

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

CASE NO: CC 11/2011

In the matter between:

THE STATE

v

NELSIENE UTIAPATIE KAUARIA

FIRST ACCUSED

GEORGE TJKUAO KATJINGISUA

SECOND ACCUSED

ERWIN KASORERE KATJINGISUA

THIRD ACCUSED

Neutral citation: *S v Kauaria* (CC 11/2011) [2018] NAHCMD 13 (01 February 2018)

CORAM: SIBOLEKA J

HEARD: 6, 8 June 2016; 15, 16, 17, 18 August 2016; 13, 20 March 2017;
3, 4, 5, 6, 7 April 2017; 1, 3, 4, 29, 30 August 2017; 9 October 2017; 22
November 2017

DELIVERED: 01 February 2018

Flynote: Criminal law: The three accused acted in unison to murder the deceased and steal his property – doctrine of common purpose satisfied – the

accused convicted on counts one, two and three respectively.

Summary: On Friday 28 August 2009 the deceased came to Katutura Shoprite to pick up accused one, his girlfriend. She was together with accused two and three in a taxi driven by Nahason Kahorongo. The two lovers had agreed to meet there between 18h00 to 19h00 in the evening of that day. Accused one alighted from the taxi and boarded the deceased's red Mazda car and they drove off. On the request of accused one to accused three, the taxi driver was told to follow the deceased up to his flat where he was assaulted to death and his property stolen.

Held: The request by accused one to accused three that the taxi driver be told to follow the deceased's car wherever he went credibly suggests that accused two and three did not know his residence.

Held: At the scene accused three started assaulting the deceased. He was later joined by accused two who helped to hold his hands while accused three tied them together and stuffed a cloth into his mouth leading to his death. During the attack, which took place in a lighted room and in her full view. Accused one was ransacking/thoroughly searching the bedroom for money, safe keys, and other valuables. She did not change her attitude even after seeing that her deceased boyfriend has died at the hands of accused two and three.

Held: The three accused satisfied the requirements of acting in common purpose to murder the deceased and rob him of his property.

VERDICT

In the result the accused' are convicted as follows:

1. Count one: Murder

Accused one: Guilty: Murder - dolus eventualis

Accused two: Guilty: Murder – dolus directus

Accused three: Guilty: Murder – dolus directus

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

Accused one: Guilty

Accused two: Guilty

Accused three: Guilty

3. Count three: Attempted robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977

Accused one: Guilty

Accused two: Guilty

Accused three: Guilty

4. Count four: Contravening section 18(2)(a) of Act 17 of 1956 – Conspiracy to commit robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977

Accused one: Not Guilty

Accused two: Not Guilty

Accused three: Not Guilty

JUDGMENT

SIBOLEKA J:

[1] The three accused are facing the following counts of the indictment:

COUNT 1: MURDER

In that during the period 28 – 29 August 2009 and at or near Windhoek in the district of Windhoek the accused did unlawfully and intentionally kill Gedeon Johannes Stoop, an adult male person.

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

In that during the period 28 – 29 August 2009 and at or near Windhoek in the district of Windhoek the accused did unlawfully and with the intention of forcing him into submission assault Gedeon Johannes Stoop by hitting him, and/or kicking him, and/or stabbing him with knife/knives, and/or tying his hands and feet, and/or gagging him by stuffing a T-shirt deep into his mouth and with intent to steal take from him a Tedalex television set, a Panasonic car radio-tape, a Wahl hair clipper and a Nokia cellular telephone, the property of or in the lawful possession of Gedeon Johannes Stoop. And that aggravating circumstances as defined in section 1 of Act 51 of 1977 are present in that the accused was before, during or after the commission of the crime wielding a dangerous weapon namely a knife or knives and inflicting grievous bodily harm to the said Gedeon Johannes Stoop.

COUNT 3: ATTEMPTED ROBBERY WITH AGGRAVATING CIRCUMSTANCES AS DEFINED IN SECTION 1 OF ACT 51 OF 1977

In that during the period 28 – 29 August 2009 and at or near Windhoek in the district of Windhoek the accused did unlawfully and with the intent of forcing him into submission assault Gedeon Johannes Stoop by hitting him, and/or kicking him, and/or stabbing him with knife/knives, and/or tying his hands and feet, and/or gagging him by stuffing a T-shirt deep into his mouth and with intent to steal, attempted to take from him a Ford motor vehicle, a grey suit (trouser and jacket), a short trouser, the property of or in the lawful possession of the said

Gedeon Johannes Stoop. And that aggravating circumstances as defined in section 1 of Act 51 of 1977 are present in that the accused were before, during or after the commission of the crime wielding dangerous weapons, namely a knife/knives and inflicting grievous bodily harm to the said Gedeon Johannes Stoop.

COUNT 4: CONTRAVENING SECTION 18(2)(a) OF ACT 17 OF 1956 – CONSPIRACY TO COMMIT ROBBERY WITH AGGRAVATING CIRCUMSTANCES AS DEFINED IN SECTION 1 OF ACT 51 OF 1977

In that upon or about 28 August 2009 and at or near Windhoek in the district of Windhoek the accused did unlawfully and intentionally conspire to aid or procure the commission of the crime of robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977 in that they planned to rob money, and/or other valuable item(s) and/or a motor vehicle(s) from the deceased and to use knives or other dangerous weapons during such robbery and/or to tie up the deceased during the robbery.

