo was the driver.

They drove around at Goreangab dam, but he did not point out anything. His rights were not explained to him by Louw.

He testified that he was again taken out for a pointing out on 5 January with Louw and Unandapo as a driver. On 6 January Shaduka booked him out and took him to the parking area where he found Unandapo, Louw and Nahambo. Before they drove Frieda Kishi arrived there. She asked Shaduka what he was doing with her client. She told Shaduka that she would hold him responsible for this in court. They did not proceed with the pointing out.

He testified that on 15 November 2006 Shaduka and Tjitemisa booked him out and told him to raise N\$15000 and to sign the pointing out notes in exchange for bail. He was taken to the office of Louw to sign the pointing out notes and he could see Shaduka and Tjitemisa standing at the door. He never told anyone after 15 November 2006 that Shaduka and Tjitemisa attempted to extort money from him or told him to sign the pointing out in exchange for bail. He signed the document.

He confirmed his signature on the document that was affixed on 15 November 2006.

The document was not read back to him.

[25] **Frieda Kishi**

She testified that during January 2006 she went to the police station to consult with accused 1. At the police station, she found accused 1 in the bakkie at a parking lot. Accused 1 told her that he was arrested on certain charges and that he did not have access to a lawyer or telephone as his cellphone was taken. She spoke to Shaduka and told him that she was acting for accused 1 and that should they proceed with the pointing out she will hold him responsible in court. The pointing out did not proceed.

[26] **Testimony of accused 2**

He testified that on 4 January 2006 between 10h00 and 11h00 he received a phone call from accused 1 who enquired about his whereabouts. He informed him that he was in Rundu. Accused 1 again called him on 5 January 2006 at around 9h00.

Whilst he was still in his bed after his wife had left the room, he felt someone fell on him. He initially thought that it was his wife, but he then heard a man's voice. He asked him who it was and they started tussling and they fell from the bed onto the floor. The man said he was police officer. Another police officer came in and they overpowered him and handcuffed him. His wife came out of the bath and asked them where they were taking him. They did not answer and Scott slapped her because she had earlier lied to them about his whereabouts. They took him outside to the car. Inside the car he saw accused 1. He testified that his rights were not explained to him. They flew to Windhoek and from the airport they were taken straight to the magistrate's court.

After their appearance in court they were taken to the offices of the serious crime unit. He was separated from accused 1. In the office he was seated in a chair with his hands handcuffed behind his back. Dax told him to speak the truth and he asked what truth, he was kicked in the ribs and he fell down. Scott stopped him. After the kick a machine was brought with a black and white wires. He was threatened with the machine saying they will electrocute him. Felix entered the office and asked him whether he should get him a lawyer and he said yes.

From there he was taken to Katutura police station to Oelofse. He testified that Oelofse asked him whether he wanted a lawyer and he said 'yes'. He also informed Oelofse that he was assaulted but did not know who assaulted him but it was a tall dark police officer. He testified that Oelofse did not explain his rights to him.

The court then asked him: 'it was put to you that Oelofse explained your rights to you and your position is that you cannot remember that?

He replied, the reason why I say I cannot remember is because I cannot quite remember if he did not and it is because there is a lot of time that passed I cannot quite remember what happened'. He also denied having given his personal details to the police such as his name, address and qualification. He also denied that he understood English.

The next day he was taken from the cells to serious crime unit and the police started interrogating him. He testified that Shaduka said that they should do something to him. Shaduka went out and returned with a sack that looks like a blanket. Like a maize meal bag. They handcuffed him the 'kentucky' style and placed the wet bag over his head. They forced him to talk, but another police officer stopped them and he was taken back.

On 7 January in the morning he was taken again to the same office by Scott, Ndikoma and Shaduka. He was seated on a chair and was handcuffed and Van Zyl entered. He asked him who the police officers were who assaulted and forced him, he told him that it was Scott and Shaduka. When Van Zyl left, Shaduka and the others came back with the same sack placed it over his head and was removed when he said he could not breathe. He said that he would take them to the house. The sack was again put on his head and they gave him a cloth and he wiped his head and face. They handcuffed him and drove to the house. At the house he did not point out anything but was told to point out the floor and pictures were taken.

He told Van Zyl that he wanted someone to represent him, but nowhere is that reflected in exhibits A, B, C, D and E which show that his rights were explained.

