REPUBLIC OF NAMIBIA

CASE NO: CC 21/2006

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

And

STONEY RAYMOND NEIDEL	**FIRST ACCUSED**
SYLVESTER LAURENCE BEUKES	**SECOND ACCUSED**
GAVIN BEAUKES	**THIRD ACCUSED**
JUSTUS CHRISTIAAN ERASMUS	**FOURTH ACCUSED**

CORAM: **DAMASEB JP**

Heard on: 01/03 – 13/04/2007; 17/09 – 30/11/2007; 17/03 – 09/04/2008; 17/04/2008; 17/06 – 26/06/2008; 14 – 24/07/2008; 22 – 26/09/2008; 03 – 12/12/2008; 10 - 12/08/2009; 25 – 29/10/2010; 22 – 24/03/2011; 09 - 12/05/2011

Delivered on: 2011 JULY 27

JUDGEMENT

DAMASEB J.:

INTRODUCTION

The charges:

[1] On the 6th of March 2005 a gruesome crime took place at the farm Kareeboomvloer ('the farm'). Eight people were shot dead or burnt to death, execution style.

[2] The deceased are: the owners of the farm, Mr Justus Christian Erasmus and his wife Mrs Elizabeth Martha Cornelia Adriana Erasmus; Mr Sunnybooi Swartbooi; Ms Hilma Engelbrecht (an adult female); Mr Set Swartbooi (an adult male); Mr Deon Gertze (an adult male); Ms Regina Gertze (a minor female) and Ms Christina Engelbrecht (an adult female).

[3] The four Accused are charged jointly and face eight counts of murder; housebreaking with intent to rob and robbery with aggravating circumstances; theft; illegal possession of firearms without a licence; illegal possession of ammunition; and

defeating or obstructing or attempting to defeat or obstruct the course of justice.

[4] Accused No. 4 is the biological son of the late Mr and Mrs Erasmus. The State's case is that he procured Accused No. 2 to kill his parents as he stood to gain financially from their deaths.

[5] Central to the State's case is *common purpose* amongst the four Accused. Accused No. 2 and No. 3 are two brothers who, until their arrest on or about 6th of March 2007, lived together in Block E, Rehoboth. Accused No. 2 was formally employed at the farm but left employment there after a misunderstanding with the late Mr Erasmus who had laid charges of theft of livestock, a vehicle and petrol against him. The charges were pending at the time of the commission of the offences at the farm.

Summary of substantial facts[1]

[6] The State's *summary of substantial facts* is as follows:

[1]Section 144(3) of the Criminal Procedure Act 51 of 1977 ('the CPA').

‘During the year 2003 Accused No. 4 conspired with Accused No. 2 to murder Justice Christian Erasmus, Elizabeth Martha Cornelia Erasmus and Yolande Erasmus. JC Erasmus and ECM Erasmus were the parents of Accused No. 4, while Yolande Erasmus is his sister. Accused No. 4 undertook to supply Accused No. 2 with a firearm to commit the murders. During 2003 and 2004 this plan was not set in motion and Accused No. 4 did not hand a firearm to Accused No. 2. On March 4 2005 Accused No. 2 and No. 3 went to the farm. The Accused knew that the Erasmus couple did not reside on the farm permanently. They broke open a safe and removed two rifles and ammunition from the safe. During the period 4 March 2005 and March 5 2005 they apprehended and held tight the hands and/or feet of the Deceased mentioned in counts 4 to 8. After shooting them they poured a flammable substance on these bodies and/or the bedroom and set the bodies and/or the

bedroom in which these bodies were alight. The bodies of the Deceased in counts 4 to 8 were almost completely incinerated. On March 5 2005 Accused No. 2 and Accused No. 3 lured the Erasmus couple to the farm by ordering the Deceased in count 3 who was the foreman on this farm to contact the Erasmus couple in Windhoek and report an accident to them. During the afternoon of March 5 2005 the Erasmus couple arrived on the farm with their Hyundai Pick-Up motor vehicle. The Accused shot them and both died on the scene due to gun shot wounds. Accused No. 2 and Accused No. 3 ordered the Deceased in count 3 to assist them to load all the items listed in Annexure A to the Indictment on the Hyundai Pick-Up and the trailer. Accused No. 2 and No. 3 thereafter tied the Deceased in count 3 onto a chair and shot him with a firearm. This Deceased died on the scene due to this gunshot wound. During or after the commission of these crimes Accused No. 2 and No. 3 phoned Accused No. 1 on the cellular phone of

Accused No. 3 and the cellular telephone of the Deceased JC Erasmus. Accused No. 2 and No. 3 placed Accused No. 3's IMEI or SIM card in the cellular telephone of Deceased JC Erasmus. During the night of 5 March 2005 Accused No. 2 and No. 3 off loaded some of the stolen goods at the residence of Accused No 1. Thereafter Accused No. 1, Accused No. 2 and Accused No. 3 drove with the Hyundai Pick-Up and trailer to the farm Areb where they off loaded and concealed and/or hid the stolen goods including the five firearms listed in Annexure A to the Indictment. They then abandoned they Hyundai Pick-Up and trailer in the district of Windhoek. The Accused at all relevant times acted with a common purpose.

How were the crimes discovered?

[7] It is common cause that the late Mr and Mrs Erasmus drove out to the farm on 5 March 2005 as they received word from a worker at the farm that

an employee at the farm was not well. Accused No. 4 admits that he knew his parents had gone there as the mother had called him and invited him to come along but he declined as he wanted to watch a rugby match of his favourite *Bulls* rugby team on TV that day. It is Accused No. 4's version that when he was unable to make contact with his parents on the farm later that day, he decided to drive out to the farm alone, very late at night, and upon arrival found his parents dead in the farm house. After making this discovery Accused No. 4 rushed back to Rehoboth where he reported the matter to the police who then went to the scene of the crime.

[8] The police then went to the farm and found the Erasmus couple and Sunnybooi dead inside the farmhouse. They also found the charred remains of five others in the outside room. That room had been burnt.

[9] One of the police officers who came to the crime scene was Warrant Officer Max Kastor Joodt

who was the Station Commander of Kalkrand Police Station. He remembered that in September 2004 the late Mr Erasmus had laid a charge of stock theft, theft of a vehicle and theft of petrol against Accused No. 2 who then was arrested and detained. Joodt remembered too that it while thus detained that Accused No. 2 said that '*die Boer sal sien*'. That was in Afrikaans. Translated into English it means 'the Boer will see'. Warrant Officer Joodt shared that information with his colleagues and was able to find a photo of Accused No. 2 which was taken at the time of his arrest in September 2004. That led the police to rush to the home of Accused No. 2 and No. 3 in Rehoboth where they were arrested in connection with the crimes committed at the farm.

[10] One of the first people to arrive on the scene of the crime (Kareeboomvloer) was Warrant Officer Johannes Jacobus Le Roux. He, with others, found the lifeless bodies of Mr and Mrs Erasmus inside and that of Sunnybooi Swartbooi sitting in the sitting room. Thereafter they

found the charred remains of five people in the outside room. He transported the burnt corpses and that of Mrs Erasmus to the police mortuary, while Constable Maharero transported the other two, Mr Erasmus and Sunnybooi Swartbooi.

[11] Le Roux also recovered from the scene of the crime several items of evidence. He marked them and placed them in separate containers and transported them to Mariental. On 15th March he took them to Windhoek where they were handed over to the National Forensic Institute (NFSI).

[12] At the address where the two Beukes brothers lived and were arrested on 6 March 2005, the police recovered items which, it is undisputed, were stolen at the farm. These items included the deceased Mr Erasmus' driver's licence, the two maroon camera bags of Ms Erasmus, as well as the .22 revolver in a holster. The following clothes belonging to Accused No. 3 were also found in a basin in the bathroom of the house: a blue long-sleeved trouser and a long blue striped T-

shirt. The black shoes were also found at the house.

[13] From the house of Accused No. 2 and No. 3, and it appears on a tip-off by either or both Accused No. 2 and No. 3, the police went to the house of Accused No. 1 where some of the items stolen at the farm were found. The police, accompanied by Accused No. 2 and No. 3, then proceeded to farm Areb where other items stolen at the farm, such as beddings, a television set, a fridge, two rifles, the gas bottle and some kitchen utensils were discovered. (Two rifles were found hidden in the grass.)

The pleas

[14] All four Accused pleaded not guilty to the charges. Except for Accused No. 2, they all gave plea explanations in terms of Section 115 (2)(a). I will deal with the respective pleas when I come to discuss the case against each Accused. Accused No. 1 and No. 3 exercised their Constitutional

right to remain silent and have not testified at the trial.

[15] The Accused exercising their right to remain silent is not a warrant for the conclusion that they are guilty. However, it is now trite that a failure to give an explanation under oath when the circumstances call for it may strengthen the prosecution's case. In appropriate case the Court is entitled to regard the failure of an Accused to testify on his behalf as pointing to guilt. If there is evidence that cries out for a response and there is a failure to respond, it could justify the inference that there is enough evidence to convict. Similarly, if the State's case against an Accused is circumstantial and the State has proved circumstances against the Accused which, if he is innocent, he could be reasonably expected to answer or explain, the failure to explain or answer will strengthen the State's case

against the Accused.[2] I will revert to this issue later on in this judgment.

Common purpose defined

[16] As is shown in the summary of substantial facts, the State relies for its case against each Accused on common purpose. That doctrine is defined as follows in Burchell and Milton, *Principles of Criminal Law*, 2nd ed. (1997) at p.393:

> 'Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their 'common purpose' to commit the crime. If the participants are charged with having committed a 'consequence crime', it is not necessary for the prosecution to prove beyond reasonable doubt that each participant

[2] *Osman and Another v Attorney General of the Transvaal* 1998 (4) SALR 1224 (CC) at 1230 to 1232 para 16 to 23; *S v Boesak* 2000 (3) SA 381(SCA); S v Boesak 2001 (1) SA 912 (CC); *S v Thebus and Another* 2003 (6) SA 505 (CC); *S v Haikele and Others* 1992 NR 54 at 63-64.

committed conduct which contributed causally to the ultimate unlawful consequence. It is sufficient that it is established that they all agreed to commit a particular crime or actively associated themselves with the commission of the crime by one of their number with the requisite fault element (mens rea). If this is established, then the conduct of the participant who actually causes the consequence is imputed or attributed to the other participants. Furthermore, it is not necessary to establish precisely which member of the common purpose caused the consequence, provided that it is established that one of the group brought about this result.'[My underlining for emphasis] (Footnotes omitted).

[17] I will be guided by this statement of the law on common purpose, which I adopt as a correct statement of the law, as I evaluate the evidence against each Accused.

The state's concessions

[18] The State conceded that it failed to prove, in respect of Accused No. 1, counts 1 to 10 of the indictment: i.e 8 counts of murder, robbery with aggravating circumstances, and arson. It persists against *that* Accused with the other counts in the indictment: being counts 11, 13, 14 and 15.

