



CASE NO. CC 20/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

IMMANUEL ISAKO	ACCUSED 1
WILLEM PETER	ACCUSED 2
GERT NUXABEB	ACCUSED 3
JAFET NUXABEB	ACCUSED 4
JOHN KHAMUXAB	ACCUSED 5
JOHANNES HEIKI	ACCUSED 6

CORAM: MULLER, J.

Heard on: 17 September 2009

Delivered on: 03 December 2009

JUDGMENT

MULLER, J.: [1] In more than one respect 06December 2006 was a faithful day in the lives of several persons. During that night Daniel Jansen Van Vuuren lost his life and six persons were charged with a number of offences. Of these six persons five are accused persons before this Court, namely accused 2

to 6. Before the trial accused 1 died while he was in custody. When this trial commenced on 17 September 2009 accused 2 to 6 faced a wide range of charges, which I will describe in detail hereunder. The trial lasted for 29 days until 29 October 2009 when the evidence have been concluded. The trial was then postponed until 01 December 2009 for submissions. I shall hereinafter refer to accused number one as Isako and to the other accused as accused 2,3,4 or 5, respectively. Accused 2 to 5 were represented by Mr Boris Isaacks instructed by the Directorate of Legal Aid and accused 6 by Ms Lucia Hamutenya, also instructed by the same directorate. Mr Campher represented the State. As mentioned accused Isako had died before the trial commenced.

[2] On the first day of the trial the charges were put to the accused, who pleaded as set out hereafter. Both counsel acting for the accused confirmed that their pleas were in accordance with their instructions. No plea explanations in respect of any of the accused were offered and no admissions were made in terms of Section 220 of the Criminal Procedure Act, No. 51 of 1977, as amended (CPA). Accused 2 to 5 were all charged with 6 different counts, namely murder, stock theft; theft of the rifle of the deceased and 45 cartridges, an ammunition box, a telescope, a cartridges belt and 12 compact discs, as well theft of the deceased's motor vehicle with an alternative of contravening section 83(2) of Act 22 of 1999, namely the use of that motor vehicle without the owner's consent, defeating the cause of justice by hiding the items mentioned in the third charge, including the skin of the head of cattle and a contravention of the Stock brands Act no 24 of 1995, namely by altering mutilating on cancelling the registered brand on the said heifer. All 4 accused, namely accused 2 to 5 pleaded not guilty to all these charges.

Accused 6 was charged with murder; stock theft; theft of the items referred earlier; defeating the cause of justice by hiding those items, contravening section 17(1)(f) of the Stock Brand Act 24 of 1995, namely by altering the brand mark on the skin of the head of cattle, as well as 2 charges of contravening sections 2 and 33 of the Arms and Ammunition Act no. 7 of 1996, namely the possession of a point 0.308 rifle and possession of 5×0.375 cartridges. Accused 6 pleaded not guilty to all these charges.

[3] Not less than 23 witnesses testified for the State, while all five accused testified under oath. Several exhibits, both documentary and specific items were handed in, numbered and identified by several of the witnesses. Two trials-within-a-trial in respect of the admissibility of pointings out and a warning statement were conducted during the course of the main trial.

[4] It is impossible to refer to the evidence of the State witnesses in detail. However, much of the evidence is in fact a common cause and I shall attempt hereinafter to summarise the events of that day and thereafter with regard to evidence that were not in dispute in order to provide a background picture of what occurred. The evidence that were disputed during the trial will be analysed thereafter in more detail.

BACKGROUND BASED ON UNDISPUTED EVIDENCE:

- [5] • The deceased was a professional hunter and employee of Mr Gunther Heimstadt at the farm Holstein.

- The deceased was at the farm where his parents lived on the afternoon of 06 December 2006 and his mother observed no injury on his body.
- The deceased attended a function for clients hosted by his employer Mr Gunther Heimstandt during the evening of 06 December 2006 and when he did not turn up for work the next morning, a search for him ensued.
- Accused 1, Isako, was employed at Standard bank, Outjo and lived with a girlfriend Elizabeth Garises, who also worked in his shebeen. Isako also had a brick house in a township in Outjo and owned a white Mazda pick-up, which was used the night of 06 December 2006
- Accused 2 knew Isako and did work in his garage on the white Mazda bakkie.
- Isako's vehicle did not start after being switched off and had to be pushed.
- During the afternoon of 06 December 2006 accused 2 went to the house where accused 3,4 and 5 resided and requested them to accompany him and Isako later that afternoon to assist in pushing Isako's vehicle and loading a wedding cow.
- Isako and accused 2 picked up accused 3-5 at the house where they were residing with Isako's vehicle later the afternoon.
- At the Engen service station at Outjo Isako filled his vehicle with fuel, put in oil and bought 2 tins of gun-gum.

- Around sunset these 5 persons left Outjo and drove towards Kamanjab, where they later turned off on a gravel road to farm Elandsputz, where Isako apparently farmed on Gryspos.
- At Gryspos accused 6 who was employed by Isako to look after his live stock and his wife resided in a house.
- Two young boys, namely Reinhold Sixub and Marius An-Aobeb also resided at Gryspos and were also at the house where accused 6 lived.
- Isako and accused 2-5 and Marius and Sixub left with the vehicle of Isako, who also took his rifle and a spot light along.
- The party drove back on the gravel road and turned in the direction of Kamanjab on the tarred road.
- At a resting place they stopped and Isako connected the spot light to the battery of the vehicle and then accused 2 drove further in the direction of Kamanjab with Isako on the back of the vehicle with his rifle.
- Cattle were spotted on the left hand side of the road in a camp.
- Isako shot one of the cattle. That head of cattle that Isako shot was pulled through the fence and loaded on Isako's vehicle.
- After the head of cattle was loaded, Isako turned the vehicle on the tarred road in the direction of Kamanjab.
- A vehicle approached from the direction of Outjo and it's lights were flashed. Isako turned his vehicle around and it came to the standstill facing in the direction of Outjo. The vehicle of the deceased passed and stopped some distance further.

- Isako approached the vehicle of the deceased. He and the deceased talked, whereafter the vehicle of the deceased was driven closer to that of Isako.
- After further conversation between the deceased and Isako, the latter shot the deceased. The deceased was dragged from the road into the grass by Isako.
- When the lights of an approaching car was seen, Isako got into the vehicle of the deceased and drove away.
- Accused 2-5 stayed with Isako's vehicle and attempted to get it going.
- After the approaching car had passed, Isako returned with the deceased's vehicle. From there accused 2 drove Isako's vehicle and Isako followed with the deceased's vehicle.
- Both vehicles stopped and Isako removed several items from the deceased's vehicle, including the deceased rifle and other items which he put it in his vehicle.
- The deceased's vehicle was left there and all the accused, together with Sixub and Marius drove back to Gryspos. At Gryspos the head of the cattle that was shot and which was on Isako's vehicle, was offloaded and slaughtered.
- On the instructions of Isako the items belonging to the deceased, as well as Isako's rifle were taken and hidden on the farm by accused 6. Marius and Sixub left and went to sleep.
- Isako and accused 2-5 left with Isako's vehicle to Outjo with the meat of the slaughtered head of cattle loaded on the vehicle.
- At Outjo the meat was offloaded at Isako's brick house.

