



CASE NO.: CC 11/2010

**IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI**

In the matter between:

THE STATE

and

ABISAI NDAUMBWA

ACCUSED

CORAM: TOMMASI J

Heard on: 17/01-20/01, 23/01, 25/01, 27/01/2012,
01/02 - 03/02, 06 - 09/02/2012

Delivered on: 21/02/2012

JUDGEMENT TOMMASI J: [1] The accused herein was indicted with having committed murder; housebreaking with the intent to rob and robbery with aggravating circumstances and a further count of robbery with aggravating circumstances.

[2] The deceased, Waltraut Hedwich Hanna Volkman, a 74 year old woman lived alone in her farmhouse on a farm, Jakalomuramba situated between Otavi and Tsumeb. A few farm workers resided on the farm in what they

called a "*location*" which is situated approximately 200 meters from the farmhouse. On 9 June 2009 sometime between the hours after the workers retired to their quarters and 21H50 the deceased was attacked in the sanctity of her farmhouse by an intruder with a sharp weapon capable of inflicting chop and stab wounds. The photographs presented to the Court tells a story of a gruesome attack wherein the late Ms Volkman sustained no less than eight (8) cutaneous wounds. Seven of these were chop wounds and one stab wound. The chop wounds which penetrated her skull led to her death. She was found barely alive, lying on the kitchen floor and died on the way to the hospital. The majority of these wounds are on the frontal part of the deceased's upper body and her arms. The latter wounds were described as defensive wounds. It was not disputed that the stab and cut wounds caused the death of the deceased.

[3] The farm workers testified that they were alerted by the sound of the deceased's vehicle driving at a high speed past their houses at around 21H50 on 9 June 2009. Upon inspection they found her study in disarray with papers strewn around. The safe was found open with a fire-arm; ammunition and other items strewn around in the passage. The cupboard in the main bedroom was open with clothes scattered on the floor and jewelry in jewelry boxes lying open on the bed. The doors of the cupboard in another room were found open. These are clear signs that the house of the deceased was ransacked by the intruder. The door between the veranda and the study as well as the gate to the farmyard was found open. They however did not enter the kitchen.

[4] Hartmund Freyer, a neighbor found the deceased lying in a pool of blood on the kitchen floor of her farmhouse. The photographs taken of the scene depicted a pool of blood on the kitchen floor and blood spatters on both the floor and walls of the kitchen. It was ascertained that a cellular phone; laptop; keyboard; computer screen; a green moneybox; and the

vehicle of the deceased were missing. There were no eyewitnesses and no fingerprints were found at the scene. The police however found a left shoeprint with a distinctive mark on the heel. Detective Warrant Officer Gomeb from the Crime Scene Investigation Unit found that the windows to the house were undisturbed and he therefore did not look for any fingerprints on the windows.

[5] From this evidence and the nature of the injuries the following facts are established: the intruder had: entered the house of the deceased; used a sharp object to assault the deceased in her kitchen; ransacked the house of the deceased; perpetrated the attack in order to steal personal belongings and the vehicle of the deceased; and the deceased died as a result of the injuries sustained during the attack. The initial investigation did however not determine the identity of the intruder or that the intruder broke into the house.

[6] The accused denied that he committed the offence and relied on an alibi for the night the incident occurred. The State thus bore the onus to prove beyond reasonable doubt that it was the accused who committed the crimes contained in the indictment.

[7] The State led evidence that the cellular phone of the deceased led them to the accused; that the accused pointed out certain items of the deceased and informed them where the murder weapon was. The State handed into evidence, after it was ruled as admissible evidence during a trial-within-a-trial, a confession made by the accused and the plea given by the accused in terms of section 119 of the Criminal Procedure Act, 51 of 1977.

[8] It was common cause that the farm Sargberg, where the accused was employed, is situated approximately 25km from Otavi on the tar road and a

further 4 - 5km from the tar road, to the farm. It was further common cause that Sargberg was situated in the same area as Jakkalomuramba, the farm of the deceased, although the latter was situated further from the tar road. Both farms used the same gravel road to reach the tar road. One of the workers of Jakkalomuramba estimated that the distance from the tar road on the gravel road leading to Jakkalomuramba to be approximately 20km.

