

**IN THE HIGH COURT OF NAMIBIA**

In the matter between

**THE STATE**

versus

1. **JOHANNES KOOPER**
2. **ANDRIES EI-ASEB**

**CORAM: MULLER, AJ.**

Heard on: 1993/05/11-14,18,19,21

Delivered on: 1993/05/26

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**JUDGMENT**

**MULLER, AJ.:** The two accused Johannes Kooper, accused no. 1 and Andries Ei-Aseb, accused no. 2, were arraigned on a number of charges namely thirty-one, that ranged from robbery with aggravating circumstances and housebreaking with the intent to rob and robbery to murder, attempted murder, rape, kidnapping, housebreaking with the intent to steal and theft, stock theft and theft as well as one charge each of escape from lawful custody.

*Viheij.* the trial started the two accused were unrepresented and the Court properly explained to them their rights in respect of legal representation, but both accused, although indicating that they duly understood their rights, adamantl' refused legal representation and explicitly said that the

wanted to defend themselves. They also confirmed that they were approached by the Legal Aid Board and that they had similarly indicated to the representative of that Board that they did not want legal representation at all. After completing the procedures in respect of pleading and the conviction of the accused on certain charges that they have pleaded guilty to, the Court again explained to them their right to legal representation and that this is a complicated matter involving several charges with difficult and technical legal aspects, but they remained adamant that they did not want legal representation and in fact, quite aggressively refused to consider applying for legal representation.

The State put all the different charges to the accused and they pleaded to these charges in the following manner: Both accused pleaded guilty to the charge of robbery with aggravating circumstances namely charge 1 as well as to charge 2, housebreaking with the intent to rob and robbery. These charges involved the complainant, Mrs Sieglinde Hoppe-Speer. Both accused pleaded not guilty to charges 3-16 involving various incidents of housebreaking with the intent to steal and theft, attempted theft, alternatively malicious damage to property, stock theft and theft. Both accused pleaded guilty to the respective charges of escape from lawful custody from the police cells at Outjo on the 26th April 1992, namely charges 17 and 18. Both accused pleaded guilty to charge 19, namely housebreaking with intent to steal and theft at the Nomtsoub Peoples Club, Tsumeb. In respect of charge 20 namely the theft of a

radio, the property of Rudolf Khaebeb, accused no. 1 pleaded guilty and accused no. 2 not guilty. In respect of all the charges which followed from the incidents that occurred at the farm Wag-'n-bietjie on the 23rd May 1992, namely two charges of attempted murder and 3 charges of murder, charges 21-25, accused no. 1 pleaded not guilty while accused no. 2 pleaded guilty. In respect of the two charges of rape as well as the 2 charges of kidnapping both accused pleaded not guilty. Those were charges 26, 27, 29 and 30. Accused no. 2 pleaded guilty to charge 28 namely theft of 3 chickens while accused no. 1 pleaded not guilty to that charge. In respect of charge 31 it is theft of the property of Alfons Gariseb or Elifas Shihepo of the farm Elandshoek accused no. 1 pleaded guilty to the theft of one pair of trousers of unknown value whilst accused no. 2 pleaded not guilty to that charge. After questioning both accused separately and in respect of each charge that they have pleaded guilty to according to the provisions of section 112 (l)(b) of the Criminal Procedure Act no. 51 of 1977, the Court entered pleas of not guilty in terms of section 113 of the Criminal Procedure Act in respect of counts 1 and 2 with regard to both accused. Accused no. 1 was convicted in respect of count 17, namely escape from lawful custody whilst accused no. 2 was similarly convicted of a similar charge on count 18. In respect of count 19 both accused were convicted on that charge. In respect of count 20, theft of a radio, accused no. 1 was convicted. Accused no. 2 was convicted of theft of three chickens in respect of count 28 and accused no. 1 of theft of one pair of trousers in respect of count 31. In respect of the attempted murder and murder charges

namely counts 21 to 25 the Court entered pleas of not guilty in respect of section 113 of the Criminal Procedure Act on each of these charges with regard to both accused.

The Court did not apply the provisions of section 115 in respect of the charges to which the accused have pleaded not guilty to. After the pleading procedure were complied with, the following charges were dealt with on the basis of pleas of not guilty. In respect of accused no. 1 counts 1-16, 21-30. In respect of accused no. 2, counts 1-16, 20-27, and 29-31.

The State then proceeded to call witnesses in respect of counts 21-27 and 29-30, which involved the alleged offences that occurred on the farm Wag-' n-Biet jie on the 23rd May 1992.

The first witness was Isak Aoseb, the husband of Franciska Aoses and the father of the three deceased children Petrus, Frans en Evelina Ase as well as Theresa, Martha, Maria and Katrina Aoses. According to him, he lived and worked **on** the farm Wag-' n-Biet jie and on the 23rd May 1992, a Saturday afternoon after mid-day, two male persons, namely the two accused arrived at his house on foot. They were looking for a certain Rudolf and asked for a place to sleep. Although they appeared sober when they arrived they had liquor yith them which they consumed and also gave the witness liquor to drink. According to the witness there were no arguments at all **between them and all of them later went to sleep.**

Apparently the younger daughters slept in another divided part of the house and the two accused in another part.

When they went to sleep the accused were drunk and bumped against items. During the night, the witness was awaked by the sound of chopping and the screaming of his wife. I must mention when Isak stood up he was struck or chopped on the left side of his neck behind the ear. He saw a person but couldn't recognise him in the dark and he received another blow over his nose which rendered him unconscious. The witness regained his consciousness in hospital, he couldn't breath properly and his neck was painful. His children were dead and his wife was seriously injured. He was also told by two of his daughters, Theresia and Maria that they were raped.

The cross-examination of both accused were directed at the day that they arrived at Aoseb' s house. Both maintained that they were there on the Friday evening and not the Saturday evening but this was denied by Isak.