- Isako took the other accused to the house where accused 3,4 and 5 resided.
- None of the accused (2-5) informed the police or anybody else what had happened that evening.
- Reservist police officer Herridge discovered that Isako bought gun-gum at the Engen service station.
- Isako and accused 2 were apprehended by the police.
- Accused 2 accompanied the police to the residence where accused 3,4 and 5 were staying and they were similarly apprehended.
- On 08 December 2006 several police officers went to the farm Gryspos where the items that accused 6 had hidden were fetched by him and handed over to the police.
- Accused 6 was also apprehended and taken back to Outjo.
- The State witnesses, Paulus Naholo and Hermograde Karunga, who were employed by Mr Paul Stommel at the farm Molden heard two shots the evening of 06 December 2006 and upon investigation with a tractor, observed a place where cattle was shot and saw blood spoor from a camp on farm Molden through the fence towards the tarred road. They also observed the body of the deceased.
- After a search for the deceased, his body was found the morning of 07 December 2006 in the grass close to the road at farm Molden of Mr Paul Stommel.
- Photos were taken by two police officers, namely Constable Alex Mwendera and Sergeant Reinharld Doeseb, both of the Scene of

Crime Investigation unit. They took photos of several points pointed out by accused 2,6 and other State witnesses.

[6] Throughout the trial witnesses referred to the specific head of cattle that was shot by Isako and which is the subject-matter of the second charge of stock theft, either as **"the cattle"** or **"the cow"**. **"Cattle"** is of course the plural and one head of cattle and cannot be referred to as **"the cattle"**. The reference to it as **"the cow"** during the trial does not denote its gender, but its rather an attempt to refer to it in the singular. The correct dictionary word for a single head of cattle is a "neat", which I believe is a foreign word to many people. The animal in second charge is a **"heifer"**, although that description does not really conform with the evidence presented in this Court. I shall in this judgement refer to the specific head of cattle that was shot by Isako as a **"cow"**, which is not any reference to its gender, and is done solely for the purpose of identification of the particular animal.

[7] Photos contained in two photo plans were handed in as exhibits C and D. Constable Mwendera took the photos and compiled the photo plan, marked exhibit C, while Sergeant Doeseb was the photographer of the photos in the photo plan marked exhibit D. Sergeant Doeseb also identified certain physical items that he photographed on the scene, as well as the items that were pointed out by accused 6 to Constable Gariseb and later shown by Gariseb to Sergeant Doeseb for the purpose of taking photos. These items were handed in as exhibits. The defence did not cross-examine Constable Mwendera at all, while the cross examination of Sergeant Doeseb was only directed at the brand mark that appears on the skin of the cow that was slaughtered and the exhibits

contained in sealed envelopes handed in by himself to the National Forensic laboratory for analysis.

[8] It is necessary to refer to some of these photos. I shall first deal with the photos contained in exhibit C.

Photo 1 shows a camp divided from the road by a fence. On the camp side marks appear where the cow was allegedly slaughtered and dragged or pulled to where it was loaded on Isako's vehicle.

Photo 2 shows marks on the tarred road where blood allegedly leaked from the vehicle on which a cow was loaded for quite a distance.

Photos 3,4 and 5 depict the place where the body of the deceased was found, 600m from where the cow was slaughtered on photo 1. On these photos several points are marked as points where different items, as well as the deceased's body, were found.

Photo 6 indicates what appears, and what is alleged to be, a blood spot on the tarred road 7,1m from where the deceased body was found in the grass.

Photos 7 and 8 respectively indicate a spent and a live cartridge found next to the tarred road, 10,4m from the deceased's body.

Photo 9 shows a plastic gun-gum holder and a rubber that apparently came from the window of a motor vehicle 13,4m from the deceased's body.

Photo 10 shows a white tekkie with blue stripes found 9.3m from the deceased body.

Photo 11 indicates a sandal found 15m from the deceased's body.

Photos 12 to 15 shows the deceased's body taken from different angles and also indicate the entrance and exit bullet wounds on both sides of his body.

Photos 16 and 17 indicate the deceased's red Nissan double cap vehicle found 4km from where his body was found.

The remainder of the photos in exhibit C were taken by Sergeant Doeseb when the post-mortem was done, namely photos 20-34.

[9] In exhibit D photos 3, 15 and 16 indicate the farm house and the fencing around it at Gryspos where accused 6 lived and where the cow was allegedly slaughtered and off-skinned.

Photos 4 to 14 show the bush in camp on Gryspos and the places where the rifles, the ammunition box, deceased's bullet belt and the cow skin were pointed out by accused 6 to Gariseb and later by Gariseb to Sergeant Doeseb, who took the photos.

Photos 18 to 20 show Isako's branding iron and the letters thereof printed on the sand.

Photos 21 to 28 indicate the skin of the heifer, its head, an ear with an ear tag and brand marks on the skin.

Photos 29 to 30 have been taken from the branding iron of the owner of the cow and letters on it printed on the sand.

Photos 31 to 34 depict the deceased's vehicle and a spend cartridge allegedly found in the vehicle.

Photos 35 to 41 are different photos of the white Mazda vehicle of Isako, indicating blood marks and damage to the right window and exhaust system of the vehicle.

Photos 42 to 43 show the green bullet box containing live rounds.

Photo 44 indicates the spot light, photos 45 and 46 the rifle bag and Isako's rifle and photos 47 and 48 that of the deceased.

Photos 49 and 50 indicate several packets of meat in a fridge.

[10] Dr F. G. Burger conducted the post-mortem on the body of the deceased and completed a medical legal post-mortem report, handed in as exhibit F. He found a bullet wound which entered the right side of the deceased and exited on his left side around the pelvis area. This bullet wound was the cause of death and the bullet which causes the wound penetrated the deceased's bladder, shattered the iliaca vein and pelvis. Blood clots, which indicated that there had been severe bleeding, were also found. According to the doctor this was a fatal wound and deceased would not have survived long in the circumstances he was in. The doctor also found several other wounds on the left arm and right leg of the deceased, as well as blood on the back of his head. The doctor was severely cross-examined in respect of these wounds. The doctor remained adamant in his opinion that the deceased was assaulted with a roundish hammer-like object before he died. In his opinion force was used to cause these wounds.

Trials-within-a-trial

[11] As mentioned before, two trials-within the main trial were held. The first was in respect of pointings out by accused 2 to the police and the second in respect of pointings out and a warning statement by accused 6. The purpose of these trials-within-a-trial were to establish whether the pointings out and the warning statement were freely and voluntarily made and whether the evidence in respect thereof are admissible. The Court ruled in each of these "**admissibility trials**", as the they were called by *Froneman J* and *S vs Melani* and others 1996 (1) SACR 335 (E), that the evidence was admissible. These two

trials-within-a-trial will be discussed in more detail hereinafter and the reasons for the Court's decisions on both will be provided therein.

Pointings out by accused 2

[12] Accused 2 objected to the admissibility of the pointings out by him to Inspector Oberholzer on basis that such pointings out were not freely and voluntarily made, because Inspector Oberholzer allegedly promised him that he will get bail and thereby induced him to make such pointings out. A further reason for the objection by accused 2 was that his rights, particularly in respect of legal representation during the pointings out, were not explained to him. A trial-within-a-trial then ensued with the State calling Inspector Oberholzer, Sergeant Hoveka and Constable Gariseb to testify, while accused 2 testified in his own defence. The evidence of Inspector Oberholzer and accused 2 were material in respect of the latter's objection against the pointings out. I do not intend to refer to the evidence in detail.

