



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case No: CC 2/2017

THE STATE

versus

RIAAN KHAXAB

1ST ACCUSED

HANS GERHARD KAMBERIPA

2ND ACCUSED

Neutral citation: *S v Khaxab* (CC 2/2015) [2017] NAHCMD 133 (11 May 2017)

Coram: USIKU, J

Heard: 9 – 13 May 2016, 23 – 24 May 2016, 31 May 2017, 2 June 2016, 15 – 18 August 2016, 8 September 2016, 14 – 15 September 2016, 17 – 19 January 2017, 23 – 26 January 2017 and 22 March 2017

Delivered: 11 May 2017

Flynote: Criminal law – Murder – Accused one and two charged with murder – Doctrine of common purpose – Act of one accused imputed to the other.

Summary: Criminal law. Accused one making spontaneous statements. Such admissions admissible against him. Where Court is faced with two conflicting versions. Court must apply its mind not only to the merits

and demerits of the state and defence case but also to consider the probabilities of the case.

Evidence: Recent possession of suspected stolen properties.

VERDICT

Count one : Guilty of murder dolus eventualis.

Count two : Guilty of robbery with aggravating circumstances as defined in Section 1 of Criminal Procedure Act 51 of 1977.

Count three : Guilty of defeating or obstructing to defeat the course of justice.

Count four : Guilty of possession of firearm without a licence.

Count five : Guilty of possession of ammunition.

JUDGMENT

USIKU, J:

[1] The accused persons face an indictment containing five counts namely: murder, robbery with aggravating circumstances as defined in section 1 of the Act; defeating or obstructing or attempt to defeat or obstruct the course of justice, contravening section 2 of Act 7 of 1996 – possession of a firearm without a license; contravening section 33 of Act 7 of 1996 – unlawful possession of ammunition.

INTRODUCTION

[2] Count one: Murder

It is alleged that on or about 28 November 2011 and at or near farm Drie Reviere in the district of Rehoboth the accused did unlawfully and intentionally kill Ernst Jacobus Cloete, an adult male person.

[3] Count two: Robbery with aggravating circumstances as defined in section 1 of the Act. It is alleged that on the same date and at or near farm Drie Reviere in the district of Rehoboth, the accused did unlawfully and with the intention of forcing him into submission assault Ernst Jacobus Cloete by hitting him with axe(s) and or other unknown object(s) and or by tying his hands and feet with a rope and did unlawfully and with intent to steal take from him a wallet with PSEMAS medical aid card, PSUN card, Meatco membership card, GIPF card and at least N\$300 cash money, a .270 saho raffle with serial number 553150 with a suppressor, telescope and rifle bag, at least 8 live .270 bullets, 30 sheep and 3 goats, a rope and a Samsung cellular telephone, the property of or in the lawful possession of the said Ernst Jacobus Cloete.

[4] Count three: Defeating or obstructing or attempting to defeat or obstruct the course of justice. It is alleged that on the same date and place the accused did unlawfully and with the intention to defeat or obstruct the course of justice by hiding the deceased's body in the bushes and covered it with some shrubs whereas these acts were perpetrated whilst the accused knew or foresaw the possibility that:

- (a) Their conduct may frustrate and/or interfere with police investigations into the disappearance and/or death of the deceased, and/or
- (b) Their conduct may conceal and/or destroy evidence of an assault perpetrated on the deceased and/or
- (c) Their conduct may protect one or both of them from being prosecuted for a crime in connection with the assault and/or death of the deceased and the robbery of property in his lawful possession.

[5] Count four: Possession of a firearm without a license

In that during the period 28 November – 2 December 2011 and at or near Rehoboth in the district of Rehoboth the accused did unlawfully and intentionally have in their possession an arm, namely a 270SAKO rifle (serial number 553150) without having a license to possess such arm.

[6] Count five: Possession of firearm

In that during the period of 28 November -2 December 2011 and at or near Rehoboth in the district of Rehoboth the accused did unlawfully and intentionally have in their possession ammunition, namely at least eight live 270 bullets without being in the lawful possession of an arm capable of firing such ammunition.

[7] Accused one pleaded not guilty to counts one, two and three but tendered a plea of guilty on counts four and five. Accused 2 pleaded not guilty to all counts.

THE SUMMARY OF SUBSTANTIAL FACTS

[8] On the 28 November 2011 the deceased was tending to his goats and sheep that were grazing in the field on farm Drie Reviere in the district of Rehoboth. The two accused who were hiding in nearby bushes attacked the deceased and killed him by hitting him with axe(s) and/or other unknown objects and tying his hands and feet with a rope. They hid the deceased's body in bushes and covered it with shrubs. They did this with an intent to defeat or obstruct the course of justice as set out in count three in the indictment. The accused proceeded to rob the items listed in count two in the indictment. Neither accused was in possession of a valid firearm license to be in possession of the firearm and ammunition listed in count four and five in the indictment. The accused acted with common purpose at all material times.

[9] Mr. Lutibezi appears on behalf of the State. Accused one was represented by Mr. Uirab and accused two by Mr. Tjituri. Both counsels were instructed by the Directorate of Legal Aid.

[10] Mr. Uirab on behalf of accused one handed in a statement in terms of section 115 of Act 51 of 1977 which was prepared in respect of counts one, two and three respectively. A statement in terms of section 112 (2) was admitted by the Court in respect of counts four and five for accused one. As a result accused one was found guilty on his own plea on counts four and five and was convicted as charged.

[11] On the other hand, Mr. Tjituri on behalf of accused 2 gave a lengthy plea explanation in terms of section 115 of Act 51 of 1977 as amended. The following were recorded as admissions: Accused two admitted to have been in the district of Rehoboth on the dates as indicated in the indictment. He also admitted to have been in the company of accused one on a farm in the district of Rehoboth upon request of the latter in order to steal livestock. They had walked for about 7 km out of Rehoboth.

[12] Accused two admitted further that they had entered a certain farm and found sheep and goats grazing together. He then pursued and run after this stock in order to direct it towards Rehoboth. Whilst in the area where sheep and goats were grazing, he spotted a vehicle at a distance of about 400 meters from the stock.

[13] Accused two's further plea explanation is that as he followed the sheep and the goats towards the direction of Rehoboth, he saw accused one going towards the motor vehicle he had spotted. He did not stop and continued to pursue the goats and sheep up to Rehoboth. His intention was to appropriate the stock for his own purposes. He left accused one behind on the farm and that was the last time he saw him on the 28 November 2011.

[14] Accused two's explanation in respect of count two is that he bears no knowledge about the alleged robbery of the deceased as alleged in the indictment. He denied to have tampered with the deceased's body. Neither did he have the rifle and ammunition in his possession.

[15] Accused two further indicated in his plea explanation that he only got to be aware about the alleged robbery after he was arrested. He denied to have handed over any properties to accused one as per the latter's plea explanation.

THE EVIDENCE

[16] Mr. Paul Skrywer testified that he is a resident of Farm Drie Reviere situated in the district of Rehoboth. He has been farming on that farm and knew the deceased Ernest Jacobus Cloete, who too was farming in the same area. On the 28th November 2011 during early morning hours, he had driven from Rehoboth and saw the deceased tending to his sheep and goats inside the kraal. They each waved to one another as the former drove passed the deceased's residence. That was the last time he saw the latter alive.

