



**CASE NO.: CC**

**46/2007**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**THE STATE**

**versus**

**RICHARD THOMSON**

**ACCUSED NO.**

**1**

**IMMANUEL KATJIRE**

**ACCUSED NO.**

**2**

**CORAM: SIBOLEKA, J**

**Heard on: 2010 July 1, 2, 5, 6, 12, 13, 14, 15, 16, 21**

**Delivered on: 2010 September 29**

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**JUDGMENT:****SIBOLEKA, J**

[1] The two accused have pleaded not guilty to two counts of the indictment namely:

Count 1: Murder

In that between 4 July 2005 and 6 July 2005 and at or near Walvis Bay in the district of Walvis Bay the accused did unlawfully and intentionally kill Albert Petrus Rigaardt, an adult male person.

Count 2: Robbery with aggravating circumstances as defined in section 1 of Act 51/77. In that between 4 July 2005 and 6 July 2005 and at or near Walvis Bay in the district of Walvis Bay, the accused did unlawfully and with intention of forcing him into submission assault Albert Petrus Rigaardt by hitting him with a hammer and or a chair and or fists and or other unknown objects and or stabbing him with a knife and by tying him up with electric cables and with intent to steal, take from him an Isuzu pick up motor vehicle with registration number N903WB, the property of or in the lawful possession of the said Albert Petrus Rigaardt.

And that aggravating circumstances as defined in section 1 of Act 51/77 are present in that the accused and or an accomplice was/were before, during or after the commission of the crime wielding a

dangerous weapon namely a hammer and or knife and or a chair and inflicting grievous bodily harm to the said Albert Petrus Rigaardt.

[2] The summary of material facts in the State's case is that during the period 4 July 2005 and 6 July 2005, the deceased, an 81 year old man granted the accused access into his residence situated at number 117 Peter Muesihange Street in Walvis Bay. Inside the deceased's residence the accused assaulted him by hitting him with a hammer and or chair and or other unknown objects and or stabbed him with a knife and they tied him with electrical cables. The deceased died on the scene due to head injury caused by a skull fracture due to the assaults. The accused stole the deceased's Isuzu motor vehicle with registration number N903WB.

[3] The State alleges that in acting in this manner the accused persons acted in common purpose at all material times. That the two accused were present together at the scene of crime where the assaults were perpetrated on the deceased, and that each had the intention or foresaw the possibility of the deceased being killed.

[4] Mr. Neves for accused no. 1 confirmed the pleas of not guilty as in accordance with instructions. According to him the instructions for the plea of not guilty by accused no. 1 are that he did not assault, nor

did he murder the deceased, and alternatively he did not use any of the instruments as claimed in count no. 2 by the State, he also did not steal the Isuzu bakkie.

[5] Mr. Mbaeva also confirmed the plea of not guilty for accused no. 2, and did not offer any plea explanation. With the consent of both defence counsel Mr. Konga, for the State handed up the following documents: pre-trial memorandum, exhibit A1, Accused 1 - 2's replies thereto A2 - A3; copy of accused no.1's firearm license exhibit B, a copy of deceased's drivers license exhibit C, registration disc of the deceased's red in colour Nissan Isuzu bakkie, N903WB exhibit D, bail proceedings in the District Magistrates Court exhibit E, psychiatric report for accused no. 1 exhibit F; Statement by Jan Hendrik Richard who identified the body of the deceased (Albert Petrus Rigaardt) to Sergeant Paulus Hausiku Muronga, affidavit by Dr. Lydia Monye declaring that the body of the deceased was identified to her by Sergeant Paulus Hausiku Muronga, the report on a medico - legal post mortem examination of the body of the deceased by Dr. Lydia Monye whose chief post mortem findings are scalp laceration with skull fracture and depression injury of brain, rectangular appearance wound on right cheek, generalized haematoma of right arm with multiple laceration wounds on forearm, haematoma of left forearm, dislocation of right shoulder joint, ligature markings on right shoulder, chest and

eyes, haematoma of chest wall and rib fractures hepatic lacerations with sub-hepatic haematoma - exhibit G, photo and sketch plan exhibit H, photo plan and the notes of pointing out exhibit J, photo plan and pointing out of the scenes by the two accused conducted by Chief Inspector Van Zyl and Inspector James Cowen exhibit K, document titled confession exhibit L, handwritten record (not certified) record of section 119 plea proceedings exhibit M, copy of accused no. 1's health passport exhibit N, accused no. 2's police statement under oath in respect of an alleged assault on him, Windhoek CR 1011/01/2009 exhibit O.

[6] I will now look at the evidence of the State:

[7] Emily Lukas is the wife of Elvis Katjivena. She testified that she knew accused no. 1 from Outjo before the two accused came and found her at her husband's homestead on the farm in 2005. It was on a Sunday at 10h00 in the morning when she heard the sound of an approaching vehicle. At the time it was only herself and her small baby, her husband was in the field on the farm. She came out of the house and saw accused no. 1 and 2 already outside a red Isuzu pick up bakkie. Accused no. 2 was unknown to her at the time. She did not see the driver. Accused no. 1 told her they had a hangover 'babalaas' and asked for meat or 'amaere' to eat. She prepared porridge and gave it

to them with sour milk. They told her they wanted to rest, and she gave them a mattress and they lay down in the veranda. At around 15h00 her husband arrived, and he talked to them. Later the two accused gave her husband a lift to Outjo to buy sugar and maize meal.

[8] Elvis Katjivena is the husband of Emily Lukas. He testified that he resides at his farm in Outjo. According to him, a year and a half back, his cousin and accused no. 1 came from Walvis Bay to his farm for a day. At that time his cousin had a goat on his farm, and it was then that he came to know accused no. 1. In 2005 (he is not sure of the month) when he came back to his homestead from a cattle post on the farm, he found accused no. 1 and 2 already there. He saw a red Isuzu pick up bakkie and the accused told him they came from Walvis Bay. Accused no. 1 told him it was his car that he wanted to sell it to him. Accused no. 2 did not take part in the discussion for the selling of the car. However these talks did not even come to the price of the bakkie, because Elvis Katjivena observed that it was an old bakkie in which he was not interested. Accused no. 1 and 2 were proceeding to Outjo, therefore no. 1 requested if he could leave his car (the red Isuzu pick up) in the witness's garage but the latter refused. This witness gave the two accused 20 litres of diesel and asked to go with them to Outjo to buy sugar and porridge. The two accused gave him a lift to Outjo, and accused no. 1 was the driver. The Isuzu bakkie broke on the

road. Accused no. 1 left this witness and accused no. 2 there where the car broke and went to Outjo to get towing assistance. The two men spent a night in the Isuzu bakkie. Accused no. 1 came back the following morning with Amporo who towed the bakkie to Usako's residence in Outjo. There it was placed in the garage, and this witness left the two accused there.

During cross-examination by Mr. Neves, accused no. 1's counsel, this witness confirmed that accused no. 1 told him that the red Isuzu pick up bakkie which he brought along from Walvis Bay was his.

[9] Eliakim Elvis Amporo testified that he resides at Outjo and that he knows accused no. 1. They are distant family. On the 4<sup>th</sup> of July 2005 at 07h00 early in the morning while preparing to take his girlfriend to work, accused no. 1 came at his home. He told this witness that his car broke 20 kilometres from Outjo to Khorixas and asked this witness to help tow it for him. This witness agreed, he first dropped his girl friend at work. Thereafter accused no. 1 directed him to where his car broke down. At the scene this witness found a red Isuzu pick up bakkie with two men, Katjivena and another unknown man whom the witness identified in Court as accused no. 2. This witness towed the car to Outjo, and he took it to Isako's house on the request of accused no. 1. The witness left, leaving the three men at

Usako's house. During the towing of the Isuzu bakkie, this witness drove his 4 x 4 Toyota Hilux with Katjivena and accused no. 2, accused no. 1 was at the wheel of the towed Isuzu bakkie, and was alone in that vehicle.

[10] Graham Knowles was a Warrant Officer stationed at Walvis Bay. He knew the deceased from seeing. He testified that on the 6<sup>th</sup> of July 2005 he was on duty as a patrol van driver. On that same day at 15h45 he received a radio call from the charge office about an alleged assault at house no. 117, Peter Mushihange Street, Walvis Bay. He drove there and found the house door slightly open. A certain Hendricks who used to visit the deceased was at the scene. This witness entered the house and observed the following on the deceased: he had a wound on his head, and blood all over his body as well as on the floor and in the corridor. He tried to lift the hand of the deceased but he realized that he was already dead. This witness made further general observations as follows: blood stains on the outside of the door, on the furniture, on the floor of the kitchen on the bathroom floor and walls, a hammer in the kitchen which was covered with blood, a cut cable covered with blood. Constable Haidula, the Scene of Crime Officer and other police officers also came at the scene. The witness collected Sergeant Muronga of the Police Mortuary, and after photos of the scene were taken, he assisted Sergeant Muronga to cover the body



of the deceased with a blanket and put it on the stretcher, loaded it on the back of the police vehicle, and transported the body from scene to the police mortuary, where it was placed in the mortuary fridge. This witness further confirmed that during the transportation of the body of the deceased from the scene to the police mortuary it did not sustain injuries.

During cross-examination by Mr. Neves, accused no. 1's counsel, it surfaced that the scene of crime appeared to the mind of this witness as if persons were engaged in a violent fight with the deceased. He testified further that it was strange to him to find a hammer lying in the kitchen covered with blood. He does not know whether it belonged to the deceased or was brought in by somebody else.

During cross-examination by Mr. Mbaeva, counsel for accused no. 2, this witness revealed that a cut cable he found at the scene of crime could have been used to tie the deceased, because it was full of blood. Apart from the hammer and the knife he saw in the kitchen, there was also a cable tied to the taps. There was also some water on the kitchen floor, but could not say with certainty where it came from. The witness also found a piece of cloth used to wipe blood. In all, this witness confirmed that all the blood he saw on the scene came from the deceased.

I am persuaded by Mr. Neves's view that if counsel 'puts' a certain question to a witness by way of saying - 'I put it to you ...' then what follows must be as a result of instructions from his client. In this instance I can safely suggest that Mr. Mbaeva received instructions from accused no. 2 to the effect that blood splashes that were visible inside the house of deceased "could have been from the deceased as he was struggling with his life".

Mr. Mbaeva further put the following question to this witness:

"What will be your reaction if I put it to you, that that blood that you could have seen all over the place, could have been from the deceased as he was struggling with his life, what will be your reaction - My Lord, can you just come again, you said the blood from the deceased?"

Counsel for the State, Mr. Konga objected to the above question saying it was not proper. However Mr. Neves for accused no. 1 said:

"...I think it is a valid question. Because my learned friend says I put it to you then it must most probably come as an instruction from his client, ...because if my learned friend said, I put it to you, it can only come as instructions from his client, which of course have certain repercussions ..."

[11] Roger Jack Hays testified that at the time of the incident he was a Detective Warrant Officer in Walvis Bay. He worked in the police force for 19 years and was the investigation officer in this matter. On the 6<sup>th</sup> of July 2005 Sergeant Knowles alerted him about a murder incident at 117 Peter Mueshichange Street, Walvis Bay. When he arrived there, there was no forced entry observed. He found the body of the deceased in a half crouched position on his knees leaning towards the cupboard. The body of the deceased was covered in blood with a severe open wound at the back of his head, and the deceased was already dead. The witness's conclusion was based on the fact that the deceased's body was stiff and cold.

The house was in disorder and there was a lot of blood stains visible. Lights were burning where the deceased was found. Inside the bedroom he found a cable with a plug which was cut. In the bathroom he saw a non foldable kitchen knife covered in blood. In the kitchen was a vacuum cleaner whose cable was cut, and tied at the sink basin taps, part of which was hanging. According to this witness the deceased may have been tied up there at some stage from what he could observe. On the cupboard he observed a hammer covered in blood. He found no vehicle in the garage. According to him there was

blood on the walls, in the passage, deceased's bedroom, on the corners and on every part when one exited the bedroom.

There was also blood inside the kitchen, on the floor, cupboard, certain wall areas, passage way from the main bedroom opposite the toilet and bathroom. This witness testified that in simple terms the place (scene of crime) was literally full of blood. On the kitchen table he found a lot of mail (post) belonging to the deceased. The registration document of his vehicle was found in the main bedroom. Suspecting that the vehicle which was nowhere to be found at the scene (in the garage) may have been stolen, he circulated its particulars as a stolen vehicle. This is the vehicle which the witness and other police officers later found in Outjo.

[12] Paulus Haidula testified that at the time of the incident he was a Detective Constable Scene of Crime Unit, serving as a Unit Commander for that section. He was then in the police force for seven to eight years. He took photos at the scene of crime, 117 Peter Mueshichange Street, Walvis Bay, on the 6<sup>th</sup> of July 2005. On the 14<sup>th</sup> of July 2005 he went to Etosha Port in Outjo, house no. 165 belonging to Immanuel Usako where a red Isuzu bakkie was hidden in the garage. The witness then drew up a photo and sketch plan. This witness said blood could be seen in the hammers darkish colour. He also referred to a cloth he

found on the floor and said it appeared to him as if somebody used it to wipe off blood.

[13] Theresia Fisch testified that she was the Station Commander in Outjo at the time. In July 2005 she received a report about a pick up bakkie at the late Usako's house in the location. She went there with other police officers and found an old red bakkie in the garage at Usako's house. She cannot remember the type or make of that vehicle. She took the vehicle to the Police Station. She later confirmed that the Police in Walvis Bay were looking for the said vehicle in connection with a murder case.

[14] Stefan Frank Hrywniak testified that he resided in Walvis Bay during the time of the incident, and he owned a pharmacy there. He only left Walvis Bay to settle in Windhoek in February 2009 where he started consultancy and professional work at different hospitals. He knows accused no. 1, as he employed him for four years as a general worker, doing cleaning, stock control and deliveries. Deliveries related to medicines ordered from his pharmacy by individuals or members of the public which had to be delivered to their homes. He does not know accused no. 2. This witness said he knew the deceased from the pharmacy where he came to buy medicines. However the deceased did not order medicine from his pharmacy during the time of the

incident.

[15] James Cowen was in inspector in the police stationed at Walvis Bay. He was asked by his Senior Detective Chief Inspector Philander to conduct a pointing out of the scene by accused no. 1, Richard Thomson. On Sunday morning he left his home in Swakopmund, went to the C I D Offices in Walvis Bay where Detective W/O Hays brought accused no. 1, Richard Thomson to him. The witness asked the accused what language he preferred to communicate with him and the accused chose English and Afrikaans. The accused preferred to speak on his own. The witness showed the accused his police appointment certificate. In addition to that the witness explained the following to the accused: that the accused was not compelled to be with him and to take him to point out any scenes; or any points at any scene; that the accused was not compelled to say out anything about the scene in that regard; that whatever the accused will say and point out at the scene will be written down, photographs will be taken, and all may be used in Court against him. The accused confirmed that he understood the above explanation. Accused no. 1 told the witness he has not been assaulted, threatened or influenced by any person to point out the scenes. He also said he had not yet pointed out the scene to another person. The witness did not ask accused no. 1 to remove his clothes to see whether he had injuries and the witness did not observe any on

him either. Accused no. 1 appeared to be very calm and willingly and did not have any injuries. The witness drove with accused no. 1 in the same vehicle driven by Constable Moller while the photographer, Constable Haidula travelled with another vehicle. From the Police Station accused no. 1 directed them to a specific house in Walvis Bay. They climbed off at that address which he pointed out, and they, the witness and the photographer followed as accused no. 1 lead the way into the house. Accused 1 told this witness and other police officers that the old man (referring to the deceased) opened the door for them (referring to himself as accused no. 1 and another person he did not mention). Inside the house accused no. 1 showed the witness the chair whereon he sat after being allowed into the house. Accused no. 1 asked some water from the old man (the deceased), it was given to him in a glass. Accused no. 1 then started to watch through one of the windows. According to accused no. 1 the guy who was with him never mentioned his name to him.

In the kitchen accused no. 1 showed the witness the small chair with which the man who was with him beat the deceased. In the kitchen area on the ground he told the witness that was where the old man was beaten with a hammer, but did not say who did it. Accused no. 1 also showed the witness the vacuum cleaner whose cable was cut and used to tie the old man. Accused no. 1 took the jug, lifted it up and

showed the witness how he poured water from it to clean blood from his shoes at the time he was with the other man in the old man's house.

Accused no. 1 further told this witness that he then went out of the kitchen and got lost in the house. When he later found the door he went outside and the door locked itself from behind him on its inside and they drove off in the deceased's bakkie.

It is my considered view that the above pointing out of the scenes and or points that accused no. 1 has showed this witness accurately described the various objects which were used to assault the deceased, as well as the bleeding that ensued thereafter. This description is not an afterthought, but that of a person who was at the scene during the assault and who was present from the beginning to the end. These objects were photos taken at the same time and are reflected on the photos compiled into a photo plan that formed part of the Court's record of proceedings.

The fact that accused no. 1 had to watch through the window clearly shows a guilty mind. It clearly shows a careful mindset to be on the lookout for possible passerbyes in order to avoid detection. Lastly the fact that after the assault, accused no. 1 drove off with accused no. 2



in the deceased' bakkie is testimony of the purpose of the assault, being to incapacitate (physically neutralize) the deceased so that they can take away his bakkie and sell it. At the scene of the pointing out, were accused no. 1, this witness and the photographer (the scene of crime officer). According to this witness accused no. 1 was very calm and very relaxed and that he freely and voluntarily did the pointing out and I am fully agreeable with this situation.

According to this witness, accused no. 1 Richard Thomson, took him to 117 Mueshihenge Street Walvis Bay, that was how he came to know that place.

[16] Isak Hermias Van Zyl is a Chief Inspector in the Police serving as a Unit Commander of Wanaheda Crime Investigation Unit. This witness testified that he did not know accused no. 2 before.

On the 15<sup>th</sup> of July 2005 Chief Inspector Philander requested this witness to go and conduct a pointing out of a scene at Walvis Bay, and that is where this witness met accused no. 2 for the first time. He testified that by the 17<sup>th</sup> of July 2005 he drove from Wanaheda Police Station in Windhoek to Walvis Bay. On the 18<sup>th</sup> of July 2005 he reported at Walvis Bay Police Station where he met accused no. 2 in private office no. 200 at 09h00. Accused no. 2 was brought to him by Warrant Officer Hays. Accused no. 2 chose to speak and to do the pointing out

in Afrikaans. There were only two in the office, and this witness started off by showing accused no. 2 his police appointment certificate. The witness further told accused no. 2 he was a justice of the peace, an officer in the Namibian Police, and that he (accused no. 2) was not compelled to point out any scene and or points of the scene or say anything about such scene. This witness further testified that he informed accused no. 2 that any pointing out of the scene and what he may say to him in that regard will be written down and photos taken of it, and these may later be used as evidence against him in a subsequent trial. Accused no. 2 was further informed of his right of legal representation and that if he was unable to privately afford it, he may apply for a state funded attorney (particulars of which were provided to accused no. 2). Accused no. 2 opted to apply for Legal Aid after the point out of the scene. He indicated his willingness to proceed with the pointing out of the scene and that his source of knowledge concerning that which he wished to point out was a certain Richard Thomson (accused no. 1) who took him to the place (the scene). Accused no. 2 told this witness he had not done the similar pointing out of the scene to someone else before. According to this witness accused no. 2 was not assaulted, threatened or influenced by any person to point out the scene. Accused no. 2 was also invited to show this witness any injuries or bruises he may have on him but there was nothing, and the witness did not see any either. The witness

testified that they then departed from Walvis Bay Police Station to the scene. The witness was the driver, accused no. 2 sat in front with him, and Constable Kamwi, the photographer, sat behind. He testified that as a resident of Windhoek he was not familiar with the street names of Walvis Bay. Accused no. 2 directed the way until he was told to stop at house no. 117 Peter Mueshihange Street. According to this witness, accused no. 2 told him that when he and another came in through the large gate into the front door of the house, he, (accused no. 2) knocked. The old man (referring to the deceased), came out and accused no. 1 asked him if he was selling his car. The old man said it was his only car and was therefore not selling it. The deceased went back into the house and before he returned accused no. 2's friend asked for water. When the deceased went into the house to fetch water accused no. 2's friend followed him and accused no. 2 remained behind. Accused no. 2's friend went in the direction of the kitchen following the deceased. At that point accused no. 2 went into the house as well and asked to use the toilet and the deceased allowed him to do so. According to this witness while accused no. 2 was in the toilet his friend started scuffling and he heard "... taka, taka, as they were fighting."

From the pointing out of a scene by accused no. 2 it is very clear that when the two accused entered the deceased's house they were

already informed by the latter that he was not selling his car because it was the only one he had, there was not much time lapse, before the attack started.

All this was told to the witness by accused no. 2 while they stood in front of the deceased's house. This witness then asked accused no. 2 whether he still wanted to go into the house and show him the scenes inside, and he agreed. At that time, the scene (deceased's house 117 Peter Mueshihange Street, Walvis Bay) was already locked and placed under police protection. This witness asked the key to the scene (house) from one of the police guards and they opened it. Inside the house the witness testified how accused no. 2 showed him various places, walls, floor covered in blood, and the hammer which according to accused no. 2 Richard Thomson (accused no. 1) used as well as the spot where the deceased was lying with blood still visible. According to this witness accused 2 told him he accused no. 2 took the hammer, but Richard Thomson grabbed it from him. From here accused no. 2 inexplicably started walking out and in the house several times while doing these several ins and outs he explained what he heard in the following terms "... then I heard bang, bang, then I came again." Although the sound was not explained, I take it to be the blows of the assault as they landed on the deceased.

It is interesting to note that during the pointing out of the scene accused no. 2 did not explain to this witness the purpose of his (accused no. 2's) walking in and out of the deceased's house. He only said he did these walkings in and out at the time when his friend was busy fighting with the deceased. It is my considered view that accused no. 1 conducted himself like that in order to be on the look out for any movements of people outside who could have been alerted by their presence there as well as what was happening inside the house. Looking at the evidence of the pointing out of the scene in regard to accused no. 2, it is very clear as this witness puts it, that according to him (accused no. 1), he was sometimes in and out of the house.

This witness testified further that accused no. 2 told him that when the accused no. 1 came in at some stage he asked his friend "... how is it ...(what is it, I have already fastened him (tied him up))." Accused no. 2 asked Richard Thomson whether he had a driver's licence to which he answered that he did as he always carried it in his purse. They took the deceased's bakkie and they went through the farms and filled up at Swakopmund and in Usakos. The deceased's hands were tied up (fastened) while in a standing position. This, it is my opinion was aimed at demobilizing the deceased from seeking any kind of help, as well as alerting the police or his neighbors. Just as it is the procedure in the pointing out of a scene, photos were taken and a photo plan

compiled which was handed in as part of the recording of proceedings in this matter. This witness testified further that the photographer was a youngster that was the reason why on most of the photos accused no. 2 and the witness were not appearing as it should have been the case.

[17] Lawrence Lisulo Sinvula testified that at some stage when he took over the investigation of this case he looked and searched for some of the exhibits allegedly used at the scene. These were the hammer, and tape recordings used during the pointing out of the scene, but he could not find them.

[18] When the State closed its case, accused no. 1 testified and did not call witnesses to support him. Accused no. 2 opted to remain silent. He however called one witness, a police officer who testified on a case of assault by threat that has to do with accused no. 1 but not related to the charges he is facing on this matter.

[19] The two accused persons were effectively placed on the scene of crime at the deceased's residence, 117 Peter Mueshihange Street, Walvis Bay, by the two police officers who conducted the pointings out of the scenes and or points.

[20] From the above evidence the following important evidential material regarding what happened at the scene came out clearly and are as follows:

- That the two accused knew the deceased's residential address 117 Peter Mueshahange Street, Walvis Bay;
- That on the day of the incident the two accused came and found the deceased at his house and that the two were all present at the scene inside the house;
- The pointing out of the scene evidence does not clearly indicate what each accused did to the deceased. The evidence however, shows a planned and intended swift (quick) assault (attack) on the deceased, the taking away of his bakkie, and leaving the scene of crime as fast as possible without detection;
- The evidence shows an endeavor by each accused in shifting the blame of the actual assault (attack) on the other and adopting the role of an innocent observer;
- That both accused freely and voluntarily agreed to take the police officers to the scene for a pointing out of the scene and or points statements;
- That the assault on the deceased was heavy and severe, and was aimed at demobilizing him totally so that he was disabled to reach out to his neighbors for medical assistance or any form of help whatsoever;

- That one or both of the two accused assaulted (attacked) the deceased with the hammer, chair and later tied (fastened) both his hands with a cable;
- That it is unlikely that the attack on the deceased was perpetrated on him by only one accused up to the end, in the absence of the other;
- That the two accused were the only persons who were together with the deceased from the beginning of the assault on him to the end;
- That after the assault the deceased sustained injuries and was bleeding from these wounds;
- That after the assault on the deceased the two accused got hold of the keys of the deceased's bakkie, accused no. 1 who was then in possession of a driver's licence sat behind the steering wheel and they both drove off to Outjo through the farms.

[21] Richard Thomson (he is accused no. 1) in this matter. He testified that in July 2005 he resided at house no. H 3251 A in Kuisebmond, Walvis Bay. He worked at a pharmacy, assisting with medicine deliveries to clients at their private houses. These deliveries were mainly within Walvis Bay and its suburbs such as Meersig and some factories. According to him, he was arrested on the 14<sup>th</sup> of July 2005. He said this arrest was as a result of his friend (accused no. 2)



Immanuel Katjire's broken car which he left at his people's place. According to him accused no. 2 found him at a certain place with friends. He took him from there and told him to stop a taxi so that he could go to his girlfriend in Narraville. Accused no. 2 stopped the taxi and accused no. 1 climbed in front with the driver. Accused no. 2 sat on the rear seat. Before accused no. 1 climbed into this taxi he was drinking ginger beer. Accused no. 2 asked if he could buy him a beer. The two accused decided to buy a bottle of Autumn Harvest, because according to them ginger beer was very weak.

Accused no. 1 had N\$500,00 on him, he took out N\$50,00 and gave it to accused no. 2 to buy that beer and a litre of cooldrink. They started drinking and accused no. 2 asked accused no. 1 why he had such a lot of money. During the pointing out of the scene accused no. 1 told the police officer , Detective Inspector James Cowen, that accused no. 2 did not tell him who he was when they met that evening. I find this to mean they were strangers to each other that evening. However, it is interesting to note the swift bond of friendship resulting in a sudden consensus over a stronger beer between the two accused when they met that evening. They quickly opted to go for Autumn Harvest which according to them was stronger than the ginger beer which they both appeared to disqualify as very weak. The reason to go for a much stronger beer has not been explained. I can safely say it was meant to

arm themselves for the task that lie ahead as they were about and preparing to go and visit the deceased's house shortly. Although a bottle of beer is generally known to create friendship very quickly between beer lovers, I am reluctant to accept that accused no. 1 met accused no. 2 for the first time that evening. This is so because in addition to quickly agreeing to go for a stronger beer, I find it strange for accused no. 2 to ask where accused no. 1 got such a lot of money if they did not know each other before. The question regarding having a lot of money shows that when accused no. 1 gave accused no. 2 N\$50,00 to buy Autumn Harvest and a litre of cooldrink he did it in such a way that accused no. 2 could see there was still much more left. Given the level of crime in this country and in particular theft and robbery, one would not easily risk his life by exposing the money he has on him for a stranger to see. To make matters worse it was in the evening (at night). It is my considered view that this conduct is a normal occurrence among people who know each other very well. This has been confirmed by accused no. 1 himself who said at the beginning of his testimony that his arrest came as a result of a friend's broken car which he left at his people's place.

When they finished drinking accused no. 1 went to the neighbors to look for somebody who owed him N\$100,00 for meat. He wanted to add this money to what he had in order to go to and withdraw his case in Outjo. He did not find this person and as he walked out of the yard,

he met accused no. 2 who then started to follow him. Accused no. 1 asked accused no. 2 what he wanted. Accused no. 2 said he wanted him to buy more beers but the latter refused and instead told him to stop a taxi, because he wanted to go and sleep at his girlfriend's house, which accused no. 2 did.

Accused no. 1 climbed in front with the driver and accused no. 2 sat on the rear seat. It is not clear who asked where the taxi was going. The taxi drove up to a filling station in Kuisebmond where they had to wait lots of other cars to fill up. In the meantime accused no. 1 fell asleep but the taxi driver woke him up. They filled the taxi with petrol, and drove in the direction of Narraville. At the main road's robots accused no. 2 stopped the taxi driver and asked him to go to town. A quarrel between the two accused ensued whereby the taxi driver asked accused no. 1 where he was going and he said Narraville.

According to accused no. 1's evidence accused no. 2 asked him that they should go together to his friend's house in town and he agreed, (my own underlining). From there accused no. 2 started directing the taxi driver until they reached the deceased's house. Accused no. 2 was the first to climb out of the taxi and he requested accused no. 1 to do the same, but the latter did not want to do so. According to accused no. 1, accused no. 2 forced him to climb out of the taxi. The

words accused no. 1 used to describe how he was forced are: "... but he forced me that just get off." Hereafter, and surprisingly indeed accused no. 1 paid the taxi fees and it drove away. I am reluctant to accept that accused no. 2 forced accused no. 1 to climb out of the taxi at the deceased's house, because both had in fact agreed to come to that place. My reluctance to accept that is further strengthened by the fact that it was accused no. 1 who in fact paid the taxi fees for bringing them to the deceased's house.

Both accused went into the yard of the deceased's house and accused no. 2 went up to the front door of the house. Accused no. 1 followed but stood a bit far. Accused no. 2 knocked at the door, but no answer could be heard. Accused no. 2 touched the door handle to see whether it was locked but accused no. 1 did not indicate in his evidence whether after accused no. 2 had touched the door handle, he found it to be locked or only closed. I will assume it was locked because from there accused no. 2 went around the house and stayed there for some time. Accused no. 1 remained standing in front of the deceased's house where there was a big glass which he described to be that of the living room. As accused no. 1 stood there he saw the deceased person through that window and he started calling for accused no. 2. Accused no. 2 came to the front and accused no. 1 said to him the deceased may have woken up because he saw him through the window. When

accused no. 2 came to the big window, they saw each other with the deceased and accused no. 1 could see that they recognized each other. The deceased opened the door and accused no. 2 moved forward to the door and they shook hands and greeted each other. Accused no. 2 called accused no. 1 and introduced him to the deceased as a friend from Windhoek. Accused no. 1 asked for water from the deceased and when deceased went back into the house to fetch water, accused no. 2 followed him and he told accused no. 1 the deceased was his friend he must also come in. Accused no. 2 went into the living room, and sat on the sofa, while accused no. 1 still stood outside the door where he received his water. Accused no. 1 also went in and sat on the sofa. Accused no. 2 and the deceased were talking, they were in a conversation. Accused no. 1 asked the deceased for another glass of water, and was told to go and fetch the water at the tap. He was directed where to get the water tap. Accused no. 1 drank the water and went to sit. Accused no. 2 asked for a toilet, he went and stayed there for a long time. Accused no. 1 felt sleepy and his eyes were closing as he sat very comfortably on the sofa. When he fell asleep the deceased woke him up. After a short time the deceased asked him the whereabouts of accused no. 2 and why he was taking so long in the toilet. The deceased stood up and went to go and call accused no. 2 so that the two accused could leave his house and go to their homes. After 2 to 4 minutes the deceased was still gone and accused no. 1

again fell asleep only to wake up and hear "... a sound, a sound" of things that are being dragged on the floor. "Accused no. 2 started calling him by his name 'Richard'." Accused no. 1 stood up, stretched himself and looked through the window and saw people in the other yard. Why? Instead of going to see why accused no. 2 was calling him, accused no. 1 went out through the exit door in which he had come in. He could clearly hear sounds in the direction he was called from. When he came inside the house again he went through the passage to the kitchen. There he saw accused no. 2 and the deceased holding each other.

If accused no. 1's contention that he was forced by accused no. 2 to climb out of the taxi and enter the deceased's house is anything to go by, why did he exit and again come back into the house. Instead of using that opportunity to go to his girlfriend's house and sleep as he stated earlier on, accused no. 1 elected to stay put in the deceased's house until latter when the attack on the deceased was completed and they took the vehicle and drove away.

Accused no. 1 testified that when he came where the deceased and accused no. 2 were holding each other, he found water on the floor and the two were quarrelling, but did not say what it was all about. He shouted to accused no. 2 to leave the deceased and asked what was

going on. Accused no. 2 had a hammer in his hands. According to accused no. 1 when he came there and found accused no. 2 holding a hammer the deceased had already been hit and was bleeding. The deceased's blood was dropping on the floor, mixing with water. He came and grabbed the hammer from accused no. 2 and told him to leave out the deceased. Accused no. 1 put the hammer on the table in the kitchen, while accused no. 2 started asking for the keys of the deceased's bakkie.

According to accused no. 1, accused no. 2 was asking, trying to ask the keys and accused no. 1 asked him what he wanted. Accused no. 1 put it as follows in his evidence: "I asked him what do you want. He said the person is having the keys of his vehicle. He does not want to give me the keys."

In my opinion accused no. 1 had been appropriately answered. At least at this stage one would expect accused no. 1 to be very clear and without doubt in his mind that the purpose of their visit to the deceased's house was to take his vehicle by force. Throughout his evidence accused no. 1 pretends not to know why they went there and what accused no. 2 wanted from the deceased. At this point, and according to his own testimony accused no. 2 had told him he wanted the deceased's vehicle. The car keys were sought when the deceased

was already badly injured from the assault in his own house.

Common purpose clearly comes to surface here. According to accused no. 1's own evidence in chief, the deceased had already told them at the door of his house before they walked in, that he was not selling his vehicle, because it is the only one he has. However, the two accused still walked inside the house and when they were inside an attack ensued resulting in severe injuries, he was tied up with electric cables, and the two drove away in his vehicle.

While accused no. 1 pretends not to have known the reason of their visit at the deceased's house, that reason had been clearly disclosed to him. Accused no. 1 testified that he found accused no. 2 holding a hammer in his hand and the deceased was at that stage already injured and bleeding. While the deceased was in such a state, accused no. 2 was demanding the keys of the bakkie from him. At this point accused no. 1 advised accused no. 2 "... to ask the keys from the deceased in a good manner." How on earth does that come into the picture when the deceased was already injured and bleeding from the assault. This conduct squarely complies with all the elements of the crime of robbery. The two accused acted in common purpose to get what they wanted. This is confirmed by the fact that after the assault the deceased was later found dead while the two accused had driven



away in his bakkie and even offered it for sale.

It is my considered view that the reason the two accused decided to come to the deceased's house and in particular when they entered his house after already being told at the door that he did not want to sell his car, clearly shows that the two had planned the attack on him that evening.

Even after accused no. 1 had advised accused no. 2 to ask for the keys in a good manner, the deceased did not hand them over. Hereafter, according to accused no. 1, accused no. 2 grabbed a chair and hit the deceased. Accused no. 1 asked accused no. 2 not to hit the deceased, but rather tie him up if he wants the keys of the car, which accused no. 2 eventually did. This clearly shows how the two accused helped each other in incapacitating the deceased in order to take away his vehicle. Accused no. 1 took some water in a jug and poured it on his shoes to wash away blood. He stated further: "... he step in this bloody water ... so this water was on my shoes. I took it that the blood of human kind is a bad thing. I have to take it off. It will involve me in hitting this person." Accused no. 1 testified that he went and waited on the pavement outside the deceased's house. While so waiting he noticed accused no. 2 reversing the deceased's vehicle, a red Isuzu bakkie, out of the garage up to the pavement. Accused no. 2 called him and he

wanted to steal a TV, but was told not to do so. Accused no. 2 climbed out of the bakkie and walked back to the deceased's house, but the door had already locked itself. Accused no. 1 waited for accused no. 2 so that they could drive away. Accused no. 2 drove the vehicle and accused no. 1 sat in the passenger's seat. At the high way to Swakopmund accused no. 1 asked accused no. 2 where they were going, and was told they were testing the vehicle, because he bought it from the deceased the time he worked for him. Accused no. 1 does not say in his evidence whether he accepted the above or not.

According to accused no. 1, accused no. 2 further told him, he would later take him to his girlfriend's house in Narraville. However, this did not happen, and accused no. 1 never bothered to query about it. When they came at the traffic area some of the vehicle's wheels drove on the ground. He asked accused no. 2 whether he can drive. This was confirmed, and said he was under intoxication. Accused no. 1 drove to Swakopmund where he filled up. They decided to drive to Outjo where accused no. 1 had a case the following Monday. Meanwhile, they had already checked and found the vehicle's tyres, water and oil to be in order. Accused no. 2 told accused no. 1 he wants to sell the vehicle for N\$10,000,00. Accused no. 1 replied that he has a brother who was interested in a diesel bakkie. They filled up in Usakos. From there accused no. 1 drove slowly when the vehicle's temperature

was going up. They came up to Elvis Katjivena, accused no. 1's brother. They found his wife and accused no. 1 introduced accused no. 2 to her as his friend. They asked for something to eat and accused no. 1 complained of a hangover from the previous day's drinking. He got sour milk to drink, and in the mean time Elvis Katjivena arrived. Accused no. 1 introduced accused no. 2 to him, and they were together there. They were given some tea. Elvis Katjivena called accused no. 1 aside and asked him about the owner of the vehicle, to which he replied it belonged to accused no. 2. He said that was the truth and that he (accused no. 2) was selling it. It is interesting to note why accused no. 1 told Katjivena the vehicle belonged to accused no. 2 when he knew they robbed it from the deceased after an attack on him. Katjivena helped them with a 20 litre of diesel and he rode with them to Outjo to buy groceries. When they reached the tarred road the car broke and accused no. 1 hiked to Outjo to ask his cousin Erenst to come and tow them. Elvis Katjivena and accused no. 2 remained at the broken vehicle. Accused no. 1 came with his cousin the next morning who towed them up to his cousin's house Usako in Outjo. He told his cousin's family who were there that it was his friends (accused no. 2)'s car and they parked it in Usako's garage. Accused no. 2 told them he was going to Court at Outjo, thereafter he will return to Walvis Bay. He would however later return to come and work on the vehicle. Accused no. 2 got a bag and removed what accused no. 1 said were his

tools from the vehicle. These were a jack, pump, screw driver, cross-wheel-spanner and others. Accused no. 2 put these in a bag and took them along.

Accused no. 2 and Katjivena stood at the hiking point while accused no. 1 went to Court where his case was postponed to 8 September 2005. When accused no. 1 later joined them, he found that accused no. 2 had sold some of his tools and bought bread and a cooldrink.

Accused no. 2 asked accused no. 1 to look for customers so that he could sell the remaining tools. Indeed accused no. 1 looked around and later got a buyer who bought the pump for N\$50,00. They used this money, N\$20,00 each to pay for the bus fee to Otjiwarongo. From there they took another lift back to accused no 1's place in Walvis Bay where he later paid N\$120,00 for both of them. This was at accused no. 1's wife. He made tea for accused no. 2, and after drinking he left with his bag containing the remaining tools. The next day accused no. 1's cousin (Usako) in whose garage they left the vehicle, called accused no. 1 to go and get meat. Accused no. 1 was interested to go there and get the meat and also to hear the news from Usako about the vehicle he left in his garage. He looked around for accused no. 2, but he could not find him, so he left for Outjo. This time accused no. 1 found Immanuel Usako (his cousin), the owner of the place where they

left the vehicle. Seeing that they did not meet when they left the car at his place the last time, accused no. 1 told his cousin the car was for his friend accused no. 2 and it was broken. The two removed the tyre and braking springs which were broken, put some braking oil and put the tyre back. The battery was weak, however they plugged it to start. They reversed and again put it back, but he did not state who was behind the steering wheel. From the above I can safely state that the conduct of accused no. 1 is that of a person who had an interest in the car. That is why he made an effort to get in touch with accused no. 2 before going back to Outjo so that they could talk about it. Accused no. 1 hiked back to Walvis Bay and put his meat in the freezer. The next morning when his wife left for work police came at his premises and he was arrested. He took the police to accused no. 2's residence still in Walvis Bay.

On the 15<sup>th</sup> of July 2005 accused no. 1 was taken to a Magistrate where he made a statement regarding his involvement in this matter. According to him, he gave evidence to assist the Court to make a proper decision. Accused no. 1's evidence in chief, his version during the formal bail application, and the statement he made to the Magistrate are more or less the same.

[22] In respect of accused no. 1, I would briefly state the following:

- In terms of the pointing out of the scene and or points conducted by Inspector James Cowen, accused no. 1 placed himself on the scene of crime at 117, Peter Mueshihange Street, Walvis Bay;
- Already at the door of the deceased's house before they entered, the deceased told them he was not selling his car, because it was the only one he had;
- He stayed put in the deceased's house during the whole attack (assault) up to the end when the two drove away in the deceased's bakkie;
- He advised accused no. 2 to ask the keys of the vehicle from the deceased in a good manner despite the fact that at that stage the deceased was already badly injured and bleeding;
- He advised accused no. 2 not to hit the deceased further, but rather tie him up, which was done, (an incapacitation) that was obviously fatal looking at the condition he was already in;
- As the person with a drivers license, it was him that drove the deceased's bakkie further up to Elvis Katjivena's farm where it was offered for sale;
- He further drove the deceased's bakkie and hid it in Immanuel Usako's garage;
- He told Elvis Katjivena and Immanuel Usako the vehicle belonged to accused no. 2 when he knew very well that they took it from the deceased after a fatal attack on him and without his consent;

- He saw blood dropping from the deceased's wounds and mixing with water that was on the floor, but he nonetheless walked towards the window several times during the attack, most likely to see if there were people watching what was happening in the deceased's house;
- He washed blood from his shoes after the attack;
- He was aware that the attack on the deceased was fatal and that it was meant to enable them to take away his vehicle.

[23] According to the post mortem examination report, the causes of the deceased's death were multiple injuries, including head injury with a skull fracture.

[24] On the facts outlined above, I have no doubt in my view that the acts of accused no. 1 manifested an active association with those of accused no. 2. He shared a common purpose with accused no. 2 to attack (assault) the deceased. Consequently the acts of accused no. 2 are imputed on him.

[25] In this matter the precise manner in which and the precise means by which the deceased was killed is irrelevant to the achievement of the common purpose.

[26] In respect of accused no. 2, I briefly want to state the following:

- In terms of the pointing out of the scene and or points conducted by Chief Inspector Van Zyl, accused no. 2 placed himself on the scene of crime at 117 Peter Mueshahange Street, Walvis Bay;
- Already at the door before the two accused entered the deceased's house, accused no. 2 asked him whether he was selling his vehicle. The deceased said he was not because it was the only one he had;
- There is evidence that when the deceased followed to check him at the toilet where he stayed unreasonably long an attack broke out there;
- Accused no. 1 went and found the deceased with accused no. 2 in the kitchen, the latter holding a hammer in his hands. At this time the deceased had already been assaulted and was bleeding. Accused no. 1 saw blood dropping from the deceased's wounds mixing with water on the floor. Accused no. 1 testified further that he asked accused no. 2 not to hit the deceased, but rather tie him up;
- After accused no. 2 had assaulted the deceased, he demanded the keys of the vehicle, and when the deceased did not hand them over he was further hit with a chair;
- It is clear that the attack on the deceased was meant to enable the two accused to take away his vehicle without his consent;



- After the deceased was badly assaulted, accused no. 1 saw accused no. 2 reversing the deceased's vehicle, and eventually driving it out of the garage;
- Accused no. 2 drove the vehicle and later gave the key to the licensed no. 1 who drove it to Elvis Katjivena's farm where it was offered for sale;
- They latter drove to Outjo where they hid the deceased's vehicle in Immanuel Usako's garage. Accused no. 2 took out the tools from the vehicle and started selling them to buy bread and cooldrink;
- It is my considered view that accused no. 2's conduct of using a hammer and a chair to assault the deceased is causally connected to the latter's death;
- The report on a medico-legal post mortem examination shows that the causes of the deceased death were multiple injuries including head injury and skull fracture.

[27] In *S v Safatsa and Others* 1988(1) SA 868 at 896 H-J, Botha, JA, quoted with approval what Holmes, JA, stated in *S v Madlala* 1969(2) SA 637(A) regarding the legal position relating to common purpose:

“It is sometimes difficult to decide, when two accused are tried jointly on a charge of murder, whether the crime was committed by one or the other or both of them or by neither. Generally,

and leaving aside the position of an accessory after the fact, an accused may be convicted of murder if the killing was unlawful and there is proof:

- (a) That he individually killed the deceased, with the required *dolus* eg. by shooting him; or
- (b) That he was a party to a common purpose to murder, and one or both of them did the deed;
- (c) That he was a party to a common purpose to commit some other crime, and he foresaw the possibility of one or both of them causing the death to someone in the execution of the plan, yet he persisted, reckless of such fatal consequence and it occurred ...; or
- (d) That the accused must fall within (a) or (b) or (c) - it does not matter which, for in each event he would be guilty of murder."

[28] It is therefore my considered view that accused no. 1 falls within (b) and (c), while accused no. 2 also falls within (b) and (c).

[29] I accordingly find as follows:

Count 1: Murder

Accused no. 1: Guilty (*dolus eventualis*)

Accused no. 2: Guilty (common purpose)

Count 2: Robbery with aggravating circumstances

Accused no. 1: Guilty

Accused no. 2: Guilty

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**SIBOLEKA, J**

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