[13] Inspector Oberholzer was called from Otjiwarongo, where he was stationed, to assist and upon arrival interviewed accused 2 in an office at the Outjo police station. According to him, all the accused's rights were explained to him particularly that of legal representation during the pointings out, but accused 2 indicated that he did not want a lawyer at that stage. Inspector Oberholzer also denied that he ever promised accused 2 bail. According to him accused 2 voluntarily accompanied him and the photographer to the various scenes where he made the pointings out. Accused 2 denied that his rights were explained to him, either by Inspector Oberholzer, or during his arrest by Inspector Reuter. He

also denied that the answers contained in the arresting statement taken by Sergeant Hoveka came from him, also where he confirmed that his rights were explained to him. According to him, he was just required to sign the document. In respect of the allegation that he was promised bail, he could not take it further than stating that Inspector Oberholzer promised to make an inscription on the docket that he should get bail if he co-operates. However, no amount of bail money was discussed and later in cross-examination he testified that upon their return from the pointings out, the bail issue was discussed.

[14] The defence relied on several South African decisions in particular that of the *State vs Melani supra, S v Mkwanyana 1978(3) SA 404(N); as well as S v Sheehama 1991(2) SA 860(A) Namibian decisions: S v Minnies and Another 1990 NR 177(HC); and S v Kapika(1) 1997 NR 285(HC)*.

[15] The Court was satisfied that no promise of bail had been made to accused 2 and that he freely and voluntarily accompanied Inspector Oberholzer and pointed out the scene and specific points described by Inspector Oberholzer in a document that he handed in after at the pointings out were ruled admissible. The Court was also convinced that accused 2's right in respect of legal representation during the pointings out were explained to him, that he understood it and preferred not to have a lawyer to represent him at that stage.

[16] The Court is alive to what was previously stated in other decisions, namely that it is entitled to reverse it's ruling made in a trial-within-a-trial if other evidence at a later stage might indicate that ruling was wrong.

Further evidence of co-operation by accused 2 with the police confirmed that the Court's ruling was correct to allow the evidence of his pointings out.

Pointings out by accused 6 and his warning statement.

[17] Accused 6 objected to the pointings out of items that he was allegedly instructed by Isako to hide the night of 06 December 2006, on the basis that he was forced to do it by Sergeant Hoveka and that his warning statement was consequently also not freely and voluntarily made. The latter statement was never referred to or regarded as a confession.

[18] Sergeant Hoveka, Constable Gariseb and Inspector Doeseb testified for the State and accused 6 in his own defence. It appeared from the cross-examination of Sergeant Hoveka and Constable Gariseb that the objection against the pointings out by accused 6 was in fact based on his original refusal to point out the items and that he only conceded to do so, after the accused 2 was called to induce him to agree to point out these items, whereafter he was arrested. Emphasis was placed on what Constable Gariseb apparently said of what accused 2 told accused 6. Accused 2 apparently said that they were held and interrogated from early that morning, whereupon accused 6 then went to point out and fetched the items that he had hidden in the bush. In his evidence quite another version was provided by accused 6. According to him, he never refused to fetch the items, but only wanted to know where his employer, Isako, was. When he was told by accused 2 that they were all held and interrogated by the police, he was apparently satisfied and went with Constable Gariseb to fetch the items. He said he was not forced to do so.

[19] In respect of his warning statement, accused 6 denied that he provided the information that Sergeant Hoveka wrote in that statement and said that he was just required to sign the statement.

[20] In coming to my decision, I have considered previous Court decisions that I have been referred to, i.a. *State vs Melani, supra*; *R v Barlin 1926 AD 469*; *S v Nicolaas de Wee 1999 NR 122(HC)*; *R v Kuzwayo 1949(3) SA 761*; *S v Ananias 1966(3) SA 486*; *S v Scott and Others 1992(2)SACR 180 E*; *S v Tjiho 1992(1) SACR 639(Nm)*.

[21] In the light of the evidence I was satisfied that both the pointings out and the warning statement were admissible as evidence and ruled accordingly. I am also satisfied that the evidence provided later in the main trial, and in particular by accused 6 himself, confirms my ruling in the trial-within-a-trial in respect of accused 6.

Common purpose

[22] In the State's summary of substantial facts, provided to the accused, it concluded with the following sentence:

"All the accused acted with common purpose before, during and after the incident"

[23] In terms of Section 155 of the CPA, persons implicated in the same offence maybe tried together. The position of perpetrators, accomplices, the liability of each, as well as the requirement of a casual link between the aid of an

accomplice and the commission of the offence by the perpetrator are comprehensively discussed in the authoritative work of *Hiemstra's Criminal Procedure*, 22-25 to 26 (*Hiemstra*). Causalty is not a requirement where the doctrine of common purpose is applied. (*S v Safatsa and others. 1988 (1) SA 868(A)*)

Hiemstra formulates the doctrine of common purposes as follows:

"If two or more persons collude in an undertaking with an unlawful purpose, each is responsible for the acts of the other performed in the furtherance of the common purpose if he/she:

- (i) foresaw the possibility that the other could perform that act in the furtherance of the common purpose; and*
- (ii) was indifferent to such acts and their consequences."*

(Hiemstra, supra, 22-27)

[24] The State has to prove, even by inference, that the participant actually foresaw the act of the other and was indifferent to the result. (*R v Hercules 1954 (3) SA 826 (A)*) This is not a type of vicarious liability, but liability based on the guilt of the participant, i.e. his or her own *mens rea*. (*S v Malinga 1963 (1) SA 692(A)*).

The Court has to be cautious in applying the doctrine of the common purpose, because it is often unnecessary and inappropriate.

[25] Although the doctrine of common purpose had been accepted in our law as a basis for the conviction of more than one participant in a crime, the South African Appeal Court discussed this doctrine in detail in a series of cases and also dealt with liability in mass actions. (*S v Safatsa, supra; S v Mgendezi and others*

1989(1) SA 687(A): S v Motaung and others 1990(4) SA 485(A) and S v Khumalo en Andere 1991(4) SA 310(A))

In *S v Mgendezi, supra*, with reference to *S v Safatsa, supra*, Botha JA at 705I-706B stated that in a matter where no prior agreement had been proved, an accused in regard to whom no casual link to the death or wounding of the victim has being proved, can only be held liable for such death or wounding on his own *mens rea* if the following are present:

- a) *presence of the scene of the violence;*
- b) *knowledge of the assault on the victim;*
- c) *the intent to make common cause with those who in fact perpetrated the assault;*
- d) *manifest participation in the common purpose with the perpetrator of the crime by some or other act of association with the conduct of the others; and*
- e) *presence of the necessary mens rea with regard to the killing of the deceased, dolus directus or dolus eventualis."*

(Hiemstra 22-29)

When there is no direct evidence to establish common purpose, it has been held that common purpose can be inferred from joint conduct. (*S v Nkomo 1966(1) SA 831(A); R v Njenje 1966(1) SA 309 (RA)*)

Steyn CJ also held in *Dudley v Minister of Justice 1963(2) SA 464(A)* at 468B that where the train of thought of people joined together is directed at a common target and they intend to achieve that target through joint action, they

can have common purpose, despite that they had no prior agreement on the common purpose.

[26] Disassociation from a common purpose may prevent the conviction of a person based on this doctrine. In *S v Maxaba 1981(1) SA 1148(A)*, the facts of that case were that a victim was robbed by three persons acting together; when that crime was completed, further violence was no longer necessary, yet one of the three fatally stabbed the victim with a knife. It was held that it was not proved that they had the common purpose to commit murder or that the other two accused foresaw that the third would use a knife and stab the victim. The Court held that *dolus eventualis* was not proved and that they were neither co-perpetrators, nor accomplices in the murder. It was further held that it must be determined whether they rendered aid to the actor by affording him the opportunity, means or information to advance the commission of the offence and that simple approval or agreement with the commission of the offence is insufficient association for liability as an accomplice.