[17] Mr. Hugo Cloete a resident of Rehoboth testified that he and the deceased have been farming in Drie Reviere since 2004. The deceased is his father. His two brothers were also farming on the same farm with mostly sheep and goats. The deceased was the one who took care of the animals on the farm. At the time of his demise the deceased was taking care of the animals alone on the farm.

[18] On the 29 November 2011, he received a call about the deceased who was said to be missing. He had been in Windhoek for business, and decided to drive to Rehoboth. Upon arrival at Rehoboth he went to the Rehoboth police station where he identified the stolen stock as his which included sheep and goats.

[19] He identified the stock from the marks by his father as well as from the ear tags of his stock and that of one of his brother. There were about 30 sheep and two goats. The ear tags of the deceased was made from aluminum and had the deceased's brand number on it which was LU6, whilst his ear tags were orange in colour. He explained that a brand mark is something unique and it specifically belong to a particular person. He was able to positively identify the ear marks on the livestock as he had cut them himself for identification purposes.

[20] Mr. Hugo Cloete also identified his brother's stock which had green ear tags and ear marks, on the right ear, which were cut off on the left edge in half moon shape and a small cut at the back. Those had been cut by his brother, one Jacobus Cloete, for the purposes of identification. He did positively identify the thirty sheep and the two goats as belonging to him, his father and his brother. The livestock was then taken back to the farm after positive identification.

[21] On the farm he joined the searching party for the deceased. The police as well as private people assisted in the search of the deceased from about 15 – 16 h00 in the afternoon. The search proceeded until about 19h00 in the evening but the deceased could however not be found.

[22] Mr. Hugo also testified that the deceased owned a motor vehicle which was a pick-up, silver in colour but black underneath at the time of his death.

[23] Having failed to trace the deceased, around the farm, he decided to spend the night on the farm with a hope that the latter will return. The next morning about six am the search for the deceased continued. At about eight o'clock in the morning of the next day the search was stopped after the deceased's body was found covered with grass and bushes which made it not be seen clearly.

[24] Mr. Hugo than drove to Rehoboth police station in order to collect the police. Police drove back to the scene where after the deceased was identified by Mr. Hugo from the clothes he wore as being that of his father who had been reported missing. He positively identified the deceased from his beard that was cut in a unique style, from the shoes he was wearing as well as from the piece of clothing the deceased wore at the time. His face could not be recognized as the body had already decomposed. The deceased's arms and legs had been tied up with a rope. His both hands were tied together as well as his feet which were tied up behind his back. The manner in which the deceased had been tied up could not allow him to loosen himself or to free himself. It was difficult to untie the knots.

[25] A photographer from the scene of crime unit also arrived and took photographs where after the body was removed to a Rehoboth hospital.

[26] At the hospital the body was identified again by Mr. Hugo as being that of his father. Furthermore, he identified the firearm on the 3rd of December 2011 at the Rehoboth police station, a point 270 Wind Chester, with a handmade belt, made by the deceased from cattle leather. The firearm had a silencer which was made by the deceased's son. It also had a telescope installed by the same deceased's son. It was kept in a brown firearm bag. Mr. Hugo identified the silencer as well as the telescope as exhibits before court. He also identified the firearm bag. He further identified the deceased's drivers license, the GIPF pension card, the leather wallet, the Woerman and Brock smart buy card, the meat board membership card with the deceased's brand number on it, the medical card bearing the deceased's initials and surname as well as the identity number on it, the deceased's PSUN card, also bearing his initials and surname as well as the deceased's identity number.

[27] Mr. Hugo further testified about the deceased's small Samsung cellphone bought by one of his brother. He handed over the cellphone's box to assist the police with further investigations. He recognized the blue and white rope that he had observed having been used to tie up deceased. He did not observe wounds or injuries on the body of the deceased at the time.

[28] Maria Van Wyk testified that she knew both accused persons. Accused one had been a friend of hers whilst accused two was her boyfriend during 2011. They did not date for long. On the 28 November 2011 she went to work but returned, after her supervisor had told her that it was her off day. Upon arrival at her mother's house she found accused two waiting for her. He had a black bag that he usually took along to work. He then left as the witness remained at the house watching television. Accused two only returned about midnight and slept until the next day. She testified that accused two invited her to accused one's house on the next day. Whilst at the house of accused one, they spoke about sheep as the latter informed accused two that he had taken two men to slaughter four sheep from which he sold some of the meat to the ladies. Accused one further informed the former that if he wanted meat he could go ahead and slaughter. Accused one then offered them meat, which consisted of a shoulder and a leg of a lamb were after they left for their home. They later cooked the meat and ate it.

[29] Ms. Van Wyk reported for work about 17h00 in the afternoon on that date and knocked off the next day at six am. Accused two then arrived at the house and they left for town for shopping. According to the witness, one of her friend bought the Republikein newspaper which reported about an old men having been killed at farm Drie Reviere. After accused two had read the article, he became nervous and smoke constantly. They returned home. Accused two then told the witness that he was going to see accused one.

[30] Accused two specifically told the witness that he was going to ask accused one about the death of the deceased, where after they both left for the residence of accused one. Upon arrival at the house, accused one and his girlfriend were arguing and as such accused two did not get the opportunity to ask him about the deceased. They returned home.

[31] At home accused two explained how they visited farm Drie Reviere. That upon arrival at the farm accused one requested accused two to hide behind a tree as the latter went to the deceased to ask for water which he was given. It was after accused one was given water that he took an axe, hit the deceased on the neck, and tied him with a rope where after he took the deceased's wallet, cell phone as well as a firearm. Accused one also drove the deceased's vehicle but did not go further as the vehicle had mechanical problems. He then told accused two to drive the sheep towards Rehoboth. They took the livestock to the river as accused one gave the cell phone to accused two in order to sell it. They agreed to meet at a specific place but accused one did not turned up as agreed. Accused two then went home.

[32] The witness upon hearing all these information advised accused two to go and report himself at the police station. The witness persisted that accused two already knew about the deceased's wallet, cell phone and a firearm before he was arrested. Accused 2 further related to the witness that at some stage, they drove the deceased's motor vehicle but it got broken, also that they left with the sheep which they took towards a river near Rehoboth.

[31] The witness denied that she visited accused two at the cells on the 4th day of December 2011 a day after his arrest. Her testimony is that she only sent him food through her relatives though admitting to have visited him at a later stage after she had given her statement to the police on the 5th of December 2011.

[32] Mr Willem Bock a farmer in the Rehoboth area testified that he knew the deceased who was his neighbour at Drie Reviere. On the 28 December 2011 he had an appointment with the deceased about an auction. The deceased never showed up. The witness visited the deceased's residence in order to find out what was going on. It was during this visit that he met with people who informed him that the deceased was missing. He then joined the search party around the mountains. He again joined other relatives of the deceased the next day when the deceased body was found. The body was found covered with branches and grass as it lay in the bushes. The witness further confirmed that whilst at the deceased's residence he never saw his vehicle and thought that he could be looking after his livestock in the field. He then left the residence.