THE CASE AGAINST THE ACCUSED CONSIDERED

[19] I will now discuss the evidence lead, or relied on, by the State against the Accused persons. To a great extent, the State relies for its case against all Accused on the various statements made by Accused No. 2 at different stages since his arrest on 6 March 2005:

i. that Accused No. 2 is guilty of the crimes named in the indictment.

ii. that Accused No. 3 jointly with Accused No. 2 committed those crimes.

iii. that Accused No. 1 acted in common purpose with Accused No. 2 and No. 3.

iv. that Accused No. 4 contracted Accused No. 2 to kill the parents of Accused No. 4 and his sister;

v. and that it was in furtherance of that contract that Accused No. 2 killed the 8 people and committed the other crimes on the farm.

[20] In view of the obvious centrality of Accused No. 2 in this case it is preferable to start the discussion with him and at the same time deal with the evidence involving Accused No. 3 considering that Accused No. 3 had, as I will show presently, admitted that he was present at the farm when the crimes were committed. This approach is preferable because Accused No. 1 and No. 3 elected to exercise their Constitutional right to remain silent and did not testify at the trial. The case against them therefore depends to a large extent on inferences to be drawn from the testimony and conduct of Accused No. 2.

[21] When the case was called at the Kalkrand Magistrate Court on 9 March 2005, only Sylvester Beukes (now Accused No. 2) and Gavin Beukes (now Accused No. 3) appeared at the Section 119 plea proceedings. Sylvester Beukes admitted committing all the offences charged and stated that he did so voluntarily. Gavin Beukes pleaded not guilty to the charges and explained that he was told by Accused No. 1 that the latter's employer had asked him to go and work with the cattle on the farm and he in turn was asked by Accused No. 2 to accompany him to the farm. Accused 3's s 119 version was that he did not know Accused No. 1's plans for going to the farm at that stage. It is clear therefore that Accused No. 2 and No. 3 were at the murder scene on the dates named in the indictment.

a. Accused 2

[22] During the trial Accused No. 2 testified on his own behalf and gave a very detailed account of the events preceding the crimes at the farm; the events as they unfolded during the commission of the crimes and what happened thereafter. He

described what role he played in the matter, the role (or lack of it) played by Accused No. 3 (his brother); the manner in which the killings took place and how he went about removing the stolen property from the farm.

[23] In short, Accused No. 2's version at the trial was that on 4 March he went to the farm together with Accused No. 3, his elder brother, and arrived there in the afternoon. He testified that his reason for going there was to execute the plan agreed with Accused No. 4. He stated that Accused No. 3 was not aware about the true reason for going to the farm. At the farm they found only one person. On the 4th (the day of their arrival at the farm) they slept in the house of a farm worker, Seth.

[24] The next morning, Saturday, when they woke up, according to Accused No. 2, he told the farm worker, Seth, that he had come to work there with the cattle as on the previous occasion they had not finished with the cattle. He testified that

he then asked Accused No. 3 and Seth to go and look for the cattle. When the duo left Accused No. 2 went to the farm house and put the radio transmitter on ‘scan’ so that he could hear what was happening in Windhoek. He proceeded to break the front door to the farm house and started to collect the things he wanted. Accused No. 3 and Seth however returned with the cattle before Accused No. 2 could finish. Accused No. 2 was then sitting with a rifle he had taken from the safe in the house after he had shot and opened the safe with the .38 special revolver which he said he had been given by Accused No. 4 as part of the contract to kill. Upon their premature return he encountered Accused No. 3 and Seth and it was *then* that the rifle went off accidently.

[25] Accused No. 3 and Seth asked him where he got the firearm and he told them to stand still, whereafter he proceeded to tie them up with nylon rope he had found inside the house. He testified that he first tied up Accused No. 3 by the arms and that Accused No. 3 might have been frightened

because he easily submitted and remained kneeling while being tied up. He then also proceeded to tie up Seth. Accused No. 2 testified that he tied up Accused No. 3 and Seth because they returned at the time he did not expect them to. According to Accused No. 2, after tying up the two men he sat on the veranda outside waiting for the promised call from Accused No. 4. In about an hour thereafter Accused No. 4 called and from the way Accused No. 4 talked, Accused 2 could allegedly tell that Accused 4 was calling from Windhoek. Accused No. 4, he testified, did not know at the time that Accused No. 3 was also at the farm. According to Accused No. 2 he and Accused No. 4 talked on the *Thompson* channel: Accused No. 2 wanted to know from Accused No. 4 what he was to do as he was now at the farm. Accused 4 said that things had not gone according to plan; presumably in that , contrary to expectation, the parents and Yolande were not coming to the farm any longer.

[26] Accused No. 2 testified that he then made clear to Accused No. 4 that he was there and that

he could not go back from there. Thereupon Accused No. 4 told him to make ‘a plan’ so that the Erasmus couple could come to the farm. Upon Accused No. 2 undertaking to ‘make a plan’ the conversation ended and Accused No. 4 said he would see him later. Someone then came from one of the posts at the farm and Accused No. 2 grabbed him and forced him inside the house and ordered him to follow his instructions: He gave the person the two-way radio and told him to call Sunnybooi and to tell the latter that Seth was sick and that he had to come. He then also tied up this person.

[27] Sunnybooi eventually came in the afternoon from the post. When Sunnybooi arrived Accused No. 2 forced him inside the house and ordered him to make a call to the late Mr Erasmus. Sunnybooi did so under duress telling Mr Erasmus that a farm worker fell and was hurt in the mouth and needed to be taken to hospital. Accused No. 2 said he then sat Sunnybooi down in the sitting room and he sat down Seth in the outside room. Accused No. 2

testified that he also proceeded to tie up a lady and two boys and locked them in the outside room.

[28] At some stage Accused No. 2 ordered Sunnybooi to make yet another call to Mr Erasmus and to tell him that the situation was very serious. After that Sunnybooi asked him for *dagga* to smoke which Accused 2 assisted him to smoke because he was tied up. According to Accused No. 2, while he was waiting for some reaction from Mr Erasmus, Accused No. 4 called and told him that the parents were on the way.

[29] Accused 2 testified that Mr and Mrs Erasmus came in the late afternoon with a Hyundai Pick-Up and Mrs Erasmus was the one driving. Accused No. 2 saw them approach while he was seated in the veranda. He told the couple to come to the front of the house and they complied. He then told them to kneel and they did - and from a distance of about 5 to 6 metres he started shooting at them. He stated that he did not recall who he shot first.

[30] Accused No. 2 went on to describe the role played by his brother, Accused No. 3, and the manner in which he killed the rest of the people and went about removing the property from the farm. With regard to the first, he testified that he had tied his brother to a trellis door at the veranda area using celotape and that his brother (Accused 3) remained tied up while he killed all the people. According to Accused 2 the brother, Accused No. 3, was nowhere near where he killed either the Erasmus couple or the rest of the deceased named in the indictment. It was only after he killed the people (at that stage except Sunnybooi) Accused No. 2 testified that he untied Accused No. 3 who, together with Sunnybooi , and under his duress, assisted him in loading the stolen property on the vehicle and the trailer.

[31] Accused No. 2 testified that after he killed the Erasmus couple he awaited instructions from Accused No. 4. He later called Accused No. 4 and told him that Yolande was not there but that he

killed the parents and that there were other people on the farm. Accused No. 4 then told him to ‘clean up’ and not to leave anything behind. He understood this to mean that he should kill the remaining people. He proceeded to put the five people, including Seth, in the outside room, shot at them randomly, poured diesel inside the room and over the bodies of the people and set them alight.

[32] Accused No. 2 then returned to the main house, untied Sunnybooi who was then in the sitting room and moved with him to the veranda and ordered him to untie Accused No. 3. He then ordered the two to load the goods and the livestock on to the Hyundai Pick-up as well as the trailer. He again returned to the veranda with Accused No. 3 and Sunnybooi and ordered Sunnybooi to tie up Accused No. 3. He took Sunnybooi inside into the sitting room, gagged him on the mouth, tied him to the chair with celotape and then shot him dead.

[33] According to Accused No. 2, after the stolen goods were loaded on the Pick-up and the trailer he and Accused No. 3 left the farm and drove to Rehoboth and proceeded to Accused No. 1’s house and thereafter to the farm Areb. From Areb they drove back to Rehoboth and Accused 2 and 3 drove to Windhoek where they abandoned the Hyundai near Gammams. They had also abandoned the trailer somewhere in the bush.

[34] On their way to Rehoboth from the farm Accused No. 2 said he spoke to Accused No. 1 from the cell phone of Accused No. 3. On that trip the two rifles were behind the seat of the Hyundai while the .38 special revolver was in a holster. Accused No. 2 testified that on the way to Rehoboth he never threatened Accused No. 3 and that after they picked up Accused No. 1 and drove to Areb he made no threats against Accused No. 3. At Areb he also made no threats against Accused No. 3.

[35] It was clear from the evidence of Accused No. 2 that Accused No. 3 had the opportunity to and did speak to Wambo aka as Booitjie , the brother of Accused No. 1, at farm Areb. If any report was made by Accused No. 3 to Wambo about him being under the duress of Accused 2, I am sure it would have been suggested by Accused No. 3's Counsel to some of the State's Witnesses. When Accused No. 2 and No. 3 drove to Gamamms in Windhoek where the Hyundai was abandoned Accused No. 2 said that he made no threats against Accused No. 3. There was also a time when they returned to Rehoboth from Windhoek when Accused No. 2 and No. 3 sat in the park near Shell Garage in the Southern Industrial area waiting for a lift to return to Rehoboth. According to Accused 2 no threats were made against Accused 3 who clearly had the opportunity to disassociate himself from Accused No. 2. He never did.

[36] Under cross-examination on behalf of Accused No. 4, Accused No. 2 testified that he had smoked *dagga* before he committed the crimes at the farm

and that he also drank beer that he found in the house. Accused No. 2 testified that he believed that the *dagga* would make him 'calm'. In examination in chief he had stated that he had smoked and had drunk 'a bit'. He specifically stated that he did not drink much beer. When asked in examination in chief how his mental faculties were affected by the drink and dagga, he said that he did not know and could not describe it. He said further that he was unable to describe his emotions at the time of the commission of the crimes. He stated that when he shot the people he did not appreciate that it was unlawful nor did he appreciate that there would be consequences for his actions. He stated that the 'thoughts were not there'. He seemed to suggest that whilst at the farm and probably during the commission of the crimes, he smoked *dagga* every five minutes.

[37] Based on this evidence of the consumption of alcohol and dagga, Mr Iipumbu, counsel for Accused No. 2 , asked that I find that the State failed to prove that Accused 2 had the necessary intent

to commit the crimes of murder. Counsel submitted that the evidence shows that on the day in question, Accused 2 consumed *dagga* and drank alcohol which the State failed to disprove negativated criminal intent.