SUMMARY OF SUBSTANTIAL FACTS IN TERMS OF SECTION 144(3) (a) OF THE CRIMINAL PROCEDURE ACT, 51 of 1977

[2] During Friday 28 August 2009 the accused planned to rob money and/or other valuable items and/or motor vehicle(s) from the deceased by tying up the deceased and by wielding dangerous weapons during such robbery as set out in count 4 in the indictment. During the late night hours of Friday 28 August 2009 or the early morning hours of Saturday 29 August 2009 and at the flat occupied by the deceased situated at erf 304 Shilunga Street in Cimbebasia, Windhoek, the accused attacked the deceased as indicated in counts 2 and 3 in the indictment and they demanded money and/or keys from the deceased. The accused also stabbed the deceased with a knife/knives. After tying the deceased's hands and feet and gagging him they locked him up in the bathroom of the flat and locked

the bathroom door and they threw away the key of the bathroom door in a riverbed. The deceased died on the scene due to suffocation and injuries sustained caused by the stab wound(s). The accused packed the items listed in count 3 in the indictment into the motor vehicle of the deceased and tampered with the wires of the ignition lock of the deceased's motor vehicle but failed to start it.

[3] Accused one pleaded not guilty to all four charges put to her. She however made the following admissions in her reply to the State's pre-trial memorandum exhibit "C":

'That her nickname is "Nancy". That she knew accused two and three by sight. She used to see them at Onyama Store where they usually washed the vehicles of the owner of the shop. This is also the place where the deceased was employed. That she informed accused two and three that on Friday 28 August 2009 the deceased would collect her at Katutura Shoprite. She admits that on 28 August 2009 she was talking to accused two and three at Willy's Bar. That she requested a lift from accused two and three from Willy's Bar to Katutura Shoprite. That the cellphone number of the deceased prior to his death was 264 81 2937 962. That on 28 August 2009 during 18h00 to 20h00 she was at the deceased's residence when accused two and three arrived there. The contents of the list of calls made and received on cell number 264 81 377 7663 for the period 28 August 2009 to 2 September 2009. That the deceased was the owner of a television set and a cellular phone. That the deceased was in possession of a Ford motor vehicle. The contents of section 119 of Act 51 of 1977 plea proceedings. The identity and age of the deceased person. That the deceased's nickname is "Koos".'

[4] Accused two pleaded not guilty to all four charges. His plea explanation is the following:

4.1 I deny that I ever had the intention to injure or hurt or to kill Gedeon Johannes Stoop.

4.2 I deny that I ever had the intention to threaten or assault Gedeon Johannes Stoop with the intention to force him into submission or to rob him of any object. I furthermore deny that I was with a dangerous weapon during or after the commission of the crime and that I inflicted grievous bodily harm to the said "Gedeon Johannes Stoop".

4.3 I deny that I stabbed Gedeon Johannes Stoop with a sharp object, or that I stuffed a T-shirt into his mouth or that I tied his hands and feet.

4.4 I deny that I acted in common purpose with any of the other accused.'

[5] Accused two however admitted the following in terms of section 220 of the Criminal Procedure Act 51 of 1977:

'The identity of the deceased, that he died during the period 28 to 29 August 2009 at or near Windhoek, that the corpse of the deceased did not sustain further injuries during transportation from the scene of the incident to the State Mortuary. That accused three is his brother, that he assisted accused three to sell a television set.'

[6] Accused three pleaded not guilty to all four charges and no plea explanation was furnished.

[7] I will now look at the evidence of the prosecution.

[8] Gerald Cloete testified that he resides in Cimbebasia, Shilunga Street 304, since 1998 with his family. His house has a front entrance from Shilunga Street. There is a flat at the back of his residence with an entrance from Arrebusch Street where the deceased lived alone. He has never seen any of the accused persons before Court. According to this witness he has three vicious dogs in the backyard. He was not aware that the deceased had a girlfriend or that he was in a relationship. He is able to see the front of the flat from his bathroom window. On Saturday 29 August 2009, he heard the dogs barking vigorously at around 01h00 – 02h00. He woke up, went to the window facing Shilunga Street and

peeped through but he did not see any strange movements and he went back to bed. When he woke up in the morning he went to the bathroom and looked out through the window. He saw a blue adidas plakkie lying in front of the kitchen door, and the gate was about 30cm open such that a slim person was able to walk through in and out. The deceased normally left it like that for the dogs to pass.