Fransiska Aoses testified that the one small child that was killed was in fact named Evelina and not Maria. According

to her the two accused arrived late on the Saturday afternoon and they were well received by her and her husband. She said they accepted them as "human beings" and that they had liquor of which they and her husband drank. According to her there was no argument at all and when they

went to bed she woke up when she heard a chopping sound and picked up the baby in her hands while she asked what was going on. She couldn't recognise the person who chopped her husband and wanted to run away, but was also chopped by that person.

According to Franciska the three small children, Evelina, Frans and Petrus slept with her and her husband in one room. According to her the house was divided into three rooms. The other daughters slept in the middle room and in the front room the two accused were supposed to sleep.

While the person chopped her with an instrument, he said that, today they will "shit". A third blow hit her on her head and while she was falling she received another blow on her right cheek and then lost consciousness. Franciska indicated to the Court the injuries that she had received which included a healed wound in the middle of her head just above the hair line, a long scar from her nose over her right cheek to her right ear, and further a long scar just below her head on her neck, that stretched approximately from ear to ear and another scar just lower than that, approximately in line with her shoulders. Her right thumb was also chopped off and her right middle and small fingers were amputated at a later stage. She regained consciousness in hospital and had a lot of pain and had to stay in hospital for approximately a month. She never saw the three small children again. While she was testifying about the small children she started crying and the Court had to adjourn to afford her the opportunity to pull herself together.

The daughters, Theresia, Martha and Maria informed her what happened after she lost her consciousness. They told her how the small children were chopped to death while they were crying and that the person who did this said the reason was because the children made noises. Three of the chickens were also chopped and the two accused took Martha and Theresa with the chickens, blankets and certain clothes along when they left. Maria indicated to her that her clothes were taken off and she was sexually assaulted. Theresa also informed her that she was raped.

According to Franciska the baby was only two weeks old and the other two children 3 and 5 years respectively. Her right hand over the part where the thumb was chopped off showed marks as if it was burnt and Franciska told the Court that that apparently happened after the thumb was hacked off and she fell near a fire with her hand in the fire.

The accused no. 1 apologetically questioned Franciska and again put it to her that they arrived there on the Friday, not the Saturday. During cross-examination accused no. 1 started shouting when he didn't receive the answers from Franciska that he wanted and accused no. 2 didn't want to ask Franciska any questions, and indicated that he didn't want the trial to continue. It must be stressed that the accused right's to cross-examine had been thoroughly explained to them and they had every opportunity to question any witness.

The next witness was Theresia Aoses, obviously a young girl

and after questioning her she was warned to tell the truth which was clear to the Court that she understood it. Her parents were also present in Court. According to Theresia, two male persons arrived at their parents' house late on a Saturday afternoon, the 23rd May 1992. They spoke to her father and later she went to bed but didn't sleep. The two visitors, who she identified as the two accused did not go to sleep where they were supposed to sleep. They were just sitting and drinking in the front room. Later accused no. 1 took her by her hand out of the house into the garden where he took off her pantie as well as his own trousers. He then had sexual intercourse with her which was painful. She denied that she consented thereto. He also had a knife in his hand and when she tried to move out from under him he threatened to stab her with the knife. She said that when they returned she found that the people inside the house were already chopped. According to her nothing has happened to them before she and accused no. 1 went out of the house into the garden where she was raped. The other person, accused no. 2 was sitting in the house when they returned and he later raped Maria, a girl who is unable to walk. Theresia did not testify that accused no. 1 also raped Maria. She said that when they returned accused no. 2 hit her mother with a panga on her arm, which she saw, and when accused no. 1 saw what had happened, he said "it is right". After the rape of Maria, who according to Theresia attempted to push accused no. 2 away who was not put off by that, accused no. 2 went out and chopped three chickens. They took their liquor and then the two accused took Theresia and Martha with them against their will when they left. They



were told that they were being taken to Ovamboland. They were kept with the two accused during the night and the accused also cooked a chicken, which they ate.

The next morning the two girls indicated that they wanted to relieve themselves and then took the opportunity to run away. They returned home and found that their parents had already been taken away. During the time that they were with the two accused in the veld, accused no. 2 said that the old man was talking "shit" and because of that he chopped him. He also asked Theresia whether it were her brothers and sisters that he chopped and when she answered in the affirmative he apologised to her. The girls were forced to carry the liquor and other things of the accused when they were taken with them.

Accused no. 1 cross-examined Theresia about the time when her parents and the children were attacked and chopped by accused no. 2 and she confirmed that this happened while she was away with accused no. 1 and was raped by him. She remained adamant, however, that when they returned and accused no. 1 saw what had happened, he said it was right. Accused no. 1 put it to Theresia that he was the one who saved her and the other daughters' lives because accused no. 2 also wanted to chop them, but Theresia was quite clear that accused no. 1 never attempted to protect them from accused no. 2. She also confirmed that accused no. 2 had a firearm with him when they arrived there that evening. She also saw a sharp object in the carry bag that the accused brought with them as well as liquor. Accused no. 2 refused

to cross-examine Theresia.

Martha Aoses, who appeared to be a very young girl was questioned by the Court to establish whether she could distinguish between the truth and lies and after being satisfied she was allowed to testify. She also confirmed that two male persons arrived on the Saturday afternoon and that they talked to her parents. She went to sleep and at one stage she was woken up by accused no. 2 who shook her. She confirmed that accused no. 2 chopped her parents and that they fell down. Accused no. 2 used a panga and uttered the words "today you are going to die". She testified that this happened while accused no. 1 and Theresia were away. Accused no. 2 also raped Maria and she also saw that the three small children, Evelina, Petrus and Frans were laying inside the house after been hacked to death. According to her she didn't see how this happened. The accused took the chickens and took herself and Theresia with them into the bush. She also confirmed that they walked with the accused and slept that night in the veld. According to her accused no. 2 also said that he was going to chop her and Theresia too. She confirmed the evidence of Theresia that while they went to relieve themselves they the next morning managed to escape and returned home. None of the accused did anything to her or raped her.