[38] Mr Iipumbu also raised several other defences on behalf of Accused 2 in respect of the remainder of the charges: As regards housebreaking with intent to rob, he argued that Accused No. 2 lacked the necessary criminal intent, presumably because of the consumption of dagga and alcohol. As regards robbery with aggravating circumstances, he argued that there could have been no robbery because the alleged victims did not know what Accused No. 2's intent was when he arrived there, that there was no proof which property was forcefully taken from the owner-victims and that having already died when the property was removed, they did not know the property was removed from the farm. As for the defeating of justice count, Mr Iipumbu argued that the State failed to prove the nature and the end-of-justice which was

defeated. As for the arson count, Mr Iipumbu argued that the State did not prove that Accused No. 2 had the intent to commit the offence in view of his consumption of alcohol and dagga. As for the theft count, it was argued that the offence was not proved because when the goods were removed from the farm, the owners were already dead and therefore were not in possession, alternatively that Accused 4 in terms of the contract to kill permitted Accused No.2 to take the property in question. As for the possession of firearms without licence, Mr Iipumbu argued that Accused No.2 did not possess the rifles implicated because they were left with Accused No. 1 and that the .38 revolver was left in the glove box of the Hyundai where it was found; and that at the time of the arrest, Accused No.2 had no possession of it. The same argument is made in respect of the possession of ammunition count.

[39] I will start with the possession of firearms and ammunition: In his own evidence under oath, Accused No. 2 admitted taking all the firearms and

driving with them from the farm to Rehoboth, Areb and at various stages conveying them in the stolen car which he later abandoned. He placed them there, not someone else. Those that he gave to Accused No. 1 he stated himself that he was to come and take them later on. He never intended to part control with them. As for the .38 I am unable to see on what basis it can be suggested that his having had it in his possession uninterrupted from the place he stole it until he abandoned it with the Hyundai, could conceivably absolve him from having possessed it.

The absence of criminal intent amplified

[40] Mr Ipumbu at the very outset of his written heads of argument and oral argument made the point that the report of the psychiatrist Doctor Japhet[3] stands to be rejected because a signature attributed to Doctor Japhet did not seem like his signature. Mr Ipumbu provided no evidential basis for the suggestion except what appeared to be his

[3]At the Court's direction in terms of s.77 (1) of the Criminal Procedure Act.

personal view that the signature appearing on the report attributed to Doctor Japhet did not bear a relationship to the known names of Doctor Japhet. The opportunity was offered to object to the report before its reception and no objection was taken such as could have justified the calling of Doctor Japhet to verify his signature. The report purports to have been signed by Doctor Japhet and it is untenable to argue - absent any evidential basis which includes showing what is believed to be the actual signature of Doctor Japhet - that what appears on the report is not Doctor Japhet’s signature.

[41] Mr Ipumbu also argued that the report received after observation of Accused No. 2 was not the product of a ‘panel’ consisting of a medical superintendent of a psychiatric hospital designated by the Court; a psychiatrist not in full time service of the State; a psychiatrist appointed for the Accused by the Court and a clinical psychologist if the Court so directed. Because there was no such report by a ‘panel’, Mr

Ipumbu argued, the State failed to prove that Accused No. 2 had the requisite criminal intent to commit the crimes charged.

[42] The provision applicable to Namibia, as rightly pointed out by Ms Verhoef for the State, is s 79(1) of the CPA which states:

> "(1) Where a Court issues a direction under section 77(1) or 78(2), the relevant enquiry shall be conducted and be reported on-
>
> (a) where the accused is charged with an offence for which the sentence of death may not be imposed, by the medical superintendent of a mental hospital designated by the Court, or by a psychiatrist appointed by such medical superintendent at the request of the Court; or
>
> (b) where the accused is charged with an offence for which the sentence of death may be imposed or where the Court in any particular case so directs-

(i) by the medical superintendent of a mental hospital designated by the Court, or by a psychiatrist appointed by such medical superintendent at the request of the Court;

(ii) by a psychiatrist appointed by the Court and who is not in the full-time service of the State; and

(iii) by a psychiatrist appointed by the accused if he so wishes.”

[43] It is obvious from the above that what applies to this jurisdiction is the highlighted part of s 79: It does not require the appointment of a ‘panel’ as suggested by Mr Ipumbu. I agree with Ms Verhoef that with the abolition of the death penalty, the Court is under no compulsion to follow the procedure set out in the section and that the Court will ask for an observation where the circumstances justify the belief that the Accused may have laboured from a mental defect at the time of the commission of the offence. The reports submitted, including an observation by a

psychiatrist Dr Reinard Sieberhagen, appointed by the Court on behalf of Accused No.2, made no suggestion that Accused No. 2 may have lacked appreciation of the wrongfulness of his actions at the time of the commission of the offences. In fact, they suggest the contrary. The case relied on by Mr Ipumbu, *S v Hansen 1994 NR (HC) 5* is no authority for the proposition that the Court must in every case ask for the referral of an Accused. It may do so where - as clearly shown in the *Hansen* case - the Court forms the view that the Accused's behaviour before the judge, or something about his history, suggests abnormal behaviour. We have no such evidence in respect of Accused No. 2.

[44] I set out at some length the events prior to, during and after the crimes at the farm - in Accused No. 2's own words. That narrative shows the detail with which Accused No. 2 is able to recount the events and in particular the effort made to lessen the role of Accused No. 3, his brother, in the events that unfolded at the farm.

I am satisfied that there is no merit in Accused No. 2's assertion that he did not possess the requisite *mens rea* when he committed the crimes at the farm. He had planned the murder of the Erasmus couple well in advance and he came to the farm on 4 March 2005 with the settled intention to kill.[4] He transferred that intention to kill to the rest of the people he killed in the most gruesome manner imaginable in order to remove any trace back to him. In any event, the suggestion that he did not appreciate what he was doing is belied by the very detailed and methodical fashion in which he described the events that unfolded at the farm and thereafter. The *onus* was on him to lay sufficient evidential basis that he had consumed the kind of quantities of *dagga* and alcohol that impaired his judgement. He failed to do that. The evidence about the alleged consumption of

[4]As Ms Verhoef correctly submitted the law does not excuse he who resolves to commit a crime and then consumes an intoxicating substance for 'Dutch courage'. In LAWSA, Vol.6 para 86 it is stated: 'An accused Who deliberately gets drunk in order to build up courage to commit a crime is criminally responsible even if he is unconscious at the time of the commission of the act. The liability of the accused flows from the fact that the actus reus consisted in the setting in motion of a chain of events which resulted in the commission of the crime and that at the initial stage, whilst sober, the accused had the necessary mens rea. In this instance the accused merely uses his drunken body as an instrument with which to commit the crime.'

dagga and beer is so sketchy and did not rise to the level that placed the *onus* on the State to prove beyond reasonable doubt that his judgment had been impaired.

Remaining defences

[45] To deal with some of the other submissions made by Mr Ipumbu, Ms Verhoef referred me to several cases. The first one is *S v Dlamini*[5]*. I*n that case the Court defined robbery as 'an aggravated form of theft, namely, theft committed with violence. The violence which is the assault and the theft are joint features of the one crime. The key considerations justifying a conviction of this composite crime are proof that the assault and the theft formed part of a continuous transaction and that the assault was a means by which the unlawful possession was obtained.' In *Dlamini* the Court specifically stated that the definition of robbery does not include theft 'from the person of another in his presence'. Then there is the case of *Ex Parte: Minister Van Justisie In*

[5] 1975 (2) SA 524 (N).

Re: S v Seekoei[6] *which* held that it is not a requirement of our law that in order to constitute the crime of robbery the theft must take place in the presence of the victim.

[46] Similarly, it was stated in *S v Yolelo*[7] that robbery can be committed if violence follows on the completion of the theft in a juridical sense. In each case an investigation will have to be made into whether in the light of all circumstances, and especially the time and place of the Accused's acts, there is such a close link between the theft and the commission of violence that they can be regarded as connecting components of substantially one action. This is also applicable to the threat of violence in so far as it can be an element of robbery. Accused no. 2's conduct is covered squarely by these dicta.

Can the Court convict of both robbery and theft?

[47] Ms Verhoef submitted that theft being a competent verdict to a charge of robbery, the

[6]1984 (4) SA 639
[7]1981 (1) SA 1002 at 1004 H

Court may convict Accused No. 2 of robbery in respect of the items and theft in respect of the same item. She relies on the case of *S v Luwadi and Other*[8]. I have had regard to the report and it is clear therefrom that the comment made by the Court in that regard was *obiter* only and did not form the *ratio* for the Court's decision.

[48] In my view it would constitute duplication of conviction to find the Accused guilty of theft and at the same time robbery in respect of the same items.

[49] As regards the Hyundai bakkie, Ms Verhoef submitted, and I would add the trailer, that the abandonment of these items constitutes theft and not merely unlawful use. Ms Verhoef's submission was intended to meet the one made by Mr Ipumbu that to the extent that Accused No. 2 left the Hyundai bakkie at Gammams Centre with the key in the ignition, he was not proven to have had the intent to steal that vehicle. Counsel for the State referred to the fact, properly established

[8]1962 (1) SA 31 D (AD) at 319

through the evidence of constable Maharero, that the key was left in the ignition of the car when it was found abandoned close to Gammams. The trailer was also abandoned on the Windhoek/Walvis Bay road where anyone could have removed it. The submission made was that in appropriate case abandonment could constitute theft.

[50] As pointed out in the case of *S v Sibiya*[9]_

> *'the law requires for the crime of theft not only that the thing should have been in fact believed where it is the owner whose rights have been invaded had consented or would have consented to the taking but also that the taker should have intended to terminate the owner's enjoyment of his rights or in other words to deprive him of the whole benefit of his ownership. The intention may be inferred from evidence of various kinds and in particular from abandonment of the thing in circumstances showing recklessness as to what becomes of it.'*

[9]1955 (4) SA 247 AD 257 B-D.

[51] To similar effect is the case of *S v Joseph Ganiseb* an unreported judgment of this Court delivered on 16 October 2006 at para 15. In that case Van Niekerk J found the Accused guilty of theft with *dolus eventualis* based on the fact that they, by leaving the keys in the ignition of a stolen vehicle at a place right next to a main road, might have realised that there was a big possibility that the vehicle would be stolen. Based on this, I see no difference with the facts of the present case although of course I am satisfied that it would be a duplication of convictions to find the Accused guilty of theft as well as robbery.

[52] Ms Verhoef also submitted that in respect of the ammunition and the firearm the State proved that Accused No. 2 and No. 3 had jointly possessed same and should be found guilty of being in possession thereof.

[53] Having regard to all of the above, I am satisfied that the case against Accused No. 2 has

been proved beyond reasonable doubt. Accordingly Accused No. 2 is guilty of counts 1 to 10, 11, 12, 14 and 15. I exclude count 13 in view of what I said about duplication with the robbery charge. I am satisfied that in respect of counts 14 and 15 there would no duplication of conviction. It is a matter more appropriately dealt with when one comes to sentencing.

Accused No. 3

[54] Accused No. 3's plea explanation in terms of Section 115 (2)(a) was that after work on 3 March 2005 he was asked by Accused No. 2 to accompany him to a farm where he was supposed to work with the cattle of his employer.[10] He was unaware of anything Accused No. 2 planned and only realised what was going on , on 4 March 2005 when he came from the veldt and Accused No. 2 held him at gun point and tied him to a burglar bar door. He stated in plea explanation further:

'He committed all these offences',

[10]Note that Accused 3 refers to Accused 2 going to his 'employer'. This is significant in view of the evidence of a police officer, Joodt which shows that Accused 3 could not have believed that Accused 2 was taking him to his 'employer's' place.