[27] **Reasons for admitting confessions and pointing outs**

Scott testified that he explained accused 1 rights at the time when he arrested him at Spur. That was confirmed by Tjitemisa who was with him. The accused also testified that whilst in the car to the offices of serious crime unit, he told his girlfriend that he needed a lawyer. That shows that he was aware of his right to legal representation already at that early stage. Scott again explained his rights to him at the offices of serious crime unit, before he was interrogated. That was also confirmed by Tjitemisa. The accused told him that he did not need a lawyer at that stage as he did not kill anyone. Unandapo who knows the accused from his childhood, told the court that he also explained the accused rights including the right to legal representation. Brune who took down the accused statement testified that he explained the rights to accused 1 as per the pro forma form 'Exhibit 'CC'. The form also states that 'you can also do the statement on your own.' *'You must keep in mind that the statement can be used as evidence either in favour of you or against you'*

What you do elect to do now?

Accused 1 stated that 'I wish to make a statement 'He was further asked 'do you understand the warning I have given you" and he said 'yes' and he was asked 'Do you nevertheless wish to make statement? He answered 'yes'. Accused 1 testified that those rights were not explained to him. He said it may have been read but he never understood it. He testified 'my lord what I say is that it may have been read, but during that time I would have never understood because the legal term that is being used. Court: 'which legal terms are you referring to here'?

Accused 1: 'I am talking about 'practitioners and let say for instance the statement that are being talked about in evidence can be used against you or in your favour.

Accused 1 'my lord, if that was so clear enough like the way I read it now here I think I would have exercised my right there'.

Accused 1 further testified 'even though I also said to Mr Brune, I wanted a lawyer. He never gave me an answer to that, whether I can get a lawyer or not.

The Court then asked: 'and then what did he say to that? My lord, he never answered me. I cannot recall also what he said.'

The explanation of his right to legal representation was clear. There was nothing ambiguous about that explanation. He elected not to exercise his right and he gave the statement. If he wanted a lawyer present when he gave the confession he would have said no. During re-examination Brune confirmed that the statement (exhibit CC) confession was completed in the presence of accused 1 and that all the answers recorded in exhibit 'CC' were given by accused 1. He also confirmed that he would not have continued with the taking of the statement if accused 1 elected to have lawyer. Accused 1 knew exactly what his rights were from the time he was arrested until his trial. Accused 1 also informed Brune that he was not assaulted or threatened by any person in order to influence him to make a statement. Nor did he expect any benefit (s) from making the statement. He also told Brune that the knowledge about which he wished to make a statement happened to him personally.

Louw testified that when accused 1 appeared before him on 4 January 2006 he was in his sound and sober sense. He explained to the accused that he was not compelled to point out the scene (s) and that what he may point out will be noted down and may be used against him in his subsequent trial. He was also informed about his right to legal representation including legal aid. He told Louw that he did not need a member of legal aid or any other legal practitioner at that stage, only later. He was then asked whether he still wished to point out the scene or points and he said 'yes'. He told him that he was not assaulted or threatened or influenced to point out the scene and he was about to report the matter to the police. The pointing out notes were only signed by accused 1 on 15 November 2006. He testified that the reason why he signed the notes on 15 November is because Shaduka and Tjitemisa told him to sign and to raise N\$15000 for them in exchanging for bail. He testified that his taxi driver was contacted in order to give the money. The taxi driver was not called to corroborate that story. He also did not

tell anyone about the attempted extortion and as counsel for the state put it 'the reason is simple, there was no such promise, otherwise the accused would have complaint about it soon after he realised it'.

Scott testified that when he arrested accused 2 in Rundu at his house, he explained his rights to him. That was confirmed by Shaduka. When he was brought to Windhoek to the offices of serious crime unit and before interrogation, his rights were again explained to him. Oelofse testified that he explained accused rights to him as per exhibit 'd' and after the statement was taken he read the statement back to the accused and he affixed his signature on each and every page of the statement. He informed Oelofse that he was not assaulted or threatened by any person in order to influence him to make a statement. Counsel for accused 2 put to Oelofse that the right to apply for legal aid is not contained in the pro forma form and therefore that part was not explained to accused 2, Oelofse answered that it was correct and that he did not ask him whether he wanted a lawyer or not as the pro forma only says 'the deponent was informed that he has the right to a legal representative'. Although he was not asked whether he wanted a lawyer or not, he was informed that he has a right to a legal representative. He was further asked 'do you understand the warning I gave you' and he said 'yes'. He was further asked 'do you nevertheless still wish to make a statement and he said 'yes'

Counsel for accused 2 also put to Oelofse that after he informed the accused of his right to legal representation, accused 2 informed him that he wanted to appoint a lawyer Oelofse replied that he would have made notes if that was the case.