[9] The Police officers who testified namely, former Chief Inspector Blaauw, Inspector Mathe and former Constable Joel Lukas; were involved in the investigation of the case directly after it was reported up to the arrest of the accused. Their undisputed evidence was that the vehicle of the deceased was recovered in Otjiwarongo outside FNB; that MTC's (Mobile Telecommunications Ltd) help was enlisted to trace the cellular phone (cell phone) of the deceased; that they were provided with a printout produced by a Call Data Recall System used by MTC, on 12 June 2009 which led to the arrest of the accused. The accuracy of the information contained in the printout was not disputed and same was handed into evidence by agreement.

[10] The printout reflects that cell phone of the deceased was operative in the reception area of Signalberg tower on 9 June 2009. The first call recorded in this area was at 16H51 and the last call at 21H56. Signalberg tower, from a map produced by Martha Constantine, an employee of MTC, provides network coverage for both Jakalomuramba and Sargberg farms. It may safely be accepted that the deceased was in possession of the cell phone during this period or that it was in the vicinity of Jakalomuramba during this time. This much was not disputed by the accused.

[11] The accused testified that on 9 June 2009 he was not feeling well and he reported to the foreman of the farm Sargberg where he was employed that he would go to the clinic in Otavi. He left the farm at 11H00 and

returned to the farm at around 3H30 on 10 June 2009. State witness Gideon Kubeb confirmed that the accused reported that he was not feeling well and that he did not see the accused on the farm during the day and the evening after work. The accused testified that he arrived at the clinic at 13H00 and left the clinic at 16H00. He walked around town for approximately 30 minutes and got a lift with a truck at approximately 19H00. According to the accused the truck's tyre burst approximately 5km from Otavi and he assisted the truck driver to change the tyre. This took very long and he only arrived at his house on the farm Sargberg around 3H30 the next morning. Selma Xamses, the girlfriend of the accused, confirmed that the accused returned early morning hours of 10 June 2009. She also testified that the accused walked into the bushes that afternoon during lunchtime and after work; and repeated this behavior remainder of that week. The accused was therefore on the farm from early hours of 10 June 2009 until his arrest on 12 June 2009.

[12] The printout indicated that the cellular phone of the deceased was in the reception area of Otjiwarongo tower from 11H22 until 11H35 on 9 June 2009 and in the reception area of Okoruso mine, Siemanshof, and Leyte towers on 10 June 2009. All these towers are situated between Otjiwarongo and Otavi. The map reflects that the area covered by these towers fall outside the area of the farm Sargberg. According to the printout the cell phone of the deceased returned to the area of Signalberg tower at approximately 17H00 on 11 June 2009. The cell phone was therefore not in the same area where the accused was during the period 10 June 2009 to approximately 17H00 on 11 June. The only reasonable inference to drawn from these facts is that the accused could not have been in possession of the deceased cell phone during this period.

[13] On 11 June 2009 the printout reflects that at 17H01 a different SIM¹ card was inserted into the phone of the deceased which registered a different cell phone number. A person using this number had, earlier that day, dialed another number from a different phone. The police officers testified that they on 12 June 2009 received the printout which indicated that the number which was dialed was in operating in the reception area of Coblenz at that time. Constable Joel Lukas was instructed to go to Coblenz. He testified that Mr Shetekela responded when called and that he was the person who was called by the person who had inserted the SIM card into the cell phone of the deceased. This call was made from the reception area of Signalberg tower at 11H26.

[14] Mr Shetekela testified that he informed Constable Joel Lukas that the number belonged to the accused and that the accused had called him to find a part for his vehicle which he wanted to repair. He had known the accused for approximately four years. He purchased cattle from the farm Sargberg where the accused was employed. Accused had given him his cell phone number approximately two years ago and he had saved his cell number on his cell phone. He, during cross-examination, testified that he recognized the voice of the accused. The accused disputed the fact that he made such a call to this witness on 11 June 2009 and that the cell number was his. The accused however did not dispute the fact that this witness knew him nor did he deny knowing this witness.