She also disagreed with questions by accused no. 1 that he attempted to stop accused no. 2 from harming them or to stop accused no. 2 from chopping her parents. Accused no. 2 asked her to whom did the panga that he used to chop her

parents with, belong and Martha said it was brought there by accused no. 2.

The next witness was Maria Aoses who appeared to be much older than the other two girls, but Maria wasn't able to walk, neither was she able to speak. However, it was made clear that she could hear properly and her sister Katrina was sworn in to interpret the signs or gestures made by Maria in reply to questions put to her and related the answers to the Court. According to Maria two people arrived at their house and started drinking with her father. She indicated that they chopped her father and her mother as well as the three children. She indicated that this was done by accused no. 2 and she also indicated that accused no. 1 was the other person who arrived there with accused no. 2. When Maria was asked where accused no. 1 was during the time when accused no. 2 assaulted the parents and the children, she indicated that he had taken Theresa out of the house at that time. Accused no. 2 said, "it is good" after he had chopped her parents and the three children and these words were repeated by accused no. 1 when he returned and saw it. She also told the Court that her clothes were torn off her body by accused no. 2 and that he then raped her. She also said that accused no. 1 also had intercourse with her. Her arms were then tied. On a question whether she gave permission to accused no. 2 to have intercourse with her she indicated that he had done so by force. She also testified that she didn't give permission to accused no. 1 to have intercourse with her. She also confirmed that accused no. 2 went to chop the chickens which they took with

them together with other blankets and clothes. Except for the intercourse she was also slapped and hit by accused no. 2 after the intercourse. She denied that Theresia was accused no. 1 or 2's girlfriend and said that she'd never seen any of them before.

Rudolf Khaebeb testified that he was employed at the farm Armar-Daar and on Friday, 22nd May 1992, the two accused arrived at his house at approximately 5 o'clock the afternoon and requested water to drink. They told him that they were employed at Grootfontein and they then left. On Saturday they returned during the night and stole his radio. I must mention at this stage that accused no. 1 has pleaded guilty to and was convicted on a charge of stealing the radio of Rudolf Khaebeb. According to Rudolf Khaebeb he didn't know the accused at all and saw them for the first time that Friday. On the Sunday morning when he woke up he missed his radio and then he followed the footprints of the two accused. He informed the owner of the neighbouring farm of the theft of his radio and requested him to contact the police. On his way to the road to wait for the police he met a girl who was unable to speak and who pointed at her throat, and who made a cutting movement with her hand across her throat indicating that something was wrong. He accompanied her to her home which was the house of Isak Aoseb and also found the same footprints there as those at his place namely that of the two accused. He described the footprints to the Court and why he recognised it. Upon entering the house he saw that the people were all, as he described it, "chopped". There were five people of whom

three were children and two adults. They were covered with a cloth, as he described it. He denied that any of the accused ever, or on the Friday night, overnighted at his place.

During cross-examination by accused no. 1 a long version of what happened according to accused no. 1 was put to this witness. Rudolf Khaebeb denied all these statements and indicated strongly that they were lies. According to the statements put to Rudolf Khaebeb by accused no. 1 he knows Rudolf Khaebeb very well and Rudolf also knows members of his family. It was further put to Rudolf that he and accused no. 1 were together in jail and that during that time Rudolf invited accused no. 1 to visit him, which he did on the Friday. They drank Vodka and Amarula liquor together and the two of them prevented accused no. 2 to fight with a certain tall man. They then went together, the tall man, Rudolf and the two accused to a neighbouring farm and the house of Isak Aoseb. There they drank together and accused no. 1 became very friendly with one of the girls, Theresia which, according to him should have been obvious to Rudolf Khaebeb. They also discussed the independence of the country and the treatment of employees on farms. They then left together and returned to Rudolf's home. According to accused no. 1 accused no. 2 bought a chicken from Rudolf and **promised** to pay for this with **liquor** which they stole from a bottlestore and which was hidden in Tsumeb. Because accused no. 1 liked a girl at Isak Aoseb's farm very much, he and his friend decided to return there.

Rudolf Khaebeb denied all these statements and adamantly repeated that they were all lies.

Accused no. 2 started his cross-examination in the same vein as that of accused no. 1 but after a few questions decided not to continue with cross-examination because he said there is no sense in it as the witness was denying everything that was being put to him.

Katrina Aoses, another daughter of Isak Aoseb and Franciska Aoses, but who wasn't on the farm Wag-'n-bietjie at the day of the incident, namely the 23rd May 1992 was called to clarify a mistake in respect of the name of one of the deceased. The baby Evelina who was also killed by accused no. 2 was referred to as "Maria" in the chargesheet and Katrina explained that as a result of the shock upon finding the children in that condition she made a mistake when she identified the bodies to Serg. Isaaks the investigating officer and referred to the baby Evelina as Maria. She also clarified a mistake on EXHIBITS "L" and "N", the two post mortem reports of Evelina Ase and Petrus Ase where their respective ages were changed, by looking at the photographs, EXHIBITS "N2" and "L2" as well as "J2" and identified the bodies as that of Petrus, Frans, and Evelina, respectively.

Two police officers were called as witnesses for the State, namely Inspector Andre van Zyl and D/Sgt. Rudolf Isaaks. Inspector van Zyl had nothing to do with the investigation of this matter and was only instructed to take certain

photos and draw up a photoplan which was handed in as EXHIBIT "A" . The photos were those of Franciska Aoses and Isak Aoseb, apparently taken in hospital, and indicating their injuries as well as the interior and exterior of the house where the incident took place on the farm Wag-'n-Bietjie. Certain points who were indicated on photo 5 for example where Theresia was allegedly raped by accused no. 1 as indicated by him.