Van Zyl testified that accused 2 appeared before him on 7 January 2006 at 12:15 for purpose of pointing out. He was in his sound and sober senses. He informed him about his rights including the right to legal representation. He told Van Zyl that he was forced to show the house, but he knew where the house was. He explained that by force he meant that they asked him. Counsel for accused 2 submitted that the accused did not voluntarily point out the scene/points. From his testimony 'force' was a way of talking. Van Zyl did not force him to point out anything and he did that out of his own volition.

I have closely observed the accused persons when they testified before me and I must honestly say that they did not make a good impression on me. Their answers were vague, they contradicted each other, and they were evasive on simple questions. The witnesses for the prosecution on the other hand appeared to be credible witnesses. They are police officers of many years of experience and the issue of explaining the rights of accused persons/suspect has been inculcated in their minds over many years when they testified about it in many court cases. I do not doubt their testimony/evidence when they said that they explained it to the accused. I am satisfied that the state proved beyond a reasonable doubt that both accused made the confessions and point outs freely and voluntarily, without being unduly influenced and their rights were explained to them.

For all those reason I ruled the confessions and point outs admissible.

[28] **Derek Brune**

He is a retired Chief Inspector in the Namibia Police Force with 40 years' experience. He was responsible for Departmental hearings in the force and is an LLB degree holder.

Accused 1 was brought to him for a statement. The statement was taken in English and at no stage did it appear to him that there was miscommunication/misunderstanding. They started with the statement at 15h55 and completed at 17h00. There was also no interruption. He denied that accused ever told him that he was telling him what police officers told him to narrate. After the statement was read back to the accused they both signed the document.

EXHIBIT CC confession was read into the record and the relevant parts state as follows:

"On Monday 26th December 2005, Mr. Ralph Kunhker phoned me at about 21h00. He called me over to his house to discuss about the gentleman who was supposed to do business with him.

This is confirmed by exhibit T and V

“I went to his house at Windhoek West opposite Louis Botha shop. We had a drink and waited for this guy to arrive called Jerry Ndjatu. Mr Kunhker made several calls to this guy until he got hold of him to come to his house.....”

This is confirmed by the presence of the glasses at the lapa on which his thumbprint was found. The calls made to accused 2 is also confirmed by Exhibit U”.

“...in fact we picked him up close to the Polytechnic, near to One Africa Television Company. After we picked him up, we went back to Mr. Kunhkers’ house.

This is confirmed by Exhibit T,U and V where the accused and deceased were in the same MTC coverage area (Polytechnic 3)

“Not very long, then we started with the business Mr. Kunhker had black money, and Mr. Ndajtu was supposed to launder it. Mr Kunhker took out a bucket like a plate or bowl in the bowl, Mr. Ndjatu put some chemical in, and some fake money into this container.”

This is confirmed by the photo plan as well as the evidence of the police officer who arrived on the scene a few days after the deceased was killed.

“Suddenly Mr. Ndjatu took a stone out of the bag he was carrying the size of a brick he struck Mr. Kunhker from behind, on the back of the head.’

This is confirmed by the presence of blood on Exhibit 1 (the half brick) that was found on the floor in the kitchen.

Mr Kunhker fell down he was bleeding very badly I was affected by the incident, because I did not know what the guy had in mind to do. I saw that it was very bad I am already in trouble, because I was hoping for a clear deal or something. There was no other way out. I was already involved at that moment. Mr Kunhker was my friend and boss as well. I had no other choice but to help and get rid of the body he was bleeding very badly, and I knew he would not make it. We took the body and loaded it in Mr.

Kunhker's car we went to the Goreangab dam area. We took the body out of the car, and set it on fire we took some fuel from the car, poured it on the body and set it on fire.

"we drove back to Mr. Kunhker's house. Mr. Ndjatu decided we must go back and look for the money. Since the house was open, we went through all the rooms, but could not find anything until we came across a huge guns safe-we pulled it out from the wall we put it in Mr. Kunhker's car and drove to almost the same area at Goreagabdam, but at a different location. We cut it with a cutting torch-we found 2 guns inside we only found a bit of the money that was in a passport. We had assumed there was 15000 euro, because most of the money was burnt out in the process of opening the safe. We dumped the guns and safe into the dam.