[33] Mr David Groenewaldt testified that during November 2011 he worked as a porter at the hospital in Rehoboth. He knew the deceased who was his father-in-law. The deceased had a home in Rehoboth but was farming at Drie Reviere. On the 30th November 2011 he assisted in the search for the deceased. The search started about seven am in the area of the mountains as well as towards the side of the river. He proceeded to the mountain side, accompanied by other family members. At about 10h30 they went to the deceased's residence in order to drink water. Upon return he decided to follow the dog which was moving towards a specific direction. It was in this direction where the deceased vehicle was located on the previous day. He discovered the body of the deceased laying covered with branches and grass as he moved close to the area. The body lay on the side and flies were hovering over it. It had been decomposed, but he was still able to identify it, from the style of his beard. The deceased's hands were tied behind his back as his head lay on its left side.

[34] Mr Groenewaldt further testified that as it was windy the previous day, he could not observe any footprints neither shoe tracks on the scene. He also did not

observe any weapon laying around in the surroundings. He left the surroundings for about 20 to 25 minutes and only returned after the police had been called in. The body remained in the same position except that some of the grass that covered the body had been blown off by the wind.

[35] Mr Martinus Stefanus Eimann testified that he is employed by the Ministry of Safety and Security, stationed at the Rehoboth Criminal Investigation department. He is a detective Inspector. On the 29 November 2011 he received information about some sheep and goats grazing near the show grounds at Rehoboth. He immediately drove to the area where he found 30 sheep and two goats. He did not observe any person in the vicinity where the sheep and goats were spotted grazing.

[36] Having found these sheep and goats, he drove back to the police station to get assistance to have the stock removed to the police station about three to four kilometres from the area where they were spotted. The stock was then chased towards the police station from the show ground.

[37] At the police station the sheep and goats were identified by one Alie Husselman as belonging to the deceased, the latter's neighbour at farm Drie Reviere. An announcement was made in local radio about the stock having been found at the show grounds in Rehoboth. People were also informed to contact the Rehoboth police station with their brand mark for identification purposes. In the meantime Mr Husselman left for the farm and later on called the police to inform them that he could not find the deceased, after he had passed by his residence on farm Drie Reviere.

[38] Mr Eimann then drove to the farm in order to find out what was going on. He found the deceased's daughter in the vehicle in the field and also met Mr Ali Husselman. The deceased's daughter then informed him that she had found her father's rifle missing from the vehicle. The vehicle was approximately 260 metres from the farm house. The deceased's vehicle was then driven to the farm house as Mr Eimann drove back to Rehoboth. As it was raining they could not find any foot tracks or any other marks on the scene where the vehicle had been located.

[39] Having arrived at the Rehoboth police station from farm Drie Reviere, he was approached by Mr Hugo Cloete the deceased's son who positively identified the sheep and goats from their ear marks as well as their ear tags. The stock was handed over to him after positive identification where after all livestock were taken back to the farm.

[40] Mr Eimann testified further that on the 30th December 2011 Warrant officer Husselmann contacted him informing him that accused one was willing to give a confession where after Chief Inspector De Klerk was contacted. The latter had not been involved in the investigations.

[41] Chief Inspector De Klerk arrived at the Rehoboth police station at about 16h30 pm where after accused one was handed over to him by the witness. Accused one was normal and sober at the time he was handed over to Chief Inspector De Klerk.

[42] The witness confirmed under cross examination that the deceased's vehicle was in a working condition and that it was driven from where it had been located by the deceased's daughter to the farm house. His conclusion was that the deceased was out to look for his livestock that was at the police station. He did not suspect any foul play at that stage, as there were no traces of blood on or near the vehicle.

[43] The witness was not present when the body of the deceased was discovered. He could not explain the position of the vehicle in relation to where the deceased body was found. He also did not inspect the deceased vehicle.

[44] Mr Jacobus Albertus Cloete testified that he was a welder since his school days. He has been a resident of Rehoboth. He has been involved in farming with small stock. The deceased was his father. During 2011 he, his brother and his father, were farming together. The latter was the one looking after their livestock on the farm.

[45] The witness testified further that after he was contacted by his elder sister Clara Groenewaldt he and his brother decided to go to Rehoboth and from there,

they drove to farm Drie Reviere. Upon arrival, they inspected the deceased's vehicle and found that the ignition wires in the vehicle were cut. They then started with the search for the deceased in different directions on the farm. They could not find the deceased on the first day and police were called in as the search continued the next day. They had to spend that night on the farm.

[46] The next day other family members arrived on the farm and the search for the deceased continued. It was discovered that some of the livestock were missing. The missing livestock were later on identified by Hugo at the Rehoboth police station as being that of the deceased. After identification the livestock was taken back to the farm. The witness identified five of his livestock from the green ear tags and ear marks. The right ear was cut off straight on the bottom and the left ear was cut half-moon at the back. He could however not tell the exact number of livestock he owned at the time as the deceased had full responsibility to take care of all the livestock. He did not allow anyone to take the livestock from the farm.

[48] The witness further testified that it was his brother-in-law David who alerted them about the discovery of the deceased's body, where after he saw the deceased body laying covered with bushes and grass nevertheless he was able to identify the deceased from the unique cutting of his beard. The deceased's hands were tied up behind his back as well as his feet with a rope. After the police had arrived, photos of the deceased were taken as Mr Hugo tried to loosen the rope, and the body was removed by the police.

[49] The witness also testified that the deceased owned a 270 sako firearm. The belt of the firearm was self-made. The firearm had a telescope which had been modified. It also had a silencer. He identified the firearm before court as the one owned by the deceased. It had a piece of iron welded on it by the witness. He also identified the silencer which had not been properly affixed on the firearm, as it was damaged when first used whereby it left the hole caused by the bullet at the edge.

[50] The witness also testified that the deceased owned a Samsung cell phone which he had bought for him. The cell phone had a box which remained with the witness's employer after it was handed to the deceased. The box was then handed

over to the police for verification. He also identified the deceased's wallet. As far as the axe is concerned, he was personally approached by the deceased who asked him to weld the head on it, which he did. The axe belonged to the deceased. It was usually kept behind the seat in the vehicle. He also recognised the rope which was used to tie up the deceased's arms and feet. That too belong to the deceased, as well as a bag of ammunition which was used in the firearm.

[51] According to the witness he had personally driven the bakkie on many occasions on the farm in order to switch on the machine as it was the only vehicle that could be driven across the river. He had to connect the wires in order to start the vehicle. The vehicle was in a working condition though it was an old pick up. About the ropes that were used to tie up the deceased, he conceded that those are common and could be bought from any shop. He did not know how the phone was recovered.

[52] A statement from Mr Kelvin Collins of Ross Central Guns in Windhoek was admitted where he evaluated the firearm, a hunting rifle point 270.a sako model valued at N\$4000 as well as a letter on identification of livestock compiled by Mr Deon Steenkamp of Agra indicating the estimated value of the livestock, during the period of 28 November 2011, where sheep was valued at N\$551 per head and a goat at N\$646 also per head.

[53] Mr Gohard Beukes testified that he had been a police officer for the past 19 years with a rank of a detective sergeant. He was stationed at the Rehoboth police station. He had since left the police force and is doing business in the north since February 2014. He knew both accused persons for a long time. He arrested accused one on the 2nd of December 2011 during a police operation which started from 22h00 to 6h00 in the early morning.