[27] In *S v Musingadi and others 2005(1) SACR 395(SCA) at 409 g-h Comrie* AJA had the following to say:

"The foregoing authorities indicate, in my view, that on a practical level the Courts of several countries, including South Africa, proceed from this premise: That the greater the accused's participation, and the further the commission of the crime has progressed, then much more will be required to take steps to prevent the commission of the crime or its completion. It is in this sense a

matter of degree and in a borderline case calls for a sensible and just value judgment."

[28] The facts of this matter will have to be evaluated against the principle of the doctrine of common purpose in order to determine whether the State can rely on that doctrine to prove the liability of the accused persons. It was not clear from the State's heads of argument whether it in fact relies on the doctrine of common purpose or on the *mens rea* of accused 2-5 i.r.o the murder charge. From the submissions advanced in this Court by Mr Campher for the State the latter seems to be what is relied on in respect of the Stock Theft charges. In respect of the murder charges against the accused, he does not rely on the doctrine of common purpose, except that the accused are accessories after the fact according to him

Accessory after the fact

[29] The State submitted that all the accused are guilty of murder as accessories after the fact in the murder of the deceased. It is submitted that this is on the basis of the doctrine of common purpose.

[30] The definition of an accessory after the fact is the following:

"An accessory after the fact is someone who unlawfully and intentionally after the completion of the crime associates himself or herself with the commission of the crime by helping the perpetrator or accomplice to

evade justice.” (Jonathan Burchell and John Milton-Principles of Criminal Law- second edition, (chapter 42, p 419).

This definition makes it clear that there is no distinction between the liability of an accessory after the fact and one who defeats or obstructs the cause of justice.

[31] Mere association with the crime of the perpetrator is too wide and not sufficient to create liability of an accessory after the fact. (*S v Augustine 1986 (3) SA 294 (C) at 297-300*) In *S v Morgan 1993 (2) SACR 134 (A)* a narrower approach was preferred, namely that there should be evidence that the perpetrator was assisted or helped to evade justice. In adopting the latter approach as favoured by the South African Appellate Court in the Morgan case there is no necessity for a separate offence of accessory after the fact since the offence of defeating or obstructing the course of justice adequately includes the conduct of the alleged accessory after the fact. Burchell and Milton, *supra*, p 421; Snyman - Criminal Law – Fourth edition, p 278).

[32] The liability of an accessory after the fact, as that of an accomplice, is accessory in nature. There cannot be an accessory after the fact if someone else has not committed the crime. Consequently a person cannot be an accessory after the fact to his or her own crime. (Burchell and Milton, *supra*, correctly in my view, criticises the decisions in *S v Gany 1957 (2) SA 212(A)* and *S v Jonathan 1987 (1) SA 633 (A)*, where accused persons were found guilty as accessories after the fact. The basis for that criticism is the fact that a person cannot be found guilty as an accessory after the fact of his/her own crime,

because his/her liability is accessory in nature to that of another. These writers submit that the competent crime in these circumstances is obstructing or defeating the course of justice or attempting to do so. (Burchell and Milton, *supra*, p 422-3).

[33] It is sufficient if the accessory after the fact knows or foresees the possibility that the perpetrator has engaged in unlawful conduct although he/she might not know or foresee the specific type of unlawfulness. It is submitted that this approach is also compatible with defeating or obstructing the course of justice. That person must have the intention to help the perpetrator to evade justice. (Burchell and Milton, *supra*, p 425).

Hearsay evidence

[34] During the trial both the State and the defence objected to evidence in chief by the State witnesses and the accused of what either Isako or the deceased have said. At the time it seemed that this would be an important issue, because generally hearsay evidence is inadmissible. During cross-examination by the defence of the State witnesses and by the State of the accused, the exact words were elicited because it seemed that both the State and the defence would rely on it. However, no argument was based on this evidence by either the State or the defence and it is consequently not necessary to deal with the hearsay-issue and its admissibility under specific exceptions at all.

Analysis of evidence

[35] Before I deal with the evidence of the individual witnesses as far as it is necessary, the following became evident during the course of the trial:

- All of the accused are not implicated in all the events of the night of 06 December 2006;
- The main perpetrator to all of the events, Isako, died before the trial commenced;
- Accused 2-5 were present during almost all of the events that night;
- Accused 6's participation was limited to what occurred before the other accused left Gryspos and what occurred after they returned, as well as during the morning of 08 December 2006;
- The only evidence of what occurred the night of 06 December 2006 after they left Gryspos until they returned, is that of the two State witnesses, Marius and Sixub, and accused 2-5;
- What happened when they returned at Gryspos depends on the evidence of the accused, as well as Marius and Sixub for the period that the latter two were still there;
- Where necessary or relevant, the photo plans, exhibits C and D, as well as the other exhibits, have been considered.

[36] It is not necessary to refer to the evidence of all the many State witnesses in detail. It is clear from the evidence presented in this Court that the evidence in respect of the incidents of the shooting of the cow, the shooting of the deceased, what happened thereafter until the accused returned to Gryspos and what happened at Gryspos, depend on the evidence of the two State witnesses

Sixub and Marius, as well as accused 2-5. Accused 6 could only testify about the arrival of Isako and accused 2-5 at Gryspos and after they returned to Gryspos late in the night. Several other witnesses testified in respect of incidents that occurred before the accused left Outjo for Gryspos and after they returned to Outjo. The two State witnesses of the Scene of Crime Unit, testified about the photos in photo plans, exhibits C and D. There were also some witnesses whose evidence will be referred to, without much detail. The evidence of these witnesses evidence are not really in dispute. They are e.g the parents of the deceased, Daniel Van Vuuren, and Mr Gunther Heimstadt. The evidence of Paul Stommel, the owner of the farm Molden, where the cow was shot and where the body of the deceased was found next to the road, as well as his two farm workers who testified, will be discussed in more detail.

[37] A mentioned, nothing much turns around the evidence of the parents of the deceased and that of Mr Gunther Heimstadt. The deceased's mother saw him that afternoon of the fatal day before he left around 18h00 to Mr Heimstadt's farm. He had no injuries and he took the trousers along that he had on when his body was found with the trousers damaged. These trousers were new and were received from somebody as a present. He intended to put it on, which he apparently did. The father went to look for the deceased when it was reported to him that he did not turn up for work that morning. Before his death the deceased worked for Mr Gunther Heimstadt as a professional hunter. According to Mr Heimstadt he attended a function the previous evening and then left without any injuries, but did not turn up for work the next morning. He and the

deceased's father went to look for the deceased. They were later informed by Mr Paul Stommel that the deceased's body was found next to the road. Both of them saw the body and testified that the items found near the body as depicted on the photos in exhibit C. The deceased's mother also turned up at the later stage while the body of the deceased was still lying in the grass.

[38] The evidence of three witnesses are very important, namely that of Mr Paul Stommel, the owner of the farm Molden on whose farm the cow was shot and dragged toward the road, as well as where the body of the deceased was found next to the road in the grass. The evidence of his workers which will be mentioned later. According to Mr Stommel he was phoned the night of 06 December 2006 around midnight by his foreman, Paulus Naholo, who informed him that he heard two cars and 2 shots being fired, whereafter he and other workers went with a tractor to that area and found blood spots. He again spoke to Paulus on the radio the next morning and was informed that they had found the body of the deceased laying in the grass. Thereafter he went to Otjikondo and informed the police and also Mr Gunther Heimstadt of what was found. At the scene he found the father of the deceased and Mr Gunther Heimstadt. He also identified the various items that he noticed in the vicinity of the body of the deceased. He did not visit the scene where the cow was slaughtered, but identified it from the photos. In respect of photos 21, 24 and 25, in exhibit D, depicting the skin of the cow, he testified that the skin has the colour of a Simbrah, which is a cross-breed between a Brahman and a Simmentaler. The ear tag, exhibit 10, was not his. He identified fresh brand marks on the skin depicted on photo 26 (exhibit D). According to him it was still black as a result of the burning, which normally wears off later. He could identify his brand mark

underneath the one that was imposed over his brand mark. In respect of the difficulty to identify his brand mark, he testified that it is easier to observe it on the skin than on the photo and that he could identify it when he saw it and because he put his own brand iron over that mark and could then clearly observe his own brand mark. The value of the cow was N\$3200.00. In cross-examination Mr Stommel testified that he did not notice any injuries on the body of the deceased, except for the gun shot wound. He also testified that the grass next to the road along the fence of his farm are normally cleared, which he did approximately a year before the incident.