'on his own and forced me to assist him with the loading and transport of the items. The fact that he is my younger brother also made me feel pity for him and made me ponder a lot about whether I should act against him or go to the police. However, soon after we arrived at our house in Rehoboth and before I could talk to anybody the police arrested and severely assaulted both of us'.

Accused 3's submissions

[55] Mr Mbaeva submitted on behalf of Accused No. 3 that there is no evidence before Court that Accused No.3 killed any of the deceased persons and that in any event Accused No. 2 took full responsibility for the killings. Although conceding the existence of the evidence by Detective Inspector Jacobus Nicolaas Theron that Accused No. 3 voluntarily stated to him that 'he dropped the people with one of the rifles', Mr Mbaeva submits that the fact that high velocity blood spatter was found on Accused No. 3's shoe

does not prove that Accused No. 3 killed any one and that the gun-pointing admission by Accused No. 3 can reasonably be interpreted to mean that he only wanted to protect his brother and that he was not party to the shooting by his brother, Accused No. 2.

[56] Mr Mbaeva also submitted that Accused No. 2 had not testified or admitted to any prior agreement with Accused No. 1 to kill the people on the farm. Mr Mbaeva's submission is that Accused No. 3 was not proved beyond reasonable doubt to have associated himself with Accused No. 2 in the murders.

[57] Mr Mbaeva's submissions in respect of the other offences is much to the same effect, e.g. that there is no evidence that Accused No. 3 broke into the premises in respect to house breaking and robbery, that there is no evidence that Accused No. 3 used or threatened violence in taking property from the persons at the farm. He also submitted that there is no evidence against

Accused No. 3 in respect of defeating or obstructing or attempting to defeat or obstruct justice or that he committed arson or that he possessed a firearm and ammunition.

[58] It is also argued by Mr Mbaeva that the State had failed to prove that Accused No. 3 knew that Accused No. 2 had gone to the farm for a criminal enterprise; or that he participated in the commission of the crime with Accused No. 2 at the farm. Mr Mbaeva made specific reference to the fact that Accused No. 2 had himself admitted in evidence that he had tied up Accused No. 3 to the trellis door at the time he killed the people and under duress made Accused No. 3 load the stolen goods on to the Hyundai and the trailer.

[59] In order to convict Accused No. 3 I must be satisfied that these assertions are false beyond reasonable doubt and that they cannot be reasonably possibly true.

[60] As a starting point in meeting those submissions, it must be borne in mind that the State's case against Accused No. 3 is his common purpose with Accused No. 2.

[61] As a necessary background, I will now go back in time to some events preceding the commission of the offences at the farm. The State led the evidence of the younger sister of the two brothers, Accused no. 2 and No.3, Zola Cloete, aged 15 at the time, who lived with them at the same address until their arrest. Cloete testified that the following happened on Friday the 4th of March 2005. It was a school day for her. Accused No. 3 who was employed in Rehoboth at the time made himself ready for work. He wore a blue overall, which is a blue trouser and a blue jacket. Cloete wanted to go to school but was asked by Accused No. 2 to look after the two young boys of Accused No. 3 who were also living at the same address at the time. She never saw Accused No. 2 and No. 3 until they returned on the 6th.

[62] Cloete testified that on the 6th March Accused No. 3 was wearing a blue overall, a blue trouser with a blue jacket and black shoes. When the two Accused returned home that Sunday Accused No. 3 took off his clothes and put them in water in an attempt to wash them.

[63] Warrant officer Le Roux testified that he seized exhibits at the house of the Beukes Brothers on the Sunday, 6 March 2005, which included shoes (exhibit 6+7) and wet blue clothing found in a metal basin in the bathroom in the Beukes residence. Warrant officer Le Roux kept these exhibits under lock and key in a storeroom at his office until he packed and sealed it and took it to the NFSI in Windhoek. He testified that he transported the wet clothes and the dry shoes in a plastic bag to the NFSI in Windhoek. Officer Le Roux's evidence therefore established that the shoes which Accused No. 3 had worn on the day of the murders, attributed to Accused No. 3 by Cloete , had blood on them.

[64] The State called Mr. Phillipus Jacobus Roberts, an expert from the NFSI, who testified that he tested Exhibits 1 to 7 for the presence of human blood. He found human blood on the blue trouser, the blue cap, a khaki trouser with belt, a pair of black shoes and P25, a pair of yellow veldt skoen shoes. The blue trouser and the black shoes where worn by accused 3 while accused 2 testified at the trial that the cap and the Khaki trouser were his. Mr. Roberts testified that although the packing of wet clothes and dry shoes may lead to a transfer of blood from one item to another resulting in a transfer pattern being displayed, such contamination would not result in a fine spray as that found in high, medium or low velocity blood spatter. He therefore excluded such contamination transferring on to the shoes worn by Accused 3 high velocity blood spatter.

[65] Mr Roberts testified that he examined the items of evidence by the use of a chemical to highlight the areas on the exhibits which have blood spots on them and concluded:

'the conclusion to be made is that the presence of meeting or high velocity blood spatter was found on both pair of shoes. In other words both these pair of shoes had to be within the immediate vicinity of an incident resulting in this type of blood spatter. For instance a gun shot wound to the head with the immediate vicinity. I would say not more than 5 metres but even less than 5 metres blood does not travel that far and both these shoes had to be within this radius of such event'.

[66] Doctor Paul Ludik who is the Head of the NFSI testified that he was not only directly involved but also oversaw the forensic analysis of the evidence in the case. He was properly qualified as an expert in chemistry and other branches of forensic science such as the behaviour of fire and blood spatter analysis. In the latter respect he validated Mr Roberts' conclusion about the high velocity blood spatter found on the shoes of Accused No. 3 and maintained that such was only explicable on the basis that Accused No. 3 stood

in direct proximity to the subject whose blood exited after a bullet entry and landed on the shoes of Accused No. 3.

[67] Doctor Ludik, relying on Mr Roberts' finding that high velocity blood spatter was found on the shoes worn by Accused 3, concluded that the shoes must have been worn by a person who was in the close proximity of the gun shot that resulted in the spatter of blood from the victim. This scientific evidence is irreconcilable with Accused No. 3's version, disclosed in his plea explanation and through suggestions made by his Counsel in cross-examination, that Accused No. 3 was nowhere near the persons who were shot by Accused No. 2 as he was tied to the trellis door during the time that Accused No. 2, by his own admission, executed eight people on the farm.

[68] Doctor Ludik was also introduced to the suggestion that Accused No. 3 had at some stage during the commission of the crimes at the farm been tied to a trellis door with self adhesive

tape around his arms and asked to comment if, from their examination of the crime scene and the evidence collected, there was any substance to such allegation.

[69] Doctor Ludik testified first that they did not find any discarded cellotape at the crime scene or self adhesive tape which was consistent with its use around the arms of a person and, secondly, that the self adhesive tape recovered from the scene of the crime was such that it could not have been used to tie up a person in the way suggested in relation to Accused No. 3.

[70] Doctor Ludik was also asked to give an expert opinion on the posture in which Sunnybooi was found tied in a sitting position in to a chair in the sitting room with duct tape around his mouth, and asked whether it was possible for a person holding a firearm in one hand, as suggested by Accused No. 2, to tie up Sunnybooi - without the assistance of another person. Doctor Ludik’s expert opinion was that it was highly unlikely for

Accused No. 2 to do that alone while holding a firearm in one hand and that he must have had the assistance of another person.

[71] This is what Doctor Ludik stated:

> *'if you have this kind of tied down as we see here you would certainly need at least some assistance there at least coming from both hands. I would argue, unless you were to flip the person on his stomach and would secure with your body weight body of the person and then of course tying the limps behind the person's back. But this position that is depicted in photo no. 58 I cannot imagine a way that this can be done using a left or right hand only and especially even holding a firearm. I cannot imagine that this can be possible. I cannot see how one will do it unless perhaps you would have had the full assistance and co-operation of the person that you are about to tie down'.*

[72] Doctor Ludik also testified that they did not discover any nylon rope near the trellis door which could have been used by Accused No. 2 to tie up Accused No. 3 as claimed.

[73] Not only is the scientific evidence therefore irreconcilable with the version put forward by Accused No. 2 in evidence and by Accused No. 3 in his plea explanation and suggestions made in cross-examination, that he was nowhere near where the people were shot and that he was at the time tied to the trellis door away from where high velocity blood spatter gunshot wounds were inflicted, but it strengthens the State’s case that Accused 2 had the active assistance of Accused 3 in the commission of the crimes they are charged with having committed acting with a common purpose. The inference of active participation by Accused 3 is corroborated by the evidence of Chief Inspector Theron that in an attempt to exculpate himself Accused 3 , upon their arrest at home on 6 March, spontaneously stated to him that he did not

kill the people and that he ‘only dropped the ‘people’ on the farm’.

[74] The unshaken evidence of Warrant Officer Joodt was that Accused No. 3 knew that he was not to go to the farm without the escort of the police. He also testified that Accused 3, having bailed out Accused 2, knew that the deceased Mr Erasmus was the complainant at whose behest Accused 2 was in prison. Accused 3’s suggestion that he was going to the farm at the invitation of Accused 2 to the latter’s employer to work with cattle, unaware that Accused No. 2 was going there for a purpose other than an innocent one, cannot be reasonably possibly true; and is in my view false beyond reasonable doubt.

[75] Warrant Officer Joodt of the Kalkrand Police testified that on the 1st of December 2004 Accused No. 3 came to bail out Accused No. 2 who was then in custody in connection with charges brought against Accused No. 2 by the late Mr Erasmus. Warrant Officer Joodt testified that he informed

Accused No. 3 that the Complainant in respect of those cases for which Accused No. 2 was detained was the late Mr Erasmus. Given that Accused No. 2 had, while in custody, informed Joodt that he would at some stage need to go and take his property from the farm, Joodt testified, he told Accused No. 2 and No. 3 that they were only to go to the farm escorted by Joodt who would then make arrangements with the late Mr Erasmus to be present at the farm. Joodt testified that neither Accused No. 2 nor No. 3 ever came to make such arrangements.

[76] Accused No. 3’s suggestion that he was under the duress of Accused No. 2 at the crime scene and that he was nowhere near the place where the shootings took place, is displaced beyond reasonable doubt by the forensic evidence which places him very close to the shooting, and in addition thereto, the evidence of Joodt makes it clear that Accused No. 3 knew that he was not allowed under any circumstances to go to the farm unless it was with the escort of the police. His

explanation that he had gone to the farm for an innocent purpose, therefore stands to be rejected.

[77] The conduct of Accused No. 3 when they returned to Rehoboth, when they went to farm Areb and after they left Gamamms having abandoned the Hyundai; and at home in the presence of his sister, Cloete, demonstrates beyond reasonable doubt that Accused No. 3 had a clear opportunity to disassociate himself from Accused No. 2 but chose not to do so; and that could only be because he at all times acted in concert with Accused No.2 and was not an unwilling participant.