[54] According to the witness, as they were on patrol duties in Block G in Rehoboth a complaint was received about a fight at Okashandja Bar in Blikkiesdorp. Together with other police officers they proceeded to that area and met accused one who started to run away. They were driving in a Volkswagen polo a police vehicle. They did not wear police uniform. The vehicle had also not been marked. As

accused one started to run away another officer jumped out of the vehicle in order to catch him. Visibility was clear as there were street lights as well as the car lights. Sergeant Van Wyk grabbed accused one on the jacket as he pulled out and run further. He remain with accused one's jacket. In the meantime there was a patrol vehicle following behind. Accused one run into that vehicle and was stopped where after he handed over the panga which he held in his hands at the time. He was arrested and taken to the police station.

[55] Upon searching accused one, a pink wallet containing documents were found on him. An Agra cash receipt bearing the deceased's particulars was also found as well as a black Samsung cell phone with a red cover. Accused one was warned about his rights and informed about an investigation in a murder case. He indicated to have understood his rights and offered to talk later. He was then detained until the next morning. The items were handed to investigating officer Warrant officer Husselmann who was also informed how the items were recovered from accused one upon his arrest.

[56] Mr Beukes identified the exhibits presented before Court, being the wallet and the cash invoice from Agra bearing the deceased's particulars. The cash invoice was taken out from the wallet at the police station before accused one was detained. He also recognised exhibits "11" which is the Samsung cell phone belonging to the deceased.

[57] The witness confirm that prior to the date of arrest he had known accused one. He did not know one Maria Van Wyk who is accused two's girlfriend at the time. Apart from himself who was the driver of the vehicle he only had one officer who was his passenger. There was no female passengers in the vehicle at the time.

[58] Mr Beukes denied to have been driving a marked police van. He was already aware that accused one was involved in a fight and it was his intention to arrest him. He denied that accused one was in the company of other persons at the time of his arrest. He specifically denied that Maria Van Wyk, one of the state witnesses had been in the vehicle at the time accused one was arrested that evening. Accused one was also not arrested upon Ms Van Wyk's information.

[59] He persisted that he had found the Agra receipt in the pink wallet which bore the deceased's particulars. He could however not confirm whether the other cards of meatco board as well as the medical card which each bore the deceased's particulars were also in the same wallet.

[60] Ms Clara Groenewaldt testified that the deceased was farming in the district of Rehoboth on farm Drie Reviere during the year 2011. During the month of November 2011 the latter failed to call her for two consecutive days which was very unusual. In the meantime information came through radio about livestock roaming in the area of the swimming pool in Rehoboth.

[61] She then went to the police station in order to identify the livestock as the police had requested owners of the livestock to come and identify the stock. It was decided by the police that the deceased be collected from the farm in order to come and identify the livestock. She drove to the farm and upon arrival on the farm the deceased's vehicle was spotted in the field, a distance from the road. She discovered that the vehicle's door was not completely closed, and the ignition switch was broken. The petrol cover on the petrol tank had also been broken. She further observed that the deceased's walking stick and his hat were lying at the back of the vehicle, whilst his glasses lay in front of the vehicle. The ignition wires were also hanging underneath. She remained at the vehicle as other people she had come with went towards the deceased's residence.

[62] She attempted to call the deceased but there was no response. Other family members were notified about the situation where after it was decided to alert the police. Police arrived on the farm and the vehicle was driven to the farm house after the ignition wires were put together in order to start it. Later on other family members also arrived on the farm, and entered the farm house. It was discovered that the house was in disarray. The firearm was missing from the house and upon checking in the vehicle it could also not be found. The search for the deceased started on the side of the river but it was too late to continue.

[63] The following morning, the search for deceased continued around the farm on the river side as well as in the mountains. As the search continued, a dog was observed running in a particular direction a short distance from the farm house. It was decided to follow the dog, and as one of the witness David Groenewaldt walked ahead following it, he discovered the body of the deceased and alerted the search party. The deceased's body lay under the bushes covered with grass. It had been tied up and had already decomposed. No one tampered with it at the time.

[64] At the time of the deceased's death he owned a cell phone with number 081 297 8007. On the 1st of December 2011, the witness received a text message at midnight from the same number which frightened her reading "look around because you are the next". There was a further text message which was received by the witness' daughter from the deceased's cell phone number some few minutes after the first text message, which read "help me please".

[65] In cross-examination the witness persisted that she had received the text message on the 1st of December after the body of her father was discovered on 30 November. The reason why she did not report the matter to the police was due to fear because what had happened to the deceased could as well happen to her.

[66] With regard to the confession and admissions made by accused one the defence objected to these, firstly that the confessions allegedly made was not made freely and voluntarily, that accused one was assaulted, threatened and promises were made to him. Further that accused one was denied the opportunity to get the services of a Damara>Nama interpreter during the entire process. The warning statement was also not made freely and voluntarily.

[67] Mr De Klerk testified that he has been employed as a police officer since 1998. During 2011 he held a rank of Chief Inspector stationed at the Regional Crime Investigation Co-ordination Khomas Region and based in Windhoek.

[68] On the 3rd of December 2011 he was contacted by Mr Eiman from the Rehoboth police station. He drove to Rehoboth and upon arrival at the Criminal Investigation Unit, he was given an office whereby accused one was brought to him.

Mr Eiman informed him that accused one wanted to make a confession about the murder and robbery where the victim was one Cloete, the deceased.

[69] He remained with accused one after Mr Eiman had left the office. The witness identified himself to accused one by showing him his appointment certificate and further explained to him that he was a justice of peace. Having introduced himself to accused one he proceeded to explain his rights to legal representation, which was to engage the services of a lawyer of his own choice or to apply for legal aid should he not be in a position to pay for himself. Accused one responded that he did not need a legal representative at that stage.

[70] Mr Luwin David Nel who worked at the Rehoboth police station as a shift commander testified about the procedure when a suspect is brought to charge office. He arrested accused one after he had been brought in by the investigating officer Sergeant Beukes on the 30 November 2011. Accused one did not complain of any injuries neither did the officer observe injuries on him.

[71] In cross-examination the witness persisted that accused one had never informed him of having been assaulted by the police upon his arrest neither did he complain about having serious pain as a result of the assault.

[72] Mr Frans Amakali testified that on the 4th of December 2011 he worked as a shift commander at the Rehoboth police station when accused one was brought to him. He charged him on CR 282.11.2011 after he had asked him if he had sustained any injuries to which accused one responded in the negative. He spoke to him in Afrikaans and they understood each other well. He did not complain of anything. Mr Amakali made an entry in the Occurrence book that accused one was free from injuries and had no complaint. No injuries were observed on accused one at the time though he had made a complaint about the slight swelling on the back to Commissioner De Klerk the previous day.

[73] Mr Luis Van Wyk also a police officer testified that on the second of December 2011 he was in company of Sergeant Beukes and were on patrol duties in

town where after they proceeded to Okashandja bar after they had received a complaint about a fight at the shebeen. Accused one was the suspect in fight.

[74] Accused one was arrested as he attempted to run away and was found in possession of a panga. He was thereafter taken to the police station. He was not assaulted at the time of this arrest.

[75] At the police station accused one's jacket was seized and a wallet was found in the jacket's pocket. Some items were also found in the accused's wallet amongst them an Agra receipt bearing the deceased's particulars. A cell phone was also found on accused one. All these items were booked in the Pol seven register.

[76] The witness testified further that accused one was informed about his arrest also that he had a right to get a legal representative of his choice. He was also warned that whatever he would say would be written down and could be used as evidence in the Court of Law where after accused one informed them that he will get a lawyer at a later stage.