Each of us walked away with 600 euros each. At that moment Mr. Ndjatu was very disappointed, because he said from the last conversation he had with Mr. Kunhker they were talking about 90 000 Euro. I didn't know what to do, because I did not understand why he hit Mr. Kunhker, and not negotiate this business in another way. Mr Ndjatu said that what is done is already done and that is it.

"The next day Mr. Ndjatu left to Rundu, and I went back home at the Polytechnic flats. It was bothering me I could not sleep at all it was my first time being involved in something like that. I told my girlfriend only a bit of the story, but not everything, that we were involved in a business, me and Mr. Ndjatu, and that things went wrong and that Mr Ndjatu strike this gentleman. I didn't mention this name, and that this gentleman collapsed....."

Mr. Ndjatu called me several times to find out how was the movement with the crime scene"

This is confirmed by exhibit Exhibits T and U

"I left something out that is from when we dumped the guns and articles we found inside the gun safe we drove Mr. Kunhker's car to the last end of Katutura, and then we left is there with the key inside the car. We came back for the car, after 10-15 minutes,

because we left something in the car it was tommy bar we picked it up from the car, and then we left again....”

That is confirmed by witness Johannes Nawemab who found the white condor with the key in the ignition.

Question: “when you loaded the body in the car, was Mr. Kunhker still alive?

A: No he wasn’t I could see the movement of his body was quiet.

Question: How many times did Mr. Ndjatu strike Mr. Kunhker:

A: Only the one time, at the back of the head I believe it is a bad spot

Questions: Is there anything you still wish to tell me?

A: This thing was eating me and I had to share it. Every time I think about it, I get dizzy I can’t eat or sleep Mr. Kunhker was a close person to me.”

[29] **Chief Inspector Marius Louw**

He is in the service of the Namibia Police for 28 year. He was approached by the late Chief Inspector Sass to assist in a pointing out of accused 1.

Exhibit EE was completed on 4 January 2006 at 17h40 to para 10 and the pointing out did not proceed due to heavy rains and was postponed to 6 January 2005.

Accused only signed exhibit EE on 15 November 2006, because he told Louw on 6 January 2006 that he first wanted to clear up a misunderstanding between him and his lawyer. Accused was brought to him on 15 November 2006 and he completed exhibit EE in the presence of accused 1 and showed him the photo plan (Exhibit FF.) Exhibit EE was read back to him and they both signed.

Exhibit EE notes on the pointing out of scene(s) and point(s) they were read into the record and they state as follows:

Para 7; *“As you are still prepared to continue with such pointing out, I would like to know the source of your knowledge concerning that which you wish to point out. His reply to this is: I was present when the incident took place.*

Para 9 *“were you in any way assaulted, threatened or influenced by any person to point out the scene(s) and /or points. His answer was: I was about to report the matter to the police I was not influenced.”*

Accused I took him to the deceased house at 131 Independence Avenue, the place at Goreangab dam where the body was dumped, at another place at the dam where the safe and rifles were dumped and Karasburg Street where the vehicle of the deceased was abandoned.

He pointed out the sleeping room of the deceased where they removed the blanket and the place where they removed the safe.

Exhibit F-Bail Application dated 18/05/2006

Ms Kishi *“how many days after his incident were you arrested? ...lets us say 3 days “*

Ms Kishi: “Mr Da costa, I want to ask you a question that the state will obviously ask you. After the incident, why did you not report this incident to the police immediately:.....I was in fear, in shock, I did not know how to approach anybody, anybody to explain the incident,. So I was already in fear, in shock, I did not know what to do.

And did you intend to do something about it?of course, the day when I was arrested, the morning, early in the morning, early in the morning I was on my way to go and report this to the police because after, after three days I had enough courage to go and tell the police about what happened. But then unfortunately it is just that they caught me before I arrived myself at the police.”

Accused. "So I was all confused and still afraid, because for three days, I could not sleep properly or concentrate."

[30] **Peter John Oelofse**

He was an Inspector in the Namibian Police and attached to the Katutura CID when accused 2 was brought on 5 January 2006 to him to take down a statement and resulted in Exhibit DD to be completed by him.

Exhibit DD was read into the record and the relevant parts state as follows:

"The story started with Costa who called me"

"I was in Rundu at the time"

He told me that there was a "Boer" what have (sic) black money. He told me that "Boer" is looking for the chemical. I poured the chemical in a bottle which I sealed. I used the cork of a champagne bottle to seal the bottle.

"I called Costa and moved down to Windhoek"

On 13 December 2005 accused 1 called accused 2 at 12h03 and accused 2 called the deceased for the first time at 15h15 and deceased called accused 2 at 12h16 and had a conversation that lasted 108 seconds.

That is confirmed Exhibit HH

At 12 h30 accused 2 called accused 1, whilst still in Rundu

Exhibit HH

Accused 2 arrived in Windhoek between 14-15 December 2005.

Exhibit HH

"I made contact with Costa about a month ago in November 2005. I slept a Costa's house since I do not know people in Windhoek."

This is confirmed by Exhibit HH by looking at the radio tower, Polytechnic 1.

Exhibit HH

We met the "Boer" the following day at about 14H00 at the "Boers" house.

This is also confirmed in Exhibit HH. At 14h26 on the 15th at least accused 2 was in the vicinity of Louis Botha which is opposite deceased house, because the tower was Polytech 3.

Exhibit HH

On arrival the boer asked Costa whether I have brought the stuff. Costa replied yes on which I took out the bottle. The boer asked me whether I could wash the money. I explained to him that they to do it themselves. I replied that I am just in need of the money for the bottle. He asked me the amount and I informed him I want U\$15000. We however discussions and I came down to U\$10 000. The boer however handed me 7500 Euro'. The Boer then said he would store the bottle in the fridge. The boer then asked costa to take me half way. We went to Wernhill of Mutual Platz close to Wernhill.

On the 16th at 16h02 at least accused 2 must have been in the vicinity of Mutaul Platz close to Wernhill.

Exhibit HH

"I received a call from Costa and the Boer requesting me to come back in order to wash the money. I told them that I was busy and that I would come later. I again received a call from Costa stating he is afraid as he is being followed by the Boer.

He said the Boer is demanding his money, and that he wants Costa to pay back the amount of N\$80 000. Costa send (sic) me an SMS with number of the Boer cellphone number. I called the Boer. He requests me to get on a taxi. I refused and said that Costa should be there as well. Costa called me the Monday after Christmas and said we must go to Windhoek.”

Exhibit T, U and V

We arrived in Windhoek and about 17h30, from Rundu in the same car. This is confirmed by Exhibit T and U. It is clear on the printout that both accused left Rundu and arrived in Windhoek on the 26th of December.

I walked to Costa’s flat. We had discussions. Costa told me he is afraid of going back to the Boer since he was demanding money from him which they lost long time back..

This is confirmed by Exhibit T and U where both accused were in the vicinity of the flat of accused I (Polytechnic 1 and 2).

“Costa then suggested that we must kill the Boer. I explained no it will not help. I then left Costa’s place. At about 22.00 to 23.00 Costa called me and said that I must take a stone along and that he, Costa will hit the Boer”

Accused 1 confirmed that accused 2 took out a stone from the bag to hit the deceased.

Exhibit CC

“We arrived at the Boers place after they picked me up nearby Costa’s place.....”

This is confirmed by accused 1 in exhibit CC that they picked up accused 2 near One Africa Television, close to Polytechnic.

“The Boer at same stage were (sic) behind me in the kitchen. I thought he would hurt me, and I turned around and hit him with my fist next to this right eye, on which he feel down.”

Accused 2 admits at least hitting him with a fist.

Costa then put his foot on his throat, his knee. He took the stone from the bag and hit him on the left side of the head. I realize he is still alive and hit him two times on his head.

“Costa then got a blanket and we loaded him in the back of the Venture/Condor”.

This is confirmed by accused 1 in Exhibit EE and accused 2 in exhibit MM

Costa drove the vehicle, into the bushes somewhere. We off loaded the Boer and Costa said we must get petrol. We bought petrol and returned to the place where we dragged the body. Costa then poured the petrol on the body, and put it alight....”

We then went back to the Boer house. We collected the safe. We took the safe to a place where we cut it. I do not know where he got the cutting torch. We found ammunition and two rifles inside. There was also money in a holder; he gave me seven hundred Euro. We took the rifles and ammunition to the vehicle from there we drove to a river where we dumped the rifles and ammunition.

This is confirmed by accused 1 in that they returned to the house of the deceased. They removed the safe and used a cutting torch to cut it. They shared the money (Euros) they found in the safe and threw the rifles and the safe in the dam.

[31] **Dr Vasin**

He was called to testify about his own interpretation of the post mortem report done on the deceased by Dr Gonzales, who has since returned to Cuba. He testified that the cause of death was a skull fracture with subdual haematoma and that was most likely caused by blunt force applied to the head.

DEFENCE' CASE

[32] **Accused 1**

Accused 1 elected to remain silent. Did not call witnesses

[33] **Accused 2**

Josef Wasuka

He knows accused 1 since 2003. He was arrested in Rundu on 5 January 2006 after accused 1 called him at around 09h00 enquiring about his whereabouts. He was in bed and was asleep when he felt someone fell on him.

He denied having been hiding in the wardrobe as it was too small. They flew back to Windhoek. They were taken to the magistrate's court.

When they returned from court they were taken in different cars to the offices of the police. He was interrogated and tortured and taken to a white man. He denied signing any statement made to any police officer. Although he told Van zyl that he only met accused 1 in November in 2005, he insisted that it was from 2003.

He knew the deceased although they were not close friends. The reason why he had frequent telephonic contact with the accused 1 on 13 December 2005 onwards was because accused 1 wanted to buy a BMW from him.

When he came to Windhoek on 15 December 2005 he cannot recall the name of the suburb he stayed in. He was unable to say whether it was in town or elsewhere. As he goes on he remembers the name of the place where he stayed as Formula 1.

He met the deceased in 2004 when he went to Rundu and used to meet with the deceased after that, but not at his house. Deceased was introduced to him by accused 1.

The telephonic contact between him and the deceased also increased specifically on the 26th of December 2005, the day he was murdered. He had dealings with the deceased about clearing of land in Rundu.

He could also recall the conversation with accused that was also very frequent (6 times also on the 26th). Their conversation was about a braai.

On the 27th he called accused 1 19 times. The reason for those frequent calls was about girls that accused 1 at times wanted to speak to and sometimes the girls used his phones to talk to accused 1. As early as 05h36 the day after the deceased was killed did he contact accused 1.

He testified that Oelofse was the author of the confession.

When questioned by the court he informed the court that some contents in the confession he was coached to say but some Oelofse wrote himself.

He denied being in the company of deceased and accused 1 on the 26th in the vicinity of the deceased house. He claimed to be in the company of a certain Samantha, unknown to him, at Wernhill. He picked her up at Kalahari Sands Hotel and had sex with her at the carwash. After that he went to Katutura to a friend's house, from there he and the friends were barhopping in the festive spirit of that time of the year, before he went home.

[34] **Sabina Marunga**

She is the wife of the accused and could only testify about the day the accused 2 was arrested. Her testimony about the police officers breaking and entering their house was never put to Scott, neither Shaduka. She testified that accused 2 did not buy anything as he claimed. He testified that he bought clothes for the kids and DSTV, but later changed his version and bought one set of television.

[35] **The law**

The state alleges that both accused acted with common purpose when they committed the crimes.

The doctrine of common purpose

The learned author Snyman: Criminal Law 4ed (2002) at 261 defines the doctrine as follows: 'the essence of the doctrine is that if two or more people, having a common

purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the others'

Ms Wanternaar referred this court to various cases dealing with that doctrine of common purpose.

See: *Elifas Gurirab and others V the State*, Case no SA 12/2002 an unreported judgment of the Supreme Court of Namibia delivered on 07/02/2008 by Maritz JA at p 11

In *S v Mgedezi and others* 1989(1) SA 687 (A). It was there laid down that in cases where it was also not shown that the accused contributed casually to the wounding or death of the deceased, and the 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 the violence was 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 killing of the deceased, he must have intended them to be killed and performed his own act of association with recklessness as to whether or not death was not ensue".

She also submitted that what is similarly important for the court to take into account in determining whether accused acted with common purpose, is what did each accused do after they killed the deceased persons. In *S v Shikunga and another* 1997 NR 156 (SC) the court held at 180:

“Further, having regard to the first accused’s knowledge of the weapon being used and the ferocity of the attack the only reasonable inference to be drawn is that he must have realised that there was a possibility of the deceased losing his life as a result of the attack. And that inference is reinforced by his behavior after the event. Evidence of behavior after an event can, of course, serve as an indication as to state of mind at the time of the event. S v Majosi and Others 1991 (2) SACR 532 (A) at 538b-c. Far from distancing himself from his co-accused after the cold-blooded killing of the deceased, the first accused remained a willing participant in their joint venture to rob him. That, in itself, tends to show that he was an active and a willing participant in what had taken place immediately before. His conduct, taken together with his state of mind at the time, made him part to the commission of the murder of the deceased and that, in my judgment, is the verdict which the Court a quo should have reached. The benefit of doubt which the Court a quo generously gave to the first accused was not, on a proper analysis, based upon a reasonable and solid evidential foundation.”

Applying the above stated principles to this case, the following emerge:

- (a) both accused were present at the scene where the deceased was struck with the brick on his head;
- (b) accused 1 was aware of the assault being perpetrated on the deceased, by accused 2
- (c) accused 1 did not distance himself from the scene when accused 2 hit the deceased with his fist and thereafter with the stone
- (d) they assisted each other to load the body of the deceased in the vehicle of the deceased.
- (e) they drove to Goreangab dam with the intention of getting rid of the body,
- (f) they set the body on fire and then together returned to the house of the deceased. Throughout they remained willing participants in their joint venture to rob the deceased. They divided the money they found in the safe and only then parted ways.

Mr Nambahu submitted that ‘the state did not prove that Accused no 1 entered into an agreement with his co-accused person to commit an offence or was at the scene of the crime on the day the offences were committed. There is no evidence whatsoever of this nature presented by the State. There is no evidence that accused no 1 causally contributed to the injuries or death of the deceased. There was no evidence presented before the honourable Court the Accused no 1 had acted in such a manner. I completely disagree with Mr Nambahu on that aspect. The confession accused 1 made clearly places him at the scene of crime. He took part in the commission of the crimes. He assisted in the loading of the body. They set the body on fire. Then there was also evidence that the deceased was going to be hit with a brick and had to be killed. So in my respectful view he actively took part in the commission of those crimes

[36] **Accused 1 failure to testify**

In *S v Katari* 2006 (1) NR 210 at C where the court quoted as per Maritz J (as he then was) what was said in *Osman and another v Attorney-General*, Transvaal 1998 (4) SA 1224 (CC) SACR at 493 at 501b-d that:

“Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that absent any rebuttal, the prosecution’s case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice.”

“He cited the remarks made by Naidu AJ in S v Sidziya and Others 1995 (12) BCLR (TK) at 16481-1649B with approval:

The rightmeans no more than an accused person has the right of election whether or not to say anything during the plea proceedings or during the stage when he may testify in his defence. The exercise of this right like the exercise of any other must involve the appreciation of the risks which may confront any person who has to make an election. In as much as skillful cross-examination could present obvious dangers to an accused should he elect to testify, there is no sound basis for reasoning that, if he elects to remain silent, no inference can be drawn against him.

“When the state has established a prima facie case against an accused which remains uncontradicted, the court may unless the accused’s silence is reasonable explicable on other grounds, in appropriate circumstances conclude that the prima facie evidence has become conclusive of his or her guilt.”

In this case the state clearly established a strong case against the accused. He confessed to his involvement in the commission of the crimes. In my view sufficient evidence has been adduced by the state to prove the elements of the crimes.

[37] Equally in my respectful view the State also proved the guilty of Accused no. 2. His confession in this matter which was admitted into evidence clearly places him on the place or the scene of crime. He admitted that he was involved in the commission of the crimes.

His alibi that he was not at the house of the deceased on the 26th December 2005, is clearly false. Having regard to the totality of the evidence, the confessions, the pointing outs I am satisfied that the prosecution proved the guilty of the Accused persons beyond a reasonable doubt.

In the results,

The accused are convicted as charged. On the count of murder the accused are convicted of murder with *dolus directus*.

G N NDAUENDAPO

JUDGE

APPEARANCES

THE STATE:

**Ms Wanternaar
OF THE PROSECUTOR GENERAL OFFICE**

1ST ACCUSED:

**Mr Nambahu
OF NAMBAHU & UANIVI ATTORNEYS**

2ND ACCUSED:

**Mr Christiaan
OF CHRISTIAAN AND ASSOCIATES**