[15] The police armed with this information and a witness who knew the accused and where he lived, drove to the farm Sargberg and arrested the accused. Constable Joel Lukas who was the arresting officer, testified that he introduced himself; had shown the accused his appointment certificate; and warned him in accordance with the Judge's rules in Oshiwambo. The accused was hereafter handed over to Chief Inspector Blaauw who testified that he

¹subscriber identification module (SIM)

first determined whether the accused understood Afrikaans and thereafter requested him to direct him to his house. The accused indicated to him that he understood Afrikaans and directed them to his house. At the house Chief Inspector Blaauw introduced himself, informed the accused of the purpose of his visit, warned him in terms of the judge's rules and informed him of his right to legal representation. The accused denied that his rights were explained to him or that he was informed of the charge against him. He however testified that Chief Inspector Blaauw showed him his appointment certificate.

[16] Inspector Blaauw testified that he requested the accused's permission to search his house and the accused consented thereto. The accused disputed this. Chief Inspector Blaauw testified that Jacky Tjivikua, the daughter of the owner of the farm Sargberg, arrived at the house of the accused during the search and wanted to know who they were and what they were doing on the farm. Chief Inspector Blaauw took her aside and informed her of the purpose of the visit. Jacky, who according to Chief Inspector Blaauw, at first was quite annoyed, calmed down after he had explained what they were doing. Jacky during her testimony confirmed that she came there just after they had started the search and that Chief Inspector Blaauw explained to her why they were there. She decided to remain present to make sure that nothing would go wrong. Inspector Mathe, who also rejoined the group at the house of the accused whilst Chief Inspector Blaauw was explaining the accused's rights, also testified that the accused had consented to the search; and that Jacky arrived whilst they were at the house of the accused. Constable Joel, who was at all times close to the accused, testified that the accused agreed that his house may be searched. The accused testified that Jacky only arrived at a later stage. Nothing was found during the search of the house.

[17] Chief Inspector Blaauw, testified that he questioned the accused and this led to the accused showing him a broken phone which he took from the house of Gideon Kubeb. This phone was clearly not what Chief Inspector Blaauw wanted and he further questioned the accused in respect of a cell phone that he had used the previous day. The accused led them to the storeroom close to the main farmhouse.

[18] Chief Inspector Blaauw during this period observed a *panga* (machete) with a broken handle and blood on it in the storeroom. Inspector Mathe testified that it was outside the house of the accused, Constable Joel Lukas testified that it was found at the house of Gideon Kubeb and the accused could not recall where it was found. The accused testified that he saw Chief Inspector Blaauw with the *panga* after they had left the house of Gideon Kubeb. Jacky indicated that it was found at the homestead. Gideon Kubeb testified that his *panga's* handle broke the previous day and that it was kept in the store-room. The accused directed the police to another *panga* which was being used by the farm workers at the time and which later was handed to the police. Both these pangas were seized and handed into evidence as exhibits. It was sent for forensic analysis. The outcome of the forensic analysis was not handed into evidence as the State considered the objection raised by the accused to be valid. The court therefore cannot attach any weight to this evidence.

[19] Chief inspector Blaauw, Inspector Mathe, Constable Joel and Jacky testified that the accused voluntarily pointed out a cell phone attached to a charger which was plugged into an electrical socket on the wall of the store-room. A picture was taken of the accused standing close to the cell phone. The accused testified that Chief inspector Blaauw, after the search and after seeing his broken phone, told him: "*that is fine, lets go.*" Chief Inspector

Blaauw then led them to the storeroom. He testified that Chief Inspector Blaauw was already in the storeroom when he arrived and instructed him to point at the cell phone. A picture was then taken of him pointing at the phone. He had no knowledge how it got there.