D/Sgt. Rudolf Isaaks was the investigating officer of the incidents that occurred on the farm Wag-'n-Bietjie. He was on standby the Sunday morning 24th May 1992 and was called out for the theft of a radio. On his arrival at the farm Wag-'n-Bietjie he met Rudolf Khaebeb who informed him that he was the complainant in respect of the radio, but that there was something much bigger that the Sergeant had to look at. He was taken to Aoseb' s house where he found the two adults in a seriously injured condition as well as the three children who were already dead. Maria and Katrina were present. Katrina identified the children as Frans, Maria and Petrus to him. He then also found a panga which he identified as the panga which was shown and identified by other witnesses and which was handed in as EXHIBIT 1. The panga is a heavy instrument with a straight blade ending in a sharp point but then the blade curves up in a broad, sharp point. The length of the blade is 32cm and is 8cm wide at its narrowest point next to the handle while at its broadest point, that is across the mentioned curved point it is 16cm wide. It has a metal handle of the same material as the whole blade and it weighs according to estimation between 1

and 1,5kg. It is a heavy object and the blade is sharpened but not very sharp. It appears to the Court that this instrument was probably meant to be used at the end of a long stick which is put into the hollow part of the handle. No other weapons were found by D/Sgt. Isaaks even when he returned to search the premises.

He transported the bodies as well as the two injured adults to Tsumeb. The bodies were taken to the mortuary and Isak and Franciska to the State Hospital. Theresia was found at the house when he returned from the hospital and she reported that she was raped. Through Katrina, Maria informed him that she was also raped. He took the two girls back to Tsumeb to the State Hospital for medical examination. Both the two girls as well as the two injured adults were handed to Dr. Scheepers. Theresia's clothes were dirty and her hair in disorder but Maria apparently had put on clean clothes. Two smears were taken by Dr. Scheepers and handed to Sgt. Isaaks, who testified that he had sent it to the forensic laboratory in Pretoria to be tested. According to the results that were handed in in terms of section 212 (4) (a) and (8) (a) of the Criminal Procedure Act, the smear taken from Maria indicated that the presence of semen could not be detected, while the smear taken from Theresia showed spermatozoa which is a component of semen which was present ***Lnjthe*** smear.

Sgt. Isaaks was not involved with any of the accused, but after they were arrested and they were shot he visited them in hospital. He asked accused no. 2 whether he knows



anything about the panga whereupon accused no. 2 said he knew about the panga and that he used it to chop the people to death but that it didn't belong to him. No questions were asked by any of the accused to this witness.

In respect of the robbery charges, namely charges 1 and 2, Detective Sgt. Robert Herridge testified that he was the investigating officer of that incident, involving the complainant, Mrs Sieglinde Hoppe-Speer. The purpose of his testimony was to explain why the complainant could not testify in Court. It was due to medical problems and he handed in a letter from **Dr.** Burger which indicates that Mrs. Hoppe-Speer is suffering from mild senile turmoration and is very depressed and anxious and that it would be unwise for her to be taken out of her normal milieu to testify in Court as this would aggravate her circumstances. According to Sgt. Herridge the complainant, Mrs. Hoppe-Speer is very old and is approximately 82 years of age. **He** also testified that he retrieved all the stolen items listed in respect of charges 1 and 2, including the motor vehicle, except for a .38 special revolver. On a question by accused no. 1 he said that accused no. 1 gave him the name of the person who is in possession of the revolver but after a search of this person's premises it could not be found.

The **medical evidence comprised** of the **testimony** of **Doctors** Scheepers, Liebenberg and Ingrid Oranda. **Dr.** Scheepers testified that he treated Isak Aoseb and Franciska Aoses in the Lombard Hospital in Tsumeb. Isak's clothes were bloody, he was shocked due **to** bloodloss and had **to** be resuscitated

before being taken to the theatre. He had six cut wounds from a panga-like object which was used with excessive force. The first cut wound was approximately 20cm long on the left cheek from the ear to the nose and through the nose bone. Two cut wounds were also on the left side of the neck each approximately 10cm long and another cut wound through the left ear onto the scalp. There were two further cut wounds on the head on the left side onto the bone. EXHIBIT 1 was shown to the witness and he said that it was probably an instrument like that that caused the injuries to Isak as well as Franciska. The injuries were serious and Isak was hospitalised for approximately 10 days. His life was in danger during the time.

Franciska was also shocked due to blood loss which was excessive and had also to be resuscitated before being taken to the theatre. She also had six cut wounds. There was a wound on the right side of her neck, approximately 15cm long and also one on her left hand side of the neck of the same length. She had a 10cm long wound on her forehead which went onto the bone with a fracture of the bone. She had a further wound on her left cheek from the ear through the cheek bone and into the mouth. On her back between the shoulder blades were two deep cut wounds and on her right hand where she had burn wounds her right thumb was completely cut off and the small and ring fingers had to be amputated due to complications. These wounds were all serious and she was hospitalized for approximately a month.

According to Dr. Scheepers, neither Isak, nor Franciska would have lived without medical intervention. They both have horrible scars and would have suffered pshychologically according to the doctor.

Dr Scheepers also examined Maria Aoses and took the smears from her and Theresia, whom he also examined. Maria indicated to the Doctor that after her parents had been assaulted with the panga she was raped by two men unknown to her. She already had two children of six and three years respectively. She was disorientated and shocked. She had a small parochial tear in the vagina with a little bleeding. According to the doctor it's possible that she could have been raped. She didn't have any other injuries on her body.

The hymen of Theresia, who was still a virgin, was torn according to the doctor, admitting one finger. The examination was painful and she told the doctor that one person had intercourse with her, and threatened her with a knife. According to the doctor's findings Theresia, who is still a small girl, was probably raped. According to the doctor's opinion not a lot of violence was used on both, Maria and Theresia, during the respective rapes. Theresia's clothes were dirty but those of Maria were clean.