[39] Two of the farm workers in the employ of Mr Paul Stommel on the farm Molden testified that they were sleeping outside the night of 06 December 2006. They are Paulus Naholo and Hermigrade Karunga. According to the evidence of both of them they heard a vehicle on the road, which vehicle was driving and stopping. They then heard a gun shot and thereafter they heard another vehicle which passed and stopped, whereafter they heard a second shot. Karunga also testified that he heard voices before the second shot was fired and a car driving away. According to both of them they took a tractor, accompanied by another worker and drove to the vicinity where they heard the shots. At the border fence of the farm and a neighbouring farm, they found blood in their camp. According to Karunga they also found drag marks leading towards the road. Both of them returned. The next morning they returned with the tractor and also saw blood in the camp and found the body of the deceased next to the road. Paulus then contacted Mr Paul Stommel. It is significant that during the cross-examination by Mr Isaacks on behalf of accused 2-5 no questions were asked about the shots

that they heard, neither was it put to them that in fact 3 shots were fired and not two, as well as that one of the cattle was earlier wounded.

[40] The distances between the various places referred to in evidence were not provided during the trial and the Court indicated at the close of the cases of the defence that it would either call a witness to measure or provide these distances, or if all parties do agree thereon, the Court would accept a statement to that effect. On Monday 16 November 2009 a statement by the investigating officer with the distances required by the Court were provided. According to that statement, the investigating officer, Warrant Officer Hoveka, measured the distances which the Court requested. They are the following:

1. The distance between Outjo Engen service station and the house where accused 6 resided at the farm Elandsputz is 90.7km.
2. The distance of the gravel road between the Gryspos homestead and the Outjo-Kamanjab tarred road is 10km.
3. The distance from where the gravel road joins the tarred road to the place where the cow was shot and loaded on Isako's vehicle is 19km.
4. The distance between where the cow was shot and where the deceased's body was found is 600m.
5. There is only one resting place between the spot where the gravel road joined the tarred road and the place where the cow was shot. The distance from that resting place to where the gravel road joins the tarred road is 11.9km
6. The distance from the resting place to where the cow was shot is 7.1km.

7. The distance from the homestead at Gryspos to the homestead of the farm Holstein is 9km.

[41] According to these distances, which are common cause, it is evident that the cow could not have been shot on Isako's farm, but was shot a distance of 29km from the homestead at Gryspos. The evidence of the accused, and in particular accused 2, to the effect that they thought they were going to get one of Isako's cattle on his farm cannot be true. This corresponds with the evidence of accused 6 that there were no cattle; belonging to Isako, missing and that Isako's cattle were in the camp in which the homestead at Gryspos was situated. In fact, the evidence of Paulus and Karunga, as well as that of Mr Paul Stommel which was not disputed, indicate that the cow was shot on the latter's farm, namely Molden. Furthermore can the evidence of the accused persons that there might have been more than one resting place between the point where the gravel road joins the tarred road and the place where the cow was shot, not be true. The distances also indicate that the accused travelled from the resting place, where the spot light was connected and when Isako got onto and stood on the back of his vehicle with a rifle, while accused 2 was driving, is 7.1km. They were clearly looking for something to shoot. That they drove back to the resting place and returned, would mean a distance of 14.2km.

[42] Inspector Hofni Reuter and a police reservist officer, Mr Robert Herridge, went to the scene where the deceased's body was found the next morning. Inspector Reuter found the red Nissan bakkie of the deceased abandoned on the road and was taken by Mr Paul Stommel to the scene where the body of the deceased was found. He found the items that were depicted on the photos in

exhibit C. He was also informed by Mr Paul Stommel where the cow was killed and found blood marks inside the camp through the fence towards the main road. Isako was arrested. At his house, Herridge recognised his vehicle and saw blood marks on the side of it, as well as cattle manure on the back of it. Isako apparently gave a version to the police officers in which he mentioned the name of accused 2. Accused 2 was then apprehended at his house. Herridge knew him from before, as well as where he lived. Accused 2's version differed from that of Isako. Initially Mr Isaacks objected to hearsay evidence in respect of the version of accused no. 2 on the basis that it was hearsay what accused no. 1 said to him. This was later confirmed by the evidence of other witnesses and elicited under cross-examination. It boiled down thereto that Isako got accused 2 and the latter accused 3-5 to accompany Isako to his farm where they picked up two boys and went to hunt a kudu. Isako then apparently changed his mind and wanted to hunt cattle. Isako shot a cow, which they assisted to load on the car. Before they could leave, they saw a car coming from the Outjo direction, the deceased was the driver of that car and a quarrel ensued between Isako and the deceased, whereafter the deceased was shot by Isako. Accused 2 told Reuter that he tried to stop Isako and ran away with one of the boys. Later they returned to Isako's farm.

[43] Reuter, Hoveka and Sibolile went with accused 2 to the house where accused 3-5 resided and they were apprehended. Because Herridge could not speak or understand Damara, he did not hear what was said between Inspector Reuter and accused 3-5. The cross examination of Inspector Reuter was directed at what happened between accused 3-5 at the police station and whether

accused 2-5 were properly arrested. In what occurred later during the trial and the evidence of the accused persons, this issue is immaterial. According to Herridge, he and Reuter and other police officers, like Gariseb and Hoveka later went to Isako's farm with accused 2. They left separately and when Herridge arrived the firearms were already found.

[44] As mentioned before, the incidents of that night were related by the State witnesses Sixub and Marius, as well as accused 2-5. I do not intend to deal with the evidence of any of these witnesses in detail, but shall refer to the evidence of Sixub and Marius and point out where they differ from the evidence presented by accused 2-5. In a reply to the State's pre-trial memorandum all four accused, namely accused 2-5, indicated that they do not have any witnesses, except for two state witnesses. During the trial it was mentioned that the two State witnesses that the accused wanted to call were Sixub and Marius.