[20] Chief Inspector Blaauw testified that upon further questioning the accused led them to the cooler which they found locked. A picture was taken of the accused standing in front of the locked cooler. The accused took out the key to open the padlock from the left pocket of his blue jacket. Inspector Mathe opened the door and a picture was taken of Inspector Mathe opening the door. The accused pointed out the shoes inside the cooler. Inspector Mathe removed the shoes; placed it on a table outside and yet another picture was taken of the shoes. His testimony was by and large confirmed by Jacky, Inspector Mathe and Constable Joel. The accused testified that Chief Inspector Blaauw, after his picture was taken said "*lets go*" and led them to the cooler room. The key of the padlock was in the padlock. Inspector Mathe took out the key and he was instructed to stand next to the door and a picture was taken. Chief Inspector Blaauw entered the cooler and came out with the shoes which he placed on the table outside. A photograph was taken of the shoes. The door was locked and a photograph was taken of the locked door. Chief inspector Blaauw thereafter said "*lets go*" and they jumped on the police vehicle. He testified that Jacky arrived just as they were about to leave and also got into the vehicle. The accused however did not testify what Jacky's response was when she arrived at the cooler.

[21] Chief inspector Blaauw testified that he wanted to know the whereabouts of the other stuff and the accused led them into the bushes and pointed out a bag filled with the personal belongings of the deceased. This was not far from the fence between Sargberg and the neighboring farm.

They drove there with a police vehicle and according to him the accused led the way. He was on the phone at the time reporting to his superiors and arrived at the place last. Inspector Mathe, Jacky and Constable Joel confirmed that the accused led the way. There were however some discrepancies in respect of where the accused was seated and who followed directly after the accused in the bushes. Some photos were taken here. Accused testified that Chief Inspector Blaauw stopped the vehicle and ordered them to get off. Chief Inspector Blaauw then led the way to where the black bag was found.

[22] The accused was thereafter taken to Tsumeb where he was further questioned by Chief inspector Blaauw. The State conceded that the admissions made during this session were inadmissible and it will therefore not be taken into consideration for purpose of determining the merits of this case. The accused made the following confession to the magistrate:

“My aim was not to kill. I just wanted to tie her up and go with the things. This was at the farm, I don’t know the name of the farm, near Otavi on the way to Tsumeb. I was on the 9th of June it was around 7H30 pm.

When I arrived at the farm, I sat at the top of the mountain. I waited for the sun to set. After sunset, I went into the yard. When I entered the house, I found her in the kitchen. I found out that the window in the sitting room was not properly closed, I managed to get into the kitchen through the sitting window.

I found her sitting in the kitchen, she started screaming when she saw me. I told her that she must not scream. She took the container which had water which she drinking and she threw it at me. I ducked. I told her that she must not throw anything at me, she must just co-operate. I took the panga which I had, I chopped her on the arm and twice on the head.[my emphasis] I went and took a computer and a laptop. I opened the safe and removed the money. I took the car key. I also took the keys for the gate and I went to open the gate.

I started the car and I drove to Otjiwarongo. I left the car at Otjiwarongo near FNB bank and I took a lift to go back to the farm. I went to the farm where I work at Sagberg. I slept. The police came and arrested me today at the farm

where I work. The person I chopped is a whit lady, I don't know her name. I knew she was alone, I used to see her with her husband but her husband passed away"

[23] The accused appeared in the district court on 15 June 2009 and pleaded in terms of section 119 of the Criminal Procedure Act, 51 of 1977. He pleaded guilty to murder; not guilty to theft of a motor vehicle read with the provisions of the Motor Vehicle Theft Act, 12 of 1999; and not guilty to a charge of housebreaking with the intent to rob with aggravating circumstances. The accused was questioned in respect of the provisions of section 112(1)(b) in respect of the murder charge as follow:

"Crt: What exactly are you pleading guilty to or admitting?"

Acc: I am pleading guilty to this charge because I am the one who killed her. I killed her with a panga, once on the hand and twice on the head. [my emphasis]

Crt: Did you have any right whatsoever or any lawful excuse to kill the deceased as you did?

Acc: No

Crt: When was this, when this murder occurred?

Acc: On 9 June 2009

Crt: Where was this?

Acc: I don't recall the name of the farm.

Crt: The charge says farm Jakkalsomuramba, Kombat do you agree?

Acc: Yes

Crt: Do you know the name of the deceased?

Acc: No

Crt: The charge says Waltrud Hedwig Volkmann

Acc: I agree.

Crt: Do you admit that by striking her with a panga on the arm and on the head as you did that your intention was to kill her or cause her death?