[77] Mr Van Wyk also testified that they drove in a Toyota Hilux and not a Volkswagen polo as testified to by Sergeant Beukes. It was a pick-up which was an unmarked police vehicle.

[78] Though the operation was for crime prevention, it was also to get information about the murder that took place earlier involving the deceased.

[79] Mr Van Wyk emphatically denied that after accused one was arrested by the police from the other vehicle, he was assaulted and kicked as he lay on the ground. His testimony is that as they approached him he was still standing up straight. No one assaulted him at all. Accused one then handed over a panga to Sergeant Beukes who instructed the members to load him on the vehicle where after he was driven to the police station.

[80] Mr Petrus Husselman employed at the Rehoboth Criminal Investigation Unit testified that he was the investigating officer. After accused one was arrested on the

third of December 2011 he took him for interrogation and questioned him about the receipts and the cell phone which were allegedly found in his possession. Upon observation accused one appeared sober and had no injuries on his body. He also did not complain of any assault on him.

[81] Mr Husselman further testified that before he interrogated accused one he explained to him about his right to remain silent, also his right to get a lawyer of his own choice and to apply for a legal aid lawyer to which the accused responded that he did not need any lawyer to be present at that stage. Accused one explained the events where after he questioned him if he wanted to make a confession. He responded in the positive. Arrangements were then made for accused one to give his confession. Mr Husselman testified that apart from accused one offering to make a confession he was co-operative and was free, he later led them to the arrest of the second accused on that same date. He had not been aware of accused two's involvement. He charged both accused the next day after he had explained to them their legal rights. Accused one informed him that he had already given a confession and had nothing further to say. Accused one then appended his signature on the warning statement.

[82] During the interview they understood each other well and there was no need for an interpreter. They spoke in Afrikaans language. Accused one had no complaints and there was no misunderstanding between them. Upon questioned if he wanted to have a legal representative accused one indicated that, may be at a later stage. On a further question as to what his choice was, if he wish to make a statement or only wish to answer questions after consultation with a legal representative, he responded that he has already made a confession and prefer to have the case finalised as soon as possible.

[83] On further questioning if he had injuries accused one responded in the negative. He had not been influenced in any way to make a statement or to answer questions. He confirmed that the statement was being given freely and on his own volition. Accused one further confirmed that he understood the purpose and consequences of the nature of the proceedings.

[84] Accused one was specifically informed of his right to apply for legal aid. The recorded statement was then read back to him where after he signed on each page of the statement. The purpose of him signing on each page was to confirm that he understood the proceedings and that he was satisfied with what had been recorded. Accused one did not raise any complaint about the manner in which the statement was taken.

[85] In the trial-within-a-trial accused one testified that at the time of his arrest on the 2nd of December 2011 he was a resident of Rehoboth. Whilst in the company of two ladies at a club, police came and stopped there, they had an operation that evening. The police vehicle stopped next to them as other officers were called in and were about to handcuff him. He questioned the police why they were handcuffing him. The police ordered him to get on the vehicle and he refused to do so as he had not done anything wrong.

[86] According to accused one, police officer Beukes accused him of being drunk. He was thereafter loaded on the police vehicle but managed to get loose from their grab and started to run away. As he run away another police vehicle with police officers approached and one of the police officers managed to tail him. There were many police officers present.

[87] Having been tripped by one of the officers he fell to the ground as the police officers started to beat him all over his body with police batons. He was also kicked as he tried to cover himself. He could however not tell how many police officers were assaulting him because he was covering himself and could not see. Accused one testified that sergeant Beukes and Van Wyk also took part in the assault on him. He was however not beaten for a long time before he was loaded on the police vehicle and driven to the police station.

[88] At the police station accused one was searched by sergeant Beukes who took two wallets from him as well as some cash money. The two wallets belonged to him and his girlfriend. Accused one denied that his rights were explained to him by sergeant Beukes. According to him, he was then locked up and told to wait by warrant officer Nel whom he had asked to release him. Accused one remained in

the cells with other inmates until warrant Eiman arrived and locked him out where after he was taken to the charge office. At the charge office warrant Eiman asked him in a rude manner about what he had done.

[89] He accused him of playing ignorant whilst he knew what he had done. Warrant Eiman then told him that Serious Crime will be coming and that he will be made to talk, also that he will be beaten. Accused one returned to the cells and after a while warrant Eiman again arrived at the cells. He was then taken to an office behind the police station where he met sergeant Petrus and sergeant Kalumbu from the Investigation Unit.

[90] Accused one further testified that he was questioned about the murder case by warrant Eiman who questioned him whether it was him or Hans the second accused person. Warrant Eiman then informed him that he will talk to Serious Crime as they laughed. He was again taken back to the cells and for the second time warrant Eiman returned and told him that he was looking for him (accused one). Accused one came out from the cells and it was when he saw police vehicles parked outside including the black vehicle for Serious Crime Unit. He was loaded on the vehicle which warrant Eiman drove. They drove to the location followed by other vehicles up until the house of accused two. As they did not find accused two they decided to go and search for him at his girlfriend's residence. At the residence of accused two's girlfriend the police officers ordered him to get out of the vehicle as they started to cock their firearms. Accused two was then arrested and they left for his girlfriend's residence.

[91] At the residence, they found Sergeant Michael an investigating officer with his girlfriend. He was then ordered to take photographs of him pointing to a firearm that was laying there by Warrant Eiman. According to accuse one he pointed out the firearm due to fear as the police had already assaulted him. He was also warned about serious crime coming to get him. After the photos were taken, the firearm bag was opened and life rounds of ammunition and silencer were found. He was questioned about to the items by the police but informed them that there were no other items. He then asked his girlfriend about the wallet which she removed from a

handbag as photos were also taken of her. After the items were photographed he was driven to the police station where he was locked up together with accused two.

[92] Accused one was later on taken to the office of the Investigation Unit where he met other police officers including Commissioner De Klerk. He also met Husselman for the first time there. He was questioned randomly by the police officers about the murder case. He explained to the police that he had no knowledge about the murder case and told them that he wanted a representative as Commissioner De Klerk ask the officers to leave the office.

[93] After the officers had left Commissioner De Klerk then introduced himself to him by presenting his appointment card whilst writing things. After which the officer spoke to him about the goods that was found as well as the murder case. Accused one informed him that he had nothing to talk about and demanded to have a representative to interpret for him in the Damara language as he did not have a good communication in Afrikaans language.

[94] Accused one further testified that he had not progressed much in school and as such he could not communicate well in Afrikaans but Commissioner De Klerk informed him that he was there to do his job which he had to complete. He then informed him that he was in pain because of being assaulted by the police officers. Accused one also informed him that he was assaulted on his back and that his shirt had bloodspots. Those assault were made at the time of his arrest.

[95] Accused one further testified that he knew about his rights to get an attorney as well as to apply for a legal representative from the Directorate of Legal Aid if one is facing a serious case. He had decided to get a lawyer before he makes his statement but Commissioner De Klerk had informed him that it was not his problem as he was only there to do his job and proceeded to write what he wrote. Concerning the explanation of rights accused one said the police officers never explained to him anything and that he was only asked to sign documents that has already been prepared. Accused one further said there was a miscommunication between him and Commissioner De Klerk as he could not speak Afrikaans well. Accused denied to have ever made a confession as alleged.