[45] Although there are differences between the evidence of Sixub and Marius, those differences are really not material. The only issue upon which they were cross-examined, because in the evidence differed was in respect of the shoes which Sixub wore and which he allegedly gave to accused 4, when arrived at the farm. The following evidence of these two witnesses and the version of accused 2-5 did not really differ in any material or significant way:

- Sixub and Marius left with Isako and accused 2-5 during the night of 06 December 2006 from Gryspos, where they resided;
- Isako took his rifle and a spot light, both exhibits, with him when they left;

- They went along to push Isako's car;
- They drove from the homestead at Gryspos on the gravel road to where the gravel joins the tarred road between Outjo and Kamanjab;
- Isako turned in the direction of Kamanjab on the tarred road and drove to the resting place where they stopped. At the resting place Isako connected the wires of the spot light to the battery of his vehicle and with his rifle he got onto the back of the vehicle, while accused 2 drove further. Marius sat in front and the rest were on the back of the vehicle;
- They drove to a place where cattle was observed in a camp and stopped. Isako shot a cow. The cow's throat was cut by accused no. 3. The cow was dragged and loaded onto the vehicle;
- A car approached from Outjo's side and flashed its lights. The vehicle of Isako gave trouble and stopped. The deceased's vehicle passed, turned around and stopped. Isako went to the deceased and they talked;
- The deceased move his vehicle closer to that of Isako. The deceased apparently quarrelled with Isako about Isako's version that he hit a kudu;
- The deceased went to the back of Isako's vehicle and looked at the animal and saw that it was not a kudu, but a cow;
- Isako then shot the deceased;
- Accused 2 ran away with Marius, but later returned when he was called by Isako;
- After he was shot the deceased was on his knees behind Isako's vehicle on the road;
- Isako wanted to shoot the deceased again but his rifle misfired;

- Isako then pulled the deceased by the collar of his shirt from the road into the grass;
- The deceased groaned;
- Isako got into the deceased's vehicle and drove away in the direction of Outjo when a car approached;
- Accused 2 attempted to get Isako's car going by working on it under an open bonnet, but did not succeed;
- Isako returned and got into his vehicle, which was pushed by the others and got it started;
- Accused 2 then got onto the driver's seat of Isako's vehicle and all the others got onto that vehicle and they drove off in the direction of Outjo:
- Isako got into the vehicle of the deceased and drove behind them until accused 2 was stopped by Isako;
- Isako had a discussion with accused 2 and removed certain items from the vehicle of the deceased, including a rifle, which he put into his vehicle;
- All of them drove off with Isako's vehicle. Isako was driving. The vehicle of the deceased was left there;
- They drove to the homestead of Gryspos;
- At Gryspos the cow was off-loaded and skinned;
- A brand mark was put on the skin of the cow with Isako's branding iron;
- The meat was loaded onto Isako's vehicle;
- Sixub and Marius went home and Isako and accused 2-5 left for Outjo; and

- Before they left accused 6 went to hide the rifles and other items in the bush on the instructions of Isako.

[46] With minor discrepancies, accused 2-5's version was obviously similar. Even the distances pointed out by them in Court were the same. It was put to them in cross-examination that they rehearsed their evidence. Accused 2 testified in more detail than all the other accused persons of the events of that evening and thereafter.

[47] In the following respects the versions of accused 2-5 differed materially from that of Sixub and Marius;

- Sixub testified he lend his tackies to accused 4 before they left, but accused 4 denied it;
- When the spot light was connected at the resting place and Isako got onto the back of his vehicle the accused testified that Sixub held the spot light, while Sixub said it was accused 3;
- According to the accused persons they went twice to the place where the cow was shot and Isako in fact shot a cow on each occasion. He first shot one and then they returned to the resting place, whereafter they again went to the place where the cattle were spotted and he shot another cow. That cow was dragged through the fence and loaded onto his vehicle. Sixub and Marius denied that they went to the same spot twice and Isako shot twice;
- Although there are differences between the accused persons versions of when the spot light was utilised, they all testified that on the second

occasion the spot light was used and not on the first, while Sixub and Marius denied that there were two such occasions;

- Of the approach by the deceased and how he moved his car closer to that of Isako they also differ. Sixub and Marius said that after the deceased and Isako talked, the deceased moved his car skew in the road with its lights illuminating the side of Isako's vehicle. According to the accused, the deceased's vehicle was reversed until he stopped in front of Isako's vehicle with its lights on the front part of Isako's vehicle;
- Sixub and Marius said that Isako asked accused 2 for his rifle, before he shot the deceased, while all the accused denied that;
- According to the accused, one of them, namely accused 3, tried to stop the approaching vehicle, but in vain. Sixub and Marius denied this;
- According to Sixub and Marius, Isako returned with the deceased's vehicle and assisted to get his own vehicle started, while accused 3-5 testified that Isako first stopped at the place where the deceased was left in the grass, a distance of approximately 22m to where Isako's vehicle was pushed and stood. The accused said Isako lingered there for some time whereafter he drove up to his own vehicle;
- Although not exactly on the same occasion, both the accused as well as Sixub and Marius testified that Isako wanted to shoot them, but was prevented to do so by accused 2:
- All the accused testified that they ran away at Gryspos when a car approached, but later returned. Some of the accused testified that Sixub and Marius ran away with them and some testified that Sixub and Marius then went home while some of the accused testified that Sixub and Marius

assisted with a slaughter of the cow. Sixub and Marius denied that a car approached or that they or any of the accused ran away, and

- According to the accused, Isako brought a bed out and had his rifle with him, which created fear in the minds of the accused persons, while this was not put to Marius and Sixub or testified by them. According to them, upon their arrival at the farm accused 6 was ordered to hide certain items, including both rifles.

[48] In analysing the evidence one has to consider that it is now nearly three years since the occurrences during the night of 06 December 2006 and that it is only reasonable and human that witnesses may not remember everything that occurred in the same way. It must also be taken into consideration that Marius and Sixub, who are young boys, were much younger at that stage. It is also understandable that accused 2-5 would try to exculpate themselves as much as possible and that task is made easier with the death of Isako, who could not testify. I have pointed out some of the material differences between the evidence of Sixub and Marius, on the one hand, and accused 2-5 on the other hand. Despite these differences of what happened that night not very much are in dispute. I shall hereafter briefly deal with the evidence and submissions made by counsel.

[49] In respect of the murder charges the State argued in the first instance that accused 4 and 5 should be found guilty of that charge, because they assisted Isako and assaulted the deceased. The State argued that there are several indications to the effect that they assisted Isako to drag the deceased from the road into the grass and that they were at least responsible for the head wounds of the deceased. These submissions are based on the evidence of Sixub,

allegedly supported by Marius, as well as several inferences. Sixub cannot be believed at all in respect of this episode as will be discussed later herein. Marius could not take it further than saying he did not notice accused 4 and 5 when he and accused 2 returned. The State sought to draw inferences from the stones depicted on photo 12 (Exhibit C), blood of the same blood group as that of the deceased on the sandal of accused 4 and the tackies, as well as the types of injuries on the body of the deceased. I shall deal with these submissions when the evidence is analysed.

[50] The further submission of the State is that, even if accused 4 and 5 are not guilty of the murder of the deceased, all the accused should be found guilty as accessories after the fact of Isako's murder of the deceased. In this regard the State submitted that all the accused's conduct was directed at evading justice and pointed out several acts by them from the time that the deceased was moved from the road into the grass up to the time when they were arrested. In the light of my findings it is not necessary to deal with all these submissions.

[51] Although the original excursion turned out into the killing of the deceased, I shall hereafter deal with the evidence inclusively and in particular in respect of the material differences between the evidence of the inferences upon which the State witnesses Sixub and Marius and that of the accused. I shall also deal with the inferences upon which the State based its submissions. It is not possible to reject the evidence of Sixub for instance because it is totally incredible. The Court is well aware of the onus that rests on the State and that the accused do not have any obligation to prove their innocence.

[52] In respect of the use of the spot light, the fact that Isako stopped at a resting place more than 7.1km from where the cow was shot and exchanged drivers, I accept the version of Sixub and Marius. Isako got onto the back of the vehicle with his rifle and accused 2 drove the vehicle further. A spot light was connected. There could have been no other purposes than to search for cattle and to use the spot light for that purpose. I accept the version of Sixub that accused 3 held the spot light. It would be ridiculous to believe that after all this effort the spot light was not used to search for cattle.