[9] Gerald Cloete went to get the spare keys of the flat. He called the deceased by his name but there was no response. He entered through the kitchen door and saw that the kitchen was in a mess. He could also see blood spots on the kitchen floor. The bed was not made up, there was a condom packet on the dressing table, and one was pulled out but not used. The bathroom door was locked. The deceased's son was called and when he arrived, they broke the door of the bathroom and saw the body of the deceased laying on the floor in the shower. The police were called, and he took them to the scene. Inside the deceased's car he saw blue PT shorts with a white ribbon, and a dirty white towel. There were wires hanging from underneath the steering wheel. He saw another blue slip on shoe on the left side of the truck more in the grass. There was a nip of Richelieu brandy on the table in the kitchen.

[10] Ismael Tjikumiva testified that he knows all accused persons very well. He knows accused one as Nancy. Accused two is his elder brother and accused three is a cousin. According to this witness accused one bought a microwave from accused three sometime back before the incident. At that stage he was staying at erf 4946 Exodus Street, belonging to one of her family members. He stayed there with accused three. He does not know where accused two lived. The intoxicated accused three left on Friday, 28 August 2009 saying he was in a hurry to meet accused two at a bar because they had a deal or business that they are doing. Accused two and three returned at around 23h00. Accused three came in the house holding a hair cutting machine which he offered to him for sale. He noticed that he was bare footed and he had a blood stain on his

trousers. He told him that he was involved in an accident with a female person (name unknown). In court he positively identified the electric hair cutter, the adidas white slip on slippers marked exhibit 2 as belonging to accused three as they are the only pair of shoes he owned while staying with him.

[11] Accused two gave Tjikumiva N\$100 to go and buy a bottle of Richelieu and cigarettes. He also said to him that they sold a tape to Mr Satta and they are going to collect their money. They took the bottle of Richelieu and drove off in Mr Satta's car. They returned at around 02h00 with a TV on Saturday morning 29 August 2009. They told Tjikumiva that they will sell the TV and split the money between themselves and Nancy. In court Tjikumiva positively identified the television as the one that was brought at his residence that night by accused two and three. When the police came, they handcuffed him and they went looking for accused three whom they found hiding in the church. He was covered in a blanket under the altar next to the chair of the Arch Bishop.

[12] Nahason Kaahangoro testified that he is a taxi driver here in Windhoek. He only saw accused one for the first time on 28 August 2009. He knows accused two and three very well, they are his first cousins. On the above mentioned date at ± 19h00 he was stopped by accused three who hired his taxi to go and pick up accused one and two at Willy's Bar who also boarded his taxi to Katutura Shoprite. Accused one climbed off and got into another car that was waiting for her. It was a red Mazda with a white man in the driver's seat. The red Mazda pulled off and drove passing them and it was at that time that accused three told Kaahangoro to drive behind it wherever it went. He complied and followed the car up to Cimbebasia, Shilunga Street. There accused three told him to turn into Arrebusch Street which he did. There he was told to stand still. Accused three climbed off and accused two informed him to drive and make a turn and park next to the road. Accused three returned and asked to use his cellphone. He gave it to him and he started speaking but he did not hear what he was talking about.

[13] According to Kaahangoro, accused one appeared and she disappeared with accused two in the direction from where she came from. Kaahangoro never saw the three accused persons after that day.

[14] On 24 November 2009 accused three called and told Kaahangoro that in order for them to displace the case preferred against them, he must testify that he only dropped accused one at Katutura Shoprite. From there he dropped accused two and three at Willy's bar where they separated. Kaahangoro agreed to testify like that, but in court he proceeded to tell the court what he knew about the matter.

[15] Joseph Tjitunga testified that he is a D/W/O at Windhoek Scene of Crime Sub Division. On the 1st of September 2009 he assisted C/Insp. Van Zyl in the pointing out of the scene of crime proceedings. He went to Van Zyl's office at Wanaheda Police Station, Katutura Windhoek before accused three arrived. He set up the video camera inside there to capture the conversation proceedings between Van Zyl and accused three from the beginning to the end. The C/Insp would at the same time also be completing the prescribed pro forma forms for the pointing out of the scene of crime. When Van Zyl finished interviewing accused three, Tjitunga started to prepare for the trip to the scene of crime. Sgt. Esterhuizen brought accused three to Van Zyl's office. It came to light that accused three was not a resident of Windhoek, he was originally from Gobabis. He did not know how to find his route from Wanaheda Police Station to the scene of crime. It was arranged that the investigation officer Kamusuvise should drive in front in a white City Golf only up to the turn off from the Rehoboth road into Cimbebasia. Joseph Tjitunga sat alone behind with the camera, while C/Insp. Van Zyl, who was also the driver sat in front with accused three. As they turned into Arrebusch Street accused three told Van Zyl that he remembered the place. He started directing Van Zyl where to go till they turned left onto a small gravel road.