Dr. Linda Liebenberg conducted the post mortems on the bodies of the three children, Petrus, Frans and Evelina respectively. Except for recording her findings in EXHIBITS "K", "M" and "O", she also handed in photos taken in her

presence, EXHIBITS "J", "L", and "N" of the three bodies. W/0 Manfred Sass of the Namibian Police, identified the bodies to Dr. Liebenberg. The body of Evelina had a head injury which was the cause of death. The first injury was 110mm in length over the right occipital-parietal area showing a deep notch in the underline skull. There was also a 50mm long wound over the left front temporal area showing a notch in the skull. There was further a deep linear wound of 120mm running from the left occipital area over the left mastoid bone, severing the tip of the left ear and continuing over the left cheek for a further 40mm. This wound reveals a depressed comminuted skull fracture and injured brain tissue. There was a further wound which showed a superficial linear abrasion over the back of the left shoulder of 105mm in length. The doctor described all the wounds in detail which are also apparent on the photos "J1" - "J5" which can only be described in laymans terms as "terrible and sickening". According to the doctor, the deceased died very soon after sustaining the head injury because the lungs did not appear oedematous. Considering the injuries the doctor correctly described the instrument that caused the wound, even before looking at the panga and then said that this was most probably the sort of instrument that had been used. The force used was moderate to considerable. At least three blows caused the different injuries according to the doctor. Although it could not be determined with any amount of certainty the child was probably lying down when she received the injuries.

The next post mortem was that of Petrus Ase. The doctor

described the wounds sustained by this young boy with the aid of photos taken, EXHIBITS "LI" - "L5". In the first instance, there was a long, curved laceration of 150mm from the right eyebrow posteriorward over the parieto-sagittal region on the right side which was gaping and showed a linear skull fracture underneath. The second wound was a laceration of 150mm in length, almost 90° on wound no. 1 over the right posterior parietal area and revealing a linear skull fracture underneath. The third wound was a laceration of 85mm horizontally over the occiput and at the back of the head. This wound revealed a deep skull fracture underneath and in the fourth instance there was a superficial, irregular linear laceration over the left jaw and neck. The last wound was a laceration over the tip of the left shoulder, lifting a skin triangle with a base of 50mm. The last two wounds could have been inflicted by the same blow according to the doctor. This body had three skull fractures. The condition of the lungs also indicated to the doctor that death must have been instantaneous. The same type of instrument was used to cause the injuries, which was probably EXHIBIT "1". A moderate amount of force was needed to cause the three most serious injuries and wound number 5 was not fatal. This child as well as Evelina would not have survived even with medical intervention. This child had probably also been lying down when the blows were inflicted.

The body of the baby Frans Ase, which appears from the photos EXHIBITS N1 - 5, to be that of a baby of approximately 2 weeks. According to Dr Liebenberg, it

weighed only 2 kgs and was the body of a very small, rather premature, baby. This body had the following injuries. There was a gaping incised wound in the left occipital area of 25 mm in length, extending forward as a crushed line in the scalp of 30 mm in length. The second wound was a gaping wound over the left shoulder involving the underlying bones of 50 mm. The third wound was a gaping wound below and behind the left ear of approximately 30 mm in length, extending over the left jaw which appears depressed. The skin was crushed and abraded for another 30 mm in the direction of the left cheek. The fourth wound was a curved laceration over the left front-parietal area of 75 mm in length. And the fifth wound was a gaping wound stretching upward from the most posterior end of wound no. 4. On the photos these wounds are difficult to distinguish as they appear to be a group of wounds, causing one gaping area. Brain tissue extruded through the skull fracture. The same sort of instrument as that which caused the other injuries to the other children, and similar to EXHIBIT 1, was used. There had been several blows and the biggest force was used on the left side of the head to such an extent that the head had been crushed on the other side as well. Because of his age this baby must have been lying down when the wounds were inflicted.

Finally, Dr Ingri<sup>^</sup>i Orinda testified that she was asked by the prosecutor to determine the ages of the three State witnesses, Martha, Maria and Theresia Aoses, respectively. She is a medical expert in the reading of X-rays and is fully qualified to determine the age of a person by way of

interpreting X-rays and comparing it with the Atlas of Skeletal Development by Greulich and Pyle. According to her, the age of persons younger than 19 years can be more accurately determined. She had X-rays taken from the left hands of Maria, Theresia and Martha Aoses and in respect of Maria she also had X-rays taken of her pelvis. The skeletal age of Martha corresponds with that of a girl of 9 to 10 years, while the skeletal age of Theresia corresponds with that of a girl of 12 to 13 years of age. In the case of Maria, there was epiphysis of the radius which indicates that some of the bones in her hand had fused its shaft and consequently it indicates an age of 19 or above, while the X-rays of the pelvis and the iliac crest epiphysis was also fused which occurs between the ages of 20 to 25. From this the doctor formed the opinion that Maria was definitely over the age of 20 years.

This then concluded the oral evidence presented by the State. With the consent of the two accused and in fact at their request, the prosecutor handed in two sets of proceedings conducted in terms of section 119 of Criminal Procedure Act in the Magistrate Courts of Outjo and Tsumeb, respectively, as well as two statements each by accused no. 1 and accused no. 2, respectively. The Court duly explained the effect of the statements to the accused, but they were adamant that they wanted the statements to be handed in. The relevant proceedings in the Magistrate Courts referred to, were read into the record and both accused indicated that these proceedings were correctly recorded. The two statements were also read into the record and the accused

said that the statements were voluntarily taken without any undue influence, signed by themselves and correctly recorded. The State then closed its case without leading evidence in respect of charges 3 to 16 and in respect of accused no. 1 on charge 28 and in respect of accused no. 2 on charges 20 and 31. The Court then acquitted both accused on charges 3 to 16 as well as accused no. 1 on charge 28 and accused no. 2 on charges 20 and 31. After explaining the rights of the accused to them, both indicated that they do not want to testify and both closed their cases without calling any witnesses.