[53] I totally reject the evidence of the accused persons that Isako shot at cattle on two occasions. This is not only a contrary to the evidence of Sixub and Marius, but he is in absolute contrast with the evidence of Naholo and Karunga, whose evidence in this regard was not disputed at all. The latter two only heard one shot and later, when another vehicle arrived, another shot. These ties in with the evidence of Sixub and Marius. It is also incomprehensible why Isako would shoot at cattle, wound one, leave it, just drive back to the resting place, 7.1km from there and then again returned to the same spot and shoot another head of cattle. There is no evidence by the farm workers at the farm Molden that another head of cattle was shot or found wounded on that farm. It was further obvious that the accused had problems to explain why the spot light was only utilised the second time. The evidence of the accused in this regard is false and is totally rejected as it cannot be reasonably possibly true. It is evident that accused 2-5 came up with this false story in order to exonerate themselves from the charge of stock theft levelled against them. Their versions of when they first

thought that something was wrong with this operation in which they joined to assist Isako to load a wedding cow is also contradictory.

[54] The versions of the four accused of how the deceased was shot are also rejected. Their versions do not only contradict each other, but the evidence of Sixub and Marius seems more acceptable in this regard. However, I do accept that the behaviour of Isako when confronted by the deceased was unexpected. I do not believe that any of accused 2-5 expected that Isako would shoot the deceased without any provocation. The conduct of accused 2 to grab Marius and run to away with him at that stage shows that this was a sudden and unexpected situation that arose. I also accept that the all the accused were totally shocked and confused at that stage and thereafter. On the other hand, I also do not accept the evidence of Sixub and Marius in favour of that of the accused to the effect that Isako asked accused 2 for his rifle. They were all suddenly confronted with something that happened suddenly and unexpectedly. From the evidence it appears that only Isako thereafter acted to avoid any discovery of what he did. The conduct of Isako is in my view akin to a *novus actus interveniens*, which severed any possible link with the previous offence of stock theft in which all the accused present participated and the unexpected behaviour of Isako.

[55] The version of the accused that when Isako returned after driving away with the deceased vehicle and stopped about 22m behind them where he lingered and apparently did something to the deceased, is contrary to the evidence of Sixub and Marius. I reject the version of the accused persons in this

regard as false and not reasonably possibly true. This version was probably offered in an attempt to explain the other injuries on the body of the deceased.

[56] Sixub and Marius denied that accused 3 tried to stop the oncoming car at the stage when Isako drove away with the deceased's vehicle. Isako clearly did this to avoid that the driver of the oncoming vehicle would find the two vehicles there and might stop. The accused persons, however, testified that accused 3 tried to stop that vehicle, but in vain. All the accused had to get away from the murderer Isako. Isako had left without his rifle and one would expect that all of them would do everything they could to stop the oncoming vehicle. Why only one of them would, namely accused 3 make such an attempt? The answer is obvious. They were all involved in the stock theft and not want the vehicle to stop. I reject the evidence of the accused in this regard as false.

[57] I also reject the evidence of the accused persons of what occurred on their return at Gryspos, namely that they had run away, because a vehicle approached as false and not reasonably possibly true. Similarly, I reject the evidence of the accused persons regarding the fact that Isako took his rifle with him when he lay on his bed outside with the clear implication that he would shoot any of the other accused if they did not continue skinning the cow. In this respect the accused's versions contradict each other. Accused 2 testified that Isako took "his" rifle, while accused 5 said it was the rifle with a telescope, namely the deceased's rifle. It is also in contradiction with the evidence of the accused 6. He mentioned that Isako brought his bed outside but said nothing of a rifle. In fact, accused 6 had already gone to hide both rifles at that stage. Also

according to Sixub and Marius the items, including the rifles were hidden by accused 6 on the instructions of Isako shortly after their arrival at Gryposos.

[58] There is one issue regarding the contradiction between the evidence of Sixub and the accused persons that needs special attention. Sixub made a written statement to Constable Gariseb in Outjo. According to his evidence they spoke in Damara language, but the statement was written in English. In Court that statement was put to Sixub, but he declined to identify it, because he cannot read or write. The statement was made on Friday 08 December 2006. He testified that he was not forced to make the statement. Mr Isaacks concentrated on one aspect of the statement, namely that Sixub did not incriminate accused 4 and 5 to the effect that they have assisted Isako in dragging the deceased, after he was shot, from the road into the grass. According to Sixub's evidence in Court accused 4 took the feet of the deceased and accused 5 his arm, while Isako took the collar of the shirt of the deceased with his left hand and had his rifle in his right hand when they dragged him into the grass. Although Sixub testified that he could not see what happened in the dark, he heard the deceased groaning and crying and testified that the deceased was crying for help. He also said in his evidence in chief that he heard that the deceased was beaten. This evidence would of course incriminate accused 4 and 5, in particular because several unexplained wounds were found on the body of the deceased, apart from the gun shot wound. Sixub apparently made a statement in Windhoek after the trial had already started to warrant office Hoveka, with Gariseb interpreting, to the effect that he had forgotten to include this crucial part of his evidence in his statement made Outjo to Gariseb. As mentioned before the State relied to a large extent on the evidence of Sixub to incriminate

accused 4 and 5. Marius did not really support the evidence of Sixub by identifying accused 4 and 5 to have assisted Isako in dragging the body of the deceased into the grass as mentioned before. None of the accused supported the evidence of Sixub in this regard. In fact, all of them denied that it ever happened and accused 4 and 5 were adamant in their denial that they were not involved in assisting Isako to drag the deceased from the road into the grass. Accused 4 said he ran away and in the process he lost his sandal. All of the accused denied any involvement in the fatal attack on the deceased after he was shot by Isako.

[59] The State also requested the Court to draw certain inferences i.r.o the presence of accused 4 and 5 when the body of the deceased was removed into the grass and the other injuries found on his body. In the first instance the State submitted that because Isako had his rifle with him, he probably caused the roundish injuries to the deceased with the rifle's barrel. The State submitted that because Isako caused those injuries with his rifle, accused 4 and 5 most probably used the stones depicted on photo 12 of Exhibit C to cause the injury to the head of the deceased. The fallacy of this argument is that this is no evidence that these stones had blood on them. Many of the items found on the scene, e.g the sandal and the tackies were sent to the forensic laboratory to be tested, but not the stones. This was in all probability not done because it did not have any stains on them that could resemble blood. The State further relied on blood of the same blood group as that of the deceased namely, blood group A, found by the forensic laboratory to be present on the sandal and the tackies. That might be a possible inference, but is certainly not the only inference to be drawn. There is no evidence what the blood group of accused 4, who wore the sandal was, how old the blood on the sandal was or how common or exclusive A blood

group is. Further more the sandal was found 15 metres from the body of the deceased. Accused 4 testified that he had run away and in the process lost one sandal in the dark. The same arguments in respect of the blood group are applicable with regard to the tackies. A tackie found 9.3 metres from the body of the deceased.

[60] I cannot find that the State has proved beyond reasonable doubt that either of the accused, and in particular accused 4 and 5 were involved in the removing the deceased into the bush or that they contributed in assaulting the deceased. It may be suspicious that they were not only observers and that it might have been improbable for Isako to drag the body of the deceased on his own from the road into the bush in the way that it was described, but suspicions are not enough.