Acc: No

Crt: Did you foresee the possibility that by so striking her with a panga on the arm and on the head as you did, you foresaw the possibility of her dying as a result of the injuries sustained?

Acc: I did not foresee that. I just wanted to beat her with the panga and she ducked and in the process she was chopped by the panga.

[24] The accused maintained that he only repeated what he was forced to repeat by Chief Inspector Blaauw as he was assaulted. The testimony of the accused and the witnesses in respect hereof was dealt with in a trial-within-a-trial and will not be taken into consideration herein. Doing so would be irregular.²

[25] The Court has to determine whether the State has proven beyond reasonable doubt whether the accused committed the offences as stipulated in the indictment. The first dispute was that the accused was not at the farm of the deceased at the time she was attacked and her vehicle and personal belongings stolen.

[26] The only direct evidence placing the accused at the scene is his confession and his answers to questioning by the magistrate during his plea in terms of section 119. This being the case, it deserves careful scrutiny. The accused stated that he had entered the house of the deceased through a window in the sitting room which was not properly closed. The State adduced evidence that the windows appeared undisturbed and therefore it was not examined for fingerprints. This is unfortunate but not fatal. The

²Evidence of accused and that of State witnesses adduced during trial within the trial ought not to be injected into main trial on the merits. See *S v SITHEBE* 1992 (1) SACR 347 (A) A

window was not broken and the disturbance thus caused was minimal. The accused indicated that he found the deceased sitting in the kitchen. The photographs taken clearly depict a writing pad, pen, a plate and a glass. It is therefore possible that the deceased was sitting at the kitchen table at the time the accused entered. His statement in the confession however that he hit her once on the arm and twice on the head does not correspond with the post mortem report that she sustained eight wounds. It further differs from his replies to questions by the magistrate. He informed the magistrate that he hit the deceased once on the hand and twice on the head. The deceased, according to the post mortem report indeed sustained chopping wounds on her arm as well as her hand. This is an indication that the accused was certainly aware of the fact that the deceased had sustained wounds to her arm and hand. The items mentioned by the accused furthermore do not include all the items which were proven to have been stolen. The State adduced evidence that the accused was not at his home during the time the crime was committed. Given some of the discrepancies between the facts presented by the State and the confession it would be prudent not to rely solely on the confession by the accused.

[27] The State submitted that in addition to the confession by the accused they had proven that the accused had been found to have been in possession of items recently stolen and that the doctrine of recent possession should be applied to infer that it was the accused who had robbed the deceased.

[28] The accused disputed that he pointed out whereas the State witnesses were adamant that he pointed out the items found at or near the farm Sargberg. Chief Inspector Blaauw impressed the Court as an objective witness. His ability to recall was better than most of the other witnesses who

came to testify on behalf of the State. He gave detailed and clear evidence of the scene and the arrest and it was corroborated by other State witnesses. Although the Court gained the impression that finding the suspect enjoyed high priority, there was no indication that Chief Inspector Blaauw at any time had a special interest beyond the call of duty. I found him to be a credible witness. The evidence of Jacky in particular is significant as she was present to protect the accused. Her ability to recall events however was poor and this made her an unreliable witness. She however would have remembered if Chief Inspector Blaauw walked around the farm like he knew where everything was or was planting evidence. Her sole reason to accompany them was to see that nothing would go wrong. I find her evidence that she joined the police and the accused at the latter's house and that the accused had pointed out the items at the places to be reliable.

[29] The inevitable inference from the account of the accused is that Inspector Blaauw knew beforehand where the items were that were pointed out and exactly where it was hidden or placed. The only information which Chief Inspector Blaauw had at the time was that the accused had phoned Lazarus Shetekela from a number connected to a SIM card which was placed in the phone of the deceased. This information only led to the whereabouts of the accused and not where the phone was kept. There is no evidence that he had obtained knowledge of the whereabouts from another source other than the accused. It is therefore improbable that Inspector Blaauw would automatically know where to find the items on the farm.

[30] The evidence of the accused strongly suggests that Chief Inspector Blaauw and the other police officers planted the items there in order to implicate him. The evidence led by the State was that it was not possible for the accused to have been in possession of the phone on 10 June until

approximately 17H00 on 11 June. A real possibility exists that someone else was in possession of the phone. The question, given the testimony given by the accused would be whether the police was in possession of the cell phone during this time.