[78] If as, he suggests, he had been under duress by Accused No. 2 at the scene of crime; it is reasonable to expect that he would have made some effort at a later stage to come clean and to demonstrate that he had no voluntary part to play in the crimes committed by Accused No. 2. His failure to provide an innocent explanation under oath as to why he chose not to disassociate himself from the actions of Accused No. 2, raises

the inference that he acted in concert with Accused No. 2.

[79] Cloete testified that when Accused No. 2 and No. 3 came home she did not notice anything special or out of the ordinary about them, especially about Accused No. 3. I wish to highlight what she said about the demeanour of Accused No. 3 because it is very important. Under examination in chief Cloete testified that when Accused no.3 returned from home on Sunday he took off his clothes and put them in water, maybe with the intention of washing them.

[80] Additionally, Cloete under questioning by the Court stated the following:

> *"Now Ms Cloete you said when Gavin and Sylvester came on Sunday they came together?' She answered, yes. 'You had seen both of them on Friday before they left? Yes. Now did any one of them on Sunday show a mannerism or behaviour which did not look normal on the Sunday? No. Now Sylvester left and you*

remained with Gavin who was sitting in the lounge on Sunday. Yes. Did he talk to you? No. Did he look normal? Yes. (This is now the Court speaking.) I am asking this because it could be very important. I want you to remember very clearly, did Gavin look his normal self as you usually know him or did you detect something which looked abnormal or unusual in his character? He looked normal. In the lounge when Gavin was alone after Sylvester left do you remember exactly what he was doing?' The answer: 'he was listening to a CD. Listening to a CD? Yes. When they arrived together that Sunday morning did they chat with each other in the house? I do not know. Sylvester left. But at some point they came together, not so, before he left, they were together in the house, were they not? I do not know whether they had a talk. Did you hear any argument between these two people when they came back home? No."

[81] Cloete stands to gain nothing from the incarceration of her two brothers who evidently doted on her and provided for her for a considerable period of time. I found her a reliable witness who did not embellish her recollection of events. I find her recollection of the demeanour of Accused No. 3 on 6 March very revealing. This is a man who on his own version had not long before witnessed the most gruesome mass murder incident imaginable. Yet on Cloete's version, Accused No. 3 seemed not to show much emotion considering what he had just gone through. He revealed no sign of shock and seemed most at ease and even sat down to listen to music in the living room. He made no mention to Cloete about what he had been forced to witness and the passive role he played in it. There is also no evidence any where in this trial that he reported the horrors that he was forcibly made to live through to a close associate, a confidant or a law enforcement official. If, as he says, he feared for his life at the scene of the crime, there is no explanation before me why he made no effort on

6 March or later when Accused No. 2 left the house, to raise the alarm. Is such conduct consistent with innocence? Certainly not.

[82] I am therefore satisfied beyond reasonable doubt that Accused No. 3, acting in common purpose with Accused No. 2, committed all the crimes in respect of which I had found Accused No. 2 guilty.

Accused No.1

[83] The State correctly concedes that it had not proved beyond a reasonable doubt that Accused No. 1 is guilty of counts 1 to 10 and count 12 of the indictment. It also concedes that it had not been proved that Accused No. 1 was at any stage in possession of the .38 revolver and that same must, in respect of Accused No.1, be excluded from the list of stolen items listed in the indictment. The other concession by the State is that although at some stage he was a passenger in the Hyundai bakkie, it was not proved that Accused No. 1 possessed the Hyundai and the trailer or knew that the two items were stolen or would be abandoned.

[84] The State, however, insists that Accused No. 1 should be found guilty of theft acting in common purpose with Accused No. 2 and No. 3 in respect of the theft of the items listed as stolen property in the indictment.

Accused 1’s concession: count 14

[85] As regards count 14 (possession of firearms without a licence) Ms Verhoef argued on behalf of the State that it relates to two firearms (Exhibits 8 and 9, being the .250 and the .22 rifles). Mr Isaacks conceded that Accused No. 1 had indeed taken possession of Exhibits 8 and 9 while not being in possession of a licence when they were brought and given to him by Accused 2 and Accused 3 at Areb and he went on to hide them in the grass away from the children; and that a conviction for being in possession of those firearms without a licence would be proper.

Counts not proved against Accused 1: 1-10; 12 and 15

[86] As regards the possession of ammunition without a licence (count 15), Mr Isaacks submitted that since the ammunition was in a stove when it was brought to Accused No. 1 the intention to possess the same was not proved, as there is no evidence that Accused No. 1 saw the ammunition and that he should therefore be acquitted of that count.

[87] I am in agreement with Mr Isaacks on this score and I am satisfied that it had not been proved beyond reasonable doubt that Accused No. 1 was in possession of the ammunition without a licence as alleged. Based on the concessions made by the State and on the finding I have just made in respect of count 15, Accused No. 1 is acquitted in respect of counts 1 to 10, 12 and 15.

Remaining charges against Accused 1: 11, 13 and 14

[88] The charges which Accused No. 1 remains answerable for are therefore counts 11(disposing of and/or concealing and hiding some of the items listed in Annexure A) , count 13 (theft of items listed in Annexure A – excepting the .31 revolver, the Hyundai and the trailer , and count 14, possession of the two rifles without a licence.

Accused 1 guilty on count 14

[89] On the vicarious admission through his counsel during argument - which was properly made- I convict Accused 1 on count 14 of the indictment.

Counts 11 and 13: Defeating or obstructing justice and theft

[90] With regard to the theft count, Ms Verhoef submitted that either Accused No. 1 acted in concert with Accused no. 2 and Accused no. 3 and agreed before the theft was committed at the farm that he would receive and assist in the disposal of the stolen property, or he was a receiver in

the proper sense by acquiring the stolen property from Accused no. 2 and Accused no. 3, not for the purpose of assisting them, but for his own profit or gain.

Theft

[91] To find Accused no. 1 guilty of theft I must be satisfied that he had a prior agreement with Accused No. 2 and No. 3 that the latter two would go and steal and bring the stolen property to him. I am satisfied that the fact that I did not find Accused 2 and 3 guilty of theft but of robbery with aggravating circumstances does not detract from that, as long as I am satisfied that he had prior agreement with them to commit theft. It would be stretching it too far to hold that their intention to rob should be attributed to Accused No. 1. I am sure it was for that reason that the State conceded he could not be found guilty of housebreaking and robbery.

[92] Accused No. 1 denies fore-knowledge or prior arrangement with Accused No. 2 and No. 3. His

counsel argued that Accused No.1 had only innocently agreed to assist Accused No. 2 and No. 3 to come and farm with him at Areb. It was argued further that Accused No. 1 had been informed by Accused No. 2 and No. 3 that the livestock that was to be brought by the two were inherited from their late father.

[93] The State relies on several facts, evidence and circumstances as supporting (and corroborating) the inference of Accused No. 1's knowledge about the criminal purpose with which Accused No. 2 and No. 3 went to the farm; and that Accused No. 1 received stolen property from the farm as compensation for his having to look after the stolen livestock of Accused No. 2 and No. 3.

[94] State Witness Mr. Cedric Bio-Ri Richter testified that on 2 March 2005 Accused No. 2 and No. 3 came to his house looking for Accused No. 1. Richter knew all Accused persons. Accused No. 3 informed Richter that they had some business with Accused No. 1. Accused No. 1 then also arrived

and upon Richter asking what business the three had in common, Accused No. 2 stated that it related to livestock he had inherited from his father and that the livestock was 20 kilometres outside Keetmanshoop. When Accused no.2 said that the livestock was outside Keetmanshoop, according to Richter, all the Accused laughed and went away. He testified that he asked the 3 Accused why they were laughing but they did not answer. The inference sought to drawn from this evidence is that the 3 Accused knew that the explanation about inherited livestock was not true. The evidence of Richter was not challenged by Accused no. 1 under oath as he did not testify. Save for a denial that it occurred under cross-examination, it remains unchallenged. The witness has in my view also not been discredited.

[95] State Witness Mr. Markus Noabeb testified that in February 2005, Accused No. 1, No. 2 and No. 3 came to him in his capacity as Headman of the area where farm Areb is located. On that occasion Accused No. 1 informed Noabeb that he was

moving back to Areb. Noabeb then told Accused 1 that although he had in November 2004 moved with his livestock to Rehoboth, he was free to return any time and that in any event Accused No. 1's donkeys and donkey cart were still at Areb. This testimony is relied on to contradict the version given by Accused No. 1 in his witness statement taken on 8 March 2005 before he became an Accused in this matter, claiming that during 2005 he started farming with sheep and goats at farm Areb. The contradiction is said to be accentuated by the fact that while giving evidence at his bail hearing Accused No. 1 testified that when Accused No. 2 and No. 3 came to ask that they farm with him at Areb, his small livestock was in Rehoboth.

[96] Another circumstance relied on by the State is that contrary to Accused No. 1's denial, through his Counsel, that the pictures taken at Areb show that the livestock stolen at the farm and brought to Areb by Accused No. 1, No. 2 and No. 3,and the stolen livestock had been mixed with the animals of Accused No. 1 which were only

returned to Areb together with the stolen livestock. The fact that Accused 1’s small livestock were only returned to Areb with the stolen livestock was confirmed by Accused No. 1 at his bail hearing.

[97] To put this in perspective, when confronted by the State at the bail hearing that the scheme between Accused No. 1 and Accused No. 2 and No. 3 was that he would inform Witness Noabeb that he was moving back to Areb and in so doing create the pretext for mixing his livestock with the stolen livestock brought by Accused No. 2 and No. 3 and to in that way avoid detection, Accused No. 1, instead of giving an innocent explanation, stated at the bail hearing that he ‘will not be able to respond’. No other innocent explanation was put on behalf of Accused No. 1 to Witnesses to gainsay the inference that the scheme was such as alleged by the State. The timing of his visit to Noabeb in the presence of Accused 2 and 3 and the manner and timing of the return of his stock together

with the stolen stock from the farm, corroborates the State's theory.

[98] Accused No. 1's Counsel put to Accused No. 2 in cross-examination that Accused No. 1 did not see the stolen items being off loaded at his house in the night of 5 March 2005. In contrast, Accused 2 positively asserted that Accused No. 1 had been informed of the goods being off loaded at his house with the undertaking they would be recovered the next day. In addition, Accused No. 1's denial is discredited by the fact that at his bail hearing he stated that he had no discussion with Accused No. 3 when the latter off loaded the stolen articles at the house of Accused No. 1. In his plea explanation before me, he specifically said:

> 'at about midnight that evening, accused no 2 and 3 arrived at my house with a small truck loaded with livestock and other movable items. I accompanied them to the farm after they offloaded some off the movable items at my house'

[99] At the bail hearing Accused No. 1 had denied seeing the small burnt revolver (.38) that had been in the possession of Accused No. 2 and No. 3 and brought from the farm. His instruction to his Counsel though was that he saw the .38 revolver on the way to Areb from Rehoboth. Accused No. 2 also testified that Accused No. 1 on 6 March 2005 asked him about that firearm; and Warrant Officer Scott testified that Accused No. 1 told him that he had seen a small ‘rusted’ gun in the glove box of the vehicle driven by Accused No. 2 and No. 3. That evidence remains undisputed. It raises the question: why lie about that and give so many versions about the same thing. The Court does not have the benefit of his explanation for these inconsistencies. It strengthens the inference that he knew more about the nefarious activities of Accused 2 and 3 then he makes out.