After the accused have been convicted of certain offences to which they have pleaded guilty and have been questioned by the Court in terms of section 112(1)(b) of Act 51/1977 as well as those charges that were not pursued with because the State didn't lead any evidence in respect of them and on which charges the accused have been acquitted at the end of the State's case, the remaining charges were charges 1 and 2 in respect of the robbery and theft at the farm Schoenau of Mrs Sieglinde Hoppe-Speer as well as the charges relating to the incidents that occurred on the 23rd May 1992 at the farm Wag-'n-Bietjie, namely the two charges of attempted murder, three charges of murder, the two charges of rape and the two charges of abduction, namely, charges 21 to 27 and 29 and 30. I shall now proceed to consider whether the State has succeeded in proving beyond reasonable doubt that the accused, or any one of them, are guilty of any of the offences that they were charged with in these remaining counts.



Both accused pleaded guilty to offences set out in these two charges, namely, the charge of robbery with aggravating circumstances of the items as set out in the charge sheet belonging to Mrs Sieglinde Hoppe-Speer as well as to the charge of housebreaking with the intent to rob and robbery with aggravating circumstances of the Nissan pick-up, the property of the same Mrs Hoppe-Speer on the same date. After the Court had applied the provisions of section 112(1)(b) and the State has indicated that it will proceed in proving that aggravating circumstances did exist in respect of charge 1 and requesting the Court to convict the accused not of the offence as formulated in charge 2 but of housebreaking with the intent to steal and theft in respect of the Nissan pickup, the Court entered pleas of not guilty in respect of both these charges in terms of Section 113 of the Criminal Procedure Act. The evidence before the Court at this stage in respect of these two charges, comprise of the following, namely, the admissions made by the two accused during their questioning by the Court in terms of section 112(1)(b), the section 119 Proceedings in the Magistrate's Court of Out jo on the 19th August 1991 as well as the evidence of detective sergeant Herridge. Mrs Hoppe-Speer, the complainant in respect of charges 1 and 2, didn't testify and, as mentioned before, a medical certificate by Dr Burger explaining the reason why she was unable to testify was handed in by

During the section Proceedings the accused were questioned after having pleaded guilty to the first charge namely, the robbery with aggravating circumstances of Mrs Hoppe-Speer involving the

items set out in count 1 as well as the Nissan pick-up, the subject matter of count 2 in this Court. Both accused denied that, except for threatening the complainant, any weapon was used during the course of that incident. In the ir plea explanation and during questioning by me in this Court, both accused also denied that any weapon had been used to induce the complainant to hand over her property. Both accused, however, admitted that they in fact took the items listed in count 1; that these items belong to the complainant; that she did not hand the items to them voluntarily, but only after they threatened her to hand over the items to them and had overpowered her. They also admitted that they tied her up with a rope. Accused no. 2 also said that he grabbed her and took her into a room where he told her that she must hand the items over to him. Mr Van Wyk conceded that aggravating circumstances were not proved. Sergeant Herridge testified that all the items, except for the .38 special revolver, were recovered. Both accused refrained from testifying. In the absence of any evidence by the complainant, I am satisfied that Mr Van Wyk's concession that no aggravating circumstances were proved, was correct. I am satisfied that all the elements of the offence of robbery of the items listed in count 1 had been proved and both accused should consequently be convicted of robbery on charge 1.

In respect of Count 2 the accused also admitted during questioning in the section 119 proceedings in the Magistrates Court of Outjo that they took a Nissan pick-up vehicle of Mrs Hoppe-Speer. As mentioned before, the two

charges before this Court were combined in a single charge at that stage. During questioning in terms of section 112 (1)(b) in this Court after having pleaded guilty to charge 2, both accused admitted that they took the vehicle of Mrs Sieglinde Hoppe-Speer. Accused no. 2 admitted that he broke into the garage where the vehicle was by breaking the lock after they had taken the keys of the vehicle from the complainant. Although accused no. 1 arrived at the garage after accused no. 2 had already broken the lock, I am satisfied that Mr van Wyk is correct in his submission that the State has proved common purpose in respect of this charge. Both accused admitted that they wanted to rob Mrs. Sieglinde Hoppe-Speer; they took the keys of the vehicle and that the garage was broken into although accused no. 2 was a person who actually broke the lock. They then drove off with the vehicle onto which they loaded all the items that they had taken from Mrs. Sieglinde Hoppe-Speer. According to Detective Sgt. Herridge this vehicle was also recovered. I am also in agreement with Mr van Wyk that the offence committed by the two accused of which I am satisfied that all the elements have been proved, is in fact housebreaking with the intent to steal the Nissan pick-up and theft thereof, and that they should be convicted of that offence which is a competent verdict in terms of the Criminal Procedure Act as have been explained to the accused.

COUNTS 21 - 27. 29 AND 30: These charges involve the alleged offences that were committed during the incidents that occurred on the 23rd May 1992 at the farm Wag-'n-Bietjie. In respect of counts 21-25, namely the two charges

of attempted murder on respectively Isak Aoseb and Franciska Aoses and the murder charges in respect of Petrus, Frans and Evelina Ase, Mr van Wyk conceded that the State did not succeed in proving that accused no. 1 committed any of these offences, neither that common purpose was proved as a basis of convicting him of these offences. The extreme irony of the matter is that accused no. 1 was saved from any involvement in these three offences because he was committing another serious offence outside the house, namely raping Theresia Aoses. The evidence of Theresia Aoses in respect of the rape charge namely count 27, with which I shall deal later, was that accused no. 1 took her from the house before any incident had occurred and when the three children, Petrus, Frans and Evelina were still alive and their parents had not yet been assaulted. According to Theresa she returned with accused no. 1 and upon her return it was found that the assaults and murders had already taken place and she further confirmed that accused no. 1 had been with her during all that time. Ironically then she provided an alibi for accused no. 1 in respect of these attempted murders and murders. Theresia was also corroborated by Martha Aoses and to a lesser extent by Maria Aoses in this regard. The only reference to accused no. 1's possible involvement in these murders was the evidence that upon his return with Theresia and seeing what had happened, he said "it is good". Mr van Wyk & /s(j) correctly conceded that there' s no possibility in our law for ratification of murder and thereby making a person liable for conviction of that offence, nor that there was any evidence whereupon accused no. 1 could be convicted as an accessory after the fact, as

he did nothing to protect accused no. 2 or to hide anything of what had occurred. During the section 119 proceedings in the Magistrates Court of Tsumeb on the 29th May 1992 accused no. 1 denied any involvement in these offences and constantly denied such involvement in this Court as was apparent from his cross-examination of the witnesses Theresia and Martha as well as Maria. Consequently there is no evidence upon which this Court can convict accused no. 1 of the offences that formed the subject matter of charges 21-25.