[31] The suggestion by the accused that the police planted the evidence is preposterous for a number of reasons. There was no evidence that the police recovered any of the property before 12 June 2009. The police solicited the help of MTC to find the phone which meant that they did not have the phone in their possession on 12 June 2009 when MTC provided them with the printouts. The police's primary concern was to find the suspect. It is highly improbable that the police officers would find the evidence and then randomly choose to implicate the accused by planting it at the farm Sargberg. It is even more improbable that Chief Inspector Blaauw would plant the cell phone with the cell phone charger in an electric socket without having had any prior knowledge that the store-room would be equipped with such a facility. It may safely be accepted that the evidence was not planted by the police.

[32] I therefore accept the State witnesses' version that the accused pointed out the various items and reject his evidence that Inspector Blaauw found it on his own at the various places, as false.

[33] Having determined the factual dispute it remains for the Court to consider the admissibility of the pointing out. The State bore the onus to prove beyond reasonable doubt that the pointing out was made freely and voluntarily as required by as it is now settled law that pointing out amounts to extrajudicial statements and that it should therefore comply with the

provisions of section 219(A) of the Criminal Procedure Act 51 of 1977.³ The police officers are to ensure that there is no infringement of the accused constitutional right to a fair trial. The State led evidence that the accused's rights to remain silent and his right to legal representation were explained to him. Chief Inspector Blaauw testified that he explained the right to legal representation to the accused including his right to apply for legal aid. He however at no stage informed the accused that he could consult with a legal practitioner before he makes any statement or pointing out and that he could have a legal practitioner present during the pointing out. The accused was not afforded the opportunity to exercise or waive this right. The accused was 20 years at the time, an unsophisticated farm worker who was confronted by a large group of very senior police officers. Only a perfunctory explanation was given before Chief Inspector Blaauw commenced asking questions which he knew might incriminate the accused. In *S v MALUMO AND OTHERS* (2) 2007 (1) NR 198 (HC) Hoff J at 214 A-D cited with approval the following passage by Froneman J in *S v Melani and Others* 1996 (1) SACR 335 (E):

"The right to consult with a legal practitioner during the pre-trial procedure and especially the right to be informed of this right, is closely connected to the presumption of innocence, the right of silence and the proscription of compelled confessions (and admissions for that matter) which 'have for 150 years or more been recognised as basic principles of our law, although all of them have to a greater or lesser degree been eroded by statute and in B some cases judicial decision' (in the words of Kentridge AJ in Zuma's case). In a very real sense these are necessary procedural provisions to give effect and protection to the right to remain silent and the right to be protected against self-incrimination. The failure to recognise the importance of informing an accused of his right to consult with a legal advisor during the pre-trial stage has the effect of depriving persons, especially the uneducated, C the unsophisticated and the poor, of the protection of their right to remain silent and not to incriminate themselves. This offends not only the concept of substantive fairness which now informs the right to a fair trial in this country but also the right to equality before the law. Lack of education, ignorance and poverty will probably result in the underprivileged sections of the community having to bear the brunt of not recognizing the right to be D informed of the right to consultation with a lawyer."

³S v Sheehama 1991 (2) SA 860 (A)

[34] The State failed to prove beyond reasonable doubt that the accused constitutional rights were properly explained prior to being questioned by Chief Inspector Blaauw which in turn led to the pointing out by the accused. The State reminded this Court that it has discretion to admit the evidence despite the infringement. No evidence was led to the fact that the accused knew or should have known of his right to consult before pointing out or to have a legal practitioner present during the pointing out. Although his employer's daughter was present to make sure that nothing went wrong, she was not present at the time when the accused were informed of his rights. Chief Inspector Blaauw was a seasoned police officer who understood the value of questioning an accused as soon as possible after the offence but he should have had due regard to the fact that the accused was unsophisticated and needed to be properly and fully apprised of his right to consult with a legal practitioner. I am not persuaded that this violation would not taint the fairness of the accused trial. The Court therefore rules the evidence of the pointing out and answers to questions by Chief Inspector Blaauw to be inadmissible and will disregard same for purposes of determining the guilt of the accused.

[35] Counsel for the accused agreed that the accused does not dispute that the cell phone, shoes and a bag filled with the deceased belongings were found at farm Sargberg. The fact that it was the accused who pointed out these items is inadmissible evidence. It cannot therefore be said that the State succeeded to prove beyond reasonable doubt that the accused was in possession of the items found on farm Sargberg on the basis that he pointed it out.

[36] This however, is not the end of it. The evidence by Lazerus Tjitikera that the accused called him on 11 June 2009 links the accused to the phone of the deceased. This fact was disputed by the accused. Lazerus Tjitikera was single witness in respect of this evidence and given the dangers inherent in accepting this evidence, the Court is required to treat it with circumspection. A further reason for caution is the fact that he identified the accused's voice over a telephone. This witness had no apparent interest in the matter. His evidence that he knew the accused was not challenged nor was it put to him that the accused did not know him. It is possible that he could have made a mistake with the voice of the accused given the fact that his name appeared on the screen of this witness's phone. It is however unlikely that there was a misunderstanding given the fact that the call originated from the network area where the accused found himself and the fact that the phone was found on the farm Sargberg. These facts called for an explanation by the accused. The accused denied calling this number and put it to the witness that he had a completely different cell number. A number of witnesses for the State knew the accused intimately eg. his girlfriend. One would think that she would have known the cell phone number that he had used at the time. The accused had ample opportunity to elicit evidence during cross-examination of these witnesses supporting his case that he had a different number. However no questions were posed to these witnesses to test whether they could recall his telephone number at the time.

[37] I am satisfied that the State had satisfactorily proven that the number belonged to the accused and that he had made the call to Lazerus Shetekela. This together with the evidence presented by Ms Constantine of MTC places the accused in possession of the deceased's cell phone on 11 June 2009. No explanation was offered by the accused that he received the phone from another person. There was only his bare denial. The State thus discharged

their onus to prove that he accused was found to have been in possession of the cell phone of the deceased.

[38] The accused confessed to having killed the deceased and having taken certain items; he was found to have been in possession of the deceased stolen phone. The alibi offered by the accused is vague. The accused when going to Otavi took 2 hours to reach Otavi but a total of 8 hours 30 minutes from Otavi to Sargberg. Surely it is not plausible that it would take that long for two persons to change a tyre on a truck; to travel 25 km on tar; and for the accused to walk 4-5 km to the farm. It certainly is possible but improbable. It cannot be said, given the evidence herein, that the accused alibi could reasonably possibly be true.

[39] The accused, in his confession stated that he did not have the intention to kill. The accused however arrived at the farm with a *panga*. The accused thus came prepared to overcome any resistance if encountered. The screaming of the deceased could be seen as such form of resistance which the accused had anticipated as this could have alerted the farm workers. The choice of weapon and the place on the body where the blows were directed leaves no doubt that the accused intended to kill the deceased and that it was pre-meditated.

[40] The Court is satisfied that the State has proven beyond reasonable doubt that the accused had unlawfully and intentionally entered the house of the deceased by opening a window which was not properly closed, unlawfully and intentionally murdered the deceased by chopping and stabbing her with a *panga* and that he had unlawfully and intentionally robbed her of her personal belongings and the vehicle. I am however not persuaded that the

State has proven a separate set of culpable facts justifying a conviction of a second count of robbery of the motor vehicle. A conviction on count 3 would under these circumstances lead to a duplication of convictions. The State succeeded in proving that the accused had the single intent to rob the deceased of her personal belongings including the vehicle and a single count of robbery with aggravating circumstances is justified.

[41] In the premises the accused is found:

1. guilty of count 1 (murder)
2. guilty on count 2 (housebreaking with intent to rob and robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977)
3. Not guilty on count 3 (robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977)

Tommasi J

ON BEHALF OF THE ACCUSED

Ms. Mugaviri

Instructed by:

Mugaviri Attorneys

ON BEHALF OF THE STATE

Adv. Shileka

**Instructed by:
General**

Office of the Prosecutor-