[16] Accused three took them to a big house that had a flat in the backyard and told them to stop. They came out of the vehicle, he requested that the handcuffs be removed from his one hand, but Van Zyl was reluctant saying he may hit him with it and they all laughed. Everything was captured by the video camera. Accused three showed Van Zyl how himself and accused two entered the deceased's flat through the kitchen door. The deceased noticed their presence at the door. He approached and chased them saying they should go away. They did not comply and instead accused two opened a knife. The deceased moved back into the bedroom and the two accused followed him as the door was only closed but not locked. Accused two and three asked the deceased to give them the keys for the safe, car, and well as money but he said he didn't have money. Accused one was also standing by the bedside waiting for the agreed action to start. According to Tjitunga when accused three was doing the pointing out of the scene of crime proceedings before C/Insp. Van Zyl, he told them it was accused two who pushed the deceased to the ground and stabbed him on the left side of his chest with a knife. Accused three however corrected this error during his evidence in chief and stated that it was in fact himself and not accused two who did that. Accused three further testified that accused two helped him to tie up the deceased's hands, hereafter he went further and stuck a cloth in his mouth resulting in his death. The two took the corpse to the bathroom and locked it up there.

[17] While the deceased was being attacked, accused one started ransacking the bedroom. She was thoroughly searching for money and the safe keys, but did not find any. According to C/Insp. Van Zyl, accused one took all blood stained items. Accused three then joined accused one scratching/searching for valuables in the kitchen. Eventually accused two and three took the deceased's television set. All the items were loaded on the deceased's car which accused two tried to start, but failed. Accused three cut and connected some wires under the steering wheel, but still it did not start. Accused one disappeared unnoticed, while her two

co-accused were still trying to start the vehicle. After they failed to start it they offloaded the television set and hid it in the riverbed. They went back to the location and came back with Satta to collect the television set which they sold to Vetoo in Katutura.

[18] According to the I/O Billy Kamusuvise at 21h00 on 29 August 2009 while on duty, he was called to attend to a murder case at Cimbebasia 304 Shilunga Street. At the scene he found a certain Cloete, the resident of the main house who took him to the bathroom where he saw blood and the deceased's body lying on the floor of the shower. When it was turned, he noticed that the arms were tied up with a blue cloth. The same piece of cloth was stuck/pushed into the deceased's mouth. He was also shown a red Mazda car whose ignition wires were ripped off and were hanging loose. Cloete said it belonged to the deceased. He returned to the scene the following day with other police officers Jamuine and Tjivikua. He inspected the car and found blood stained clothes; a white towel, a suit, blue shorts in the boot. At the back seat he found a black and white cellphone that appeared to be damaged and held together by sellotape, it had no sim card inside. This is the cellphone that Memory Tjituka, the ex-girlfriend of accused three identified as her property. She exchanged it with accused 3 at the time they were still in a love relationship. A blue slip on shoe was also found in front of the kitchen door, the other was outside next to a parked truck. The car radio was stolen, the hair clipper in a box and a television set were missing.

[19] Kamusuvise got the print out IMEI of the cellphone he found at the back seat of the deceased's car. On the print out exhibit "T" he noticed that cellphone number 264 814546395 repeatedly appeared. He dialed it and a lady, Memory Tjituka answered. She told the officer she exchanged the phone with her ex-boyfriend Erwin Kasorere Katjingisua accused three, on 21 August 2009, residential address Herero Location 27/30 Katutura. Kamusuvise and other officers visited the house and found Ismail Tjikumisa who took them to the church where accused three was hiding and he was arrested there. Accused three took

the police to accused two's residence in Wanaheda and they arrested him there. A knife was found in accused two's pocket and accused three told the officers it was the weapon accused two used to stab the deceased. Accused two opted to remain silent and the police respected his election. Vetoo bought the deceased's television set on 29 August 2009 and they recovered it from him.

[20] Kamusuvise got the printout of the deceased's cellphone number at MTC exhibit "V". On 31 August 2009 he called the last cellphone number that made the last contact to the deceased's cellphone number before he was murdered. The caller called him at 18h34 on 28 August 2009 and they talked for 26 minutes. The deceased was receiving the call in Katutura Tiyokachimuve. Kamusuvise with Jamuine called the number and accused one answered. The officer told her he was looking for information about the deceased. He asked her to meet him at Katutura Police Station, and they met there. This lady was accused one before court. She told the officers that the deceased was her boyfriend, and that she was present at the scene and she knows who killed him. Accused one took the officers to accused three's residence where they have already been on referral by Memory Tjituka. W/O Jamuine and Tjivikua corroborated the evidence of the investigation officer, Billy Kamusuvise.

[21] Lucia Kavari testified that she only knows accused three as he was her boyfriend. They separated in 2009 and since then they were only friends. On 20 August 2009 she met accused three in Windhoek. On 24 August 2009, the cellphone number she had at the time was 081 454 6395. It had speaker problems. She had to press it hard to hear the caller. She exchanged this faulty cellphone with a phone she got from accused three. She went back to the farm. In November 2009 the police called and requested her to give a statement with regards to the said phone that she exchanged with her former boyfriend, accused three. In court she recognized the phone because it was still in the same condition in which she gave it to him. It was a Nokia, the front face cover is black and the back is white. It was wrapped in sellotape. Although the actual tape that

held the phone together was no longer the same, she could still see the remains of its marks on the phone itself. In November 2009 accused three called and told her not to testify that they exchanged phones, but she should rather say that her phone was stolen. She informed him that she cannot change her story as she had already given a statement.