[96] There are primary requirements for the admissibility of a confession which should be complied with, that the confession must have been made freely and voluntarily. It is the duty of the state to prove beyond reasonable doubt that the confession was made freely and without any promises having been made to an accused.

[97] Whereas the accused had persisted in his evidence during the trial-within-a-trial that he was not informed about his rights, he has testified at the same time that he was aware of his rights to legal representation which included the right to apply for legal aid. He further testified that it was necessary to get a lawyer if one is charged with a serious crime. Commissioner De Klerk testified that he had been contacted by the Rehoboth police in order to record a confession from an accused. He had used a proforma that contained all the steps he had taken before he took the confession from the accused. Accused spoke frankly and there was no miscommunication between them as they conversed in Afrikaans. The Court is satisfied that the accused was informed of his right to legal representation as well as his right to remain silent before he proceeded with the confession. Accused's assertions that he had not been so informed is a pure lie which this court rejected as it cannot be possibly true.

[98] With regard to the accused having been assaulted by Sergeant Beukes, or Van Wyk, at the time of his arrest. These were denied by the two police officers when they each testified during the trial-within-a-trial. Mr Swartbooi whom the accused person had called as a witness in the trial-within-a-trial also testified that he saw the accused being beaten by the police officers that came from the other vehicle. He did not see the first two officers beating accused one. Accused one was also not beaten for a long time according to Swartbooi.

[99] From the evidence presented before Court during the trial-within-a-trial it became clear that accused one was in actual fact, aware of this legal rights at the time of his arrest and detention. The police officers that dealt with accused one each testified that accused was informed of his legal right at every stage. I am therefore satisfied that accused one was informed of his right to legal representation as well as

his right to remain silent as per the proforma. I reject his assertions that he was not so informed as such cannot be reasonable possibly true.

[100] I will now proceed to the other ground where the accused claimed not to have had an interpreter during the course of being interrogated or during the alleged confession that he gave to Commissioner De Klerk. Commissioner De Klerk testified that he was not requested by the accused to provide him with a Damara>Nama interpreter on the date the confession was taken. Evidence was led by several witnesses that the communication with the accused in the Afrikaans language was good and such there were no misunderstanding neither any indication that accused could not understand Afrikaans. None of the witnesses was challenged about the misunderstanding due to the language used by the officers and the accused person at the time. This ground would not hold water and therefore it must fail.

[101] Having considered all the evidence, I am satisfied beyond reasonable doubt that accused one indeed made the statement freely and voluntarily and that he was properly informed of his legal rights. He was also able to understand the proceedings in the Afrikaans language and those were the reasons why it was ruled that the admissions and confession made by accused one were ruled admissible in evidence.

[102] Accused one in his confession alleged that on the 28 December 2011 in the morning he and his co-accused left Rehoboth. They walked until they reached the farm of the deceased. He had not known the deceased. They saw the deceased driving with his bakkie in the bush and saw that he was looking after his livestock. They decided to steal some of the stock as the deceased moved in a different direction. They hid themselves into the nearby bushes. Accused one explain in detail as they waited to get the opportunity to steal the deceased's livestock. It was agreed between them to engage the deceased in order to get his attention away from the livestock. Accused one was still hiding in the bushes as his co-accused spoke to the deceased, who was on his way back to the vehicle. Accused one could clearly observed how the deceased open the bakkie door and bent down into the front compartment on the driver's side. It was at that stage when he saw his co-accused lifting up an axe from behind then hit the deceased behind the head as the

deceased tried to move upwards. His co-accused struck the deceased for the second time behind the head where after the deceased fell to the ground.

[103] He then went towards where his co-accused and the deceased were. When he reached them he found his co-accused busy tying up the deceased's hands and he help him to do so. As they were busy tying up the deceased's hands he regained his consciousness as his co-accused again used the same axe to struck him with the backside of that axe for the third time behind the head.

[104] the deceased lay still without breathing. He then finished tying up the deceased's hands as his co-accused get on the deceased's bakkie and drove. They drove with the bakkie and the deceased's body, which they went to hide behind a nearby tree. His co-accused went back to the bakkie and he saw him taking a rifle out of the bakkie and walked in the direction where the livestock was grazing. He then took another axe and removed some small bushes and covered the deceased's body.

[105] He walked towards his co-accused who was busy directing the stock. He advised his co-accused that the stock was too large as they took 32 from the rest of the stock, which consisted of three goats and sheep. He then took the rifle from his co-accused in order to carry it as his co-accused was short and the rifle was too big for him to carry. They both started to chase the stock in the direction of Rehoboth alongside the river. They chased them until they reached Blikkiesdorp in Block E of Rehoboth.

[106] His co-accused informed him that he knew someone with a vehicle who was willing to buy the livestock alive. He remained looking after the livestock as his co-accused moved into the direction of Block E. He remained with the livestock until in the evening about 21h00, as he decided to slaughter one sheep. He had chased the livestock towards Klipdammetjie and left to ask for drinking water from a woman. It was very late as he went to ask for the drinking water and the woman must have been afraid of him. He again chased the stock back to the area he had come from towards the Chinese mine.

[107] He left the stock there and took the slaughtered sheep and the rifle and walked towards Block E. He had also taken the wallet of the deceased from his pocket as his co-accused took the cell phone from the deceased. He asked his co-accused whether the cell phone had credit on it to which his co-accused had responded in the negative. He then took the cell phone from his co-accused and realised that it indeed had credit on. He kept the cell phone.

[108] He then walked to a house of an Oshivanbo speaking male in Block E, where he sold part of the slaughtered sheep. He took the remainder of the meat to his house, but before he went home he first hid the rifle in the nearby bushes. At his house, his wife questioned him about where he had been and he told them that he had helped someone who then gave him the meat. He asked his wife to cook the meat. He then told her that he was going somewhere for a while. Accused one then went back to where he had hidden the rifle which he collected and wrapped it in the jacket in order to conceal it.

[109] Upon reaching his house his wife was still busy in the kitchen preparing food. He hid the rifle under the mattress having ensured its safety. The rifle had one bullet in the chamber and there were several other live rounds of ammunition in the side pocket of the rifle bag. His wife confronted him about what he was carrying into the room. He lied to her that he was merely extending his arm in the jacket behind his back whilst entering the room. Accused one then asked her if there came in any call and she informed him about a text message from someone that had come in earlier. Accused one then went out to buy beer and returned home. They ate the meat and drank beer together, where after they went to sleep.

[110] The next day the 29 December 2011 at about 8h00 his co-accused arrived home accompanied by his wife. He questioned him about his whereabouts on the previous night as he had gone to look for him in the bushes with a green Golf. He informed him that he had observed a silver Golf in the bushes. His wife confronted him (co-accused) why he had told her that he had gone to look for him on foot and made no reference about a vehicle. He told his co-accused where he had left the stock, as he informed him that he will walk into that direction and requested him to

walk in the area of Klipdammetjie. His co-accused then left as he remained at his house.

[111] Later on that same date, he walked into the direction of the Brick house location where he met one of his friends. That friend related to him that there were some goats which were confiscated by the police and that the man who was found with the stock was arrested whilst the other two run away. He then realised that it was the stock that he and his co-accused had stolen because the number of stock referred to tally with theirs. He went to his co-accused's house in order to tell him. His co-accused explained to him that he did not find the stock in the area, and that whilst in that vicinity he had observed a police vehicle and he hid himself and went home after police had left the area.