[61] Accused 2 and some of the other accused testified that they were threatened by Isako, who had a rifle and they obeyed the instructions of Isako, because they were afraid that they might also be shot. I am convinced that none of the accused 2-5 expected Isako to shoot the deceased and that his behaviour was a surprise to all of them. Having said this, I do not regard the behaviour of accused 2-5 as reasonable since the time that Isako dropped them at the house where accused 3-5 resided. There was no longer a threat and having regard to what has happened earlier that evening, one would have expected them to report the matter to the police immediately. Despite that, they casually went to sleep until they were apprehended. I also reject the evidence that accused 2 that he would make a plan and inform them later what to do and because of that, nothing happened. That does not make them guilty of murder or as submitted

,accessories after the fact. Although they were not involved in the murder of the deceased, they knew that they were involved in the stock theft and that is probably the reason why they remained silent and hoped that nothing would happen. I do not accept the submission of the State that they remained silent because of the murder and that their conduct in this regard constitutes proof that they wanted Isako to evade justice for the murder.

[62] It is clear from the evidence that the occurrences of that night can be divided into two parts, namely the stock theft part, i.e the shooting of the cow and a second part, the shooting of the deceased. In respect of the second part, I find that the State has not proved that accused 2-5 were involved in the murder of the deceased. It might have been different if Isako was alive and could have testified, but on the evidence before me, these accused cannot be convicted of the murder of the deceased or even as accessories after the fact.

[63] In respect of the first part, namely the shooting of the cow, the State has proved beyond reasonable doubt that accused 2-5 are guilty of stock theft of that particular animal as charged. When all the evidence in respect of the shooting of the cow are viewed in perspective, there cannot be any doubt that accused 2-5 joined willingly in committing this offence. It is highly doubtful that accused 3-5 would be willing to drive out in the night to a farm that they did not know solely for the purpose to assist an unknown person by pushing his car and to load a cow that was to be slaughtered for a wedding. Accused 3-5 were promised to be paid and would also have received the intestines of the cow. Accused 2 was the one who persuaded them to accompany him and the unknown person for this escapade. This must be viewed against the evidence of

what happened later, as well as their individual attitudes. Even if accused 2-5 were under the impression that they were only accompanying the unknown person, Isako, to assist in pushing his car and to load a wedding cow, they should have become suspicious immediately when Isako took his rifle and a spot light at Gryspos, even before they left Gryspos. When Sixub and Marius were also taken along, the question would arise to any normal person: Why are we needed to push the car and load the cow? They then drove away from Gryspos on a gravel road for 10km. Still they did not become suspicious. When they stopped 19km further at a resting place and a spot light was connected their suspicions should have become a certainty, namely that they are not any longer going on an innocent trip of loading a cow; they were going to shoot the cow that Isako needed and not on his farm. They then drove a further 7km with Isako on the back the vehicle with his rifle and accused 2 driving. Accused 2 was clearly actively participating at that stage. Isako then shot the cow. I have already rejected the fact that there were two shooting incidents involving cattle. All the accused participated in dragging the cow through the fence, accused 3 slid its throat (which I previously called slaughtering) and they all assisted in loading the animal on the vehicle. Later they skinned the cow and loaded the meat onto Isako's vehicle. Accused 6 put the final in the coffin of their stories, by testifying that the skin of the cow was that of a Sumbra and not the Herero cattle that Isako farmed with.

[64] The involvement of accused 6 should be considered next. There is no evidence that accused 6, who was living at Gryspos and working for Isako, was aware of Isako's intension to go and hunt that particular evening. He and his wife was busy eating when Isako and accused 2-5 arrived. Sixub and Marius

were also there. According to him, Isako took his rifle and the spot light from his own room, which is usually locked. When they returned, he was asleep. He said he was not aware of what had happened that evening. Even if he suspected or became aware of what had happened, namely the shooting of the deceased, it is clear that he was not at all involved therein. The only involvement of accused 6 is that he apparently held the torch to assist the slaughtering and that he hid the items on instructions of Isako. He held the torch over the fence for some time on instructions of Isako, whereafter he gave it to Isako. I do not agree with the State's submissions that he should be found guilty as an accessory after the fact of the murder of the deceased. The State based this submission on an assumption that he must have become aware of that offence and associated him with it in order that Isako could evade justice. As far as the hiding of the rifles and the other items are concerned, he testified that he did that on instructions of Isako. I also find it suspicious that he would do so and would hide these items in separate places in the bush, but on the evidence before me, I cannot find the State has proved beyond reasonable doubt that accused 6 was involved in the offence of the stock theft or the murder.

[65] In respect of the charge of obstructing or defeating the course of justice, which was clearly based on the alleged failure of accused 6 to immediately retrieve the items that he had hidden, I also do not find that this offence was proved beyond reasonable doubt. Although it forms part of the evidence of what occurred during these pointings out, delivered in the trial-within-a-trial, all that evidence was also elicited in cross-examination when other witnesses e.g Warrant Officer Hoveka, testified. There is nothing to gainsay the evidence of accused 6 that he did not refuse to show the police where he had hidden these

objects. Initially he only asked where Isako, his employer, was. That is certainly not unreasonable. When he was told that Isako was apprehended and they, meaning also Isako and accused 2, were being held or interrogated by the police since early that morning, he immediately co-operated.

[66] I shall hereafter consider the different charges against all the accused. The offences that the accused were arranged for, and to which they all pleaded not guilty, have been extensively set out in an earlier paragraph of this judgment. Accused 2-5 pleaded not guilty to all of the 6 charges against them, namely charges 1-6. Accused 6 was not charged with the offences contained in charge 4 and its alternative, but was charged in respect of charges 7 and 8. The State submitted that all the accused are guilty as accessories after the fact, as discussed earlier. I have indicated that the correct charge would be that they defeated or obstructed the course of justice. They were charged with that charge too, but the State did not ask for a conviction of accused 2-5 on that charge, because it might have been duplication of the murder charge. In respect of count 3, the State requested a conviction. There is no evidence that any of the accused stole these items that Isako removed from the deceased's vehicle and the State has failed to prove this offence beyond reasonable doubt. In respect of count 4, theft of the deceased vehicle, the State has conceded it cannot ask for a conviction, but submitted that accused 2 should be convicted on the alternative charge, namely the use of the deceased's vehicle without his consent. The State has certainly not proved this offence i.r.o accused 2. I have already dealt with count 5 in respect of accused 6. He cannot be convicted on that charge. The evidence involving accused 2 is not conclusive. There is no evidence that any of the accused were involved in respect of the ear tag. With

regard to count 6, namely the altering of the brand mark, there is similarly no proof beyond reasonable doubt that any of the accused is guilty of this offence. Although Sixub testified, accused 2 used the branding iron, he was not so clear about it in cross-examination. Isako was apparently the one who used the branding iron to change the brand mark on the skin of the heifer. Counts 7 and 8 involve only accused 6. The elements of these statutory offences were not proved.

[67] On the evidence before me the State only proved beyond reasonable doubt that accused 2-5 are guilty of the second charge, namely theft of one Heifer, a contravention of the Stock Theft Act, no 12 of 1990, as amended. The State has failed to prove that accused 2-5 are guilty of any of the offences contained in any of the other charges against them.

[68] On the evidence before me the State has not proved any of the offences contained in the charges against accused 6.

[69] In the result the verdict of this Court is the following:

1. Accused 2,3,4 and 5 are all convicted of the offence of contravening the Stock Theft Act no 12 of 1990, as amended, as charged;
2. Accused 2,3,4 and 5 are all found not guilty and are acquitted on all the other charges against them; and
3. Accused 6 is found not guilty and is acquitted on all the charges against him.

MULLER, J

On behalf of the State:

Mr L. Campher

Instructed By:

Office of the Prosecutor-General

On behalf of Accused 2-5:

Mr B. Isaacks

Instructed By:

Directorate of Legal Aid

On behalf of Accused 6:

Ms L. Hamutenya

Instructed By:

Directorate of Legal Aid