[22] Accused three did not know that his ex-girlfriend was standing with police officers Tjivikua and Kamusuvise at the time he was talking to her. The fact that accused three had indeed used cellphone no. 081 833 8508 to call her from prison was confirmed by D/W/O Ratjindua Tjivikua. Tjivikua requested Simeon Kaypiti who worked at Windhoek Correctional Facility where accused three was locked up and asked him to find out whether he possessed cellphone no. 081 833 8508 from which he was said to have called and threatened Lucia Kavari not to testify about the exchange, but to say it got stolen. Kaypiti testified as follows: He first went to Unit 4 and searched accused two, George Katjingsiua, but found nothing on him. Before he proceeded to the nearby Section E where accused three was locked up, he used his cellphone and called the number 081 833 8508. Kevin Gariseb answered it in Cell No. 5. Kaypiti went inside Cell No. 5 and found a black and white Nokia cellphone with a simcard inside on the said Kevin Gariseb which he said belonged to accused three, Erwin Katjingsiua. Kaypiti took the cellphone no. 081 833 8508 from Kevin Gariseb. He went to Cell No. 6 where accused three was locked up, and he indeed found him inside that Cell. Before Kaypiti asked him about the ownership of the said phone he again called it from his own mobile phone to verify whether what he had on him was still the same cell no. 081 833 8508 which he was following up as part of the investigation on this matter, and it indeed started ringing. When Kaypiti asked him who the owner of the phone is, accused three told him it was his cellphone.

[23] Markus Kandjii's nickname is Satta, he drives a Volkswagen Fox sedan. He testified that he knows accused two and three. On 28 August 2009 at ± 23h00 in the evening he saw accused two and three at the T-junction of Clemence and

Exodus Street. They stopped him and said they were selling a car radio which they showed him. He wanted the radio, but the price of N\$250 that they offered him was too high. They reduced it to N\$100 provided he took them to Cimbebasia. He got N\$100 from his girlfriend and left the radio with her. He took the two accused to Cimbebasia. They first drove to Shilunga Street, then into Arrebusch Street. The two accused directed him all the way. On their request he stopped the vehicle and they disembarked. They returned after 5-10 minutes with a television set which he positively identified in court as “exhibit 2”. Satta offloaded the two accused in Exodus Street at Ismael’s Salon. Kandjii positively identified the car radio in court as “exhibit 4”.

[24] Vetoo Tjivikua testified that he knows accused two and three. They are his relatives, they stay at the same village. On 29 August 2009 he bought a television from the two accused between 21h00 to 22h00 in the evening. They were selling the television for N\$600, but he only had N\$250 at the time. He told them he would give them the remaining amount at the end of the month. He took it but it was later taken away by the police. He positively identified the television set in court.

[25] I will now look at the evidence of the accused on this matter.

[26] Nelsiene Utiapatie Kauaria is accused one on this matter. She testified that on 28 August 2009 in the afternoon, she was scheduled to be picked up by the deceased, her boyfriend. She was at Willy’s Bar where she boarded a taxi that dropped her at Katutura Shoprite. She boarded the deceased’s car and they drove to his flat at Cimbebasia. The deceased parked his car outside the yard where he also parks the Onyama Store truck of his employer. They sat in the bedroom watching television. Dogs started barking outside and the deceased went to find out what was going on there. Kauaria went to the bathroom and on her return and before she could re-enter the bedroom, she saw the deceased standing between two strange young men, his nose was bleeding. According to

her the two men were the same persons who were on the taxi that dropped her off at Katutura Shoprite where the deceased picked her up. She became so frightened that she did not see it fit for her to go back to the bedroom. She instead walked out through the kitchen door, and knocked at the main house, shouting loud "hello, hello". There was no answer and she left the scene. This evidence is totally at variance with her reply to the State's pre-trial memorandum exhibit 'C' where she stated that she knew accused two and three. She used to see them at Onyama Store, her deceased boyfriend's workplace where they washed the vehicles of the owner of the business. She also talked to accused two and three at Willy's Bar, and told them that the deceased would pick her up at Katutura Shoprite that Friday, 28 August 2009.

[27] It is accused one's evidence that she was not in a permanent gainful employment to sustain herself. It was her deceased boyfriend who appropriately supported her, by buying her food and clothes in addition financial assistance. She testified that the deceased has been very helpful to her up to the time he passed on. The facts of the matter from her own evidence in chief are that on the day of the incident (the Friday evening) when she saw him bleeding from the nose, she fled the scene. She got a lift at Windhoek Country Club. From her version it is clear that she did not even bother to ask that she be dropped off at Katutura Police Station which is conveniently on the route to her residence. Instead she was dropped off at Herero Mall, a beer outlet. From here she later went home to sleep. Her testimony is further that the whole Saturday and Sunday she was just at home doing nothing and still not bothering to alert the police about the demise of her beloved deceased boyfriend.

[28] On Monday accused one still had not yet reported to any of the police stations in Windhoek and she even left for Okahandja. It was while she was there that the police officer Kamusuvise called and asked her to meet him at Katutura Police Station where she was arrested. Surely and it is indeed my considered view that the above conduct cannot be that of an innocent lover who is said to

have been shocked and left devastated by the death of her boyfriend. It is in my view that this is a conduct of a facilitator, the overseer who initiated the whole exercise related to the murder of the deceased and the robbing of his property from the beginning up to its logical conclusion.

[29] It is credibly clear from accused one's reply to the prosecution's memorandum; the evidence of accused three on this matter that accused one knew accused two and three very well. It was herself who alerted her two co-accused about her appointment with the deceased at Katutura Shoprite. She arranged that they should remain on the taxi she had boarded with them and follow the deceased's car to his residence in Cimbebasia.

[30] George Katjingsua is accused two on this matter. On 28 August 2009 he left his residence and went to Pamwe Cafe where he bought some chips. While eating accused three found him there. He took accused three and showed him the premises he was renting in Exodus Street. He had money to socialize and was looking for company. The two walked over to Willy's Bar. It was ± 13h00 during the day. They drank a few beers and were later joined by accused one and another girl. They were only known to his brother, accused three. Accused one greeted accused three and she was introduced to him as Nancy Kauaria. They all spoke Oshierero. Accused two was meeting accused one for the first time. Shortly thereafter accused one and three stood apart talking, but he did not hear what the topic was all about. Later accused one received a call and she informed accused three that it was her boyfriend phoning. She walked apart to take the call and came back to the table. She requested accused three to find her transport to Katutura Shoprite. Accused three walked away and came back with Nahason Kahorongo, a taxi driver. Accused three asked him to come along so that they take accused one to her boyfriend waiting for her at Katutura Shoprite and they will come back at Willy's Bar and he agreed. Accused one sat in front with the driver while accused two and three sat at the back. When she alighted from the taxi at Shoprite she came to the open window where accused three was

sitting and told him that from there, they should follow her boyfriend's car, to help collect her belongings at his residence. She then walked straight to the red sedan, boarded it and it drove away.

[31] According to accused two, in Cimbebasia, accused three told the taxi driver to turn into Arrebusch Street and stop. He disembarked to walk along Shilunga Street to see if he could spot the red car parked at one of the houses to no avail. He was absent for a long time till the taxi driver identified accused one walking towards them and stood \pm 9 meters from the taxi. She called him to go to her which he did and there she asked him about the whereabouts of accused three, to which he said he did not know. Accused two told the taxi driver to wait for him there, but the latter started asking for his money. He told him to wait for accused three, the person who had hired him. Accused one took him to the riverbed where she showed him a television set and a bag in a trolley. She asked him to hand over the stuff to accused three and they parted.

[32] Accused two testified that when he pushed the trolley up to where he left the taxi parked, it was nowhere to be seen. He pushed it back to the river bed and he suddenly saw accused three walking towards him. He was gone for \pm 25 minutes. He told accused three the taxi driver was gone and he showed him where accused one's belongings were hidden in the river bed. Accused three only took the bag and the two hiked back to his residence in Katutura where they found Karoro Ismael Tjikumiva. Accused three gave him a hair cutter. They took along a car radio while looking for transport. They stopped Satta and accused two corroborates Satta as to how the car radio was disposed. They sent Tjikumiva to buy a bottle of brandy and they started drinking. Accused two became very drunk and woke up the next day (Saturday) finding himself in accused three's residence. Accused three told him that the television set was collected the previous day. It was at accused three's residence where accused one came and gave all her belongings referring to the television set; hair cutter; and car radio to accused three. This was done in full and final settlement of a

previous debt that she owed him.

[33] If accused two's evidence is anything to go by it would mean that within a timeline of fifteen minutes that accused one was with the deceased at the scene of crime, she single handedly managed to do the following to him: Stab him with a knife; tie up his two hands together and stuff a cloth into his mouth to stop him from breathing as a result of which he died. Accused one must then have proceeded to take the obese 95 kg body mass of the deceased into the bathroom alone and locked it there. She then must have loaded the television set and a bag containing a car radio and hair cutter on the trolley, and pushed to hide it in the riverbed and showed him where she hid her belongings before they parted. This evidence is false beyond reasonable doubt. The reason being that if accused one, a female, was able to attack, kill, and rob the deceased alone, she would not, in my view, have sought the assistance of her co-accused. This evidence has therefore been satisfactorily displaced by the whole body of evidence placed before court.

[34] Accused three, is Erwin Kasorere Tjiueza Katjingsua. In the beginning his evidence was a denial of all the allegations preferred against him and his co-accused. They both denied any involvement including setting their feet at the scene of crime on this matter. In the middle of his evidence in chief, he testified that he was a reborn again in faith and has decided to tell the truth to this court about what had happened on this matter. According to him accused one approached him at the house they were renting from one of her family members. She told him that she had a boyfriend who always carried money in a bag whenever he knocked off from work. She asked accused three to find another person for assistance in the following regard. She, accused one, would direct them to her boyfriend's flat in Cimbebasia. Accused three and his helper would come there at the time she was already with her boyfriend. She will show them the bag containing an undisclosed amount of cash. The two accused would then tie accused one and her boyfriend up, leave them inside the house in that

condition to create the impression that a robbery has taken place. Accused three and his helper would then go back home. Later when the investigations were over, they would then share the money among themselves. The date for the execution of this false robbery was not agreed upon between accused one and three.

[35] On the day of the incident, while accused two and three were at Willy's Bar drinking, accused one found them there. She stood apart with accused three and reminded him about their previous discussion. Accused one suggested to accused three that since she will be picked up by her boyfriend at Shoprite Katutura, their plan could be easily executed as well. Accused three objected because he was not yet ready and there he had only come to enjoy himself. He was not carrying any weapon to use in the agreed false robbery exercise.

[36] However, accused one persuaded and convinced him saying it would be a very quick process, it won't take that long. It was here that accused three informed accused two about it and he also agreed. Accused three quickly got back home and took a knife and a screwdriver to use during the robbery. He hired Nahason Kahongoro's taxi for the exercise. At Willy's Bar all the three accused boarded Kahongoro's taxi to take them to Shoprite Katutura where the deceased's car was pointed to them by accused one. She disembarked from the taxi and boarded the deceased's car. As already agreed the taxi followed the deceased's car up to Arrebusch where accused three alighted and walked behind the deceased's car up to the flat. Accused two should have followed him as per agreement between them, but he instead remained seated in the taxi.

[37] Accused three was in full view of the deceased and accused one as they alighted from the car parked outside the yard. He followed them. The deceased unlocked the kitchen door of his flat, walked inside with accused one, and accused three knocked at the entrance door in readiness to kick start the execution of the plan they had agreed upon. The deceased heard the knock and

he came to open the door, whereupon accused three pushed him back inside at knife point ordering him not to make any noise. He held him under full control and pushed him up to the bed and force seated him there. Accused three was expecting accused one to show him the bag containing cash and thereafter come and sit next to the deceased in order to avail herself for the tie up exercise, but she did not do so. She was instead scratching, searching, ransacking the deceased's room in search for valuables which she did not find any. The false robbery accused one had promised to be short and quick appeared to go out of schedule. Accused three then started piercing the deceased with a knife underneath his left armpit demanding money.

[38] The deceased only had N\$50 and nothing more. Accused three kept on pushing the knife deep slowly to frighten the deceased and subdue him in order to hand over the money, but he said he didn't have. Accused three pushed the knife very deep such that the deceased started screaming. He pulled it out and pushed the screwdriver in the same stab wound. All this was happening in full view of accused one who was still ransacking the deceased's room. She eventually got out of the flat and came back with accused two. Accused three asked accused two to help hold the deceased's hands in order to tie him up which he did. Accused three first undressed the deceased's T-shirt and tore it in the middle. He used part of it to tie up the deceased's hands, the other part he pushed deep into the deceased's mouth to suppress his screaming. Accused three did all this while the deceased's hands were firmly held by accused two. He noticed that the deceased had died due to suffocation. With the help of accused two, they took the deceased's body to the bathroom floor, opened the water tap, washed away blood from their hands. Hereafter accused three locked the deceased's body therein and put the key in his pocket.

[39] Time was no longer in their favour, accused three took the deceased's television and hair cutter and loaded them in the deceased's car. Accused one took all the blood stained material from the deceased's room and went to sit in

the rear seat of the deceased's car. Accused three sat in front next to accused two who took the driver's seat in order to drive back to Katutura, but the car did not want to start. Accused three alighted from the front passenger seat, went over to accused two who was sitting in the driver's seat. He then went on his back, got himself underneath the steering wheel, trying to connect the ignition wires to get the car started without success. While accused two and three were still trying to start the car, accused one quietly got off from the rear left seat and disappeared without being detected. When they failed to start the car, accused three offloaded the television and hid it in the riverbed. He removed the car radio which together with the hair cutter he placed in a plastic paper and took along hiking back to Katutura. Here accused three hired Satta who took him back to the riverbed at Cimbebasia and collected the deceased's television set.

[40] Counsel for accused one, two and three submitted that the prosecution has failed to prove any of the charges/allegations preferred against their clients beyond reasonable doubt. They asked the court to find them not guilty and discharged on all charges.

[41] On the other hand the prosecution counsel, referred the court to several authorities. She submitted that the evidence placed before court by her witnesses satisfactorily placed all the three accused at the scene of crime. She related to the doctrine of common purpose. According to her the evidence from her witnesses clearly showed that accused two assisted accused three to have the hands of the already stabbed deceased tied up with a piece of his own torn T-shirt. The other piece while still being assisted by accused two, he pushed deep into the deceased's mouth as a result of which he died of suffocation. Hereafter the two accused carried the body of the deceased into the bathroom and locked it in there. Accused three took away the keys resulting in that door being later broken to retrieve the corpse. The prosecution counsel submitted further that accused three was an accomplice whose evidence against his co-accused required to be treated with caution which the court has in fact done. She

asked the court to convict accused one and two on murder – *dolus eventualis* and accused three on murder *dolus directus*. This argument is only valid in relation to accused one. In regard to accused two this court is convinced that it was his and accused three's conduct that directly caused the deceased's death. This in my considered view makes the two accused guilty of murder *dolus directus*.

[42] The discussion of evidence on this matter:

[43] Accused three is an accomplice and hence the court approached his evidence with caution. His evidence; that of the taxi driver Nahason Kahongoro; the police officers; the Scene of Crime Officer Joseph Tjitunga; Chief Inspector Van Zyl who conducted the pointing out of the Scene of Crime proceedings as well as that of his own cousin Ismael Tjikumiva credibly proved beyond reasonable doubt that the three accused acted in common purpose to murder and rob the deceased of his property.

[44] According to Ismael Tjikumiva accused one's family resided in one of the two houses separated by a fence in Exodus Street, Katutura, Windhoek. Accused one's residential shack house was attached to it. Ismael Tjikumiva rented a room belonging to accused one's family which he regularly shared with accused three, his brother at times when the latter was not at his church residence. This state of affairs existed way back before the incident and that was how accused one and three came to know each other as neighbors. Before the incident accused one borrowed an amount of N\$2 700 from accused three. Before she could pay the money back, accused three sold a microwave to her at N\$700. This brought the total amount of money accused one owed accused three to N\$3 100. That was the reason accused one gave all the goods they robbed from the deceased to accused three in full and final settlement of her debt to him.

[45] Accused one's evidence that accused two and three pounced on them by surprise was also credibly displaced as false beyond reasonable doubt. The evidence of the prosecution further proved beyond reasonable doubt that apart from being the facilitator and the principal organizer of the murder and robbery of the deceased's property on this matter, accused one also participated in the actual commission of the crimes through the doctrine of common purpose. At the time accused two and three were busy bringing the life of the deceased to an abrupt end it was in her presence and full view. Accused one was thoroughly ransacking, scratching, searching for money, safe keys and other valuables all over the deceased's bedroom. She did not change her mind even after she saw that her deceased boyfriend has died at the hands of accused two and three.

[46] From the J88 compiled by Dr. Kabanje, the deceased was naked, a T-shirt was stuffed deep into his mouth, such that he died from suffocation and chest injuries. The evidence of the findings by the investigation officer W/O Kamusuvisi at the scene of crime corroborates accused three's evidence in chief and, what he told C/Insp. Van Zyl during the pointing out of the scene of crime proceedings.

[47] Accused one was present inside the deceased's room, and she had the full view of what her co-accused were doing to him. She did not physically take part in the assault on the deceased from the beginning to the end. However, from the facts alluded to above, it is deemed by the doctrine of common purpose that she has reconciled herself with the attack accused two and three have launched on the deceased as well as the consequences thereof. She could therefore not be exculpated from the crime of murder with indirect intent, and the other charges preferred against all three of them. Accused two and three whose actions directly caused the deceased's death committed murder with direct intent.

[48] In *S v Mgedezi and Others*¹ the reasoning in the *Safatsa* case was approved by holding that in cases where the prosecution does not prove a prior agreement and where it was also not shown that the accused contributed causally to the wounding or death of the deceased he can still be held liable on the basis of the decision in the *Safatsa* case if the following requirements are proved, namely –The accused must have been present at the scene where the violence was being committed. He must have been aware of the assaults on the victim being carried out. He must have intended to make common cause with those who were actually perpetrating the assault. He must have the requisite mens rea in regard to the killing of the deceased or he must have intended that he be killed or he must have foreseen the possibility of the deceased being killed and he performed his own act of association with recklessness as to whether or not death will ensue.

[49] I am satisfied that although the initial plan was only to rob the deceased, the three accused eventually satisfied the requirements of acting in common purpose to the crimes that ensued from their actions at the scene.

[50] The charges: Attempted robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act 51 of 1977 and conspiracy to commit robbery with aggravating circumstances in contravention of section 18(2)(a) of Act 17 of 1956 as defined in section 1 of the Criminal Procedure Act 51 of 1977 are the same. A conviction on both of them will be a duplication of charges, because they have the same elements.

[51] In the result the accused are convicted as follows:

1. Count one:

Accused one: Guilty: Murder – dolus eventualis

Accused two: Guilty: Murder – dolus directus

¹ *S v Mgedezi and Others* 1989(1) SA 687 A at 705 to 706.

Accused three: Guilty: Murder – dolus directus

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

Accused one: Guilty

Accused two: Guilty

Accused three: Guilty

3. Count three: Attempted robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977

Accused one: Guilty

Accused two: Guilty

Accused three: Guilty

4. Count four: Contravening section 18(2)(a) of Act 17 of 1956 – Conspiracy to commit robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977

Accused one: Not Guilty

Accused two: Not Guilty

Accused three: Not Guilty

A M SIBOLEKA
Judge

APPEARANCES:**THE STATE:**

A. Verhoef
Office of the Prosecutor-General, Windhoek

ACCUSED 1:

L. Karsten
Instructed by Directorate of Legal Aid,
Windhoek

ACCUSED 2:

B. Cupido
Instructed by Directorate of Legal Aid,
Windhoek

ACCUSED 3:

M. Karuaihe
Instructed by Directorate of Legal Aid,
Windhoek