[100] The stolen livestock and Accused No. 1’s livestock was transported to Areb at night. At his bail hearing Accused No. 1 denied entertaining

any suspicion that the goods were stolen. This stands in sharp contrast with his plea explanation that he had at some point become suspicious about the large quantity of property brought by Accused No. 2 and No. 3 and intended to talk to them very seriously about it. And it remains undisputed that Accused No. 1 never reported his suspicion to law enforcement.

[101] Accused No. 1 was given the stolen rifles by Accused No. 2 and No. 3 at Areb. He never demanded to see the licences for these firearms and his action after receiving the same was to go and hide it in order to make sure that the children did not come in contact with the rifles. One would, the State suggests, have expected him to return the rifles to Accused No. 2 and No. 3 or to bring them to the attention of law enforcement. He did neither of those things and the version given by the Accused No. 2 that in January 2005 he told Accused No. 1 that he would be bringing unlicensed firearms to him corroborates the State’s case that Accused No. 1 knew more about

the intentions of Accused No. 2 and No. 3 before they went to the farm then he is prepared to state.

[102] Detective Warrant Officer Geoffrey Scott stated in his testimony that the rifles found at Areb and hidden by Accused No. 2 had, as conceded on behalf of Accused NO.1, been found lying in the grass away from the home of Accused No. 1 and his brother, Wambo, without any pretence at concealing them and that children would have easily found them.

[103] Counsel for the State submitted that the above conduct of Accused No. 1 is inconsistent with innocence and establishes a common purpose between Accused No. 1,Accused No. 2 and No. 3 to steal and to possess the stolen goods jointly after the theft was committed. She submitted therefore that Accused No. 1 is a *socius* to the crime of theft in that he acted in concert with the thieves and agreed before the taking that he

would receive and assist to dispose of the stolen property.

[104] Ms Verhoef also submitted that I need not find that Accused No. 1 in so acting in concert with the thieves intended to derive any personal financial gain or benefit from his custody and control.[11]

[105] In the face of these damning circumstantial evidence against him, Accused No. 1 elected not to provide an answer under oath that he did not know what the intention of Accused No. 2 and No. 3 were when they went to the farm. He has by so doing also chosen not to give the Court an explanation for the many falsehoods that he told at various stages both before and after his arrest.

[106] The lies told by Accused No. 1, the State submitted, do not stand alone: It must be considered together with the other evidence and that doing so leads to the inescapable conclusion that he was either a socius with Accused No. 2 and

[11] *R v Kinsella* 1961 (3) SA 519 CPD at 526 C to H.

No. 3, or was a receiver of stolen property in the proper sense.

[107] In his plea explanation Accused No. 1 stated that at some stage when Accused No. 2 and No. 3 brought the livestock and other property he became suspicious that they may have been stolen. In the Witness statement he also stated that when they arrived at the farm at about 05:00 or 06:00 in the morning of 6 March they off loaded the animals and the other loose items and that he 'realised that the food was too many'. He was then told by Accused No. 2 and No. 3 that 'the white man was having a shop and as he also moved from the farm he gave us half of the stock which were in the shop.' Another significant aspect of the Witness statement of Accused No. 1 is that his brother, Booitjie, who lived at farm Areb and who was present when the animals and the loose items were brought and off loaded at farm Areb where Accused No. 1 and his brother lived was

> *'not happy about the goods which was in his yard and said that it must be removed a bit*

far from his home. Me and my brother then removed the goods'.

[108] That Accused No. 1's brother did not wish to be associated with the goods is therefore very clear. How could Accused No. 1 who had been told only about inherited livestock not have more than just suspicion about the property brought by Accused No. 2 and 3, which included unlicensed firearms?

[109] The State seeks that an adverse inference be drawn against Accused No. 1 for his failure to return the firearms Accused 2 and 3 left with him when he realised that they were unlicensed. Another circumstance is the fact that Accused No. 1, a farmer with livestock, did not bother to find out from Accused No. 2 and No. 3 whether they had permits to transport the animals from where they got them to farm Areb.

[110] During the trial I had expressed the *prima facie* view that the law requires a person

receiving stock to be in possession of a permit. I have since had regard to the Stock Theft Act, 12 of 1990. Section 8 of the that Act states:

> *"(1) No person shall drive, convey or transport any stock or produce <u>of which he or she is not the owner</u> on or along any public road unless he or she has in his or her possession a certificate (hereinafter referred to as a removal certificate) issued to him or her by the owner of such stock or produce or the duly authorized agent of such owner, in which is stated-*
>
> *(a) the name and address of the person who issued the certificate;*
>
> *(b) the name and address of the owner of such stock or produce..."*

[111] The significance of this is that I am satisfied that Accused No. 1 did not act in breach of that provision considering that he was not driving the vehicle at the time stolen stock was being transported; and as regards his stock that

was being transported, he could not be in breach of the said section because he was the owner.

[112] In coming to the conclusion that I do as regards the guilt of Accused No. 1 therefore, I do not take into account the fact that he had not demanded from Accused No. 2 and No. 3 to see the permit for the transportation of the stolen animals.

[113] That notwithstanding, I am satisfied on all the proven circumstantial evidence, strengthened by the failure of Accused No. 1 to offer an answer or response thereto, that he had planned the theft at the farm with Accused No. 2 and No. 3, and that in respect of count 13 he is guilty and that he acted in common purpose with Accused No. 2 and No. 3.

[114] Accused No. 3 is therefore found guilty of count 13 excluding the items conceded by the State should be excluded from Annexure A to the indictment. Based on the concession by his Counsel

which was properly made Accused No. 1 is also found guilty of count 14 of the Indictment.

In my judgment delivered in Court I did not specifically deal with count 11 as against Accused 1. I have again considered the record and am satisfied that in so far as it is alleged that he mixed the stolen livestock with his own at farm Areb to avoid detection of the stolen stock, the evidence demonstrated that the stolen stock was identified without much difficulty and with his co-operation. It is therefore unproven that he intended to defeat or obstruct the course of justice in that respect. As for the other items, he also co-operated to identify the rifles hidden in the grass and the other properties brought to the farm Areb. There was no suggestion that he in any way hid the items which were off-loaded at his house. Overall therefore, I am satisfied that count 11 was not proven beyond reasonable doubt against accused 1.

Accused 4

[115] Accused No. 4 in his plea explanation denied each and every charge against him and put the State to the proof of the charges against him. The State relies on the allegation by Accused No. 2 that he was contracted by Accused No. 4 to kill his parents and his sister, to justify the conviction against that Accused. It is alleged by the State that Accused No. 4 had the motive to do so because he stood to gain financially from the early demise of his parents.

[116] The State alleges that Accused No. 4 had the motive to kill his parents and that Accused No. 4’s alleged dissatisfaction with his parent’s intended distribution of assets after their death to Accused No. 4 and his sister, Yolande, which allegedly treated Yolande more favourably than Accused No. 4, provided that motive.

[117] Accused No. 2 testified that while working for the Erasmus couple he overheard a conversation between the father of Accused No. 4 and Accused No. 4 in which the father complained about the

laziness of Accused No. 4. Accused No. 4 then informed Accused No. 2 that he will have to make a plan regarding the will and starting in 2003 proposed to Accused No. 2 the killing of his parents with the offer that Accused 2 could take whatever he wanted from the farm and in addition he would receive a reward of fifty thousand Namibian Dollars (N$ 50 000.00).

[118] It is alleged that Accused No. 4 did the following acts in furtherance of Accused No. 2's crimes at the farm:

(i) He met with Accused No. 2 on 31 January 2005 to give Accused No. 2 a .38mm revolver and a firearm licence of the late Mr Erasmus.

(ii) He called Accused No. 2 on 19th February 2005 to give him instructions and to inform him that his father will not be on the farm the next weekend, being the weekend of the 25th of February as he is going to buy some Oryx in the Gobabis

district and that he take action take the following weekend. Accused No. 2 interpreted such information to mean that the killings must take place the second week after his visit on the farm, being the weekend of 4 March.

(iii) After Accused No. 2 committed the crimes Accused No. 4 met with Accused No. 2 at the police station at Kalkrand on 10 March and gave him the thumbs-up signifying his approval of what Accused No. 2 had done. Accused No. 2 interpreted such action from Accused No. 4 to mean that everything was done according to the contract to kill.

[119] The State relied on a number of factors, circumstances and evidence as corroboration of Accused No. 2’s allegations against Accused No. 4. I will set out the critical ones.

[120] The State led the evidence of a former co-worker of Accused 4, Mr Paul Beukes. Paul Beukes

worked at Hertz Car Rental where Accused no.4 was employed in March 2005. The high water mark of Beukes' evidence is that Accused No. did not show up for work on 5 March when he should have and that he then tried to reach Accused No. 4 on the latter's cell phone number without success. He then went to the home of Accused No. 4 at about 13:00 hours but did not find him and he eventually managed to speak to Accused No. 4 on his cell phone number at about 15:15 when Accused No. 4 informed him that he was on his way to the farm. The State relies on the fact that Accused No. 4 had allegedly told Paul Beukes about some problems at the farm before he had been told as much by his mother, the late Mrs Erasmus. The call by his mother was only at 15:30 while the conversation with Paul Beukes took place at about 15:15. Accused No. 4 denies that Paul Beukes phoned him and that the underlying suggestions by Paul Beukes that he called Accused No. 4 because he was supposed to be on duty but was not, was not true.

[121] Under cross-examination by Mr Theron for Accused 4 , Paul Beukes was unable to explain certain aspects of his evidence relating to the employment history, not only of Accused No. 4, but some of the other employees at Hertz at the time. I am not entirely satisfied that the time he gives about when he spoke with Accused No. 4 is not the result of some after- the- fact-rationalization considering that the time he says he spoke with Accused No. 4 is only a difference of 15 minutes from the time Accused No. 4 spoke to his mother. In my view not much turns on the evidence of this witness.

[122] Another important circumstantial fact against Accused 4 is his conduct after he found out that his parents had been killed. I am satisfied that it was established by the State that when Accused No. 4 left the farm, after he discovered his parents had been murdered, he had the presence of mind to close every gate, starting from the farm house until the gate leading to the

main public road: To my recollection at least 3 gates.