[112] Accused two explained to his co-accused what his friend had informed him about the stock at the police station and the person who was arrested as the other run away. His co-accused also informed him that such a mission would not be successful and that they must take the rifle and hid it near Echo Service Station. He did not support the idea. They had a discussion about the rifle as he refused to give out any of the ammunition to his co-accused. His co-accused then requested to be given three or four bullets as they had to fire one shot into the air in order to scare people off. Accused one still refuse to give his co-accused bullets.

[113] In the confession accused one also narrated that they also spoke about the deceased but his co-accused insisted that he was not dead but only unconscious. He then told his co-accused that he was the last person to be at the deceased when he covered his body with bushes and that when he felt his pulse there was nothing and that means the deceased was infect dead. Accused one then left for his house.

[114] On the 31st November 2011 in the morning his co-accused again visited their house and wanted to be given either the rifle or the cell phone in order to go and sell it. He advised him that people could look for documentation which may get them into trouble. His co-accused then left. During that evening, his wife came home and questioned him about someone who was killed on a farm. She further asked him whether he was involved in the killing whereby he informed her that they had only

assaulted someone. She further questioned him about the direction where the assault was carried out. He then directed her by showing the direction in which the assault was carried out without the deceased being killed. He then also informed his wife about the rifle they had taken from the person they had assaulted. She then informed him that she knew a police detective with whom she could talk in order for the rifle to be handed in at the police station.

[115] His co-accused again visited his home on the 2 December 2011 and remained there for the whole day trying to convince him so that they could go to the direction of the farm south of Block E in order to steal a cow which they could chase into the direction and shooting it with a rifle. He then waited for his wife to return from work in the afternoon and told her about the suggestion of his co-accused. She got angry and told him that he had just come out of prison. She convinced him not to get involved and offered him some money to buy alcohol so as to stay home and drink. She convinced him not to follow his co-accused's advice. After the drinking he and his friend escorted accused two to his house.

[116] Upon his return back home, he did not find his wife but discovered that the beer he had been selling had been poured out. He suspected his wife's ex-boyfriend, and immediately plan to go and look out for him armed with a panga. He went to a certain shebeen and whilst there police arrived and closed the shebeen. He was arrested by the police.

[117] In the light of the evidence presented before this court, and despite the fact that the cause of death could not be determined, I will now proceed to consider the law with regard to common purpose upon which the state relied:

THE LAW

[118] In the State's Summary of Substantial facts, provided to the accused persons, it concluded with the following sentence: The accused acted with common purpose at all material times.

[119] Section 155 of the Criminal Procedure Act provides that persons implicated in the same offence may be tried together. The position of perpetrators, accomplices the liability of each, as well as the requirement of a causal link between the aid of an accomplice and the commission of the offence by the perpetrators are comprehensively discussed in Hiemstra's Criminal Procedure 22 – 26 that casualty is not a requirement where the doctrine of common purpose is applied.

[120] The doctrine of common purpose was formulated as follows:

'If two or more persons collude in an undertaking with an unlawful purpose, each is responsible for the acts of the other performed in the furtherance of the common purpose if he/she:

- (a) foresaw the possibility that the other could perform that act in the furtherance of common purpose; and
- (b) was indifferent to such acts and their consequences'¹

[121] The State has an obligation to prove, even by inference, that the participant actually foresaw that act of the other and was indifferent to the result. The participant must therefore have intent on his/her own. In *S v Safatsa and Others*² it was stated that in a matter where no prior agreement had been proven, an accused in regard to whom no causal link to the death or wounding of the victim has been proven, can only be held liable for such death or wounding on his own mens rea if the following are present:

- (i) presence of the scene of the violence;
- (ii) knowledge of the assault on the victim;
- (iii) the intent to make common cause with those in fact perpetrated the assault;
- (iv) manifest participation in the common purpose with the perpetrator of the crime by some or other act of association with the conduct of the others; and

¹ Hiemstra supra 22-27.

² *S v Safatsa and Others* 1988 1SA 868(A) at 7051 – 706 B.

- (v) Presence of the necessary mens rea with regard to the killing of the deceased, dolus directus or dolus eventualis”.

[122] When there is no direct evidence to establish common purpose, it has been held that common purpose can be inferred from joint conduct. In *Duddly v Minister of Justice*³, it was held that where the train of thought of people joined together is directed at a common target and they intend to achieve that target through joint action, they can have common purpose, despite that they had no prior agreement on the common purpose.

[123] The facts of the present case will be evaluated against the principle of common purpose in order to determine whether the State can rely on that doctrine to prove the liability of the accused persons. It is clear from the submissions advanced before Court by Mr Lutibezi for the State in respect of all the charges preferred against the accused persons.

[124] During the trial the state led several witnesses. Both accused also testified in their defence.

ANALYSIS OF EVIDENCE

[125] Before I deal with the evidence of individual witnesses as far as it is necessary it is important to note the following issues that are not in dispute:

- (i) That the deceased was alive and was at his home that morning of the 28 November 2011.
- (ii) It is also not in dispute that by 14h00 in the afternoon of the same date the deceased had an appointment with Mr Willem Bock which he latter missed. Upon inquiries at his home, the deceased was nowhere to be found.

³ *Dudley v Minister of Justice* 1963 2 SA 464 (A) at 468 B.

- (iii) From the evidence and admissions made by the accused persons this is the date the deceased was killed.

[126] Accused two in his plea explanation as well as in his evidence does not deny that he was at the deceased's farm, Drie Reviere on the date the deceased was killed but has denied having robbed and murdered the deceased as alleged. Accused two places himself at the crime scene the day the deceased was killed. Furthermore, accused two had told Ms Maria Van Wyk in detail how the deceased was killed with an axe by being struck at the back of the neck and how he was tied up after which they took possession of the deceased's wallet, cell phone and a firearm.

[127] Accused one on the other hand denied to have been at the crime scene on the 28 November 2011.

[128] Ms Maria Van Wyk a girlfriend of accused two at the time testified that she had received information from accused two that they had gone to farm Drie Reviere on the date in question. Accused two went on to inform her that they were both involved in the killing of the deceased. Accused two though confirming to have been at the farm he denied to have committed the alleged offences.

[129] Furthermore detective officer Husselman's testimony is that accused one had informed him that they had gone to the farm on the 28 November 2011. Accused one thereby placing himself on the crime scene.

[130] It is also common cause that accused one gave a written confession to Chief Inspector De Klerk in which he give full detail of what transpired at the farm when the deceased was killed. That accused one was on the crime scene is evidence from the fact that he was found in recent possession of all the stolen items which were positively identified by Mr Hugo and Mr Jacobus Albertus Cloete, the sons of the deceased. Accused one pleaded guilty to charges of being in possession of a firearm without a licence on the fourth count as well as contravening section 33 read with sections one, eight, 10, 38 and 39 of Act seven of 1996 – which is the possession of ammunition in respect of the fifth count.