Accused no. 2, on the other hand, admitted during the questioning in the section 119 proceedings in the Magistrates Court at Tsumeb on the 29th May 1992, that he was the person who chopped both Isak Aoseb and Franciska Aoses as well as the three small children with a panga. In this Court he pleaded guilty to these charges but during questioning in terms of section 112 (l)(b) he alleged that he didn't have the intention to kill anyone of them. The accused also alleged that he was attacked by Isak or Franciska with a spear and a panga and that he took off the panga and in fact acted in a self-defence. He also averred that the children received blows when the parents protected themselves by holding the children in front of them. The Court entered pleas of not guilty in terms of section 113 of **th4** Criminal Procedure Act in respect of accused no. 2 to the 2 attempted murder and the three murder charges.

Theresia Aoses, Martha Aoses, as well as Maria Aoses made it clear in their evidence that accused no. 2 was the person

involved in these assaults that led to these charges. Theresia left with accused no. 1 and only accused no. 2 remained in the house and upon her return she saw him with the panga, which she identified as EXHIBIT no. 1, with which he hit her mother on the arm. Martha also saw the accused with the panga, while Maria explained to the Court that accused no. 2 attacked and assaulted the victims with the panga. From accused no. 2's attitude during cross-examination it was apparent that he accepted responsibility for these attacks. Not a word was further mentioned, neither was any evidence presented that there was ever a situation of an attack upon accused no. 2 and that he had to defend himself. There was also evidence that accused no. 2 had the panga in his bag. Accused no. 2 also admitted to inspector Isaaks that he was the one who chopped the victims with the panga although he denied that it belonged to him. As mentioned before, accused no. 2 did not testify.

The State also proved the injuries inflicted upon Isak Aoseb and Franciska Aoses by their own testimony as well as the medical evidence and the photos that appear in EXHIBIT A, taken and handed in by Inspector van Zyl. The State also proved the injuries which caused the death of Frans, Petrus and Evelina Ase as presented by the testimony of Dr. Linda Liebenberg in respect of the post mortems that she conducted on the bodies and the photos handed in by her. On all the evidence presented to this Court, I have no doubt that the State has proven all the elements of the two attempted murder charges in respect of Isak Aoseb and Franciska Aoses namely counts 21 and 22 as well as the murder charges in

respect of the three small children, Petrus, Frans and Evelina Ase as set out in counts 23,24 and 25 concerning accused no. 2 and that accused no. 2 should be convicted on all these five charges.

COUNTS 26 AND 27; Both accused were charged of raping Maria Aoses namely count 26 and of raping Theresia Aoses, count 27. The Court has properly explained the effect of section 14 (1) and (2) of the Immoral Practices Act, no. 21 of 1980, in respect of a complainant under the age of 16, as well as the presumption that a girl under the age of 12 is incapable of consenting to intercourse. It was also explained to the accused that competent verdicts can be made on rape or indescent sexual assault charges in terms of the Criminal Procedure Act.

The State has proved the ages of Theresia as being 12-13 and that of Maria as being over the age of 20 years through the evidence of Dr. Ingrid Orinda, who took X-rays as explained earlier in this judgment and thereby established their ages. In respect of charge 26, namely the rape of Maria I am satisfied that the State has proved all the elements of this offence as far as it relates to accused no. 2. Although Maria was unable to speak, she testified through signs and gestures to her sister Katrina Aoses, who acted as an interpreter. Although Maria was unable to speak she is able to hear and understand questions. She positively identified accused no. 2 and indicated that he was the person who had sexual intercourse with her and denied that she gave him any permission to do that. Also Theresia and Martha confirmed

that accused no. 2 had sexual intercourse with Maria and that this was done forcefully and against Maria's will.

Accused no. 2 did not in any way attempt to dispute this and didn't testify. I am satisfied that the State has proved beyond reasonable doubt that accused no. 2 did rape Maria Aoses.

In respect of accused no. 1, Mr van Wyk also requested the Court to convict this accused on charge 26 namely of raping Maria Aoses. According to Mr van Wyk Maria implicated accused no. 1 by pointing at him during her evidence as having had sexual intercourse with her without her consent and that she also confirmed this to the doctor during the medical examination by Dr. Scheepers and further because accused no. 1 failed to testify and to deny this under oath. Accused no. 1 in argument continued to deny that he had intercourse with Maria. In considering the evidence in this respect it is important to mention that neither Theresa, nor Martha who were both present during the time that this alleged rape by accused no. 1 of Maria would have occurred, mentioned this in their evidence at all. Theresa testified in detail of everything that occurred including accused no. 2's rape of Maria, but didn't mention any involvement of accused no. 1 with Maria and neither did Martha. They were also not questioned by the State in this respect. Although I accepted the evidence of Maria where she indicated through signs and gestures to Katrina who interpreted those signs to the Court, I was very cautious not to accept Maria's evidence where it was not corroborated by other witnesses or



factual evidence because of the possibility that such signs or gestures may have been misinterpreted by Katrina. Furthermore, Maria was a single witness in respect of the alleged rape by accused no. 1 on her. The fact that she indicated to the doctor that two persons raped her must also be treated with caution. Dr. Scheepers mentioned that she conveyed this to him through gestures which he had to interpret himself without the aid of Katrina as the Court had the advantage to do. Furthermore the content of anything conveyed to Dr. Scheepers remains hear-say as it was not covered during Maria's evidence in the Court namely that she in fact conveyed this to Dr. Scheepers. I am satisfied that there was no case that accused no. 1 had to meet in respect of this count and that his failure to testify in this respect cannot lead to any adverse inference against him. The State did not succeed to prove beyond reasonable doubt that accused no. 1 raped Maria or in any way sexually assaulted her and he must be acquitted on this charge.