[123] We know from the evidence, that Accused 4 was the last person to come to and leave the farm after the departure of Accused No.2 and No.3. The next to come to the scene were the police officers after he went to report at the Rehoboth police station. The police found all the gates to the farm closed, including the one at the farm house. Seductive inference from this proven fact is that when Accused 4 left the farm he did not apprehend any harm to himself from whoever had killed his parents and that such conduct on his part is not consistent with the primordial human instinct of self-preservation in the face of apprehended danger. The question is: is the only reasonable inference to be drawn from this proven fact the one that he knew who had perpetrated the murders and that because of his alleged contract with Accused No. 2, he knew that the perpetrators of the murders did not represent a threat to him? Against him it has to be said, human experience

teaches us that a person in such circumstances would apprehend danger to themselves and not act in a manner that would expose them to the very danger that they just observed perpetrated on others. That is however not an immutable principle, nor is it in the nature of an irrebutable presumption.

[124] Accused No. 4’s explanation is that he had no recollection if it was he who closed the gates and why he would have done so if it were him. He said he was so shocked by what he had seen and could not give an explanation if he was the one who closed the gates. This, in my view, is not a reasonably possibly true explanation. However, whether his closing the gates in the manner that I have described is evidence of guilty knowledge must depend on the strength of the other evidence pointing to the existence of a contract to kill between him and Accused No. 2. I now turn to that evidence.

[125] Accused No. 2 testified that it was on 31 January 2005 that Accused No. 4 handed him the .38 special revolver at Klein Windhoek. That such a meeting took place or that a .38 revolver was handed to Accused No. 2 are denied by Accused No. 4. Accused No. 2's testimony is that the meeting took place around 13:00 on 31 January 2005. Truth is, and this Mr Theron himself positively stated in argument, Accused No. 2 had no way of knowing that in the period since he left the employ of the Erasmus family, Accused No. 4 had started work at Hertz at the Hosea Kutako International Airport.

[126] We know that Accused No. 2's knowledge of Accused No. 4 is that he lived in the Cimbebasia area at the other end of town. It must be such an incredible coincidence for Accused No. 2 to identify as the meeting place for the 31 January 2005 meeting, a location which is closest to Accused No. 4's work place than unknown to Accused No. 2 and not a location closer to where Accused No. 2 knew Accused No. 4 had lived or worked.

[127] Although it is submitted on behalf of Accused No. 4 that the State failed to prove that Accused No. 4 left his place of work at the time Accused No. 2 claims to have met him at Klein Windhoek, the time given by Accused No. 2 is such that it was possible for Accused No. 4 to have left his place of employment and to meet up with Accused No. 2.

[128] What cannot be lost sight of, however, is the fact that, as stated on behalf of Accused No. 4, Accused No. 4’s cell phone does not show any cell phone calls to any number which Accused No. 2 could have used at the time or that Accused No. 4 was in the place other than the place of employment at the time that Accused No. 2 says he met with or received a call from Accused No. 4.

[129] The cell phone records admitted in evidence show that Accused 4’s known number was registering at the Hosea Kutako Tower at the time Accused 2 said he met him at Klein Windhoek. That he might have used another cell phone number is pure

conjecture and no evidence was led of such a number. I am not able to find admissible proof beyond reasonable doubt to justify a finding, as asked by the State, that Accused No. 4 used a cell phone number other than the one he said he used throughout the relevant period.

[130] Mr Theron on behalf of Accused No. 4 correctly submitted that Accused No. 2 is a single witness in respect of the alleged pact between the two to murder the parents of Accused No. 4 and that for that reason Accused No. 2’s evidence must be approached with caution.

[131] Accused No. 2 testified that before he broke open the safe at the farm with a crow-bar and a handsaw, he first fired at it with a .38 special revolver to thereby again forcible entry to the safe. The Court at that point directed Mr Nambahu, a ballistics expert from the NFSI, to conduct a forensic examination into the safe to verify this claim of Accused 2. This was crucial to establish the truth of his allegation because on it hinged

his allegation that he received the .38 revolver from Accused 4 on 31 January 2005. I was satisfied that justice would be served by establishing the truth of this crucial allegation.

[132] Mr Nambahu's forensic examination of the safe, based on the evidence of Accused No. 2, led him to conclude that a bullet fired from a .38 special revolver could not have penetrated the safe and that the more likely explanation is that the damage to the right hand side of the safe was caused by a metal handsaw. Under cross-examination by Ms Verhoef, considering that at that point he was a Witness of the Court, Mr Nambahu stated that the reason for that conclusion lies in the difference of the marks made by slow velocity objects and high velocity objects. He explained that a high velocity object such a fired-bullet would have caused more paint to chip off at the point of impact of the safe but that such was not seen on the safe. His conclusion was that he saw no evidence of a high velocity projectile such as a bullet being fired at the safe.

[133] Despite the State's best efforts to get Nambahu to leave open the possibility that Accused No. 2 might indeed have fired at the safe as he alleged, and that the marks caused by such firing may well have been obscured by the subsequent damage caused to the safe on the same surface area by the use of the crow-bar and the handsaw, Nambahu was firm in his expert opinion that none of the marks that he saw on the safe were consistent with the damage caused to the safe by a high velocity projectile. He opined that the damage to the right hand side of the safe was highly probably caused by the saw blade followed by the crow-bar and that the scratch marks on the door of the safe could have been caused by wear and tear and not by a high velocity projectile. He said that the projectile fired from a .38 special revolver could not penetrate the safe.

[134] In the absence of other expert evidence challenging Nambahu's version I must accept this version. That leads me to the conclusion that

Accused No. 2 lied when he said that he used the .38 special revolver which he allegedly received from Accused No. 4 in Windhoek to fire at the safe. I am fortified in this finding by the fact that the State failed to prove that in the scullery where the safe was found there was any spent projectile found by the police investigators to give credence to the version of Accused No. 2 that he might have missed the safe, alternatively, that a projectile after striking the safe ricocheted and dropped somewhere in the scullery or nearby.

[135] Accordingly, I am not satisfied beyond reasonable doubt that Accused No. 2 received a .38 special revolver from Accused No. 4 in the circumstances and for the reason he alleges he did ; that is to kill the family of Accused No. 4 for a reward by the latter.

[136] I have set out the most crucial evidence the State relies on to justify a conviction against Accused No. 4. I have also set out the adverse

inferences that can and should be drawn against Accused 4.

[137] I must admit that certain of the proven facts raise some suspicion about the relationship between Accused No. 2 and No. 4. There are aspects about Accused No. 4's conduct, especially on the day he drove to the farm after he failed to make contact with the parents, and the coincidences in relation to the times that Accused No. 2 says he communicated with Accused No. 4, that are difficult to explain. That, however, gives me no warrant for a finding that it was proved beyond reasonable doubt that he conspired with Accused No. 2 to kill his parents and six other people named in the Indictment. The test for conviction is not suspicion, however strong, that an accused was involved in a crime, it is proof beyond reasonable doubt.

[138] I am mindful that Accused No. 2 is a self-confessed mass murderer who, faced with the inevitability of his fate at the altar of justice

for his heinous crimes, had the motive and clearly demonstrated the resolve to minimise his brother's role in the unspeakable evil deeds that unfolded at the farm and which are the subject of this trial.

[139] The danger that Accused No. 2 might be seeking some sympathy for his admitted crimes by attributing blame to someone else is all too real. I must only rely on Accused No. 2's word against that of Accused No. 4 if I am satisfied beyond reasonable doubt that the danger of relying thereon is removed by cogent corroborative evidence.

[140] As stated in *S v Blom*[12], *in convicting on circumstantial evidence based on inferences,*_

> *'the inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn. The proved facts should be such as to exclude every reasonable inference from them save the ones to be drawn. If they do not exclude*

[12] 1939 AD 188 at 202.

other reasonable inferences there must be a doubt whether the inference sought to be drawn is correct.'

[141] The State sought to establish that Accused No. 4 stood to benefit from the death of his parents. His knowledge about the contents of the will of his parents prior to their death is a central plank of that argument. The theory is that he was not content with what he stood to benefit which was only the Cimbebasia house which in any event was placed on the market by his parents. According to the State, he wanted more. He wanted to also get a share of the farm which, in terms of the will as written but not as intended by the parents, entitled him to a share of the estate as residue.

[142] In cross-examination of Accused No. 4 his sister Yolande and book- keeper Greef that theory was pursued with vigour by Ms Verhoef. Particularly Greef, debunked that theory. He was emphatic that instead of, as suggested by the

State, seeking to exploit the parents' lack of diligence in making a determination that in fact made the interest in the CC owning the farm part of the residue from which he would get an equal share with his sister, Accused No. 4 actively co-operated to facilitate the transfer of the interest in the farm owning CC in to the sole name of the sister.

[143] The State also sought to discredit Greef suggesting that he was interested in buying assets from the estate. Greef gave a full explanation regarding why he applied to the Master of the High Court for permission to sell the farm by public auction and that he also obtained the Master's permission for him to bid for the property so that he could get the best possible price - which he achieved in the end.

[144] Accused No. 4 testified that he loved his parents and his sister, Yolande, and that they were a close family who openly discussed affairs of the family. He testified that the terms of the

parents' will was discussed amongst the family and that he never felt that he was being unfavourably treated. The reason why he did not accompany the parents to the farm on 5 March, he said under oath, was because he was entertaining friends and had to watch a rugby match. He under oath denied any common purpose with Accused No. 2 or any other Accused in the commission of any of the offences charged. He specifically denied having contracted Accused No. 2 to kill Mr and Mrs Erasmus or Yolande, his sister, and denied supplying a firearm to Accused No. 2 to kill any one or that he had any motive to cause death to his parents.

[145] Mr Theron submitted on behalf of Accused No. 4:

> *'Accused No. 2's actions were impulsive and motivated by revenge and racial hatred and were not motivated by the alleged financial gain resulting from a contract to murder his parents and sister. In order for the State to prove its case against Accused No. 4 the State must rely on the evidence of Accused No. 2 and*

that the only inference that can be drawn from the circumstantial evidence is that a contract for the murders and the other crimes existed. If any other inference, e.g. the crimes were committed out of revenge and hatred or even an impulse can be drawn then Accused No. 4 is entitled to the benefit of the doubt'

[146] Mr Theron cautioned that Accused No. 2 is a single Witness in all material respects and that his evidence is riddled with discrepancies and is a total fabrication. He relied on the fact that the late Mr Erasmus had pending criminal charges against Accused No. 2 as proving the motive for revenge against his parents. He points out that the Court should take into account that the murders were committed after Accused no. 2 had been arrested on charges laid by Mr Erasmus and that the racist utterance testified to by Warrant Officer Joodt against Accused No.2 proves the revenge motive.

[147] Mr Theron also relied on the following discrepancies of the evidence of Accused in particular:

(i) There is no evidence that Accused No. 4 visited the farm in November 2004, yet Accused No. 2 claimed that the discussion regarding the .38 special revolver took place with Accused No. 4 during November 2004. This is to be considered together with the fact that Accused No. 2 was only released from Kalkrand Police Station late in the afternoon of 1 December 2004.

(ii) Mr Theron also submits that Accused No. 4's cell phone records place him outside Windhoek on 31 January 2005 while Accused No. 2 alleges that the two of them were together. Accused No. 4's evidence is that he was at Hosea Kutako International airport at the time Accused 2 alleges the two met in Klein Windhoek. I have already made reference to the coincidence and the extent to which there

is plausibility in Accused No. 2's evidence that there was a possible meeting between the two of them on 31 January 2005. Be that as it may, that there is no evidence from Accused 4's supervisor that he was not at work, is an important consideration that Mr Theron suggests I should have regard to in favour of Accused 4.)