[131] It is clear from the evidence presented before this court that the deceased after being killed was tied up as depicted in the photo plan, Exhibit "G" photos 10 and 11. The manner in which he had been tied up could not allow him to loosen up and seek help. In my view there can be no doubt at all that the crime of murder is committed if a person in need of assistance is intentionally prevented from obtaining it and in the result dies or dies earlier than he would otherwise have died. Accused one conceded that the deceased being an elderly man could not have been able to assist himself under those circumstances. He further confirmed that a person who hit another human being at the back of the neck, a vulnerable part of a human body had an intent to kill such a person.

[132] As far as accused two is concerned, his testimony is that he did not know that one could die if left without food and water neither did he know that one could die when hit on the head. This cannot be reasonably true, and accused two's testimony must be rejected on that score. By striking the deceased on the head repeatedly is a clear indication that he had an intention to kill. He thus subjectively foresaw the possibility of causing death of the deceased and was reckless of such result. Accused one and two's testimonies are full of contradictions and inconsistencies that make it hard for this court to believe them to be true.

[133] The testimony before court is that accused one offered to give a confession after his rights were fully explained to him by Chief Inspector De Klerk a day after his arrest. In the confession he gives full details how he saw accused two from a distance striking the deceased on the head twice. He offered help to accused two in tying up the deceased thereby associating himself with accused two's conduct. On his own version the deceased was still alive and regained consciousness and accused two whilst being assisted by accused one to tie up the deceased, hit the deceased three more times at the back of the head. Accused one did not at any stage stop accused two from assaulting the deceased. After the first blow, as such they acted in concert in the killing of the deceased where after they robbed him of his livestock and personal items.

[134] Though accused one has repeatedly denied to have been involved in the killing of the deceased and the robbery, there is another strange facet of the case in that the firearm and other properties which belonged to the deceased were recovered hidden in the room accused one shared with his girlfriend some few days after his arrest. Accused one's explanation that he received the properties from accused two cannot be reasonably true, as there is evidence that he had been using the deceased's cell phone as his own prior to his arrest. The reason accused one had opted to keep the deceased's properties at his house upon request of accused two in my opinion raises more questions than providing answers. Furthermore, if accused two had not been involved in the commission of the crimes charged and had been present at the crime scene and saw crimes being committed, he could then have taken reasonable steps to either stop accused one or to immediately report the incident to the relevant authorities. Evidence before court is that Ms Van Wyk had advised him to report himself to the police after the matter was reported in the local newspaper. He did not do so.

[135] It must be pointed out that the deceased though an elderly person, according to the doctor who carried out an autopsy on his body described him as being stout built and was markedly overweight. He found no external or internal injuries. There were marked features of body decompositions and features of obesity. His conclusion was that the causes of death was undetermined. He found no clear pathological features of assault due to marked body decomposition. The state of decomposition might have destroyed the features of possible traumatic assault on the head.

[136] In my opinion though the cause of death could not be determined, there is sufficient evidence placed before this Court how the deceased was left tied up on both arms and legs. He had no chance to assist himself under those circumstances. His body was only found on the second day through search by police and community members. His death came about as a result of the accused persons' conduct, as such they are each responsible for bringing about his death.

[137] It was submitted that there was a possibility that death might have resulted from natural causes. There is however evidence pointing to violence having been

used in that the deceased was found tied up and his body covered with bushes. This piece of evidence is undisputed. It has also been submitted by the state that the accused had unlawfully concealed the death of the deceased and as in all cases of unlawful killing it is important to establish the motive for the killing. Accused two testified that they intended to go and steal stock from the farm. The stock which belonged to the deceased were stolen from him after the murder. The killing of the deceased was committed in order to facilitate the robbery. It has now also become common knowledge that the deceased's property including his personal items were taken from his person, to which accused one had pleaded guilty. These items were positively identified by the deceased's relatives who testified before this court. In fact this piece of evidence places accused one to have been on the crime scene, and in the absence of any reasonable explanation as to how he came to be in possession of personal properties of the deceased some few days after the deceased's demise.

[138] Moving to the issue whether the accused persons should be convicted of the crime of defeating the course of justice or attempting to do so. It is evident from the photo plan Exhibit "G" how the body of the deceased was discovered. The deceased's body could not be found on the first day of the search. The concealment of the deceased's body with branches and shrubs was meant to ensure that it could not be easily seen, which would interfere with the investigation into the death of the deceased. That would protect one from being prosecuted in connection with the deceased's death.

[139] In my view the only reason why the accused had tied up the deceased and left him so tied up was with an intention to have him dead as he would not have been able to free himself under those circumstances. As reasonable human beings the accused each foresaw that death would occur but they proceeded with their unlawful conduct. They acted in concert.

[140] Accused one testified under oath that he received the firearm and ammunition from his co-accused. In his detailed confession that he gave to the then detective Chief Inspector De Klerk, the reason for him to take over the firearm from his co-accused was due to the fact that it was big and accused two was too short to carry it.

Accused one offered a plea of guilty to a charge of possession of a firearm and ammunition.

[141] Accused two at the same time also testified that they were together on the farm where the deceased was killed on the 28 November 2011. He visited accused one's residence on the 29 November as confirmed by one of the state witness Ms Van Wyk. The reason for the visit was to discuss about the stolen stock. In fact accused two claimed to have witnessed the actual killing of the deceased allegedly by accused one but made no efforts to report the crime to the authorities even when his girlfriend had advised him to do so. The evidence presented before court clearly shows that accused two associated himself with accused one's unlawful actions. There is no doubt in my mind that the two accused persons acted with common purposes and as a result each is found guilty on the first count.

[142] With regard to the second count, evidence presented before court is that the deceased after being killed was robbed of his firearm and personal belongings, which were recovered from accused one. Though there were no eye witnesses to the actual killing of the deceased, and how the items were removed from him, it is evident from Exhibit "G" which is the photo plan, compiled by the police that the deceased was tied up both arms and legs in order to incapacitate him and left on the scene as his stock was driven away by his assailants. Accused two confirm that he went to the farm with a clear intention to steal the stock. The only reasonable inference is that the deceased must have resisted and as such his attackers went on to tie him so as to make sure that he could not be able to defend himself. Accused two's version that he witness the killing of the deceased by his co-accused cannot be reasonable true, he had associated himself with the killing as he did nothing to stop it, or to report accused one to the police.

[143] With regard to the charges on counts four and five. I am satisfied that accused two's guilt have been established in that he continued to associate himself with accused one even when he had been advised to report himself to the police. Though he did not have physical possession of the arms and ammunition, he was aware of the unlawful act and did nothing to prevent it. Accused two is similarly found guilty on counts four and five and is convicted as charged. I am satisfied that

the state has proven beyond reasonable doubt that the murder and robbery with aggravated circumstances were committed by the accused persons on the basis of common purpose.

[144] In the result the following verdict are reached in respect of both accused one and accused two.

Count one : Guilty of murder dolus eventualis.

Count two : Guilty of robbery with aggravating circumstances as defined in Section 1 of Criminal Procedure Act 51 of 1977.

Count three : Guilty of defeating or obstructing to defeat the course of justice.

Count four : Guilty of possession of firearm without a licence.

Count five : Guilty of possession of ammunition.

D N USIKU
Judge

APPEARANCES

STATE : Mr Lutibezi
Office of the Prosecutor-General

ACCUSED'S 1 : Mr Uirab
Directorate of Legal Aid

ACCUSED 2 : Mr Tjituri
Tjituri Law Chambers
Instructed by Directorate of Legal Aid