In respect of count 27, that is the alleged rape by the two accused of Theresa Aoses, no evidence was presented that accused no. 2 raped or in any way sexually assaulted Theresa Aoses. Consequently he must be acquitted on that charge. With regard to accused no. 1, he initially, if I understood his cross-examination and statements put to witnesses correctly, attempted to indicate that he had a relationship with Theresa and in fact had intercourse with her the previous Friday and again on the Saturday, but on both occasions with her consent. Theresa strenuously denied that she had known accused no. 1 before the 23rd May

1992 or had any relationship or affair with him and was adamant that she did not consent to the sexual intercourse that occurred on the 23rd May, the Saturday night at the time when the other murders were being committed by accused no. 2. This was also denied by all the State witnesses. Later, during the trial it appeared that accused no. 1 accepts the liability of having raped Theresia on that particular occasion which also served as his alibi to the other charges of attempted murder and murder. According to Dr. Scheepers' examination he found that Theresia didn't have sexual intercourse before this occasion and his opinion was also that she was raped. Because of the age of Theresia, namely 12-13, accused no. 1 could have been convicted of the offence of having sexual intercourse with a girl under the age of 16 in terms of section 14 of act 21 of 1980, as mentioned before, where consent is not necessary, if the elements of rape were not proved. However, I am satisfied on the evidence of Theresia, supported by the findings of Dr. Scheepers during his medical examination of her the following day and the evidence of Isak and Franciska of what was conveyed to them by their daughters that accused no. 1 did commit the offence of rape as he had sexual intercourse with her, which he admits, but forcefully and without her consent and by using a knife to threaten her with. He should consequently be convicted on charge 27.

Counts 29 and 30: These two charges involve the kidnapping by both accused of Theresia and Martha Aoses. Both accused refrained from testifying and the Court is left with the

evidence of Martha and Maria in this regard. Although both are young girls, I am satisfied that their evidence were given correctly and honestly. They both corroborated each other. It also appears that neither accused denied that they took the two girls along with them after the traumatic incidents on the farm Wag-'n-Bietjie. Accused no. 1, however, during cross-examination, attempted to persuade Theresia that he was in fact protecting them from accused no. 2 who wanted to kill them, and that he took them along in order to give them the opportunity later to escape. Both Martha and Theresia denied this. According to their evidence they were taken along and succeeded to escape on their own when they went to relieve themselves at a time while accused no. 1 was still sleeping early in the morning. Theresia said that the accused said that they were taking them along to Ovamboland. There is no reason, and the accused failed to provide any reason, why they had to take these two girls along. They were prepared to leave Maria behind. The only possible reason was that the accused wanted to remove any witnesses against them and probably did not regard Maria with her disability to speak as a threat in this regard. The offence of kidnapping is defined as:

"The unlawful and intentional depriving of a person of liberty of movement and or his custodians of control."

Milton - South African Criminal Law and Procedure, Vol 2, Common Law Crimes p. 509. There was no justification for taking these two girls along. They knew that the accused or at least accused no. 2 was armed with a gun which he showed

to them earlier the previous evening and Theresia knew that accused no. 1 had a knife and at that stage they were aware of the vicious attacks on their parents; the killing of their brothers and sister, the rapes of both of them and that these two accused were capable of anything. By taking them along against their will, they were deprived of their liberty and were taken into the unknown. I am satisfied that the State has proved all the elements of this offence in respect of both accused and both accused must be convicted of the offence of kidnapping with regard to Theresia and Martha Aoses.

In the result the accused are convicted as follows:

"Accused no. 1 is convicted on charges 1, namely robbery; 2, namely housebreaking with the intent to steal and theft of a Nissan pick-up; charge 27, rape of Theresia Aoses; and charges 29 and 30 for kidnapping of Theresia Aoses and Martha Aoses. He is acquitted on charges 21-25 and 26."

"Accused no. 2 is convicted on charges 1, namely robbery; 2, namely housebreaking with the intent to steal and theft of a Nissan pick-up; 21, attempted murder on Isak Aoseb; 22, attempted murder on Franciska Aoses; 23, murder of Petrus Ase; 24, murder of Frans Ase; 25, murder of Evelina Ase; 26, rape of Maria Aoses; 29, kidnapping of Theresia Aoses; and 30, kidnapping of Martha Aoses. He is acquitted on charge 27."

For the sake of completeness I repeat the convictions of the 2 accused after they have pleaded:

"Accused no. 1 had also been convicted on charge

17, escape form lawful custody, charge 19 housebreaking with the intent to steal and theft at the Nomtsaub Peoples Club, charge 20 theft of a radio and charge 31 theft of one pair of trousers."

"Accused no. 2 had also been convicted earlier on charge 18, escape from lawful custody, charge 19, housebreaking with the intent to steal and theft at the Nomtsaub Peoples Club, and charge 28 theft of 3 chickens."

A handwritten signature in black ink, consisting of several vertical strokes followed by a few horizontal and diagonal strokes, positioned above a horizontal line.

**MULLER, A. J.**

**COUNSEL FOR THE STATE:**

**ADV. F.P. VAN WYK**

**COUNSEL FOR THE DEFENCE:**

**BOTH ACCUSED IN PERSON**