(iii) Then there is the obvious contradiction in Accused No. 2's testimony as regards how he gained access to the contents of the safe at the farm. In his statement to the police Accused No. 2 said he sawed opened the safe on 4 March and took the .38 revolver. In Court he testified that he received it from Accused No. 4 on 31 January 2005 only to again state under cross-examination that he shot at the safe with the .38 revolver in order to gain access to the safe to remove the rifle.

(iv) The other circumstance is the Accused No. 2's failure to give a plausible explanation why instead of laying ambush for the Erasmus couple near the road that leads to the farm, he went up to the house to then wait and kill when he by so doing exposed himself to being noticed by others on the farm.

(v) Mr Theron also argued that Accused No. 2's assertion that he spoke on the two-way radio with Accused No. 4 on 5 March 2005 to discuss the execution of the murder plot, is so implausible because Accused No. 2 knew that there was a risk of such a conversation being overheard by farm workers and the Erasmus couple while they were in Windhoek. If such a conversation was overheard by the Erasmus couple it clearly would have given rise to suspicion why Accused No. 4 was talking to Accused No. 2.

(vi) The fact that during the section 119 proceedings in the Court below, Accused 2 said his reasons for committing the murders was because he was not well treated is said to provide the motive.

(vii) There is also the inexplicable delay in Accused No. 2 implicating Accused No. 4 at any time between 6 March and the Section 119 proceedings, a period of ten days. Accused No. 2 for the first time only implicated Accused while he was being detained at the Hardap Prison.

(viii) Accused No. 2 also maintained that as part of the contracted killing of the Erasmus couple he was given a firearm licence by Accused No. 4 together with the .38 special revolver. The fact, however, is that the firearm licence found at the Beukes' residence in Rehoboth on the day the two brothers were arrested belonged to the late Mr Erasmus and had no connection with the .38

special revolver, which revolver was on the contrary licences to the late Mrs Erasmus and her licence was not found in possession of Accused No. 2. Accused No. 2 was unable to provide any credible explanation why Accused No. 4 would have given him the firearm licence of the late Mr Erasmus which had no relationship to the .38 special revolver. Clearly as an after- thought Accused No. 2 suggested that Accused No. 4 had also given him a photograph of himself which was to be pasted on the licence of the late Mr Erasmus. That of course still does not explain the fact that the licence would still not be valid in respect of the .38 special revolver.

[148] In seeking to demonstrate the implausibility of the contract to kill, in cross-examination of Accused No. 2, Mr Theron identified three occasions on which Accused No. 2 had a perfect opportunity to kill the Erasmus family if he was contracted by Accused 4 to do so:

(i) The first was in December 2003 when Accused No. 2, the couple and Yolande were on the farm and only with only one potential witness, one Willem present at the farm. Accused No. 2 explained the reason for not committing the crime at this point of time was because he was waiting for Accused No. 4 to bring along the firearm as discussed by the two of them.

(ii) The second chance was when the said Willem went on leave around the 8th of December 2003 until the beginning of January 2004 leaving Accused No. 2 alone with the couple on the farm. Again Accused No. 2 stated that he was waiting on Accused No. 4’s instructions.

(iii) Lastly it was on the weekend in February 2005 when Accused No. 4 went to go buy cattle with the couple in the direction of the Oanob Dam as he put it himself. Mr Theron questioned Accused No. 2 on why he did not execute the plan

since by then he got the firearm that he was waiting for on both preceding occasions and Accused No. 2 (implausibly) answered :

> *'although I had the firearm with me, My Lord, my intention was to go and collect my goods . I did not go there with the intent to go and kill them'.*

[149] Ms Verhoef has, with some justification, levelled criticism at certain discrepancies in the evidence of Accused No. 4 and in some respects falsehoods in his evidence. I do not propose to deal with each of these because, one, the fact that an Accused tells a lie does not make him a murderer and, two, at the end of the day, as regards Accused No. 4, I must be satisfied beyond reasonable doubt that Accused No. 2's version that he was contracted by Accused No. 4 to kill his parents; that Accused No. 4 in fact gave him the .38 special revolver on 31 January 2005 and that the two communicated with each other on 5/6

March 2005 while Accused No. 2 was at the farm, must be proved beyond reasonable doubt.

[150] A very significant consideration in favour of Accused No. 4 is the fact that Accused No. 2 never implicated him for up to ten days since his arrest on 6 March. The explanation Accused No. 2 offers for that is that he had expected to be assisted with legal representation by Accused No. 4 and could therefore not have implicated Accused No. 4.

[151] I find the assertion of the promise of legal representation difficult to accept. If Accused No. 4 had contracted Accused No. 2 to kill his parents and Accused No. 2 is apprehended, as he was, how reasonable would it be to expect that Accused No. 4 would engage legal representation for the very person that is accused of killing his parents without attracting attention to himself? How could Accused No.4 have justified providing legal assistance to Accused No. 2 in such circumstances? I accept anything is possible in life, but I have

no plausible explanation for an arrangement which on the face of it defies logic. I find Accused No. 2's explanation about being promised legal representation by Accused No. 4 incoherent, implausible and false beyond reasonable doubt.

[152] Coupled with this is the fact that at the Section 119 plea Accused No. 2 accepted full personal responsibility for what he did and declared that he killed the Erasmus couple out of revenge and the rest of the people in order to avoid being implicated in the crimes.

[153] I am not satisfied beyond reasonable doubt that Accused No. 2 was procured by Accused No. 4 to commit the crimes on the farm; and accordingly Accused No. 4 stands acquitted of all the charges against him.

VERDICT

[154]In light of the above, the results are as follows:

Accused 1:

Count 1: Murder **(Acquitted)**

Count 2: Murder **(Acquitted)**

Count 3: Murder **(Acquitted)**

Count 4: Murder **(Acquitted)**

Count 5: murder **(Acquitted)**

Count 6: Murder **(Acquitted)**

Count 7: Murder **(Acquitted)**

Count 8: Murder **(Acquitted)**

Count 9: Housebreaking with intent to rob and robbery with aggravating circumstances as defined in section 2 of the Criminal Procedure Act, 51 of 1977. **(Acquitted)**

Count 10: Robbery with aggravating circumstances as defined in section 2 of the Criminal Procedure Act, 51 of 1977.**(Acquitted)**

COUNT 11: Defeating or Obstructing or attempting to defeat or obstruct the course of justice. (**Acquitted)**

COUNT 12: Arson, alternatively malicious Damage to Property. **(Acquitted)**

Count 13: theft **(guilty)**

Count 14; Contravening section 2 read with section 1, 38(2) and 39 of Act 7 of 1996- Possession of fire-arm without a licence. **(guilty)**

Count 15: Contravening section 33 read with section 1, 38(2) and 39 of Act 7 of 1996- Possession of Ammunition. **(Acquitted)**

Accused 2:

Count 1: Murder **(guilty)**

Count 2: Murder **(guilty)**

Count 3: Murder **(guilty)**

Count 4: Murder **(guilty)**

Count 5: murder **(guilty)**

Count 6: Murder **(guilty)**

Count 7: Murder **(guilty)**

Count 8: Murder **(guilty)**

Count 9:Housebreaking with intent to rob and robbery with aggravating circumstances as defined in section 2 of the Criminal Procedure Act, 51 of 1977. **(guilty)**

Count 10: Robbery with aggravating circumstances as defined in section 2 of the Criminal Procedure Act, 51 of 1977.**(guilty)**

COUNT 11: Defeating or Obstructing or attempting to defeat or obstruct the course of justice. (**guilty)**

COUNT 12: Arson, alternatively malicious Damage to Property. **(guilty)**

Count 13: theft **(not guilty)**

Count 14; Contravening section 2 read with section 1, 38(2) and 39 of Act 7 of 1996- Possession of fire-arm without a licence. **(guilty)**

Count 15: Contravening section 33 read with section 1, 38(2) and 39 of Act 7 of 1996- Possession of Ammunition. **(guilty**)

Accused 3:

Count 1: Murder **(guilty)**

Count 2: Murder **(guilty)**

Count 3: Murder **(guilty)**

Count 4: Murder **(guilty)**

Count 5: murder **(guilty)**

Count 6: Murder **(guilty)**

Count 7: Murder **(guilty)**

Count 8: Murder **(guilty)**

Count 9: Housebreaking with intent to rob and robbery with aggravating circumstances as defined in section 2 of the Criminal Procedure Act, 51 of 1977. **(guilty)**

Count 10: Robbery with aggravating circumstances as defined in section 2 of the Criminal Procedure Act, 51 of 1977.**(guilty)**

COUNT 11: Defeating or Obstructing or attempting to defeat or obstruct the course of justice. (**guilty)**

COUNT 12: Arson, alternatively malicious Damage to Property. **(guilty)**

Count 13: theft **(not guilty)**

Count 14; Contravening section 2 read with section 1, 38(2) and 39 of Act 7 of 1996- Possession of fire-arm without a licence. **(guilty)**

Count 15: Contravening section 33 read with section 1, 38(2) and 39 of Act 7 of 1996- Possession of Ammunition. **(guilty**)

Accused 4:

Count 1: Murder **(Acquitted)**

Count 2: Murder **(Acquitted)**

Count 3: Murder **(Acquitted)**

Count 4: Murder **(Acquitted)**

Count 5: murder **(Acquitted)**

Count 6: Murder **(Acquitted)**

Count 7: Murder **(Acquitted)**

Count 8: Murder **(Acquitted)**

Count 9: Housebreaking with intent to rob and robbery with aggravating circumstances as defined in section 2 of the Criminal Procedure Act, 51 of 1977. **(Acquitted)**

Count 10: Robbery with aggravating circumstances as defined in section 2 of the Criminal Procedure Act, 51 of 1977.**(Acquitted)**

COUNT 11: Defeating or Obstructing or attempting to defeat or obstruct the course of justice. (**Acquitted)**

COUNT 12: Arson, alternatively malicious Damage to Property. **(Acquitted)**

Count 13: theft **(Acquitted)**

Count 14; Contravening section 2 read with section 1, 38(2) and 39 of Act 7 of 1996- Possession of fire-arm without a licence. **(Acquitted)**

Count 15: Contravening section 33 read with section 1, 38(2) and 39 of Act 7 of 1996- Possession of Ammunition. (**Acquitted)**

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DAMASEB JP

ON BEHALF OF PLAINTIFF **MS VERHOEF**

Instructed by: **OFFICE OF THE PROSECUTOR GENERAL**

ON BEHALF OF ACCUSED NO. 1 **MR ISAACKS**

Instructed by: **ISAACKS & BENZ INC**

ON BEHALF OF ACCUSED NO. 2 **MR IPUMBU**

Instructed by:

ON BEHALF OF ACCUSED NO. 3 **MR MBAEVA**

Instructed by:

ON BEHALF OF ACCUSED NO. 4 **MR THERON**

Instructed by: