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CC 77/92

THE STATE vs PAULUS ALEXANDER & 1 OTHER

O'Linn, J

1992/05/29

Criminal Law

Robbery
Where an article is snatched from a person, such as a handbag or glasses or whatever it is, the element of violence required for the crime of Robbery is already present.
Robbery can be committed even if violence follows an taking of persons property, where the following violence is narrowly connected to the taking e.g. where the victim is stabbed when he attempts to recover his property from the thief, immediately after the taking.

IN THE HIGH COURT OF NAMIBIA

In the matter between

THE STATE

versus

1. PAULUS ALEXANDER

2. NGHILIFA GABRIEL

CORAM: O'LINN, J.

Heard on: 1992.05.26,27 and 29

Delivered on: 1992.05.29

JUDGMENT

O'LINN, J.: The accused PAULUS ALEXANDER, a 25 year old male of Namibian nationality and NGHILIFA GABRIEL, a 18 year old male of Namibian nationality appeared before me on charges of (1) Murder and (2) Robbery (with aggravating circumstances as defined in section 1 of Act 51 of 1977) -

> "IN THAT on or about the 25th October 1991 and at or near Independence Avenue, Windhoek in the district of Windhoek the accused unlawfully and intentionally killed ANDREAS UZIGO.
>
> IN THAT on or about 25 October 1991 and at or near Independence Avenue, Windhoek in the district of Windhoek the accused unlawfully and with the intention of forcing him into submission, assaulted Andreas Uzigo by stabbing him with a

knife and unlawfully and with intent to steal took from his possession a pair of sunglasses the property of or in the lawful possession of the said Andreas Uzigo.

AND THAT aggravating circumstances as defined in section 1 of Act 51 of 1977 are present in that the accused and/or an accomplice were, before, after or during the commission of the crime, in possession of a dangerous weapon, namely a knife".

In the State's summary of substantial facts the State's case was briefly stated as follows:

"On Friday afternoon, the 25th of October 1991, approximately 14h00 the deceased was in Independence Avenue, Windhoek. He was walking on the side-walk in a southerly direction. The accused approached him and accused no. 1 snatched his sunglasses from his eyes, and handed them to accused no. 2. The deceased asked that his glasses be returned, but accused no.l stabbed him with a sharp object in his throat. The deceased died on the scene due to exsanguination because of the stabwound in the throat".

In this Court both the accused pleaded not guilty to both charges. Accused number 1, however, explained in explanation of plea that he in fact did injure the deceased with a knife and that the deceased in fact died as a result thereof. He, however, indicated that he had no intention to kill the deceased. In so far as the crime of robbery is concerned he denied that he had taken the sunglasses from the deceased

prior to the injury or at any stage.

Accused number 2 in his explanation of plea indicated that he did not see anyone grabbing the sunglasses but that a coloured person by the name of Soon handed the glasses to him whilst he was walking from the direction of the Windhoek Central Post Office towards the alleged scene of crime in front of the music shop. According to him he did not participate in either the injury to the deceased or the taking or snatching of the sunglasses from his eyes.

The State was represented in this Court by Mr Januarie delegated by the office of the Prosecutor-General and the accused were represented by Mr Hinda, on the instructions of the Legal Aid Board.

The State called the following witnesses, namely:

Dr Linda Liebenberg

Constable L.Beukes

Mr Salmon Cloete

Mr Michael Andima

The defence called both accused to testify for the defence.

At the end of all the evidence the following facts appeared to be common cause:

1. Both accused and two state witnesses Salmon Cloete and Michael Andima had been roaming around in a group through the streets of Windhoek during the

morning of Friday the 25th February 1991 before the killing of the deceased.

2. During this time they visited the shop known as "Shoprite". There witness Michael obtained a knife either by purchase or theft which was subsequently, but prior to the killing of the deceased, wrapped in a newspaper and handed to accused number 1, Paulus Alexander.
3. The knife is described as a kitchen-knife about 30 centimetres in length with the point of the blade forming a sharp point and tapering down from the blunt side of the blade towards the cutting edge.
4. At about 14h00 on the same day the aforesaid group came across the deceased.
5. The deceased was wearing sunglasses.
6. Somebody approximately at that time, snatched the sunglasses from the deceased's face.
7. The deceased accosted accused number 1, Paulus Alexander and requested the return of the sunglasses.
8. Thereupon accused number 1 made a movement with the aforesaid knife which resulted in an injury to the neck of the deceased.
9. The wound was an incised wound 26 millimetres long on the outside of the skin of the deceased and 60 millimetres deep. It entered on the right side of the throat and extended horizontally to the left, passing behind the right side of the carotid artery and jugular vein, through the right wing of the thyroid cartilage, through the upper

oesophagus and partially severed the left carotid artery and jugular vein. Moderate force would have been required to cause the wound.

10. The cause of death was exsanguination due to a stab wound into the throat.
11. The accused number 1 caused the death of the deceased.
12. The accused fell down and died on the scene shortly after being stabbed.
13. The two accused as well as the two aforesaid state witnesses ran away from the scene and was subsequently arrested.
14. When accused number 2 fled from the scene he was in possession of the sunglasses of the deceased.
15. These sunglasses were handed to him at the scene shortly before the deceased was stabbed, either by accused number 1 or by state witness Salmon Cloete.

The facts and/or issues in dispute at the close of the evidence were the following:

1. Did Salmon Cloete steal the knife or buy it?
2. Did accused number 1 force him to hand over the knife to him or did Cloete voluntarily hand it to accused number 1.
3. Did Salmon Cloete or accused number 1, snatch the sunglasses from the face of the deceased or did another person do so.

4. Did accused number 1 hand the sunglasses to accused number 2 or did witness Cloete hand it to accused number 2?
5. Was accused number 2 present with accused number 1 and the two state witnesses when the glasses was snatched from the face of the deceased and when the deceased was injured by accused number 1?
6. Did accused number 1 carry the knife in his hand after receiving it from witness Michael and before injury to the deceased or did he keep the knife inside or partly inside his trousers?
7. Did accused number 1 stab the deceased as testified by the state witnesses Cloete and Michael Andima or did accused number 1 only flick his hand slightly in a movement to indicate that the deceased must leave him alone and/or was the deceased pushed by someone else onto the knife and/or did accused number 1 stab the deceased intentionally?
8. Did accused number 2 associate himself with the action of accused number 1 and/or the person who snatched the sunglasses from the face of the deceased.

As to the first two issues of the facts in dispute, namely (1) did Michael Andima steal the knife or buy it and (2) did accused number 1 force him to hand over the knife to him or did Michael Andima voluntarily hand it to accused number 1.

As far as these first two issues in dispute are concerned,

the Court cannot rule out the reasonable possibility that the evidence of the two accused are correct in so far as they alleged that Michael Andima actually was one of those who stole knives on that particular morning and also in so far as the allegation of accused number 1 is to the effect that he did not in any way force Michael to hand over the knife to him.

I have also a great difficulty on the probabilities of accepting Michael Andima's evidence in so far as he alleged that he had bought the knife for R5 and actually handed it to accused number 1 to sell it for him. These aforesaid issues are, however, not of any real significance in this case.

As far as the next issue is concerned, namely did accused number 1 snatch the sunglasses from the face of the deceased or did some other person do so, I have no difficulty in accepting the evidence of the two state witnesses on this issue and I therefore find that in fact accused number 1 was the person who snatched the sunglasses from the face of the deceased. But even if I am wrong in this then at least one of the group snatched the sunglasses from the face of the deceased and he did so in the circumstances from which it can be inferred that accused numbers 1 and 2 were at least parties to this snatching of the glasses from the face of the deceased.

As to the issue - did accused number 1 hand the sunglasses to accused number 2 or did witness Cloete hand it to accused

number 2, it again is impossible to reject as not reasonably possibly true the evidence of accused number 2 on this aspect. However, whether or not Cloete first took possession of the glasses or whether he never took possession of the glasses, are not important or significant considerations in coming to a conclusion on the guilt of the accused in this matter.

On the fifth issue, i.e. was accused number 2 present with accused number 1 and the two state witnesses when the glasses was snatched from the face of the deceased and when the deceased was injured by accused number 1, I have no doubt, whatsoever, that accused number 2 was present at all relevant times. His explanation why he suddenly moved away from the group and went to the Post Office to look for another friend with whom he normally moves around in town is wholly improbable and clearly a fabrication. In this connection he initially at the preparatory examination explained that he did not know anything about the incident because he had only arrived there after the whole incident had taken place and the deceased had already been killed.

In this Court he said that the coloured person by the name of Soon, i.e. Cloete, ran towards him and handed the glasses to him. That is also totally improbable. But then he goes on to say and here he improves on his original explanation before the magistrate, by saying that as he moved towards the scene after receiving the glasses from Soon he saw a group of people standing around, he saw a newspaper moving in the air and he saw a movement of the newspaper as if it

was drawn back from a certain position. He did not want to tell the Court at that stage of his testimony that he had actually seen this newspaper in the hand of accused number 1, he was very evasive as to that. Then he tells a story of how he was shocked when he saw the blood spurting from the neck of the deceased and that in actual fact because of the shock he ran away from the scene immediately. He, however, then continues to tell the Court that he ran for a distance and then, when he got to Pep Stores, he decided to go and buy drinking glasses in accordance with a request or a mandate from his mother or some other relative. A person who is so shocked that he decides to run away and immediately afterwards in the next few seconds or minutes decides to walk into a shop to buy a glass or glasses as if nothing has happened, cannot tell the Court that he ran away because he was shocked. It is obvious from that, that his whole story is not only improbable but clearly concocted. I have no difficulty in finding that he was at the scene at all relevant times. He saw what happened, the snatching of the glasses, he saw the stabbing and he ran away, not because he was shocked but to avoid arrest and implication in these crimes.

The next issue, number 6, is, did the accused number 1 carry the knife in his hand after receiving it from witness Michael and before the injury to the deceased or did he keep the knife inside or partly inside his trousers? On this point accused number l's evidence stands alone. Both accused number 2 and the two state witnesses indicated that in fact accused number 1, after having received the knife

from Michael that morning, kept the knife inside his trousers, whether inside a pocket or just on the inside of his trousers. The seventh point of dispute, i.e. did accused number 1 stab the deceased as testified, to by state witnesses Cloete and Michael Andima or did accused number 1 only flick his hands slightly in a movement to indicate that the deceased must leave him alone and/or was the deceased pushed by someone else onto the knife or did accused number 1 stab the deceased intentionally.

The story about the flicking of the hand in a slight manner to indicate that the deceased must leave him alone and that the deceased then turned his head and was accidentally injured is totally improbable and obviously a very weak effort to mislead the Court. As to the story that the deceased was pushed by someone else onto the knife, the accused did not persist with that story in this Court. This was, however, the story which he told the magistrate in his explanation of plea and that is why I must, nevertheless, consider it even though he did not persist with that story in this Court. In this Court he even said that he had never said something like this to the magistrate. He had never told the magistrate as was recorded as follows: "Die oorledene se bril is deur iemand afgeruk, die oorledene kom toe na my en ek se dit is nie ek nie. Ek het 'n oop mes in 'n koerantpapier in my hand gehad, iemand stamp oorledene toe van agter en hy val in die mes". He says he never told the magistrate that story - "Ek het "n oop mes in 'n koerantpapier en iemand stamp die oorledene toe van agter en hy val in die mes". Now he even told this Court that in

actual fact the proceedings in the magistrate's court, before Magistrate Horn, was in English and not in Afrikaans. When it was pointed out to him by the State advocate, Mr Januarie, that according to the record, the matter was interpreted into Afrikaans from Ovambo by a certain interpreter Ms Bunga, he said that Ms Bunga interpreted on the first day, that is the 28th October 1991, but did not interpret on the 13th November 1991 when he gave his aforesaid explanation to the magistrate. It also turned out surprisingly that the same interpreter, Ms Bunga, was the same person as the one who, according to the accused's earlier testimony in this Court, was his sister. He also told the Court in the course of his story on the merits that when he reached home after the incident on the day in question he felt bad and he actually asked this sister of his, Ms Bunga, to phone the police so that they could come and fetch him. He testified in detail how the sister had phoned the police on three occasions, that afternoon and evening, but that the police never turned up until 11 o'clock that evening when he was arrested.

In the circumstances the Court thought it just to call the presiding officer at the magistrate court, Ms Horn and to call the person who was the interpreter, according to the records, Ms Bunga. The magistrate, Ms Horn, testified that the proceedings on the 13th November was in Afrikaans because no English interpreter was available and that in fact the interpreter on that particular date was Ms A. Bunga. She testified that she recorded what the interpreter interpreted in Afrikaans, as it appears on the record of the

proceedings.

Ms Bunga then was called by the Court and she testified that she knew accused number 1 as well as accused number 2, that accused number 1 and she lived for some time in the same place, but she was not his sister in any sense of the term. She also denied that she had ever been requested to call the police on the day in question and she denied that she had ever called the police on that particular evening. As to the record she confirmed that she was in fact the interpreter on the day when both accused gave an explanation, that is on the 13th November 1991. She testified that she at that stage was one of the interpreters at the magistrate court interpreting from Afrikaans to Oshivambo and vice versa and she could not interpret in English. She confirmed that, that is why the proceedings on that day was recorded in Afrikaans and she interpreted from Oshivambo to Afrikaans and vice versa. She confirmed that what was recorded by the magistrate was what was in fact said by the accused. She denied emphatically that she had ever phoned the police at the request of accused number 1 or at all.

It is quite clear that accused number 1 tried to mislead the Court continuously and throughout his evidence. He made a bad impression as a witness and there is no difficulty in finding that he was lying to the Court. As to the alleged so-called flicking of his hand, the fact of the matter is that the wound inflicted on the deceased required moderate force, it was a stab wound, it penetrated into the body of

the deceased for 60 millimetres. There can be no doubt that the wound was not inflicted accidentally but deliberately and as described by the state witnesses. Their description was that accused number 1 removed the knife from the inside of his trousers where he kept it until that moment, he suddenly took it out and he pushed it straight towards the neck or the upper part of the body of the deceased in a striking movement. As I have indicated the wound is an incised wound and it was described by Dr Liebenberg as a stab wound and the Court has no doubt that in fact it is a stab wound directly and deliberately inflicted on the deceased by the accused.

The issue, did accused number 2 associate himself with the action of accused number 1 and the person who snatched the sunglasses from the face of the deceased. I have no doubt that not only was accused number 2 present all the time, but that he was one of the group from the beginning. He assisted in confusing the deceased and he assisted in the theft and the robbery by taking the sunglasses which were snatched from the deceased into his possession and by running away from the scene with the sunglasses after the brutal stabbing. By keeping it he helped to make it impossible for the deceased to recover his glasses. As I have indicated the reason for the running away was not that he was shocked, but probably that he had a guilty conscience, a knowledge of his association and the participation in at least the violent snatching of the glasses. Accused number 2 made a bad impression as a witness.

As to the correct verdict the State contended in argument that accused number 1 should be found guilty of murder firstly and secondly of robbery with aggravating circumstances and that accused number 2 be found guilty only of robbery but not guilty of murder.

Mr Hinda, for the defence, conceded that it is impossible for him to argue that the evidence does not justify that accused number 1 must be found guilty of murder and robbery.

In argument, therefore, as far as the verdict in regard to accused number 1 is concerned there is no dispute between state and the defence counsel.

As far as accused number 2 is concerned Mr Hinda contends that accused number 2 cannot be found guilty of murder because that charge has not proved beyond reasonable doubt.

The defence and the State is therefore ad idem on this point and the Court has no difficulty in accepting that joint stand by state and defence. It is obvious to the Court that the State did not prove in the case of accused number 2 the charge of murder.

However, in the case of accused number 2 the State contends that he is guilty of robbery with aggravating circumstances and the defence contends that he can only be found guilty on a charge of theft in view of the fact that he ran off with what he should have known was a stolen pair of sunglasses. There is also the possibility of convicting accused number

2 of the crime of being an accessory after the fact to robbery, because he actually assisted at least after the robbery in removing the stolen goods from the scene and in that way attempted to obstruct the course of justice and attempted to assist accused number 1 and/or any other person who actually removed the glasses from the deceased.

There is also the possibility in such a case that on the charge of robbery the accused can be found guilty of assault or assault with intent plus the crime of theft. Those are all competent verdicts on a charge of robbery.

I must now shortly deal with the law on the issues raised here.

A person can be found guilty in a case where he has acted in the execution of a common purpose with another accused. This aspect is mostly relevant to the question of the guilt of accused number 2. I wish to refer in this connection to the case of S v Safatsa and Others, 1988(1) SA (AD) 868 at p.898, paragraph A and B. Botha, J.A. in this decision of the Appellate Division referred to certain dicta in other cases and commented as follows:

> "In my opinion these remarks constitute once again a clear recognition of the principle that in cases of common purpose the act of one participant in causing the death of the deceased is imputed, as a matter of law, to the other participants. The reference to 'voorafbeplanning' is not significant, for it is well established that a common purpose need not be derived from an

> antecedent agreement, but can arise on the spur of the moment and can be inferred from the facts surrounding the active association with the furtherance of the common design".

I have also dealt with this case and the subsequent case of S v Mqedezi and Others, 1989(1) SA 687 and the case of S v Motaunq and Others, 1990(4) SA 485 (A) in a recent judgment in the case of S v Likius Aikele and 2 Others, a judgment which was delivered on the 24th April 1992 and not yet reported in the Law Reports.

However, as far as accused number 2 is concerned the Court infers from the conduct and the facts with which I have already dealt, that even if no antecedent agreement between him and accused number 1 and/or the other state witnesses were proved, then at least he joined in on the spur of the moment, by associating himself with the violent snatching of the glasses and by assisting in the act of depriving the deceased of his property.

There is another aspect on the crime of robbery which needs some consideration. Traditionally the courts have regarded robbery to be committed when a person uses violence to subdue the victim in order to obtain the goods. It was generally accepted at one stage that when goods are stolen or taken from a person and violence is subsequently supplied, that that would not in the normal course constitute the crime of robbery, but only the crime of theft and assault. However, in the authoritative judgment in the case of

S v Yolelo. 1981(1) SA 1002 (A) at p. 1015 G-H, the learned judges of appeal stated the position to be as follows:

> "Ek meen derhalwe dat roof gepleeg kan word ook indien geweld volg op die voltooiing van diefstal in 'n juridiese sin. In elke geval sal nagegaan moet word of daar in die lig van al die omstandighede, en veral die tyd en plek van die handelinge, so 'n noue verband tussen die diefstal en die geweldpleging bestaan dat die as aaneenskakelende komponente van wesentlik een gedraging beskou kan word. Die vraag of die opset van die dader by die toediening van geweld gerig moet wees op behoud van die besit van of beheer oor die goed wat die dief reeds verkry het - in teenstelling tot blote ontvlugting - kom nie in die onderhawige geval ter sprake nie.
>
> Dit is nodig om te meld dat hoewel ek hierbo gerieflikheidshalwe meestal slegs na geweldpleging verwys het, wat gese is ook van toepassing is op 'n dreigement van geweld insoverre dit 'n element van roof kan wees".

Even if in this case the mere snatching of the glasses did not constitute robbery in itself, then the violence used, namely the stabbing of the deceased, when he tried to recover possession of his glasses, constitutes violence which is so narrowly connected to the taking that it is in any case sufficient to constitute the crime of robbery. On that basis alone the crime of robbery has been proved even though the glasses was first snatched from the deceased and he was stabbed subsequently. There is, however, another legal question which needs consideration. Traditionally, the snatching of an item from a person has been regarded by our courts not as robbery but as theft. That is on the basis

that the snatching itself was held not to involve violence to subdue the victim in order to obtain the handing over of his property. However, in several cases in recent times, courts in South Africa have found that the actual snatching of a handbag from somebody in the street amounts to robbery and not merely theft, because it is violence directed to overcome his potential resistance to the taking. This line of cases started actually with some comment by Rumpff, C.J. of the Appellate Division of the Supreme Court of South Africa in the case of S v Mogala, 1978(2) SA 412 (A) at 415H to 416A, where he stated:

> "Ek vind dit moeilik om te verstaan waarom 'n persoon wat met geweld 'n handsak uit 'n vrou se hand ruk, nie geweld pleeg nie (al hoef dit gering te wees) met die doel om die handsak te ontneem. Dit skyn my haarklowery te wees om te se dat die geweld 'toevallig' is, of dat die geweld die slagoffer nie in 'n toestand van onmag plaas nie. Die gryper weet goed dat hy alleen deur 'n onverwagte vinnige en harde ruk die handsak kan kry. Hy weet dat sy slagoffer weerstand sou bied indien hy dit gewoonweg sou wou vat. Daarom moet hy die slagoffer se greep en verdere weerstand by voorbaat uitskakel deur 'n vinnige handeling wat uit geweld bestaan. Die verskil tussen die sakkeroller en die grypdief le juis daarin dat eersgenoemde met behendigheid my beurs of portefeulje verkry, terwyl die grypdief alleen met geweld kan slaag. Hoewel by die gryp van 'n handsak gewoonlik die ontneming van die handsak saam met die pleeg van geweld gaan, is die geweld 'n sine qua non vir die gevolg".

This approach was followed, for instance, in a decision by the Natal Provincial Division in the case of S v Sithole, 1981(1) SA (NPD) 1186 at 1187. This approach was also

followed in several other cases since in the 80's. In the S v Mofokeng, 1982(4) (TPD) 147 a judgment of two judges, the reasoning appears from paragraphs A-C at p.150.

The same approach was followed in the case S v Witbooi, 1984(1) SA (CPD) 242 by two judges of that court.

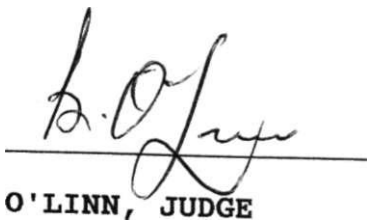
I have no doubt that the Namibian Court should follow the approach applied in the aforesaid cases, namely that where an article is snatched from a person, such as a handbag or glasses or whatever it is, the element of violence required for the crime of robbery is already present and it is not required that there must be violence in any other form at the time of the taking.

When the said approach is applied to the present facts, it follows that the crime of robbery was already committed at the moment when the glasses were snatched from the face of the deceased. In any case it was certainly committed at the time when the deceased tried to get his property back and when he was stabbed and stabbed to death.

I have considered all the evidence, the probabilities and the credibility of the witnesses and have applied the legal principles of our law to the facts. In the result I have come to the conclusion that -

ACCUSED NUMBER 1 is GUILTY of the CRIME OF MURDER firstly and secondly of ROBBERY with AGGRAVATING CIRCUMSTANCES.

I find ACCUSED NUMBER 2 NOT GUILTY of the CRIME OF MURDER but GUILTY on the CHARGE of ROBBERY with AGGRAVATING CIRCUMSTANCES.



O'LINN, JUDGE

For the State: Adv. H.C. Januarie

For the accused: Adv. G.Hinda

Instructed by the Legal Aid Board

IN THE HIGH COURT OF NAMIBIA

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SENTENCE

O'LINN, J.: It is certainly always one of the most difficult tasks for courts to impose a sentence in the case of serious crimes like the present. It is trite law that when imposing sentence the Court considers the person of the accused, the nature of the crime committed and the interest of the community. Obviously in most cases those three considerations are interrelated and cannot be marked off in separate and clear cut compartments.

The facts of the cases against the two accused appear from the Court's judgment on conviction. It is not necessary to repeat those facts. However, certain features of the crimes committed must be underlined. The crimes of theft, robbery and murder have certainly increased markedly in the last few years. Today it is not an exception to hear of people whose goods are stolen, gangs walk the streets and move into

the shops to rob people and now we even have the case where a person was murdered in daylight in the main street of Windhoek. The fact that this was done in broad daylight in the centre of town shows that the accused persons not only committed cowardly and brutal acts, but were contemptuous of the forces of law and order. This is not a case where food was stolen or even where a person was robbed of items such as food and where the explanation is that the accused were out of work and requiring food to survive or even money to survive or to maintain their dependants or anything of the sort.

The crime here starts off with the accused roaming around in the streets of Windhoek. They snatched a minor item such as the sunglasses off the victim's face and then, when the victim was not satisfied and attempted to recover his property, he was assaulted, killed in a brutal and cowardly fashion. The crimes committed are very grave crimes. The robbery was committed in circumstances which are regarded in law as aggravating circumstances because a dangerous weapon was involved.

As far as accused number 1's person is concerned it appears that he reached only standard 5 at school. Nevertheless, he did not commit the crime somewhere in an area where one would look perhaps on such a crime with more sympathy. This person, accused number 1, has been in the city of Windhoek apparently for a considerable time. He must be aware of the appeals from the leaders of the community, from the President of Namibia right down to the ministers, the

repeated warnings of the courts of law, cries of desperation from many sources in the community. He cannot be ignorant of all that.

The accused furthermore did not take the Court into his confidence during the trial stage or at any stage. He started off with an explanation in the magistrate's court which was a blatant lie. In this Court he wasted the Court's time with explanations and further allegations which amounted to misrepresentations. It was necessary for the Court to call the magistrate, to call a person named by the accused as his sister to give evidence and both refuted some of his lies here in Court. Those lies I have already dealt with in the judgment on the merits. But now the accused came forward at the sentence stage and gave evidence under oath once more. The Court was just beginning to be more sympathetic to the accused because at least he came forward to say under oath that he was sorry that he had wasted the time of the Court, the magistrate, the interpreter and other witnesses by his misrepresentations. That was a very good beginning for a person showing remorse and contrition. However, one of the aspects which the Court would have taken into consideration was the fact that he had no opportunity to attend school if that was the fact. The Court, therefore, pertinently put the question during the sentence stage to the accused whether he had attended a school at all during his lifetime and he said clearly and emphatically - no he has never attended school. Fortunately Mr Januarie, the State advocate, had a record of some of the particulars of the accused and Mr Januarie then put to the accused that

he had told the police that he had passed standard 5. His answer to that was string of evasions, contradictions and further lies. In that way his bona fides were destroyed by himself and the weight which I would have given to a person in his position who showed sorrow and contrition was not only diminished but also completely eliminated. He also continued with a story that in actual fact the deceased had been stabbed or injured accidentally. The Court already found on the merits for good reason that that explanation was a lie. The Court has no reason now, even if it was in a position to do so, to change that finding. He also continued with the lie that he does not know who snatched the sunglasses from the deceased's face. It is quite clear that if he did not snatch the glasses himself, then he must be well aware of precisely who of his group of friends snatched the glasses. So there again, he persisted in his lies.

It has also been brought to the Court's attention by the accused and his counsel that the relatives of the deceased had demanded a payment of R3 500 and 15 head of cattle as damages for the killing of their deceased relative. Accused also said that according to a sister of his this amount has been paid and the cattle delivered to the family of the deceased. However, the Court has no proof that that has happened and a problem in a case like that is firstly one of fact. Unless the Court holds a further enquiry it cannot establish whether in fact such monies were paid or such cattle were handed over. If this was a weighty or a very relevant factor then the Court would have called further

witnesses, but it seems to me that in cases where people originating from certain so-called tribal areas are involved and where in the case of murder, an accused person or an accused persons' family are required to make amends by paying certain damages to the family of the victim, then that type of arrangement must of necessity remain primarily a civil matter. It is in essence the settling of a civil claim between families and that cannot really effect what sentence a court must impose when an accused is found guilty in this court of the most serious crimes.

In some cases, particularly where the crimes are not that serious, it may be that a court in appropriate circumstances, will give some weight to the fact, if that fact is proved, that amends have been made by the family of an accused to the victim of an accused by the payment of a sum of money and/or the delivery of cattle. But at best that could be only a minor consideration considering the sentence which a court must impose.

Evidence has further been put before this Court that accused number 1 was previously sentenced for the crime of theft. That in itself was not a very serious crime because the value of the stolen article was small. But at the same time or related to that, he was convicted of a crime of malicious injury to property, doing damage to a police van in which he was apparently conveyed. It is also common cause that the present crime was committed by him whilst he was already out on parole. Now when a person is out on parole that is an opportunity given to him by the authorities to go out and

not serve his full sentence, on the understanding that he will behave himself and provide signs of being a responsible member of the community. He also failed to fulfil this trust which the authorities and the community put in him by letting him out on parole.

As far as accused number 2 is concerned he is said to be only 18 years of age. Certainly this would in most cases be seen as a factor which counts in favour of an accused person. Unfortunately it seems nowadays that so many crimes are committed by persons of a youthful age more or less 17 to 20 years of age and although I must give this factor some weight in favour of accused number 2 as compared to accused number 1, it cannot be taken out of proportion. Then it has been argued by Mr Hinda and it is a fact conceded by the State that accused number 2 certainly played a lesser role than accused number 1, the older man. Accused number 2 has been acquitted of the crime of murder because his participation in the murder could not be proved beyond reasonable doubt. The murder is one of the elements also of the robbery in the case of accused number 1, but it is clear that the murder cannot be held against accused number 2, when considering his sentence on the crime of robbery. However, if, as I have found, the mere grabbing of the spectacles in a violent movement already constituted the crime of robbery then one can say that at least as to that form of robbery his role was not less than the one who actually snatched the glasses because it is obvious what the modus operandi was. The one grabs the item of the victim and it is passed on to one or more of the other people in

the group standing around or running around so as to confuse the victim and so as to make it more difficult for the victim to try and recover his property. Furthermore accused number 2 gave no assistance to the deceased. He ran away from the scene and he was not shocked or sorry, not then or today, because on his own evidence although he contended that he was very shocked, on his own evidence after he had run some distance from the scene of the crime he callously walked into a shop to go and buy glasses in accordance with a request or instructions for some relative of his. He also did not come into the witness-box to give evidence that he regretted his acts. What he did throughout was to lie to the Court except in those instances where the Court found that the evidence of accused numbers 1 and 2 could be reasonably possibly true. Those exceptions I have clearly stated in the judgment on conviction.

In the light of the increase in this type of crime, the sentences of this Court must be such that it will play some role, however small, in deterring the accused or persons in the position of the accused to commit this type of crime. Before the Namibian constitution the murder committed by accused number 1 would have been regarded as one without any extenuating circumstances and the death sentence would have been imperative. A court also in a case of robbery with aggravating circumstances was entitled to impose the death sentence but was not compelled to do so. In Great Britain, when the death sentence was abolished, the statute made it compulsory to sentence a person to life imprisonment in the place or in lieu of the sentence of death. Under the pre-

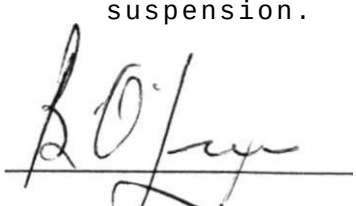
independence dispensation, accused number 1 would have been sentenced to death. Under the present dispensation, the only realistic punishment for accused number 1 is life imprisonment on the charge of murder.

IN THE RESULT, the following sentences are imposed:

ACCUSED NUMBER 1 on the charge of murder, LIFE IMPRISONMENT. In the case of ROBBERY with aggravating circumstances, 15 (FIFTEEN) YEARS IMPRISONMENT. The sentence of robbery will run concurrently with the indeterminate sentence of life imprisonment. I want to make it clear immediately that the executive has a right and a duty to consider when a person sentenced to life imprisonment is allowed out on parole or otherwise and it will depend inter alia on the conduct of the accused how long he will be in prison.

As far as ACCUSED NUMBER 2 is concerned the sentence in his case on the charge of robbery with aggravating circumstances, is as follows:

> TEN (10) YEARS IMPRISONMENT, five (5) years of which are suspended for five (5) years on condition that the accused is not convicted of the crimes, robbery or theft or any crime involving violence for which the accused is sentenced to imprisonment without the option of a fine and which is committed during the period of suspension.



O'LINN, JUDGE